



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 47 | Number 1

Article 8

---

12-1-1968

# Appraising the System of Criminal Law, Its Processes and Administration

Kenneth Lawing Penegar

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Kenneth L. Penegar, *Appraising the System of Criminal Law, Its Processes and Administration*, 47 N.C. L. REV. 69 (1968).

Available at: <http://scholarship.law.unc.edu/nclr/vol47/iss1/8>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# APPRAISING THE SYSTEM OF CRIMINAL LAW, ITS PROCESSES AND ADMINISTRATION

KENNETH LAWING PENEGAR\*

*The movement to reform the criminal law has received additional impetus from the publication of the report of the President's Commission on Law Enforcement and Administration of Justice. The Commission examined every facet of crime and law enforcement in the United States; its report and the reports of its various task forces contain perhaps the most exhaustive collection of data on crime and criminal justice yet assembled in this country. The author utilizes the Commission's findings to analyze the American system of criminal justice in terms of its efficiency and its service of societal norms. In the end, he concludes that the work of the Commission will be useful in charting the reform of criminal law and justice, but warns that despite the improvement of the system's administrative structure, scholars and practitioners should continue to be concerned with its fairness.*

## I. INTRODUCTION

The principal occasion for attempting to write on so large a theme is the recent publication of a series of reports by the President's Commission on Law Enforcement and Administration of Justice.<sup>1</sup> In light of both the pervasive importance of law in the ordering of human relationships and the bulk and complexity of the Commission's findings, it seems appropriate that an attempt be made to summarize its reports for the benefit of the thoughtful man of law, who may not have an opportunity to study them extensively. While nearly all the data, information, and insights will be drawn from American sources, what is intended

---

\* Associate Professor of Law, University of North Carolina.

<sup>1</sup> The Commission's general report, released in February, 1967, is entitled *THE CHALLENGE OF CRIME IN A FREE SOCIETY*. Subsequently, the Commission published nine Task Force Reports on the following subtopics: The Police; The Courts; Corrections; Juvenile Delinquency and Youth Crime; Organized Crime; Science and Technology; Assessment of Crime; Narcotics and Drugs; Drunkenness. All of the reports were printed and are being distributed by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. The composition, organization, and work of the Commission is discussed in note 162 *infra*.

is not merely the description of one country's administration of criminal justice but rather a framework for evaluation in comparative contexts to be employed by scholars in any country sharing similar expectations and ideals about the role of justice under law in a free society.

Crime in any society has always been an item of urgent public business. No less important, however, to the spirit of a humanely administered crime control system has been the ways and means that the society uses in response. Professor Herbert Wechsler of Columbia University some years ago summed up the competing demands for any such system in these lines:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.<sup>2</sup>

It is easy to agree with the spirit of such a statement—that law should be “as rational and just” as it can be. Having said this much, however, little more is done than to state our collective dilemma. Surely no one of any responsibility would willingly support an irrational or unjust system. The first need in making an appraisal of any human institution is to establish criteria at lower levels of abstraction for determining when some aspect of it is clearly not rational, clearly not just. The abstraction of rationality presumably refers to a balance of strategies and procedures designed to achieve stated ends or goals. The design then depends upon well clarified goals supported by the society at large and upon means fairly supported by the major participants in the criminal law process. Justice, on the other hand, while it is a more abstruse concept, presumably refers to the degree of acceptance of the means employed to achieve stated ends both by society at large, or a majority of it, and by the individual confronted by the power of the State. And

---

<sup>2</sup> Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

in constitutional democracies what is thought to be generally acceptable in terms of what the government can and cannot do to fulfill stated policies is expressed in terms of basic fundamental rights listed—albeit in cryptic verbalisms of unspecified detailed content—in the basic charter of government. To avoid the logical pitfall of infinite regress, these generalized terms must with practice be given more concreteness, just as in grappling with “rationality” there must be well clarified goals, well supported means or strategies.

Accordingly what is proposed to be done here is to state explicitly the several points of view from which the criminal law as a system of social control may be seen and to discuss the presently available information pertinent to each point of view. In the first place, there is the public's concern about crime as social phenomena and how it affects the quality of human lives. In this connection it will be appropriate to mention the range of goals established for the criminal law and the degree of clarification and acceptability they enjoy. Of incidental, but significant, importance to a society whose public demands are wider than the criminal law alone is the real and relative costs of the system. Thus, the viewpoint of the economist becomes relevant and will be the second major subdivision of this article. Third, although no less important than the first two, is the viewpoint of the individual involved in the administration of criminal justice. Fourth, and finally, an attempt will be made to bring into focus the perspective of the independent observer, interested in value outcomes and sharing the broader commitments to rationality and justice, but disassociated from any other specialized perspective such as policeman, defense advocate, or other major participant. The concern of this independent observer—he might be called a policy scientist—will be to draw together the common threads of the other perspectives, marshal the data furnished by others, compare stated goals with performance, and recommend appropriate alterations in trends of public decisions about criminal law and its administration.

## II. THE PUBLIC'S CONCERN

Specifically what purposes does the public expect to be served by the system of criminal justice that has emerged by the present day? Consideration of factors effecting changes in amount and rate of the incidence of crime may be deferred for the moment while explicit focus is given this more general question, which should be raised periodically in assessing the effectiveness of the criminal law and its institutions.

It is characteristic of the common law world that not much explicitness has been attempted by any branch of government in stating the goals of a system which has its origins in the dawn of the culture and has grown or developed not so much by conscious alteration as by piecemeal and expedient tinkering. The codes of very few states contain any preambles or list of policies to be served by the definition of offenses and the sanctions to be imposed for their violation. Nevertheless, it is possible to find here and there among court judgments and the writings of scholars a synthesis of what is felt to be the major social objectives of the criminal law.

Generally speaking there is consensus on at least one point—that the criminal law supports several purposes, not a single purpose. Beyond this it becomes a matter of the individual spokesman's order of priorities (and they may vary from context to context); but the list would usually include deterrence or general prevention, rehabilitation of the offender or re-socialization, incapacitation or specific prevention, and some variant of the older Hegelian idea of retribution, sometimes called more ambiguously "punishment" or the punitive ideal.<sup>3</sup>

It is something of a disappointment, but hardly surprising, to find that the President's Commission on Law Enforcement and the Administration of Justice [hereinafter referred to as "the Commission"] devoted little attention to the matter of formulating these goals more clearly and in some hierarchy of importance. The Commission tended to acquiesce in the rather vague and generalized ad hoc statements found elsewhere. At one point in its general report the Commission, in describing the system it had undertaken to study, stated:

The action taken against lawbreakers is designed to serve three purposes beyond the immediately punitive one. It removes dangerous people from the community; it deters others from criminal behavior;

---

<sup>3</sup> Even the MODEL PENAL CODE formulation of the American Law Institute has foresworn any statement of the social goals of a criminal law system, save that among the purposes to be served by a *definition* of offenses is: "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual and public interests." MODEL PENAL CODE § 102(1) (a) (Proposed Official Draft, 1962). More recently, the New York legislature has enacted a reformed Penal Law, whereof a purpose to be served is:

To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.  
N.Y. PEN. LAW § 1.05(5) (McKinney 1967).

and it gives society an opportunity to attempt to transform law-breakers into law-abiding citizens.<sup>4</sup>

On the other hand when the Commission undertook, through its Task Force on the work of the criminal courts, to assay the critical task of sentencing, it chose a slightly different formulation of the goals of the system:

The difficulty of the sentencing decision is due in part to the fact that criminal law enforcement has a number of varied and often conflicting goals: The rehabilitation of offenders, the isolation of offenders who pose a threat to community safety, the discouragement of potential offenders, the expression of the community's condemnation of the offender's conduct, and the reinforcement of the values of law abiding citizens.<sup>5</sup>

On balance, judging from the emphasis of the Commission throughout on the problems of corrections and uniform and fair sentencing procedures in the courts, it would appear that the members considered deterrence, or general prevention, and reform of the individual offender the most important goals of the system—or at least the goals that can profitably receive most intensive research and reformatory efforts.<sup>6</sup>

These observations will again become pertinent, and in a more specific context, when we consider, in a subsequent section on the individual's viewpoint, the effects of sanctions in this section and the element of fairness to the individual accused and to the offender. For the present these general comments suffice to indicate something of the scope and range of problems to be considered in discussing the public's concern with crime and criminals. The public is concerned that crime not happen

---

<sup>4</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 7 (1967) [hereinafter cited as *THE CHALLENGE OF CRIME*].

<sup>5</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 14 (1967) [hereinafter cited as *THE COURTS*].

<sup>6</sup> Not only is the idea of punishment difficult to analyze in functional terms and with quantitative precision sought in connection with the other goals, it may just be that the Commission considers that some expression of approbation of the punitive ideal, or at least support for a policy of "community's condemnation of the offender's conduct," is the minimum political price it must pay for public acceptance of its other findings and recommendations. Such equivocation seems patent in this quotation from the Commission's general report: "A sentence prescribes punishment, but it also should be the foundation of an attempt to rehabilitate the offender, to insure that he does not endanger the community, and to deter others from similar crimes in the future." *THE CHALLENGE OF CRIME* 141.

if at all possible, that is, that it be prevented; secondly, it is concerned that when it does happen, the offender will be apprehended and prevented from erring again—whether through the threat of “punishment” or the promise of rehabilitation. This much at least is expected of the criminal law. How well it is succeeding is the next and most vital question.

#### A. *Amount and Rates of Crime*

One index of how well the criminal law is succeeding in achieving its major goals might be seen in the incidence of crime of all kinds measured across time. That is, how much crime did we have last year, how much this year; is there a differential? It is not uncommon for newspapers to take this approach and conclude in dire terms that society is coming apart at the seams because a rise in the number of crimes, even crimes of violence, is taking place from year to year.<sup>7</sup> What actually is reliably known about such trends?

In its annual report, *Crime in the United States, Uniform Crime Reports*, the F.B.I. collects complete data on seven major “index” crimes—four of them crimes against the person (willful homicides, forcible rape, aggravated assault, and robbery) and three property offenses (burglary, larceny of fifty dollars or more, and motor vehicle theft). With the exception of willful homicide, all seven of these index crimes show steady increases in absolute terms and in rate per 100,000 population over the years since 1940.<sup>8</sup> Difficulties in placing too much reliance on such figures have long been pointed out in professional criticism. For one thing the earlier *Uniform Crime Report* did not account for population increases and other demographic changes such as urbanization and the presence of more young people in the general population. For another the figures tended to be somewhat misleading owing to variations in definition of the various index offenses from state to state—thus what was listed as a burglary in one state might be listed as a robbery by another jurisdiction, if a confrontation between culprit and the victim occurred. Moreover, the quality of record keeping varied

---

<sup>7</sup> Cf. an editorial entitled “The Campaign: Crime Control,” N.Y. Times, Sept. 20, 1968, at 46, col. 2, for an atypical, more thoughtful comment.

<sup>8</sup> PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 19-20 (1967) [hereinafter cited as CRIME AND ITS IMPACT]. The three index property offenses show the more marked increase—from about 425 per 100,000 persons to about 1,250 per 100,000 persons in 1965. *Id.* at 20. Willful homicide has remained at about 5 per 100,000 persons over the same period.

enormously from one city to another, and not all police departments made the reports requested. But by 1965 some eight thousand police agencies covering 92 per cent of the population were involved in the survey, and many improvements had been made in the F.B.I.'s compilation.<sup>9</sup>

Despite these shortcomings, the Commission believes there are several identifiable reasons why reporting of crime is now better and more reliable than previously. Four factors may be mentioned. One is that minority groups are now more vocal, more willing to express their complaints and to go to the police. Closely related to this is the fact that slum residents, whose lives are more apt to be touched by violence than members of the society at large, are increasingly less tolerant of the syndrome of violence. Third, there is more professionalism and formality in police organization. For example, in 1950 the City of New York discontinued its practice of allowing precinct headquarters to process their own complaints. Beginning in that year a citizen's complaint would go through a central office before being passed on to the precinct concerned. In the central office a permanent and complete record of the complaint would be made, whereas in the local offices there was a tendency not to record many complaints.<sup>10</sup> Fourth, more theft insurance is obtained on property today, and often the submission of a report to the police is a precondition to making a claim on the insurance company.

Although more and better reporting is now in evidence in the United States, the Commission was not satisfied that official sources indicated the full magnitude of actual crime. Not only did these sources not account for significant categories of crimes beyond the seven index offenses,<sup>11</sup> but also they reflected only the knowledge of official agencies.

---

<sup>9</sup> See generally FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORT 1965 (1965) [hereinafter cited as UNIFORM CRIME REPORTS 1965]; Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 709 (1963).

<sup>10</sup> As an indication of the success of this change of procedure, in 1951, one year later, robberies known to the New York Police Department rose by 400 per cent; burglaries by 1,300 per cent! CRIME AND ITS IMPACT 23. This is the Commission's conclusion:

People are probably reporting more to the police as a reflection of higher expectations and greater confidence, and the police in turn are reflecting this in their statistics. In this sense more efficient policing may be leading to higher rates of reported crime.

*Id.* at 40.

<sup>11</sup> Not covered, for example, were such serious offenses as arson, kidnapping, and simple assault, and such property offenses as embezzlement, fraud, and tax evasion as well as a host of minor violations of public order, like public drunkenness, gambling, and prostitution.



In the first national survey of crime victimization ever conducted, the Commission found that crimes of violence were about twice the number reported officially and property offenses were more than twice as numerous—in the aggregate.<sup>12</sup> These are of course valuable findings, indicating as they do that official rates of reported crime, high though they are,<sup>13</sup> probably err on the conservative side. But they are, in the Commission's own view, only a beginning. It was unable to conclude that it had found "fully reliable methods for measuring the volume of crime" or "such methods for measuring the trend of crime."<sup>14</sup> In other words, although the Commission concluded that there has been an increase in the volume and rate of crime in America,

it has been unable to decide whether individual Americans today are more criminal than their counterparts 5, 10, or 25 years ago. To answer this question it would be necessary to make comparisons between persons of the same age, sex, race, place of residence, economic status, and other factors at the different times. . . . Because of the many rapid and turbulent changes over these years in society as a whole and in the myriad conditions of life which affect crime, it was not possible for the Commission to make such a comparison. Nor do the data exist to make even simple comparisons of the incidence of crime among persons of the same age, sex, race and place of residence at these different years.<sup>15</sup>

Even though the Commission declined to make any summary judgments about the relative criminal propensity of today's society and hence indirectly a judgment in part about the efficacy of criminal law and its enforcement, still it did offer certain observations as to several factors that in its judgment most probably contributed to rises in the incidence of crime. Of the three principal factors noted, two relate to demographic changes in society. These are the increased percentage of young people in the population at large and the increased urbanization of the country.

---

<sup>12</sup> CRIME AND ITS IMPACT 17-19. This particular survey was conducted for the Commission by the highly respected National Opinion Research Center of the University of Chicago. It consisted of interviewing 10,000 households all over the country and asking whether the person questioned, or any member of his household, had been a victim of crime during the past year, whether the crime had been reported, and if not, the reasons for not reporting. A summary of the responses will be pertinent in a subsequent subsection devoted to public attitudes about crime and law enforcement.

<sup>13</sup> The trend for 1960-1965 is even sharper than the long-term trend. Violent crimes showed a 25 per cent increase and property crimes a 36 per cent increase over this period. CRIME AND ITS IMPACT 20.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 40.

Of course they are complicated and interrelated concepts, and only a summary presentation can be made here. First, noting that in 1965 large percentages of several violent crimes were committed by persons in the 18 to 24 year old age group,<sup>16</sup> and that a majority of certain property offenses were probably committed by the age group under eighteen,<sup>17</sup> the Commission pointed out from census data that this "high risk" age group had been increasing in size much faster than other groups in the population. "Beginning in 1961 nearly one million more youths have reached the ages of maximum risk each year than did so in the prior year."<sup>18</sup> Not enough is yet known, however, to conclude whether the same percentage of youths who committed offenses, say in 1950, would today commit more; that is, whether youth are more generally crime-prone than formerly.<sup>19</sup> All that can be said in reference to this factor is that everything else remaining constant, the rises in certain kinds of crime could have been predicted from this change in demographic patterns.

Secondly, the Commission noted that rates of crime are twice as great for all index crimes, except burglary, in large cities as in towns and smaller cities.<sup>20</sup> Again the demographic correlate is that the United States has become an urbanized society, city population increasing by fifty per cent since 1930 while rural population increased only two per cent.<sup>21</sup> While direct cause-effect relationships have not yet been specified in this large-scale shift of people from the countryside and small towns to the cities, it is common knowledge that serious social dislocations occur in the process, not the least of them being crowding of already crowded slums, the creation of more semi-employed or unemployed groups, strain on welfare and educational establishments and the like. The important point here is not that new answers have been

---

<sup>16</sup> "In 1965 more than 44 per cent of all persons arrested for forcible rape, more than 39 per cent for robbery, and more than 26 per cent for willful homicide and aggravated assault were" in this age group. *Id.* at 25.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> With better correlations to census data in the future, one consultant to the Commission believes that such inferences might be drawn. CRIME AND ITS IMPACT app. D, at 207.

<sup>20</sup> Twenty-six core cities of more than 500,000 people, with less than 18 per cent of the total population, account for more than half of all reported Index crimes against the person and more than 30 per cent of all reported Index property crimes.

*Id.* at 25.

<sup>21</sup> 1 BUREAU OF THE CENSUS, U. S. CENSUS OF POPULATION, 1960: CHARACTERISTICS OF THE POPULATION, NUMBER OF INHABITANTS pt. 1 (1960).

found for old questions, but that additional data may provide the basis for better social planning.

Finally, the Commission identified a third factor which undoubtedly accounts for some of the rise in crime and crime rates—at least in the categories of property offenses. And this is the nation's markedly increased affluence in the last thirty years or so.<sup>22</sup> The significance of this development for the Commission is that with increased affluence property may be less well protected than before; it pointed to many car thefts where the keys had been left in the car and many burglaries of houses left unlocked. Furthermore, there has been a boom in banking, with small suburban branches less well protected than central ones. Finally, some increase in shoplifting could be attributable to the fact that shop managers choose to tolerate a certain amount of pilferage rather than hire more clerks or guards, which in the view of the store owner might be "bad for business."<sup>23</sup>

The conclusion to which much of the preceding leads is that it would be hasty and unwarranted to say that criminal law is failing merely on the evidence of rising incidence of crime or even higher rates of crime. No one knows what life would be like without the institutions of the criminal law, and experimentation along these lines would not, on a large scale, be feasible or morally defensible. What the Commission's work suggests is that understanding the forces engendering crime and the processes by which these may be influenced is a very complex affair and requires considerably more research efforts than have heretofore been mounted. This is a theme to which we shall return in the concluding section of the article.

### B. *Clearance, Prosecution and Conviction Rates*

Perhaps second only in importance, in the mind of the general public, to the incidence and rate of all kinds of crime is the concern that whatever else happens, the machinery for law enforcement should apprehend, try, and convict the persons responsible. Conceding that not every crime

---

<sup>22</sup> The Bureau of the Census notes that at constant dollar values national wealth and all kinds of goods have increased more than fourfold since 1940. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1966, at 346 (1966).

<sup>23</sup> CRIME AND ITS IMPACT 27. A final explanation offered by the Commission, relating to increased affluence and its impact on crime, may be seen in the general inflation that the country has experienced in the same period. Under one category of index crime—larceny of fifty dollars and over—an incident that ten or twenty years ago would go unrecorded now gets listed because the item's value, relative to contemporary prices, has gone over the cut-off line. *Id.*

—perhaps only a relative few in times of rapid social change—can be *prevented*, the thoughtful man in the street still expects considerable diligence on the part of the police to apprehend, and of the courts to try, convict, and sentence, the guilty. It seems appropriate to ask: how efficient are these agencies of the law? Of all offenses known to the police, how many are “cleared” by arrest? Of these, how many are charged, tried, and convicted; how many are sentenced? If percentages are available for more than a single year, is there a perceptible trend of increasing success?

The American experience, as reported by the Commission, is not a heartening one in terms of cold percentages. Although noting that the data are spotty and in many ways unreliable, the Commission reports that rates of clearance (*i.e.*, ‘solving’ a crime and making an arrest) have on the whole remained fairly stable over the years since 1935 (the earliest date for which reports are available). Considerable variation exists among different categories of offenses. Thus, the highest clearance rates exist among the four violent index crimes: 89 per cent of willful homicide cases cleared by arrest in 1966 (the lowest rate of 85.6 per cent being 1935, the highest of 93.8 per cent in 1950); 65 per cent of forcible rape cases in 1966 (compared with 64 per cent and 73.6 per cent in earlier years); 35 of robbery cases (compared with 43.5 per cent as the high, and no lower figure); 72 per cent of aggravated assault cases (compared with 78.9 per cent as a high and no lower figure).<sup>24</sup>

The three property index offenses show smaller rates of clearance and reveal, with the exception of car theft, steady *declines* during the past decade. Thus, 23 per cent of burglary cases were cleared by arrest in 1966 (compared with 33.1 per cent in 1940 and 29.5 per cent in 1960); 19.6 per cent of larceny cases were cleared by arrest in 1965 (compared with 23.4 per cent in 1940 and 20.1 per cent in 1960); and 25 per cent of car thefts cleared in 1966 (compared with 23.8 per cent in 1940 and 25.7 per cent in 1960).<sup>25</sup>

As might be expected, the rates of charging (meaning that an indictment or information is laid against a specific individual) are higher

---

<sup>24</sup> One explanation the Commission offers for the higher clearance rate for homicide, rape, and aggravated assault, than for property offenses and robbery, is that not infrequently in the former offenses the culprit is either known to, or may be identified by, the victim. *Id.* at 37-38.

<sup>25</sup> This information was taken from UNIFORM CRIME REPORTS 1965 and FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS; PRELIMINARY REPORT 1966,

than rates for arrest. And, interestingly, the situation in regard to which offenses have the highest rates of charging is just the opposite of the arrest rate picture. Thus, in 1965, 62.5 per cent of those persons arrested for willful homicide were actually charged. In the category of forcible rape 71.8 per cent were charged. Of those arrested for robbery, in the same year, 70.6 per cent were charged; for aggravated assaults, 74.8 per cent; for burglary, 84.1 per cent; for larceny, 81.7 per cent; and for car theft, 81 per cent.<sup>26</sup>

Comparison of these recent figures with rates for earlier years—in order to discern any trend of efficiency in charging in terms of arrests made—was possible only as far back as 1962, which is a very short time for projection purposes. Nevertheless, the change from 1962 to 1965 reveals a drop of several percentage points in every category of index offenses. Several possibilities, which the Commission did not explore, exist to explain this apparent decline in the rate of charging (in terms of percentages of arrests made). One is that the police are arresting more persons than formerly for mere investigation, harassment, and confiscation of contraband without seeking to prosecute.<sup>27</sup> Another is that prosecuting attorneys are becoming more selective, declining to charge in cases where success of prosecution is less probable than in others. A third possibility is that more *recording* of actual arrests is taking place today, because of greater administrative surveillance or some other reason, than formerly; if this is so, it would tend to 'inflate' the charging *rate* of the earlier years. Finally, it is distinctly possible that the few years available for comparison only reveal normal statistical deviation and do not reflect actual shifts in practice.

The final category here relates to rates of conviction. These are expressed in terms of a percentage of persons *charged*. Again, as in the case of the rate of charging, the "efficiency" of the system is greater in the less serious kinds of offenses; thus more are convicted in the category of property offenses than in that of violent crimes, and more for the less violent than for the most serious category of willful homicide.<sup>28</sup> Without specifying detailed figures for each category, an idea of

---

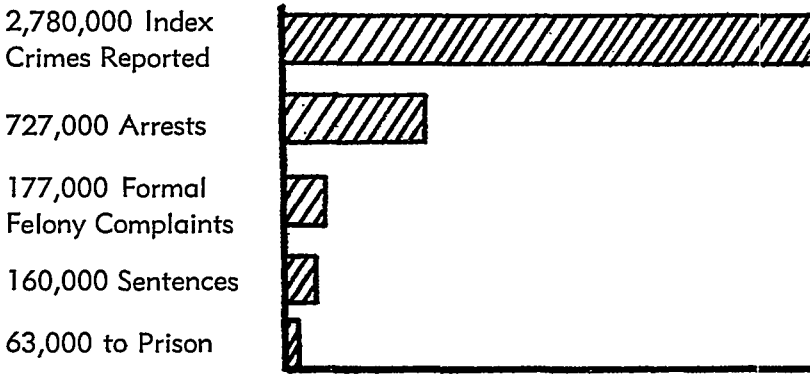
<sup>26</sup> CRIME AND ITS IMPACT table 19, at 39.

<sup>27</sup> See LAW ENFORCEMENT IN THE METROPOLIS 78-96 (McIntyre ed. 1967). Significant numbers of arrests for parole and probation violations would also tend to affect charging rates, for seldom would fresh prosecutions stem from them. *Id.* at 95.

<sup>28</sup> One passing comment may suggest an explanation. The police, being subject to strong pressure in capital cases, will do everything possible to make an arrest, even if no charge, trial, or conviction follows. The courts, on the other

the conviction rate (in terms of those charged) may be obtained by looking at the percentage *range* into which the index offenses fall. Three of the four index crimes of violence were, as of 1965, in the 65 to 70 per cent range. Robbery was higher with about 80 per cent. All three property offense categories fell within the high 80's to 90 per cent range. If these 1965 figures are compared with the 1962 figures, the variation is too slight to suggest the existence of any upward or downward trend, save in the categories of aggravated assault and burglary in which cases the rate of convictions appears to be in decline.<sup>29</sup>

A graphic impression of the "funneling" effect of the apprehension, charge, trial, and sentencing process—how the intake is quite large compared with the output of the process and how each stage of the process winnows out so many passed on from the preceding stage—may be had in the rough diagram printed below. It represents the flow for all seven index crimes processed in 1965 in the United States.



The greatest single difficulty with tabulations such as have been discussed here—as they are presently constituted—is simply that “there is no reliable way of connecting up the number of offenses committed with the number of offenders processed at each stage.”<sup>30</sup> The F.B.I. reports do not differentiate criminal offenders in totalling crimes reported, arrests made, and so on. It should be kept in mind that several persons may be charged with the same offense, hence a listing of aggregates of arrests made in one year may suggest larger numbers of separate offenses than is warranted. But even if arrests were tabulated separately from,

hand, may be more scrupulous in supervising the trials of capital or other serious offenses, and consequently tend to reduce the conviction rate for these offenses.

<sup>29</sup> CRIME AND ITS IMPACT 39.

<sup>30</sup> *Id.* at 37.

and in addition to, incidence of offenses, there would be no way for the reader to discern how many persons were involved in the same crime, how many were subsequently dropped out of the process, or how many persons were ultimately convicted for which offenses. Without such details, "measuring the trend over time of the solution of crime and the prosecution and conviction of offenders is even more difficult than that of measuring the trend of crime" itself.<sup>81</sup>

Finally the tabulations seem to suffer from one additional shortcoming. And it is one that we have been wrestling with for at least thirty years, since the famous Wickersham Commission in 1931:<sup>82</sup> while offenses known to the police are reported for the year in which they occurred, arrests, charging, trial, and conviction may occur in subsequent years for those very offenses. In other words there is no internal comparability between the precipitating event which is the offense and the several official responses that take place over extended periods of varying length. In view of the presumed ascending rate of the incidence of crime and the relative stability of the conviction rate, previously noted to be about 30 per cent, it would appear that the machinery of the criminal law system is perhaps holding its own. At what cost is another question. And whether the level of performance could be still better is yet another.

### C. *Effects of Sanctions*

#### (1) In Terms of the Goal of Rehabilitation

In this third general mode of appraising the criminal justice system, the first problem encountered is the one of deciding which of the several goals of the system to emphasize—deterrence, rehabilitation, incapacitation, or sheer punishment. Something of course can be said about each of them, but not very much in terms of existing knowledge. As we saw in the beginning, no two decision-makers in the system think alike on which is the most important of these goals in the particular case. Without preempting this value-laden decision for the reader, some effort will be made to summarize what is known about two of these goals in terms of general effectiveness. In large part this choice has been predetermined both by the availability of information and by the very nature of the concept concerned. Much of what is written on the fundamental

---

<sup>81</sup> *Id.* at 38. The difficulties in measuring trends of crime are discussed in the preceding section.

<sup>82</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 52-73 (1931).

idea of punishment, and of the four it is the most controversial, takes the form of polemical or ethical arguments for and against its justification as a legitimate goal of a secular system. Few thoughtful observers of the criminal law would be prepared to say, however, that it has no place at all in the system, at least in the more palliative form in which it is nowadays verbally disguised, such as "reinforcing norms of society" or communicating a "sense of the community's disapprobation" for the offender's conduct. At any rate it is not a concept that is reducible—within our present stage of knowledge—to quantifiable and therefore measurable terms. Consequently no canvass of its dimensions and effectiveness in today's setting will be attempted here.<sup>33</sup> It should also be borne in mind throughout this discussion that in many, if not in most, instances sentences in criminal cases are meant to serve several of these goals at once, and it is difficult to say that they do not have more than one effect in social as well as human terms. Consequently, the task of measuring the practices that are presumed to serve one or another primarily is fraught with difficulties, not the least of which is the artificiality of separating the goals as if they were wholly discrete concepts.

Little is known about how the deterrent model works in society, save from generalizations based on the incidence of crime generally; as we saw previously, this is a risky, albeit tempting, game in which to engage. All that can be done here is to suggest some of the lines of research needed to be done before very much can be said about this important social function of the criminal law and its processes.

Most of the knowledge that throws any direct light on the efficacy of our criminal law sanctions applied in support of these broad goals is drawn from experience with the individuals who have been processed by the system. In other words more is known about those who have already become offenders than those who have not. Such knowledge as there is may be broadly summarized under two heads, one for rehabilitation, reform or re-socialization, another for incapacitation.

How well do prisons, reformatories, probation, and other conditional release schemes do in terms of returning their charges to society as

---

<sup>33</sup> The idea of punishment, of course, has not lost its appeal for scholarly writing. See, e.g., P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1960); Bittner & Platt, *The Meaning of Punishment*, 2 *ISSUES IN CRIMINOLOGY* 79 (1966); Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987 (1940); Gardiner, *The Purposes of Criminal Punishment*, 21 *MOD. L. REV.* 117 (1958); Gerber & McAnamy, *Punishment: Current Survey of Punishment and Law*, 11 *ST. LOUIS U.L.J.* 491 (1967).



responsible citizens? This is the fundamental question the public has a right to ask. Unfortunately, the answers are neither complete, nor reassuring. The principal index that has emerged for attempting to answer this evaluative and vital question is recidivism—the rate at which persons who have been convicted of crime subsequently return to crime. The Commission did not undertake any fresh studies, but relied on existing surveys to make its assessment in this area.<sup>34</sup> Specifically the Commission mentioned four studies conducted in various parts of the country at various times. One of the earliest done anywhere was that of Drs. Sheldon and Eleanor Glueck of Harvard University on a sample of 510 inmates released between 1911 and 1922 from Massachusetts prisons.<sup>35</sup> In tracing as many as possible over a fifteen year period following release, the Gluecks found 32 per cent of these men each committed several new offenses.

A study in California of persons released from prison on conditional release (parole) between 1946 and 1949 showed that by 1952, 43 per cent had been re-imprisoned (half for committing new felonies, half for violation of parole conditions).<sup>36</sup> Another California study conducted from 1956 to 1958 dealt with persons conditionally released on probation at the time of sentencing,<sup>37</sup> without first having gone to prison. By the end of 1962, only 28 per cent of these probationers (and the group was large—about 11,000) had to be taken off probation and given an active sentence in an institution.<sup>38</sup> Based on these, as well as others not specif-

---

<sup>34</sup> This is not to say that the Commission was not concerned with the performance of the American penal system. On the contrary, it is fair to say that its major assumption was that whatever the rate of recidivism, it is probably too high to tolerate known shortcomings in the work of our prisons and other institutions. Consequently the Commission chose to concentrate its energies—within this area of sanctions—on gaining a more complete picture of current reality in corrections to find out the real substantive content of all programs aimed at treating, incapacitating, and ultimately returning most offenders to society. In consequence of its findings, the Commission made some very far-reaching specific recommendations for reform and improvement of corrections.

<sup>35</sup> THE CHALLENGE OF CRIME 45.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> One cannot quickly conclude that probation is all that much better—in the average case—than imprisonment on this comparison. Better risks in every criteria are selected for probation in the first place. As the Commission itself observed: A 'portrait' of the offender emerges that progressively highlights the disadvantaged character of his life. The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country, poorly educated and perhaps unemployed, unmarried, reared in a broken home, and to have a prior criminal record.

*Id.* at 44.

ically mentioned, the Commission was prepared to conclude that "roughly a third of the offenders released from prison will be re-imprisoned, usually for committing new offenses, within a 5-year period."<sup>39</sup>

This conclusion is of course only an estimate based on statistical sampling done by agencies other than the Commission. It nevertheless tends to correspond with the best evidence the author has been able to find elsewhere.<sup>40</sup> The return-to-prison rate for adult offenders is probably somewhere between 30 and 45 per cent across the nation as a whole, although certainly there are variations from state to state.<sup>41</sup> Previous estimates based upon less valid empirical data often ran as high as sixty per cent. Thus, while it is not possible to congratulate ourselves on very low rates, it is not fair to say, on the other hand, that the whole penal system must be a decided failure. Before one attempts a value judgment of the relative "success" of a system, which has a re-input or "cycling" rate as high as say forty per cent, one additional complication should be identified.

While it is important to know how many persons returned to prison after having been released from it and how many are taken off probation because of new criminal activity, it is also important to be able to distinguish cases of persons who have been forced to return for non-criminal reasons (violation of minor parole or probation conditions, for example) from those genuine recidivists who resort to renewed

---

<sup>39</sup> The most frequent recidivists are those who commit such property crimes as burglary, auto theft, forgery, or larceny, but robbers and narcotics offenders also repeat frequently. Those who are least likely to commit new crimes after release are persons convicted of serious crimes of violence—murder, rape, and aggravated assault.

*Id.* at 45-46.

<sup>40</sup> See Penegar, *The Emerging "Right to Treatment"—Elaborating the Processes of Decision in Sanctioning Systems of the Criminal Law*, 44 DENVER L.J. 163, 213 & nn. 199 & 200 (1967).

<sup>41</sup> One noted researcher in this field has suggested the following hypotheses for local variations in the recidivism rate:

The proportion of releasees returned to prison tends to be higher:

- a. where probation is used extensively, so that only the worst risks go to prison (although this use of probation may make the long-run recidivism of all felons lower);
- b. where parole is used extensively, so that many poor-risk parolees are released on a trial basis;
- c. where a large proportion of parolees are returned to prison when they have violated parole regulations but have not been charged with or convicted of new felonies;
- d. where there is a high overall crime rate in the communities to which persons are released, so that there is high prospect of the releasee coming from and going to highly criminogenic circumstances.

D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 24-27 (1964).

criminal activity. Furthermore, a complete and detailed picture of the recidivism problem would include data on what percentage of released offenders were later to have any contact with the criminal law process, apart from returning all the way through the long process to prison. In other words, it may be that many persons might validly be rearrested but for a variety of reasons may not return to prison in that instance. The Commission reports on a recent study done on 13,198 offenders released from Federal institutions during the calendar year 1963 and surveyed two and one-half years later. As of June 30, 1966, more than half had been arrested for new offenses.<sup>42</sup> Not only does more careful appraisal suggest using rearrest as the key point for measuring recidivism, in crude figures, because of its greater inclusiveness in comparison with return-to-prison as the key point, but closer scrutiny also indicates that more complete reporting of details in varying recidivism patterns would be useful in examining the relative importance of several variables in the recidivism equation. Differences may be detected in the longevity of post-conviction release without a "brush with the law," which may correlate with such factors as the kind of crime previously committed, age of the offender, and the point of exit from the system.<sup>43</sup>

Finally, tentative as all this appears to be, it must be remembered that assessment involves taking account of *trends* as well as levels recorded in particular years. Unfortunately, we have here only the basis for beginning to establish trends—some bench marks against which systematic surveying in future periods can be measured. But only with such will we be able to say much more about the efficacy of our efforts in the field of criminal law sanctions that are based on recidivism as the principal indicator.

Statistics, even if reliably collected, are not the end but only the

---

<sup>42</sup> The figure reported is 57 per cent. CRIME AND ITS IMPACT 79. An editorial caution seems in order here. Because the Commission's general report was published earlier than the individual supporting task force reports, it occasionally happens that the latter have more up-to-date information. For example, this federal study on 1963 releasees was not completed when the general report was printed, hence the recidivism rate—in terms of re-arrests anyway—was set at 48 per cent on the basis of evidence then available. See THE CHALLENGE OF CRIME 46.

<sup>43</sup> One study making use of such variables suggests (1) that the probability of re-arrest decreases in each category of crime with increases in age; (2) that re-arrest, if it occurs, is most likely to occur within the first two to five years; and (3) that an individual's subsequent crimes are related to his previous crimes. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 60, 63 (1967) [hereinafter cited as SCIENCE AND TECHNOLOGY].

beginning of rational penal policies and sound social planning. What after all is the real significance of even a precisely defined rate of recidivism? What does it reveal about the efficacy of efforts at rehabilitation in the institutions designed to serve the ends of the criminal law? Unless we know something about the content of various institutional and noninstitutional practices and programs, and the comparative success rates of these different institutions and about the inmates who have served in them, the answer of course would be "not much." It is in this respect that the Commission's work becomes of more immediate help in the tasks at hand.

"As a foundation for its work, the Commission decided that a comprehensive, nationwide survey of correctional operations should be undertaken."<sup>44</sup> The findings of this survey, while revealing a more accurate national, and hence synthetic, view of the whole, did not reveal much that was not known to at least a few scholarly observers in the profession. They did, however, serve to highlight the shortcomings of the system in sufficient detail to enable follow-up work to be done by responsible state and federal officials. It should of course be borne in mind that it is hardly accurate to speak of a national "system" of corrections in the sense of an integrated, hierarchical, smoothly functioning, unitary organism. Owing to the federal character of the American polity, it is not possible to describe an organizational chart, for example, that reaches from Washington down to regional prisons, district parole and probation officers, and city jails. Rather the responsibility for corrections is divided among federal authorities for federal institutions, state authorities for most prisons, cities and counties for jails and police lock-ups. Even within one state, responsibility is further divided among prison boards and wardens, parole departments and sometimes probation staffs on the one hand, and county judges (for probation services more often) and county or city police on the other. Nevertheless, from this disparate mass of prisons, jails, and probation and parole services (not to mention juvenile or youth services departments), it is possible to discern common patterns, practices, and policies. For the purposes of this brief over-view these common characteristics will suffice, except to note more promising deviations in approach when that seems indicated.

What the Commission noted first in the results of its survey was the magnitude of the "corrections population." "On any given day" the system of American corrections "is responsible for approximately 1.3

---

<sup>44</sup>THE CHALLENGE OF CRIME 159.

million offenders."<sup>45</sup> And during the course of a single year, it will process nearly two and a half million admissions. Only about one-third of the corrections population are institutionally confined (including both adults and juveniles), while about two-thirds are being handled in the community (meaning under either probation or parole).<sup>46</sup> The principal significance of these numbers—larger than most observers had previously estimated—lies in the fact that existing institutions are already overcrowded and existing after-care supervisors (parole and probation officers, child welfare workers) are already overburdened with self-defeating case loads. And in ten years time, the Commission estimated, the corrections population will rise to nearly two million.

More particularly the segments of the system that will feel the greatest strains will be the very ones in which most experts place the greatest confidence for remedial work with offenders. These are probation and parole services, particularly for juveniles and youths (whose percentages in the general and criminal population are rising so rapidly), and other community-oriented corrections work.<sup>47</sup>

Some of the reasons for a basic mistrust of the prison or other institutional modes of sanctioning are not difficult to discover if a few salient facts and insights are kept in view. For one thing, the staffing of prisons reflects a preoccupation with security and maintenance of what is, after all, typically a fairly sizeable human, albeit dependent, community. For example, of a total of about 121,000 corrections personnel employed in 1965, only 24,000, or twenty per cent, could be said to have direct concern with efforts at rehabilitation. These included not only some social workers, psychologists, psychiatrists, and instructional staff in prisons, but also probation and parole officers working in the community. "By contrast, eighty per cent of correctional manpower had major responsibility for such functions as custody and maintenance."<sup>48</sup> What these bare figures suggest, and the Commission's Task Force on Corrections readily documents, is that the reformers' zeal of the last generation or so

---

<sup>45</sup> *Id.*

<sup>46</sup> The 2:1 ratio is for serious offenders, or felons. In the case of less-serious offenders, misdemeanants, the ratio is just the opposite, namely two-thirds are confined, one-third are under supervised release. But it should be borne in mind that the first proportion has to be discounted by the fact that about twenty per cent of those in the community at any time have been in prison previously.

<sup>47</sup> In this connection, the Commission noted a trend in the courts toward greater use of probation for the adult offender and in parole boards for earlier conditional release from prison. *THE CHALLENGE OF CRIME* 160.

<sup>48</sup> *Id.* at 162.

has not enjoyed much success in restructuring what is still essentially a society of captives. In other words, too few resources have been committed to make a genuine reality of the promise of remedial education, vocational training, and group therapy, which have been widely touted in the literature about corrections for a long time. Too often, the Commission noted, the typical day for an offender in prison consisted of simply performing the routine chores of living plus considerable time spent in absolute idleness. The idea that an inmate learns a useful and marketable skill in prison is by and large a patent myth, although there are of course significant exceptions. The prisons industry system is simply out of touch with the larger economy, which an earlier generation felt would be unduly threatened by "cheap labor."<sup>49</sup>

Even if greater resources were made available to upgrade the quantity and quality of educational, vocational training, and therapeutic services within the prison, it is not clear that these could be well used in light of the prevailing, though not universal, practice of assigning all manner of offenders to large, catch-all units. In other words we have not made adequate use of classification techniques, separating offenders not just according to the crime they have committed and the age of the offender, but rather according to a large range of variables more closely approximating the complex human and social relationships that obtain in the case of any individual. The point is that institutional program content can only rationally be the product of some system of classification of offenders. Specifically what can such systems tell us?

[T]hey can sort out the correctional population according to an estimate of the prospects of each member for resocialization. The value of this instrument for the rationalization of practice is considerable, even though some problems are created which are far from solution. But as long as time and confinement are dimensions of the disposition of offenders, we need reliable means to decide between probation or institution and to determine the time required for each. What prediction systems can tell us about good risks and bad can influence the courts when they award probation and classifying centers when they decide on institutional placement.<sup>50</sup>

---

<sup>49</sup> The chief notable exception is in the federal prisons where there are modern machine shops and the like with competent supervisors and sales schedules to meet. A more recent and promising development is in the concept of "work-release," whereby a prison inmate is allowed to spend the work day at a job in the community. See the discussion below relating to community-oriented corrections.

<sup>50</sup> J. CONRAD, *CRIME AND ITS CORRECTION* 185 (1965).

In fact little sustained use has so far been made of such methods, although several American states have made significant beginnings. In California, for example, by 1960 (under the leadership of that state's Research Division of the Department of Corrections which was begun in 1957) every inmate in the system had an established "base expectancy" by which offenders are ranked according to the risk of recidivism each presents. The method employed is the Mannheim-Wilkins Scaling, which is based on an assessment of scores on five factors: use of alcohol, disposition of prior offenses, nature of past living arrangements, place of residence, and length of employment.<sup>51</sup> The California experience in the use and application of its base expectancy tables in correctional decision-making will be well worth continuing attention by correction departments elsewhere. If the tables are well founded, one would expect to find, after several years, that such things as parole outcomes reflect the predictions made in a significantly high degree. It would be expected that different risk categories would in fact have different rates of recidivism after release. Over a longer period of time, when the Corrections Department has been able to phase into a second stage of development based on successful use of the tables, it might be expected that new institutional programs would be structured so as to afford poorer risk offenders necessary compensations to enable them to move into better risk categories. In other words, a second stage of correctional development might focus on dampening the disparities between categories of risks that have been demonstrated to have considerable empirical validity, thereby moving the whole range of institutionalized offenders toward ever decreasing levels of recidivism.<sup>52</sup> At any rate the shorter range expectations have indeed been realized, for as of 1965, those released offenders who had been classified as "poor" risks on the Mannheim-Wilkins scale showed a 50 per cent violation rate as compared with the 40 per cent violation

---

<sup>51</sup> H. MANNHEIM & L. WILKINS, PREDICTION METHODS IN RELATION TO BORSTAL TRAINING (1955). A more limited use of prediction-classification procedure is being used in Illinois for decisions about parole. See L. ÖHLIN, SELECTION FOR PAROLE (1951).

<sup>52</sup> It seems fair to add that such a second stage will likely be considerably more difficult to mount than the first. Statistical inference will not yield details of new programs designed to change significant factors in the life-style of human beings. Nevertheless, experiments with small groups of offenders has begun. One of these, which involved differential parole case-loads in several similar-risk groups of parolees, has suggested that variation in style or method of supervision probably affects parole outcome more than size of the parole officer's case load. See Reiner & Warren, *Special Intensive Parole Unit*, 3 NAT'L PROB. & PAROLE ASS'N J. 222-29 (1957).

rate for "medium good" risks and with the 23 per cent rate for "good" risks.<sup>53</sup> With this kind of "hard" data increasingly available, it should be possible to begin controlling variations in program content of prisons and after-care services to determine which might be more promising for concentrated effort in depressing recidivism rates to newer, lower levels.

Despite these and other worthy efforts to improve the quality of institutionalized treatment of offenders, the view of the Commission is that, by and large, the level of likely success is artificially limited by a more fundamental drawback than those previously mentioned—namely, the philosophy or theory that pervades custodial treatment in its more typical form.

All of the past phases in the evolution of corrections accounted for criminal and delinquent behaviour primarily on the basis of some form of defect within the individual offender. The idea of being possessed by devils was replaced with the idea of psychological disability. Until recently reformers have tended to ignore the evidence that crime and delinquency are symptoms of the disorganization of the community as well as of individual personalities, and that community institutions—through extending or denying their resources—have a critical influence in determining the success or failure of an individual offender.<sup>54</sup>

In consequence of this view, the Commission placed its heaviest emphasis in making specific recommendations for change on extending an improving community-oriented treatment of offenders. A brief summary of these recommendations would seem in order. These, however, must first be seen against the background of the Commission's general appraisal of existing structures and practices which characterize today's community based efforts at rehabilitation of the offender. The Commission's own description is succinct enough to warrant the following extensive quotation:

The responsibility for community treatment and supervision has been entrusted mainly to probation and parole services. As noted, these programs handle far more offenders than do institutions. Probation—supervision in the community in lieu of imprisonment—was first established for juveniles almost a century ago, and is now at least superficially available for both juveniles and adult felons in a majority of states. Very little probation service is available to misdemeanants.

---

<sup>53</sup> Glaser, *New Trends in Research on the Treatment of Offenders and the Prevention of Crime in the United States of America*, INTERNATIONAL REVIEW OF CRIMINAL POLICY 3, 6, UN, ST/SOA/Ser. M/23 (1965).

<sup>54</sup> THE CHALLENGE OF CRIME 164.



Parole, the postincarceration equivalent of probation, dating from about the same period, is also widely used for juveniles and felons, but seldom for misdemeanants.

Often probation and parole are separately administered, probation as a service to the courts and parole as a part of State correctional agencies. Probation officers typically spend much time preparing sentencing reports for judges in addition to supervising offenders. Parole officers perform functions for parole boards in providing information relative to decisions to grant or revoke parole.

Supervision consists basically of a combination of surveillance and counseling, drawing partly upon the methods identified with social casework, but distinguished by the need to enforce authoritative limits and standards of behavior. Offenders are put on probation or released on parole subject to certain conditions: That they stay out of trouble; that they maintain regular employment or stay in school; that they not drink or use narcotics; and usually that they obtain permission for such steps as getting married, changing jobs or residence, or leaving the jurisdiction. The probation or parole officer's first duty is to "keep track" of his cases and see that they comply with these conditions. Often he has little time even for this function.

If this were the whole of the job, it still would not be easy to accomplish in most jurisdictions. But in fact probation and parole supervision aims at much more. An officer is expected to offer counseling and guidance and to help in getting a job or in straightening out family difficulties. In practice he is almost always too pressed to do this well. Probation and parole supervision typically consists of a 10- or 15-minute interview once or twice a month, during which the officer questions and admonishes his charge, refers him to an employment agency or a public health clinic, and makes notations for the reports he must file. The great pressures on these officers make it difficult for them to exercise evenly and knowledgeably the tremendous discretion they have in recommending the revocation or continuation of community treatment when offenders under their supervision get into trouble.

There are, of course, many exceptions to this picture, some of them very impressive—experiments with small caseloads of offenders classified on the basis of need and given carefully prescribed treatment, and with agencies that use teams of case-workers and have specialized services such as psychiatric treatment, legal advice, job placement, and remedial tutoring.<sup>55</sup>

The Commission's policy recommendations in the realm of corrections may be summarized under three headings, one relating to supervised release services per se, another relating to changes in the practices

---

<sup>55</sup> *Id.* at 164-65.

of institutional treatment with an outward-looking orientation, and a third relating to decision-making in corrections.

**Supervised release services:** Noting the prevalence of heavy caseloads in nearly every jurisdiction, the Commission stressed the need for states to recruit large numbers of new probation and parole officers to reduce the average caseload from 100 cases or more to around 35 per officer. And if conditional release under supervision is to be extended to misdemeanants—as the Commission also recommended—then the manpower needs in the next decade would be around 23,000 new personnel for adult services alone. No offender who has served any significant incarceration, the Commission felt, should be released without some after-care supervision and guidance. As a measure of the Commission's seriousness in its concern for these extended practices, it was willing to recommend that, in the short run, reliance on professional recruitment would not be sufficient so that experimenting with lay volunteers should be tried, as is done in some European communities with notable success. The caseloads, too, should be differentially varied depending on classified needs and problems of the offender.

**Institutional practices:** Here the Commission called for much more sweeping changes from the prevailing pattern. Organizationally, state-wide integrated corrections departments should be established; such departments should administer all institutions that are in any way responsible for correctional services, including local jails in which large numbers of misdemeanants spend substantial confinements of weeks or months, if not longer terms. Such an integration would permit greater supervision in keeping with the state's total corrections policy. And regardless of other changes that might ideally occur much later in schemes for improving the content of programs and the systems within which they might work, prisons should immediately move to make more industrial work available to the inmates, along the lines developed already in some federal units. This would require changes in many existing laws prohibiting or restricting the sale of prison-made products, except some made for use by the state government itself such as printed forms, institutional soap, road signs, license plates, and the like. Such a change could be integrated with the next, and probably more politically controversial, suggestion made by the Commission: to reduce the social distance between staff and inmates so as to make the institution run along cooperative lines, with both groups made to feel responsible for rehabilitation

efforts.<sup>56</sup> Of great interest and certainly the most far-reaching change recommended by the Commission was that gradually the whole institutional pattern of corrections be reoriented—shifted from a stone-wall and guards, self-contained type of place largely forgotten about by the public, to a campus environment in which security is deemphasized and vocational training and basic education of the offenders are centered in existing community-based institutions. Even if this relatively open type of correctional unit (it should invariably be much smaller than today's state prison units and to a considerable extent specialized to discrete categories of offender-risks) should not prove feasible for every offender, they might yet serve as a kind of "half-way house" for the offender who has had to receive more intensive and more restrictive treatment institutionally. Such model units could thus serve a variety of offender clients, but at different stages of their correctional exposure. Short of such sweeping departure from existing practice, the Commission recommended much greater use of "graduated-release" schemes, leading toward reintegration into the full life of the larger community. Such things as the work-release scheme, for example, which now exists in several states and in the federal correctional program should be implemented in every state and for wider categories of offenders than might appear appropriate from the point of view of the type of offense the offender in question has committed. In the words of the Commission itself:

The process of repairing defects in the individual must be combined with the opening of opportunities for satisfying participation in community life, opportunities that lead toward legitimate success and away from illicit and destructive ways of life. For most offenders, however, the doors to legitimate opportunity are hard to find and harder to open.<sup>57</sup>

And:

Institutions tend to isolate offenders from society, both physically and psychologically, cutting them off from schools, jobs, families, and other supportive influences and increasing the probability that the label of criminal will be indelibly impressed on them. The goal of

---

<sup>56</sup> This could be done without new legislation, but would require considerable adjustment on the part of older, more tradition-bound staff *and* inmates alike. The best-known experimental efforts in this record are in a few youth programs such as the one in Highfields, N. J. There a small group of sixteen and seventeen year-olds help each other work out problems of social maladjustment. See generally McCORKLE, ELIAS & BIXBY, *THE HIGHFIELDS STUDY: AN EXPERIMENTAL PROJECT FOR YOUTHFUL OFFENDERS* (1958).

<sup>57</sup> *THE CHALLENGE OF CRIME* 165.

reintegration is likely to be furthered much more readily by working with offenders in the community than by incarceration.<sup>58</sup>

Decision-making in the corrections process: Because of the greater complexity in the nature of the corrections process as envisioned in the aggregate of the preceding recommended changes and as reflected in changes that have already occurred, the Commission explicitly called for increased efforts at screening, diagnosing, and classifying offenders early in the process. Most decisions today regarding which institution is appropriate for each offender, how long he stays there, and what his program will be once there are based on too-scanty information about the offender's own particular background (this assumes of course that the state has alternatives to choose from; many do not have enough). Supplementing this call for greater classification efforts and hence more rationality in making decisions, the Commission also recommended more professionalization in key positions—discarding the dominant practice of having parole boards composed of political appointees and having such appointments based on competence in the area of corrections.<sup>59</sup> And, keeping in mind that the whole process is becoming more and more complex and the lines between institutional and community treatment increasingly blurred, the Commission realized that greater opportunities for administrative arbitrariness were being created. Consequently, it recommended that explicit attention be given to such things as what degree of formality in proceedings should be established in granting and revoking parole, and in shifting offenders from one institution or program to another. Such questions as whether counsel would be present in parole hearings, what body should review an agency's decisions effecting a change in an offender's status, and what type of record for review purposes should be required—all are fast becoming live constitutional questions of import. The sentencing phase, too, while operationally related to these considerations and others, was treated in the Commission's discussion of court and substantive law reform. This latter theme will

---

<sup>58</sup> *Id.*

<sup>59</sup> This is obvious enough, but reforms decreasing a state governor's opportunities for patronage are not the easiest for a governor to propose nor legislatures to adopt. The best that can be hoped for in the short-run is greatly increased press coverage of parole board activities to accelerate public concern for the quality of parole work. However, there are inherent risks in such exposure. Sometimes a newspaper inadvertently or deliberately caters to a segment of opinion that sees any penal reform in terms of simplistic slogans such as "coddling of criminals,"

be resumed in the subsequent section which focuses on the individual's viewpoint vis-à-vis appraising the system of criminal justice.

## (2) In Terms of the Goal of Incapacitation

A complete appraisal of the effectiveness of criminal law's sanctions would of course include some identification of the extent to which those persons are confined who deserve to be isolated from the community as potential harmdoers—if not for their own good, then for that of society from which they come. Accordingly we may look at the numbers of persons actually detained, the length of that detention, and the trend of such incarceration over time. A more sophisticated element would be to describe incapacitation more specifically in terms of offenders who pose the greatest threat to community values. Of course such indicators may be stated either in terms of the offense that led to confinement, or in terms of more subtle factors such as the life-style and personality of the offender. Unfortunately, the available data do not permit this more sophisticated identification. The data available, however, may say something about crude rates and periods of incapacitation as one, if not the most important, goal of the system and in a very general way about how the goal is being served presently.

In gross terms the correctional system in the United States is responsible for about one and a quarter million persons on any given day. But of these only about 33 per cent will be in confinement, the rest being on parole, probation, or juvenile probation. The breakdown on the 33 per cent would be 16 per cent in state institutions for adults, 12 per cent in local institutions for adults, and about 5 per cent in juvenile institutions or other detention.<sup>60</sup> A clear idea of the magnitude of the population of correctional institutions may be had by noting the average daily size of the various segments of the correctional institution in the United States. In adult prisons, the average daily population in 1965 was 201,220 offenders.<sup>61</sup> The average daily population of jails and other local institutions was 141,303.<sup>62</sup>

---

<sup>60</sup> See PRESIDENT'S COMMISSION ON LAW AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 192-93 [hereinafter cited as CORRECTIONS].

<sup>61</sup> *Id.* at 202.

<sup>62</sup> *Id.* These are the most significant groups for purposes of evaluation of incapacitation, but some comparison with other sizeable groups in the daily average corrections population may prove useful for a larger context. Specifically four other groupings may be mentioned here: adult felony offenders on probation, average daily size: 230,468; adult offenders on parole, average daily number: 102,036; adult misdemeanants on probation: 201,385. In the juvenile field an average of 223,805 were on probation in 1965; 42,000 were in institutions; and

What is happening to such figures over time? Are fewer or more offenders being incapacitated each year than the previous year?

In [the decade] 1955-65, the number of felons received annually increased, but the commitment rate compared with the general population decreased. Inasmuch as the number of crimes, the number of arrests, and the number of convictions all have increased, the decrease in commitments per 100,000 of population apparently reflects an increase in the use of sentences other than imprisonment in a number of States.<sup>63</sup>

The picture presented then is one of incremental increases in incapacitation each year, but of *rates* which are declining, evidently indicating greater resort to use of probation or other modes of disposition following conviction.

How long are offenders confined? If 125,000 or so are added to the prisons each year (and this was the 1965 figure), one would expect that the daily average prison population would be much larger than 201,000. The answer is of course that there is a fairly high turnover rate, or rate of discharge. The average length of stay in prisons is difficult to compute because it varies from state to state. The Commission's survey of corrections showed that the average length of stay in such institutions varied from less than six months in one state to as much as five years in several states. In fourteen states the average length of stay was 19 to 24 months. This was the most numerous category of states.<sup>64</sup> If the average is computed in terms of the offenders rather than as a catalogue of state practices, it may be seen that the typical adult offender under state prison administration spends about two years in confinement. Somewhat paradoxically, however, the trend over time is not in the direction of lessened average length of stay, but in the direction of longer periods. As the author reported in 1967: "The median time served in state and federal prisons has increased from 17.3 months in 1936, to 18.5 in 1940, to 21.9 in 1942, 24.6 in 1944, to about 26 months in 1960."<sup>65</sup> Such a trend seems paradoxical only as seen against the other trend, already mentioned, of decreasing resort to imprisonment as a principal disposition after conviction and the complementary trend in favor of probation. Two explanations may be sug-

---

nearly 60,000 were on supervised release following a period of institutional treatment. *Id.* at 202, Table 25, "Some National Characteristics of Correction."

<sup>63</sup> CORRECTIONS 178.

<sup>64</sup> *Id.* at 178-79.

<sup>65</sup> Penegar, *supra*, note 40 at 203.

gested. One is that in those cases where sentencing judges feel imprisonment is indicated, they may also feel that longer sentences are indicated in the face of rising crime rates and growing public concern. Another is that parole boards are being more conservative in the exercise of their discretion to release earlier.<sup>66</sup> The two are doubtlessly interrelated, as the action of one agency of the system does influence the action of another. The possibility for over-reaction is patent in such a situation. For example, the courts for their part may be deliberately adding length to sentences where incapacitation is indicated, seeking thereby to offset a presumed leniency on the part of an independent parole board. On the other hand, parole boards may have reacted to the longer sentences by restricting their decisions to release to the clearly better risks or waiting longer in individual cases when formerly in the same case they might have released earlier. In any event there is no evidence that the average increase in active sentence served has engendered better success on parole. But that of course is a function of the rehabilitation goal, and not of incapacitation. The two need not be in conflict, however, and as judges and parole board officers become aware of this tension, a certain equilibrium may return to this interaction.

Of course the public is interested in custody of all offenders, not only those in prisons. What is known about other categories of law-breakers who may again be a threat to community values? Surveys conducted by and for the Commission have provided the first comprehensive and reliable estimates of juveniles and adults convicted of misdemeanors under confinement. In the case of juveniles confined to institutions the range is from four months to two years, while the median time served is nine months.<sup>67</sup> Adults who are convicted of less serious offenses than felonies and who therefore typically do not qualify for admission to state administered prisons may be committed to jail for from thirty days to two years in a few jurisdictions (thirty states limit such custody by law to one year). The Commission's survey shows that the average length of stay in such cases is only about eight weeks.<sup>68</sup>

---

<sup>66</sup> This is the explanation offered by P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 448 (1960).

<sup>67</sup> *CORRECTIONS* 144.

<sup>68</sup> *Id.* at 76. Not much is known, nationally, about the relative use of fine, probation, suspended sentences, and commitment for misdemeanors. But it is reliably reported that many more are committed, more than two-thirds more than are released on active supervision or probation. And, interestingly, for those who are released on probation from a misdemeanor conviction, the range and median time for this period of supervision is longer than for persons who are committed

Finally, the public wants to know if the system of criminal justice differentiates among those offenders who pose a relatively greater threat than others, or does the system tend to lose sight of this concern heavily loaded as it is with so many other considerations? Of course any law student could say that judges in passing sentence must and do take into consideration the kind of offense that has been committed, the pattern of past criminal behavior of the individual, and other factors indicating seriousness of the individual's deviation. Parole boards, too, typically take into account what offense the prospective parolee has committed offset to some extent by his conduct and performance in custody, in reaching a decision whether to release the inmate from some part of the sentence under supervision in the community. This of course is only impressionistic. Unfortunately little concrete information is available to reveal what actual correlations exist between the perceived dangerousness of the offender and the time he actually spent in custody. Nor are there very many agreed criteria for determining this degree of dangerousness. A man may have taken a life in heat of controversy or under provocation; he is sentenced to life; he may never again be a threat in any way to the community; yet few decision-makers would be willing to place him on probation or release him at the minimum time on parole. The kind of offense committed is by itself an insufficient indicator of future criminality. On the other hand, suppose a man is serving a two-year sentence for car theft, but on classification it is discovered that he has a very aggressive personality, although fortunately he has never been involved in a crime of violence, or at least one known to the authorities. Does this mean that he should be kept in custody the full two years, or longer? The law does not permit any such preventive custody in the case of adults; but such findings may require the parole board to focus on the man's *problem* rather than his sole offense and perhaps keep him the full time allowable, even though at release there may be no observed change in his personality.<sup>69</sup> At any rate the public seems to be more concerned about custody in cases where the felony label is applied than where the offense is only a misdemeanor,

---

to jail or other local institutions for misdemeanors. *Id.* at 159. The range of time spent on probation is from six months to three years. The median time spent is twelve months. *Id.*

<sup>69</sup> Such are the dilemmas of correction authorities. Another factor in the hypothetical case to be kept in mind would be some form of supervision after release from prison to attempt re-integration into the community. This would militate in favor of a release from custody before the full two years, for after that time no parole officer would have any jurisdiction to supervise him at all.



although many so-called petty criminals can be quite a nuisance to their own communities and very often "graduate" to more serious crimes.<sup>70</sup> Such evidence as there is suggests that the system actually takes this basic public concern into account. One study done for the Commission in the two most populous counties of California reveals that those convicted for what might be termed serious misdemeanors—assault, house-breaking, theft, car theft, and weapons offenses—are routinely serving more time than persons who are convicted for the less serious ones of gambling, drunk driving, public drunkenness, disorderly conduct, vagrancy and the like.<sup>71</sup> Furthermore, one need hardly mention that the whole development of habitual offender statutes in the recent past is a testament to the system's sensitivity to this concern for incapacitation.<sup>72</sup>

The significance of the foregoing discussion of trends in support of the goal of incapacitation lies, first, in the fact that the vast majority of offenders return to the community in a relatively short time, considering both the sentencing structure in law and the actual sentences imposed. This of course is attributable to the wide and active use of parole. Secondly and somewhat ironically, however, there is a tendency to use supervised release—either preliminary as in probation, or subsequently through parole—in a greater proportion of serious cases (*i.e.*, the felony categories) than in the less serious cases. Certainly part of this tendency is attributable to the fact that generally speaking the administration of the correction of felons is under *state* supervision with greater organization and resources; whereas, the misdemeanor correc-

---

<sup>70</sup> While, as was noted earlier, some relation exists between previous crimes and new ones after release, not much is known about this relationship. A simulated study done for the Commission suggests, however, that more crimes of violence will appear among aggregates of re-arrested offenders than appeared in the list of previous offenses for the same group. "This analysis suggests the seriousness, in terms of escalating criminal conduct, of the problem of recidivism." *THE CHALLENGE OF CRIME* 265. But it remains to be studied "whether the re-arrest probabilities increase or decrease and the serious crimes become more or less prevalent for those who are processed further through the system." *Id.*

<sup>71</sup> See *CORRECTIONS* 77. For those in the more serious categories, jail terms tend to be in the range of two to four months, while for others the range is more like two weeks to two months in the larger number of cases. (Extrapolations by the author from Table 8, *CORRECTIONS* 77).

<sup>72</sup> Although no studies have come to light in this connection, it may be quite likely that the more a person is involved with the system the more likely he is (than a random member of society) to return to it when he does violate the law—and sometimes—even when he does not. This hypothesis seems to rest on such things as ease of identification, known pattern of life, suspicion of police and others. Aside from increased punishment authorized by habitual offender laws, we should know what happens before the sentencing judge in jurisdictions when there is no such law or in cases where it does not apply.

tions supervision is more typically a local function, which is typically largely devoid of form, resources, or direction. Thirdly, there is some evidence to suggest that those persons who commit crimes of violence—whether the incident rises to the felony level or not—are certainly more likely to be incarcerated in the first place and are likely to remain in custody longer than other offenders.

If a summary appraisal of the system's relative success with incapacitation in terms of the number of possible crimes prevented is attempted, the following points should be reiterated. First, of all the index crimes known to police, only about 25 per cent are cleared by arrest. Second, of all persons arrested for these crimes (and they include most of the serious personal offenses), no more than about twenty per cent are actually sent to jail or prison. Third, jail terms are on the average of not more than a year's duration; and prison terms are about two years (although the Commission believes they are nearer one and a half years). Thus, on any given day the number of crimes which are prevented by actual incarceration is comparatively small. As the Commission itself concluded:

This means, neglecting the deterrent effects of imprisonment and the rehabilitative effects of associated correctional programs, and concentrating only on the removal effects of incarceration, that *the amount of crime would increase by only a small percentage if there were no incarceration at all.*<sup>73</sup>

### (3) In Terms of the Goal of Deterrence

There has been for a long time much brave talk about deterring crime through appropriately stern sentences; although Bentham refined our thinking and taught us not to treat all offenses with the same severity, the present age has not lost its faith in what is essentially a policy of lawful terror. Consider, for example, this judicial dictum delivered by a distinguished high court in India in the course of upholding the death penalty in a case involving murder committed in the course of dacoity:<sup>74</sup>

Punishment is awarded in order to achieve any or as many as possible of the four objectives, namely, to serve as deterrent, to be preventive, to be reformative and to be retributive. Of these four the first is the all important one, others being merely accessory. Punishment has to be before all things deterrent, for the chief end of the law of

<sup>73</sup> SCIENCE AND TECHNOLOGY 55 n.72 (emphasis added).

<sup>74</sup> Dacoity under the Indian criminal law is an aggravated form of robbery, committed by five or more persons. GOUR'S INDIAN PEN. CODE § 391 (1967).

crime is to make the evil-doer an example and a warning to all that are like-minded with him. Punishment is intended to prevent offences being committed by destroying the interests to which they owe their origin by making all deeds which are injurious to others injurious also to the doers of them.<sup>75</sup>

The court went on to note that crimes of violence with firearms were on the rise in India, that courts must accordingly give proper place to deterrent sentences, and that in such a case as this, even if the dacoits had not killed or even hurt anyone with their guns, he would still be inclined to award the death penalty. The court thus poses an interesting hypothesis: that crimes—particularly those done for gain and therefore done deliberately—can be diminished in number if only the law threatens and carries through on its threat to mete out the severest of punishments. What, if anything, is known empirically about such an hypothesis?

While the Commission raised some very searching questions about general prevention or deterrence, it chose to concentrate its major efforts on rehabilitation and re-integration of offenders into the community. In passing, however, recognition was given that deterrence—"both of people in general and offenders as potential recidivists—and, where necessary, control remain legitimate correctional functions."<sup>76</sup>

It was pointed out previously in this article that inasmuch as crime rates appear to be rising faster than general population (although there are many qualifications such as differential demographic factors), it might be argued at least that society is becoming more criminogenic, less law-abiding, or that the deterrent model is weakening. Some of the caveats, and with them some of the things we need to know, which would make the argument less persuasive to the open-minded, need to be stated explicitly. First, the argument that "the deterrent model" is weakening assumes at least two things which are not borne out by recent experience. It assumes a monolithic entity which operates with predictable precision and thrust somewhat like a finely tuned diesel engine. It also assumes that additional inputs into the system—such as police units, correction staff, judges—have been made at periodic intervals and have been commensurate with the increase and translocations of population; or to continue the metaphor of the diesel engine, the argument assumes augmented

---

<sup>75</sup> *Khanzaday Singh v. State of U.P.*, [1960] All India Rptr. 190, 193 (Allahabad).

<sup>76</sup> CORRECTIONS 16.

torque has been added to the engine (say, by a better grade of fuel or by building it bigger) to enable it to pull the larger load.

Both assumptions are mistaken, patently so. Reference has been made already to the near-swamped conditions of the correctional institutions and the continuing crises in the attendant personnel situation. And the shortage of judges, sometimes expressed in terms of court congestion or delay, is notorious.<sup>77</sup> The Commission's report made it clear, too, that augmentation of police forces had not kept pace with growth and relocation of population, and equally important, with the increased duties of the police.<sup>78</sup>

Also important to a clear understanding of a deterrence model or theory, as it is supposed to operate in our contemporary society, is an appreciation that we have not a unitary machine but a sprawling enterprise composed of many unequal components, working with varying efficiency in different areas, related to multitudinous social problems presented in varying cultural contexts by varieties of different personality types. To state one's expectations of such an enterprise in terms of control or reduction of rates of crimes is really to speak metaphorically, somewhat akin in rhetoric to endowing society with a *purpose* or *mission*, when society really represents nothing more than a useful construct to begin talking about common aspirations entertained by significant numbers of people. It seems impossible to state whether deterrence in this conglomerate sense is working by comparing yesterday's crime rate with today's when there is no agreement within one time unit on what public and individual efforts to control deviancy are within the definition. It is well known to sociologists, for example, that a person's social behavior is the resulting force not only of influences from the polity of

---

<sup>77</sup> For example, the nation's capital—Washington, D. C.—until quite recently employed four lower court judges to process at preliminary hearing stage 1,500 felony cases, to hear on the merits 38,000 petty offences and 7,500 serious misdemeanor cases per year! *THE COURTS* 31.

It is not only judges who are in short supply. There are not enough prosecutors, defense counsel, and probation officers even in those courts where some of them are available. The deluge of cases is reflected in every aspect of the court's work, from overcrowded corridors and courtrooms to the long calendars that do not allow more than cursory consideration of individual cases.

*Id.*

<sup>78</sup> "The current police-population ratio of 1.7 policemen per thousand citizens obscures the many differences from city to city and region to region." *THE CHALLENGE OF CRIME* 106. While recommending that authorities face up to the "urgency of the need," it cautioned that "mere addition of manpower without accompanying efforts to make the best use of existing personnel strength might serve only to aggravate the problem of inefficiency." *Id.* at 107.

which he is a member, but also from small groups like the family, circles of friends and associates, as well as from intermediate sized groups like the church and the neighborhood. What this knowledge suggests for present purposes is that ways must be found to differentiate the importance of several social institutions in the lives of offenders and non-offenders alike, including the apparatus at least of the criminal law (as opposed to the idea of it), but also including some quantum of public opinion, the pull of morality and religion, the family, and employment (does the fear of loss of job in any way influence a person who refrains from embezzling or cheating on his tax returns?). All these undoubtedly play a part in keeping most people law-abiding, but we have yet no means of knowing what part.<sup>79</sup>

Without scanning these larger, outer dimensions of the social enterprise of preventing crime, considerable knowledge needs to be acquired on the more immediate fronts of the criminal law system itself. How much deterrent effect is there, for example, in each more or less discrete phase or segment of the process of arrest, charge, trial, sentencing, actually serving time in prison, and so on? Of course variations would probably appear at each stage depending on the social class and education of the individual. One hypothesis that should be tested in this connection is that fear of exposure accompanied by arrest or charge is sufficient to deter many middle class persons from committing certain offenses, notably those against property like theft, embezzlement, fraud, and tax evasion.<sup>80</sup> On the other hand, certain "situational" offenses such as aggravated assault or homicide through a rash or negligent act clearly might not have been prevented by such minimal exposure to the law's processes. Furthermore, there will be ample scope for the additional hypothesis that the further alienated an individual is from accepted com-

---

<sup>79</sup> For description of much of the experimental research that does shed light on this large question, see HOOD, *RESEARCH ON THE EFFECTIVENESS OF PUNISHMENTS AND TREATMENTS* (Report to the European Council No. 1 DPC/CDIR 9, 1964); E. POWER & H. WITMER, *AN EXPERIMENT IN THE PREVENTION OF DELINQUENCY: THE CAMBRIDGE-SOMMERVILLE YOUTH STUDY* (1951); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Aronson & Carlsmith, *The Effect of Severity of Threat on the Devaluation of Forbidden Behavior*, 17 AM. PSYCHOLOGIST 300 (1962); Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L.C. & P.S. 347 (1955).

<sup>80</sup> In the celebrated price-fixing cases of the early 1960's where respected corporate managers were convicted and given active jail or prison terms, it was argued for the defense, in hopes for mitigation of punishment, that these men were duly chastened by the opprobrium already incurred by the publicity attending the trial of the cases. See M. PAULSON & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 69-71 (1962).

munity norms in all respects, the more likely he is to be unrestrained by fear of arrest and trial or even fear of conviction and imprisonment. Such groups as urban gangs of young "toughs" and fairly sophisticated syndicates of vice "barons" would contain numbers of such alienated people. Not the least of our problems in acquiring any such knowledge is developing a theory of communications in regard to the attitudes and information held about the system by potential wrongdoers. My hunch is, for example, that middle class persons probably overestimate the response a court of law would make to an imagined offense on their part, whereas lower class persons probably underestimate or more nearly predict the actual response courts will make. It might be worth undertaking a few sample research projects to determine at various stages in the arrest-trial-conviction process what perceptions are held of "the law" and the sentence that confronts the offender as he goes along. These perceptions could be compared with actual responses and plotted over time to indicate, even in a crude way, something about how the system effectively communicates its limits to its intended audience. Other important variables to be controlled in such research would include age and place of residence, whether urban (city core or suburbs) or rural.

Shorter range research has been suggested (albeit not explicitly with reference to deterrence) by the Commission, which gives promise at least of keeping the public adequately informed about the real nature of the incidence and risk of harm from crimes in their community. National averages and other computations do not, after all, tell the citizen much about the quality of life in his community specifically. And the "system" of criminal law in America is nothing unless it is a series of community based, decentralized, fairly inefficient conglomerations of people, institutions, and resources. Basically the suggestion is to establish intelligence systems based on as small populations as feasible with which to measure the following things: the rate of population change, rate of crime per unit of population, percentage changes in certain demographic groups (*e.g.*, persons under age 24 or 18), changes in basic living patterns (attached houses to multiple family units, etc.), changes in work or employment patterns, changes in reporting practices for crime, and changes in police patrol and investigation patterns.<sup>81</sup> If, for example, base expectancies for rates of crime per thousand population were found to be exceeded or not realized, then a look at certain changes in patterns

---

<sup>81</sup> SCIENCE AND TECHNOLOGY 55-56.

of policing might disclose at least a working hypothesis for action in the future.

With greater knowledge of the patterns, trends, and nature of offenses in a certain area, better planning and allocation of resources, particularly police resources, would be possible. Detection of crime and apprehending offenders are conceded to be the most difficult phases for the apparatuses of law enforcement in a community. Probabilities of detection can be established depending on the kind of crime and its relative visibility and the kind of forces deployed to make the detection. In one California city the police experimented with plainclothesmen on bicycles as a more effective means than the patrol car of detecting and making an arrest in cases of street crimes such as robberies, which are of relatively short duration compared to, say, burglaries. Such crimes in certain areas of that city were reported to have been "reduced markedly supporting the general assumption that increasing the apprehension probability tends to deter crime, or at least to displace it."<sup>82</sup> Alternatives in allocating available police manpower may be illustrated by the recent experience of another California city. Instead of assigning equal numbers of police to each shift and each area of the city, the Los Angeles Police Department uses a formula containing weighted components, according to crimes known from the previous year, radio calls from various sectors, population density and the like; then assignments are made proportionately to each sector's weighted score.<sup>83</sup>

Finally, in addition to the need for more and better refined empirical and experimental data, there is a role to be played more directly by the public. It is to express—through the legislature perhaps—some hierarchy of felt seriousness of crimes. In other words, in statistical compilations each category of offense tends to be treated about the same as any other crime. But they are not all of the same seriousness in the minds of men who live in the community. Should we allocate the limited resources available to apprehend, prosecute, and treat offenders to every category

---

<sup>82</sup> *Id.* at 13.

<sup>83</sup> For example, if there were 1,000 crimes in Precinct A and 600 in Precinct B, this procedure might suggest transferring officers from Precinct B to . . . A. But the conditions in Precinct B might be more conducive to deterring crime. If an additional officer in Precinct B could suppress 50 crimes whereas one in Precinct A could suppress only ten crimes, then it would be desirable to transfer an officer from A to B.

*Id.* at 18. The Task Force emphasized that such efforts need continuing experimental testing under controlled conditions and that refinements in the relevant community data will have to be made before large scale action programs are justified.

of crime, or should the instruments of the law be used more selectively, depending on the relative disutility of crime? This consideration of course raises questions of cost-effectiveness that must be taken into account before the answers can be adequately assessed. Along with other economic considerations, this point will be further discussed in the next part of the article.

### III. THE ECONOMIC PERSPECTIVE

Considerations of the economic impact of crime and the costs—both social and economic—of efforts to control it are hardly remote from many of the other matters which have been treated together as the public's concerns. While this is no doubt true as a general proposition, it seems justifiable to focus on costs as a separate consideration, if only for the convenience in permitting a somewhat more detached discussion to center around specialized data and information. Furthermore, such detachment, coming in the wake of a discussion of the broader aspects of the criminal justice system, will facilitate the recognition and perhaps the resolution of questions having to do with allocation of scarce resources within that system. These questions, while they perhaps do not share the profundity of those explored preliminarily, are nevertheless of immense practical importance to those in positions of public responsibility.

Some idea of the importance attached to these questions by the Commission may be seen in the following excerpt from its report:

Economic costs alone cannot determine attitudes about crime or policies toward crime, of course. The costs of lost or damaged lives, of fear and of suffering, and of the failure to control critical events cannot be measured solely in dollars and cents. Nor can the requirements of justice and law enforcement be established solely by use of economic measures. A high percentage of a police department's manpower may have to be committed to catch a single murderer or bomb-thrower. The poor, unemployed defendant in a minor criminal case is entitled to all the protections our constitutional system provides—without regard to monetary costs.

However, economic factors relating to crime are important in the formation of attitudes and policies. Crime in the United States today imposes a very heavy economic burden upon both the community as a whole and individual members of it. Risks and responses cannot be judged with maximum effectiveness until the full extent of economic loss has been ascertained. Researchers, policymakers, and operating agencies should know which crimes cause the greatest economic loss,



which the least; on whom the costs of crime fall, and what the costs are to prevent or protect against it; whether a particular or general crime situation warrants further expenditures for control or prevention and, if so, what expenditures are likely to have the greatest impact.<sup>84</sup>

In view of the range and importance of decisions that depend upon knowledge, it is surprising, as the Commission noted, that so little information has been accumulated. The most significant efforts to obtain systematic knowledge were made by an earlier national crime commission more than thirty years ago.<sup>85</sup> The Commission itself did not undertake a new and comprehensive study, although it did make some sampling surveys concerning small business and losses accruing to individuals, which do not show up in normal crime reporting. From these and other sources already available, such as the F.B.I. and insurance companies, the Commission attempted to present an integrated picture of the cost of crime, although estimates for some categories were much more reliable than for others.

Total figures of loss accruing to individuals and businesses because of crime would doubtlessly be impressive in their magnitude, running as they do into the billions of dollars, but they are not very helpful (save for "shock" value) in appraising the relative importance of kinds of crime and appropriate social responses. Accordingly, detailed estimates will be given here for each kind of offense. First, offenses against the person will be listed, then offenses against property, and then a collection of miscellaneous offenses.

Two categories of personal offenses were established, criminal homicides and assaults (including all non-fatal crimes against the person). Somewhat surprisingly, homicide is the most expensive of all index offenses, including property offenses as well as offenses against the person. The Commission estimated that 750 million dollars could be allocated as the cost of the 9,850 cases of murder and non-negligent homicide in 1965. This figure was based on the national average earnings for the victim's age, multiplied by the life expectancy of the victim at time of death, and discounted by five per cent (the interest which would

---

<sup>84</sup> THE CHALLENGE OF CRIME 32.

<sup>85</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE COST OF CRIMES (1931). It is also noted that the Cambridge Institute of Criminology has undertaken unique studies of cost of crimes in the United Kingdom. See Martin & Bradley, *Design of a Study of the Cost of Crime*, BRIT. J. CRIM. 596 (Oct. 1964).

accrue from being able to invest the lump sum). Estimates of the loss growing out of personal injuries sustained in assaults, robberies, and rapes are much more tentative, for there is as yet no way of knowing in how many such cases actual physical injury requiring medical attention and involving days lost from work occurred. And these estimates do not even touch the many unreported incidents of such crimes in which the chance of substantial injury seems less probable. Even so, the Commission conservatively estimated that some injury occurred in two-thirds of such reported cases and suggested that about 65 million dollars would be lost in wages and medical bills (assuming an average weekly wage of 100 dollars lost and medical bills of 250 dollars in each case).<sup>86</sup>

The most reliable figures on property offenses probably are those associated with F.B.I. index offenses. The following tabulation shows their magnitude of costs:

Robbery.....	\$49.4 million (based on a reported average loss in each incident reported of \$254.00, multiplied by the number of reported offenses)
Burglary.....	\$312.7 million (based on an average of \$170.00 per reported incident)
Larceny (more than \$50).....	\$128 million (based on an average of \$109.00 per reported incident)
Car theft.....	\$63.5 million (based on an average of \$159.00 per reported incident and includes only those cars not recovered).

Other property offenses, about which comparatively less is known, mainly because reporting statistics are incomplete, could be only roughly approximated in estimated economic cost. These estimates were based largely on insurance company data and trade association files coupled with what is publicly reported and what the Commission found through its victim survey of 10,000 households. Even if the estimates are inaccurate by a margin of twenty or thirty per cent, which seems unlikely, these additional categories of crime are among the most costly of all in the wide spectrum of property offenses. For example, arson and vandalism losses are calculated to be about 300 million dollars annually. Embezzlement would account for another 200 million dollars; unreported theft of all kinds, about 1.4 *billion* dollars. Fraud, one of the least often reported offenses, might cost another 1.3 billion dollars.<sup>87</sup>

<sup>86</sup> THE CHALLENGE OF CRIME 45.

<sup>87</sup> CRIME AND ITS IMPACT 45. The unreported theft category is high for the reason that much shoplifting and pilferage goes on in retail and wholesale business, for which most owners are relying on insurance or the pricing mechanism to

In the third major breakdown of offenses are a miscellaneous group about which no reliable estimates are made—such as tax fraud,<sup>88</sup> abortion, loansharking (charging usurious interest rates), and prostitution. But two categories of offenses are worth mentioning wherein the estimates, if not totally reliable, are of such magnitude as to be of continuing concern to a society that concedely has profound problems relating to their incidence and control. These are gambling and narcotics traffic. According to the Commission:

There is almost universal agreement among law enforcement officials that gambling is the greatest source of revenue for organized crime and the crime that involves by far the largest amount of money. Because gambling is a consensual transaction rarely reported to the police, there is no fully accurate way to estimate its amount.<sup>89</sup>

Some of the difficulties are associated with the fact that some forms of gambling are illegal, some not; some forms are legal in some states that are not legal in other states. But the Commission tried to stick to the profits retained by the operators of illegal gambling enterprises such as card and dice games, punch boards, and slot machines. "In economic terms, the bettors pay the bookmakers a fee to have money redistributed back to the bettors. The fee is the cost to society. It includes the bookie's profit as well as operating expenses such as graft, telephones, runners, etc."<sup>90</sup>

Traffic in illegal narcotics is also associated with organized crime, but is more insidious than gambling because of the addiction induced in many vulnerable, often young, members of society. Relying on Bureau of Narcotics figures, the Commission reports that there are about 57,000 narcotics addicts in the United States and that the average expenditure of an addict is on the order of 5,800 dollars per year for drugs, or a daily expenditure of 14 dollars. This is sufficient to produce illegal sales on the magnitude of 350 million dollars.

In general terms the Commission offered these summary points about

---

compensate. In the category of fraud the single largest mode is passing bad checks. This would be in addition to the crime of forgery, for which the Commission pegs another 82 million dollar annual loss. *Id.*

<sup>88</sup> Although no percentage estimate of how much tax money was intentionally withheld is possible, the U.S. Department of Justice has a fairly good idea of how much is collectable under prosecution per year. It is in the range of 70 million to 100 million dollars. CRIME AND ITS IMPACT 51. This is doubtlessly lower than the total actually withheld.

<sup>89</sup> CRIME AND ITS IMPACT 52.

<sup>90</sup> *Id.* at 53.

the economic impact of crime. They suggest some modifications in the intelligence system by which we strive to improve our control, if not a wholesale change in action programs. First, "organized crime takes nearly twice as much income from gambling and other illegal goods and services as criminals derive from all other kinds of criminal activity combined."<sup>91</sup> Second, "unreported commercial theft losses, including shoplifting and employee theft, are more than double those of all reported private and commercial thefts."<sup>92</sup> Third, "of the reported crimes, willful homicide, though comparatively low in volume, yields the most costly estimates among those listed by the F.B.I.'s Uniform Crime Reports Index."<sup>93</sup> Fourth, "a list of the seven crimes with the greatest economic impact includes only two, willful homicide and larceny of 50 dollars and over (reported and unreported), of the offenses included in the crime index."<sup>94</sup>

From the standpoint of the economist, of course, more is at stake in estimating the total bill to the public than the direct losses incurred by the victims of crime. It must also be known how much was deliberately spent by public authorities in administering the criminal justice system. Of course, there are additional allocations made by private persons and organizations having to do with crime prevention, such as night-watchmen, alarm systems, and insurance schemes, but no assessment of these will be made here. The two most important features of the public cost in terms of expenditures to deal with crime and criminals are the rising rate of these costs over time and the relative allocations within the system. The magnitudes themselves, except to the reader who has some prior exposure with which to make comparisons, are not particularly revealing except in the items taken into account in reaching the totals. First, consider the trends. The Commission noted that a comparison between 1955 and 1965 expenditures (for police, courts, prosecution and defense personnel, and for corrections at all levels of government) showed an increase of about 100 per cent over the decade, from about 2.2 billion dollars to about 4.6 billion dollars.<sup>95</sup> This worked out to about \$13.50 per person in 1955 versus \$23.78 per person in 1965, an eight per cent per annum increase, considerably higher than inflation over the same period.

---

<sup>91</sup> *Id.* at 43.

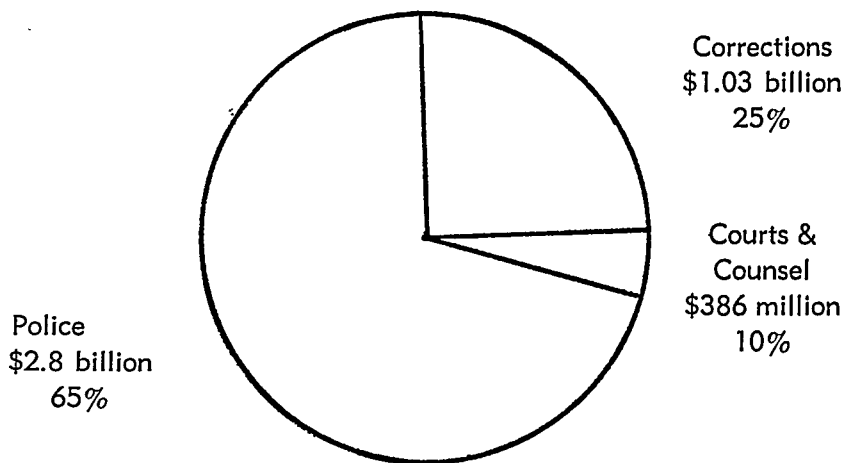
<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 55.

What percentages are allocated to each of the major sectors of the system? The proportions for 1965 may be graphically seen in the accompanying figure:



As the figure demonstrates, the great majority of all public funds went to pay police salaries (85 per cent of all police expenditures) and maintain police equipment all over the country. Corrections cost, while representing only a quarter of public expenditures in 1965, has grown fastest of the three sectors represented. Expenditures on the judicial functions have been expanded at the lowest rate. The corrections figure represents largely state and local expenditures for all services, including jails, prisons, probation, and parole. As might be expected, institutional costs predominate, about eighty per cent of all state and local expenditures in this function going for institutions of corrections; and of this, the greater part goes for staffing, which is dominated by custody, security, and maintenance considerations. The Commission estimated that less than ten per cent of corrections personnel were directly concerned with treatment or rehabilitation programs.<sup>96</sup>

Costs of maintaining criminal courts could not be precisely measured mainly because of the fact that at the federal level and in most states the court of general jurisdiction is alternately both a civil and a criminal court. But based on the case load in the federal courts, which is reported to be a fairly steady 67,000 civil cases and 33,000 criminal cases per year, expenditures for criminal cases were allocated at about 261 million dollars for the nation as a whole. In addition to these costs in the pro-

<sup>96</sup> *Id.* at 54.

cessing of cases in the courts (mainly for judicial and clerical personnel), an allocation of another 125 million dollars was made for counsel's services on both prosecution and defense sides (including only those defense services for which the state paid). These two costs are shown together in the above diagram, representing ten per cent of total public expenditures on the criminal justice system in 1965.

Even more revealing than these functional costs within the system would be a break-up of total expenditures in terms of *kinds* of offenses and *stages* of the criminal law process. Thus it would be useful to know which offenses required relatively more expenditures than others and which stage—arrest, trial, or correction—was relatively more costly. The Commission's Task Force on Science and Technology calculated some estimates for these points, but explicitly cautioned that they were very rough estimates, or in some instances only hypothetical in foundation. Nevertheless, there would be illustrative utility in presenting the scheme as a whole. Taking only the F.B.I.'s seven index crimes, dollar estimates were assigned to each of them which represent total operation costs by the public to process all cases in each category, from arrest to correction. These are listed in the following table:

*Total 1965 System Costs for Index Crimes*

(the percentage in parentheses indicates ratio to total crimes reported)

Willful homicide: 9,850 (2%).....	\$ 48 millions
Forcible Rape: 22,467 (1%).....	28 millions
Aggravated assault: 206,661 (9%).....	190 millions
Robbery: 118,920 (7%).....	140 millions
Burglary: 1,173,200 (39%).....	820 millions
Larceny (\$50 +): 762,352 (24%).....	500 millions
Car theft: 486,568 (18%).....	370 millions
Total index offenses: 2,780,140 (100%)	

Total System Costs for Index Offenses:                   \$2,097,000,000.<sup>97</sup>

Not surprisingly, the two most numerous of these seven index crimes, burglary and larceny of over 50 dollars, account for the biggest operating costs. What is more instructive, however, is that in both these two and the third most numerous offense (car theft), the most expensive phase in processing cases was the police phase, accounting for about seventy per cent of the total costs of each offense. On the other hand, corrections cost were on the order of only fifteen per cent in each of these categories.

---

<sup>97</sup> THE CHALLENGE OF CRIME 263-65.

The three least numerous categories of offenses—homicides, rape, and robbery—showed just the opposite configuration. Namely, corrections costs on the whole were relatively larger than costs of apprehension and charging. In one case, that of homicide, correction costs are estimated to be 81 per cent of the total versus a mere 10 per cent for policing.<sup>98</sup> The principal explanation for these radically different patterns seems to be that for the three violent offenses police clearance rates are relatively high (i.e., efficient), whereas, for the property offenses, for which fewer persons are arrested and charged in relation to number of offenses reported, clearance rates are relatively low. Correlatively this means that in the serious crimes, corrections has relatively more persons per known offense and for greater lengths of time than it does in the less serious crimes.

Another interesting feature of this cost data for index offenses is that of a certain distortion of the pattern shown in the preceding circular graph. Police costs rise to 67 per cent, corrections drop to twenty per cent, and court costs drop to two per cent. What gains is juvenile processing, up to 11 per cent (whereas this entry is submerged in the preceding graph), largely due in all probability to the predominance of car thefts (a youth crime) in this limited listing. It is not mentioned in the Commission's analysis, but its data suggest that the crowding of court dockets must be largely attributed to cases of a kind not listed in the index offenses if the two per cent cost allocation to courts for these seven offenses is fairly accurate. It may be that petty offenses like public drunkenness, disorderly conduct, driving violations, and the like absorb a disproportionate amount of court energy, time, and resources. This assumption is partly borne out by comparing the total cost allocated to the index crimes, shown in the last table (2.1 billion dollars) with the total expended for dealing with all crime—4.6 billion dollars in 1965. Although I have found no comparable figure disclosing allocation of court time to such cases, it is reliably reported that 34 per cent of all arrests are for the very minor "offense" of public drunkenness.

Thus far we have been discussing only the most measurable and direct costs to society, both in terms of losses caused by the criminal event itself, and in terms of the public's efforts to control crime. There are of course many other indirect costs, such as "antipoverty, recrea-

---

<sup>98</sup> *Id.* at 264.

ational, educational, and vocational programs,"<sup>99</sup> which are ignored here only because they have social purposes much broader than crime control. Furthermore, many types of offenses have not been assayed for their likely economic impact on society. "Antitrust violations reduce competition and unduly raise prices; building code violations, pure food and drug law violations, and other crimes affecting the consumer have important economic consequences, but they cannot be easily described without further information."<sup>100</sup>

And of course "losses due to fear of crime, such as reduced sales in high crime locations, are real but beyond measure."<sup>101</sup> Such distortions of living patterns may better be discussed in terms of intangible *social* costs of crime rather than as indirect monetary losses to society, although they are not of course solely one or the other. Fear of crime, if it is widespread, can greatly diminish the quality of social life by unnecessarily restricting contact among members of communities. Fear, whether it is based on realistic assessments of the risk of harm or not, is a factor that must be taken into account in assessing social costs of criminal activity and the reporting and discussion of that activity. It is a factor in which the Commission had great interest for a variety of reasons. Attitudes like fear have even wider implications, effecting what public response is possible in a democracy and in some measure even generating processes that fulfill the fear. This will become clearer in the descriptions that follow.

The surveys conducted by or for the Commission revealed startling changes in daily habits of individuals. In high-crime districts of two large cities, five out of every eight persons surveyed reported significant changes. For example, 43 per cent reported staying off the streets at night completely. Another 21 per cent reported using cars or taxis. And 35 per cent said they would not talk to strangers on the street any more.<sup>102</sup> The fear of strangers was pronounced in all the reported surveys (particularly in urban areas) and seems connected to an equally strong fear of personal injury. Both reflect an inaccurate picture of the larger risks to the average American. Serious crimes of violence are more likely to be committed by someone known to the victim. And property crimes are much more numerous than crimes of violence.<sup>103</sup>

---

<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.* at 34.

<sup>101</sup> *Id.*

<sup>102</sup> THE CHALLENGE OF CRIME 51.

<sup>103</sup> "Actually, the average citizen probably suffers the greatest economic loss



This relatively greater tolerance for property offenses has been demonstrated in one of the Commission's most important surveys, the national survey of 10,000 households studying unreported crime. This survey showed that rates of burglary, larceny, and fraud were from three to five times greater than the number of these crimes *reported* to the police. Asked why such crimes were not reported, most victims replied that they felt the police could not be effective or would not want to be bothered about it.<sup>104</sup>

Whether the fear of harm in general or fear of strangers in particular is rational or not, it has important consequences. Most immediate is the impoverishment of the social lives of those within a community. Beyond this it may contribute substantially to the creation of conditions in which crime can more easily flourish. The logic of this possibility may be seen in the following summary description, which, while it might not be typical of most communities, tends to depict more densely populated areas of the larger cities:

People stay behind locked doors of their homes rather than risk walking in the streets at night. Poor people spend money on taxis because they are afraid to walk or use public transportation. Sociable people are afraid to talk to those they do not know. In short, society is to an increasing extent suffering from what economists call "opportunity costs" as the result of fear of crime. For example . . . officials interviewed . . . report that library use is decreasing because borrowers are afraid to come out at night. School officials told of parents not daring to attend PTA meetings in the evening, and park administrators pointed to unused recreational facilities. When many persons stay at home, they are not availing themselves of the opportunities for pleasure and cultural enrichment offered in their communities, and they are not visiting their friends as frequently as they might. The general level of social interaction in the society is reduced.

And:

When fear of crime becomes fear of the stranger the social order is further damaged. As the level of sociability and mutual trust is reduced, streets and public places can indeed become more dangerous.

---

from crimes against business establishments and public institutions, which pass their losses on to him in the form of increased prices and taxes." *Id.* The risk of personal injury from traffic, industrial or home accident is considerably greater than the risk of intentional harm. *Id.* at 52.

<sup>104</sup> *Id.* at 22. In the case of consumer fraud, attitudes were about equally divided between those who presumed the police could not be effective, on the one hand, and those who felt it was a private matter or did not want to harm the offender, on the other. *Id.*

Not only will there be fewer people abroad but those who are abroad will manifest a fear of and lack of concern for each other. The reported incidents of bystanders indifferent to cries for help are the logical consequence of a reduced sociability, mutual distrust and withdrawal.<sup>105</sup>

One way to view the preceding evidence about costs of crime and public attitudes as to the risk of harm is in terms of policy alternatives. Knowing what we do, even tentatively in some areas, what should be done? One suggestion might be to eliminate certain offenses altogether. Considering, for example, the relatively large magnitude of arrests for ordinary drunkenness (barring injury to another or driving drunk) and the poor social support given for arrest for gambling, it might be appropriate to abolish these as offenses. Enormous savings in police and court energies might result. Another suggestion would be to concentrate relatively more resources on the most expensive crimes (rather than trying to treat all alike). These are of course homicides and property offenses associated with organized vice and crime; but since homicides already have a high rate of processing in the system, it seems likely that other categories like burglary and car theft could take their place—assuming adequate public support for the shifts in emphasis. In the realm of corrections, the evidence available would suggest the desirability of greater experimentation with supervised release (from sentencing as well as from prison), for the cost disparity is particularly large there. The Commission estimated that the national average cost per probationer or parolee is less than forty cents per day, while the cost per prisoner within an institution is over five dollars per day. While it should not be thought that the costs of the whole system will be appreciably reduced—on the contrary, most of the promising programs will require greater expenditures—still it does seem possible to effect a better allocation of existing resources by intelligent rearrangement of institutional practices. In all probability, this is particularly true for the police sector which already accounts for approximately 65 per cent of the system's

---

<sup>105</sup> *Id.* at 52. Moreover, considerable public opinion exists that sees increased crime, real or imagined, in terms of moral deterioration suggesting a loss of confidence in society's institutions to control it, which in itself adds to self-defeating pessimism and more withdrawal. The Commission pointed its finger at the role that irresponsible journalism has in this situation. The media may distort the amount of real crime—particularly violent crimes—by sensational portrayal of relatively isolated, if tragic, crimes. Furthermore, reports of rises in crime and crime rates rarely differentiate between crimes of violence and property offenses, the latter actually having the sharpest rates of increase.

budget.<sup>106</sup> But before any sweeping changes are made, considerable research is in order. One thing that should be done is to make a more accurate assessment of the public's attitude as to the relative seriousness of crimes for which the police routinely have responsibility.<sup>107</sup> Secondly, and quite independent of public opinion, we need better or more accurate indices of precisely how much each step of the criminal process costs per offender; what the relative costs of each offense are as functions of enforcement; and what the relative costs of different kinds of acceptable alternatives in corrections are. This of course is not meant to suggest that there are only cost-effectiveness considerations involved. On the contrary, in a system that places a high premium on the dignity and liberty of each individual processed, some steps, some costly procedures such as providing free counsel to the indigent accused, will have to be accommodated as fixed "social overhead," unless the Constitution is to be amended. Nevertheless, it seems probable that in the maze there are some shortcuts that might not run afoul of these considerations. Indeed, certain reforms, such as an overhauling of the very costly and discriminatory bail system, may be a positive enhancement of the individual's dignity and liberty and at the same time reduce the direct and indirect costs of the system.<sup>108</sup>

#### IV. THE INDIVIDUAL'S POINT OF VIEW

##### A. *The Individual seen as Accused or Offender*

Recalling the admonition of Professor Herbert Wechsler quoted at the outset that the law that carries such responsibilities as does the penal law must be not only as rational as it possibly can, but also *just*, there are yet other perspectives to consider in this comprehensive appraisal. Justice of course is an ideal and one for which it is difficult, if not impossible, to state quantitative indices of measurement. Even so, it has

---

<sup>106</sup> Not all police work of course can be allocated strictly to criminal law enforcement efforts, for the police perform other related community services such as traffic regulation. One estimate is that from ten to fifteen per cent of local police time is spent on traffic control and other non-criminal functions. *CRIME AND ITS IMPACT* 53.

<sup>107</sup> The Commission has suggested the use of the concept of social disutility of crime in this connection. This could be done by random sampling of public opinion as to being a victim of several typical offenses. Thus, a scale could be derived that might show, for example, that the average citizen would greatly fear less a car theft than a burglary, a robbery than an aggravated assault, and so on. In consequence of such scaling, better allocation of existing police apprehension resources might be accomplished. *See generally* T. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964).

<sup>108</sup> *See* note 131 *infra* and accompanying text.

long been the business of the legal profession to help the law approach this ideal. And while the measurement may not be precise, balancing is done, distinctions are drawn, choices are made, and values are applied that have wide currency and fundamental acceptance in our society. The overall task that the law in our system sets for itself is to strike a balance between society's need to capture, isolate, and correct the offender on the one hand and a free people's desire to preserve the individual's maximum liberty consistent with that need on the other. It is a balance, fundamentally, between the power of the state otherwise unchecked by law to coerce and destroy and the relative weakness of the individual human beings confronted by that power.

The principal devices by which it is attempted to strike this balance in the English-speaking legal world can be succinctly called to mind. One of the most fundamental, and one that we hardly think of except in times of great political stress when it is sought to take preventive steps to preserve public order, is the requirement that criminal charges shall be forthcoming only for past conduct which has been defined in preexisting law. And the law that defines crimes should be clear enough so that the man of common intelligence need not have to guess at its meaning. Procedurally there are perhaps five basic norms which are designed to restrain, channel, or guide the operations of the state's machinery to bring offenders to account. The official decision to make a charge against a citizen must be formally and explicitly made, and it must be made sufficiently before trial for the accused to prepare his defense. The trial must be so ordered that the accused can confront his accusers and present his own evidence as well. But in any event, the state must prove its case beyond reasonable doubt and not out of the mouth of the accused. The proof should be independently tested by an impartial trier of fact, traditionally the jury, although its use may be declining as a practical matter.<sup>100</sup> And because the proceedings are

---

<sup>100</sup> The reference here is twofold. Within the United States waiver of jury trial takes place in about three out of five felony trials, and of course in a great many more cases, trial is dispensed with altogether by pleas of guilty. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 1-2 (1968). Furthermore, the scope of the right in the United States is not uniform throughout the states and the federal system. See Comment, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 U. CHI. L. REV. 311 (1965). The most recent Supreme Court case interpreting the sixth amendment's application to the states through the fourteenth is *Duncan v. Louisiana*, 391 U.S. 145 (1968), holding that a jury trial is required in a misdemeanor case where the accused faces up to two years' imprisonment.

specialized and involve professional knowledge, the right of assistance of counsel in serious cases has come to be firmly accepted. Two additional restraints on official conduct in the criminal process are now well entrenched as "constitutional practice." One is the command of the Bill of Rights that arrests and searches shall not be unreasonable and shall be based on probable cause. The second is a judicially created corollary that if violations of this norm occur, any ill-gotten fruits will be suppressed and not allowed into evidence at trial.<sup>110</sup>

In the main these are restraints on the official conduct of the executive and judicial branches of government. Consequently, much of what follows in this section will deal with the police and the courts, and, to a lesser extent, with the executive at the far end of the criminal process, *i.e.*, in the corrections phase. The Commission, in assaying the work of the courts and the police, looked at it in operational terms and in light of certain contemporary issues—social and legal—regarding these operations. Rather than attempt a step-by-step presentation of these issues it seems preferable to adopt a few organizing principles around which the problems dealt with, which are of more universal concern, can be focused. The half-dozen or so fundamental rights which theoretically protect the accused in our criminal justice system might be expressed in four related concepts for purposes of testing the degree to which these rights are actually fulfilled in common practice. Briefly stated, they are timeliness of each step in the process, the economic cost to the accused of his participation in the process, the comparability of treatment throughout, and the inherent fairness of decisions all along the way.

Timeliness versus delay:<sup>111</sup> It is not only costly to the community to detain persons awaiting trial for significant periods of time, it is also demeaning to the individual. Promptness should characterize official practice at every major step in the criminal law process—from arrest to production before a magistrate, from charging to trial, and so on. It is in these pre-trial stages that the Commission sees the greatest cause for

---

<sup>110</sup> There are of course additional specific provisions in the United States Constitution relating to control of the criminal law process including right to speedy trial, prohibition of cruel and unusual punishments, trial in the place of commission of the offense, guarantee against suspension of habeas corpus, and the fairly all embracing concepts of equal protection and due process of law in the fourteenth amendment. Most of these might have been found to be implicit in the ones mentioned in the text, but many historical reasons can be identified to warrant the explicitness.

<sup>111</sup> The fundamental norm operative here is the right to a "speedy trial" embodied in the sixth amendment of the Constitution. U.S. CONST. amend. VI, § 1.

concern. For example, "there are courts in which the normal lapse of time between a preliminary hearing and action by a grand jury (for formal charging) is 3 months and in which persons charged with serious crimes normally await trial for over a year."<sup>112</sup> A model timetable, and one the Commission thought reasonable, might organize the phases of booking, hearing, trial, and disposition in the following ways. After arrest and before an accused person is brought before a magistrate only a very few hours should elapse. A period of three days before the accused is given a preliminary hearing would be sufficient if the accused is in jail, seven days if on bail. Formal charging could take place within a very few days more. Appointment of counsel would take place before this, but not much before, so several weeks should then be given for preparation for trial. After the trial, from two to three weeks should elapse before sentencing (speaking of serious cases in the main), during which time a probation officer could make an intelligent background check of the offender. Finally, the Commission recommended a lapse of only five months before appellate review should take place, if it is going to take place at all.<sup>113</sup> It would necessitate stringent efforts on the part of supervisory courts, as well as trial courts and administrative staffs, to begin to approach these model times in most American jurisdictions today. The principal ingredients of a formula for such drastic improvement would be additional court personnel (including prosecutorial as well as judicial personnel), integration of court structures with strong supervisory powers at the top, and a heavy investment in systems analysis, computer programming, and administrative personnel with training and adequate authority.

An emphasis on dispatch so that as much liberty (and other individual values such as one's job or being with family) as possible is preserved to the individual should not mean, however, that the meaningful formalities of the law are turned into hasty ceremonial symbols of a society's impatience with crime and its progeny. All too often the operations of the lower courts are characterized by too-summary proceedings once the accused—along with scores of others—is hurried through a highly stereotyped version of the adversary process. This is mostly true of urban courts below the level of general trial jurisdiction. The Commission recommended doing away with most magisterial courts as currently structured and staffed, and establishing in their stead courts of

---

<sup>112</sup> THE CHALLENGE OF CRIME 154.

<sup>113</sup> *Id.*

equal status with those of higher jurisdiction. This would require enormous expenditures as well as considerable statesmanship on the part of state legislators, but significant numbers of states have commenced reform in these directions in recent years. Even the superior courts, where justice seems less hurried and more sure of itself, have their time-saving devices. Some of these devices pose questions of searching proportions. Chief of these is the so-called negotiated plea. In return for the accused in effect waiving a trial by pleading guilty to the offense charged or a lesser one, the state for its part undertakes to recommend a certain sentence to the judge or to reduce the charge so that the sentencing outcome could not be as serious as in the original charge. The Commission estimates that in some courts as many as ninety per cent of the cases coming before the court are handled in this manner, although the average is probably no higher than eighty per cent.<sup>114</sup> Some experienced trial lawyers and judges are of the opinion that without some such device the work of the courts, as currently staffed, would grind to a halt.<sup>115</sup> Yet, there are obvious potentialities for mischief in the system, not the least of which is the possibility of undue influence on the accused by all concerned (sometimes including his own court-appointed counsel).<sup>116</sup> The Commission took a balanced view of the practice, pointing out realistically some of its positive features:

It would be a serious mistake . . . to assume that the guilty plea is no more than a means of disposing of criminal cases at minimal cost. It relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system. The guilty plea

---

<sup>114</sup> It is difficult to establish precise figures because of such factors as inadequacy of court records, differing standards as to definitions, and the confusion between felonies and misdemeanors. The leading scholarly work on the subject estimates that ninety per cent of all criminal convictions are by pleas of guilty, referring to final pleas, and not merely those entered at arraignment. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (1966). See also Newman, *Pleading Guilty for Consideration; A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

<sup>115</sup> See, e.g., the opinion of a federal district court judge in *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

<sup>116</sup> Additionally there is the question whether the accused who pleads guilty and thereby saves the state the expense of a trial should receive preferential treatment in sentencing. See Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956), indicating that substantial judicial opinion is in favor of such consideration. A range of professional problems in connection with the practice of receiving guilty pleas is canvassed succinctly in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (1967).

is used to mitigate the harshness of mandatory sentencing provisions and to fix a punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible under inadequate penal codes. It is frequently called upon to serve important law enforcement needs by agreements through which leniency is exchanged for information, assistance, and testimony about other serious offenders.<sup>117</sup>

On balance, the Commission chose to support the retention of the plea bargain practice, provided that the judge supervise the agreement after it is reached by the attorneys. The judge would be interested in seeing what pressures were actually working on the accused and whether the prosecutor was being too lenient in his selection of the charge. If the judge were satisfied in all respects, then the plea might be accepted. The current practice is for the judge to pretend he does not know about the plea bargaining, so that nothing of these considerations get into the record of the proceeding. If the judge chooses not to accept the plea, then it would be incumbent on him, knowing so much about the case at that point, to have it transferred to another judge for trial.<sup>118</sup> Such

---

<sup>117</sup> THE CHALLENGE OF CRIME 135. It should be borne in mind in understanding the dynamics of the plea bargaining system that the prosecuting attorney has enormous discretion. It is he who forms the charges (either completely on his own in what is called an "information" or in association with the grand jury in the indictment for some crimes), and it is he who can release detained persons or dismiss pending charges that have not been docketed with the court; even then "leave to nol pros" is often routinely granted by the sitting judge. That this local official is what he is today is a testament to the decentralized, locally oriented framework of the criminal law "system." Indeed it is fair to say there is no other figure quite like him either in other parts of the system or in other units of the American polity as a whole. In light of these attributes, and although most such posts are filled with competent and honest men, it may sound a trifle hollow to hear the Commission propose that prosecutors should "endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released" and that explicit policies be established by which he will release certain persons, try others, and divert still others to non-criminal agencies for custody or treatment. *Id.* at 134. Doubtlessly, some conscientious prosecuting or State's attorneys will take this precatory language to heart, but political realism suggests that before one may observe trends of action nothing less than legislative mandates or restructuring will have to occur. See generally J. SKOLNICK, JUSTICE WITHOUT TRIAL 199-203 (1966) (a section entitled *The Quasi-Magisterial Role of the Prosecutor*); Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROB. 65 (1948); Wright, *Duties of a Prosecutor*, 33 CONN. B.J. 293 (1959); Comment, *The Right to Non-discriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

<sup>118</sup> This assumes a wide acceptance in judicial practice of the proposed scheme, otherwise the successor judge may begin all over again to see if time could not be saved by the entry of a guilty plea. The Commission is consistent here in insisting that the initiative should not come from the trial judge. THE CHALLENGE OF CRIME 135-136.



additional steps will not necessarily reduce the time involved in many cases; on the contrary, they will consume more time at least during the early stages. But the advantages, so long as the practice endures, are that the accused is better protected from the risks of inducement of pleas by over-reaching on the part of both attorneys and that subsequent appellate fights about whether the plea was improvidently entered or not will more frequently be avoided if these suggestions are adopted.

Cost to the accused: The point here is not that involuntary participation in the processes of criminal justice should never entail personal expense on the part of the individual. The system that did not impose some demands for sacrifice of time or money can scarcely be imagined. Rather what our system seeks to insure is that the kind of treatment one receives in being processed does not turn on his ability to pay. In other words, the concept of justice presupposes equivalent treatment regardless of the accused's wealth or station in life. The best illustrations of rising expectations in this regard are the Supreme Court's decisions interpreting the sixth amendment right to counsel and the fourteenth amendment's due process and equal protection clauses as commands that if a person accused of crime cannot afford to retain counsel at trial or on appeal, then the state shall provide counsel.<sup>119</sup> The principal battleground since *Gideon v. Wainwright* has been over the question at what points—other than trial—does the right to appointed counsel attach<sup>120</sup> and the question whether the right extends to all types of offenses, or only to felonies. Many states have extended the right to cover at

---

<sup>119</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

<sup>120</sup> If the stage at which the accused invokes the right to counsel can be said to be "critical" in the criminal process, as where he is required to enter a plea to the state's charges, then appointment is required. *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961). See also *Townsend v. Burke*, 334 U.S. 736 (1948), wherein the need for counsel at sentencing was recognized to insure a fair and meaningful proceeding. More recently, the Court has decided that pre-trial identification "lineups" may require the presence of counsel to insure a fair trial. *United States v. Wade*, 388 U.S. 218 (1967).

On the other hand whether or not the Constitution requires appointment of counsel in "collateral" hearings, such as post-conviction review, revocation of parole and probation is a question which has not received uniform answers from the courts. As of 1963, the American Bar Association reports, counsel was being provided to some extent in collateral proceedings in 38 states. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 41 (Tent. Draft 1967). And a certain trend toward statutory provision for appointment in some such cases may be in progress. *Id.* at 42. Most recently one of these so-called collateral proceedings—probation revocation—has been brought into the ambit of the right to counsel by the Supreme Court. *Mempa v. Rhay*, 389 U.S. 128 (1967).

least "serious misdemeanors."<sup>121</sup> The Commission now contends that distinctions between serious crimes and non-serious crimes cannot be justified in this connection. The only criterion, in its view, should be whether the accused faces any significant penalty, meaning presumably something more than a small fine as in ordinary traffic violations.<sup>122</sup> It also recommends appointment of counsel as early as possible in the processing, and in no case later than the first judicial appearance, well in advance of trial. Of course appointment may have to occur earlier than this if the indigent individual is in police custody and wants the services of an attorney before voluntarily answering the questions of the police. This is the requirement of the controversial decision in *Miranda v. Arizona*,<sup>123</sup> its teeth is the exclusionary rule which would preclude introduction into evidence of any statement made to the police in violation of these requirements.

It has been argued that *Miranda* will greatly limit, or already has curtailed, the utility of confessions or informal statements as a means of proving guilt in some difficult cases, and that the case will encourage lack of cooperation with the police in their informal investigating efforts. The Commission said it did not yet have enough data to resolve this question. Whatever the state of knowledge concerning the actual operation of *Miranda*, its effect on police practices, and the possible trends with respect to confessions during in-custody interrogation, the Congress, apparently persuaded by some such arguments, has sought during this election year to return at least the federal judiciary to the older

---

<sup>121</sup> The basis for such provision is not everywhere the same. For example, some courts have held that the Constitution requires appointment in misdemeanor cases; others that such appointment is within the sound discretion of the trial court. Compare *State v. Blank*, 241 Ore. 627, 405 P.2d 373 (1965), with *State v. Bennett*, 266 N.C. 755, 147 S.E.2d 237 (1966). And in some other jurisdiction the appointment is required by statute. *E.g.*, CAL. PEN. CODE § 859 (1956); TENN. CODE ANN. §§ 40-2002-2003 (1955); W. VA. CODE ANN. § 62-3-1 (1966).

<sup>122</sup> The American Bar Association's tentative proposal is not quite as broad. The Association's Advisory Committee on the Prosecution and Defense Functions proposes: "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise." A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 37-38 (Tent. Draft 1967) (emphasis added).

In federal courts, appointment under the Criminal Justice Act of 1964 is made in all but petty offenses. 18 U.S.C. § 3006A(b) (1964). "Petty offenses" are defined as those in which the penalty does not exceed six months confinement or a fine of 500 dollars or both. 18 U.S.C. § 1 (3) (1964).

<sup>123</sup> 384 U.S. 436 (1966).

test of voluntariness of confessions as the basis for admission into evidence.<sup>124</sup> Not only are the *Miranda* rules overturned by the Omnibus Crime Control and Safe Street Act of 1968, at least so far as federal prosecutions are concerned; the Act also overturned the eleven year old rule of *Mallory v. United States*,<sup>125</sup> which has insured the *prompt* production of arrested persons before federal Commissioners by treating as tainted any confessions obtained in violation of this requirement of the Federal Rules of Criminal Procedure.<sup>126</sup> Although the majority report of the Senate committee that supported these provisions in the new legislation purports to rest on considerations of factual determination underpinning the Supreme Court's decisions and hence hopes to avoid an ideological conflict with the Court,<sup>127</sup> the next, if not the last, word will come from the Court when test cases reach it. Wherever the pendulum comes to rest in this continuing debate, it is important to remember one great merit of *Miranda*. That decision attempted to moderate the considerable disadvantage that persons who lack the income or status to avoid arrest, or to secure counsel if arrested, routinely experience in the station house.<sup>128</sup>

---

<sup>124</sup> Omnibus Crime Control and Safe Street Act of 1968, Pub. L. No. 90-351 § 3501 (June 19, 1968).

<sup>125</sup> 354 U.S. 449 (1957).

<sup>126</sup> FED. R. CRIM. P. 5(a).

<sup>127</sup> See *Senate Debates Safe Street Bill*, 3 BNA CRIM. L. REP. 2115-2116 (May 8, 1968).

<sup>128</sup> In the period shortly before *Miranda* was decided, the American Law Institute's MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, in preliminary draft form, was being debated. Chief Judge David L. Bazelon, of the U.S. Court of Appeals for the District of Columbia Circuit, thought that the provision allowing police questioning without appointment of counsel of a suspect for up to 24 hours after arrival at a police station would "diverge greatly from the ideal that the administration of criminal justice should avoid invidious discrimination based on wealth." Letter to Mr. Nicholas deB. Katzenbach, Washington Evening Star, Aug. 4, 1965, at 4A. For his part, Mr. Katzenbach, who had defended the proposed procedure in an earlier speech, replied that removal of inequalities was not the aim of our system of criminal law. Though he conceded Judge Bazelon's factual premise in large measure, the Judge's "suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro," struck Mr. Katzenbach "as particularly irrelevant." Since "poverty is often a breeding ground for criminal conduct . . . inevitably any code of procedure is likely to affect more poor people than rich people." *Id.*

In this connection, it should be noted that the new Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351 (June 19, 1968), allows a delay of six hours before the arrested person should be brought before a commissioner during which time confessions may be received without being subject to exclusion based on delay alone. *Id.* § 3501(c). Among the factors that the Act lists as being relevant to, though not determinative of, admissibility based on voluntariness are whether or not the accused had the benefit of counsel during the giving of the confession and whether or not he was told before this of his right to the

This custodial interrogation problem should be distinguished from on-the-street questioning, which is closely related, but which presents additional factors for consideration concerning the policy question about the respective rights and duties of police and citizen. And the Commission is also in favor of having the right attach for indigent persons in the post-conviction phase in two or three critical places: the appeal or any other post-conviction review procedure afforded by state law; the administrative hearing to determine whether parole should be revoked; and the equivalent judicial hearing to determine if probation should be revoked.<sup>129</sup> The only significant point in the process where counsel is not yet involved directly is the parole *granting* decision and this will be explored subsequently under the "fairness" heading.

The other major dimension of the factor of disparity of the accused's financial resources relates to bail. As previously suggested, this system puts a premium on financial viability at the expense of one's liberty. To the extent that pre-trial liberty in most cases depends on one's income or wealth, the system discriminates in favor of the middle class and against the poor. It certainly does not keep in detention those who are significantly connected with organized criminals, for their resources are shamelessly plentiful. Many of the persons who are accused of crime are good risks in that they will probably show up for trial and are unlikely to commit offenses while at liberty. And this liberty is important in practical ways, as being able to stay on one's job, to continue the wholesome contacts of family and friends, and more crucially, to assist the defense counsel in preparing for trial. Yet, because the bail system is tied to a kind of schedule of "prices" by offenses, it fails to take into account factors, other than a stake in redeeming one's bond, which might give promise of the worthiness of the risk in particular

---

assistance of counsel. *Id.* § 3501(b). Presumably the reference here to the right of assistance of counsel contemplates *retained* counsel, for absent *Miranda*, there is no federal (Constitutional or statutory) requirement of appointment at this stage of the criminal process.

The other great merit of *Miranda* is that it focuses on what must be viewed as an embarrassing flaw in the mantle of an adversary system, the apparently widespread and heavy dependence of law enforcement agencies upon the admission and confession device for successful prosecutions. Doubtless there will always be a few celebrated and ugly cases which cannot be solved without this device, but the broader question, to what extent ought our police and prosecutors routinely rely on it, has scarcely been mentioned in the current debate.

<sup>129</sup> THE CHALLENGE OF CRIME 150. Since the Commission's report was published, the Supreme Court has said that such appointment is constitutionally required for the revocation of probation. *Mempa v. Rhay*, 389 U.S. 128 (1967).

cases.<sup>130</sup> The way of future reform has probably already been established in two recent innovations. One is the technique initiated by a private, volunteer organization in New York, which seeks to establish criteria such as the man's ties to the community, regular residence, employment, family, and reputation, by which a judge can make a calculated decision to release without money bond on the person's own recognizance. The other is the Federal Bail Reform Act of 1966 which builds on this model and specifically states a presumption in favor of release on promise of return, or on an unsecured bond. "Judges are authorized to place non-monetary conditions upon release, such as assigning the defendant to the custody of a person or organization to supervise him, restricting his travel, association or place of abode, or placing him in partial custody so that he may work during the day and be confined at night."<sup>131</sup> The Commission readily endorsed these and recommended them to the states for adoption.

Comparability of treatment: The term "equality of treatment" has been deliberately avoided here, because the system must make discriminations according to the offense and type of offender involved. Identical treatment in such variable conditions cannot be expected, but considering these fairly objective criteria the treatment accorded persons suspected of committing offenses and proved to have committed offenses should in other respects be comparable or as nearly alike as possible. In the contemporary American scene this principle arises in three distinct ways. Two of them relate primarily to the police surveillance and enforcement stage, principally in urban areas. The third arises everywhere in connection with the sentencing function of the courts. In the urban setting the routine work of the police, often in situations of clear-cut violations, may be cast in such a way as to give offense or insult to the minority

---

<sup>130</sup> The system has other drawbacks, too, in that it encourages the parasitic and often corrupt interaction of professional bondsmen and the police. Typically the bondsman posts a certain amount of his own security on the payment of a fee by the accused, which is a percentage of the bond set by the court, five to ten per cent usually. One study in New York, cited by the Commission, where the fee is five per cent showed that one-quarter of arrested persons were unable to meet a bond set as low as five hundred dollars, meaning they could not raise twenty-five dollars for the fee. *THE CHALLENGE OF CRIME* 131.

<sup>131</sup> *THE CHALLENGE OF CRIME* 132. Extensive background information supporting the reform in federal law is contained in *NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT* (U.S. Dept. of Justice and Vera Foundation 1965) and *Hearings on S. 2838 & S. 2840 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess.* (1964).

group predominant in a particular neighborhood, as by rough handling in making an arrest. Complaints of alleged police brutality, real or imagined, are becoming a commonplace in the cities of America. Presently there is no systematic way to have these grievances growing out of a clash of cultures and resentment on both sides properly screened, short of a civil suit against the police officer, which is an unrealistic alternative for most of the citizens concerned. Thus, the Commission strongly recommends the creation of civilian review boards in all such cities, the function of which will be both to vindicate an often-maligned police department and to give vent to the frustrations of the minority group. A few localities have already made promising beginnings with this concept,<sup>132</sup> and the expectation is that an easing of tensions and a rapport may be established between citizenry and police, making law enforcement efforts more successful through increased mutual confidence.

Related in a geo-cultural sense, at least, is the problem of dealing with suspicious looking persons in high-crime areas of the city. For example, the police on patrol at night see a man lurking around a closed shop. The citizen may or may not be about to commit a crime. But if the police are to prevent what their experience tells them probably will be a crime, they cannot rely on normal arrest procedure, for they have no probable cause to make an arrest. The question posed is whether they may stop and interrogate the suspect and frisk him for weapons in the process. If a weapon is found, and generally its possession simpliciter will be an offense, may they arrest him for the offense of carrying a concealed weapon? Or must the case fall because the brief detention is an "arrest" without probable cause and hence the fruit of that illegal search must be excluded from evidence? In general the Commission was favorably disposed toward the police in such a situation. It noted that analysis of over 9,000 major crimes against the person in one major city during a six-month period revealed that 61.5 per cent of the cases occurred in street locations.<sup>133</sup> More directly to the point is the fact that of the 57 police officers killed in the line of duty during 1966, 41 died of wounds inflicted by handguns.<sup>134</sup> One authoritative

---

<sup>132</sup> *E.g.*, Baltimore, Denver, New York, and Pittsburgh have established agencies that can receive, investigate, and recommend action with respect to complaints of police irregularity, discrimination, or brutality. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 204-05 (1967).

<sup>133</sup> THE CHALLENGE OF CRIME 95.

<sup>134</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 46 (1966).

response in some states has been to allow the police to stop the suspicious persons and in the process to "frisk" them to determine if weapons are present that might endanger the officer's life.<sup>135</sup> Until this year it had not been made clear whether this practice could be constitutionally condoned in view of Supreme Court precedents relating to searches without warrants but incident to arrest. In a very carefully worded decision in *Terry v. Ohio*,<sup>136</sup> the Supreme Court, taking explicit notice of the "need for some form of self-protective search power" in the hands of the police when they undertake legitimate crime-preventive investigation, held that it is not always *unreasonable* for a police officer to seize a person and subject him to a limited search for weapons even where probable cause for an arrest does not exist. In this case as well as two others decided the same day,<sup>137</sup> the Court made it very plain that it was neither approving wholesale the "stop and frisk" statute, nor giving the police carte blanche to harass the public, for the Court took the view that such invasions of personal security were not mere "petty indignities" to be suffered in isolation from the rigorous safeguards of the fourth amendment.<sup>138</sup> The outcome of the *Terry* decision, that it was reasonable to pat down the outer clothing of the appellant and seize the pistol found in this limited search in order to protect the policeman, rests of course upon the premise that the officer was legitimately confronting the man in the first place. The most troublesome feature of the Court's approach to the problem is the rather poorly articulated criteria for determining when an officer may "investigate" as he did here, by drawing close, asking questions, and sensing the need then to search for weapons. The kind of activity that attracted the eye of the officer in *Terry*—men pacing up and down in front of a store in daylight—may be unusual in mid-town Fifth Avenue, but abounds in the

---

<sup>135</sup> See, e.g., *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964); Note, *Stop and Frisk in California*, 18 HASTINGS L.J. 623 (1967).

<sup>136</sup> 392 U.S. 1 (1968).

<sup>137</sup> *Sibron v. New York*, 392 U.S. 40 (1968) (decided together with *Peters v. New York*).

<sup>138</sup> The Court declined the invitation to pass on the bare "facial constitutionality" of the New York statute involved in *Sibron* and preferred to look instead at the actual transaction involved. In *Sibron*, the seizure of heroin from the hand or pocket of the suspect was not justified in terms of protecting the officer; and since the officer lacked probable cause to arrest the suspect for a narcotics violation, the search was illegal. In *Peters*, on the other hand, the arrest of a man lurking in the public hallways of an apartment house who fled on being confronted by a resident off-duty policeman was, the Court thought, based on probable cause and thus the burglary tools found in a frisk upon apprehension were properly seized whether under the New York special statute or otherwise.

crowded life of the ghetto. Of course, the Court indicated it would proceed on a case-by-case basis; and while experienced observers of constitutional litigation may be confident of the Court's intended path, it remains to be seen whether the police can successfully counter the fear of many in the inner city that an additional police privilege to suppress crime means one more burden to be borne primarily by their community.<sup>139</sup>

Another example of this kind of differential handling of suspects on the basis of time, place, and circumstances may be seen in the approach taken toward drunks, prostitutes, and gamblers. The assertion is an old one that if a respectable, known member of the community is a little tipsy on the street, the most the police might do would be to send him home in a taxi. But if the citizen is not known to the police or has no known residence or is "uncooperative," then more often than not he gets at least a night in the lockup, if not a booking for being drunk and disorderly. For the Commission this kind of problem is seen as an illustration of wide discretion reposed in the police to exercise their arrest powers with selectivity.<sup>140</sup> What the Commission recommends is not the curtailment of this discretion, but a requirement that the police publish guidelines establishing the criteria for arrest in such cases. This not only would be of aid to the individual policeman but also would inform the public more adequately of where they stand with

---

<sup>139</sup> The innocent black man who is stopped by a policeman will resent having been detained. This resentment may manifest itself in language or gestures challenging the authority of the policeman. When that happens, the policeman may assert his authority in a brusque, rude, sometimes demeaning and sometimes physically challenging fashion. From the point of view of the black man, he has been needlessly detained, solely because of his color, because he is by social circumstances required to live in a high-crime area, and because police are either bigoted, have difficulty distinguishing between one black man and another, or both.

Street inquiries in the urban ghetto are the occasions most likely to provoke insult and indignation. Accordingly, 'stop and frisk' laws that encourage a higher frequency of more direct contact—including a demeaning touching of the body—will serve to heighten ghetto tensions and increase the probability of violence.

J. SKOLNICK, *THE POLICE AND THE URBAN GHETTO* 7 (Research Contributions of the Amer. Bar Found., No. 3, 1968).

<sup>140</sup> See generally *LAW ENFORCEMENT IN THE METROPOLIS* (McIntyre ed. 1967); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); Abernathy, *Police Discretion and Equal Protection* 14 S.C.L.Q. 472 (1962); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CAL. L. REV. 11 (1962); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); LaFave, *The Police and Non-enforcement of the Law* (pts. 1 & II), 1962 WIS. L. REV. 104, 179.



respect to this kind of administrative justice. The suspicion, however, is unavoidable that police departments will resist such requirements in terms of reduced effectiveness to suppress activity that may be undesirable enough in the minds of many people to justify police harassment. Although the Commission declined to state an opinion on it, another alternative may be for legislatures deliberately to rid the criminal code of these marginal offenses and free the police from its difficult roles in their suppression.<sup>141</sup>

The final category of comparability problems to which attention may be drawn is in the courts. It concerns what is widely known as the disparity of sentences problem. Given that no two cases, say of robbery, may be quite alike and certainly that no two offenders convicted of robbery are alike either, still within these limitations there is little justification for the fact that the kind and degree of sentence awarded may turn as much on the personality and perspectives of the sentencing judge as any other factors. The Commission noted the prevalence in the United States of poor delineation in statutes of what factors should be taken into account in passing sentence. "The enactment of statutory criteria for sentencing, together with programs to educate judges in sentencing and correctional methods, would enable them to sentence on the basis of more uniform standards."<sup>142</sup> More specifically, the Commission suggested two devices, for which there is already some precedent in the country, to help in this connection. One is the use of councils of trial judges of the same court, wherein discussion of relevant facts and criteria could be explicitly discussed and defended or moderated by the judge responsible in the pending case. As the Commission noted, "the discussion and need to state reasons for a sentence tend to restrain the imposition of unreasonably severe or lenient sentences."<sup>143</sup> Another is the systematic appraisal of sentencing through appellate review.<sup>144</sup>

Inherent fairness in decision-making: Obviously these concepts are not mutually exclusive, but each of the problems discussed seems on the

---

<sup>141</sup> While it does not involve the suggested legislative alternative, an experiment is now underway in the city of St. Louis which might facilitate a different approach to public drunkenness. The experiment involves the establishment of several detoxification centers around the city which will deal with persons arrested for public drunkenness in a therapeutic way. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 50-57 (1967).

<sup>142</sup> THE CHALLENGE OF CRIME 145.

<sup>143</sup> *Id.*

<sup>144</sup> See generally A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1967).

whole to present some characteristics which, for convenience of discussion, may be subsumed under artificially separate headings. "Fairness" calls to mind many things and may be said to be a very imprecise notion of measurement almost as ambiguous in content as the more abstract notion of justice. Accordingly, it seems necessary to give more specificity to the notion if it is to be very useful in practice. There surely may be other indicia, but what I have in mind are two guiding criteria more or less subject to objective examination. Fairness, minimally, implies third-party decision-making; it also implies that decisions will be taken explicitly in terms of all relevant facts, law, and policy. One way to look at the process of arrest, charge, trial, sentence, and correction is in terms of *who* makes the critical decision at each vital step.<sup>145</sup> Thus, it may be seen that few of the early decisions are subject to review; they are made by one of the adversaries in the process with fairly unbridled discretion. The decision to arrest and the decision to produce before a magistrate are police decisions. The decision as to what charge will be made is largely the prerogative of the state's attorney. The decision as to what plea will be entered is largely the defense counsel's, although it is increasingly subject to judicial scrutiny through one of two devices—incompetence of counsel or involuntary or improvidently entered plea. Decisions on admissibility of evidence and guilt or innocence are, of course, routinely scrutinized by appellate courts; in any event, they are removed from the hands of the adversaries at the

---

<sup>145</sup> The model of a hierarchical pyramidal structure in which the superior official condones or modifies the decisions of inferior officials has been consciously abandoned here in favor of what may be a closer approximation of the system—at least as the author observes it in the United States. Schematically the process may be seen as horizontal in structure, a kind of conveyor belt, if you will, along which strategically placed decision-makers are called on to make a series of decisions primarily about whether to retain the accused-suspect-offender in the process, but also about what disposition to make if he is retained. And each decision is increasingly more refined, each partaking of different competences, different perspectives, and even to some extent slightly different goals. Thus, the largest and crudest discretion to take-in and retain in the system for further processing is vested in the police and prosecuting attorneys. Next the committing magistrate makes a slightly less "rough and ready" decision to detain the arrested person (the *prima facie* test is the operative norm here). Then the trial judge (*cum* jury) makes critical assessments of facts and law (guilt or innocence are the crude approximations of this level). Then the appellate judge reviews certain aspects of the trial, including motions denied about admissibility of evidence, and so on. The sentencing judge and later the parole board decide about the kind of control that is indicated in the case; sometimes also the modification of that control, based on more and later evidence of susceptibility to certain treatment, is often invoked by yet another decision-maker, the parole supervision officer.

trial court level. The decision about sentence, although participated in by both sides, is of course a judicial function at the trial level, but the criteria for and hence the quality of review above that level is more doubtful. Decisions about conditional release on parole (after some time in prison) are almost never reviewed except internally by the same agency responsible for its supervision.

It is not to be inferred that the full panoply of rigorous safeguards the individual enjoys at the trial stage and the review to which decisions at that stage are subjected should necessarily attend every other phase of the process. But what does seem dictated by the notion of fairness implicit in these safeguards and checks is that some degree of control by the courts, the most independent of the branches of government and the branch least subject to partisan control, should be imported into the system. It is in the pre-trial stage on the one hand, and the post-conviction stage on the other, where this seems most needed. Two or three notable examples drawn from the contemporary scene will serve as illustrations. As has been seen at two or three places in preceding sections of this article, the police process many more persons than ever are charged or tried. One does not have to believe the police to be bent upon malicious deprivation of liberty for its own sake to see that this is not totally acceptable in law or policy. Indeed, it is largely because the police are so zealous to capture and prosecute someone for a known crime that often many are arrested who are only suspects. On other occasions, however, the police will arrest and detain for various periods of time persons they have no intention of prosecuting.<sup>146</sup> And there will be others who are arrested without adequate grounds against whom a case will subsequently be established. Unless these cases get to court and unless the police introduce evidence, or attempt to have it introduced, there is no way the courts in the United States can control this behavior.<sup>147</sup> As yet no judicial device has appeared to correct this practice or to control it, although one suggestion is that the courts should divest themselves of jurisdiction when legally deficient arrests are made.<sup>148</sup> But the other kind of case, where no charge was brought at all, suggests

---

<sup>146</sup> See generally W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); J. SKOLNICK, *ARREST WITHOUT TRIAL* (1966).

<sup>147</sup> Without overemphasizing the regulatory rule of the courts, it can be fairly surmised that the disappearance—on the whole—of police third-degree tactics in the last thirty years or so is largely because the courts developed the exclusionary rule to rid the police of the utility of this practice. *THE CHALLENGE OF CRIME* 93.

<sup>148</sup> Note, 100 U. PA. L. REV. 1182 (1952). See generally Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. U.L. REV. 16 (1953).

the limited utility of this approach. It remains to be seen if the civilian review board or some other expedient like the ombudsman might suffice to scrutinize this kind of executive behavior.

The second illustrative problem is again drawn from the sentencing function of the courts. Explicitness of the basis for a decision about the disposition of the offender is exceedingly rare, especially as it relates to a choice between probation and imprisonment. Part of the problem lies in the absence of appropriate statutory guidelines.<sup>149</sup> Part lies also in the fact that too frequently the decision is made without adequate information which a pre-sentence report could provide.<sup>150</sup> The Commission quoted with approval the American Law Institute's proposed Model Penal Code criteria for granting probation, including such factors as the mildness of the offense, the provocation offered the offender, the involvement of the victim in the offense, the character of the offender, and the hardship that imprisonment would impose on the offender or his dependents.<sup>151</sup>

---

<sup>149</sup> Two other significant defects, in the view of the Commission, characterize most American penal codes: (1) that certain offenses carry mandatory minimum sentences of severity and forbid the granting of probation or parole; (2) maximum sentences commonly are too long, giving the sentencing judge too wide a latitude in choosing appropriate penalties along a continuum that runs from probation to prison terms of 25 years or more. *THE CHALLENGE OF CRIME* 142.

<sup>150</sup> Of course problems of fairness may crop up in the routine use of such reports, as in the investigator's reliance on gossip and other hearsay information that may influence the judicial decision. The trend is in the direction of allowing the defense access to these reports as a check on such potential abuse.

<sup>151</sup> See *THE CHALLENGE OF CRIME* 142. Other relevant provisions of the Model Penal Code, which give an idea of its different approach to sentencing, would reduce all crimes to three grades of felony and two grades of misdemeanor, would set a maximum penalty for each grade which in each case is shorter than those currently in use, would allow the sentencing judge to extend the penalty if the offense is an atrocious one or if the offender is especially dangerous, and would give the judge discretion to grant probation in all but capital cases. As to minimum terms of imprisonment, the Model Penal Code permits a minimum not to exceed three years in the most serious felony cases and requires him to sentence any felon, if imprisonment is used, to at least one year. *Id.* The idea behind this provision for a minimum sentence is twofold. First, it forces the judge to consider probation as a serious alternative possibility. Second, it ensures a period of custodial treatment, which in the view of some correction experts is the minimum time to effect sound classification and undertake any realistic rehabilitation efforts. For young offenders the minimum time may be shorter, about six to nine months, because of their generally more pliable personalities. This of course suggests a variant of the indeterminate sentence, which ideally divides the responsibility of fixing terminal dates on the correction effort between the judge and the parole board. One principal difficulty, aside from the strictly correctional expertise aspect, is that judges do not have a ready reckoner, other than the seriousness of the offense itself, with which to gauge how much "destigmatization" is called for in the case, i.e., a sound basis for setting the minimum. Hence the decision by the drafters of the Model Penal Code for the compromise

Finally there are two quite recent judicial developments which represent or illustrate the kind of recognition of the problem of explicitness and inherent fairness which this portion of the article is meant to address. One is the case, already briefly referred to, in which the Supreme Court of the United States held that revocation of probation is such an important point in the overall criminal process and the risk of arbitrariness is so high that the hearing which determined this move should at least be covered by the assistance of counsel (to assist in cross-examination of witnesses to the alleged violations and help present affirmative evidence), and if the probationer could not afford it, then the appointment of free counsel was required.<sup>152</sup>

Such an administrative hearing could be objectively appraised, the Court must have recognized, only if an adequate record of the proceedings was kept; this could effectively be created only with assistance of counsel. The other case is equally far-reaching in its impact on pre-existing procedures in a different area of the system. It is a case in which the Court took into account the vagueness of the concept of delinquency, the informality of the proceedings by which the fact of delinquency however defined is sought to be established, and the lack of assistance of counsel, as well as other attributes of what was euphemistically called juvenile justice.<sup>153</sup>

These are certainly not exhaustive of the possible list of issues and problems that may go under the heading of inherent fairness. Passing mention may be made of two features of the corrections phase which continue to disturb thoughtful observers. One is that the parole boards exercise discretion second only to the sentencing court in its total impact on the offender. At present this discretion not only is subjected to no judicial review but also escapes the attention of the typical penal code in any significant detail. Without seeking to reduce its procedure to the

---

of the one year requirement—if imprisonment is indicated at all. Unfortunately the promise of the indeterminate sentence as a flexible vehicle for expressing the several community concerns in sentencing has not yet been realized in practice in the United States. One leading penal administrator writes as follows: "It is a reasonable hypothesis . . . that the indeterminate sentence *as at present administered* not only contributes to the great length of American sentences but also to the essentially antitherapeutic culture which prevails despite the increase in services." J. CONRAD, *CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES* 54 (1967) (emphasis added).

<sup>152</sup> *Mempa v. Rhay*, 389 U.S. 128 (1967).

<sup>153</sup> *In re Gault*, 387 U.S. 1 (1967). The Court sought to preserve other more wholesome features of the juvenile court structure such as the confidentiality of the proceedings and the rehabilitative orientation of its dispositions.

extensive requirements of a full trial of facts and law, it yet may appear possible to import some minimal safeguards in terms of judicial review of administrative hearings, safeguards of explicitness of criteria, adequacy of a factual record, and professional assistance of counsel. The second feature of contemporary corrections to which considered attention should be given is the set of incidental impediments which attach to a convicted prisoner. The so-called civil disabilities, (like inability to conduct a business or enter certain callings or to vote) as well as the fact of the presence of the record of conviction itself, often give the lie to the promise of the system that through punishment a man will have paid "his debt to society" and should be considered an ordinary citizen again—these deserve the conscientious attention of those who put their trust in and live by the system of criminal justice.<sup>154</sup>

### B. *The Individual Seen as Victim*

Here is a theme which for the greater part of even the most recent times has been sorely neglected in the study and research of crime, its control, and related social planning. Only in the last few years have scholars begun to concern themselves with the individual as a victim or potential victim of crime. The concern may arise in at least three ways. We shall only touch on these three different aspects of the theme in these pages, for most of what we need to know lies in the future. The first significant aspect of knowledge about the victims of crime is that it may directly serve our policies with respect to prevention of crime. Second, as has been demonstrated inferentially in respects already considered, knowledge about the dynamics of certain crimes may serve better to explain the etiology of those crimes and to shed light on the respective roles of offender *and* victim in the interaction that is roughly called the criminal event. This knowledge could be of profound service in reaching correct diagnosis of an offender's need and the correlative decision about his correction program. Third, the victim *qua* victim is a vital participant in the criminal law process, at least as invoker of the process in most cases. Accordingly an examination of the policies and practices by which our society recognizes and supports this role seems eminently in order and long overdue.

In the first respect it has been observed:

---

<sup>154</sup> For example, expungement of the record may be possible some time after release from prison without at the same time removing the incidence of the case as a social statistic useful for research purposes.

If it could be determined with sufficient specificity that people or businesses with certain characteristics are more likely than others to be crime victims, and that crime is more likely to occur in some places than in others, efforts to control and prevent crime would be more productive. . . .<sup>155</sup>

Accordingly the Commission through surveys of its own sought to discover variations in victimization rates among significant variables such as age, sex, race, and income level. In brief it was found that:

The risk of victimization is highest among the lower income groups for all Index offenses except homicide, larceny and vehicle theft; it weighs most heavily on the non-whites for all Index offenses except larceny; it is borne by men more often than women, except, of course, for forcible rape; and the risk is greatest for the age category 20 to 29, except for larceny against women, and burglary, larceny and vehicle theft against men.<sup>156</sup>

The special significance of such expanded knowledge is that it helps to build better models of reality upon which to predicate rational crime control measures. For example, in discovering what areas of a city have the highest incidence of what kinds of crimes, we could better deploy police forces not only in reference to numbers but also with respect to special skills of those police so assigned. But it can scarcely be predicted in what variety of ways better knowledge can and will be of specific practicality. Thus, for the short run the emphasis should be on more research programs. The classical approach in criminology has been to look for the "causes" of crime in the offender and in his social environment. While the search should not be abandoned, what much of this recent research suggests is that it was too simplistically structured; it did not presuppose a theory adequate to account for the complex factors at work in the typical criminal event. The need for a model better approximating the bio-social complex of factors which produce a crime is becoming increasingly apparent. Suppose, for example, that it is discovered that certain groups of people (or certain kinds of personalities) are apparently victim-prone in somewhat the way that certain people are said to be accident-prone: this might lead to the establishment of civic education projects yet to be imagined or projects of help and treatment for the victim as well as the offender.

The interaction of the offender with his victim is the first aspect of

---

<sup>155</sup> CRIME AND ITS IMPACT 80.

<sup>156</sup> *Id.* at 81.

this theme to have received serious attention. The work of Professor Marvin Wolfgang of the University of Pennsylvania is notable.<sup>157</sup> His study and analysis of criminal homicides in Philadelphia between 1948 and 1952

clearly demonstrated that it is not the marauding stranger who poses the greatest threat as a murderer. Only 12.2 per cent of the murders were committed by strangers. In 28.2 per cent of the cases studied, the murderer was a relative or close friend. In 24.7 per cent he was a member of the family. The murderer was an acquaintance of the victim in 13.5 per cent of the cases.<sup>158</sup>

And in another study reported by the Commission, which was conducted in Washington, D.C., it was revealed that almost two-thirds of the 151 rape cases surveyed involved an offender and a victim who were at least casually acquainted.<sup>159</sup> One concrete, albeit modest, instance of how such knowledge can affect policy decisions may be seen in the Model Penal Code's listing of the victim's role in the offense as a factor to be taken into account in awarding probation.<sup>160</sup> And of course it need hardly be said that some impressionistic experience with insights into human relations has historical precedent in the provocation formula in the common law of homicide.

Finally the nascent recognition of the victim not only as a participant in the social events that criminal law seeks to control but also as participant in the very processes of the criminal law deserves explicit comment. The problem here is what might be termed *victim disposition*. Two policy questions arise. One is what responsibility does society have, if any, for reparation of the injuries or losses suffered by the victim? The traditional answer to the long unspoken question has been the civil suit in tort. But even if this were an otherwise realistic strategy open to the aggrieved victim, the state usually takes the offender's typically meager earning power away by sending him to prison. But for a variety of reasons this has not been a realistic mechanism of reparation for injuries, which may render the victim permanently disabled or subject to expensive hospital and medical treatment—to say nothing of his lost income and pain and agony for extended periods of time. There is growing acceptance of the idea that society is to some extent

---

<sup>157</sup> See his pioneer work: M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (1958).

<sup>158</sup> CRIME AND ITS IMPACT 81.

<sup>159</sup> *Id.*

<sup>160</sup> See note 110 *supra* and accompanying text.



responsible for the crime and thus owes it to the victim to make good the loss insofar as a monetary award can do this.<sup>161</sup> The alternative normative foundation for reparation schemes seems to be that of the welfare state, namely that it is wholly undesirable to allow a person to bear alone the misfortunes which befall him and which he is unable to offset by his own efforts. Experience to date is probably too limited to attempt an assessment of the problems of administration and costs of such programs, but undoubtedly the trend in the direction of adopting them will continue, at least in the more affluent countries.

The second question of major policy dimensions which arises in this connection is simply whether the victim's positive role in the processes of the criminal law is being adequately supported by society. The question may be more fully appreciated if it is brought to mind that the crime is only the first of several traumatic experiences that the victim has to endure. If he complains at all, he is likely to have some unpleasant encounters with case-hardened detectives or policemen. If he succeeds in getting his case before the courts, he then faces the often harrowing questioning of attorneys and judges. And even in the presence of the most benign of courts he will typically suffer the frustrations of long delays, the uncomfortable waiting in unfamiliar and foreboding surroundings, and often the necessity to come again and again to the courts before his testimony is finally heard. He will of course lose time away from his work for this service; yet, typically, any witness fee that is in some places available is likely to be inadequate. In addition he may experience intimidation during this time from the accused's friends or family. The question should be asked and asked insistently—how much is all this worth to society? What kind of services are, or should be, available to protect and support the victim who cooperates with the system by invoking its processes and becomes a witness not for his own vindication alone but also for society's benefit? Specifically it would seem possible for police and the courts to establish community relations units, which would have as their primary mission such things as escorting the witness to and from courts, giving timely notice of court hearings, perhaps in some cases giving routine house protection, or

---

<sup>161</sup> At last report at least four common law jurisdictions and one civil code country had adopted some such scheme to recompense victims up to stated amounts in cases of physical injury suffered by the victim of an unprovoked crime. These jurisdictions are the United Kingdom, New Zealand, California, New York, and Italy.

interceding with employers to give time off from work without docking pay and the like.

## V. AN OBSERVER'S PERSPECTIVES AND CONCLUSIONS

The observer professionally detached from the processes of the system itself and removed from the specialized viewpoints considered above has a peculiar obligation. He should not only describe but also clarify, so far as possible, what common policies exist among the various perspectives and indicate the probable directions or trends in the future. He should also recommend appropriate changes which might better accommodate *desirable* future developments. Description without these additional functions is almost as inadequate as blithe recommendations without adequate description. In order to make deliberate progress toward any new model of a criminal justice system, there must be an adequate explanatory model of the current reality. The work of the Commission—and the reporting of it here—has been concerned primarily with the tasks of describing, understanding, and clarifying. To a lesser extent, recommendation has been attempted. No completely new model is deliberately projected, although some new dimensions and contours may be faintly visible.<sup>162</sup>

---

<sup>162</sup> A word on the duties, composition, and work of the Commission is in order here. While President Johnson in July, 1965, instructed the Commission "to inquire into the causes of crime and delinquency and report to him, early in 1967, with recommendations for preventing crime and delinquency and improving law enforcement and the administration of criminal justice," and while the Commission made scores of specific recommendations in response to these instructions, the great value of the Commission's work, in the view of this observer, lies in its attention to necessary data, information, and insights underlying those recommendations. Consequently I have deliberately chosen to emphasize this aspect rather than the host of specific policy recommendations growing out of the Commission's work. Furthermore, I have taken the liberty of treating the most general or universal aspects of the criminal law system here and have not touched at all on four areas the Commission studied. Specifically these are: narcotics and drug abuse; juvenile delinquency; gun control; and organized crime. There were, in addition to those mentioned in this article, task force reports in all but one of these four fields, that one being gun control.

The nineteen members of the Commission included a former Attorney General of the United States, Mr. Nicholas Katzenbach, as chairman, several judges (including both trial and appellate, state and federal), the president of a leading private university, a publisher, a former mayor of the City of New York, several leading attorneys, a police chief, members of state parole boards, a leading criminal law professor, and the head of a principal minority rights group. While the Commission itself met only seven times for two or three days each, the several task forces, composed of one Commission member plus some of the forty full time staff members and ad hoc consultants and advisors in specialized fields, were in almost continuous session. The full time staff included lawyers, police officials, correctional personnel, sociologists, psychologists, systems analysts, professional

As the preceding parts of the article have attempted to illustrate, the current reality is an exceedingly complex one. More than that, it is often times a contradictory, seemingly self-defeating, or at least inconsistent, reality. Far fewer persons are charged than are arrested for crimes, and far fewer still are convicted and sentenced than charged. We proclaim that it is the right of every man to be *tried*, yet so arrange things that the pressures to waive the trial are irresistible in most cases. The whole thrust of the system bespeaks coercion of those who will not abide by the community's norms; yet in the field of corrections increasing and seemingly justifiable emphasis is being placed upon modes of persuasion. And while we condemn and separate the guilty from society, ultimately we strive to reconcile and integrate the released offender with and into that same society. At the same time, but at a different level of the same reality, the public demands greater efforts on the part of its police, the courts, and corrections, yet discourages, or at least is apathetic toward, efforts to improve the likelihood of that greater effort by declining to invoke the system regularly and by ignoring the need for greater financial inputs. The public expects its protection, yet resents the system's intrusions on privacy and demands on personal time and resources.

Not all of these competing practices and ambivalent attitudes are operative at the same time and in the same place, of course. They are reflective only of the larger image of the system and not necessarily the several components of it. Seen separately—as they frequently “see” themselves—the various institutions or functional components of the sys-

---

writers, and editors. Many of these were officials on leave from various state governments and federal agencies; others were on leave from universities and private organizations.

Although the Commission itself directly sponsored some surveys and studies—done either by its own staff or by independent research organizations—much of its information came from papers prepared by consultants hired by the various task forces and from the files and staff of many federal agencies which apparently cooperated very well with the Commission. Communication was stimulated among various groups of informed opinion by a series of conferences, for example one composed of scientists and businessmen. It is evident that the work of the Commission, independent of its lengthy reports and recommendations, served to generate interest in the manifold aspects of crime and its control all through the American society and polity. Its list of consultants and advisors reads like a catalogue of the most knowledgeable and experienced personnel in a dozen or so related fields of expertise. And while the outline of its approach to the enormous tasks set for the Commission will continue to be useful as a kind of roadmap for more sustained efforts at understanding, clarifying, and improving the system, it seems fair to say that too much was expected of it in too short a time. The hope is that the Commission's recommendation for a national criminal research institute will be one of the first items of public business of a succeeding national administration.

tem perform distinctly different tasks, frequently with different purposes in view, and with varying degrees of effectiveness, efficiency, and confidence. For instance, the principles of operation of the police are very likely governed more by considerations of gaming theory—which strategy will suppress more crime per unit of time and energy than any other—than by considerations of the normative idealism that characterizes the work of the courts. In this respect, if in no other, the system in the United States is experiencing a positive enhancement, that is, in terms of its fulfilling stated promises of normal official behavior in respect to the individual confronted by the system. Corrections, for its part, while there is certainly a greater professional expression of a willingness to treat, reform, and rehabilitate rather than condemn, isolate, and forget, has not yet found its footing toward greater performance levels. On the other hand, if rates of recidivism do not increase, and on the whole they do not appear to be doing so (and in some instances they are going down), it is difficult to say that corrections generally is not holding its own in the face of ever rising numbers of inputs.

Without intending to oversimplify what must necessarily be a complicated undertaking if done comprehensively, the major purposes of this more limited appraisal will be served if four features are selected for highlighting here. The choice of the limited number is dictated primarily by the importance of the concepts and the central positions of the related institutions in the over-all system of criminal law and its administration. The four features involve the two principal goals—rehabilitation and deterrence; the one central institution of the court and its most crucial problem, delay; and the research and action programs addressed to all three. The goal of rehabilitation may be seen as primarily, although of course not exclusively, a function of what has been referred to herein as the corrections component of the system. Thus what will be said about this goal will center largely on that component. Secondly, and this is a more radical suggestion, the concept of deterrence should probably be seen not so much as a goal effectuated by the courts and corrections components as by the police-prosecution component. The shift is not altogether a matter of mere emphasis but of orientation to action based on certain assumptions that contemporary conditions tend to validate, although they may change. (We ignore here the other major quantifiable goal of incapacitation in view of the evidence discussed previously that prisons and jails are not detaining relatively large numbers of inputs for very substantial periods of time.) Delay appears to be a

chronic symptom of the system and is "expensive" not only in terms of dollar costs, but also in terms of the additional variables and complications this single one throws into the equation of assessing the role of the apprehension and adjudicatory phases and their effectiveness on individual inputs to the system. As has been pointed out previously, this variable has an untold effect on the confidence the public has in the system. It is also something that professionals spend a good deal of time talking about. Accordingly, it appears to be a problem which deserves special comment in this appraisal. Closely related are a range of other variables, such as streamlining the criminal code, specializing the police, and perhaps unkninking parts of the adjudication process, which affect very closely the money costs of the system. Finally, in keeping with the primary aim herein of reporting on the work of the President's Commission on Law Enforcement and the Administration of Justice, some attention will be given to specific research and action programs of more than passing promise.

What we know about corrections suggests the following points. Probation as opposed to imprisonment produces fewer returns to the system, although this should be checked to see if the selection of better risks is not primarily responsible for this differential success. Generally the longer in prison, the greater likelihood there is that the offender will return to crime and prison. On the other hand, most experts agree that if imprisonment is indicated at all, some minimum time is needed for adequate classification and exposure to treatment programs. And the younger the offender is when he enters prison, and the younger he is when he leaves, the more prone he will be to recidivism. In other words recidivism proneness declines (for most crimes) with age. In policy terms what this knowledge suggests, among other possibilities, are these: the greater use of conditional release (primarily from court, but also from prison after some intensive treatment) for all types of offenders except those clearly in need of custodial treatment; shorter prison terms (than those commonly used now in the United States) for serious offenders, coupled with more intensive efforts at graduated, community oriented treatment; and more attention to special care programs for youthful offenders and juveniles who are an increasing percentage of the total population.

But what is not known is unfortunately much greater. We are not even sure how many released offenders (either following probation or parole) return to some phase of the system without necessarily being

convicted and sentenced again. Nor do we know what the relative probabilities of return to the system at any point are for offenders who have progressed to various stages of the system. In short no firm assessment is possible for the rehabilitative effects of discrete phases of the system. This kind of inquiry should, of course, try to correlate offense typologies as well as personality typologies to these various release points. Furthermore, only a beginning has been made in comparing in rigorous, controlled fashion different correction programs over time. The California experience currently appears to be the most promising in answering some of these questions. Nor have evaluations of some very promising ideas yet been adequately undertaken—for example, the ideas of using inmates in collaboration with professional personnel for treatment within the institution, of graduated release schemes, of programmed learning for the under-educated inmates of prisons.

In terms of deterrence, we know even less. What is known at least suggests the following: that inexorably crime will increase in absolute numbers in our societies; this may be so because we are now counting it better than formerly, because our population is less inclined to endure it silently, particularly in the case of crimes of violence, and of course because the population is increasing in size and density. Second, crime *rates* will probably also increase, due probably to several factors which are not yet fully understood but which include urbanization, an increasing percentage of young people in the general population, and the changing economic and social patterns that accompany what is being called techno-industrialization.<sup>163</sup> But the rates we have been developing and using in the

---

<sup>163</sup> The term is not meant to refer to the coming of wage oriented, first and secondary mechanical skills in volume to a community. That of course produces social and demographic dislocations associated with the growth of cities. But in the West a new phase is being entered in which tertiary skills are becoming the most remunerative, and these are not necessarily needed in large volume. For example, a machine tool factory, itself using machine tools to produce them, may employ a few dozen highly skilled workmen whose total wages might approximate the payroll of several hundred making ordinary products in familiar mass-production, assembly line fashion. This newer pattern produces structural changes not only in the economy but also in social relationships, and these are not yet thoroughly understood. The data available, however, reveals some sort of correlation between technological changes in one locality and higher rates of crime in that same locality. No known cause-effect relationship has yet been demonstrated, but the variables thought to be influencing these higher rates (higher than the same area previously, and higher than other more rural areas) are those that come in the wake of increased technological efficiency and population concentration, namely: death rates fall, life expectancy increases, standard of living for most goes up, personal possessions and private wealth increase, education levels go up, and society becomes more secular and less family centered. One theorist

past are very crude, and being national figures they tell us very little about actual risks of harm to certain communities and neighborhoods—the level at which most of the machinery of the criminal law system operates. Furthermore, we have not bothered much to differentiate the public's relatively greater concern and fear of personal offenses from property offenses in our reporting and discussion of rates of crime. Until we develop more refined reporting schemes, taking account not only of type of offense but also age and other characteristics of offenders, tied to a well defined community, it will be impossible to assess very meaningfully whether the community is deterring crime. If the rate of crime, or risk of victimization per offense per unit of time per community, is the standard of measurement toward which we are groping as a yardstick, similar to recidivism for the rehabilitation goal, we will then be in a position to begin to take note of the different roles played by various community institutions (including the machinery of the criminal law system) in deterring or preventing or reducing the incidence of crime. And we will then be able to begin careful comparisons among different localities in their strategies toward control of crime that may account for differential rates of crime among those different communities. Again what we need to know far exceeds that which is already known about preventing crime in a community. Yet this is not to suggest that any action must await a much more complete picture of the hard reality that confronts us. The challenge of crime in our society is much too critical to be put off. And certainly the knowledge we do have suggests some lines of action and policy which at least deserve experimentation.

Two such can be mentioned here. One is that increased emphasis be placed on the role of crime suppression that the police serve. This need not necessarily mean vastly increased police forces, but it will mean a more intelligent allocation of forces both geographically and in terms of type of offense most susceptible to public suppression. Thus, street crimes of robbery and assault (or "mugging") may be greatly reduced, displaced, or suppressed by a more visible police presence either through more intensive patrol or quicker response to calls for police intervention.<sup>104</sup> The City of New York reported that violent crimes in its sub-

---

has suggested that—at least in the United States—as this techno-industrial process spreads to every area of a country the differential rates of crime (rural to urban) will begin to dampen down and disappear, although the over-all rates might remain just as high or higher than in earlier periods. See Wilks, *Ecological Correlates of Crime and Delinquency*, CRIME AND ITS IMPACT 138, 156.

<sup>104</sup> The Commission has reported a correlation between the time it takes

ways went down markedly after the introduction of one policeman on each train during the night hours of operation. Another, and closely related strategy, would be to increase the efficiency of the apprehension function of the system's machinery. This means not only that the police should apprehend more offenders than they are currently apprehending, but also that the courts should process them more expeditiously. The assumption is that the system poses a more realistic or credible deterrent force if it catches and promptly prosecutes a larger percentage of those who have committed offenses.<sup>165</sup> There is hardly anything new, let alone startling, in these suggestions if we stop there; for after all, the goals of the components themselves have been along the same lines. What should now be added are some of the conditions which would make these goals realizable.

For example, if apprehension in many crimes is related to police response time, then it would seem to make sense to shorten this time as much as resources will permit. One suggestion of the Commission is to automate the communications center of a municipality so that incoming calls could be given priority, the police car nearest the area be located, and the policeman manning that car radioed in a matter of seconds.<sup>166</sup> The installation and use of public call boxes on street locations would maximize the increased communication facility of the police.<sup>167</sup> Another important strategy would attempt to deal more satisfactorily with the crimes in which quick response would be unavailing, as for example in a burglary that was discovered days after its occurrence. This is the more familiar detective work of the police. The police

---

for a police car to reach the scene of a crime and the likelihood of making an arrest in connection with a reported crime. For instance, in the cases where an arrest is actually made the average response time (for the cases studied) was 4.1 minutes, whereas in all those cases which remained uncleared the response time was 6.3 minutes on the average. *THE CHALLENGE OF CRIME* 248.

<sup>166</sup> It is surely common knowledge among persons who are routinely inclined to commit certain property offenses that the clearance rates for ordinary larceny or theft are low (twenty per cent in most places), and that in some metropolitan areas the police hardly bother to register cases of stolen goods, and in some precincts, burglaries, too.

<sup>166</sup> Chicago recently spent two million dollars in going to semi-automatic processing of such complaints, reducing the response time to *minutes*. See *THE CHALLENGE OF CRIME* 251.

<sup>167</sup> These are a typical feature of most cities, but they are kept locked for police use only. The Commission recommends unlocking them and encouraging public use even if the number of false alarms increased. Experience with other systems such as fire reporting by phone versus alarms on street corners tends to justify this recommendation. Further, a single police telephone number in metropolitan areas would be very helpful. In England it is possible to have one number for the entire country. See *THE CHALLENGE OF CRIME* 250.



have not moved ahead with the technological revolution of our times. In the first place most local police departments do not have skills represented on their staffs that could intelligently use the technology of ten or twenty years ago, such as taking latent fingerprints. And, secondly, with the notable exceptions of the F.B.I. laboratory in Washington and one or two metropolitan police forces like Los Angeles, most of the recent breakthroughs in science and technology are not siphoned off into law enforcement work.<sup>168</sup> In the matter of fingerprints alone, quite a bit could be done by application of computer technology. The simplest task involves comparison of prints of a known suspect already in custody with those found at the scene of the crime. But *searches* may be required in the more sophisticated cases of either tracing an unknown offender from prints left behind or of positively identifying a person who is in custody and believed to be wanted by the authorities. In such cases the technique is hampered by two factors—one the limited file of known offenders that exists anywhere (the F.B.I. has sixteen million), the other the time required to make a manual search of any substantial portion of this file (currently the F.B.I. employs 1,000 clerks to process 23,000 fingerprint records daily). The Commission believes that the time, thoroughness, and cost positions can be significantly improved—ideally by computerization of the search operation, but also, in the short run, by the semi-automatic operation of trained operators working with scanning machines.<sup>169</sup>

Fingerprints are of course only means to an end, the end being knowledge about particular persons who may be involved in known crime. They will not themselves disclose anything of the person's past or possible future behavior. Consequently, the fingerprints may be seen as a key, and currently the principal key, for gaining entry to a set of facts recorded about the person whose prints are indexed. At the present time the F.B.I. fingerprint file contains individual records of convictions and, in a majority of cases, the disposition made in those convictions. The principal drawback from the police's point of view has been that the search must be done manually and takes on the average about two weeks. Of course the other side of the coin is that this kind of structural inefficiency provides a kind of protection against unwarranted invasions of personal privacy. The proposal that the Commission makes will neces-

---

<sup>168</sup> One notable illustration of the exceptional use of modern technology has recently arisen in California: the use of an electronic oscillographic "voice print" to identify a criminal.

<sup>169</sup> THE CHALLENGE OF CRIME 255.

sitate careful screening of requests for information and great caution in its use, because with computerization the ease of using the files will be greatly increased. What the Commission recommends is that a national law enforcement directory be established that records all arrests for serious crimes, the disposition made in each case of arrest, and subsequent contacts with criminal law agencies. There should be state directories for less serious offenses. If both sets were even semi-automated in storage and retrieval, the police could greatly expand their potential for apprehension and courts could make better informed sentencing decisions. If entry into this directory could be obtained by more than one device—that of fingerprints might yet be supplemented by name, personal appearance, or modus operandi of offense—its usefulness would of course be even greater. With automation of storage and retrieval, this might become quite feasible at little additional cost.<sup>170</sup>

Police effectiveness in clearing more crimes by arrest and prosecution may be enhanced in equally substantial ways by “streamlining” the penal code under which the police operate, as well as by improving their operations. The suggestion has already been made that certain offenses which occupy enforcement time out of all proportion to the degree of public disapprobation might best be left out of the penal code altogether, such as drunkenness and gambling. Even if some other social agency should have to assume some responsibilities in connection with these modifications, the increased specialization of the police on the crimes that pose a greater threat to the well-being of others might more than offset the costs incurred by other agencies through greater police efficiency and total effectiveness in the apprehension process.

If such efforts do produce higher clearance rates, this will of course generate new problems for the other functional components of the system—the courts and corrections. An already crowded criminal court calendar and an already overloaded probation and parole system will have to cope with unknown new numbers. It is important for this reason alone to focus some attention on the problem of overload in these other components. Enough has already been said to indicate the dimensions of the problem in corrections. We shall turn now to the courts.

---

<sup>170</sup> The Commission was quick to point out that such a directory should not only be guarded confidentially but also should have limited life, so as not to become an albatross around the individual's neck. “Earlier purging—either destroying the record or putting it in a secure file to which only the most serious crimes would warrant access—would not only increase efficiency but reduce the stigma of a stale arrest.” *Id.* at 269.

Actually there is probably an additional reason, perhaps equally valid, for analyzing the principal defect in the courts' operations. It is that not only does delay adversely effect the individual's perspective of justice and not only is the habit of keeping people waiting (the accused as well as witnesses, attorneys, policemen, etc.) expensive; more importantly, it could quite conceivably have detrimental effects on the effectiveness of the whole system in terms of the goal of deterrence. Seen as a form of communications between the system and the general public, particularly potential violators, the syndrome of delay tells these audiences in effect that crime and its participants are not really urgent public business, that not much store is set by it in practical terms however much well meaning judges may huff and puff from the bench when the accused finally comes before it. The English courts have long prided themselves on the practice of providing sure and swift apprehension and trial as one, if not the most effective, way to communicate to its citizenry that the system should really be taken seriously. Whether or not the individual is convicted, regardless of the sentence he receives (whether imprisonment for a short or long period or probation), the most important messages to the individual about society's disapprobation of his conduct will be conveyed to him in the first weeks of apprehension, charging and trial with efficient, deliberate progress throughout. This of course is a hypothesis that would be difficult to validate empirically or through controlled experiments, but so far as I know, the effort has not been made to determine what effect on local rates of crime a much improved apprehension and trial processing could have.

The theory does seem to have some impressionistic evidence to support it. For instance, the longer the periods of time in each step of the arrest, preliminary hearing, indictment, arraignment, and going to trial, the greater the likelihood of the individual becoming a kind of "drop-out" somewhat along the line. The slippage in the system, seen in the section on clearance versus charging rates, is quite large in terms of aggregate numbers. Who knows but what it is not even larger in terms of the lost opportunities to uphold the system's most important deterrent role. The reasons for this slippage are many, but among the most important are probably the possibility that the complaining witnesses may lose some of their sense of outrage and consequently relieve the pressure on the prosecuting attorney, who has so many other cases to handle anyway; the "fading" of evidence as by witnesses disappearing, dying or moving away; and the decision of the

prosecuting attorney not to charge and merely harass the individual arrested for minor offenses. Whatever the reasons, and they might vary in importance from one locality to another, the dilution of the system's impact is evident. How much more effective it could be with smaller amounts of dilution is a question that needs studying. More immediately, conceding that the theory has some possible validity, what needs to be precisely determined is where, at what point in the system, the larger delays occur. When that is known, appropriate remedial changes can be tried experimentally. This is of course difficult when the experiment must take place within the operating institution itself, for there is a risk of disruption that will prejudice the rights of the individual and undermine the public institution as well. It is with this consideration in mind that the Commission undertook through its Task Force on Science and Technology to study a given court system (in this case that of Washington, D.C.) in detail in terms of processing serious (felony) cases throughout, then to analyze the data accumulated to see first whether delay occurred (against the model timetable discussed in a previous section) and to identify when and where it occurs, then finally by computer simulation to study modifications of the system. The study revealed that delay did in fact occur, and it was almost as long in the cases of those who pleaded guilty or whose cases were ultimately dismissed by the court as it was in the case of persons who went to trial and were convicted.<sup>171</sup> Having identified the chief bottleneck at the indictment stage, the Task Force simulated the same case load but added the presence of a second grand jury sitting part of the time and ran these on the computer; the result was a reduction from a median time of six weeks to two weeks between initial appearance and return of the indictment.<sup>172</sup>

This modest research project, albeit one with inestimable potential for effectuating structural reform in the system, serves to illustrate one

---

<sup>171</sup> The model time-table recommends a total of four months in the system from initial appearance before a magistrate and final disposition short of an appeal, with a maximum of fourteen days from initial appearance to charging. In one half the felony cases studied, at least one month passed between initial appearance and charging by grand jury indictment. The main cause of delay was not the varied motions filed by the defense in advance of trial but the charging step, waiting for the indictment. *THE CHALLENGE OF CRIME* 258.

<sup>172</sup> This seventy per cent reduction could be achieved with an estimated outlay of fifty thousand dollars in additional support services for the second grand jury. Savings associated with such things as less time of valuable staff wasted and so on were not estimated, *Id.*

of three cardinal points of emphasis in the Commission's report:<sup>173</sup> that research is and must be the primary instrument for reform to better serve the goals of the system, to better prevent and control crime and its participants. This is not to say that expenditures on criminal law systems as a whole are not substantial. As previously noted, the United States spends more than four billions of dollars annually on the system. The striking point, however, is that unlike other costly public policy systems, the criminal law has a negligible research budget.<sup>174</sup> Some of the many opportunities for meaningful research have been touched upon in almost every one of the preceding sections and will not be repeated here.<sup>175</sup> One remaining consideration is *who* should do the required research? It perhaps goes without saying that no one agency or institution could or should have sole responsibility for such tremendous research tasks. On the one hand there is an indisputable need for research at the operating levels of the system—the courts, the police, the prisons and probation—which in the first instance should be carried on by research cells within major component segments (probably administered at a level no higher than the state). On the other hand, there is

---

<sup>173</sup> While many of the Commission's findings and recommendations in policy changes can only be effectively implemented at state and local levels, since that is where most of the criminal law system is controlled, it nevertheless proposed a fairly comprehensive program of federal support and collaboration to give local and state agencies "an opportunity to gain on crime rather than barely stay abreast of it, by making funds, research, and technical assistance available and thereby encouraging changes that in time may make criminal administration more effective and more fair." *THE CHALLENGE OF CRIME* 284. Specifically the Commission recommended federal support for these eight major needs: (1) state and local planning; (2) education and training of criminal justice personnel; (3) surveys and advisory services concerning organization and operation of criminal justice agencies; (4) development of coordinated national information systems; (5) development of a limited number of demonstration programs in agencies of justice; (6) scientific and technological research and development; (7) institute for research and training personnel; (8) grants-in-aid for operational innovations. *THE CHALLENGE OF CRIME* 285.

<sup>174</sup> The Defense Department spends fifteen per cent of its vast annual budget on research and regards it as a high priority item in that budget.

<sup>175</sup> The Commission offered this summary:

There is no activity, technique, program, or administrative structure in the criminal justice system that is so perfect it does not need to be systematically scrutinized, evaluated, and experimented with. Police patrol and police investigation, personnel structures, communications systems and information systems, community relations programs and internal investigation programs; court business methods and court organization, plea bargaining and ways of providing defense counsel, the selection of prosecutors and the training of judges; prison industry programs and prison design, half-way houses and juvenile training schools, parole techniques are a few of the hundreds of subjects that should be studied.

*THE CHALLENGE OF CRIME* 274.

a commensurately large need for independent research carried on at an appropriate administrative distance from the operating units of the system. In the past, most of this independent research has been conducted by university personnel. The principal drawback, noted by the Commission, in university centered work is that it tends to take second place to the pedagogical needs of the institution. Consequently, what seems to be indicated is the establishment of several regionally oriented specialized criminal research institutes which could work in collaboration with universities, but not under their supervision, with financial support from state and central funds, but not under their administrative control.<sup>176</sup> At the apex of this research structure might be a national foundation or institution for criminal research, working as an agency independent of direct control of existing governmental departments although with considerable interest in such existing organizations as the F.B.I. and the like.

The other cardinal points of the Commission's recommendatory function relate to personnel staffing of the system and policy *planning*—at various levels of government—for research and action contemplated to make the whole system more effective in all its major goals. The importance of more personnel for every functional component has been implicit in most of the foregoing sections and will not be elaborated here.<sup>177</sup> Of course a great deal can be done at the central level, but crime varies in its intensity and peculiar manifestations from state to

---

<sup>176</sup> The second handicap of most traditional research in the universities is that despite the great potential for interdisciplinary collaboration, departmental lines are drawn and maintained rather rigidly. Law teachers do theirs, sociologists theirs, and so forth with little systematic effort to cross the lines. And the administrative organism of the universities is such that there are currently few inducements to greater collaboration. Individual research has often produced significant contributions to our learning and will continue to be a major source of new data and new ideas, but there are large areas where it is inadequate. . . . [T]o develop a comprehensive plan for combating organized crime, for example, it would be helpful to bring together economists, sociologists, and lawyers.

THE CHALLENGE OF CRIME 275. An example of the kind of institute envisioned is the one located at the University of Chicago but which apparently has status independent of any teaching department. It is entitled the Center for Studies in Criminal Justice and receives substantial support from private foundations.

<sup>177</sup> What is not often appreciated, however, is that the skills and perhaps attitudes of existing personnel can be improved with deliberate educational, goal-oriented programs. Some of those suggested by the Commission for greater intensification are graduate training in law and business management for police supervisory personnel; special programs to train judges, prosecutors, and defense counsel for indigent persons involved in the criminal process; orientation in correction and non-criminal dispositions for prosecutors and judges; training custodial personnel for rehabilitative roles. THE CHALLENGE OF CRIME 285-86.

state. In other words, in a very large respect crime must be assessed at state and local levels and responses to meet it must be partially planned at those levels, too.<sup>178</sup> Quite obviously, regardless of some divisions of labor between various planning authorities there will be a strong need to coordinate these planning efforts—between local and state groups on the one hand and state groups and the central planning organization on the other. The clear implication of a strong investment in the idea of comprehensive planning for the challenge of crime, in political terms, is that existing institutions have not proved adequate to the tasks posed by crime in the modern urban context.<sup>179</sup> For this reason any serious effort to create new institutions must be accompanied by a willingness to invest the new institutions with enough power and prestige to carry through on the promise of greater effectiveness.<sup>180</sup>

What specifically would such boards do? The first thing would be to gather and analyze facts: statistics about crime and the costs and case loads of the criminal justice system; knowledge about the programs and procedures being used in the board's own jurisdiction and about those that have proved successful elsewhere; data about the social conditions that appear to be linked with crime; and information about potentially helpful individuals and organizations in the community.<sup>181</sup>

On the basis of the facts it gathers the planning body will be able to appraise objectively and frankly the needs of its State or city and the resources that are available for meeting those needs. It would ask, for example, whether in its jurisdiction police training is adequate;

---

<sup>178</sup> The problems of the police and, to a certain extent, of the jails and lower courts are typically city problems. Welfare, education, housing, fire prevention, recreation, sanitation, urban renewal, and a multitude of other functions that are closely connected with crime and criminal justice are also the responsibility of cities.

*Id.* at 280.

<sup>179</sup> Even in the slow and haphazard development of political and legal institutions in the West, the growth of a conscious set of policies and institutions to deal with crime and criminal law was even slower and less orderly. It should be recalled in this connection that Roman law and the early common law did not distinguish very carefully between what we have come to regard as public and private wrongs, but lumped most together under *delicts*. And until quite late in England's political maturity, private prosecutions were commonplace; the office of the Director of Public Prosecutions was not statutorily established until the nineteenth century. And the rise of a professional police in England and the United States is only a century and a quarter old.

<sup>180</sup> This in turn probably means that the planning boards cannot be composed merely of technical experts (although it is of course essential to have various professions like law and social work, as well as statisticians, city planners, penologists represented), but will have also to include prominent members of partisan leadership as well.

<sup>181</sup> THE CHALLENGE OF CRIME 281.

whether the lower and juvenile courts are failing in any of the ways cited by the Commission; whether the correctional system is beginning to make fundamental improvements of the sort the Commission has found are widely needed.<sup>182</sup>

There is an abiding localism in all that pervades the American approach to social problems. It remains to be seen, however, whether the necessary political adaptations can be made so that many of these ideas may be given a decent chance.<sup>183</sup> It is not so much that drastic institutional changes are needed in the political organization of our society to achieve better levels of success in meeting the goals of the criminal law system; rather it is a question of how universal the necessary public concern and consequent support can become throughout society to make a coordinated, research-based, planned, and sustained attack on far-reaching, interrelated, complex manifestations of crime in a free and increasingly mobile society.

Whether or not our society consciously increases the level of activity designed to meet the challenge of crime, the need for careful assessment of the system by lawyers will remain a critical one. The sheer volume of individuals being processed by the existing structure suggests that this is so. Because of the press of numbers throughout the system, it may already be that the principal functional components (*viz.*, police-

---

<sup>182</sup> *Id.*

<sup>183</sup> It would appear that Congress intended to go a long way toward supporting the Commission's call for better planning and more coordinated research efforts in establishing a Law Enforcement Assistance Administration and within it a National Institute of Law Enforcement and Criminal Justice. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. I (June 19, 1968). The key provisions dealing with grants to state and local agencies are conditioned upon states drafting a comprehensive plan for the improvement of law enforcement throughout the state, including primarily action and training projects as well as facilities and equipment procurement. The Institute on the other hand is authorized to carry out research, evaluation, and information dissemination projects itself and to make grants to other agencies (public and private) for the same general purpose. Both the Administration and the Institute are placed within the Department of Justice, however, and at least in this respect the legislation falls short of the President's Commission on Law Enforcement and the Administration of Justice recommendations that a national center for evaluation of criminal law's efforts to control crime and research related to this effort be established, *independent* of operating agencies. Nevertheless Title I is a giant step forward and could conceivably make substantial progress possible on many of the fronts canvassed by this article. Over 100 million dollars were appropriated for carrying out the purposes of Title I for the fiscal years ending in June 1968 and 1969, and 300 million dollars for fiscal year 1970. Significantly about twenty million dollars were earmarked in the first of these two periods for the research, evaluation, and dissemination functions of the National Institute of Law Enforcement and Criminal Justice.



prosecution, courts, and corrections) are tending to accept a shared accommodation, namely to test their own effectiveness in terms of mere numbers processed. If this is so, it suggests the routinization of much that was intended to be thoughtful and deliberate. It suggests a shift from the adversary process, which of course has occupied the high ground only in the judicial component, even in classical theory, to a more completely administrative process.

Lawyers are traditionally most concerned with what happens in the courts, but they are becoming increasingly aware of opportunities to render professional services in the other components as well. And by his training and inclination the lawyer is the champion of the individual's liberties and dignity. It is the lawyer, therefore, who more than any other professional concerned may view with alarm the shift away from the judicially-centered adversary process to the more informal administrative way of handling the large numbers of inputs into and out of the criminal law system. And while lawyers do not ignore the social problem of crime and enforcement of law, they do insist first on a rigorous shield for the individual—even in the face of rising crime rates and indications that the traditional ways of handling the accused and the offender may be too slow or too cumbersome, as currently structured, to keep abreast of the tide. And it seems fair to say that history suggests that essential human freedoms are effectively guaranteed in no other way; that is, lawyers in the common law tradition tend to reject the thesis that in the short run society must first be made safe before liberties can be extended to individuals who otherwise might abuse them to the detriment of social well-being. It is not simply a matter of honoring the Constitution for its own sake, but for the general health of the body politic as well. As Mr. Justice Clark once observed in the course of a landmark judgment in the field of criminal procedure: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."<sup>184</sup>

Conceding all this—indeed the attitude is the profession's most honorable badge of service to society—still the risk seems not so much one of succumbing to the tyranny of malicious governors in the executive or legislative branches, but rather one of having the whole process become the province of well-meaning but harried, hurried administrators. Having a truly adversary process was never cheap, but the price was felt to be worth the dignity it gave to the individual and the safeguards

---

<sup>184</sup> *Mapp v. Ohio*, 347 U.S. 643, 659 (1961).

it provided against a sovereign not yet tamed by parliamentary democracy. Today it is costlier still, not in direct payments alone, but in such intangibles as delay and its accompanying frustrations, and in the wilting of confidence these breed. The point is not whether a greatly expanded adversary system could be afforded even by a country as wealthy as the United States. It could be, but the point is that in a great degree the shift is already well underway. The need is that this be consciously recognized and that the essentials of the list of fundamental rights, which our society holds aloft, are grafted into this newer, more flexible process. In other words, it is by no means clear that an administrative process is in itself iniquitous or unfair. If we are overwhelmed by numbers, both the public *and* the individual will suffer; it will hardly matter whether the system be called an adversary one built for an earlier, more rural, non-technocratic age or whether it be called an administrative one that was designed too late in the day to be really effective and fair. The changes are already implicit in most of the critical issues being debated in the United States today. The four indices for measuring the fairness of the procedure of a criminal law system which were discussed in a preceding section, it is hoped, may be of some utility to scholars who will undertake to gauge the force of these pressures in the future. The common task that is set for men of law in our society remains a continuing, perhaps unfinishable one—to assay the fairness to the individual of all that is done in the name of society to make it safer from the ravages of crime.