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CRIMINAL COURTS AND LOCAL LEGAL CULTURE*

*Hon. Stephen A. Schiller and Peter M. Manikas***

The judicial system in Cook County has been shaken by the indictment, prosecution, and conviction of judges, lawyers, law enforcement officers, and court personnel in connection with Operation Greylord.¹ The Greylord investigation revealed not only criminal misconduct but also widespread irregularities in the court system. Some judges commonly conducted *ex parte* communications,² manipulated the assignment of cases,³ and repeatedly ignored or routinely violated several other rules.⁴

Attempts have been made to remedy the most blatant abuses disclosed in the Greylord trials,⁵ yet a gap remains between the court's formal rules and actual legal practice. This Article explores the meaning of this lacuna between formal rules and the practice of law in the criminal courts. We suggest that the courts' formal rules and informal customs be reconciled so that the reality in a criminal courtroom reflects the theoretical underpinnings of our system of justice. Our recommendations also call for greater involvement by professional organizations and all segments of the bar in ensuring compliance with the court's written rules.

I. BACKGROUND

An observer who visits an urban criminal courtroom expecting to find a textbook application of the "rule of law" might well be disappointed. The

* This Article arose from the work of the Felony Courts Task Force of the Special Commission on the Administration of Justice in Cook County. The authors wish to especially acknowledge the helpful advice and criticisms of Jerold S. Solovy, the Commission's chairman and Lawrence X. Pusateri, chairman of the Felony Court's Task Force. Nancy M. Zaczek, a staff attorney for the Commission, also provided valuable research in the preparation of this Article. The views and conclusions expressed here, however, are the authors' and do not necessarily reflect those of the Commission or Task Force members.

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1. Operation Greylord is an undercover investigation of the corruption in Cook County's court system conducted by the Federal Bureau of Investigation and the United States Attorney's Office for the Northern District of Illinois. As of June 1, 1987, the investigation had led to the conviction over fifty persons, including nine judges.

2. *See infra* note 49.

3. *See Kent, Perspectives on a Judiciary Gone Wrong*, Chicago Lawyer, July 1986, at 14, col. 3-4.

4. *See infra* notes 48-53 and accompanying text.

5. In January 1985, the Circuit Court of Cook County enacted a new rule strengthening the prohibition on *ex parte* communications. *See CIR. CT. COOK CO. R. 17*.

formal rules that govern courtroom decorum, require the speedy disposition of criminal cases, and provide the right to a jury trial are central to our conception of justice. Yet the events that actually occur in a criminal courtroom bear little resemblance to classical textbook adversary proceedings.

The proceedings in criminal branch courts, where misdemeanor cases and felony preliminary hearings are heard, appear chaotic to most visitors. Dozens of cases are processed in rapid succession and nothing resembling a trial occurs. Most cases are disposed of in a few minutes. The defendant, lawyers, and witnesses stand clustered before the judge where their voices are inaudible to others in the courtroom. Defendants who have been arrested the previous night are escorted to the bench where they meet the public defender, their lawyer, for the first time. The public defender has only a few seconds to glance at the police report and determine what amount of bail should be requested or by what amount the prosecutor's request can be reduced. Bonds are set, continuances are granted, and guilty pleas are accepted swiftly. Few, if any, complex legal or factual issues are raised or heard.

Between cases, lawyers, clerks, and bailiffs engage in friendly conversations as they wander in and out of the courtroom. Often the judge also engages in this friendly banter. The day ends early, despite a heavy backlog of cases and by mid-afternoon many courtrooms are empty.⁶

Greater decorum prevails in felony courtrooms, where more serious cases are heard. A visitor is far more likely to view a jury trial taking place. Inside the courtroom, the congested, frenetic atmosphere of the lower courts is replaced by a hushed formality appropriate for consideration of serious matters.⁷

Yet what occurs in felony courtrooms is still far from what might be expected. When the courts are not in session, defense attorneys and prosecutors may be relaxing amicably in the judge's chambers, joined by other courtroom personnel. In the morning, when motions are heard, the speedy trial requirement inexplicably gives way to seemingly endless continuances. While jury trials are not uncommon, only a small portion of the thousands of felony cases that enter the court system each year are disposed of by a trial.⁸ Most are settled by plea bargaining, which might take place in the prosecutor's office, the courthouse hallways, or the judge's chambers.⁹

6. For a description of criminal branch courts, see J. EISENSTEIN & H. JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 19-20 (1977) [hereinafter EISENSTEIN & JACOB]. See also *infra* note 51 and accompanying text.

7. See H. JACOB, *LAW AND POLITICS IN THE UNITED STATES* 183-87 (1986) (describes felony criminal proceedings).

8. In 1984, 20,001 felony cases were disposed in the Criminal Division of the Circuit Court of Cook County resulting in 4,756 trials. Of these, 4,268 were bench trials and 488 were jury trials. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, *REPORT TO THE SUPREME COURT OF ILLINOIS* 217 (1984).

9. EISENSTEIN & JACOB, *supra* note 6, at 183.

The proceedings in criminal courtrooms do not result from formal, externally imposed rules alone. There also are informal procedures and unspoken rules and customs which shape courtroom behavior. The gap between the formal and informal rules—what the public expects and what actually occurs in practice—is largely the product of the “local legal culture.”¹⁰

The local legal culture is the product of accommodations reached within the “courthouse workgroup,” which consists of judges, policemen, bailiffs, clerks, public defenders, prosecutors, and private defense attorneys who work together on a daily basis. The workgroup members come from different sponsoring organizations: the State’s Attorney’s Office provides prosecutors, the Public Defender’s Office sends defense lawyers, and the Clerk of the Circuit Court supplies the clerks.¹¹ Yet despite their disparate origins and the different objectives of their sponsoring organizations, the workgroup members arrive at shared values and goals. These shared values sometimes undermine stated objectives. For example, a recent report of the Cook County Court Watching Project found, “The expectations of the whole system appear to be low productivity and low efficiency, with the pace of justice geared to the wishes of the judges, prosecutors and private defense counsel and other court personnel—not the consumers of the system—the citizens who must appear in court.”¹²

The workgroup is affected by other governmental agencies, reviewing courts, and political organizations as well as by broader social and economic forces. Nevertheless, as several Operation Greylord cases demonstrate, the workgroup in the criminal branch courts can become highly deviant. This can and does lead to widespread violations of formal rules and professional norms. It also has led to violations of the criminal law and more generally held conceptions of morality.¹³

The existence of a local legal culture does not set the court system apart from other large organizations. Many institutions adjust their practices to suit the needs and interests of their members.¹⁴ Unlike other organizations, however, courts rely in large measure on conformity with formal rules of

10. Local legal culture has been defined as “the practitioner norms governing case handling and participant behavior in a criminal court.” Church, *Examining Local Legal Culture*, 1985 AM. B. FOUND. RESEARCH J. 449, 451 (emphasis in original).

11. EISENSTEIN & JACOB, *supra* note 6, at 20-21, 24-28. See Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, in CRIME AND THE LEGAL PROCESS 233 (W. Chamblis ed. 1969).

12. Testimony of Suzanne E. Jones, President of the Cook County Court Watching Project, before the Finance Committee of the Cook County Board of Commissioners, Jan. 29, 1985.

13. See *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986).

14. In the view of one attorney, “[J]udicial practice . . . reflects an accommodation of the interests of the participants. In the abstract this accommodation may not be ideal but in context it is at least acceptable.” M. FEELEY, COURT REFORM ON TRIAL 191 (1983) (quoting Raymond T. Nimmer).

law to maintain their legitimacy. When actual practices significantly depart from the formal rules and the public's expectations, those practices appear improper. The legitimacy of our system of justice is then called into question.¹⁵

In felony courtrooms, formal rules are disregarded for several reasons and in different ways. Some of the court's rules are no longer relevant due to changed circumstances,¹⁶ while other rules are simply unenforced.¹⁷ Rules, such as the prohibition of *ex parte* communications, are observed unevenly. They are sometimes breached by the prosecutor, sometimes by defense counsel, and occasionally by the judge or outside persons interested in the dispute.¹⁸ The statute that requires motions for continuances to be supported by reasons is rarely enforced.¹⁹ In the branch courts, even criminal statutes such as those prohibiting bribes to court clerks and other court personnel have been widely ignored for decades.²⁰

The repeated failure to observe formal rules, even when done innocently, creates an appearance of impropriety. Moreover, when practices vary substantially from courtroom to courtroom, it may appear as if cases are being manipulated to affect their outcome. Public confidence in the integrity of the court system is not likely to be enhanced by highly idiosyncratic court practices.

II. SHAPING THE COURT ENVIRONMENT

A. Fragmentation of the Criminal Justice System

The local legal culture is shaped by the fragmented nature of the criminal justice system.²¹ The personnel assigned to a courtroom report to different

15. As Alexander Hamilton noted, the judiciary lacks the powers of both the purse and the sword. Thus, it must rely in large measure on voluntary compliance with its internal rules and regulations as well as with judicial decisions. See 78 FEDERALIST, THE JUDGES AS GUARDIANS OF THE CONSTITUTION, quoted in A. BICKEL, THE LEAST DANGEROUS BRANCH vii (1962). If voluntary compliance could not be expected, a virtual army would be required to monitor the lawyers, litigants and their family members, witnesses, and court personnel who come to court each day.

16. See CIR. CT. COOK Co. R. 15.6(d) (discusses Witness Central, an agency that was discontinued due to the cutoff of federal funds).

17. See CIR. CT. COOK Co. R. 15.1(h), 15.1(i). These rules, providing for notification to the presiding judge concerning "ready" and "priority" cases, are frequently ignored.

18. See *infra* notes 25 & 49.

19. See ILL. REV. STAT. ch. 38, para. 114-4 (1985). For observations regarding the court's policies toward granting continuances, see REPORT OF COOK COUNTY COURT WATCHING PROJECT, at 175-76 (1984).

20. See J. CARLIN, LAWYERS ON THEIR OWN 155-64 [hereinafter CARLIN].

21. M. FEELEY, COURT REFORM ON TRIAL (1983). Of the criminal justice process, Feeley states, "Perhaps its most visible quality is fragmentation: it is fragmented in its organization, its operations and its goals." *Id.* at 9.

governmental units and are paid from different sources. The bailiffs who guard prisoners and maintain order are assigned to the courtroom by the County Sheriff; the clerks report to the Clerk of the County Court; and the Assistant State's Attorneys are supervised by the State's Attorney of Cook County, an elected public official. The Assistant Public Defenders, probation officers, and secretaries are court employees. Judges are supervised by the Chief Judge of the Circuit Court, but receive their salaries largely out of state funds.²²

As a result of this fragmentation, the judges have limited authority over the courtroom workgroups. Judges neither hire nor fire personnel, they cannot promote good performance by offering salary increases, nor can they demote or impede the advancement of those who perform poorly. Judges also do not control the budget of their courtroom; their power to meet courtroom needs by ordering a new public address system or repairing an air conditioner is limited. Their influence over the other workgroup participants resides largely with their formal legal authority, such as their contempt powers, and their informal powers of persuasion.²³

B. Insulation from the Public and Legal Profession

The felony court workgroups are also insulated from the public and a large portion of the legal profession. In Cook County, the felony courts are geographically isolated, often located miles away from the civil courts. The main location at 2600 South California Avenue in Chicago is not easily accessible from downtown where many private law offices are located. As a result, for most of the public, the felony courts are alien territory.

The routine activities of the felony courts are largely shielded from public scrutiny.²⁴ While there is a press room in the felony court building, the news media generally focuses its attention on particularly violent crimes, partisan courtroom politics, and judicial misconduct. Journalists who cover the criminal courts are often reporters regularly assigned to that beat who sometimes become peripheral members of the courthouse workgroups. Reporters may develop a dependency on judges, prosecutors, other government officials,

22. In Cook County, a small proportion of judicial salaries is paid out of the County's budget. The 1986 budget, for example, provided \$500 for each circuit court and associate judge's salary, amounting to \$172,000. COUNTY BOARD OF COMMISSIONERS, THE ANNUAL APPROPRIATIONS BILL (approved and adopted Feb. 1986).

23. The quality of a judge's work will suffer, for example, if the clerk's records do not accurately reflect the status of a case and the orders that previously have been entered. Nor can the court's work go forward if there are inadequate security personnel to maintain order in the courtroom or control prisoners.

24. The public's lack of knowledge and misperceptions about the criminal justice system have been noted by several observers. Herb Jacob, for example, wrote, "[T]here is more misunderstanding about the actual processes used by the courts in criminal prosecutions than in most areas of the governmental process." H. JACOB, URBAN JUSTICE: LAW AND ORDER IN AMERICAN CITIES 96 (1973).

and private lawyers for their stories.²⁵ As a result, the decision to cover some events and not others sometimes is not made on the basis of the story's "newsworthiness" alone.

The felony courts are isolated professionally as well as geographically from a large segment of the legal community. Judges assigned to felony courtrooms have little professional exposure to lawyers who practice in other fields. Lawyers who accept criminal cases tend to handle relatively few cases or specialize in this field of practice.²⁶ In the branch courts, a large portion of cases are handled by "regulars" who appear frequently in the same courtroom. These lawyers develop on-going relationships with judges, bailiffs, probation officers, and other courtroom personnel.²⁷ These courthouse regulars have few collegial ties to lawyers in other fields of practice. Lawyers who specialize in criminal law appear to be socially and professionally distant from those in other fields of law.²⁸

C. Political Environment

To some extent, the local legal culture is shaped by the larger political system. Judges are elected public officials who seek slating by a political party to run for office and raise campaign funds for both primary and general elections. Judges must seek retention every six years. They incur "political debts" in obtaining office and raising funds which erodes the image of an independent judiciary and may create the appearance that a judge's decision is motivated by political considerations.²⁹

The electoral process has recruited judicial candidates mainly from the ranks of political figures.³⁰ One recent study found that almost one-third of

25. One reporter who covered the Cook County criminal courts wrote:

Most disturbing to me was that certain pressroom reporters were in cahoots with certain lawyers. These reporters were able to put their fact-finding facilities at the service of their pals; they could ignore cases that merited coverage . . . ; they could rummage through the barrel of facts in a case and turn in something favorable to the clients of a crony; or they could intercede (with a judge, prosecutor or witness), which, to be blunt, means, more or less, "fix."

Block, *Judges and the Press: The Power to Suppress*, 16 *LOY. U. CHI. L.J.* 445, 446 (1985).

26. A study of Chicago lawyers found that of those attorneys who devote at least five percent of their practice to criminal cases, fifty-two percent devote between five percent and twenty-five percent of their time in this field and thirty-six percent devote over half of their time to criminal law practice. This bimodal pattern is not confined to the practice of criminal law. J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 47-48 (1982) [hereinafter HEINZ & LAUMANN].

27. EISENSTEIN & JACOB, *supra* note 6, at 117-21.

28. See HEINZ & LAUMANN, *supra* note 26, at 221 (figure 7.1) Heinz and Laumann note that the Chicago bar is divided into distinct social circles. The criminal bar appears to be further removed from the "center" of the profession than other practitioners. *Id.*

29. Party slatemaking sessions frequently elicit affirmations of party loyalty, only adding to the appearance that judicial candidates will lack independence after reaching the bench. See, e.g., *Chi. Tribune*, Nov. 11, 1985, § 2, at 2, col. 1.

30. See J. RYAN, A. ASHMAN, R. SALES & S. SHANE-DUBOW, *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* 204-05 (1980).

Chicago judges came directly from an elected or appointed public position.³¹ Furthermore, many judges have done less visible work for a political party and are sponsored by political figures.³² The same recruitment pattern can be found in the selection of associate judges, who are elected by the full circuit court judges. In October 1986, for example, eight of the thirteen associate judges elected were current or former lawyers for government agencies.³³

Judicial independence is also affected by the judge's relationship with the organized bar. Bar associations evaluate both full circuit court judges and associate judges when they seek office. When circuit court judges stand for retention every six years, a major factor is the review of a candidate's performance by committees of bar groups. These performance evaluations are made largely by lawyers who practice before the judge. Consequently, these lawyers may be perceived by judges as having power over their retention, power that can be used as leverage by influential lawyers when they appear before the judge.³⁴ Bar associations also recognize judicial performance by granting judges awards and favorable publicity through their publications and public ceremonies. The effect of these activities is difficult to measure, yet it seems reasonable to assume that many judges feel pressure, however subtle, to provide favorable treatment to lawyers who are considered to be influential within bar groups. Electoral pressure also can be exerted on judges from any group interested in the outcome of a case or dissatisfied with a judge's performance. Judges who have made decisions in controversial cases affecting competing political forces have been targeted for defeat in their campaigns to be retained on the bench.³⁵

D. *The Social Structure of the Metropolitan Bar*

The metropolitan bar is highly stratified.³⁶ Lawyers in large firms have a much different practice than do lawyers in small firms and solo practitioners. The differences among lawyers, in fact, is so stark that it sometimes appears that there are really several different legal professions.³⁷

31. *Id.* Additionally, an informal survey by the authors found that approximately half of the judges in the Criminal Division of the Cook County Circuit Court previously served as either prosecutors or public defenders. In Philadelphia, one judge in six formerly held a political position. In Los Angeles, the ratio was one judge in twelve. *Id.* at 32.

32. *Id.* at 207.

33. Chi. Tribune, Oct. 13, 1984, § 2, at 4, col. 3-4.

34. Judge Marvin Aspen, a Federal District Court judge who at one time sat in the Circuit Court of Cook County, noted that state court judges have difficulty making decisions that might be viewed as unpopular by influential people. Neubauer, Snyder & Nolan, *Judges Compare Courts*, THE J. OF THE SECTION ON LITIGATION, A.B.A. 10 (Spring 1985).

35. See, e.g., Chi. Sun-Times, Oct. 12, 1986, at 57, col. 5.

36. See HEINZ & LAUMANN, *supra* note 26.

37. A recent study of the Chicago bar described the profession's social structure this way:

Most lawyers do not view criminal law as a prestigious area of practice.³⁸ Within the legal profession, fields of practice in which lawyers represent individuals rather than businesses or organizations generally rank lower in prestige.³⁹ Criminal defense lawyers also tend to practice alone or in small firms and have attended local, rather than national or regional law schools.⁴⁰ Within the bar itself, this area of practice is viewed as having a high incidence of ethical misconduct.⁴¹ Perhaps because of these characteristics, criminal defense lawyers tend to be under-represented in the leadership positions of professional organizations.⁴²

Attorneys who practice criminal law also are more likely than lawyers in other fields of practice to be exposed to particular types of unethical misconduct, such as the abuses arising in Operation Greylord. In the branch courts, lawyers have openly solicited clients in the courtrooms or in the court's hallways to obtain business.⁴³ It is difficult to imagine lawyers practicing in the court's upper level civil division "renting courtrooms" or routinely and openly making illegal payoffs to clerks to have their cases called early.⁴⁴ It is also in the criminal courts that lawyers are most exposed to court personnel and others, including their clients, who are most likely

In large cities like Chicago . . . the differences among the several sorts of lawyers are dramatic. The lawyer who commutes to Brussels and Tokyo and who spends his time negotiating the rights to distribute Colonel Sanders throughout the world will have little in common with the lawyer who haunts the corridors of the criminal courts hoping that a bailiff will, in return for a consideration, commend his services to some poor wretch charged with a barroom assault. Both of those private practitioners will differ from the government-employed lawyers who prosecute criminal cases or who practice public international law in the employ of the State Department.

Id. at 3-5.

38. *Id.* at 91. Chicago lawyers ranked criminal prosecution twenty-first and criminal defense twenty-third among thirty fields of law. *Id.* (table 4.1).

39. *Id.* at 127. Heinz and Laumann noted that "the side that represents the more 'establishment' client is consistently rated higher in prestige. That is, those who defend criminals are given less prestige than those who prosecute." *Id.* at 128.

40. *Id.* at 133-34, 442-43 (table B.3, app. B). See F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 99 (1981) [hereinafter ZEMANS & ROSENBLUM] (there is a statistically significant linear trend for private practitioners from national law schools to work in larger organizational settings).

41. See HEINZ & LAUMANN, *supra* note 26, at 103, 124. The authors note that "certain types of cases—for example, personal injury, criminal defense and divorce—are perceived as more likely to be handled by lawyers who employ 'sharp practices' that are contrary to the prevailing ethical norms of the profession." *Id.* at 124.

42. *Id.* at 133 (five percent or fewer of the criminal defense and personal injury lawyers in the sample had been Chicago Bar Association leaders).

43. See *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986). See also CARLIN, *supra* note 20.

44. Lawyers who practice in other divisions encounter additional forms of ethical misconduct. For a discription of such problems in the Chancery Division, see *United States v. Holzer*, Indictment of the Special October 1983 Grand Jury, (N.D. Ill.) (May 1, 1985).

to engage in unethical or illegal conduct. The criminal defense bar, at least in the criminal branch courts, competes for clients in situations unlike lawyers in other areas of practice. In the criminal courts, opportunities and incentives to become involved in unethical or corrupt practices are often far greater.

There are many individual exceptions to these generalizations. Some criminal defense lawyers have achieved a national reputation for their highly developed legal skills. Moreover, the vast majority of the criminal defense bar is probably at least as ethical as those in other fields of practice.⁴⁵ However, the general point is clear. Criminal defense lawyers (as well as other lawyers who handle "personal plight" cases) are not held in high esteem by their professional colleagues.⁴⁶ They represent low-status and low-income clients, tend to earn less income, do not command the resources available to large firm lawyers, and have little contact socially or within professional organizations with higher status members of the bar.⁴⁷

III. FORMAL AND INFORMAL RULES

The local legal culture is shaped by the characteristics of the criminal justice system as well as by relationships with the larger political and professional community. The proceedings in a felony courtroom are often the result of accommodating these various interests rather than conforming to formal rules. For example, *ex parte* communications have been common despite a ban on these conversations.⁴⁸ To efficiently arrange the judge's court call, prosecutors often meet with judges prior to the court's opening session to review cases and discuss how they might most readily be disposed.

45. Carlin stated that "the purity of those at the top may be purchased by the morally questionable practice of personally assigning contaminating tasks to those in subordinate positions." He quotes one lawyer as saying, "I've been shocked by members of large firms who bring clients here and suggest I should fix this thing—talk to cops or the judge. It's these 'respectables' who suggest we go in and try to put in the fix." J. CARLIN, *LAWYER ETHICS: A SURVEY OF THE NEW YORK CITY BAR 173* (1966) [hereinafter *LAWYER ETHICS*].

46. See HEINZ & LAUMANN, *supra* note 26, at 452 (table B.6). The "personal plight" area includes fields such as civil rights, criminal defense, divorce, family, and personal injury law (plaintiff).

47. *Id.* at 440 (table B.2) (discussion of lawyer's incomes). With the exception of lawyers working for the government, those in the "personal plight" area appear to have lower incomes, as a group, than in any other field of legal practice. The role of criminal defense lawyers in the organized bar is discussed *id.* at 133. See also ZEMANS & ROSENBLUM *supra* note 40, at 76 (discussion of lawyer specialization).

The income of criminal defense lawyers is somewhat lower because many who practice criminal law are employed to do so full-time by the government. However, it is also true that attorneys in another line of practice rarely devote a significant portion of their time to criminal defense work.

48. In January 1985, the Circuit Court of Cook County enacted a new local rule strengthening the prohibition of *ex parte* communications. See CIR. CT. COOK CO. R. 17. The rule was passed in response to a recommendation made by the Felony Courts Task Force of the Special Commission on the Administration of Justice in Cook County.

Defense attorneys also might discuss, *ex parte*, cases with a judge either to clarify a procedural matter or the merits of a pending case.⁴⁹

Formal rules also give way to the need for efficiency or other accommodations for courtroom participants. The protocol for advancing cases and treating the most serious cases first might be ignored. Despite a strict written policy toward granting continuances, they may be allowed routinely, permitting cases to drag on for years.⁵⁰ Attorneys appear for trial unprepared to try a case, yet go unsanctioned by the court. Sometimes, attorneys do not show up at all. A recent report by the Cook County Court Watching Project, for example, found that "[s]ome attorneys regularly delayed the court by arriving late to represent their clients Nearly 400 attorneys were named by court watchers as 'no shows' with thirty-seven of them repeat offenders in this category."⁵¹

Accommodating the interests of courtroom participants also is illustrated by the work habits prevailing in some Criminal Division courtrooms. Again, the court watchers have found, "Most of these courts started late and adjourned early, after only a few hours' work. On 86 percent of the days, they began after 10 a.m. despite the stated opening hour of 9:30 a.m.; 55 percent of the time, court was over for the day at or before 1 p.m."⁵² Although there are clear rules to the contrary, workdays are short because that is what the courtroom participants want and it is a situation which the local legal culture sustains.

The formal rules, then, often are not enforced because to require strict adherence would contravene the values and expectations of the local legal culture. A judge or lawyer who violates the courtroom's prevailing norms may be ostracized by other workgroup participants and would likely receive little support from the professional community.⁵³

49. For a graphic illustration of *ex parte* communications, see *In re Laurie*, No. 84 St. of Ill. Cts. Comm'n, Stipulation of Facts 5 (1985). Judge Laurie was the first judge to be disciplined for engaging in *ex parte* communications.

At Judge Laurie's earlier trial on federal criminal charges, which resulted in his acquittal, a public defender gave the following account of *ex parte* contacts:

A. I would try to beat the prosecutor there [the judge's chambers] to better my position. I wanted to give him my flavor of the facts rather than have him hear the State's flavor first.

Q. And did you understand the State would try to do that as well?

A. Sure, it was a race on the case.

United States v. Laurie, No. 84 St. of Ill. Cts. Comm'n 2421, (N.D. Ill. 1984) (testimony of George Grzcae, at 857).

50. ILL. REV. STAT. ch. 38, § 114-4 (1985) (lists the grounds for which a continuance may be granted in a criminal case).

51. COOK COUNTY COURT WATCHERS, INC., *CITIZENS LOOK AT THEIR COURTS: 1984-1985*, 29-30 (1986).

52. *Id.* at 13.

53. It might even be argued that given the sustained period over which an "alternative" (though unstated) set of rules has been in effect, the official court rules have been nullified by the doctrine of desuetude. It might be considered unfair or improper to suddenly enforce formally adopted but long ignored rules without reenacting them.

IV. DEVIANT LEGAL SUBCULTURES: A THEORETICAL PERSPECTIVE

As the Greylord trials demonstrate, courthouse workgroups sometimes not only reach agreements to adopt informal procedures leading to casual breaches of the court's rules, they also sometimes consent to serious ethical misconduct and even to violations of the criminal law. Whether this reflects a rejection of the profession's and the public's dominant norms and values has been the subject of much scholarly debate.⁵⁴

While the evidence is ambiguous, it seems just as likely that norms are "neutralized" or "nullified" rather than expressly repudiated. Attorneys and court personnel may believe that certain rules are appropriate, but only in an "ideal situation." They may believe that it is simply impractical to slavishly adhere to formal rules under existing conditions. The current rules are neglected, but there is no effort to change them or defend the informal or deviant procedures that operate in their place.⁵⁵

The techniques used for neutralizing normative behavior were noted by sociologists Gresham Sykes and David Matza in their study of juvenile delinquency.⁵⁶ In substance, this framework involves the actor's denying responsibility, denying the existence of an injury to a victim, condemning the accusers, and appealing to higher loyalties.⁵⁷

These techniques operate as follows:

1. Denying Responsibility: This technique might be reflected by the expression, "In order to get along, you have to go along." Judges and lawyers come into a legal system which is not of their own making; they are not responsible for a system in which court clerks receive tips and ex parte communications are common. Yet they have to participate in at least minor forms of misconduct in order to compete or to "fit in."⁵⁸

2. Denying Injury: By helping certain litigants or influential lawyers, we are benefiting someone and injuring no one. With the strong heritage of political experience in the "political plight" area of law, we are likely to

54. For a general review of this debate, see *LAWYER ETHICS*, *supra* note 45, at 4-8, 170-76. One author's theory of "differential association," which hypothesizes that "criminal behaviour is learned in association with those who define such criminal behaviour favorably and in isolation from those who define it unfavorably." E. SUTHERLAND, *WHITE COLLAR CRIME* 240 (1983). See also Westley, *Secrecy and the Police*, *SOC. FORCES* 254 (1956); Westley, *Violence and the Police*, 59 *AM. J. OF SOC.* 34 (1953).

55. Thurman Arnold has attempted to explain the phenomenon of a community routinely neglecting a law while at the same time avoiding initiatives to repeal or change it. He states: "The laws are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." T. ARNOLD, *SYMBOLS OF GOVERNMENT* 160 (1935).

56. Sykes & Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 *AM. SOC. REV.* 664 (1957).

57. *Id.* at 667-69.

58. *Id.* at 667.

have judges, lawyers, and clerks who are service oriented, especially toward their own "constituencies."⁵⁹

Beyond the denial of an injury, the existence of a victim may also be denied. A defendant who demands a costly jury trial deserves a more severe sentence. Assistant Public Defenders have an interest in expeditiously processing their case load, judges have the burden of overloaded calendars of pending cases, and private lawyers may also want to dispose of cases by a less costly means than a jury trial. Consequently, the defendant who demands the jury trial may be viewed as a "troublemaker" deserving additional punishment, rather than the victim of an unfair sentence imposed as the cost of exercising a constitutional right.

3. Condemning the Accuser: There may be a feeling among some lawyers that the "downtown lawyers," court watchers, and other "do gooders" are hypocritical. These critics have their own forms of corrupting rules and compromising formal structures within their own areas of specialization.

4. Appealing to Higher Loyalties or Duties: There may be a feeling among workgroup members that they are all working together. Those within the workgroup have the same goal of providing legal services under difficult conditions. To report a violation of a formal rule by a colleague would be reprehensible, for it would undermine the stability of the workgroup. Unlike the segment of the bar that represents more affluent clients, the workgroup members deal with the problems of the poor. There are insufficient dollars for them, from either clients or taxes, to support rigid compliance with the courts' formal rules.

The issue concerning the role of norms in determining deviant subgroup behaviour cannot readily be resolved. As others have observed, "No one can doubt that norms exercise some influence on behaviour, but the question of how much influence they exercise is highly debatable."⁶⁰ In any case, the widespread deviance from expressed professional norms and formal court rules persists, at least in part, because of "an operational code" which treats various forms of misconduct as acceptable.⁶¹ While the precise nature of this operational code is uncertain, its existence seems apparent.

59. In a comparative study of two criminal court systems the prior political experience of Pittsburgh judges was described in terms that would apply to many in public office in Cook County. The study noted that judges who have been precinct workers often helped voters and provided favors in a wide range of problem areas. When they became judges, it was difficult for them to identify an *ex parte* communication as improper when a case involved the interests of someone identified as being within the judge's "community of interest." M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* 136-56 (1977). In another context, the Tammany Hall politician, George Washington Plunkett, referred to this as "honest graft," bringing profit to the office holder, but no harm to the public. See W. RIORDAN, *PLUNKETT OF TAMMANY HALL* (1963).

60. BLAKE & DAVIS, *Norms, Values and Sanctions*, in *HANDBOOK OF MODERN SOCIOLOGY* 461 (R. Faris ed. 1964).

61. See W. REISMAN, *FOLDED LIES: BRIBERY, CRUSADES AND REFORMS* (1979).

V. RECOMMENDATIONS

Judges must follow the rule of law, even when to do so means that they will face the disapproval of friends and colleagues. For judges, as well as lawyers and court personnel, the pressure to conform with a culture that eschews formal rules is strong. But that pressure must be resisted. There are no easy answers to this problem; there is no "quick fix." In the long run, if the judicial system is to retain the respect of the public, it must either bring its actions into conformity with or alter the existing rules.

One of the greatest impediments to enforcing professional norms in the courtroom is the fragmented nature of the bar. Attorneys who represent individuals in "personal plight" cases, including criminal cases, are largely sole or small firm practitioners. Moreover, a criminal defense lawyer "deals with clients who, typically, lack wealth, political power, prestige [and] rectitude" ⁶² These lawyers are largely isolated from the elite lawyers of the profession who work in large firms, represent wealthy, politically powerful clients and command substantial resources which can be used in their clients' causes. These lawyers, because of their resources and influence in the larger society, could use their position to help improve the administration of justice in the criminal courts. ⁶³ Unfortunately, this rarely occurs. ⁶⁴

More can be done directly to enforce formal rules and we recommend such enforcement. But much of the conduct or misconduct that occurs in the courtroom is not easily controlled. Professional ethics "remains the 'domain of the unenforceable,' the sanctions for proper behavior being the desire for professional prestige and esteem" ⁶⁵ Consequently, all seg-

62. See HEINZ & LAUMANN, *supra* note 26, at 359-60.

63. At the very least, greater awareness throughout the bar as to what differing demands might be in each discrete area of practice could produce rules and laws that would provide a visible process for addressing pressing needs.

64. The bar associations and their leadership have not completely ignored criminal justice problems. See, e.g., CHICAGO BAR ASSOCIATION COMMISSION ON ADMINISTRATION OF CRIMINAL JUSTICE IN COOK COUNTY, PROGRAM FOR ACTION (1975). Such efforts, however, tend to be sporadic. There is little or no sustained involvement in the criminal justice system by the more prestigious firms or bar leadership over an extended period of time. As Jerome Carlin has stated:

Isolation of the elite from rank and file members of the bar and from lower reaches of the administration of justice partly accounts for the unwillingness of bar leaders to accept responsibility for seeking reform. Elite lawyers . . . are cut off from meaningful contact with lower status lawyers. They have little in common with the rank and file in social background and professional training and the two groups are largely segregated from each other in work, social activities, and participation in professional association The elite lawyer's isolation from the lower levels of the administration of justice tends to weaken his concern for the problems of these institutions

LAWYER ETHICS, *supra* note 45, at 181-82.

65. C. TAEUSCH, *Professional Ethics*, 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 472-75 (1934), reprinted in G. HAZARD & D. ROHDE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 85 (1985).

ments of the bar should assume responsibility for improving the administration of justice in the criminal courts. Lawyers with the greatest amount of power and prestige should not be allowed to delegate their moral and professional obligations.⁶⁶

There are steps that can be taken now to begin a process involving the full weight of the bar:

1. The Chief Judge should conduct a survey to identify court rules relating to the criminal division which are widely ignored or no longer needed. If the rules are determined to be desirable, they should be enforced; if not desirable, they should be eliminated. If the current "informal rules" are defensible, they should be adopted formally.

2. Judges should be given more control over the personnel which operate within their courtroom. Clerks, and perhaps bailiffs, should become employees of the Illinois Supreme Court's Administrative Office, subject to a uniform personnel code.⁶⁷

3. Judges must also be insulated from the partisan political process and politics of the organized bar. In the absence of a merit (or appointive) system of judicial selection, new rules should be considered for financing judicial election and retention campaigns.

4. Judges should be rotated regularly among divisions every three to five years to prevent overspecialization and periodically to revitalize judicial performance in the courts' various divisions.

5. The organized bar must itself take a more active role to ensure that its members understand and adhere to the formal rules. They also should offer support for judges who attempt strictly to enforce those rules.

6. The major bar associations periodically should review basic practice areas where ethical problems seem to be most acute. Review teams, consisting of practitioners in a variety of fields from both small and large firms, should review legal practice in the criminal courts. If practitioners cannot defend standard operating procedures to a group of reasonably intelligent professionals, the procedures are unlikely to be justifiable.⁶⁸

VI. CONCLUSION

These recommendations are not a panacea to the problems posed by the local legal culture. However, they would begin the process of altering that

66. A federal judge who came from a teaching and large law firm background noted while sentencing a Greylord defendant: "I practiced law in this jurisdiction for many years, and I must say I saw some things at traffic court that caused me to open my eyes. Who knows? Maybe I played a part when I didn't do anything." Judge Prentice Marshall, *quoted in* Chi. Sun-Times, May 22, 1986, at 4, col. 2.

67. See A.B.A. COMMISSION ON STANDARDS OF JUDICIAL ADMISSIONS, STANDARDS RELATING TO TRIAL COURTS 61 (1976).

68. A similar periodic review process could be used in other highly specialized, and insulated, practice areas such as domestic relations and law enforcement.

culture and ensure the courts' accountability to the broader legal community and the public. Criminal courtroom proceedings are too important to defendants, the legal community and society to permit the existing legal culture to prevail.

