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THE EMERGING "RIGHT TO TREATMENT"— ELABORATING THE PROCESSES OF DECISION IN SANCTIONING SYSTEMS OF THE CRIMINAL LAW

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Professor Penegar discusses the changing approaches in our criminal law sanctioning system, pointing out that emphasis in treatment of offenders has shifted from deterrence and punishment to rehabilitation. He notes the lack of judicial evaluation of present criminal law sanctions and engages in a detailed analysis of existing trends of decision in terms of overriding policies, strategies, and outcomes or effects within selected phases of the sanctioning system. In his Summary Appraisal, Professor Penegar discusses four major principles supporting social goals in light of the trends in the sanctioning process. He concludes that the major social goals of the system, protection of society and promotion of human dignity, are not being supported adequately by the trends of decision, suggesting that more judicial involvement is needed for a continuing appraisal of the authoritative decisions within the system.

INTRODUCTION

> The history of penal reform thus becomes the history of the diminution of gratuitous suffering.[1]

ONE of the most thoughtful observers of developments in penology has thus recently characterized the authoritative efforts to make our society's criminal law sanctions more rational. While we may not be certain of our path, we are a good deal less sure of the efficacy and decency of prevailing practices in the past. We have not lost faith in deterrence, yet we espouse more willingness to rehabilitate. There might be, however, a more naive faith in techniques of rehabilition than we have recently had in those of deterrence. And therein lies, in Professor Morris' view, a certain threat to individual "justice," for more power may have been given to the "treaters," or those whose guiding star is rehabilitation, than we have so far been willing to bestow on the "punishers."[2]

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[1] Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 628 (1966).

[2] *Id.* at 637-44.

One of the great shortcomings of our age, of course, is that precious little effort has gone into evaluating the impact of our criminal law sanctions, whether in individualistic or general societal terms.[3] To what extent can the central decision makers of our criminal law processes, the courts, assist in the process of evaluation? This is a question which deserves some discussion in the context of the continuing concern about other critical features of the criminal law. I am referring here, of course, to the contemporary evolution of a kind of procedural code fashioned by the courts just at a time when we are gaining our most significant insights into the sanctioning phase of the criminal law— how police function; who gets arrested for what, by whom, under what conditions; who gets charged and tried, for what offense, etc.[4] Traditionally the courts have shied away from very substantial involvement in the sanctioning or application phase of the criminal law process. This is not to say that there are not developments, particularly of late, in the direction of importing more and more of the due process model into the *procedures* by which liberty is taken, restored, retaken — as in the parole and parole revocation practices of administrators.[5] However, by and large the courts have been accustomed to think that the content of the sanctioning institution is beyond their ken or legitimate inquiry.[6]

It is a principal task of this article to explore whatever trend of decision may be discernable away from or in support of this traditional indifference. In the process of describing such a trend we may discover that common goals have not been established across the different arenas of power: the courts on the one hand and the administrators of our penal or quasi-penal institutions on the other. If that be so, we shall wish to consider what range of policies is sought to be effectuated in these separate arenas, as well as the kind of strategies actually applied with respect to their impact on human values and their implications regarding over-riding policies supported by our legal system. Whether the abstraction employed in particular contexts

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[3] For this we should all be in Professor Morris' debt for his provocative call for research — research within ethical limits, yet tested rigorously by empirical methods. The humanitarianism which has thus far sparked many of the ameliorative policies in effect now provides, he argues, an insufficient framework for such research.

[4] See, *e.g.*, GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929 (1965).

[5] See, *e.g.*, Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946); Kadish, *The Advocate and the Expert: Role of Counsel in the Peno-Correctional Process,* 45 MINN. L. REV. 803 (1961).

[6] See, *e.g.*, Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963) (numerous cases collected there, particularly at 508 n.12).

is "punishment" or "treatment," the effort will be to discover to what extent meaningful content has been, is being, or will be poured into it by major participants or decision-makers in the processes relevant to sanctioning.

In keeping with the fashion of the times, which suggests that various "models" or "processes" are appropriate constructs for analysis, we will at the outset concern ourselves with several *systems* recognizable in the sanctioning phase of that body of policy, institutions, prescriptions and strategies roughly called the criminal law. Just as there are said to be a crime control model and a due process model of the criminal law,[7] there are, or seem to be, several systems cutting across or partaking of these models which do, whether or not explicity designed, treat certain types of social situations in predictable fashion — in the sanctioning phase of the over-all process. The term "process" refers to that dynamic continuum which consists of someone *invoking,* another *prescribing,* yet another *applying,* others *reviewing, recommending, terminating,* and gathering *intelligence* about conditions, effects and outcomes — all in terms of basic human values, policies, and detailed expression of the policies in partciular modes of strategy.[8]

I. Selected Sanctioning Systems

A. *The Juvenile System*

1. Policies

The prescriptive background of the system dealing with juvenile delinquency may be summarized by the doctrinal phrase "parens patriae." This is but a shorthand expression for society's expressed preference to deal with young people in a way which in theory does not carry the stigma of criminal proceedings, but which nevertheless leads to imposition of restraints and remedial strategies designed to protect society and enhance the individual's likelihood of self-fulfillment. This preference, embodied in statutes of the several states and those of the federal government for about sixty years, continues to receive the highest authoritative support. Thus, in the recent decision of the Supreme Court, *Kent v. United States,*[9] this parenthetical comment is found:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than

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[7] Packer, *Two Models of the Criminal Process,* 113 U. Pa. L. Rev. 1 (1964).

[8] For general orientation see Lasswell & Kaplan, Power and Society (1950); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 Yale L.J. 203 (1943), in McDougal & Associates, Studies in World Public Order 42 (1960). For a more specialized explication see Arens & Lasswell, *Toward a General Theory of Sanctions,* 49 Iowa L. Rev. 233 (1964).

[9] 383 U.S. 541 (1966). See Editor's Note, page 224, *infra.*

> in the *corpus juris*. . . . The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.[10]

An important feature of the system is the identity of those who, in various arenas of authority, apply sanctions in the light of society's objectives. The principal participants include the juvenile court judge,[11] a probation officer or other officer responsible to the judge, state or county welfare officers, city or county detention home superintendents, and foster parents (private individuals who agree to take custody of the child). The qualifications for their posts may be established by statute or regulation, but it is not uncommon to see none of the principals possessed of training specialized to their tasks. Of course, the child[12] who is the subject of the sanctioning process will be interacting with these decision-makers as well as with witnesses who may include his parents or other relatives.

One critically distinguishing characteristic here has traditionally been the presumed irrelevance of an attorney. Accordingly, it is thought that the decision in *Kent v. United States* will have profound impact on the juvenile system, since that decision suggests the need for and desirability of introducing the skills of the lawyer into the process in a pervasive way, recognizing that the process does impose restraints or value deprivations upon the individual.

The situations evoking the sanctioning process include a broad range and variety of events which are disturbing to some elements or individuals in society. Thus, a young person may be sanctioned in this system for that which, in the general or larger system of the criminal law, would be called theft offenses, crimes of violence, crimes involving the so-called public welfare — or for other less generally disturbing events not at all subject to sanctioning under the general criminal law, such as school truancy or disobedience of parents.[13] The prescriptive language which allows sanctioning typically describes these latter instances in terms of "delinquency," although many statutes also include parental neglect as a basic situation sufficient to

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[10] *Id.* at 554.

[11] He is often not a judge at all but some other state functionary, such as the Clerk of Court of general jurisdiction. One recent survey shows that of about 1200 "full-time" juvenile court judges, 72% spent only one-fourth or less of their official time dealing with juvenile matters. McCune & Skoler, *Juvenile Court Judges in the United States: Part I: A National Profile,* in 11 CRIME AND DELINQUENCY 121, 126 (1965). See also Walther & McCune, *Juvenile Court Judges in the United States: Part II: Working Styles and Characteristics,* in 11 CRIME AND DELINQUENCY 384 (1965).

[12] The chief identifying characteristic of the subject will be his or her age — typically fourteen to eighteen years of age, although in some states it is lower.

[13] See generally Tappan & Nicolle, *Juvenile Delinquents and Their Treatment,* 339 Annals 157, 161 (1962).

invoke the juvenile court's power and hence, the system's application.[14] "Currently, about one-fourth of all cases handled by the juvenile courts are youth offenses that have no parallel in adult crime: curfew violation, running away from home, ungovernability, and related types of activity."[15]

In broadest formulation the fundamental policies to be pursued by the system of juvenile courts are (1) the substitution of specialized tribunals for penal ones from the general system, (2) the substitution of state responsibility for a child's welfare when his natural parents have failed in their responsibility, and (3) the implementation of remedial restraints — all in the best interest of the child's wholesome development and the protection of society currently as well as in the future. To a great extent the creation of this specialized system in the last sixty years is an explicit recognition of the failures, or at least the "slippage," in other social institutions like the family and home, schools, and responsible peer groups to achieve acceptable rates of maturation in the most susceptible individuals in our society.

The principal goal of the system is restorative, that is, to conserve the human resources of our society both for the individual good as well as the common good. At the same time the system, consistently with other goals of authoritative decision, has sought to accommodate the basic desire of individual families to rear their children according to their own best lights and not according to some social blue print. Consequently the system has to accord a wide margin of error to parents before intervening for "the best interests of society . . . and their own good."[16]

Among the range of human values sought to be enforced and supported, several particular values may be identified as receiving primary emphasis in this system: (1) the actual physical well-being of the child, including his nutrition and medical needs, housing and clothing; (2) the enlightenment value inherent in schooling; (3) rectitude and affection; and (4) respect.

What base values or resources are at the disposal of the system to achieve its goals? Obviously, the physical arrest and detention power of the state vested in its various agents directly supports the

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[14] See SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS 33-34 (Children's Bureau of HEW 1966). Where the disturbing event and the central point here is that these may be events significantly less disturbing than traditional crimes — is a serious crime such as a capital felony many states give the criminal courts concurrent jurisdiction. This procedure is definitely viewed by some commentators as antithetical to the fundamental philosophy of the system. *Id.* at 34.

[15] WHEELER, COTTRELL & ROMASCO, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 25 (Russell Sage Foundation 1966).

[16] Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913). See also People v. Gutierrez, 47 Cal. App. 128, 190 Pac. 200 (1920). *But see* Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

system. More important, from the standpoint of the explicit goals of the system, would seem to be the aggregate knowledge and skill of individuals supervising the system's principal institutions — the child welfare case worker, the probation officer, the children's home superintendent, and sometimes the judge and lawyer participating at the more formal parts of the sanctioning phase. Closely allied to these values are those of rectitude, respect and affection centering about the individuals and institutions making up the system. The child custodian, case worker or policeman who interacts effectively with the child in situations of varying intensity is thought to be successful not only because he is formally clothed with the authority of the state, but also because he provides a dependable source of concern for the child as an individual and because he possesses sufficient personal security to provide a realizable model or pattern for responsible behavior.[17]

To the extent that there is inter-agency and inter-professional cooperation along lines clearly designed to effectuate major goals of the system there is an added element of strength in the base values of the system.[18] Mention should be made of the distinct value of continuing research by the related behavioral sciences into conditions of deviancy and effective treatment methods as a base of support for the juvenile sanctioning system.[19] Crucially related to all these base values is the wealth value: specifically, how much the state is willing to commit to the whole range of the system's needs, including attractive salary levels for professionals in the field, building of new institutions, and subsidies to foster parents, as well as fundamental research and modest experimentation.

2. Strategies

The particular strategies designed to achieve the goals of conserving the child include a wide range of modalities, from the judge's lecture to the truant or disobedient child, to immediate institutionalization of the child with a persistent pattern of aggressive behavoir. Between these extremes fall the strategies of placing a child into the custody of parents or foster homes, or of active supervision by a probation officer or social worker, the choice depending on a variety

[17] Yet the increased personal involvement of decision-makers working toward exceedingly broad goals, raises the real danger that intervention into the life of a child may be undertaken in many marginal cases, thus risking distinctly negative results in over-all value outcomes. WHEELER, COTTRELL & ROMASCO, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 26 (Russell Sage Foundation 1966).

[18] See generally Sheridan, *The Court and the Community,* in STANDARDS FOR JUVENILE AND FAMILY COURTS 124 (Children's Bureau of HEW 1966).

[19] See, *e.g.,* Gibbins, Psychiatric Aspects of Delinquency in TRENDS IN JUVENILE DELINQUENCY 14 (World Health Organization 1961).

of factors such as age, degree of past responsibility, and expectations about the juvenile's attitudes and understanding of his motivations.

In theory, the juvenile court system makes a basic distinction between neglect cases on the one hand and delinquent cases on the other. In the former category the customary disposition is supervised treatment at liberty, with the child living at his parents' home or in a foster home.

In the delinquent category the range of potential dispositions is greater. The more typical disposition is not institutionalization, but probation or simply holding the case open. The conditions of probation, when they are officially enunciated, will in large measure depend not only on what the court perceives as the child's particular needs, such as attending school regularly, obeying parents, avoidance of certain companions, or restitution of damages, but also upon what agencies are available to help, such as the citizenship training course used in Boston.[20] Where commitment to a training school or similar institution is the disposition, as is the case in a distinct minority of adjudicated as well as "informal" dispositions, it is generally for the period of minority or until discharged by the institution.[21] The average length of actual detention in the institutions appears to be about ten months.[22]

Even though institutional commitment is used in less than ten per cent of all juvenile cases processed in the system (including the so-called unofficial dispositions handled without a record),[23] some account should be taken of the typical content of institutional treatment. It can be noted that, in general, the institutional programs designed to effect the values of wealth, skill, enlightment, and well-being do not vary significantly from those in the adult criminal law system. Effort is made to continue formal school instruction, usually with classes in the institution; the emphasis is on achieving completion of the primary grades, although some institutions have junior high and high school programs as well.

Vocational training seems to be largely a function of the maintenance program of the institution. Thus, painting, carpentry, and farming are typical, although in some institutions, particularly the federal ones, more resources are put into the program to offer at least a basic introduction to the trade or craft. There are no industrial production programs here like those of the adult prison. Heavy

[20] See Reinemann, *Probation and the Juvenile Delinquent,* in THE PROBLEM OF JUVENILE DELINQUENCY 610 (Sheldon Glueck ed. 1959).

[21] Tappan & Nicolle, *supra* note 13, at 169.

[22] See U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, STATISTICS ON PUBLIC INSTITUTIONS FOR DELINQUENT CHILDREN — 1956-57 (1958).

[23] See U.N., COMPARATIVE SURVEY OF JUVENILE DELINQUENCY, PART I, NORTH AMERICA, Table V, at 56 (1958); U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, CHILDREN'S BUREAU, JUVENILE COURT STATISTICS 1964 11 (1965).

emphasis, not surprisingly, is placed upon sports and recreation programs in most institutions.[24]

Program content more specifically related to the values of rectitude, respect, and affection, while not as well developed as the more traditional educational programs and certainly not as widely distributed throughout these institutions, is receiving increasing emphasis from professionals. Effort is made to involve the child in self-expression, group participation (including the setting of goals and supervision of conduct for the group), and community-self orientation. This is not to say that more coercive strategies are not still a feature of many institutional programs.[25] But there does appear to be a slight trend in the direction of relatively more persuasive modalities, stressing the individual's interaction with a definable group.[26] Historically this trend has some antecedents, if only dimly perceived, in the use of cottages in the training school. However, like other features of the system, this one has undergone considerable perversion. Not only are the groups in such housing today ineffectively large, but the groupings are by age and size and not on other more relevant criteria. Security and economy are often the only realizable goals.[27]

According to one of the few existent surveys on the extent of use of group therapy approaches within juvenile institutions of correction, the type most often reported was defined as "group counseling." Reliance was primarily upon nonprofessional staff, only about a third

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[24] See generally U.N., COMPARATIVE SURVEY OF JUVENILE DELINQUENCY, *op. cit. supra* note 23, at 72-76. Some idea of the chronic shortage of staff for such institutions can be seen in these ratios: in 1956 the average teacher to pupil ratio was 1 to 24; of recreation supervisor to child, 1 to 133. The Children's Bureau has recommended an outside ratio in the teacher category of 1 to 15, since the training school teacher is analogous to the teacher of classes of maladjusted pupils in community schools. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, INSTITUTIONS SERVING DELINQUENCY CHILDREN: GUIDES AND GOALS 66-67 (1957).

[25] Although there is apparently no systematic empirical data to suggest the incidence of corporal discipline, impressionistic accounts are available which suggest extraordinarily punitive practices are used. See, *e.g.*, DEUTSCH, OUR REJECTED CHILDREN (1950). Such measures as shaving the heads of runaways, the "fire hose water cure," marching back and forth for hours are some of the more benign ones recounted in TEETERS & REINEMANN, THE CHALLENGE OF DELINQUENCY 461-62 (1950).

[26] The trend is seen in the increased willingness to experiment with therapeutic models both within and without the institution. See *e.g.*, Close, *California Camps for Delinquents*, THE PROBLEM OF JUVENILE DELINQUENCY 646 (Sheldon Glueck ed. 1959); Blackley, *Treatment Practices in Juvenile Court*, 10 CLEV.-MAR. L. REV. 533 (1961); U.N., COMPARATIVE SURVEY OF JUVENILE DELINQUENCY, *op. cit. supra* note 23, at 50-52. The emphasis in New York's new state-wide specialized body for youth deviance is on preventive techniques in the community as opposed to post-event strategies. See HARTUNG, CRIME LAW AND SOCIETY 244-63 (1965) (chapter on juvenile court, prediction and the rehabilitative ideal). Since 1961 there has been federal support for a variety of such state efforts. Juvenile Delinquency and Youth Offenses Control Act of 1961, 75 Stat. 572 (1961). See Frankel & Kravitz, *Federal Program for Delinquency and Control*, in NCCD, CURRENT PROJECTS IN THE PREVENTION, CONTROL AND TREATMENT OF CRIME AND DELINQUENCY 14 (1962-63).

[27] U.N., COMPARATIVE SURVEY OF JUVENILE DELINQUENCY, *op. cit. supra* note 23, at 69.

of the reporting institutions using psychiatrists, psychologists or social workers.[28] This approach, although some professionals set large goals for it ("assisting clients in the perception and acceptance of social reality, providing positive group experiences . . . and enhancing self-esteem"), is primarily a kind of periodic bull session hardly related to the myriad of events, feelings, and persons otherwise encountered during the days or weeks between sessions.[29]

Perhaps the next most significant strategies in terms of their wide use in correctional institutions for juveniles are the group psychotherapy and group social work approaches. Both of these bear the strong imprint of the two professions most directly involved, psychiatry (especially of the psychoanalytic bent) and social work. In the former approach, emphasis is on getting the patient to develop personal insight and to resolve conflicts. The role of the other members of the group is supportive only. In the group social work approach the emphasis, traditionally, has been on changing the conditions and patterns of living for the client by limiting size and membership of the cottage group and the quality of the surroundings, and by encouraging adoption of vocational training and healthy recreation patterns. Essentially it is a leader-directed model, although a fairly permissive one.[30] Neither approach receives universal support in the current literature. Criticism of both is made because neither makes explicit attempts to mobilize peer group forces for change, and in both the staff member remains largely out of primary interaction with the group and does not identify with it.[31]

To some extent, perhaps, as an outgrowth of these earlier approaches, but definitely in a spirit of experimentation encouraged by disappointment in other efforts, there is another kind of program now used both within the institution and in the community. This is the guided group interaction concept, so-called because the principal

[28] McCorkle & Elias, *Group Therapy in Correctional Institutions,* 23 Fed. Prob. 57 (June 1959).

[29] Sarri & Vinter, *Group Treatment Strategies in Juvenile Correctional Programs,* 11 CRIME AND DELINQUENCY 326, 332 (1965):

> The difficulty in group counselling is the tendency to seek changes in the attitudes or behavior of the client which have little connection with, or only tangential relevance to, his immediate life situation and his behavior in the community.

[30] See Sarri & Vinter, *supra* note 29, at 335-37; VINTER & JANOWITZ, THE COMPARATIVE STUDY OF JUVENILE INSTITUTIONS: A RESEARCH REPORT (1961).

[31] These views rest of course on the prevailing sociological assumption that youth deviancy is group focused and must be dealt with as such — the subculture notion. See, *e.g.,* Cressey, *Contradictory Theories in Correctional Group Therapy Programs,* 18 Fed. Prob. 20 (June 1954); Grosser, *The Role of Informal Inmate Groups in Change of Values,* 1958 CHILDREN 25; Illing, *Group Psychotherapy and Group Work in Authoritarian Settings,* 48 J. CRIM. L., C. & P.S. 387 (1957). Indeed one team of investigators has discovered that in some instances a group therapy approach may actually increase negative client attitudes toward the desired change goals. VINTER & JANOWITZ, *supra* note 30.

focus is upon a definite peer group in which each member is persuaded to participate both as a target for change and as a precipitator of change in others. The basic theoretical assumption of such a program is not that the youth have distinctly alienated attitudes about how they should behave in society, but rather that they know about the community's norms and are ambivalent about their own patterns with respect to conforming. By allowing its members to vocalize their conflicts in relation to particular problem situations, the group comes to grips with the detailed rationalizations and defenses used to justify behavior, thus turning to constructive use the anxiety produced by the latent ambivalence.[32] Such an approach requires continuing interaction of the group, so that not only the working day but also part of each evening are subject to scrutiny by the group. It is therefore considered a "total environment" approach to re-socialization, whether the particular group is from a probation or a training school population.[33]

Since probation represents the most often used strategy in the juvenile system other than dismissal with warning,[34] it warrants separate comment. The following summary seems succinctly accurate:

> The assumption is that the offender can profit from guidance, counseling, and help provided by a person experienced with human problems. Professional training for probation work has typically been social casework, and hence has had as its intellectual foundation some form of psychiatric or psychoanalytic theory. In actual practice, probation methods have varied from those of psychiatric social work to friendly counseling, to a form of supervision very like surveillance.
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> In most jurisdictions the probation officer is the chief link between the delinquent and the programs established for him. It is the officer who works with and advises the judge, who is in regular contact with the delinquent, who may know the problems he and his family face, and who may work most directly with him in solving them. Despite all the handicaps of probation officers with heavy caseloads and overwork on pre-sentence investigations, probation remains the central core of any court-established program for delinquents.[35]

The content of the probation approach is a function of three variables: the case load of the probation officer, the kinds and number of conditions imposed on the individual, and the availability and accessi-

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[32] See generally MCCORKLE, ELIAS & BIXBY, THE HIGHFIELDS STORY (1958); Sarri & Vinter, *Group Treatment Strategies in Juvenile Correctional Programs,* 11 CRIME AND DELINQUENCY 326, 333-35 (1965).

[33] See also Scarpitti & Stephenson, *The Use of the Small Group in the Rehabilitation of Delinquents,* 30 Fed. Prob. 45 (Sept. 1966), describing the New Jersey Essexfields experiment. For comparable developments on an institutional model in England see Fisher, *Total Institutional Commitment and Treatment: Trends in English Corrections,* 2 ISSUES IN CRIMINOLOGY 61 (1966).

[34] U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, JUVENILE COURT STATISTICS—1964, Table 6, at 11 (1965), shows 49% probation for "judicial" cases and 21.3% for all cases together.

[35] WHEELER, COTTRELL & ROMASCO, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 38 (Russell Sage Foundation 1966).

bility of supportive assistance from other community institutions. In all three respects the current indications are that, with some notable exceptions, genuine program content is all but non-existent.[36] Consequently the community oriented strategies,[37] which involve the juvenile in some small group with its constant interaction of members and professional leader are counted the most promising developments to date.

In this setting the key judicial function is of course the careful consideration of substantial information on the child's social history, intelligence, emotional development, education and self-awareness. Not only the future status of the child until he reaches majority, but also the kind and quality of treatment he will receive depend upon this evaluation, its accuracy, and its relevance to an enlightened judgment about what the child needs at that point.[38] Practical considerations intrude on this exercise of judgment in such substantial ways that the actual range of dispositions made in the cases coming before a juvenile court might be quite narrow indeed, considering the theoretical alternatives. The central point here is that although the competence bestowed on the juvenile system is comprehensive and far-reaching, the actual dispositions may not be commensurate in scope. Since the child's best interest is considered paramount and his condition is a dynamic and not a static one, ideally the various parts of the system (court, social agency, state institution) will remain in continuing interaction. To this end, the court's jurisdiction continues until majority so that orders may be modified in accordance with the child's needs and progress.[39]

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[36] Case loads, for example, range from 50 to 100 cases per officer in nearly 78% of all juvenile cases, with 46.41% of these in the range of from 71 to 100; many probation officers are also responsible for additional adult offenders. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 168-69, fig. 3 (1967) [Hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY.] Actual contact with the delinquent has been characterized in the following terms:

> 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.

Id. at 165. Given these conditions it is not difficult to imagine how little time the probation officer has to intercede with school officials, recreation leaders, police authorities, and so on in the child's behalf, or to get the child's family involved in wholesome activities with or for the child.

[37] See notes 32, 33 *supra* and accompanying text.

[38] "Court orders as a rule represent major treatment decisions. . . . The court in its disposition should determine the status required to accomplish the necessary treatment." SHERIDAN, *supra* note 14, at 12.

[39] One glaring practice that seems antithetical to the stated aims of the system, although it is not in the strictest sense designed to fall into the disposition phase, is the detention of children in common jails awaiting juvenile court action. Even though some if not all state systems provide that it is unlawful to detain children in county jails, it is common knowledge that in less populous areas the practice is quite common. The courts could help remedy this situation by awarding temporary custody to social workers pending adjudication.

The procedures by which the system applies these various strategic sanctions, euphemistically labeled orders of disposition and not judgments or sentences, deserve passing description.[40] The child who is suspected of being neglected or delinquent (or in some statutory schemes dangerous to himself) may be taken into custody without the safeguards of the probable cause requirement of the adult criminal process, detained for varying periods of time without notice of charges, without warning as to silence, counsel, and preliminary hearing.[41] The proceedings are not completely informal, but the rules of evidence are not strictly enforced, nor are there yet generally any requirements for confrontation and cross-examination of witnesses. Juvenile court petitions are often imprecise in raising two basic issues — one of fact as to the conduct or condition alleged, the other of a sound judgment as to an appropriate disposition. This imprecision, the absence of counsel from the hearing, the free-wheeling inquiry into the social background of the child, or the common failure of the court to make explicit findings of fact may obscure the reasoning behind the disposition of many cases.

The *Kent* decision suggests that this relatively laissez-faire atmosphere is due for some tightening-up.[42] The Court's own language is instructive:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he

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[40] This phase of the juvenile system has been the one most frequently and critically commented upon. See, *e.g.,* Beemsterboer, *The Juvenile Court — Benevolence in the Star Chamber,* 50 J. CRIM. L., C. & P.S. 464 (1960).

[41] See, *e.g.,* Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961). See also Edwards v. United States, 330 F.2d 849 (D.C. Cir. 1964). The Supreme Court in Kent v. United States, 383 U.S. 541, 545 n.3 (1966), expressly declined to express any view "as to the legality of these practices."

[42] The Court has in this case begun at the critical frontier between the juvenile court system and the adult criminal process. Here the juvenile court could waive its otherwise exclusive jurisdiction to the District Court in cases involving felonies where the child is sixteen. But the statute stipulated a "full investigation" of the case before exercising such discretion. Here no hearing was held. The Court held that the petitioner was entitled to an adequate hearing before the waiver order was entered, that counsel (the right to which had been established in a prior Court of Appeals decision) should have access to social records considered by the court, and that the court must give its reasons for waiver.

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Id. at 562.

gets neither the protections accorded to adults nor the solicitous care and regenerative treatments postulated for children.[43]

Whatever the apparent shortcomings of the system in its procedural dimensions when compared with the "due process model" of the general criminal system, it is apparent that the emphasis has been deliberately placed upon the disposition phase, that a good deal of efficiency is expected and desired at the sacrifice of what would be the adult's basic procedural safeguards. Hence, from the perspective of the distinterested observer, the system is to be evaluated primarily in terms of its effects and outcomes, taking the system at face value to be less concerned with *how* those effects are achieved.[44]

3. Outcomes and Effects

The particular outcomes of applied sanctions in the juvenile system can be assessed in the familiar terms of several human values: well-being, rectitude, respect, affection and enlightenment. It is proposed to look at these sanctioning outcomes categorically in these terms.

Well-being. The most immediately observable outcome in many instances is that the child whose family is of small economic means, if he goes to an approved foster home or is committed to a state children's institution, is awarded a more dependable and qualitatively different environment. He will be allowed (indeed required) to get full night's sleep (without interruptions from domestic quarreling and drunken behavior by parents). He will be given, if not a rich diet, one that is quite sufficient for sustenance and growth. His clothing, while perhaps not individualistic, will be adequate; his shelter, warm and basically secure. To the extent that these dispositions to surrogate homes are not employed, it seems doubtful whether the environment is much changed. Although the probation officer may and does frequently insist on such things as regular hours in the home of the child's own family, the supervision of diet, dress and internal arrangement of living quarters is much less the subject of detailed regulation.

Although in an objective sense the new environment may be seen as more "normal" or at least more middle-class and comfortable, subjectively the degree of comfort or contentment the individual will

[43] Kent v. United States, 383 U.S. 541, 555-56 (1966). See Editor's Note, page 224, *infra.*

[44] One must not, however, overlook the obvious possibility that the very ends sought may be lost or only marginally achieved if in the details of the process the child is not recognized as a subject of rights and duties, hence a responsible member of the society interested in his welfare. Thus, the oft-repeated observation that the child may not perceive the solicitous quality of the system because hustled through it, would seem to have cogency. Contrast this with the commonly held understanding of subjects in the general criminal law system that, while they may or may not be convicted, depending on a host of variables, the clear intention of the system is to *punish* the convicted individual.

feel depends not alone on such conditions, but also on his own attitudes about the desirability of such trappings. More specifically, the *sense* of well-being is not so simply regulated; there may be peculiar emotional attachments to certain persons, places, things, and habits which are closely related to the child's outlook on his own life-style.

Rectitude. To the extent that little account is taken of the particular social and psychological background of the child in making an initial disposition, it is difficult to generalize about the impact of the sanction upon him — except to see if he recidivates either as a juvenile or subsequently in the post-adolescent years.

Although there is not a great deal of hard data on which to base evaluative estimates of rates of return to crime and to the system, a few surveys have recently been made in various areas. In the District of Columbia, of all children (under 18) who were released from the Children's Center in 1964 about 50 per cent became involved in a subsequent law violation before their eighteenth birthday.[45] These are of course rather crude figures and do not take account of variations in intensity of parole efforts. Rates of return have in at least one instance been shown to decrease markedly in correspondence to such efforts.[46] Nor, in fairness, do such reports take account of what variables were at work in the institutional phase or what variables in the child or his social situation might have accounted for the trend.[47] However, for the juvenile who has gone to one of the newer group-oriented programs, whether an institutionalized form or one operating totally within the community, the emerging evidence seems to suggest that distinctly lower rates of return to new offenses are to be expected.[48] There are apparently no published reports on the return rates of those juveniles going to pure probation (of the traditional sort), although general estimates of the probation sanction suggest that the rates are quite low comparatively.[49]

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[45] REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 709 (1966).

[46] *Id.* at 709-10.

[47] Recidivism rates for institutions for juveniles . . . can be expected to exceed rates for the adult prisons because probation and other alternatives to confinement are used more liberally for juveniles than for adults. Hence, only the worst risks among juveniles are committed to institutions, whereas prisons for adults receive more diverse risks. A second reason for expecting higher reimprisonment rates for juveniles is simply the consistent statistical evidence that the earlier the age at which an individual is first committed for criminal behavior, the more likely he is to continue in that behavior.

GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 18 (1964).

[48] See Scarpitti & Stephenson, *The Use of the Small Group in the Rehabilitation of Delinquents*, 30 Fed. Prob. 45, 49 (Sept. 1966). Glaser offers this estimate of the California programs: "The first two years' experience indicates that the community-treated offenders commit markedly fewer and less serious offenses than those kept in institutions — in the average case, eight months — before release." GLASER, *op. cit. supra* note 47, at 420.

[49] THE CHALLENGE OF CRIME IN A FREE SOCIETY 166 (1967).

There is need for one explicit qualification at this point. Although abundant literature deals with the etiology of delinquency, with suggested preventive attacks on its conditions, and with recent fruitful experiments, there are few if any systematic efforts to relate specific post-event strategies to particular delinquent "symptoms," and specific events, preferred or deviant, in the post-application phase.[50] It should not be surprising that little work along these lines has been forthcoming, considering the vast range of variables operative. Furthermore, it seems quite likely that if any such research were developed, it would be somewhat vague for the simple reason that explicitly desired outcomes, except in the negative sense of no return to the system, are impossible to state in concrete terms.[51] Particularly in a society where individual freedom is sought to be maximized, some deviancy, or departure from the norm, is not only expected but desired.

Respect. Although not one of the stated goals of the system, it hardly seems arguable that, for any individual who is formally sanctioned, some loss of respect is involved. In any appraisal of post-sanctioning outcomes, therefore, some account should be taken of re-acceptance or re-integration patterns, for expectations about an individual's behavior are probably as closely associated with the way in which other individuals and informal social groups perceive him as with authoritative perceptions of deviancy and personal awareness of one's own past behavior patterns.

A neighborhood may have been the outer limits of the child's contacts, and an abrupt exclusion from it may prove in the short run disastrous to the teenager, particularly in the thirteen to fifteen year range. The issue here for the sanctioning decision-maker is whether to distort the current identifications, hoping for a "wholesome" substitution later (a hope which seems naive in view of the plain reality that the child will shortly return to the neighborhood),

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[50] Some observers are, however, willing to generalize in terms of personality types along a range from least likely to need or benefit from institutionalization to most likely. See, *e.g.,* Gibbins, *supra* note 19.

[51] The lack of relevant intelligence is decried by the President's Commission on Law Enforcement and Administration of Justice, as the following passage illustrates:

> We know much too little about how various actions of the criminal justice system affect the number and types of crimes committed by different classes of offenders. It is necessary to collect data on recidivism (rearrest probabilities, reconviction probabilities, etc.) by type of crime and by offender treatment. It is important to know how recidivism varies with how far a person travels through the criminal processes (discharged on arrest, prosecution dropped, put on probation, paroled, etc.). This information needs to be correlated with age, crime type, and other relevant variables.

THE CHALLENGE OF CRIME IN A FREE SOCIETY 266 (1967). Nor does the Commission despair of researching the potentially unresearchable: "While collecting and processing such a large amount of data is clearly a difficult task, it is well within the capabilities of today's technology and will be considerably aided by the development of a national criminal justice information system." *Ibid.* See also Bittner & Platt, *The Meaning of Punishment,* 2 ISSUES IN CRIMINOLOGY 79, 82 (1966).

or to leave them relatively intact and seek to divert particular activities of either the group or the individual or both in the direction of self-fulfilling activity.

Two other aspects of the total process by which delinquents are sanctioned suggest that labeling the immature person presents formidable problems for his subsequent acceptance in a variety of contexts.[52] One is the relatively frequent use of the so-called unofficial disposition by principal decision makers in the system. The other is the frequently heard suggestion that some remedial steps be taken either to protect the confidentiality of a juvenile court appearance or to "erase" the record once the sanction has been exhausted, or to do both.[53]

Affection. The intimate sharing of feelings between individuals who are most obviously "friends," or more formalized affection in the traditional patterning of "family," can be critical in the child's adequate treatment. These patterns are distinctly interfered with when institutionalization is indicated, although to a degree perhaps less coercively than in adult prisons.[54] On the other hand, it is not uncommon for formal relationships (for example, between an aggressive teenager and an equally aggressive parent) to require deliberate manipulation as by putting some time and distance between the child and these relatives, or associates. Formerly it could be said that the child case worker may have been all too ready to interrupt these "unwholesome" relations, but increasingly it is being recognized that, however quarrelsome a parent-child relationship might have been, or however "misdirected" the advice of peers or older adolescents, for example, there could be a dependency which may not easily be transferred.

Enlightenment and skill. For the average youthful offender, whether he is the product of a short training school experience or of several years on probation, it is likely that his net value position in the area of education is little if any better than the norm for his community and economic class. Indeed, his chances of successfully completing high school may be slightly lower if the probation is in an

[52] See WHEELER, COTTRELL & ROMASCO, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 22-23 (Russell Sage Foundation 1966). For fuller exposition of the labeling process see Kitsuse, *Societal Reaction to Deviant Behavior Problems of Theory and Method,* THE OTHER SIDE: PERSPECTIVES ON DEVIANCE 87 (Becker ed. 1964).

[53] See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U.L.Q. 147, canvassing the need and the response in a few states by statute.

[54] The furlough or temporary leave policy now only very slowly coming into adult prison programs has apparently been long established in juvenile training schools. See U.N., COMPARATIVE SURVEY OF JUVENILE DELINQUENCY, PART I. NORTH AMERICA, 75 (1958). Visiting in the institution by family, while not discouraged by policy, is often made difficult by reason of the remoteness of the facility. Receipt of letters by the institutionalized individual, adult or juvenile, does seem to keep kinship ties viable. See GLASER, *op. cit. supra* note 47, at 366.

urban context and of the traditional sort. The most meaningful work experience seems to be developed in the guided group interaction programs or in work release programs now being used for training school inmates. The most promising educational experience, though it is too early for evaluation, seems to be the kind being tried at the National Training School. It is a work-study program in which the boys are "employed" and paid points with a dollar equivalent for work, study and achievement of 90% accuracy on periodic examinations.[55]

An additional, general test of the success of a behavior control system involves what is coming to be called general prevention — that is, the extent to which people in the population at large are prevented from engaging in deviant behavior without themselves having been directly involved in the system. The juvenile system cannot be judged a success in those terms.[56]

Two points need to be made here. One is that while it may be empirically sound to ask such a question of the juvenile system, general prevention is not explicitly one of the goals of the sanctioning system itself. This stems from the conceptual clam-shell which sees the system as non-penal and hence limited to the business of restoring the individual misdirected youth.[57]

The other point is that from the general debate about the interaction of a range of variables which affect the individual's perceptions of reality, his attitudes about authority, his identification with models of socially acceptable behavior, and his developed capacity for control or choice of alternatives in situations of stress,[58] has emerged a new emphasis upon prevention strategies, a shift toward rehabilitation of *neighborhoods.* More attention is being given to a range of social services which in varying degrees affect the future of the young person. These include public health measures for the whole family, welfare case work for mother and child, employment relief or redirection for the father plus occasional alcoholic rehabilitation, and encouragement and support in school for the child — all combined with observation for early signs of social, familial, or personal failures in the child.

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[55] This experiment is described in REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 704 (1966).

[56] "In 1965 a majority of all arrests for major crimes against property were of people under 21, as were a substantial minority of arrests for major crimes against the person. The recidivism rates for young offenders are higher than those for any other age group." THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967).

[57] Ironically, the teenage subculture of the slums may long have had a tradition of actually desiring to go to training school, for that would suggest genuine success in patterns condoned by the peer group. For colorful impressionistic evidence of this see BROWN, MAN CHILD IN THE PROMISED LAND (1965).

[58] The influences of community life, particularly of family, school, and neighborhood, received great emphasis in the President's Commission on Law Enforcement and Administration of Justice. See THE CHALLENGE OF CRIME IN A FREE SOCIETY 55-88 (1967).

A range of dispositions is becoming available to redirect the child beginning to show signs which indicate that his chances are poor to stay out of the delinquent or offender category later on. In other words immediate invocation of the authoritative decision-making of the system is being used less, but intervention for substantially the same goals continues. We are just beginning to appreciate some of the implications of this preventive, contextually oriented approach in terms of the individual's basic liberty and dignity.[59] Further comment on these trends will be postponed to the Summary Appraisal section below.[60]

B. *The Drug-Alcohol Dependence System*[61]

1. Policies

In recent times this system has undergone distinctive metamorphosis as a system concerned with control of human behavior. The changes have occurred in rather direct proportion to the incidence of the abuse of alcohol and drugs in the culture. Paradoxically, the poorly clarified policies of earlier models of the system may have led to the need for radical changes in strategy and, of course, to a drastic need to be explicit about goals.[62] Recently, for whatever social

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[59] See, *e.g.*, one observer who sees a series of shifts of theory which guides us from delinquency based on moral degenerency to delinquency based on mental or emotional illness and now ultimately to delinquency based on poverty. HARTUNG, CRIME LAW AND SOCIETY (1965). "If the objective of the program [war on poverty] becomes the rehabilitation of the poor, rather than the rehabilitation of the socio-cultural processes that produce them, it will, I predict, fail." *Id.* at 263.

[60] Suffice it to say here that if it is thought ironic that we are emphasizing the traditional sanctions of the system less and less at a time when rates of delinquency are climbing and when we have only begun to test systematically the effects of our sanctions, several other facts should be remembered. For one thing the percentage of young people in the total population is growing more rapidly than other categories. This factor is *not* taken into account by the FBI tables in annual reports of the Bureau. Equally substantial as an evaluative factor is that young people are physically maturing earlier than in former eras, but continuing for a variety of not not so well known reasons, in a sort of adolescence longer than was the case with other generations. One observer estimates that the average age of the onset of puberty has been going down at the rate of about half a year every ten years. "It is generally assumed that this is related to better nutrition." Gibbins, *supra* note 19, at 19. "At the same time, the tendency is to regard young people as pychologically immature to a higher age than formerly." *Ibid.* Furthermore it is clear that increased urbanization with its concomitant migration of rural and minority families has had unstablizing effects which certainly must account for some of the trend. "Traditional controls are easily damaged irreparably by migration or urbanization." Gibbins, *supra* note 19, at 23. Even so, the President's National Commission on crime thinks the real incidence of crime is much higher than we have dared to imagine. See generally *Crime in America,* THE CHALLENGE OF CRIME IN A FREE SOCIETY 17-43 (1967).

[61] The primary characteristics of other particularized systems will be examined in this and the following sections. The description will focus upon three phases of each system: (1) essential policies; (2) sanctioning strategies; and (3) outcomes and effects.

[62] The first federal legislation, the Harrison Narcotic Act of 1914, was essentially a revenue measure to control the import of morphine and heroin, partially in response to treaty obligations with other nations about traffic in addictive drugs. See Statement of Emmanual Celler, Representative from New York, in *Hearings Before Sub-committee No. 2 on Civil Commitment and Treatment of Narcotic Addicts of the House Committee on the Judiciary,* 89th Cong., 1st & 2d Sess., ser. 10, at 53 (1966).

causes, authoritative concern has begun to focus on the consequences of drug and alcohol dependence in terms of wasted personal income, neglect of family needs, unemployment, and ultimately, entrance into personal and property crimes to sustain the need.

Associated with concern about this self-perpetuating syndrome is the attempt to control the illicit economic hierarchy which facilitates the importation, manufacture, distribution, and sale of drugs. In this respect, the licensed access to alcohol represents a more permissive policy, perhaps resting in large part on pragmatism if not ideology; absolute denial of access to alcohol is impossible, at least in a society which abhors the police state.

The system as it has evolved in the more urban states and in federal legislation and administration distinguishes three categories of offenders subject to the sanctions of the system, and the policies are different with regard to each. First, the big-timer or the simple "pusher" — the non-user who imports or otherwise manipulates the market in drugs (though hardly different empirically in function from legitimate distributors of liquor) — is thought to be a menace to the adult or young person who is led ultimately to disrupt his life radically by dependence and thus the chief actor whose apprehension is most highly desired.[63] The central goal here is explicitly one of stopping or controlling a commercial enterprise in contraband merchandise. It is like other government efforts to regulate the economy or the conduct of business insofar as certain outlets, for certain purposes, to certain persons are condoned,[64] and hence a complete blackout is not anticipated or desired, but it is unlike other models of government control of business in that the penal processes are more heavily relied upon, and legitimate participants in society's wealth process are not systemtically employed as prime participants in the system.[65]

The second category is the addict himself in situations where he poses little threat of value deprivations to society. The charge is usually for mere possession of the prohibited substance or for public

[63] Nevertheless, "the brunt of enforcement has fallen heavily on the user and the addict. In cases handled by the Bureau of Narcotics, whose activities are directed against international and interstate traffickers, more than 40 per cent of the defendants prosecuted are addicts." THE CHALLENGE OF CRIME IN A FREE SOCIETY 219 (1967). The President's Commission also reports that the traffic in narcotics is a very large scale business in America, something on the order of $350 million annually being spent in the heroin trade alone, with $21 million of this going as profit to the importors and major distributors. *Id.* at 189.

[64] The medical use of morphine, for example.

[65] The suits for treble damages in anti-trust violations, patent infringement, etc., have no parallel in the narcotics control system. Hence, the enforcement process takes on a good deal more sinister, secretive, cloak and dagger appearance, the police and federal agents routinely having to resort to the use of stoolies and provocateurs. See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951).

behavior which, though not otherwise socially harmful, demonstrates that one is under the influence of the drug or alcohol (*e.g.*, public drunkenness). The third category deals with more threatening situations, such as robbery, which may be intimately related (in the personality of the actor) to the dependency need.

In the category where the charge is mere possession, use or addiction there has finally evolved a clear policy. Chronic alcoholism — even though it may manifest itself in public places — is now being authoritatively recognized as an "illness" not subject to ordinary penal sanctions.[66] Relying on expressions of professional and administrative concern about "revolving door" confinement of alcoholics in jail and prison, and upon congressional purpose "to establish a program for the rehabilitation of alcoholics, promote temperence, and provide for the medical, psychiatric, and other scientific *treatment* of chronic alcoholics,"[67] the courts are coming to see the social and individual problems involved in dependence on alcohol as a mental health concern, albeit one for which the community has considerable responsibility.

So, too, with regard to addiction or dependence on drugs. Thus in *Robinson v. California,*[68] a landmark decision which figured prominently in the two alcoholism cases mentioned above, the Supreme Court said: "[I]n the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement."[69]

Congress has recently enacted a statute the thrust of which is to give a person charged with a non-violent federal crime, who is an "addict likely to be rehabilitated," a choice between a sentence to prison (where he might get some therapy anyway) and a civil commitment for treatment.[70] Congressman Emanual Celler, Democrat of New York, spokesman for the Bill in the House, said in testimony before the House Judiciary Committee: "Rehabilitation is the goal to be sought [not solely for the benefit to the individual but also to protect society]. . . . The deterrent effect of long sentences is vigorously challenged. The threat of long sentences may deter non-using traffickers, but long sentences do not necessarily deter the drug abuser."[71] Attorney General Katzenbach gave similar views as to the

[66] Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

[67] 361 F.2d at 51 (emphasis added).

[68] 370 U.S. 660 (1962).

[69] *Id.* at 665.

[70] Narcotic Addict Rehabilitation Act of 1766, 80 Stat. 1438 (1966).

[71] *Hearings before Subcommittee No. 2 on Civil Commitment and Treatment of Narcotic Addicts of the House Committee on the Judiciary,* 89th Cong., 1st & 2d sess., ser. 10, at 57 (1966).

purpose of the legislation: "Drug addition is a fearful disease of mind and body no less damaging and no less deserving of our attention. This legislation, I am convinced, represents our best current hope to halt its eroding effect on our society."[72]

In the final category of offender mentioned above, competing policies are at stake. On the one hand it is recognized that in individual cases the act committed by the person may be severe enough to be sanctioned by the general criminal system, *i.e.,* not subject to "civil commitment"; on the other hand the person's dependence on drugs or alcohol may have precipitated the event.[73] Neither the *Easter* nor the *Driver* Court presumed to pass on this kind of case, and indeed in the latter decision there is dictum to the effect that a substantive offense other than public drunkenness could not be defended by a plea of addiction.[74] This ambivalence is characteristic of the new federal legislation. It is explicitly recognized that in cases of crimes of violence, crimes of selling narcotics primarily for profit, and situations wherein persons have two or more prior felony convictions or prior narcotics civil commitments, something other than rehabilitation should be given primary expression. It is not expected that these individuals would be denied access, after conviction, to the remedial approach provided for others; but nevertheless it is thought desirable to stigmatize them with a criminal conviction and sentence.[75]

2. Post Disposition Sanctioning Strategies

By and large the principal sanctioning strategy employed by both federal and state variants of this system is still confinement, usually in prisons. The mode will vary according to which part of the criminal code has been violated; but generally speaking, the offenders who have been convicted of public drunkenness will be sentenced

[72] *Id.* at 83. Mr. Katzenbach also said: "This legislation . . . allows us to treat criminals as criminals but allows us to treat addicts when they can be rehabilitated." *Id.* at 79. In certain situations, some deviants are to be selected out for reformative treatment, others because of the nature of crimes they commit and/or because of their own predispositions or personality structure will still be subject to "punishment." It remains to be seen whether this was a jury argument needed to convince the skeptic in Congress, or whether anyone caught in the criminal law processes who has an identifiable addiction problem will be *treated* anyway.

[73] Those jurisdictions with fairly broad tests for mental irresponsibility might avoid the dilemma by treating the whole syndrome — addiction, stealing, etc. — in terms of loss of behavioral controls. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

[74] Furthermore, it is clear that these courts will insist on loss of control of the use of alcohol and will not accept "voluntary use" as its equivalent.

[75] Both Presidential Commissions on crime and law enforcement have taken issue with the denial of the civil commitment alternative to certain addicts. See THE CHALLENGE OF CRIME IN A FREE SOCIETY 229 (1967); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 579 (1966), where it is stated:

> We see little reason to exclude such addict-sellers from pretrial commitment although allowing them post-conviction treatment. Pretrial commitment would perimt treatment to be started at the earliest possible stage and avoid prolonged trials and appeals in pretty addict cases.

either to jail or to prison as misdemeanants for terms up to two years for "habitual drunkenness." In the case of an alcohol offender there is, if he is a *state* prisoner and not confined in a county jail, a prospect for parole; but the granting of it is usually dependent upon, minimally, refraining from use of alcohol or association with persons and events where its use is expected. In the more severe cases, the potential parolee must have a well developed plan for his association with a private treatment group like Alcoholics Anonymous or with a public health agency.

It is the exceptional prison unit that affords active treatment of alcoholics while in confinement. Some prisons, however, do have units of Alcoholics Anonymous within the walls. In the prisons of the larger states and the federal system, some opportunity is available to the alcoholic to join group therapy sessions. (Keep in mind that many such persons will be in prison on charges other than violation of the liquor laws.) Furthermore, in some hospitals used as prisons for addicts (*e.g.*, the U.S. Public Health Hospital at Lexington, Kentucky) the administration of drugs to engender a nauseaous reaction to imbibing has been tried.[76]

In the case of narcotics addicts who are convicted of selling or smuggling, commitment to prison is the rule[77] (or has been until recent federal legislation and similar statutes in two or three states). The content of the programs for dealing with narcotics addicts is not very different from programs dealing with alcoholics, save that the convicted person in the federal courts may elect to go to one of two U.S. Public Health Hospitals. Of course, the program in the hospital is limited by the sentence imposed by the court. Use of group therapy and administration of withdrawal drugs (Methadone maintenance, for example) are the characteristics of treatment.

In California and New York, it is possible for narcotics addicts to be involved in a combination inpatient-outpatient program of treatment, characterized by work therapy, vocational courses and high school instruction for at least six months, followed by supervised release during which periodic tests for relapse are made. Final discharge becomes possible after three drug-free years on supervised release.[78]

Recent federal legislation takes a similar approach, providing that one *about to be tried* for a narcotics offense may *elect* a three-

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[76] See TAPPAN, CRIME, JUSTICE AND CORRECTION 531 (1960).

[77] 68A Stat. 1003, 560 (1954); 26 U.S.C. §§ 4705, 4742 (1954); 70 Stat. 570 (1956); 21 U.S.C. §§ 174, 176a (1961).

[78] In California part of the parole process may include membership in a Halfway House project, the first of its kind to be established in the United States. See Fisher, *The Rehabilitative Effectiveness of a Community Correctional Residence for Narcotic Users*, 56 J. CRIM. L., C. & P.S. 190 (1965).

year civil commitment to a hospital, followed by two years of intensive parole involving "out-patient" work with a hospital or other agency.[79] According to the sponsors of the legislation, the new federal approach, modeled after New York's and California's systems, will give the individual addict more real incentive to cooperate in his own therapy program.[80]

Supportive of the aims of these innovations are the efforts of private voluntary membership organizations like Synanon, which began in California and now operates in one or two other states. In an aggressive regimen of group therapy, the participants tear away each other's defenses used to support addiction.[81]

3. Outcomes and Effects

A minimal requirement of systems which purport to "cure" individuals of anti-social conduct is that they will not need to go through the process again. The value of rectitude, then, is our standard for evaluation. Recidivism rates among addicts (both alcoholics and narcotics dependents) are among the highest of all groups of offenders,[82] with the return to addiction occurring fairly soon after institutional release. It is too early to test the effectiveness of the newer modalities which stress intensive "after-care" as well as treatment during confinement.[83] Moreover, as the President's Commission on Law Enforcement and Administration of Justice observed,

> There is great need for better standards for measuring the outcome of treatment. To think only in terms of 'cure' is not very meaningful in the case of a chronic illness such as addiction. There is little knowledge about why a good outcome is achieved for one addict but not another, by one method but not another. . . . Methods of treatment for abusers of nonopiate drugs must be developed, and there is a general need for research effort in the whole area of personality disorder, of which drug abuse is usually a symptom.[84]

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[79] Some form of civil commitment statute exists in about twelve states, in addition to the usual criminal processes. See Cantor, *The Criminal Law and the Narcotics Problem,* 51 J. CRIM. L., C. & P.S. 512 (1961); King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick,* 62 YALE L.J. 736 (1953).

[80] See, *e.g.,* Senator Robert Kennedy's statement in *Hearings Before Subcommittee No. 2 on Civil Commitment and Treatment of Narcotic Addicts of the House Committee on the Judiciary,* 89th Cong., 1st & 2d Sess., ser. 10, at 53 (1966); *id.* at 53 (statement by Congressman Emanual Celler).

[81] See generally YABLONSKY, THE TUNNEL BACK: SYNANON (1965). It has been suggested that perhaps the group approach works too well for some addicts, who may find more community in such a group than ever before at large and consequently are loath to venture forth and build new lives outside the group.

[82] Estimates based on the few existing studies place the range for narcotics offenders between 50 and 90 percent recidivism. See GLASER & O'LEARY, THE CONTROL AND TREATMENT OF NARCOTIC USE 32-33 (Nat'l Parole Institutes 1966). Return rates are not well established for the alcoholic. But impressionistic research indicates that most individuals going to prison or serving any sentence for an alcoholics offense are chronic offenders. THE CHALLENGE OF CRIME IN A FREE SOCIETY 233 (1967).

[83] The limited evaluative data which has been assembled is referred to in THE CHALLENGE OF CRIME IN A FREE SOCIETY 226-28.

[84] THE CHALLENGE TO CRIME IN A FREE SOCIETY 228.

In any event, for the foreseeable future the civil commitment avenue is likely to be the most heavily traveled, and the leadership in the few jurisdictions already using it should generate similar measures elsewhere.

There is need for authoritative caution, however, lest the spirit of experiment born of frustration with older strategies carry us into empty formalities which deny citizens substantial liberty.[85]

C. *The Insanity System*[86]

1. Policies

The most controversial of the American criminal law sanctioning systems is certainly that system by which persons formally accused and tried for crime (usually a major offense though not conceptually so limited) are relegated to a quasi-civil process at some stage in the proceedings because it is decided that they are "not responsible." Originally this determination was the end of the State's concern, but gradually the public interest in controlling the individuals' subsequent behavior asserted itself.

Although the details of the system vary from jurisdiction to jurisdiction, two basic models are discernable. In one there is an automatic commitment to a public hospital.[87] In the other a separate hearing is held to determine whether the individual is "dangerous to himself or others"; he is generally found to be in one or both categories. Commitment follows in either case.

The purpose of commitment, though not often stated explicitly in the statutes establishing the procedure, is to effect a "cure" for the insanity, mental illness or defect. Additional implicit goals are to afford society some protection from the person's possible deprivations, and to afford a measure of the deterrence which might have been forthcoming if conviction had been achieved. The latter goal, of

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[85] *Ibid.*

> Most of all, it is essential that the commitment laws be construed and executed to serve the purpose for which they were intended and by which alone they can be justified. This purpose is treatment in fact and not merely confinement with the pretense of treatment.

[86] This system could be considered a particularistic decisional outcome of the adult (general) criminal system, as it customarily is; even more conventionally it is placed in the context of the guilt-no-guilt dichotomy being based on inherited concepts of *mens rea and actus reus*. See, *e.g.*, CLARK & MARSHALL, THE LAW OF CRIMES 336 (Wingersky ed. 1958); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 449 (2d ed. 1960); PERKINS, CRIMINAL LAW 738 (1957). Special emphasis is justified because of the incidence of its use and the special policies and sanctions it draws into play.

[87] *E.g.*, District of Columbia.

course, is not highly visible and seldom authoritatively enunciated.[88] Seldom have courts taken occasion to be explicit about the immediate subgoal sought in a given case. Thus the recent decision in *Rouse v. Cameron*[89] is deserving of mention here, for there the court stated in deciding to hear a habeas corpus petition of one confined in a hospital following acquittal by reason of insanity: "The purpose of involuntary hospitalization is treatment, not punishment. The provision for commitment rests upon the supposed 'necessity for treatment of the mental condition which led to the acquittal by reason of insanity.' "[90]

It was not clear until fairly recently that a viable assumption was being made that something affirmatively helpful was to be done to the individual confined under the decisions of this system. Indeed, if an evaluation be made on the basis of average length of incarceration and the burdens of proof and initiation imposed upon the inmate who seeks release, it is fair to say that this system's major purpose has been to detain out of society's sight the "drop-outs" of the general system, those that could not be conceptually fitted into it, yet about whom society retained profound fears and doubts.[91]

2. Strategies

The commitment to a mental hospital is typically, if not uniformly, for an indefinite period — until "cured" or until the committed person is no longer dangerous to himself or society. Normally the burden of initiating review procedures to test whether there has been a cure is upon the inmate, although automatic periodic review is provided in some jurisdictions.

What content is there in the program for bringing about a cure or treatment of the mental illness which was the justification for

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[88] *But see* Goldstein & Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853, 865 (1963), where it is argued:

> [T]he insanity defense is not designed, as is the defense of self-defense, to define an exception to criminal liability, but rather to define for sanction an exception from among those who would be free of liability. It is as if the insanity defenses were prompted by an affirmative answer to the silently posed question: 'Does *mens rea* or any essential element of an offense exclude from liability a group of persons whom the community wishes to restrain?'

[89] 373 F.2d 451 (D.C. Cir. 1966).

[90] *Id.* at 452-53.

[91] A like purpose probably underlies the commitment of substantial numbers of persons for whom a criminal trial could have been the regular course but for the decision — made by the state's attorney in the first instance and ratified by the court — to commit the person prior to or during trial because of his "incompetency" to participate in his own defense. See generally RUBIN, WEIHOFEN, EDWARDS, & ROSENZWEIG, THE LAW OF CRIMINAL CORRECTIONS 495-507 (1963). The author is advised by members of the Commission on Mental Health in one state that to their knowledge persons have languished for years (thirty years being the longest time given) in state hospitals after being initially committed rather informally prior to trial, even when the charge was a relatively minor one. Without safeguards requiring the keepers periodically to justify the detention of anyone in their charge, the likely abuse of this strategy is patent.

removing the individual from the general criminal system and placing him in this special one?

Although the diagnostic sub-categories of "not guilty by reason of insanity" are as numerous as the varieties of human personality, this has not meant that inmates are treated individualistically. It is not uncommon to find that state mental hospitals group all such inmates together, at least initially, confining them to a separate pavilion or building of a multi-unit hospital which is also responsible for the care and treatment of persons civilly committed under "lunacy" proceedings and voluntary patients for treatment of alcoholism and the like.

Rouse v. Cameron[92] provides a useful illustration of specific program content in a hospital considered a model for innovation in the treatment of the mentally ill. Rouse was said to be receiving "environmental therapy." This apparently meant that he was subjected to the constructive influences of a structured social setting. His daily life was regulated by the requirement that he keep his room neat and tidy, participate in hall sessions of clean-up, and occasionally meet with his psychiatric nurse. An opportunity was provided for participation in group therapy sessions led by a non-professional.

The staff prognosis for Rouse was that he was anti-social and lacking in insight; hence his continued confinement was justified. Rouse challenged this appraisal of himself through a habeas corpus petition, alleging that his condition was appreciably unchanged and that, in effect, if this was all the institution had to offer, he should be given his freedom, since there was no continuing justification for his remaining. In agreeing to consider these assertions, the District of Columbia Court of Appeals undertook to appraise the content of the treatment program for such an inmate. Therein lies the significance of the case—an expressed judicial willingness to give critical appraisal to the modes in which the system's sanctions actually were cast.[93]

"The milieu of the hospital, if properly structured, is . . . a constructive force for getting well; if improperly constructed it is a force

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[92] 373 F.2d 451 (D.C. Cir. 1966). See also Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966).

[93] The court found the 1964 Hospitalization of the Mentally Ill Act controlling:

> A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment. The administrator of each public hospital shall keep records detailing all medical and psychiatric care and treatment received by a person hospitized for a mental illness and the records shall be made available, upon that person's written authorization, to his attorney or personal physician.

D.C. CODE § 21-562 (Supp. V. 1966). The court did not seek to put the hospital in the all but impossible position of having to guarantee "cure" in order to justify continued restraint. "The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so." 373 F.2d at 456. But, on the other hand, "continuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities." 373 F.2d at 457.

of remaining sick."[94] Even the best available milieu therapy is not well suited for every patient (Rouse, for example), and for some it may be harmful. The conditions or quality of the milieu will quite obviously vary according to a number of variables, including the over-all size of the inmate population, the resources given over to the ward, the size of staff, and the time to experiment and conduct research on optimum inputs and conditions for the milieu. In a few hospitals, the patient will have access to shock therapy, intensive group and individual psychotherapy, and vocational work therapy. However, it seems that the typical "criminal ward" inmate is unlikely to have such access. If he does, the play and work sessions will be reduced in scope, quality and frequency, compared to programs for the general hospital population.[95] The implicit goal of protecting society often leads to an emphasis on the secure restraint of patients at the expense of strategies aimed at treatment.[96]

The other principal variable controlled by decision-makers in this system, other than content of the treatment program, is time. While the time factor may be manipulated by the extraordinary habeas corpus procedure, as in *Rouse v. Cameron,* clearly the more usual decision to release or to continue the retraint is taken by the staff and administration of the mental hospitals, coupled with the acquiescence of committing courts in the majority of jurisdictions.[97] Considering the potential for abuse or for mere unnecessary con-

[94] Dr. Dale Cameron, Superintendent of Saint Elizabeths Hospital, District of Columbia, in *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on a Bill to Protect the Constitutional Rights of the Mentally Ill,* 88th Cong., 1st sess. 1466 (1963), cited in the majority opinion in the *Rouse* case.

[95] See RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 519. See also the description of the program at Saint Elizabeth's in the District of Columbia in the REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 543-45 (1966).

[96] While many of the inmates of such wards have actually committed violent personal deprivations, it is generally said that they are no more aggressive in hospital than the general population of those institutions. RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 520-26 (1963). But this does not mean that relaxed security concomitant with efforts at treatment will not produce some escapes (or walkoffs) by those committed following acquittal by reason of insanity, as well as by others of the inmate population. An example of an individual hospital's escape record is set out in REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 555-58 (1966). Inadequate staffing is deemed primarily responsible for high escape rates. See *e.g.,* Goffman, *On the Characteristics of Total Institutions,* cited in RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 522 n.104. In any event, "maximum security and other extraordinary precautions need to be determined for each patient individually, and not on the arbitrary basis that he has been accused of a crime" or because the individual is thought to *be* a murderer, a rapist, etc. Cruvant & Waldrop, *The Murderer in the Mental Institution,* 284 Annals 35, 42 (1952).

[97] For a summary of the various release provisions in American jurisdictions see Susee, *Procedure for the Commitment and Release of the Criminally Insane,* 4 WILLIAMETTE L.J. 64, 72-74 (1966). And see Note, 68 YALE L.J. 293 (1958). A very few jurisdictions insist upon either Gubernatorial approval or a special legislative bill, an incomprehensibly involved procedure which may not be honored in practice. See N.C. GEN. STAT. § 122-86 (1964).

servatism in exercising this judgment, especially by professional staff, it may come as a surprise that in at least one important mental hospital in this country the median time spent in restraint is not much longer than for felons committed to prison.[98] The courts have begun to make plain that decisions affecting several goals established for the system will not be the province solely of the administrative and professional staff. Both treatment goals pursued by hospital personnel and the judicial conservatism which holds to security as the prime consideration will be placed in dynamic balance.[99]

3. Outcomes and Effects

The data available for an evaluation of the outcomes of the Insanity System is not voluminous. Nevertheless, we will look briefly at the system's effects in terms of the rectitude value.[100]

Although the potential abuse, from the standpoint of the individual's liberty, balanced against society's interest in restraint used to change behavior patterns and attitudes and improve related value positions so that changed attitudes may succeed, is enormous, still it bears emphasis here that this long standing fear today may be unjustified. In other words, it would appear that many, perhaps the great majority, of all persons committed under the system do in fact serve only a predictable period of time in active restraint and are actually released for varying periods of supervision in the community, and some are freed or discharged directly.[101]

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[98] Saint Elizabeths in Washington, D.C., reports that of all patients committed after acquittal in felony cases the median time spent in the hospital was 22.7 months. Homicides fell very near the median at 23.1 months. The median time for misdemeanants were 15.8 months. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, Tables 9 & 10, at 548-49 (1966). These data are based on fiscal years 1954-65 records for felony patients and on fiscal years 1958-65 records for misdemeanor patients.

[99] *E.g.,* Hough v. United States, 271 F.2d 458 (D.C. Cir. 1959), in which Saint Elizabeths had sought to bestow the status of conditional release on an inmate committed after acquittal on charges of a major felony, after some six months treatment. The hospital made a considered decision that her release under supervision at that time was warranted, to give her a chance to find a job and to build up her confidence. The District Court refused to admit the inmate to such release or to allow her to leave the hospital under guard, relying in part on an assumption that she was a "prisoner" whose safe-keeping was one of the institution's major responsibilities. The Circuit Court of Appeals reversed and remanded for a finding as to whether the hospital had shown that the inmate had sufficiently recovered so as not to be, in all reasonable likelihood, a danger to others. Thus the court construed applicable statutes broadly enough to encompass the treatment policy pursued by the hospital staff and yet gave voice also to the fair demands for public safety clearly written into the statute.

[100] The observations regarding outcomes and effects of the Insanity System are equally applicable to the Mental Defective and Sex Deviant Systems to be discussed, *infra,* §§ I, D and E.

[101] Figures from state studies are reported in RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 541 n.152. But the observer is forced to express his disquiet at not finding among these studies figures on what percentage of inmates remained for lengthy periods, until senility or death. The studies deal primarily with comparisons among those actually released; we are not told how many remained in a category of ill-defined hopelessness.

What expectations for post-sanctioning behavior are generated by this and related systems? Is the probability that most will avoid criminal conduct? Two qualifications appear to be in order. First, for any person released from active restraint it is impossible to be certain whether unlawful behavior takes place; we are dependent on someone invoking the processes of the criminal law. Secondly, estimated rates of recidivism are quite crude because varying lengths of time after release are involved in most surveys of hospital releases, and further because they are not commonly related to type of psychiatric indication, but sometimes are related to category of offense (which could have formed a basis for conviction). More fundamentally, such reports do not take account of marginal success stories: for example, those individuals whose lives on a qualitative level are more productive and meaningful, and who because of a situation endemic in the ex-patient's associations or economic status may yet become involved in some kind of low level criminal conduct.[102]

Nevertheless, one principal measure of the effectiveness of a behavior control system is thought to be the extent to which it inclines people — particularly those directly involved in it — distinctly away from deviant behavior. Although the data are far from being comprehensive, that which is available suggests that releases from mental hospitals have about a fifty-fifty chance of "getting into some trouble" within the first several years. That is, somewhere in the area of forty to fifty percent will be arrested again, although something less than this, perhaps around one third will actually be convicted of such offenses.[103]

As to variables primarily affecting the return to some criminal conduct, the conclusion reached by Henry Weihofen seems borne out by recent research:

> Whether the ex-patient is later arrested for crime is directly related to all the factors that influence the crime rate generally: age, marital status, depth of drug and alcohol addiction, amount of community support given him, influences of family and friends, availability of professional help at crucial points in the period of adjustment. . . .[104]

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[102] Of those persons in Saint Elizabeths in the category of acquitted by reason of insanity and released up to the end of 1965, only 6% were involved in charges *more* serious than the original charge that brought them through the process initially. And only 11% were equally serious. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 558, Table 13 (1966).

[103] This should not obscure the possibility of a return to an institution without proof of such crime, for they may simply violate the conditional release or be returned through the "civil commitment" process much the same as before. The estimates in the text are reflected in studies based on Saint Elizabeths releases in 1965-66. See REPORT OF THE PRESIDENT'S COMMISSION IN THE DISTRICT OF COLUMBIA 558-59 (1966).

[104] WEIHOFEN, *Disposition of the Mentally Ill.*, in RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 540. "The likelihood of later criminality also is *inversely* related to the severity of the person's mental symptoms: the more manifest the evidences of mental illness during hospitalization, the lower the rate of arrest after release." *Ibid.*

D. *The Mental Defective System*

1. Policies

Several states have in recent years sought to fill what are perceived to be wide gaps between the outer reaches of one system and another. For example, a person with a severe personality disorder may for various reasons (including narrowly drawn legal rules defining insanity) not be acquitted by reason of insanity and thus not be given over to the mental health keepers of the Insanity System. Such a person may, however, suffer from such disorientation as to present serious problems of custody in the general prison system. One expedient in such a situation has long been to transfer the inmate — usually adminstratively — from the prison to the state hospital, where he then typically goes into the bin with those processed through the Insanity System.[105] The drawback in this disposition, as perceived by the mental health people, is that such an individual's stay has often been artifically set at some definite number of years, which may not be long enough to effectuate desirable treatment.

The legislative response to the problem has been the creation of the label of "mental defective" or "defective delinquent" or something similar.[106] The assumption of such legislation is that there are certain identifiable persons who, regardless of the punitive sanctions imposed upon them, are beyond the reach of ordinary approaches to correction or control of human behavior and consequently must be confined indefinitely and *treated*.[107]

A recent Fourth Circuit Court of Appeals decision indicated that the court is persuaded that this is a tenable policy, relying in part upon

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[105] Contrast, however, the procedural obstacles judically imposed on the reverse kind of transfer, namely, where the state hospital seeks to transfer one committed by reason of insanity to the security of the prison. *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958). More recently the Supreme Court has taken occasion to consider a New York statute which permitted an administrative transfer directly from a state prison to a state hospital maintained by the department of corrections of a person whose penal term was at an end. In Baxtrom v. Herold, 383 U.S. 107 (1966), the Court held this violated the petitioner's equal protection of the laws in that no court hearing was held to determine whether he was dangerously mentally ill, which judicial determination was the prescribed course for those not coming from penal institutions.

[106] There are "defective delinquent" statutes in at least six states: New York, California, Massachusetts, Minnesota, Maryland, Pennsylvania, and Ohio. TAPPAN, CRIME, JUSTICE AND CORRECTIONS 419 (1960).

[107] Consider for example, the Maryland provision:

> For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

Maryland Defective Delinquent Act. MD. ANN. CODE art. 31B, § 5 (1967).

a report from a committee of the American Psychiatric Association on the Patuxent (Maryland) Institution:

> 'From the standpoint of social policy, the Defective Delinquent Law is primarily concerned with the protection of society, secondarily with the rehabilitation of antisocial persons by means now developed by psychiatry, psychology and the social sciences.'[108]

The particular significance of such developments is that preventive custody is thought to be justified because of *potential* threats to social values. Ordinary criminal law processes are in effect not considered adequate (either from the point of view of content of sanctions or from the point of view of time) to meet the perceived challenge. Although not explicitly rested upon the evolution of a similar system in the juvenile court rationale, this approach may be seen as an extrapolation of the same kind of thinking. Furthermore, the idea of "criminal propensity," as opposed to demonstrated criminality, is based upon a probability model imported from the social sciences and not upon the more rigorous "certainty beyond a reasonable doubt" traditional to the general criminal law system.[109] Accordingly, while the courts have sustained the new development as being "progressive and humanitarian," the conformity of the system with overriding policies supportive of individual human dignity should be tested in its actual application, lest "it become a mere device for warehousing the obnoxious and anti-social elements of society."[110]

2. Strategies

Except for two states (Pennsylvania and Maryland) the nine states which have special policies for this category usually commit persons so categorized to a state mental hospital. There the treatment is not fundamentally different from that employed in the insanity system.[111]

A description of the program at the Maryland treatment center[112] clearly indicates that something more substantial than custody

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[108] Sas v. Maryland, 334 F.2d 506, 513 n.3 (4th Cir. 1964). See also People v. Levy, 151 Cal. App. 2d 460, 311 P.2d 897 (1957).

[109] It should be pointed out here, however, that the Maryland approach does require a conviction first before the second disposition and labeling as a "defective delinquent" be made. Other states employ a more direct approach. See, *e.g.*, MASS. GEN. LAWS ANN. §§ 113-118A (1958). See generally Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey*, 110 PA. L. REV. 78 (1961). Note should be taken, too, of the system's similarity to the older commitment for lunacy, the goals of which cannot be radically different.

[110] Sas v. Maryland, 324 F.2d 506, 516 (4th Cir. 1964). See also Minnesota *ex rel* Pearson v. Probate Court, 309 U.S. 270 (1940); Palmer v. State, 215 Md. 142, 137 A.2d 119 (1957); Eggleston v. State, 209 Md. 104, 121 A.2d 698 (1956).

[111] See Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 B.U.L. REV. 1 (1962). It has been found, however, that peculiar custody problems are present where the person is indeed suffering from some socio-pathic disorder. He may harass the more seriously disturbed patients and cooperate less in attempts at re-socialization. He is more aggressive and hence constitutes a greater security risk. See RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 529.

[112] Boslow & Manne, *Mental Health in Action: Treating Adult Offenders at Patuxent Institution*, 12 CRIME AND DELINQUENCY 22 (1966).

is contemplated in these specialized institutions, although objective examination is lacking with which to make an explicit comparison.[113] The wording of the enabling legislation has left the institution free to try almost anything it likes. The proof of the pudding in an individual case is whether on the next bi-annual review (to which the inmate is statutorily entitled) the court finds that he is no longer a "defective delinquent." If he is still in need of treatment, he goes back to the institution; if he is not, he goes free or to prison.

The statutory scheme however, does not envision any requirement that the institution justify what it is doing from time to time. In this sense the Fourth Circuit's decision in *Sas v. Maryland*[114] elaborates the appraisal aspect of the sanctioning process. There the court remanded to the District Court for a hearing to determine "whether Patuxent does in fact furnish treatment for treatable defective delinquents."[115] In the words of the Court,

> the creation of a non-medically determinable category of persons who may be confined for indeterminate periods by a civil proceeding is so serious a departure from traditional concepts of justice that it deserves a critical analysis on the broadest of terms after a careful factual development of its present operation.[116]

3. Outcomes and Effects

Because of the similarity in goals and strategies between the Insanity System and the Mental Defective System, the observations regarding the outcomes of the Insanity System are equally appropriate here.[117]

E. *The Sex Deviant System*

1. Policies

In examining this system, which applies sanctions in situations said to involve an abuse of the affection value,[118] it is virtually impossible to generalize about contemporary policies in a broad range of situations which are and traditionally have been partially subject to

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[113] Similar programs for mentally retarded or disturbed children are described in Kane, *An Institutional Program for the Seriously Disturbed Deliquent Boy*, 30 Fed. Prob. 37 (Sept. 1966); Reed & Hinsey, *A Demonstration Project for Defective Delinquents*, 11 CRIME AND DELINQUENCY 375 (1965).

[114] 334 F.2d 506 (1964).

[115] *Id.* at 509.

[116] *Id.* at 517. See also the guarded approval by the United States Supreme Court of the Minnesota sexual psychopath statute in Minnesota *ex rel* Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940).

[117] See notes 100-04 *supra* and accompanying text.

[118] Not included herein are the so-called morals offenses of prostitution, soliciting, assignation, and related offenses which are handled in the general criminal law system. It is suspected by some investigators that most such known offenses rarely go through to the sanction phase in its official dimensions anyway. These situations and persons are subjected more routinely to harassment by police for non-sanctioning purposes, such as discovering organized vice rings or sources of drug pushing. See, *e.g.*, SKOLNICK, JUSTICE WITHOUT TRIAL 124-63 (1966).

the general criminal law. Forcible rape and intercourse with a person of minor years, for example, are usually treated as part of the adult system (assuming the defendant himself is of sufficient age). So also are *ad hoc* instances of homosexual acts between consenting adults, incest, voyeurism and exhibitionism.[119] On the other hand, if an individual is involved with a person below the age of consent or if he has been convicted, charged, or even suspected (sometimes) of prior indiscretions, then in many states he may be labelled either an habitual sex offender, a sexually dangerous person, or a sexual psychopath and given a kind of civil commitment to be "treated" for his "condition."[120]

Although the empirical assumptions which supported legislation authorizing special labelling and disposition have been rather thoroughly discredited,[121] the stated purpose of such statutes was to treat certain offenders as if they possessed special characteristics rendering them particularly susceptible to medical and psychiatric therapy, and potentially to make them less dangerous to society. Were it not for the authoritative enunciation of this policy in a rash of statutes, it would hardly be meaningful to identify this as a separate system for the reason that it has fallen into disuse if it ever was routinely employed.[122]

2. Strategies

Although the system as it was formulated in legislation has been relatively unused as a separate sanctioning system, and although those processed in it are involved in relatively minor crimes, such as exhibitionism and homosexuality, still it is instructive to see how declared policies have been implemented.[123]

The principal sanctioning strategy in most of the twenty-three jurisdictions having such laws is simply commitment to a mental hospital, and in a dozen jurisdictions, without a criminal trial first. The commitment is typically for an indefinite period, regardless of

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[119] See generally BLOCH & GEIS, *The Sexual Offender,* MAN, CRIME AND SOCIETY 282-311 (1962).

[120] See generally RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 408.

[121] See, *e.g.,* GEBHARD, GAGNON, *et al.,* SEX OFFENDERS 845 (1967); HENRY, SOCIETY AND THE SEX VARIANT (1955); Sutherland, *The Diffusion of Sexual Psychopath Laws,* 56 AM. J. SOC. 142 (1950).

[122] *E.g.,* a 1950 report of the New Jersey Commission on the Habitual Sex Offender indicates that as of that time, only California appeared to be invoking the statute at all. Cited in RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 410-11.

[123] It is likely, considering the under-development of this system, that the policies were not seriously declared; or they may be perceived simply as immediate responses to situations of high crisis level, where public opinion had been greatly outraged by a series of "awful sex crimes." See Sutherland, *The Diffusion of Sexual Psychopath Laws,* 56 AM. J. SOC. 142 (1950).

the severity of the offense, or until "cured" or found not likely to be a further danger to the community.

Only two states, Maryland and California, have special institutions for commitment of sexually deviant persons (and the Maryland one doubles for the mental defective system as well);[124] all the others apparently use a mental hospital or in some instances a prison. In the majority, using mental hospitals, no special divisions have been established for the care and treatment of such inmates.[125] "Their treatment," concludes Tappan, "is almost purely custodial. . . . Hospital administrators generally indicate that they are unable to provide effective therapy for sex psychopaths."[126] There are, however, significant efforts in a few places looking toward more intensive therapy and actual release in many cases.[127]

More recent developments in a few states indicate that the system, as it is retained in viable form, is undergoing some sharpening. Thus, New Jersey in revising its statutes in 1950, has provided that commitment cannot exceed the maximum term for which the inmate would be eligible under a prison sentence.[128] The statute also provides for some persons to be treated under probation in the community, and deals primarily with major rather than minor offenses.[129] California, Illinois, Florida, Utah and Virginia have had parallel developments, including the legislative *recommendation* of the creation of specialized treatment centers.[130]

3. Outcome and Effects

A study of California's Atascadero State Hospital (the institution responsible for the sexual psychopathy program) correlated age,

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[124] The California Atascadero State Hospital although it houses some civil committees and some mentally ill criminal offenders seems to a large extent specialized to this system. For a critical appraisal of the hospital suggesting that security is emphasized at the expense of treatment, see Nasatir, *Atascadero: Ramifications of a Maximum Security Treatment Initiation,* 2 ISSUES IN CRIMINOLOGY 29 (1966).

[125] In 1959, Massachusetts set aside a separate building in its Bridgewater institution for sexual psychopaths. See Tenney, *Sex, Sanity and Stupidity in Massachusetts,* 42 B.U.L. REV. 1, 21 (1962). The population of this facility in 1961 was reported to be forty-five, among whom were persons convicted of various crimes and committed there, and a larger group transferred there from prison. *Ibid.* At least another twenty were there for observation, about five of whom would probably be found to be sexual psychopaths and given formal commitments. *Id.* at 23. Group therapy is the only treatment form discussed as being used at the Massachusetts center. *Id.* at 21.

[126] TAPPAN, CRIME, JUSTICE AND CORRECTIONS 415 (1960).

[127] The single largest category of personality disorder in one of these institutions was simple neurosis. Lieberman & Siegel, *A Program for 'Sexual Psychopaths' in a State Mental Hospital,* 113 AM. J. PSYCHIATRY 801 (1957), describing California's program. See also, for follow up comment on administration of the Massachusetts program, Cohen & Kozol, *Evaluation for Parole at a Sex Offender Treatment Center,* 30 Fed. Prob. 50 (Sept. 1966).

[128] N.J. STAT. ANN. § 2A: 164-6 (1957). Wisconsin and Wyoming have the same provision. WIS. STAT. ANN. § 959.15(12) (1958); WYO. STAT. ANN. § 7-356 (1957).

[129] TAPPAN, CRIME, JUSTICE AND CORRECTIONS 417 (1960).

[130] *Ibid.*

geography, marital status, schooling and occupation, as well as characteristics of victims and length of hospitalization, with recidivism in nearly two thousand cases.[131] This study showed that rates went up to a high of 26.6% in the last five years studied; this for all releasees. More significant are the variations shown among different categories of offenders. Thus, as had been hypothesized, the pedophile had a lower rate than the less aggressive offender, for example, the exhibitionist and the voyeur.[132] Of equal importance in terms of rational appraisal of all sanctioning efforts to induce desirable community behavior are the indications in such studies which correlate recidivism (an index of rectitude) to other values including enlightenment, skill, respect, etc.[133]

The general observations regarding the Insanity System outcomes are also applicable here.[134]

F. *The General Criminal Sanctioning System*

The general criminal sanctioning system, juxtaposed with all those previously considered in the overall American mosaic of publicly directed systems for control of human behavior, is the oldest in our traditions. It is the one that is employed, initially at least, for almost all deviant behavior except that committed by children.[135] And it is the furthest removed from the juvenile system in terms of formality and stated goals.[136] How this system differs substantially from the juvenile and other systems in terms of sanctioning strategies, outcomes and effects will now be considered.

1. Policies

The evolution of the purposes sought by Anglo-American criminal law is co-extensive with the history of the culture of the English

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[131] See Frisbie, *Treated Sex Offenders Who Reverted to Sexually Deviant Behavior*, 29 Fed. Prob. 52 (June 1965). It should be noted in passing that California, in 1963, substantially revised significant segment of the system: specifically, changed the operative concept from "sexual psychopath" to "mentally-disordered sex offender;" established mandatory eligibility for probation and parole; and provided that credit on subsequent prison sentences would be given for time spent in hospitalization. *Id.* at 53.

[132] *Id.* at 55.

[133] For example in the California Atascadero study the reporter remarks that "in each category the lower the skill the higher the recidivism rate." *Id.* at 56.

[134] See notes 100-04 *supra* and accompanying text.

[135] We leave to one side the civil commitment process for the mentally ill, which is of course, a related system designed to control human behavior, the goals of which may not be radically different from some of the systems considered above. Only considerations of space remove it from our focus here.

[136] Passing notice should be taken here of a sort of sub-system within the general criminal law system, although for most of the early phases (invoking, applying general criminal code) it is conterminous with the general system. This is the Youthful Offender concept. Statutes in most states allow first offenders under a certain age, usually around twenty-five, to be sent to institutions which are separate from the prisons used for "hardened criminals," in which the vocational and educational efforts are often more impressive than in the other penal institutions of a particular state. This specialized institution is sometimes called a reformatory. See generally RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *op. cit. supra* note 91, at 142.

speaking peoples. Hence, it is not possible to look solely to the verbalisms contained in the statutes affecting various segments or functions of the system, as it was to do with the latter-day contrivances represented in the several systems just described. It is rare indeed to find in the codes of American states the expressed hopes and expectations of and about the system.[137] The courts have done little more than reflect the fashion of the day in terms of the attitudes of commentators, law enforcement officials, and to some extent the perspectives of the professional correction administrator. These reflections are conditioned to some degree by outcries of periodic public concern expressed in the polemics of subjective, albeit vigorous, journalism. Nevertheless, it is this judicial reflection which, however diffuse and imprecise, has been the only perceivable constant thread of policy and should therefore be sampled here.

It is not often that an appellate court will take occasion to say anything about the goals which the system is designed to support. When the courts do write of these matters, it is usually not at length but in cryptic and abstract terms. The abstractions commonly employed relate to "protect[ing] the public"[138] or deterring others[139] or "reformation and rehabilitation of offenders."[140] It is rarely made clear, however, whether the broad goal of "protection of the public" is meant to subsume other goals such as reformation. Frequently, several such abstractions will appear in tandem with no expression as to any desirable hierarchy. Thus, one Ohio court has said that "the object of a criminal penalty is to punish the accused, deter others from crime, and to protect the public."[141]

Not all attempts at basic policy clarification are at such high levels of abstraction. One federal court has thoughtfully included some admittedly irrational goals, recognizing that the system is closely related to human emotional taints:

> At least one purpose of the penal law is to express a formal social condemnation of forbidden conduct, and buttress that condemnation by sanctions calculated to prevent that which is forbidden. The ultimate goal is deterrence. In attempting to achieve this end we employ means which secondarily satisfy the retributive feelings of society.[142]

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[137] A few state constitutions have provisions which express a preference for reformation and prevention. *E.g.*, MONT. CONST. art. III, § 24; N.C. CONST. art. XI, § 2; ORE. CONST. art. 1, § 15. Some others, perhaps reflecting the fashion of Victorian draftsmen, state that punishments shall be proportionate to the crime. *E.g.*, R.I. CONST. art. I, § 8; W. VA. CONST. art. III, § 5.

[138] See Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 471 (1946).

[139] See, *e.g.*, France v. State, 95 Okla. Crim. 244, 244 P.2d 341 (1952).

[140] Williams v. New York, 337 U.S. 241, 248 (1949).

[141] State v. Meyer, 163 Ohio St. 279, 126 N.E.2d 585, 589 (1955).

[142] Sauer v. United States, 241 F.2d 640, 648 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957). Of course, there may be less commendable judicial candor here than meets the eye. It may be retributive feeling of the judge making such a statement that is most prominently involved.

Still, it is probably fair to say that most statements of this kind fall into neither extreme; that is, of favoring individualized rehabilitation as the major sub-goal of public protection on the one hand, or hard-headed, no nonsense, old-fashioned retribution on the other. Indeed, courts are more likely to approach the former end of the spectrum than the latter. The nearest that the courts are likely to come in expressing themselves in favor of pure "punishment" (whatever it is supposed to mean) is something like the following: "The sentence for any crime must be punitive and exemplary. It should be adequate as a penalty to the person who commits the crime. . . ."[143]

More frequently, it is possible to find statements tending in the opposite direction, suggesting that sanctions should prevent future crime "by the defendant through education, reformation or detention, and . . . the deterrence of others . . . from committing such crime . . . ; of the two the latter probably is the more important."[144]

It is relatively clear that we have a multi-goal system. However, it is one in which there is not complete agreement on priorities among the goals. Neither have particular sub-goals been very frequently clarified. One observer suggests that the criminal law "seeks to punish, restrain, and rehabilitate . . . as well as to deter. . . ."[145] According to some scholarly observers, no matter how much our stated aims may appear garbed in the dress of other ages, still we in the modern age are tending rather markedly in the direction of a "rehabilitative ideal" (and away, presumably, from a deterrence model).[146] However this might be, "renunciation of punishment as an instrument of legal policy actually involves a change in means rather than ends. . . ."[147]

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[143] Larkey v. State, 95 Okla. Crim. 338, 245 P.2d 751, 755 (1952).

[144] Territory v. Dojiro Oshiro, 39 Hawaii 303, 306 (1952).

[145] Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543, 544 (1960). This author's attempt to clarify the several major goals in respect of some particular decision outcomes is in Penegar, *Criminal Law Sanctions in Two Civil Rights Cases — A Brief Comparison,* 43 N.C.L. REV. 667 (1965).

[146] The rehabilitative ideal is itself a complex of ideas which, perhaps, defies an exact definition. The essential points, however, can be identified. It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, and of primary significance for the purposes at hand, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function; that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.

ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 26 (1964).

[147] Dession, *Social Sanctions,* 1 VA. L. WEEKLY DICTA COMP. 22, 25 (1949). The thought following the quoted passage was: "We should simply renounce the erroneous view that inflicted expiation or punishment is well adapted either to the deterrence and reform of past offenders or to fostering respect for the law and its agencies among the rest of us." *Ibid.*

Of course, punishment has not been renounced, but we are not very proud of it. Where thoughtful observers of and participants in the system meet together, such as in the American Law Institute or in a state's penal code reform commission, the resultant expressions of general purpose are apt to be a refinement of both the deterrence goal and the "rehabilitative ideal,"[148] with expressions of concern for the "law's authority" being the stylized vestige of the "punitive ideal."

It is somewhat surprising that little scholarly interest in recent years has been shown in what exactly our institutions of the criminal law have intended, meant, or assumed by "punishment." This is most surprising in an age conditioned by Freud to ask questions about self and perspectives of reality. What is *intended* to punish (kill, hurt, embarrass, inconvenience) may not be perceived as punishment by the recipient.[149]

Of course there are older philosophical antecedents which gave some shape to the concept of just punishment. Hegel and Kant's metaphysics, for example, postulate a great cosmic ledger of rights and wrongs which in part can only be balanced by the entries of human error on the one hand, and just punishment on the other. More recently, the combination of natural law ideas and a kind of a functional morality supported by law and its institutions has produced new defenses.[150]

Today the feeling is certainly widespread, despite the lack of data suggesting its validity, and indeed often in the face of some evidence to the contrary, that long prison terms (if that can be accepted as a common denominator for modern punishment) in and of themselves deter others from committing crimes (this point to be carefully distinguished from the ego support such sanctions give to conformists). Nevertheless, as a team of thoughtful observers has recently noted:

> Even if it could be shown that punishment is both right and expedient, we have neither the means nor the nerve to institute its use on a scale anywhere commensurate with the problem it is meant to address. Of course, we continue to punish offenders, and when we do, we do it with the solemnity that ordinarily attaches to traditions. There is, however, hardly any doubt that this is done, by and large, with misgivings and the punitive approach is abandoned readily at the slightest hint of an alternative, while at the same time

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[148] In the first article of the newly enacted New York Penal Law, among other general statements of purpose, appears this provision: "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 (becomes effective on September 1, 1967).

[149] *Cf.* CAMUS, THE STRANGER (Gilbert transl. 1946).

[150] See, *e.g.*, DEVLIN, THE ENFORCEMENT OF MORALS (1951); Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965).

> the suggestion that we punish harshly, say by mutilation, would certainly be repudiated even against perfect evidence of its deterrent effect.[151]

"Punishment" then, may be definable only in terms of sanctioning alternatives or in functional terms, and not in discrete abstractions.[152]

Whatever tentativeness is apparent in today's expressions of major policy in the general system of the criminal law, two lines of research prospects have been thought most attractive: (1) the effectiveness of rehabilitation;[153] and (2) the effectiveness of deterrence or general prevention.[154] Accordingly, it seems appropriate to defer any further comment upon goals until some description has been given of the particular sanctions themselves which are thought to be the more detailed expression of major goals or policies.[155]

2. Strategies

In a comprehensive sense it is possible to identify a host of particular sanctioning strategies which touch nearly every human value commonly used in the general adult criminal system. Basic political power, for example, may be attenuated in individual cases as by the denial of the right to vote or to hold public office.[156] Wealth may

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[151] Bittner & Blatt, *The Meaning of Punishment,* 2 ISSUES IN CRIMINOLOGY 79, 96 (1966).

[152] See generally Mead, *The Psychology of Punitive Justice,* 23 AM. J. SOC. 577 (1918).

[153] By far the most ambitious research project that has come to my attention is reported in GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

[154] See, *e.g.,* Andenaes, *The General Preventive Effects of Punishment,* 114 U. PA. L. REV. 949 (1966).

[155] Another source should be briefly alluded to for expressions of major goals, *viz.,* the statutes speaking to the administrators, which to some extent are the expressions of the administrators themselves. *E.g.,* 18 U.S.C. § 4001 (1951), which provides, in part, as follows:

> The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

A provision in the California Penal Code is parallel:

> The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director.

CAL. PEN. CODE § 5054. Another provision from federal statutes is even more particularistic:

> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an *individualized system of discipline, care, and treatment* of the persons committed to such institutions.

18 U.S.C. § 4081 (1951) (emphasis added).

[156] The loss of the right to vote is a statutory penalty for conviction of felony in three-fourths of the states. It is doubtful that any state permits a prisoner to vote. . . . In half a dozen states conviction is a statutory disqualification for jury duty.

RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 614 (1963).

be directly affected by the levy of fines and indirectly affected by denial of access to paying employment during confinement.[157] Respect may be taken away in part by the conviction alone. Affection also is involved implicitly if not explicitly by the separation of the prisoner from wife and family. Finally, it is still possible in most versions of the system (state and federal) to take the offender's life, although the use of the death penalty may be declining.

Indeed it seems meaningful to say that there are two basic sanctioning modalities, (1) those reserved for certain kinds of offenders and offenses where deprivations are relatively mild, and (2) those reserved for certain other offenders and offenses which are relatively more severe or coercive. The first is represented by probation, the other by the prison-parole process.

From the perspective of the courts it would seem that the primary sanctioning device for supporting a policy of pure retribution is confinement. Its linear dimension across time is its functional, dynamic expression.

Length of prison commitment can be seen as a principal sanctioning strategy *primarly,* but not solely, used in support of non-rehabilitative goals.[158] The duration dimension of the prison process is manipulated not only by the sentence to prison *per se,* but also by the opportunity for parole, a sanctioning outcome which is contemplated as possible in most individual cases. However, competence to decide this outcome rests in other decision-makers, looking at other criteria than the offense itself and the background of the offender at the outset of the sanctioning process. Perhaps in no other phase of decision-making in the adult general system is discretion so vast as in the parole board or commission. Most state statutes do not list guidelines and courts will not review their decisions. The polar star, however, seems to be a prediction as to the success of parole; that no criminal offenses or violations of parole conditions will occur. "Even with predictive devices and elaborate parole success studies, determination of the probability of recidivism is virtually a matter of intuition based on experience but unaided by rules or even firm guidelines."[159]

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[157] The work-release plan represents a modification in the direction of ameliorating this older trend. Often it is justified on grounds of economic benefit to the state and to society by virtue of reduced expenses of maintenance of the prisoner or in welfare payments to the prisoner's family.

[158] Most observers and participants in the sanctioning process insist that some minimum of confinement is necessary to effectuate other policies through the less coercive strategies or modes. This is reflected in the nearly universal trend of enactment and use of the indeterminate sentence.

[159] Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 WASH. U.L.Q. 243, 299.

Presumptively the rational decision to release on parole is related to three major factors (other than the eligibility date typically set by statute): (1) the social, psychological background of the inmate; (2) his prison performance; and (3) some assessment of such variables as the category of the offense and its surrounding circumstances. However, the background file may be woefully incomplete. The prison record may only indicate the superficial "high-points," like presence or absence of infractions and courses of study completed. Finally, the category of offense may be at cross purposes with probabilities (based on past statistical data). Thus, a murderer who statistically has a high success probability has to face the board's reluctance to "risk" this "kind of offender" in the community. The largest single deficiency in the parole decision process seems to be one of lack of contemporary communication with a variety of participants in the process of social interaction with the individual inmate.

Some of those individuals whose cases go through the adult criminal system and are sanctioned are put into the prison-parole process.[160] At any time the total number of persons in the United States confined in prison, including federal and state institutions, is approximately 250,000.[161] These estimates do not include persons confined in local jails, nor do they include juvenile centers. "No figures are available on the numbers of persons on probation and parole in the entire country, but one index is the fact that [as of 1966] there are more than 40,000 federal offenders under community supervision."[162]

While there may be a trend in the direction of increased use of probation as a sanctioning device, the prison population increase is quite pronounced, paralleling population growth. It also coincides with the use of longer prison terms. 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, to 24.6 in 1944, to about 26 months in 1960.[163] This marked trend probably represents an impressionistic

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[160] See generally Alexander, *Current Concepts in Correction,* 30 Fed. Prob. 3, 7 (Sept. 1966).

[161] *Id.* at 6. In 1958, Tappan estimated the total at about 200,000. See TAPPAN, CRIME, JUSTICE AND CORRECTION 620 (1960).

[162] Alexander, *supra* note 160, at 6. A survey conducted for the President's National Crime Commission indicates that in 1965 about 1-1/3 million persons were under correctional authority on an average day. The break-down was as follows: jails — 342,688; juvenile authority — 348,204; prisons — 591,494. THE CHALLENGE OF CRIME IN A FREE SOCIETY 160 (1967).

[163] See TAPPAN, CRIME, JUSTICE AND CORRECTION 447-48 (1960); U.S. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS 1960, reported in GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 523 (1964) (1960 statstics found herein). See also Bennett, *The Sentence and Treatment of Offenders,* Annals 142-45 (1962).

frustration of sentencing judges and parole boards rather than a changed statutory sentencing structure.[164]

On the other hand, there is a small trend discernable in the direction of ameliorating the confinement strategy in three other ways. We refer here to statutory authorization of "work-release" programs for felons, "furloughs" or prison leaves for visitation to families or in anticipation of release, for the purpose of securing employment, and the creation of decentralized confinement centers called "half-way houses." Until 1965 only Wisconsin, North Carolina, Michigan, and Maryland had programs whereby inmates of prisons were allowed to pursue regular employment outside the prison during the day, returning to the prison for nights and weekends.[165]

The federal government added impetus to the trend in 1965 when the Prisoner Rehabilitation Act was passed.[166] This statute provides for "work-release" as well as for the establishment of unescorted furloughs and for the building of half-way houses, several of which have begun operation.[167]

Since relatively few individuals have thus far participated in these innovative institutions, it is not accurate to characterize them as principal strategic devices for achieving specific rehabilitatve goals. However, it is clear that even in this experimental state of their development they are being looked upon precisely in this light.[168]

For the great bulk of the prison population the more significant institutions and practices are those that are confined to the limits of the prison.

The longer history of our prisons in this country discloses that if a prison had a farm or an industry of some sort — even if it was only soap making or stamping license plates — it was considered advanced. If it had some form of elementary school program and a

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[164] Tappan characterized this attitude in terms of "the growing public and official concern with crime and, consequently, the increasingly conservative action of parole boards." TAPPAN, CRIME, JUSTICE AND CORRECTION 448 (1960).

[165] None of these include the inmates of local jails except in North Carolina where arrangements are made with local jails to house the work-releasees.

[166] 18 U.S.C. § 4082 (1965).

[167] N.Y. Times, Feb. 12, 1967, p. 12, col. 4 (city ed.), announcing the planned opening of the first two adult half-way houses in the federal system, one each for Atlanta and Houston.

[168] This perspective is shared both by correction administrators and by the legislators who have initially made them possible. Consider, for example, what the current Director of the Federal Bureau of Prisons has recently written:

> Together with furloughs, work release is the best method yet devised for bridging the traditionally wide gap between the correctional institution and the communities from which offenders come and to which they will return. These three recent developments — attempts at better sentencing; use of half-way houses; and the implementation of work release and furloughs — are the essence of current corrections. These concepts really are not so new, but their emphasis is.

Alexander, *supra* note 160, at 6.

modest library, it was even more progressive. These programs still characterize much of the activity typically engaged in by large numbers of prisoners for perhaps the greater part of each day. What else is going on in these walled communities, these "societies of captives," to borrow Gresham Sykes' compelling appellation?[169] Is it worthy of the name rehabilitation, treatment, or corrections?

The difficulties in quantifying the participation in any of these programs should be acknowledged, but the prevalence or incidence of their employment as part of the national picture should at least suggest some contours of dimension and scope.

The principal sub-strategies employed in the confinement phase of the prison-parole process seem to be the classification technique, vocational counseling, group therapy (for of course smaller numbers within the whole), and work or schooling, plus some form of recreation. Classification is intended to be the key to the individualization which later follows by finding out as much about the individual inmate as possible. His educational achievement, work record and skills experience, family pattern, religious orientation and insights into the basic personality structure and characteristics must be garnered from incomplete sources by the testing of a hostile, or at best rather indifferent subject, by a staff which in a professional sense is far from adequate.[170]

The current trend appears to be away from reliance upon classification at a particular prison, where the diagnostic team may or may not be complete, and toward the creation of "reception centers" where all intake into the system is initially channeled for a period of "quarantine" until the testing and data gathering is rather complete. This is by no means a universal achievement in the various states; and the trend is most noticeable in the sub-system dealing with the youthful offender, roughly below age twenty-five.[171]

The significance of such a trend should be noted in several respects. If at the same time specialized units or programs are made

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[169] SYKES, SOCIETY OF CAPTIVES (1958).

[170] The ordinary prison lacks the personnel, space, and resources for conducting the sort of intensive studies that are commonly deemed to be desirable for planning the individual's treatment program. The diagnostic-reception center has developed in response to the need felt in some states for more adequate and appropriate information upon which to predicate treatment.

TAPPAN, CRIME, JUSTICE AND CORRECTION 626 (1960).

[171] Tappan reports that in the 1940's only New York and California had such centers, the one in New York being for youths between sixteen and twenty-one, the one in California being for adults. Now, in addition to California and New York, at least ten other states have established the reception-diagnostic centers. Several are specialized for young adults or juveniles, some only for adults, and some without age limits. The states are Illinois, Massachusetts, Kentucky, Washington, Alabama, Rhode Island, Minnesota, New Jersey, Michigan and Pennsylvania. Furthermore, in recent years the Federal Bureau of Prisons has set up diagnostic resources in the youthful offender sub-system. See TAPPAN, CRIME, JUSTICE AND CORRECTION 626 (1960).

available, depending on factors peculiar to each case, then it represents a distinctly rational effort to make best use of these. On the other hand, the trend in favor of establishing the diagnostic center may be an end in itself, to be used for understanding what kind of population is being received regardless of what programs are actually implemented.[172]

Finally, to the extent that authoritative participants outside the prison programs themselves are involved, the trend may represent increased opportunity for authoritative supervision of the prison-parole process. In Hawaii and Michigan, for example, the diagnostic device is consciously regarded as a necessary step in the court-imposed sentence.[173]

By and large, at the current state of evolution, the classification device is still considered, not as a discrete and autonomous phase or arena, but part and parcel of the correctional institutions themselves. Hence, what kind of program the inmate receives is still largely a function of what the institution has to offer and a function of what will "take" in the individual case.[174]

After the classification phase, the inmate, assuming he is neither a medical case nor an extreme custody risk, will be afforded opportunities to work (indeed he is expected to do some kind of work), to play, and perhaps to learn a bit. Ideally, the work experience in prison should be related both to future plans or prospects for employment as well as to past experience and level of skills. But, as in nearly every other phase of the prison experience, what the individual inmate does is a complex function of what facilities are available and what level of education the individual possesses, together with his attitudes and motivations. Today prison industries are limited in the main to production of items like traffic signs, printing of forms, etc., for use by governmental agencies, although formerly prisons produced a much wider range of items for public marketing. Prison

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[172] See, *e.g.*, Hannum & Warman, *The MMPI Characteristics of Incarcerated Females*, 1 J. RES. IN CRIME & DELINQUENCY 119 (July 1964).

[173] See PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 185 (1962).

> Under the Hawaiian system, the sentencing court is required to sentence . . . for the statutory maximum . . . . Within three months the parole board is required to conduct an intensive presentence investigation and in-confinement study of the prisoner's character and background and to fix the minimum term of imprisonment to be served before he shall become eligible for parole. Such minimum must then be submitted to the sentencing court . . . .

[174] The subtle power of the interaction between the inmate and his culture, including not only the perspectives of his keepers but also his peers, to influence certain decisions to involve oneself in the prison team, newspaper, or "shrinker sessions" has been noted by more than one scholarly observer. CLEMMER, THE PRISON COMMUNITY (1958); SYKES, SOCIETY OF CAPTIVES (1958). But Glaser's recent research suggests that inmate-to-inmate pressure negating cooperation with staff is not immutable. Rather, it tends to vary according to how authoritarian in attitude and practice the the staff is *vis-a-vis* the inmates. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 119-28 (1964).

operated farms have become commonplace today but mainly for those prisoners with low-risk designations. The pressures of organized labor and business have combined to challenge the prisons to undertake meaningful work for the inmates, which means in many instances vocational training such as auto mechanics, appliance repair, carpentry and masonry — activities without production goals.[175]

To a large extent prison labor is still characterized by the patronizing traditions of its origins (work gangs being contracted to state highway and forestry departments and the like), although without many of the older evils of the "leased labor" system.[176] Even so, there is not enough meaningful work available in prisons, even though those in decentralized rural settings may get quite enough of the physical sort, and idleness or over-assignment to projects is not uncommon throughout the system.[177] Where there is some work available wages are quite low by free market standards, varying between five and fifty cents per day, the federal system being at the upper ranges.[178]

From the point of view of the correction specialist, the most significant recent trend is represented by the work-release scheme, whereby the inmate is released daily to pursue his normal employment or a substitute therefor in the community where the prisoner finds himself.[179] The particular advantages of this are seen to be (1) the fact that the offender continues a meaningful tie with the community; (2) that he actually performs a socially useful task; and

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[175] The federal prisons' industrial program is perhaps the best developed. Some seventeen different lines of products and services valued in 1958 at over thirty million dollars having been established. U.S. BUREAU OF PRISONS, FEDERAL PRISONS: 1958, A REPORT OF THE WORK OF THE FEDERAL BUREAU OF PRISONS 1959.

[176] For a comprehensive view, see TAPPAN, CRIME, JUSTICE AND CORRECTION 681-90 (1960).

[177] Glaser's research shows that even in the best of prisons the median working day is apt to be less than eight full hours actually spent at the assignment and the time actually spent working is frequently six hours and in some cases as low as three hours, particularly at the beginning of the sentence. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 229 (1964). The typical prison job is not an industrial one, since

> less than a fourth of inmates in federal or state prisons are employed in prison industries. This is partly because the maintenance and sanitation of the prisons and the care and feeding of inmates requires the employment of a considerable number of prisoners in kitchens . . . laundries . . . and supply storage and distribution . . . .

Id. at 226.

[178] TAPPAN, CRIME, JUSTICE AND CORRECTION 690 (1960). In a few states, about 12, the practice is to bestow "industrial good time," or credit toward service of sentence in lieu of wages. An international congress of correction administrators has recommended the eventual parity payment of inmates for their work, "provided output is the same both in quantity and quality." SECOND U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, London, August 1960, at 41 (A/Conf. 17/20).

[179] See generally Carpenter, *The Federal Work Release Program,* 45 NEB. L. REV. 690 (1966).

(3) that he is paid for it at a competitive rate, resulting not only in greater self-esteem but continued non-public support of his family.[180]

Education, at least through the elementary grades combined with opportunities for correspondence courses and special courses offered by visiting teachers, is a typical feature of the contemporary prison scene, although as might be expected the quality of instruction and materials, to say nothing of inmate motivation, is spotty.[181] Recreation, particularly team sports, while they are highly lauded by outside enthusiasts as particularly useful in "character building," seem to play a relatively minor part in most prison programs, unless one includes the relatively passive activities of TV viewing, reading magazines, gambling, and making marketable craft items like hand-stitched wallets.

Although they are not yet prevalent strategies in this general criminal system in the United States, there is enough actual employment and professional comment (accompanied by some research) to make mention of several related topics. These concern the deliberate manipulation of factors most vitally related to the inmates' opportunities for self-expression and the gaining of insight into his own distorted life style or personality structure. These attempts are most clearly related to respect, rectitude and psychological well-being, while the strategies or program content discussed above most clearly relate to other values such as skill, enlightenment, and wealth. I am referring to group psychotherapy, the social milieu, and experiments in limited self-government.

It is apparently not known with any degree of accuracy how many adult penal institutions, federal and state, actually employ professionally guided psychotherapy programs.[182] Instead of having specialized units for such an approach, the typical experience is for the prison to have available, in most instances on a part time basis, a psychiatrist, clinical psychologist or a social worker to meet regularly with volunteers from the general inmate population. The group may not be very homogeneous (for the obvious reason that a wholesale collection of personality or emotional distortions will be represented), but sometimes it is reported that the group will have some success in revealing aggressions, defenses, and anxieties of many of the participants not always explicitly related to the particular offense

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[180] Such an offender is typically also expected to defray at least part of his own expenses in living as a "guest of the state."

[181] For a sampling of the trends in this category of prison program see MACCORMICK, THE EDUCATION OF ADULT PRISONERS: A SURVEY AND A PROGRAM (1931).

[182] A New Jersey experiment dealt with juvenile offenders. It is described in MCCORKLE, ELIAS & BIXBY, THE HIGHFIELDS STORY: AN EXPERIMENTAL TREATMENT PROJECT FOR YOUTHFUL OFFENDERS (1958).

or style of life which is more or less directly responsible for their commitment to the institution.

In any event, relatively few penal institutions employ psychologists, psychiatrists, or trained social workers in any kind of group treatment programs — therapy or "counseling."[183] Group-centered activity in prison does not always take the explicitly therapeutic cast, but may extend to less ambitious tasks than full self-awareness and understanding. Group counseling, for example, may aim at simple release of tensions or the providing of shared experiences of a positive sort with secondary gains of identification with others, and this appears to be more widely used than any other variant.[184] Indeed, it has been suggested that group psychotherapy contributes "little to attainment of change goals and . . . actually 'may increase' negative client attitudes toward these goals and the staff."[185]

On the other hand while the less individual-therapist oriented approaches, represented by the social milieu, group counseling, and guided group interaction concepts, may superficially have more easily obtainable short-run tasks (especially as they are thought to depend less on the high level of training necessary for the deep-probing psychotherapy), they depend to a larger degree on concern with every facet of the group and individual's social relationships, a scope not yet considered feasible in most adult prisons.[186] One inhibiting factor from outside the system is the imprecision in workable models for group interaction, therapy, or counseling.[187]

Nevertheless, it does seem to be agreed that efforts to achieve even modest levels of participation in inter-personal, intra-group

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[183] There has been little systematic reporting, *but see* McCorkle & Elias, *Group Therapy in Correctional Institutions,* 24 Fed. Prob. 57 (June 1960), for a survey of the trends in the decade 1950-59. One reporter estimates that only nine states had full time psychiatrists for prisons in 1954; and the general ratio over-all between psychiatrists and inmates was something on the order of 1 to 1600, including part time personnel. The time of most of these is spent largely in classification work and in preparing prediction reports for parole board use. TAPPAN, CRIME, JUSTICE AND CORRECTION 706 (1960) (relying on a Massachusetts study).

[184] Sarri & Vinter, *Group Treatment Strategies in Juvenile Correctional Programs,* 11 CRIME AND DELINQUENCY 326, 330 (1965).

[185] *Id.* at 333. The reasons for this, these investigators suggest are several.

> *First,* therapists interacted with client members of their groups almost exclusively in the therapy section, where relations were structured and formalized. *Second,* the content of group sessions was unrelated to daily life or to the problems of clients as they perceived them. *Third,* the group served only a context for therapist-client exchanges, there was no attempt to mobilize its forces to achieve client change. *Fourth,* the group experiences did not facilitate meaningful interpersonal relationships relevant to other aspects of institutional life.

See also Hadden, *Group Therapy in Prisons,* 1948 PROC. AM. PRISON ASS'N 178.

[186] See Empey & Rabow, *The Provo Experiment in Delinquency Rehabilitation,* 26 AM. SOC. REV. 679 (1961); Konopka, *The Social Group Work Method: Its Use in the Correctional Field,* 20 Fed. Prob. 25 (March 1956).

[187] Cressey, *Contradictory Theories in Correctional Group Therapy Programs,* 18 Fed. Prob. 20 (June 1954).

identification with goal-directed activity containing behavior models (*e.g.*, former inmates who have "graduated" to the larger community or other persuasive staff types) are distinctly worthwhile, though too much should not be expected of them, certainly not in the short run when so many other variables in the prison-parole equation are not drastically altered.[188] Some of these other factors are now receiving appropriate research attention, for example to discover what kind of institutional setting, training and class of staff, related to categories of offenders determine estimates of goals and goal achievement.[189] Furthermore, it seems that it is now being recognized that strategies of correction and treatment involve not only dynamic interaction to achieve stated goals, but also, at a more elemental level, that *research* itself into the innovative strategies which may be appropriately adopted is or must be a function of staff and inmate participation.[190]

3. Outcomes and Effects

Whatever the general adult criminal law system professes to be, it is clearly a social funnel through which human beings are constantly passed, from and to the society at large. It may interrupt life styles, careers, and drives, but not for long. To what extent does this funneling or detour system work to change individual life-styles, expectations and attitudes? The impact of the sanctions previously discussed, in light of policies of varying clarity and precision is the remaining phase to be considered in this overall view of the trends in the system.

Of course, from one point of view the most important value outcome will be the one most immediately significant for society. Looking to the system for certain generally stated goals, this is the rectitude value. By giving the system a larger context it becomes meaningful to account for impacts on values of the participants along a larger range. Thus, we will briefly consider sanctioning outcomes in familiar terms of the human values mentioned earlier, grouped for

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[188] See, *e.g.*, Grosser, *The Role of Informal Inmate Groups in Change of Values*, 5 CHILDREN 25 (Jan.-Feb. 1958); Metton, *The Social-Cultural Environment and Anomie*, in WITMER & KOTINSKY, NEW PERSPECTIVES FOR RESEARCH ON JUVENILE DELINQUENCY 32 (Children's Bureau Publ. No. 356, 1956); Schein, *Interpersonal Communication, Group Solidarity, and Social Influence*, 23 SOCIOMETRY 148 (1960).

[189] In a fairly recent California study, for example, it was found that pessimism among staff is characteristic of prisons with young, rather than old, offenders; that the higher the job status in prison the less authoritarian, pessimistic and socially distant from inmates were the staff (whether simply "custodial" or "treatment"); and that the same correlation was found with reference to education. Kassebaum, Ward & Wilner, *Some Correlates of Staff Ideology in the Prison*, 1 J. RES. IN CRIME & DELINQUENCY 96 (1964).

[190] Grant & Grant, *Staff and Client Participation: A New Approach to Correctional Research*, 45 NEB. L. REV. 702 (1966) (brief description of some of the experiments to date).

emphasis into (1) wealth, skill and enlightenment, and (2) rectitude, respect, affection and well-being.

Wealth. In most states and in the federal system the parolee or discharged prisoner will leave the prison with a new suit of clothes, travel money to a certain destination, and either a gratuity of about $20.00 or his own required prison savings (of less than $50.00 in about half the cases), or both. Only fifteen per cent will have any savings outside the prison.[191]

A pre-parole arranged job frequently fails to materialize. The reason most frequently cited is that the prospective employer's needs have changed in the intervening weeks or months. As many as one-third of such released individuals fail to receive any employment during the first month following release. Furthermore, perhaps as many as one-half will not work full time during the first three months after release.

The typical kind of employment will be that of a shipping or stock clerk, packing house worker, helper, truck driver, or semi or unskilled factory worker. Median incomes will be quite low in the initial post-release jobs, ranging from about $80.00 in the first month to about $250.00 after the third month, although many will have partial support of some kind such as meals or low-rent housing in this period. Debt will not be uncommon among the post-release inmate.

In sum, the picture is one of marginal economic viability which does not change drastically over the years in the typical case.[192] Furthermore, it seems clear that prisoner expectations are not correlated to this predictable pattern.[193]

Skill and Enlightenment. Considering the work experience of adult inmates noted above, it should not be surprising to find that few inmates leave prison with either newly acquired skills or others sufficiently maintained to command an impressive range of skilled jobs on the outside.[194] One recent project suggests strongly that the

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[191] These approximations are based on surveys reported in the compendious study by Professor Daniel Glaser's Ford Foundation supported project at the University of Illinois. See GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 316-20 (1964).

[192] *Id.* at 327-58.

[193] Our interviews with prisoners at various stages of their sentence, and shortly after release, predominantly supported the proposition: Prisoners have expectations of extremely rapid occupational advancement during the years immediately following their release, expectations which are unrealistic in the light of their limited work experience and lack of vocational skills.

Id. at 358.

[194] *[I]n about one-tenth of inmate postrelease jobs there are benefits from new learning acquired in prison work, in about three or four per cent of these jobs there are benefits from the preservation of old skills through practice in prison, and in about five or six per cent of the post-release jobs the prison provided useful physical or psychological conditioning.*

Id. at 252 (italics in original source).

skill level attained before prison is most significant in determining what the post-release position will be.[195]

This is not to suggest that the prison experience does not produce some positive features with respect to skills, work attitudes, and individual expectations. One of the most interesting features of Glaser's research report is the finding that for most inmates the work in prison was the longest and most continuous employment experience that most prisoners, especially the younger ones, have had.[196]

Furthermore, those inmates who were fortunate enough to be in a skills supervision enterprise in prison, such as machine shop, printing or electronics were, in the cases studied by Glaser, far better rewarded in terms of helpful interaction with a staff member. On the other hand, there is apparently a good deal of "dead end" kind of work in prisons, stemming from the shortage of real labor, in which attitudes were poorly shaped and no preparation for outside work was given. Such jobs as office orderly, runner, or maintenance men are examples.[197]

While their average intelligence does not differ substantially from that of the general population, prison inmates typically have median formal education which is about two years lower, a majority never having finished high school. Superficially at least, many inmates reach higher levels of formal education, but there is some evidence to suggest that one paramount motivation involved is to achieve the *record* of completing some level of school, evidenced by a school completion diploma, and not to acquire knowledge itself.

Account has to be taken of the use by the prisons of a mixed system of inmate teachers and some paid staff teachers, together with the wide use of correspondence courses duplicated for profit within the prison. The most significant gain to be noted anywhere in the system is the improvement of reading skills of the youthful offender, many of whom enter as functional illiterates.

Glaser's research indicates that not many post-release employment opportunities are significantly enhanced by the prison educa-

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195 Those who were salesmen . . . return to sales . . . ; those who were agricultural workers return to agricultural work or unskilled labor. . . . All of this suggests the hypothesis that, whatever the underlying factors may be, the intervention of institutional work experience or vocational training has a negligible impact on the level or type of work inmates go to upon release.

U.S. BUREAU OF PRISONS, THE FINANCIAL AND EMPLOYMENT RESOURCES OF PERSONS RELEASED FROM FEDERAL INSTITUTIONS 13 (Jan. 1962), reported, *id.* at 253.

196 *Id.* at 232. "Regularity of prior employment is more closely related than type of work previously performed to the postrelease success of prisoners in avoiding further felonies." *Id.* at 233.

197 The highest failure rates were in those inmate positions which are conducive to the most influence in the inmate community. These are the prisoners who were personal assistants to officers, as clerks, orderlies . . . .

Id. at 256.

tional experience. Indeed, for some the experience appears to have distinctive negative features, such as raising unrealistically high expectations about vocational chances.[198]

Rectitude. Estimates of how many released prisoners commit further serious crimes and return to the system have been difficult to obtain, although it had until quite recently become fashionable to place the figure at about sixty per cent, suggesting a rather wholesale failure of one of the chief goals of the system.[199] Statistical surveys and analyses in Minnesota, Washington, Pennsylvania, California, Wisconsin, and New York, as well as in the federal system, provide estimates of the rate of return to prison ranging from 31% to 44% for adult parolees and from 31% to 49% for youthful offenders.[200] This estimate is based primarily on crude figures of return to prison by all former inmates regardless of the reason for return — violation of some parole condition or the commission of a new crime, whether felony or misdemeanor.

A much larger proportion of released inmates has "some brush with the law" — something on the order of fifty per cent — but not all infractions of parole are reported or used as the basis for revocation. Neither do all new convictions of discharged former inmates result in a return to prison. These are functions of the parole supervision process and the sentencing phase of the overall sanctioning process.[201]

Accounting records are not yet sufficiently well developed or coordinated to permit conclusive generalizations about recidivism in the population of the adult prisons. Nevertheless, Glaser is willing to offer the following hypotheses, which will bear testing in the future:

> 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;

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[198] *Id.* at 289. See generally Schnur, *The Educational Treatment of Prisoners and Recidivism,* 54 AM. J. SOC. 142 (1948).

[199] One observer who questioned this figure is Sol Rubin of the National Council on Crime and Delinquency. See Rubin, *Recidivism and Recidivism Statistics,* 4 NAT'L PROB. & PAROLE ASS'N J. 233 (1958).

[200] See GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 21-24 (1964) (statistical studies of parolee recidivism); Zuckerman, Barron & Whittier, *A Follow-Up Study of Minnesota State Reformatory Inmates,* 43 J. CRIM. L., C. & P.S. 622 (1953).

[201] See generally Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice,* 23 LAW & CONTEMP. PROB. 495 (1958) (factors commonly influencing a sentencing structure).

d. where there is a high overall crime rate in the communities to which prisoners are released, so that there is high prospect of the releasee coming from and going to highly criminogenic circumstances.[202]

Such generalizations of course say something about the prison-parole program, but they do not by any means take account of a whole aggregate of variables, some of which are directly related to the content of the prison-parole program and others of which are not yet so directly related. For example, the age at which a person commits his first offense has been shown to have a strong influence on predicting success after release. Likewise, the character of the offense is important.[203] On the other hand there is not yet much evidence to suggest that race, intelligence, or biological factors, such as body build have important determinant positions in relation to recidivism.[204]

There is little in the corpus of reported research to indicate specific correlations between particular features of the prison program and the successful releasee, or negatively to suggest concretely a nexus between features of the prison experience and a failure on parole or discharge.[205] Nevertheless, Glaser's recent research into the attitudes of inmates about the total impact of prison on them and their fellow inmates suggests that the prospect of loss of liberty, "thinking about being locked up," particularly among older prisoners or ones with prior confinement, is an important ingredient in the conscious support one could give toward a decision "to go straight."[206] Among a majority of "successful releasees" interviewed, it was during confinement that they thought they changed most permanently from an interest in crime.[207] Of course, participant attitudes are not decisive of basic questions about real causation in behavior changes,

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[202] GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 24-27 (1964).

[203] *Id.* at 44, wherein the following broad conclusion is offered:

> Felony offenses fall into three broad rankings of recidivism, as follows: a. The most recidivistic category consists of economic offenses not involving violence (larceny, burglary, auto theft, and forgery), and the most recidivistic single type of felony is auto theft. b. Consistently intermediate in recidivism rate are several common but diverse types of crime, such as narcotics offenses, robbery, and kidnapping. c. The lowest recidivism occurs with those offenses most associated with unusual circumstances in the offender's life rather than with offenses pursued as vocations; notable here are murder, rape, and embezzlement.

[204] *Id.* at 51-53.

[205] See, however, the stylized description of certain categories of the successful release career as well as the marginal and the failure careers in *id.* at 54-83.

[206] *Id.* at 481.

[207] When we asked them how this change came about, 62 per cent made reference to their deterrence by the unpleasantness of imprisonment. This was the most frequently mentioned type of abstract influence in their reformation. In addition, 54 per cent referred to their maturation, and 30 per cent to their learning a trade or acquiring good work habits.

Id. at 482.

but such indications do have implications for other values closely related to rectitude.[208]

Respect, Affection and Well-being. Despite estimates of prison life which characterize it as a subculture or self-contained community,[209] this does not necessarily imply a kind of solidarity which carries over into the post-release life of the adult offender. Ties with the outside may be more important than formerly suspected in allowing the individual to adjust to his custodial environment. While inmate relationships in many prisons may be characterized as relationships in which a premium is placed on independence, aloofness or limited engagement both between prisoners themselves and between inmate and staff (the "do your own time" ethos), it seems clear that inmates do receive wholesome support from each other, particularly younger inmates by first-term older inmates.[210]

The process of interaction among prisoners and staff is admittedly a complicated one. However ambivalent such relationships may be, the social world in which the inmate apparently sees himself, as well as the whole class of his fellow inmates, is one of considerable pessimism. It is one characterized by relatively high expectations of failure in various pursuits.[211]

Such attitudes may be a function of the time remaining before release. As release date approaches, Glaser's evidence suggests, ties with relatives tend to improve, although particular friendships and even marriages may have long since dissolved. Most releasees return to their home communities, and for a time at least live with their families.[212] Those who live alone apparently have less chance of staying out of criminal activities.

Old friends will be encountered, but most will know of the releasee's record. In most instances, new friends will be made and they too will learn of the prison record. In those situations where the record is not known the releasee will have a better chance of not returning to prison. Although former prison acquaintances will be

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208 [T]here is evidence that the extent of any deterrent effect does not increase at a uniform rate in proportion to increments in the severity of a sentence. . . . This does not eliminate the possibility of major deterrence occurring from a certain minimum sentence, the most effective minimum probably being much less for first offenders than for advanced offenders. This is a matter on which the F.B.I. may throw some light from extensive statistics on recidivism rates for different lengths of confinement, for various types of offender.

Ibid.

209 CLEMMER, THE PRISON COMMUNITY (1958); SYKES, THE SOCIETY OF CAPTIVES (1958).

210 GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 89-118 (1964).

211 This point is not without its contradiction in selected cases of inmates who not infrequently see certain aspects of their prison experience in inflated terms, such as their level of attainment in education or skills. See note 193 *supra.*

212 See GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 378, Table 15.6 (1964).

encountered, most releasees will not maintain contact with them.[213]

The picture which emerges is one of a fairly dependent economic relationship for some time, with kinship ties strengthened, some new friendships established, but haunted by fears of being regarded as different and an outcast. This is particularly true with regard to the police, who not infrequently "watch" and harass the releasee, frequently arresting him on mere suspecion.[214] In view of his low self-image, his relatively uncompetitive position economically, his precarious social relationships and the fact that in many instances the local police know the ex-inmate as "undesirable," it is perhaps surprising that return rates are not higher.[215]

II. SUMMARY APPRAISAL OF SYSTEMS

First it should be emphasized that the events which occur in the arenas of authority and power which make up our systems of human control are not isolated from parallel events that take place in the daily lives of the millions of individual human beings whose constant interactions in pursuit of the same value set (albeit with varying emphasis) constitute a process of social interaction. Consequently, comprehensive analysis of a decisional process should take account not only of rule, but also of outcome, and the variables contributing to the evolution of both. While this degree of comprehensiveness has not been attempted in the foregoing descriptions of trends in order that sharper focus could be maintained on other features of the process, it should not be understood that such things as personality, culture, class of major participants and level of crisis are not relevant to a full understanding of the real dynamics of such processes. It should suffice for this abbreviated analysis to indicate preferred perspectives to be assumed by sanctioning decision-makers. Thus, the sanctioning decision-maker should be oriented in time to the future events which major goals of the system attempt to govern,

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[213] *Id.* at 388-93.

[214] It would have been helpful if the Glaser research had undertaken to sample attitudes of friends and associates of the releasee with regard to his criminal record, since many releasees who subsequently are returned to prison cite prejudice as well as lack of employment opportunity and family discord as reasons for their failure to stay out of trouble. In any event, one of the most interesting revelations of the research actually undertaken is that family accord, the strengthened family tie, where it is present, can be one of the most important factors in determining likely success in the post-prison experience. In this respect the work of the Gluecks and McCords is confirmed. GLUECK & GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950) and MCCORD & MCCORD, ORIGINS OF CRIME (1959), cited in GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 381 (1964).

[215] While such an appraisal might suggest the desirability of the released prisoner routinely going to a new community upon release, there are competing considerations in that often the most immediate support available anywhere is with family and perhaps others such as former employers genuinely interested in the individual's reintegration into his community. This paradox may suggest appropriate remedial steps not yet attempted in the post-release phase.

be identified with the largest community possible in which the value processes operate, and be committed to the larger goals of the public order system supporting these value processes.

Contextuality and policy oriented perspective aside, what then of basic policy of the public order systems under consideration?

In its most abstract formulation the overriding goal of our legal system is the achievement of human dignity. While a public order system may achieve a high degree of success measured in one dimension (behavioral conformity to given norms), a public order system committed as well to human dignity must find expression in other less simplistic dimensions. In the field of unauthorized deprivations (crimes) this preference takes two forms: the culturally determined list of situations thought to be disordering (our criminal codes), and the procedures for assaying particular disordering events. Principles of content and procedure are both relevant. Given an overriding commitment to the achievement of human dignity in the context of some normative prescriptions about human conduct for the good of the community, four principles of content, suggested by the late Professor George Dession,[216] are applicable.

First, an Equality Principle says that the prime value in our best traditions, is placed on the individual, "be he citizen or alien, useful or harmful, sane or mad."[217]

An Economy Principle, founded on a premise that application of any coercion by the state has no essential worth or legitimacy in and of itself, suggests that only proportional sanctions will be employed, and only in a hierarchy of least depriving-most indulging to most depriving-least indulging. Instead of maximum use of power at the disposal of the community for all threats of disorder, a policy of terror, our sanctioning policies will, so far as possible, be based on restraint and minimal use of that power, consistent with the largest identifiable goal in the largest identifiable community. It follows that a "sloppy" application of power which allows wider margins for possible error to official sanctioners is inconsistent with this principle of economy in service of the central goal of preserving individual human dignity.

A third content principle relates to the sharing of the power of decision in sanctioning matters, and may be called the Democratic Principle. This is not meant to suggest that in a large, representative governmental system like ours there should be an absolute parity of influence among all citizens. However, it is meant to suggest that, consistent with an underlying goals of effectiveness in decision taken

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[216] Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22 (1955).

[217] *Id.* at 31.

for and in behalf of the community, there should be a wider, not a narrower spread of authoritative persons involved in the process of sanctioning decisions.

Finally, but closely allied to the other principles, there is a principle which allows our sanctions to be evaluated in terms of their impact and sub-goals with respect to the whole community of mankind, and not simply those who at any one point in time are found within certain geo-political boundaries. This is the Humanitarian Principle. Such a principle of course emphasizes the common attributes of mankind everywhere, regardless of cultural differences. It suggests the relevance of comparative research to decision-making and reduces to some extent the influence of provincial positivism.

It should not be understood that restraint and other value deprivations on individual human beings by the community have no place in a public order of human dignity. No serious commentator suggests that our sanctions should all be positive and indulgent. There is not yet that kind of understanding of human behavior and social dynamics. Yet, while carefully designed negative sanctions do have such a place, it should be seen that the place is only complementary to other dimensions of total policy to achieve community ends. Professor Dession made the point this way:

> The special attribute of negative sanctioning behavior is that it consists in the infliction of value deprivation for the purpose of achieving a net value gain. . . . [U]nder proper conditions negative sanctions may serve positive and productive ends. . . . They are considered destructive only when the deprivation inflicted appears insufficiently compensated by any realized gain.[218]

If this sounds like the Holmesian sacrificial sheep, it should be recalled that not all the value gain referred to is in others than the person sanctioned. What then of the dilemma posed for us in the ultilitarian notion of "less eligibility"? Dare we make the threats of the criminal law so inviting that the least of our members will be attracted or induced to do what they might not otherwise?

If one assumes that the notion is addressed to the problem of organized crime, the highly nonconforming world of the mobster, *and* assumes that only fine or modest jail terms as modes of sanctioning are realistically involved, some viability must be conceded.

On the other hand, if one assumes neither of these two conditions, *or* assumes that we wish to sanction even in the most disordering of situations in which deviant personalities seek to establish essentially a subversive subculture, we are not powerless to experiment and find suitable expression of authoritative condemnation and effective control of such cultures. Under such conditions the notion

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[218] *Id.* at 30.

loses a great deal of force. Couple this with the expectation that whenever the community seeks to interfere affirmately in the life of any individual *because* of his past conduct and indications that it will continue unless redirected, the process necessarily implies a stigma which should in the more rational individual be regretted because of its obvious suggestions of diminution of self-fulfillment.

In the individual who is less adequate, either in endowment or conditioning, and in whom one may find a total absence of such regret, the need for interference should dismiss completely the notion of using the individual to achieve collective ends. Professor Dession would find support among those whose vocabulary and analysis might be traditional, yet whose insights are valuable. Consider, for example, this testament from Professor Henry Hart:

> Social resources for providing the satisfactions of life and human capacities for enjoying them . . . are always susceptible of enlargement. . . . Man realizes his potentialities most significantly in the very process of developing these resources and capacities — by making himself a functioning and participating member of his community. . . . What is crucial in this process is the enlargement of each individual's capacity for effectual and responsible decision. For it is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow. Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice. . . . Seen in this light, the criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create the good society. For it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals.[219]

The first part of this statement — that man learns by participating in the system he is expected to know about and conform to more or less— is substantially justified by empirical evidence. The latter part must stem only from an ideal. It comports with the Equality Principle. But the more important question remains — *how* will you hold him responsible? In what dynamic ways related to the larger, real world of social interaction? This is the point most frequently ignored in the traditional literature, which continues to place considerable reliance on faith. For example, Professor Hart follows the statement above with this sentence: "It [referring to the assertion of social responsibility which criminal law makes] has far greater value as a stimulus to the great bulk of mankind to abide by the law and to take pride in so abiding."[220]

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[219] Hart, Jr., *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401, 409-10 (1958).

[220] *Id.* at 410.

Account should be taken of the major principles supporting major social goals touched upon in this section by recalling the outstanding features of the trends in decision and decisional outcomes described above. Looking back over the description of these trends of the various criminal law systems, one of the strongest impressions the observer receives is that we have rather deliberately set out to build institutional inequality, that is, to devise preferred processes for preferred categories of offenders. One must hasten to add that it seems doubtful whether in fact the effort has succeeded when the sanctioning modes of the juvenile system, the insanity and mental defective system, and until quite recently the addict system as well are considered. There is, however, a certain realization of this on the part of some decision-makers, accounting in large measure for the wholesale use of probation or even "unofficial" release in the juvenile system.

In part, this trend toward preferment owes something to what were perceived by some at the time as breakthroughs in understanding of the human psyche, which gave rise to the feeling of justification in differential treatment. It seems equally likely that such developments were spawned by public fear fed by political leadership which would not make any effort to see particular provoking events in larger perspective and context.

More fundamental, however, than the disparate treatment envisioned, yet perhaps not forthcoming in the actual working of the various systems, is the regard in which the individual is held. By indulging in the *parens patriae* theory of the juvenile system, or the civil commitment concept of the newer version of the addict system, or the dangerous capacity notion of three "mental" systems, we have obviated much of the "cumbersome" procedure required to *convict* a citizen. It is not at all clear that, of all the labels available in these control systems, the penal label is the most reprehensible in our society, yet the manipulation of such a set of labels allows us to deceive ourselves in thinking that for the individual who needs it we are giving help, but for the "bad guy" we are not.

In return for this alienation of the criminal, we bestow a kind of ceremony — the whole guilt-determining process with fundamental safeguards like the right to precise charging, counsel, cross-examination, etc., and a definite sentence (albeit with ill-defined content). For the others, since "they are being helped," they cannot insist on such elaboration.

Such a characterization, I believe, is fairly accurate for the longer history of these systems. Most recently, however, it seems that a certain reaction even in highly authoritative arenas has begun to develop which now begins to insist upon a demonstration-of-effective-

ness-of-the-treatment approach which will justify the short-cuts. At the same time there is a certain perspective emerging which sees this approach as a long-time thing and sees the intermediate loss in personal dignity too great to sacrifice longer. Illustrative are the Supreme Court's discussion in *Baxstrom v. Herold,*[221] and the Circuit Court of Appeals' discussion in the District of Columbia in *Rouse v. Cameron.*[222]

Such developments may be seen as consistent with the Equality Principle. And they seem to be outgrowths not only of changed perspectives of these decision-makers but also of changing expectations about what is possible in dealing with the disordered personality — expectations to which the work of the professional correctional staff itself has contributed.

Both the Equality Principle and the Economic Principle are seemingly involved in the trends discernable in the adult criminal sanctioning system. The first has not yet received the kind of judicial support referred to immediately above in the case of other systems. The *content* of the program is still thought to be of little or no concern to the courts. At the same time these same decision-makers involve themselves increasingly in probation, its granting, supervision and termination. On the other hand, there has been for some time now in the United States a willingness to sentence to increasingly longer prison terms. One effect of this is to generate more custodial problems for the prisons; another is to confront the parole authorities with a more complex equation for decision.

This trend, however, is not premised on any shared expectation concerning the likelihood of greater success rates after imprisonment due to the longer sentence. On the contrary, it seems reasonably clear that the administrators, prison and parole, do not welcome the longer sentences. To a great extent they may be viewed as a function of the frustration of courts felt in the absolute rates of the incidence of crime. If both rates have gone up rather steadily since World War II, as some evidence suggests, then it would clearly seem that the resort to longer periods of incarceration is distinctly antithetical to the Economy Principle, representing a distinctly more coercive mode than is warranted by the circumstances.

This is not to conclude that the prison-parole system is a failure. Glaser's research suggests very strongly that it is not, that the recividism rates are not nearly as high as previously thought. However, our experience suggests that we do not yet have a very satisfactory definition of post-release success. Neither we do have

[221] 383 U.S. 107 (1966).

[222] 373 F.2d 451 (D.C. Cir. 1966).

systematic ways of relating the details of the prison experience to the post-release life of the individual.

In this light the independent observer must see the indiscriminate dumping of all categories of persons for great periods of time into the prison-parole system as highly uneconomic in the preservation of various human values unless differentation on the basis of their needs along a full value spectrum is made. Indeed, considerable evidence suggests that such a process is positively destructive of human values.

Furthermore, the persistent failure of courts to involve themselves in appraising the outcomes of this process in terms of what is done with the inmate must be seen as a violation of the Democratic Principle. Decisions effecting vital attributes of personal liberty and dignity have long been thought to involve many levels of "expertise," not a few. Penology is no more an esoteric and precise science, the province of a few highly trained specialists, than economics. Yet our courts have not declined to help supervise a highly regulated modern market place through various strategies like the anti-trust laws.

The general doctrines for judicial intervention are not lacking where the inclination is present; and the inclination has been most evidently present in those cases where positive threat to physical well-being, the practice of religion, or access to the courts is suggested.[223] This peripheral involvement or interaction with other sanctioning agencies will probably expand. Eventually the courts will be asked to decide whether the lack of staff, or a deficiency in imagination, or too high a regard to "security" should prevent an inmate from participation in a planned graduation of activities (work, school, and group therapy) logically leading to greater self-reliance through increased contacts with the larger community. Without such interaction responsible participation will remain only a cynical ideal for the outputs of the system.

One factor which suggests this expansion of judicial involvement is the authoritative experimentation with work-release, furloughs,

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[223] In the case of threats to physical well-being the courts' inclination or willingness to intervene in the decisions of prison authorities is supported by the presence of a rather specifically relevant constitutional provision against "cruel and unusual" punishments. U.S. CONST. amend. VIII. See generally Sutherland, *Due Process and Cruel Punishment,* 64 HARV. L. REV. 271 (1950); Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985, 1003 (1962). In the case of religious practice again there is a clearly relevant constitutional provision. U.S. CONST. amend. I. The most critical contemporary context in which this provision is being considered is the Black Muslim cases. See generally Brown, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review,* 32 GEO. WASH. L. REV. 1124 (1964).

Finally, with regard to the cases claiming denial of free access to the courts the judicial response has been one of impliedly protecting this vital link between authority at the center of the whole sanctioning process and the individual inputs of it — whatever the state of progress through it by various participants. See generally Comment, *The Rights of Prisoners While Incarcerated,* 15 BUFFALO L. REV. 397, 414 n.149, 414-16 (1965).

half-way houses (for adult offenders now, after earlier implimentation in some of the other systems) and the group interaction efforts coming of age in the juvenile, addict, and insanity systems. Wider community involvement characterizes these developments and represents, whether consciously or not, a willingness to incorporate at least marginally some dimensions of a previously alienated sub-community into the law-abiding, conformity-inducing greater community. This comports with the ideal of a wide shaping and sharing of values; and to the extent to which there is a conscious sharing of particular decisions effecting outcomes (like the time of release from total institutionalization) among the participants of related social processes, there is also support for the Democratic Principle.

There is, in these observable trends of decision in the adult criminal system, a considerable reluctance on the part of decision-makers in both the judicial and administrative arenas to appraise the impact of decisions in terms broader than predictions about return to criminal behavior.

This is essentially a security-oriented perspective, which, while it may not be explicitly and consciously "punishment" directed, does have the effect of diminishing the real social viability potential of the inmate. In other words, adequate contextuality, in terms of a full range of human values at stake, is lacking most often in the series of decisions that first commits the individual to several months or years in prison and, consequently, to routinized, cautious and remote processing into the parole phase.[224]

CONCLUSION

Authoritative efforts to modify attitudes of deviant members of society and to control the behavior of these and other individuals who threaten deprivations of values protected by our criminal codes have met with only partial success, even considering only one principal indicator. Yet "success" is not a word which has been given very precise meaning in our sanctioning decision process. It remains an unfinished, and perhaps unfinishable, task for a policy-oriented and contextual jurisprudence to elaborate sub-goals for decisional outcome in a host of categories of situations and personalities subject to sanctioning.

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[224] See generally Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966); Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964); Richardson v. Rivers, 335 F.2d 996 (D.C. Cir. 1964). *But see* McCreary v. Kenton, 190 F. Supp. 689 (D.Conn. 1960), indicating that the parole board must have a "reasonable basis" for its decision; that it cannot act "arbitrarily." The reasonable basis is in most instances merely a judgment based on information the board alone considers relevant as to the "prisoner's ability to maintain lawful existence in society." United States *ex rel.* Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963).

The large goals are clear: to protect society and at the same time promote individual human dignity. The description of the trends discernable at present suggests that the major control systems are not adequately supporting either goal. Even so, it is becoming increasingly clear that more intelligence is needed properly to evaluate all relevant systems, that experimentation in specific modes of sanctioning is indicated, and that the more we learn the more we are moved to moderate our reliance on traditional assumptions, concepts, and procedures. Most of all, our most relevant experience has suggested to us that conformity to social norms is not simply a function of authoritative prescription — that is of enunciating and applying *rules* of behavior to individuals and then relegating the individual to limbo.[225]

Creating conditions in which individual rehabilitation or correction becomes probable and general prevention effected in perceivable ways requires a great deal more. It requires, minimally, that account be taken of the inter-relation of social and authoritative processes, of the roles played by *all* participants in the sanctioning process, those who are targets of as well as those who impose the sanctions. It requires the willingness of those situated in central arenas of community power and authority, such as the courts, to become involved in continuing appraisal, and re-appraisal, of particular decisions taken by others which directly affect the value aggregates of those who are being subjected to the power and authority of our various control systems.

Editor's Note:

After Professor Penegar's article was prepared for publication, the United States Supreme Court handed down In Re Gault, 35 U.S. Law Week 4399 (May 15, 1967). This decision should have a profound impact upon the procedures by which juvenile courts determine whether a juvenile is "delinquent" and consequently, whether institutional sanctioning strategies should be applied. The Court held that due process in such proceedings requires adequate and specific notice of charges, the right to appointed counsel, opportunity for confrontation and cross-examination of witnesses, and observation of the privilege against self-incrimination. Many of the previously followed procedures, described in notes 9-44 supra and accompanying text, fell far short of these due process requirements. — Editors.

[225] Of course few thoughtful observers see the ideal in such terms as these, but even those who would bring about needed "reforms" in corrections are sometimes the ones whose conceptualizations are inadequate to move in desired directions. Consider, for example, the following passage from Professor Gerhard Mueller:

> Everything I have described above is opinion, not law. Strictly speaking, there is no law of retribution or of vindication, of penitence or of deterrence, of neutralization or of resocialization. . . . Strictly speaking, the common law codifies no principles or theory of corrections.

Mueller, *Punishment, Corrections and the Law,* 45 NEB. L. REV. 58, 83 (1966).

What is it, then, that keeps men confined for long periods of time out of contact with society and its wholesome interactions if not "the law"? Mere abstractions of course are not responsible for purposive action. Such an abstraction may, however, serve as a short-hand expression for the many decision-makers possessed of varying perspectives, situated in different arenas of power and authority, more or less following general social goals, and poorly clarified sub-goals, making particular choices, with varying impacts on individuals, etc., which together make up a process of decision which combines authority (or expectations about how power will be wielded) with actual power to produce particular results.