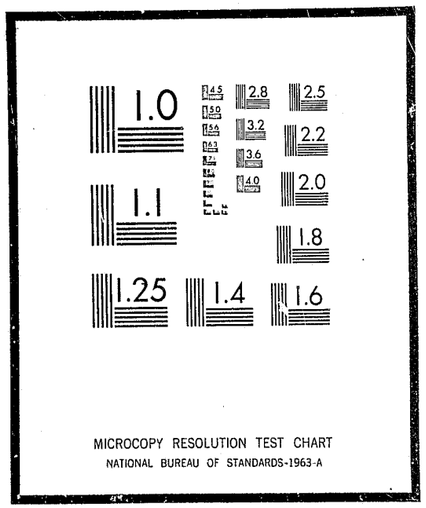
If you have issues viewing or accessing this file contact us at NCJRS.gov.

NCJRS

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on this frame may be used to evaluate the document quality.



Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U.S. Department of Justice.

U.S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE
WASHINGTON, D.C. 20531

Date filmed 7/13/76

TASK FORCE REPORT: THE COURTS

The Task Force on the Administration of Justice
The President's Commission on Law Enforcement and Administration of Justice

U.S. GOVERNMENT PRINTING OFFICE, Washington: 1967
For sale by the Superintendent of Documents,
U.S. Government Printing Office, Washington, D.C. 20402
Price $1.
Copies of the Commission's General Report, THE CHALLENGE OF CRIME IN A FREE SOCIETY, can be purchased from the Superintendent of Documents for $2.25.
Copies of other task force reports and other supporting materials can also be purchased.

FOREWORD

In February of this year the President's Commission on Law Enforcement and Administration of Justice issued its General Report, *The Challenge of Crime in a Free Society.* As noted in the Foreword to that Report, the Commission's work was a joint undertaking, involving the collaboration of Federal, State, local, and private agencies and groups, hundreds of expert consultants and advisers, and the Commission's own staff. Chapter 5 of that Report made findings and recommendations relating to the problems facing the Nation's criminal courts.

This volume, the Task Force Report on the Courts, embodies the research and analysis of the staff and consultants to the Commission which underlie those findings and recommendations, and in many instances it elaborates on them. As noted in the Introduction that follows, preliminary drafts of materials in this volume have been distributed to the entire Commission and discussed generally at Commission meetings, although more detailed discussion and review have been the responsibility of a panel of five Commission members attached to this Task Force. While individual members of the panel have reservations on some points covered in this volume but not reflected in the Commission's General Report, this volume as a whole has the general endorsement of the panel. The organization of the Commission and the Task Forces is described in the General Report at pages 311–312.

The appendices that follow are papers prepared for the Commission by Task Force consultants. They were used as background documents in the preparation of this volume and are believed to be of interest and value as source material. The inclusion of these papers does not indicate endorsement by the panel of Commission members or by the staff of the positions or findings of the authors.

The Commission is deeply grateful for the talent and dedication of its staff and for the unstinting assistance and advice of consultants, advisers, and collaborating agencies whose efforts are reflected in this volume.

Nicholas deB. Katzenbach

NICHOLAS DEB. KATZENBACH
Chairman

THE COMMISSION

Nicholas deB. Katzenbach, *Chairman*

Genevieve Blatt
Charles D. Breitel
Kingman Brewster
Garrett H. Byrne*
Thomas J. Cahill
Otis Chandler
Leon Jaworski*
Thomas C. Lynch
Ross L. Malone
James B. Parsons*
Lewis F. Powell, Jr.*
William P. Rogers
Robert G. Storey*
Julia D. Stuart
Robert F. Wagner
Herbert Wechsler
Whitney M. Young, Jr.
Luther W. Youngdahl

*Administration of Justice Task Force panel members.

THE STAFF

Executive Director:

James Vorenberg

Deputy Director:

Henry S. Ruth, Jr.

Associate Directors:

Gene S. Muehleisen
Elmer K. Nelson, Jr.
Lloyd E. Ohlin
Arthur Rosett†

Assistant Directors:

David B. Burnham
Bruce J. Terris
Samuel G. Chapman (*Police*)
Howard Ohmart (*Corrections*)
Vincent O'Leary (*Corrections*)
Charles H. Rogovin (*Organized Crime*)

Director of Science and Technology

Alfred Blumstein

William Caldwell
Weston R. Campbell, Jr.
Gerald M. Caplan†
Roland Chilton
Joseph G. J. Connolly†
Virginia N. Crawford
Elizabeth Bartholet DuBois
Paul B. Duruz
Robert L. Emrich
Floyd Feeney
Victor Gioscia
Sheldon Krantz
Anthony Lapham
John L. McCausland
Sheila Ann Mulvihill
Albert W. Overby, Jr.†
Nick Pappas
John F. Quinn
Robert Rice
Gordon D. Rowe
Susan Freeman Schapiro
Gerald Stern
Keith Stubblefield
Thelma C. Stevens
Martin Timin
G. Joseph Vining
Richardson White, Jr.

†Staff members devoting primary attention to the work of the Administration of Justice Task Force.

CONSULTANTS, ADVISERS, AND SUPPORTING STAFF

Consultants

Norman Abrams, Professor of Law, University of California, Los Angeles, Calif., Special Assistant, Criminal Division, Department of Justice
Anthony G. Amsterdam, Professor, University of Pennsylvania Law School, Philadelphia, Pa.
Sheldon Elsen, Attorney, New York, N.Y.
Arnold Enker, Professor, University of Minnesota Law School, Minneapolis, Minn.
Daniel Freed, Acting Director, Office of Criminal Justice, Department of Justice
Gilbert Geis, Professor, California State College at Los Angeles, Los Angeles, Calif.
Abraham S. Goldstein, Professor of Law, Yale University, New Haven, Conn.
Norbert Halloran, International Business Machines, Inc., Yorktown Heights, N.Y.
Howard Heffron, Professor, University of Washington Law School, Seattle, Wash.
Zona F. Hostetler, Consultant, Office of Economic Opportunity, Washington, D.C.
Louis L. Jaffe, Professor of Law, Harvard University, Cambridge, Mass.
Sanford H. Kadish, Professor, University of California Law School, Berkeley, Calif.
John S. Martin, Jr., Attorney, Nyack, N.Y.
Monroe E. Price, Associate Professor of Law, University of California, Los Angeles, Calif.
Frank Remington, Professor, University of Wisconsin Law School, Madison, Wis.
Lee Silverstein, Research Attorney, American Bar Foundation, Chicago, Ill.
Harry Subin, Associate Director, Vera Institute of Justice, New York, N.Y.
Patricia M. Wald, Commissioner, President's Commission on Crime in the District of Columbia
Lloyd L. Weinreb, Assistant Professor of Law, Harvard University, Cambridge, Mass.

Advisers

Francis A. Allen, Dean, University of Michigan Law School, Ann Arbor, Mich.
Richard Arens, Professor of Law, McGill University, Montreal, Canada
Sylvia A. Bacon, Assistant Director, President's Commission on Crime in the District of Columbia
Gary Bellow, Deputy Director, California Rural Legal Assistance, Los Angeles, Calif.
Charles L. Decker, Major General U.S. Army (Retired), Director, National Defender Project of the National Legal Aid and Defender Association, Washington, D.C.
Richard A. Green, Project Director, A.B.A. Special Project for Minimum Standards for the Administration of Criminal Justice, New York, N.Y.
Lois R. Goodman, Washington, D.C.
Geoffrey Hazard, Jr. Administrator, American Bar Foundation, Chicago, Ill.
Phillip Hubbart, Office of the Public Defender, Dade County, Fla.
Earl Johnson, Director, Legal Services Program, Office of Economic Opportunity, Washington, D.C.
Sam Johnson, Director, Houston Legal Foundation, Houston, Tex.
Bertram L. Keys, Jr., Coordinator, Offender Rehabilitation Project, Georgetown Law Center, Washington, D.C.
Arthur B. Kramer, attorney, New York, N.Y.
Richard A. Levin, attorney, Newark, N.J.
Peter Low, Professor of Law, University of Virginia, Charlottesville, Va.
Frank Miller, Professor of Law, Washington University, St. Louis, Mo.
Tim Murphy, Judge, Court of General Sessions, Washington, D.C.

Joseph Navarro, Institute of Defense Analyses, Arlington, Va.
William Offutt, International Business Machines, Inc., Rockville, Md.
Herbert Packer, Professor of Law, Stanford University, Stanford, Calif.
A. Kenneth Pye, Associate Dean, Georgetown University Law Center, Washington, D.C.
Harold Rothwax, Director, Legal Services, Mobilization for Youth, New York, N.Y.
Barbara Roffwarg, New York, N.Y.
Murray L. Schwartz, Professor of Law, University of California, Los Angeles, Calif.
Saleem A. Shah, M.D., National Institute of Mental Health, Public Health Service, Dept. of Health, Education, and Welfare
David L. Shapiro, Professor of Law, Harvard University, Cambridge, Mass.
Ted Small, staff attorney, Office of Criminal Justice, Department of Justice
Jean Taylor, Institute for Defense Analyses, Arlington, Va.
James Thompson, Professor of Law, Northwestern University, Chicago, Ill.
David Twain, National Institute of Mental Health, Public Health Service, Dept. of Health, Education, and Welfare
Jack Weinstein, Professor of Law, Columbia University, New York, N.Y.
Leslie T. Wilkins, Professor, School of Criminology, University of California, Berkely, Calif.

Supporting Staff and Services

Secretarial and Clerical

James A. Adkins
Doris J. Bacon
Margaret Beale
Mary G. Bergbom
Margaret R. Bickford
Nancy B. Bradley
Rita Louise Brooke
Conchita A. Brown
Scennie M. Brown
Suzanne L. Carpenter
Barbara A. Casassa
Sally M. Chopko
Willie Copeland
Catherine Cyrus
Mary Frances Factory
Doris T. Farmer
Ann Felegy
Mary Fox
Carol A. Hambleton
Rosalind M. Humphries
Nancy Hunt
Betty C. Irby
Barbara J. Jones
Patricia A. Lanham
Joan E. Peterson
Evelene Richards
Lee E. Salerno
Shelia M. Sheahan
Nancy Strebe
Margaret Triplett

Index

Edward T. Johnson & Associates, Washington, D.C.

CONTENTS

Introduction

The courts are the pivot on which the criminal justice system turns. Two decisions the courts make are crucial to the criminal process: whether a person is to be convicted of a crime and what is to be done with him if he is. The courts have great power over the lives of the people brought before them. At the same time the limits of this power are carefully laid out by the Constitution, by statute, and by elaborate procedural rules, for the courts are charged not only with convicting the guilty but with protecting the innocent. Maintaining a proper balance between effectiveness and fairness has always been a challenge to the courts. In a time of increasing crime, increasing social unrest, and increasing public sensitivity to both, it is a particularly difficult challenge. An inquiry into the performance of America's criminal courts, therefore, must of necessity examine both their effectiveness and their fairness, and proposals for improving their operations must aim at maintaining or redressing the essential equilibrium between those two qualities.

This report does not purport to be a comprehensive survey of American criminal courts or of the activities of the men and women who work in and around them: judges, prosecutors, defense counsel, probation officers, and other court officials. On the contrary, it confines itself to those parts of the court system and those aspects of the criminal process that the Commission has found to be the most in need of reform. It dwells at length on urban courts and their problems and particularly on urban lower courts. It is in the cities that crime rates are highest. It is in the cities that poor and ignorant defendants who most need protection are concentrated. It is in the cities that courts have so enormous a volume of cases that they are able neither to mete out prompt and certain justice nor to give defendants the full protection that they should have.

The report considers in detail two important nontrial aspects of the criminal process: the prosecutor's charge decision and the negotiated plea of guilty. These administrative and largely invisible procedures now determine the disposition of a majority of criminal cases in many courts, particularly in the cities. The report analyzes the sentencing decision, the laws under which it is made, the procedures by which it is made, and the training of the men who make it. It discusses the problems relating to pretrial release of persons accused of crime. It explores such subjects as structural reorganization of the courts, methods for scheduling cases and ensuring that they proceed expeditiously, and the treatment of jurors and witnesses. It recognizes the importance of reform of the substantive criminal law and the inherent limits of effective law enforcement.

Finally, the report reflects the Commission's finding that a major need of many courts is more manpower, and a major need of all courts is better qualified, better trained personnel. It examines, therefore, the selection and training of judges and prosecutors. And since there is no doubt that during the next few years the most pressing manpower need by far will be for defense counsel, it considers with special care what defense counsel will be doing in years to come and how they should be recruited and trained.

That this report does not treat in detail the trial of criminal cases does not suggest that trial proceedings are unimportant. While relatively few cases reach trial, those that do establish the legal rules for all cases and vitally affect the public image of justice. Unlike the administrative proceedings in the pretrial stage, court proceedings are the subject of continual, careful study by lawyers and are now receiving intensive scrutiny from other groups. The Judicial Conference of the United States sponsors continuing examinations of the Federal Rules of Criminal Procedure, proposed rules of evidence in Federal criminal cases, and the habeas corpus jurisdiction of the Federal courts. The American Bar Association, through its Sections on Criminal Law and Judicial Administration and its Special Project on Minimum Standards for Criminal Justice, is conducting studies that touch on many major areas of interest in the criminal law and court administration. The American Law Institute's efforts have produced the Model Penal Code and a tentative draft of a Model Code of Pre-Arraignment Procedure. The National Conference of Commissioners on Uniform State Laws has drafted several model State statutes dealing with problems of criminal court administration.

The Commission has drawn heavily on the efforts of these and other responsible groups. The American Bar Foundation Survey of the Administration of Criminal Justice, particularly its study of the administrative practices of police, prosecutors, and courts relating to decisions to arrest, to charge an offense, and to negotiate a plea of guilty, is an essential basis for the discussion of disposition without trial in chapter 1. We are deeply indebted to Geoffrey C. Hazard, Jr., administrator of the American Bar Foundation, and Professor Frank Remington, editor,

for advice and assistance; the published volumes reporting the results of the survey and manuscripts of unpublished volumes now in preparation were exceptionally helpful. The discussion of legal manpower needs in chapter 5 draws heavily on the work of Lee Silverstein, research attorney of the American Bar Foundation, and on data drawn from his three-volume study, Defense of the Poor (1965), supplemented by his work as a consultant for the Commission, which is incorporated in appendix D of this report.

We are also indebted to the American Bar Association Project on Minimum Standards for Criminal Justice, under the chairmanship of Hon. J. Edward Lumbard and directed by Richard A. Green, for continuing assistance and cooperation. The project, the Commission, and the National Legal Aid and Defender Association, jointly sponsored a meeting on legal manpower needs in the criminal law in June 1966. The work of the ABA advisory committee on sentencing and review is reflected in the chapter on sentencing. Professor Peter Low, reporter for that advisory committee, generously made available unpublished materials of the project and reviewed the related Commission drafts. Professor David Shapiro, reporter for the advisory committee on fair trial and free press also reviewed Commission drafts. There has also been an exchange of materials and consultation on the plea of guilty with the advisory committee on the criminal trial and its chairman, Hon. Walter Shaefer, and reporter Professor Wayne LaFave.

Several aspects of the criminal process that directly involve the courts are considered in the reports of other Commission task forces. The controversial issue of the exercise of judicial controls over the conduct of law enforcement officers is discussed in chapter 4 of the General Report and in the Police Task Force volume. The Report of the Organized Crime Task Force considers wiretapping and electronic eavesdropping and also examines the importance of the grand jury as an agency for investigating organized crime cases. In the volume on juvenile delinquency there is a chapter on the juvenile courts, which are no less in need of procedural and organizational reform than the adult criminal courts.

Many experts and scholars have contributed to this volume. A list of consultants and advisors is found at the head of the report. Mention should be made here of some of those who contributed substantial sections to the report. Professors Arnold Enker of the University of Minnesota, Abraham Goldstein of Yale University, and Howard Heffron of the University of Washington gave invaluable assistance to the treatment of disposition without trial in chapter 1. Chapter 8, substantive law reform, is largely the work of Professor Sanford Kadish of the University of California at Berkeley. The advice of Daniel J. Freed, acting director of the Office of Criminal Justice, and of Mrs. Patricia Wald were relied upon in the section on bail. Harry I. Subin, formerly of the Office of Criminal Justice and now associate director of the Vera Institute, contributed significantly to chapter 4 on the study of lower courts. Professor Norman Abrams of UCLA developed the section on coordination of State prosecutors. Professors Enker, Heffron, and Kadish spent a substantial part of the summer and fall of 1966 working on a full-time basis with the Commission staff and made important contributions to this report in addition to those noted. Special contributions to a number of sections were also made by Professor Anthony Amsterdam of the University of Pennsylvania and John Martin, Esq., of Nyack, N.Y.

This volume was prepared by the staff of the Commission on the basis of its studies and those of consultants. Many members of the Commission staff participated in its preparation, and the staff members whose names are marked with an asterisk on the masthead preceding this Introduction devoted primary attention to the work of this Task Force. Preliminary drafts of the materials in the volume have been distributed to the entire Commission and discussed generally at Commission meetings, although more detailed discussion and review have been the responsibility of a panel of five Commission members attached to this Task Force. While individual members of the panel have reservations on some points covered in this volume but not reflected in the Commission's General Report, this volume has the general endorsement of the panel.

The appendices that follow the report are papers prepared for the Commission by Task Force consultants. They were used as background documents in the preparation of this report and are believed to be of interest and value as source material. The inclusion of these papers does not indicate endorsement by the panel of Commission members or by the staff of the positions or findings of the authors.

Finally, it is important to note that many of the recommendations and suggestions made in this volume are intended to be a "package." For example, the discussion of defense counsel must be read in the context of the suggestions that are made in other chapters for expediting court procedures and making them more efficient; by the same token the discussion of the guilty plea must be read in connection with the chapter on defense counsel. In fact this entire volume should be considered in connection with the volumes of the other task forces. It will do no good for prosecutors to work out better procedures for precharge disposition of cases if there are no community agencies to which to refer defendants, nor for judges to improve their sentencing decisions if the correctional system does not similarly improve its programs and facilities. The courts may be a constitutionally separate branch of the government, but they are not an independent one. How well they perform depends heavily on the police, on corrections, and on the entire community.

TABLE OF RECOMMENDATIONS

This Table of Recommendations is reprinted from the General Report of the Commission, "The Challenge of Crime in a Free Society." It lists the Commission's recommendations on the courts and shows where in this volume each is treated in more detail.

Chapter 1

Disposition Without Trial

Much of the basic legal structure of the criminal process rests on the assumption that criminal cases initiated by the police will be decided in a trial by court or by jury. Limited statistical data and a number of studies, including those recently conducted by the American Bar Foundation,[1] by the Commission staff, and by others,[2] indicate that this assumption is not justified.

Most cases are disposed of outside the traditional trial process, either by a decision not to charge a suspect with a criminal offense or by a plea of guilty. In many communities between one-third and one-half of the cases begun by arrest are disposed of by some form of dismissal by police, prosecutor, or judge.[3] When a decision is made to prosecute, it is estimated that in many courts as many as 90 percent of all convictions are obtained by guilty pleas.[4]

Many overburdened courts have come to rely upon these informal procedures to deal with overpowering caseloads, and some cases that are dropped might have been prosecuted had sufficient resources been available. But it would be an oversimplification to tie the use of early disposition solely to the problem of volume, for some courts appear to be able to deal with their workloads without recourse to such procedures. Furthermore, the flexibility and informality of these discretionary procedures make them more readily adaptable to efforts to individualize the treatment of offenders than the relatively rigid procedures that now typify trial, conviction, and sentence. It would require radical restructuring of the trial to convert sentencing procedures into a comparable opportunity for the prosecution and the defense to discuss dispositional alternatives. Moreover, by placing less emphasis on the issue of culpability, discretionary procedures may enable the prosecutor to give greater attention to what disposition is most likely to fit the needs of those whose cases he considers. The pressures on the prosecutor to insist on a disposition that fits the popular conception of punishment are less before conviction, when the defendant has not officially and publicly been found guilty.

There are many cases in which trial would be clearly inappropriate. Often it becomes evident that the accused is innocent. Often while he appears to be technically guilty, criminal prosecution would serve no legitimate purpose. As Judge Charles Breitel has noted:

> If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.[5]

In addition, there are obvious practical advantages to disposing of large numbers of cases without trial. The results are relatively prompt and certain compared to trial dispositions and therefore represent a substantial economy of resources. Even when criminal prosecution is appropriate, charges may be dropped or reduced in exchange for a plea of guilty simply to conserve resources for more important cases.

The main dangers in the present system of nontrial dispositions lie in the fact that it is so informal and invisible that it gives rise to fears that it does not operate fairly or that it does not accurately identify those who should be prosecuted and what disposition should be made in their cases. Often important decisions are made without adequate information, without sound policy guidance or rules, and without basic procedural protections for the defendant, such as counsel or judicial consideration of the issues. Because these dispositions are reached at an early stage, often little factual material is available about the offense, the offender, and the treatment alternatives. No record reveals the participants, their positions, or the reason for or facts underlying the disposition. When the disposition involves dismissal of filed charges or the entry of a guilty plea, it is likely to reach court, but only the end product is visible, and that view often is misleading. There are disturbing opportunities for coercion and overreaching, as well as for undue leniency. The very informality and flexibility of the procedures are sources both of potential usefulness and of abuse.

It is essential to bring to these dispositions some, although clearly not all, of the attributes of the trial process. First, facts bearing both on the offense and on the character of the offender should be brought out systematically before decisions as to nontrial dispositions are made. Second, these important decisions must be surrounded with some procedural regularity. Finally, provision should be made for fuller judicial consideration of dispositions which involve criminal sanctions or some intrusive, although nonpenal, alternative.

[1] The history of the American Bar Foundation Project, which commenced in 1953, is recounted in LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY ix (1965). The discussion that follows draws heavily on the work of the American Bar Foundation Project, including Professor LaFave's book and another volume in the series, NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966), as well as manuscripts of several other volumes now in preparation.

[2] Staff Studies, *Administration of Justice in the Municipal Court of Baltimore*, and *Administration of Justice in the Recorders' Court of Detroit*, printed in Appendix B of this volume; SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT (1966); PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REP. 239–40 (1966).

[3] See, *e.g.* 1965 FBI UNIFORM CRIME REPORTS 103 (table 12); CAL. DEP'T JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 53 (1965); 1964 ILL. SUP. CT. ANN. REP. 63; 1964–65 ADMINISTRATIVE DIRECTOR OF THE N.J. COURTS ANN. REP. 13 (table B-8).

[4] See page 9, *infra*.

[5] Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

THE DECISION WHETHER TO BRING CHARGES

Before a formal information or indictment is lodged in court, the prosecution has an opportunity to consider not only which charges to press but also whether to press toward conviction at all. The decision whether to file formal charges is a vitally important stage in the criminal process. It provides an opportunity to screen out cases in which the accused is apparently innocent, and it is at this stage that the prosecutor must decide in cases of apparent guilt whether criminal sanctions are appropriate.

In many instances the defendant presents a serious threat to the security and safety of the community, and invocation of the criminal process is clearly indicated. Community attitudes justifiably demand that the armed robber, the corrupt public official, and the hardened, persistent offender be subjected to the full weight of condemnation. But in many cases effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it. Not all offenders who are guilty of serious offenses as defined by the penal code are habitual and dangerous criminals. It is not in the interest of the community to treat all offenders as hardened criminals; nor does the law require that the courts do so. It is at the charge stage that the prosecutor should determine whether it is appropriate to refer the offender to noncriminal agencies for treatment or for some degree of supervision without criminal conviction.

The police have a similar decision to make earlier in the process, and they adopt varying responses to criminal conduct.[6] When serious criminal conduct is involved, the police objective will be arrest and full invocation of the criminal process. When less serious violations are involved, the police may ignore the situation (as in some instances of intoxication), or they may attempt on-the-scene conciliation (as in some instances of family disputes). Sometimes offenders are arrested and released (as may be true in the case of fights and brawls), and often referrals to social agencies are deemed appropriate (as in the case of some mentally disordered offenders).

But the police decision whether to arrest must usually be made hastily, without relevant background information, and often under pressure of a pending disturbance. There is ordinarily no opportunity for considered judgment until the time when formal charges must be filed, usually the next stage of the proceedings.

In some places particularly when less serious offenses are involved, the decision to press charges is made by the police or a magistrate rather than by the prosecutor. The better practice is for the prosecutor to make this decision, for the choice involves such factors as the sentencing alternatives available under the various possible charges, the substantiality of the case for prosecution, and limitations on prosecution resources—factors that the policeman often cannot consider and the magistrate cannot deal with fully while maintaining a judicial role.[7]

The legitimacy and necessity of the prosecutor's discretion in pressing charges have been long recognized.[8] There are many cases in which it would be inappropriate to press charges. In some instances, a street fight for example, the police may make lawful arrests that are not intended to be carried forward to prosecution. When the immediate situation requiring police intervention has passed, the defendant is discharged without further action. Often it becomes apparent after arrest that there is insufficient evidence to support a conviction or that a necessary witness will not cooperate or is unavailable; an arrest may be made when there is probable cause to believe that the person apprehended committed an offense, while conviction after formal charge requires proof of guilt beyond a reasonable doubt. Finally, subsequent investigation sometimes discloses the innocence of the accused.

When there is sufficient evidence of guilt, tactical considerations and law enforcement needs may make it inadvisable to press charges. Prosecutors may, for example, drop charges in exchange for a potential defendant's cooperation in giving information or testimony against a more serious offender. They may need to conserve their resources for more serious cases.

In some cases invocation of the criminal process against marginal offenders seems to do more harm than good. Labeling a person a criminal may set in motion a course of events which will increase the probability of his becoming or remaining one. The attachment of criminal status itself may be so prejudicial and irreversible as to ruin the future of a person who previously had successfuly made his way in the community, and it may foreclose legitimate opportunities for offenders already suffering from social, vocational, and educational disadvantages.[9] Yet a criminal code has no way of describing the difference between a petty thief who is on his way to becoming an armed robber and a petty thief who succumbs once to a momentary impulse. The same criminal conduct may be the deliberate act of a professional criminal or an isolated aberration in the behavior of a normally law abiding person. The criminal conduct describes the existence of a problem, but not its nature or source. The system depends on prosecutors to recognize these distinctions when bringing charges.[10]

Among the types of cases in which thoughtful prosecutors commonly appear disinclined to seek criminal penalties are domestic disturbances; assaults and petty thefts in which victim and offender are in a family or social relationship; statutory rape when both boy and girl are young; first offense car thefts that involve teenagers taking a car for a short joyride; checks that are drawn upon insufficient funds; shoplifting by first offenders, particularly when restitution is made; and criminal acts that involve offenders suffering from emotional disorders short of legal insanity.

In addition, a large proportion of the cases in the criminal courts involve annoying or offensive behavior rather than dangerous crime.[11] Almost half of all arrests are on charges of drunkenness, disorderly conduct, minor assault, petty theft, and vagrancy. Many such offenders are burdened by economic, physical, mental, and educational disadvantages. In many of these cases effective law enforcement does not require prosecution.

[6] See, *e.g.*, LAFAVE, *op. cit. supra* note 1; SKOLNICK, JUSTICE WITHOUT TRIAL—LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); Goldstein, *Police Discretion Not To Invoke the Criminal Process—Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). See also Report of the Police Task Force of this Commission, ch. 2.

[7] *Cf.* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.02 (Tent. Draft No. 1, 1966).

[8] "He [the prosecutor] must appraise the evidence on which an indictment may be demanded and the accused defendant tried, if he be indicted, and in that service must judge of its availability, competency and probative significance. He must on occasion consider the public impact of criminal proceedings, or, again, balance the admonitory value of invariable and inflexible punishment against the greater impulse of 'the quality of mercy.' He must determine what offenses, and whom, to prosecute . . . . Into these and many others of the problems committed to his informed discretion it would be sheer impertinence for a court to intrude. And such intrusion is contrary to the settled judicial tradition." *Howell* v. *Brown*, 65 F. Supp. 537, 540 (D. Neb. 1949). See also *Pugach* v. *Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965).

[9] See Goldstein, *supra* note 6, at 590 (appendix).

[10] Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481.

[11] 1965 FBI UNIFORM CRIME REPORTS 110–11 (table 19); Commission's General Report, ch. 2.

THE EXISTING SYSTEM

A major difficulty in the present system of nontrial dispositions is that when an offender is dropped out of the criminal process by dismissal of charges, he usually does not receive the help or treatment needed to prevent recurrence. A first offender discharged without prosecution in the expectation that his conduct will not be repeated typically is not sent to another agency; in fact, in most communities there are few agencies designed to deal with his problems. Whether mental illness, youth, or alcoholism is the mitigating factor, there rarely is any followup. In the struggle to reduce the number of cases that compete for attention, there is little time to consider the needs of those who are dropped out of the process.

In some places attempts are made to refer offenders in need of treatment to appropriate community agencies. The health, education, and welfare programs to which offenders may be referred range from family service agencies to foster families, from medical treatment to mental health facilities and vocational training, and from shelters to specialized facilities for the alcoholic, the narcotics addict, and the mentally retarded. In a few places the threat of prosecution is used to guarantee that the offender follows through with a proposed program of treatment, submits to supervision, makes restitution, or performs some other condition of his release.

In Washington, D.C., for example, the U.S. Attorney's office generally does not prosecute apparently casual first offense shoplifters, the offender is warned that a second offense will lead to prosecution. In first offender cases involving checks returned for insufficient funds, an informal hearing with representatives of the police and of the store which received the check usually results in dismissal of the charges upon the offender's agreement to make restitution.[12] Many cases involve relatively minor acts of violence stemming from domestic or neighborhood brawls and are initiated largely by citizens' complaints. In these cases the prosecutor holds an informal hearing attended by the complainant and the offender and attempts to resolve the problem which prompted the complaint. "He may warn the person complained against to stay away from the complainant or face prosecution. He may suggest the return of property or the payment of support,, or refer the parties to a family counseling agency.[13]

In Baltimore this kind of informal adjustment is performed by a magistrate, who holds court in a police precinct station.[14] In Detroit the police, who play an active part in the charge decision, hold informal hearings to deal with bad check and shoplifting cases.[15] The adjustment division, a special unit of the Recorder's Court probation department, also disposes of criminal complaints; it deals with 4,000–5,000 persons monthly, mainly women with complaints of nonsupport and other domestic problems. Warrants of arrest are issued for only about 3 percent of the complaints filed. In Chicago the police department refers many cases, again primarily family problems, to the Municipal Court's social service department, which sees about 10,000 clients yearly, most of whom receive counseling or are referred to other agencies. In Minneapolis a somewhat similar procedure is used, although there the probation office performs the screening service under the supervision of the prosecutor's office. New York City has established an independent agency, the Youth Counsel Service, which, upon referral from the prosecutor, investigates cases involving youthful offenders and makes recommendations for noncriminal treatment. The Service may refer the youth to other agencies for care and rehabilitation.

Pre-judicial determination of criminal charges is particularly common in the juvenile courts, and is described in detail in the Task Force Report on Juvenile Delinquency and Youth Crime. In many juvenile courts more than half of all cases are disposed of at the intake stage. Although in some communities these decisions are guided by policies and surrounded by some procedural regularity, ordinarily they are made on an informal, case-by-case basis.

Other, more formal alternatives to prosecution have been developed. For example, the Department of Justice has authorized a procedure for deferred prosecution of juveniles known as the "Brooklyn plan." In general, a juvenile will not be considered a subject for the plan unless his violation of law is not serious, his previous behavior and background are good, and the prospects for future lawful behavior are favorable. After investigation and report by a probation officer and with approval of the parents, the U.S. Attorney may place a juvenile on unofficial probation for a definite period. The conditions to be observed during this period may be similar to those for probation following adjudication. When the juvenile successfully completes this period of unofficial probation, the case is closed and the juvenile is left without the stigma of a court record. If he violates the conditions, he may then be prosecuted as a juvenile delinquent.

In some jurisdictions a similar disposition is possible even after the case reaches court. For example, in the magistrates' courts of Maryland the defendant may receive the disposition of "probation before conviction." A similar disposition in lower courts in Massachusetts is termed "case continued without finding." In both instances if the individual stays out of further difficulty for a given period of time, usually six months to a year, and follows a recommended course of action, such as outpatient psychotherapy or attendance at Alcoholics Anonymous, the case is closed. Failure to cooperate or a further encounter with the law could lead to conviction and imposition of sentence on the earlier charge.[16] Probation without conviction, provided for by statute in several States,[17] appears to be used widely elsewhere without specific statutory authority.

A number of innovative programs are designed to deal with alcoholics, in part as a response to increasing doubts about the legality of the criminal approach to this problem.[18] The Denver Municipal Court, for example, conducts a group therapy "honor court" program for offenders with drinking problems. Since the court has limited probation services available, this program is manned entirely by the chief judge and members of his administrative staff. A large alcoholism treatment unit in a city hospital provides inpatient and outpatient care for referrals.

[12] See SUBIN, *op. cit, supra* note 2, at 31–32.
[13] *Id.* at 54.
[14] Staff Study, *Administration of Justice in the Municipal Court of Baltimore*, printed in Appendix B of this volume.
[15] 3 American Bar Foundation, The Administration of Criminal Justice in the United States—Pilot Project Rep. 570 (mimeo. 1957).
[16] Examples of similar procedures in the lower courts of Kansas, Wisconsin, and Michigan are given in chapter 11 of NEWMAN, *op. cit. supra* note 1.
[17] *E.g.*, FLA. STAT. ANN. § 948.01 (Supp. 1966); MD. ANN. CODE art. 27 § 641 (Supp. 1966). Probation without conviction is provided for in the MODEL SENTENCING ACT § 9 (1963).
[18] See *Easter* v. *District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver* v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966). This subject is discussed in chapter 9 of the Commission's General Report.

Numerous programs have been established to provide services for persons who might otherwise be prosecuted for such crimes as vagrancy, public drunkenness, and disorderly conduct. New York City has a short-term hostel care program for homeless men. Denver has established a "group home" for elderly evacuees from a skid row renewal project. Boston has in operation a center to coordinate community services for homeless alcoholics and other men on skid row.

Although some of these programs are promising, the system for making the charge decision remains generally inadequate. Prosecutors act without the benefit of direction or guidelines from either the legislature or higher levels of administration; their decisions are almost entirely free from judicial supervision. Decisions are to a great extent fortuitous because they are made on inadequate information about the offense, the offender, and the alternatives available. At this stage in the process the prosecutor generally knows only a few bare facts about the offense. He generally knows little about the accused, except perhaps what is revealed by a prior criminal record. In many places little consideration is given to cases where guilt is apparent but criminal sanctions seem inappropriate. Often cases are prosecuted that should not be. Often offenders in need of treatment, supervision, or discipline are set free without being referred to appropriate community agencies or followed up in any way.

In most places there is little liaison between the prosecutor and community agencies which could assist an offender. The prosecutor, frequently overworked, has difficulty searching out noncriminal dispositions, and it is open to question whether he is the appropriate official to perform this searching function. He may have few professional qualifications to decide what treatment alternatives are appropriate for particular offenders. Consultative services to analyze the offender's medical, psychiatric, and social situation: to consider that situation in light of available community resources; and to make appropriate recommendations are at best limited and in many places are not available. But the basic problem is that in many communities the resources for dealing with offenders and their problems are totally inadequate. The development of such resources is clearly essential; detailed recommendations to this end are made in chapters 3 and 6 of the Commission's General Report.

IMPROVING THE CHARGE DECISION

Gathering and Sharing Information. A prosecutor should have several kinds of information if he is to make sound charge decisions. He must evaluate the strength of his case. Police reports usually provide him with some facts about the offense, but often he needs more. Before a prosecutor decides whether to charge or dismiss in any case that is not elementary, he should review the case file to determine whether more evidence and witnesses are available than the police have uncovered. In addition, the prosecutor needs to know enough about the offender to determine whether he should be diverted from the criminal track. Greater involvement of court probation departments and the availability of probation officers for consultation with the prosecutor and defense counsel at this stage of the proceedings are clearly advisable. Often the prosecutor needs to know whether there are facilities in the community for treating such medical or behavioral problems as the offender may have and whether those facilities will accept him.

In cases in which there is an indication that intensive treatment or supervision is needed, the prosecutor and defense counsel should be able to obtain a thorough investigation of the accused's background and treatment needs. A special division might be created in the prosecutor's office or in the public defender's office to conduct such an investigation. In some places the parties might call upon the probation office for help; in others a representative from a community agency could be designated. Some communities might choose to create a new agency to coordinate community services for offenders, conduct background investigations, and prepare treatment programs for consideration by prosecutor and defense counsel. Where a Youth Services Bureau has been created, as recommended by the Commission in chapter 3 of the General Report, it could conduct the investigation in youthful offender cases. Where neighborhood law offices have been created under programs of the Office of Economic Opportunity, they might be called upon for help.

Chapter 4 of this report discusses ways in which other information relevant to the disposition at this stage can be gathered. Techniques will vary; what is essential is that the relevant information be gathered so that dispositional decisions can be made on a rational basis.

Defense counsel has an important role to play at this stage, and he should be involved wherever an intrusive disposition or significant penalty is likely. Counsel can assist in gathering information and formulating a treatment program; he can help persuade the prosecutor of the appropriateness of a noncriminal disposition.

It is unusual for either attorney to have sufficient information; it is even more unusual for them to share it. But the early accumulation and sharing of information might well lead to early agreements between the prosecution and the defense about how some cases should be disposed of, thus saving time and futile legal maneuvering. The prosecutor should have the benefit of defense counsel's views and suggestions, as well as an idea of how strong the case for the defense is. By the same token, defense counsel should be familiar with the prosecution's case and the prosecutor's views in order to advise his client whether to seek a noncriminal disposition, to plead guilty, or to insist on a trial.

A conflict often exists between the need for a frank exchange of information and defense counsel's obligation to act only in ways favorable to his client. Defense counsel may possess information adverse to his client, or the prosecutor may have erroneous information which defense counsel knows paints an unjustifiably favorable picture of his client. Obviously all exchanges of information must be explicitly authorized by the defendant, and appropriate provision should be made to ensure that a defendant's statements and information disclosed are not used against him in the event of a trial. But subtle and difficult questions of professional responsibility will remain. Experience may offer guides for some of the problems presented; other norms may be provided by efforts such as the American Bar Association's redefinition of the Canons of Professional Ethics or the consideration of the role of counsel by the ABA Special Project on Minimum Standards for Criminal Justice.

The Precharge Conference. A conference between the prosecutor and defense counsel before formal charges are filed would provide an opportunity for them to discuss the appropriateness of noncriminal disposition of the case.

Prosecutors should establish guidelines for convening such conferences, indicating those classes of cases in which

conferences might be held as a matter of course, for example, when the offense involves conduct characteristic of a recognized disorder, such as alcoholism or mental disease; when the offense is a minor crime against property; or when the age of the defendant, his history of family and employment stability, or the absence of any prior criminal record indicate that he is a good risk. Discussions should of course be held when there are indications that the evidence of guilt is insufficient for trial or otherwise raises doubts in the prosecutor's mind whether prosecution of the case is warranted. The object of discussion in such cases would be whether the charges should be dismissed outright. The guidelines should also provide that in cases not specifically covered, conferences may be convened at the discretion of the prosecutor and defense counsel may submit appropriate information showing the desirability of a conference.

When there is a factual basis for the charge, the central concern at the precharge conference should turn to the question of what disposition is most appropriate for the offender and whether prosecution or noncriminal methods are the preferable way to attain that disposition. Among the factors that might be weighed in determining whether to adopt a noncriminal disposition are: (1) the seriousness of the crime and the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction; (2) the place of the case in effective law enforcement policy, particularly for such offenses as tax evasion, white collar crimes, and other instances where deterrent factors may loom large; (3) whether the offender has medical, psychiatric, family, or vocational difficulties; (4) whether there are agencies in the community capable of dealing with his problems; (5) whether there is reason to believe that the offender will benefit from and cooperate with a treatment program; and (6) what the impact of criminal charges would be upon the witnesses, the offender, and his family. Even if the case is ultimately prosecuted, the conference will have served many useful purposes, including an increase in the discovery and consideration of the facts on both sides, a narrowing of the trial issues, and formulation of a sounder basis for negotiated guilty plea discussions.

Adoption of the proposed precharge conference will no doubt entail some added administrative burden for prosecutors, but that burden should not be exaggerated. In many communities, for example, much of the needed offender information may be gathered from existing sources. Moreover, as some cases which might have been sent forward for prosecution are diverted to noncriminal disposition and others are routed out earlier in the process, prosecution resources would be freed for concentration on serious offenders and disputed cases.

Noncriminal Alternatives. When the prosecutor decides that a case should not be prosecuted criminally, a simple dismissal will often be appropriate: Investigation may reveal that the accused is not guilty of the offense for which he was arrested, or that although he is guilty, the offense is minor and there is no reason to believe he will commit such an offense again. But there are many cases where some followup should be provided: The offender may be an alcoholic or a narcotics addict; he may be mentally ill; he may have been led to crime by his family situation or by his inability to get a job. If he is not helped, he may well return to crime.

There are many cases in which minimal intrusions on the defendant's liberty would be all that seem necessary. Often it will be enough simply to refer the offender to the appropriate agency in the community, and hope that he will take advantage of the help offered. The prosecutor might, for example, be willing to drop charges if the defendant goes to an employment agency and makes a bona fide effort to get a job, or if he consults a family service agency, or if he resumes his education. The prosecutor retains legal power to file a charge until the period of limitations has run, but as a practical matter, unless the offense is repeated, it would be unusual for the initial charge to be revived.

While ideally there should be no intrusion on the defendant's liberty without a judicial finding of guilt and imposition of sanction, it may not be feasible to insist on this protection when the intrusion is so minimal. As noted above, there is a great deal of informal adjustment of cases now. A prosecutor might develop statements of policy with the approval of the court, defining with some precision the kinds of dispositions he proposes to make without seeking court approval. It might be advisable to limit the time during which the prosecutor would be authorized to reinstitute charges, as the Commission recommends in the juvenile area when youths are referred to a Youth Services Bureau. Such a disposition would not require elaborate procedural steps. A simple notation in the prosecutor's files would show that the charges were dismissed and the accused referred to a particular agency. Offenders would know that if they were arrested for the same offense again, full prosecution would be very likely.

But there are some cases where a simple referral may be inadequate: The offender may present too great a danger to the community; he may require longer supervision, or referral may have been tried before unsuccessfully. Yet subjecting the offender to the stigma of a criminal conviction may be undesirable. If the disposition involves significant restrictions on the accused or is of sustained duration, approval by the court should be required to assure that there is a factual basis for the charge, that no undue pressure has been put on the defendant to accept the disposition, and that the disposition is appropriate. Such an agreement might entail the kinds of conditions that would be appropriate for probation following conviction. The agreement might, for example, require supervision of the defendant's activities by a probation officer; it might require that the defendant give up certain associates; it might require that he cooperate with a program of treatment for alcoholism, narcotics addiction, or mental illness; it might require that he reside in a halfway house, or enter a mental institution for some definite period of time.

In such cases a written agreement, executed by the prosecutor, defense counsel, and the accused, should be submitted to the court and become effective only upon court approval. Depending upon local procedure, this agreement could take the form of a consent decree, and the prosecutor would be authorized to initiate prosecution only if the accused violated its terms. A substantial modification of the terms of the disposition should be presented to the court for review as part of an amended decree. Normal time limitations governing the filing of the charges might be suspended. If the prosecutor fears that it might not be feasible to try the charge at a later date, the decree could include an admission by the defendant, a stipulation of facts, or the depositions of witnesses.

There are of course dangers in granting such discretionary power to prosecutors and judges. Ordinarily the state can apply compulsory sanctions, inside prison or out, only after an offense has been proved or a guilty plea has been entered. And the permissible sanctions are limited by a maximum fixed by the legislature. There is a danger that the prosecutor's agreement to dismiss charges may induce the defendant to accept an alternate disposition consisting of onerous, unreasonable, or even illegal conditions. There is an additional danger that an alternate disposition could become a justification for indeterminate commitment. Recently reported instances of judicial attempts to obtain consent to sterilization and of prosecutorial intervention in the family life of the accused illustrate the possibilities of abuse. One safeguard is that the offender must, at any point in the process, have the right to insist on trial and criminal disposition. But there is nevertheless a danger that the prospect of criminal prosecution would be so dire as to force the offender to accept an unreasonable, although less onerous, alternative. The proposal here that the agreement be recorded and submitted to court for approval would tend to minimize this danger.

An accused might be induced to accept a burdensome, although noncriminal, program of treatment on the basis of a flimsy charge of which he clearly would be found not guilty if he insisted on his right to trial. Obviously the accused is under strong pressure to accept any disposition which does not carry the stigma of a criminal conviction. The problem is very similar to that which arises in the negotiation of a guilty plea. Similar protections, discussed in more detail in the following section, should be provided. The reviewing judge should, in the first place, determine that there is a factual basis for the charge. If the judge determines that there is no basis for the charge, he should inform the accused, who then would be free to pursue or reject the recommended program without the threat of a criminal charge. The judge should also consider the amount of pressure that was put on the accused to agree to a noncriminal alternative and determine whether it constituted an overwhelming inducement to surrender the right to trial. If he is not satisfied, the case should be set for trial. When the agreement includes any factual admissions or depositions prejudicial to the defendant, he should be allowed to withdraw them. When feasible, trial should take place before a different judge, who would not be influenced by involvement in the consent decree decision.

The final safeguard would be the presence of counsel, which should be required wherever an intrusive disposition is under consideration. Counsel would ensure that the other safeguards provided are meaningful. And counsel is necessary for the accused to make an informed decision whether to agree to a noncriminal disposition requiring burdensome performance on his part.

THE NEGOTIATED PLEA OF GUILTY

The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions.[19] But the Commission has found it difficult to calculate with any degree of certainty the percentage of cases disposed of by guilty plea, since reliable statistical information is limited. Clearly it is very high. The following statistics indicate the number and percentage of guilty plea convictions in trial courts of general jurisdiction in States in which such information was available.

State (1964 statistics unless otherwise indicated)	Total convictions	Guilty pleas	
		Number	Percent of total
California (1965)	30,840	22,817	74.0
Connecticut	1,596	1,494	93.9
District of Columbia (year ending June 30, 1964)	1,115	817	73.3
Hawaii	393	360	91.5
Illinois	5,591	4,768	85.2
Kansas	3,025	2,727	90.2
Massachusetts (1963)	7,790	6,642	85.2
Minnesota (1965)	1,567	1,437	91.7
New York	17,249	16,464	95.5
Pennsylvania (1960)	26,632	17,108	66.8
U.S. District Courts	29,170	26,273	90.2
Average [excluding Pennsylvania][1]			87.0

[1] The Pennsylvania figures have been excluded from the average because they were from an earlier year, and the types of cases included did not appear fully comparable with the others.

A substantial percentage of guilty pleas are the product of negotiations between the prosecutor and defense counsel or the accused, although again precise data are unavailable.[20] Commonly known as "plea bargaining," this is a process very much like the pretrial settlement of civil cases. It involves discussions looking toward an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favorable sentence recommendation by the prosecutor. Even when there have been no explicit negotiations, defendants relying on prevailing practices often act on the justifiable assumption that those who plead guilty will be sentenced more leniently.

Few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty.[21] The correctional needs of the offender and legislative policies reflected in the criminal law appear to be sacrificed to the need for tactical accommodations between the prosecutor and defense counsel. The offense for which guilt is acknowledged and for which the sentence is imposed often appears almost incidental to keeping the business of the courts moving.

The system usually operates in an informal, invisible manner. There is ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although the participants and frequently the judge know that negotiation has taken place, the prosecutor and defendant must ordinarily go through a courtroom ritual in which they deny that the guilty plea is the result of any threat or promise.[22] As a result there is no judicial review of the propriety of the bargain—no check on the amount of pressure put on the defendant to plead guilty. The judge, the public, and sometimes the defendant himself cannot know for certain who got what from whom in exchange for what. The process comes to

[19] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 1 (Tent. Draft 1967); NEWMAN, *op. cit. supra* note 1, at 3 n.1.

[20] The *University of Pennsylvania Law Review* surveyed 205 prosecutors' offices in the most populous counties of 43 States. Roughly 80 responses were received. More than half of the offices in this group reported that 70 percent or more of the defendants pleaded guilty, and of these guilty pleas between 30 and 40 percent resulted from negotiations. Approximately 11 percent of the offices responding indicated that 70 percent or more of guilty pleas were negotiated, while 28 percent indicated that 10 percent or less were negotiated. See Note, *Guilty Plea Bargaining—Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 896-99 (1964); *cf.* Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, (1956).

[21] See Comment, *Official Inducement to Plead Guilty—Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964).

[22] *Cf. Shelton* v. *United States*, 242 F.2d 101 (5th Cir.), *rev'd*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

look less rational, more subject to chance factors, to undue pressures, and sometimes to the hint of corruption. Moreover, the defendant may not get the benefit he bargained for. There is no guarantee that the judge will follow the prosecutor's recommendations for lenient sentence. In most instances the defendant does not know what sentence he will receive until he has pleaded guilty and sentence has been imposed. If the defendant is disappointed, he may move to withdraw his plea, but there is no assurance that the motion will be granted, particularly since at the time he tendered his guilty plea, he probably denied the very negotiations he now alleges.[23]

A more fundamental problem with plea bargaining is the propriety of offering the defendant an inducement to surrender his right to trial. This problem becomes increasingly substantial as the prospective reward increases, because the concessions to the defendant become harder to justify on grounds other than expediency. There is always the danger that a defendant who would be found not guilty if he insisted on his right to trial will be induced to plead guilty. The defendant has an absolute right to put the prosecution to its proof, and if too much pressure is brought to discourage the exercise of this right, the integrity of the system, which the court trial is relied upon to vindicate, will not be demonstrated. When the prosecution is not put to its proof and all the evidence is not brought out in open court, the public is not assured that illegalities in law enforcement are revealed and corrected or that the seriousness of the defendant's crimes are shown and adequate punishment imposed. Prosecutors who are overburdened or are insufficiently energetic may compromise cases that call for severe sanctions.

Despite the serious questions raised by a system of negotiated pleas, there are important arguments for preserving it. Our system of criminal justice has come to depend upon a steady flow of guilty pleas. There are simply not enough judges, prosecutors, or defense counsel to operate a system in which most defendants go to trial. Many of the Commission's proposals, such as the recommendation to expand appointment of counsel for the indigent, will strain the available resources for many years. If reliance on trial were increased at this time, it would undoubtedly lower the quality of justice throughout the system. Even were the resources available, there is some question whether a just system would require that they be allocated to providing all defendants with a full trial. Trial as we know it is an elaborate mechanism for finding facts. To use this process in cases where the facts are not really in dispute seems wasteful.

The plea agreement, if carried out, eliminates the risk inherent in all adversary litigation. No matter how strong the evidence may appear and how well prepared and conducted a trial may be, each side must realistically consider the possibility of an unfavorable outcome. At its best the trial process is an imperfect method of factfinding; factors such as the attorney's skill, the availability of witnesses, the judge's attitude, jury vagaries, and luck will influence the result. Each side is interested in limiting these inherent litigation risks. In addition, the concessions of a negotiated plea are also commonly used by prosecutors when a defendant cooperates with law enforcement agencies by furnishing information or testimony against other offenders.

Confining trials to cases involving substantial issues may also help to preserve the significance of the presumption of innocence and the requirement of proof beyond a reasonable doubt. If trial were to become routine even in cases in which there is no substantial issue of guilt, the overwhelming statistical probability of guilt might incline judges and jurors to be more skeptical of the defense than at present.

Because of the invisibility of the plea bargaining system, the essential issues involved have generally not received adequate consideration by the courts. Some courts have, however, begun to look at the system for what it is and to focus on the need to regulate it to assure that neither public nor private interests are sacrificed. As a Federal Court of Appeals noted in a recent case:

> In a sense, it can be said that most guilty pleas are the result of a "bargain" with the prosecutor. But this, standing alone, does not vitiate such pleas. A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence. The latter possibility exists if he pleads guilty . . .
>
> No competent lawyer, discussing a possible guilty plea with a client, could fail to canvass these possible alternatives with him. Nor would he fail to ascertain the willingness of the prosecution to "go along." . . .
>
> The important thing is not that there shall be no "deal" or "bargain," but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced.[24]

Some jurisdictions appear to be able to deal with their caseloads without reliance on negotiated guilty pleas. The discussion in this chapter should not be taken as suggesting that plea bargaining should be introduced in courts that have satisfactory alternatives. Particularly in single judge courts it may not be feasible to introduce the safeguards that would enable a negotiated plea system to operate fairly and effectively. Indeed this chapter does not resolve the issue whether a negotiated guilty plea system is a desirable method of dealing with cases. Rather the discussion is directed to improving the operation of the plea bargaining system in those jurisdictions where negotiations are ordinary occurrences.

FORMS AND USES OF NEGOTIATED PLEAS

The plea agreement follows several patterns.[25] In its best known form it is an arrangement between the prosecutor and the defendant or his lawyer whereby the accused pleads guilty to a charge less serious than could be proven at trial. "Less serious" in this context usually means an offense which carries a lower maximum sentence. The defendant's motivation is to confine the upper limits of the judge's sentencing power. Similar results are obtained when the plea is entered in return for the prosecutor's agreement to drop counts in a multicount indictment or not to charge the defendant as a habitual offender. In some situations the benefits obtained by the defendant may be illusory, as when he bargains for a reduction in counts unaware that local judges rarely impose consecutive sentences.

Charge reduction is tied to the exercise of the prosecutor's discretion as to what offenses he will charge originally. Although the charge process is distinct from the plea negotiation, the two are closely related by the prosecutor's expectations at the time of charge as to the likely course bargaining will take, and by the important role bargaining for reduced charges plays in the exercise of the prosecutor's discretion.

Plea negotiations concerning charges provide an opportunity to mitigate the harshness of a criminal code or to rationalize its inconsistencies and to lead to a disposition based on an assessment of the individual factors of each crime. The field over which these negotiations may range is broad; the defendant's conduct on a single occasion may justify separate charges of robbery, larceny, assault with a deadly weapon, assault, or disorderly conduct. Some of these offenses are felonies, while others are misdemeanors, and the maximum sentences may range from 30 years to less than 1 year. Conviction of a felony may involve serious collateral disabilities, including disqualification from engaging in certain licensed occupations or businesses, while conviction of a misdemeanor may not. The prosecutor often has a wide range of penal provisions from which to choose. His choice has enormous correctional implications, and it is through charge bargaining that in many courts he seeks to turn this discretion to his own advantage.

Charge reduction may be used to avoid a mandatory minimum sentence or a restriction on the power to grant probation. In these instances the agreed plea becomes a way of restoring sentencing discretion when it has in part been eliminated from the code. Charge reduction is also used to avoid the community opprobrium that attaches to conviction of certain offenses. Thus to avoid being labeled a child molester or homosexual, the defendant may offer to plead guilty to a charge such as disorderly conduct or assault.

The plea agreement may take forms other than a reduction of charges. A defendant may plead guilty to a charge that accurately describes his conduct in return for the prosecutor's agreement to recommend leniency or for a specific recommendation of probation or of a lesser sentence than would probably be imposed if the defendant insisted upon a trial. Although in theory the judge retains complete discretion as to sentence, in reality the negotiations are conducted by the prosecutor and the defendant or his attorney on the assumption that the recommended sentence will be imposed. The practices of individual judges vary, but they are likely to be known to the parties. Some judges neither request nor accept sentencing recommendations, and others give them differing weight in different cases. But many judges feel obligated to accept such recommendations, because they know that it is essential to the plea negotiation system. In some instances the judge may indicate explicitly that he will impose a particular sentence if the defendant pleads guilty. This can lead to the undesirable involvement of the judge as an active participant in negotiations, lending the weight of his power and prestige to inducing the defendant to plead guilty.[26]

Other forms of plea bargaining may involve judge shopping. In places where there are wide sentencing disparities, a plea of guilty may be entered in exchange for the prosecutor's agreement that the defendant will appear before a particular judge for sentencing.

PROBLEMS IN CURRENT PLEA BARGAINING PRACTICES

There are many serious problems with the way that the plea bargaining system is administered. In the first place bargaining takes place at a stage when the parties' knowledge of their own and each other's cases is likely to be fragmentary. Presentence reports and other investigations into the background of the offender usually are made after conviction and are unavailable at the plea bargain stage. Thus the prosecutor's decision is usually made without the benefit of information regarding the circumstances of the offense, the background and character of the defendant, and other factors necessary for sound dispositional decisions. In too many places the acceptance of pleas to lesser offenses, which began as a device to individualize treatment, becomes routine, with a standard reduction for certain charges.

The informality and wide variation in practice among prosecutors and trial judges regarding plea bargains often cause bewilderment and a sense of injustice among defendants. Some may be denied the opportunity to participate in the bargaining process and the benefits which may accrue because they or their counsel are unaware of the customary practices of plea negotiation. Others may come away from a system which invites judge shopping with justifiable feelings that they have been treated improperly.

Too often the result may be excessive leniency for professional and habitual criminals who generally have expert legal advice and are best able to take full advantage of the bargaining opportunity. Marginal offenders, on the other hand, may be dealt with harshly, and left with a deep sense of injustice, having learned too late of the possibilities of manipulation offered by the system.

The most troublesome problem is the possibility that an innocent defendant may plead guilty because of the fear that he will be sentenced more harshly if he is convicted after trial or that he will be subjected to damaging publicity because of a repugnant charge. The danger of convicting the innocent obviously must be reduced to the lowest possible level, but the fact is that neither trial nor plea bargain is a perfectly accurate procedure. In both, the innocent face the risk of conviction. The real question is whether the risks are sufficiently greater in the bargain-

[23] See, e.g., *United States* v. *Hughes*, 325 F.2d 789 (2d Cir. 1964), *cert. denied*, 377 U.S. 907 (1965); *United States* v. *Lester*, 247 F. 2d 496 (2d Cir. 1957); *cf.* CA. CODE ANN. § 27-1404, allowing withdrawal of a guilty plea as a matter of right at any time before judgment.

[24] *Cortez* v. *United States*, 337 F.2d 699, 701 (9th Cir. 1964).

[25] See generally NEWMAN, *op. cit. supra* note 1; Enker, *Perspectives in Plea Bargaining*, printed as appendix A to this volume.

[26] See *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966); *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).

ing process to warrant either abandoning it entirely or modifying it drastically. Such improper practices as deliberate and unwarranted overcharging by the prosecutor to improve his bargaining position, threats of very heavy sentences if the defendant insists on a trial, or threats to prosecute relatives and friends of the defendant unless he pleads guilty may, on occasion, create pressures that can prove too great for even the innocent to resist. The existence of mandatory minimum sentences aggravates this problem since they exert a particularly heavy pressure on defendants to relinquish their chance of an acquittal.[27] Inadequate discovery procedures often impair counsel's ability to appraise the risks of trial. Clearly those courts that continue to use a negotiated plea system must take vigorous steps to reduce these potential abuses.

RESTRUCTURING THE PLEA BARGAINING SYSTEM

The process as presently constituted contains some safeguards to prevent innocent defendants from pleading guilty. Most judges take pains to assure that the defendant is in fact guilty by questioning him or hearing evidence before accepting a plea of guilty. In some jurisdictions the presentence investigation contains a careful evaluation of the facts underlying the charge.

The recommendations which follow are intended to convert the practice of plea bargaining into a visible, forthright, and informed effort to reach sound dispositional decisions; they are meant to assure a measure of judicial control so that dispositions which are against the interests of the public or the defendant can be avoided.

Whenever the defendant faces a significant penalty, he should be represented by counsel, whether the offense is classified as a felony or a misdemeanor. The presence of counsel helps ensure that the plea is reliable, that the risks of litigation have been considered, and that no unfair advantage has been taken of the defendant.

Prosecutors who practice plea bargaining should make the opportunity to negotiate equally available to all defendants. Rather than leaving it to the defendant to seek charge and sentence concessions, the prosecutor should publish procedures and standards, making clear his availability to confer with counsel and listing the factors deemed relevant. The defendant should be able to include within the disposition all crimes, charged or not, which could be charged within the jurisdiction of the court.

Discussions between prosecutor and defense counsel should deal explicitly with dispositional questions and the development of a correctional program for the offender. A plea negotiation is fundamentally a negotiation about the correctional disposition of a case and is, therefore, a matter of moment to both the defendant and the community. If the offense is a serious one, a plea bargain should be founded on the kind of information available to both parties that is gathered by probation departments for presentence reports. Less complete information may be adequate for less serious cases.

The full and frank exchange of relevant information regarding the offender and the offense, already discussed in connection with the decision whether to charge, is equally essential at this stage of the proceedings. When a precharge conference has been held, the data assembled by both parties may be used in the plea negotiations. In addition procedures should be adopted which would enable the parties to call upon the probation office or some other factfinding agency to obtain what is in effect a presentence investigation for use in the negotiation discussions. In the District of Columbia the defender's office has an experimental project, in many respects resembling a probation service, for evaluating defendants and developing correctional plans for them. Defense counsel should painstakingly explain to the defendant the terms of the proposed agreement and the alternatives open to him.

The negotiations should be freed from their present irregular status so that the participants can frankly acknowledge the negotiations and their agreement can be reviewed by the judge and made a matter of record. Upon the plea of guilty in open court the terms of the agreement should be fully stated on the record and, at least in serious or complicated cases, reduced to writing. If there is a written memorandum, it should contain an agreed statement of the facts of the offense, the opening positions of the parties, the terms of the agreement, background information relevant to the correctional disposition, and an explanation of why the negotiated disposition is appropriate. This material should be probed by judicial questioning. Use of a memorandum is preferable to relying entirely upon judicial questioning, because it should encourage more thoughtful negotiations and a more complete consideration of the agreement by the judge. Regardless of which procedure is chosen, the judge's questions at the time of plea should be transcribed and filed.

Judicial supervision is not an effective control when the system of plea bargaining is built on tacit rather than explicit understandings. When there has been explicit discussion of a charge reduction or of a sentencing recommendation, the terms of the discussions will be well defined, and the judge will be in a position to enquire into them. But the judge is in a different position when a defendant pleads guilty to a particular offense in the expectation that a given sentence will be imposed, or when a prosecutor agrees to a reduction in charge or to an adjournment that results in the case coming before a particular judge in the expectation that the defendant will be led thereby to plead guilty. In these cases counsel may in good faith insist that the steps taken were unilateral and not pursuant to an agreement, and the judge's ability to intervene in these decisions will be less.

Inevitably the judge plays a part in the negotiated guilty plea.[28] His role is a delicate one, for it is important that he carefully examine the propriety of the agreement without undermining his judicial role by becoming excessively involved in the negotiations. The judge's function is to ensure the appropriateness of the correctional disposition reached by the parties and to guard against overcharging by the prosecutor or an agreed sentence that is inappropriately light in view of the crime or so lenient as to constitute an irresistible inducement to the defendant to plead guilty. The judge's role is not that of one of the parties to the negotiation, but that of an independent examiner to verify that the defendant's plea is the result of an intelligent and knowing choice. The judge should make every effort to limit his participation to avoid formulating the terms of the bargain. His power to impose a more severe sentence than the one proposed as part of the negotiation presents so great a risk that defendants may feel compelled to accept his proposal.

Before accepting the plea of guilty, the judge, in open court, should determine that the defendant's plea is the result of an intelligent and knowing choice and not based on misapprehension. The judge should make sure that the defendant understands the nature of the charge, his right to trial, the consequences of his plea, and the defenses available to him. The judge also should determine that there is a factual basis for the plea, by specific inquiry of the prosecutor, the defendant, his counsel, or witnesses, or by consideration of other evidence.[29] Such inquiry should be more precise and detailed than the brief and perfunctory question-and-answer sequence that has been common in some courts.

The judge should assess the inducements that have been offered to the defendant for his plea. If a written memorandum of the negotiation has been submitted, he should inquire whether the plea has resulted from any inducements not set forth in the memorandum. He must decide whether undue pressure has been put on the defendant to plead guilty. This decision is admittedly an extremely difficult one to make and calls for a careful weighing of the inducements offered and the ability of the defendant to exercise a real choice.

The judge also must decide that the agreed disposition is fair and appropriate in light of all the circumstances. The judge should determine that the disposition is consistent with the sentencing practices of the jurisdiction and that the prosecutor did not agree to an inadequate sentence for a serious offender. The court should be given and apprised of all information and diagnostic reports concerning the offender. If the judge feels that additional investigation is in order, entry of the plea should be postponed pending completion of a presentence investigation. He should weigh the agreed disposition against factors similar to those that would be considered on the imposition of sentence after a trial: the defendant's need for correctional treatment, the circumstances of the case, the defendant's cooperation, and the requirements of law enforcement. If the agreed sentence appears within the reasonable range of an appropriate sentence after trial, it should satisfy the need to deal effectively with the offender yet not be an improper inducement. This standard may provide a somewhat clearer context for judicial consideration of the plea by putting it on the same footing as a sentencing decision, but the inherent difficulty of the sentencing choice, which is discussed in the next chapter, is still present.

Only if the judge is satisfied that these criteria have been met should he indicate that the disposition is acceptable to him.[30] Otherwise he should deny entry of the plea. For example, if the judge is not satisfied that there is a factual basis for the plea, he should set the case for trial. If he determines that the plea is not entered knowingly, he should advise the defendant of the relevant issues and allow additional time for him to reconsider the plea. If he decides that a more severe sentence should be imposed, the defendant should be permitted to withdraw his plea. Neither the written memorandum nor any statements made at the judicial inquiry should be received in evidence.

Provision must be made for situations in which the judge finds the agreement unacceptable and in which the case is set for trial. In such instances the judge's function as arbiter at the trial would be complicated by his participation during the plea proceedings and the knowledge thus obtained. Procedures should be established for referral of trial and all further proceedings in the case to another judge, if possible. Application of these procedures in the many single judge courts would, of course, continue to raise vexing issues.

The steps suggested in this section are not proposed as a final answer to the problems presented by plea bargaining. They are designed to minimize the dangers of these practices. They do not resolve the central question whether our system of justice should rely to the extent it does on practices that place such heavy pressures on a defendant to plead guilty. But experience with a plea bargaining system in which negotiations are open, visible, and subject to judicial scrutiny should help to identify the risks involved in the system, and indicate the need for and direction of further change.

[27] Studies show a far greater incidence of bargaining in Michigan, where sentences for certain crimes are legislatively mandated, than in Wisconsin, where judges have greater discretion in sentencing. See NEWMAN, *op. cit. supra* note 1, at 53–56, 177–91.

[28] The role for the judge in the guilty plea process suggested in this chapter should be compared with the approach taken by the ABA Project on Minimum Standards for Criminal Justice, *op. cit. supra* note 25, at 71–77 (§ 3.3). Both recognize that the judge should not become an active participant in the discussions leading to a plea agreement. This chapter places greater emphasis on the importance in the negotiating stage of gathering dispositional information, including even the equivalent of a presentence investigation. If this approach is taken the parties should be able to present to the judge more information concerning the case and the defendant than might otherwise be available. The ABA draft, on the other hand, contemplates that the presentence investigation will occur after plea (p. 74) and, therefore, that the judge would be in a position to give only a preliminary indication of the acceptability of the agreement at the time the plea is tendered. Both approaches recognize the desirability of assuring that the defendant who pleads guilty on the basis of an agreement receives the benefit of his bargain.

[29] *Cf.* FED. R. CRIM. P. 11.

[30] Not only will such detailed inquiry result in fairer procedures, but the slight additional time spent in careful questioning will eliminate most collateral attacks on guilty pleas, thus saving judicial time in the long run.

Chapter 2

Sentencing

The imposition of sanctions on convicted offenders is a principal vehicle for accomplishing the goals of the criminal law. The difficulty of the sentencing decision is due in part to the fact that criminal law enforcement has a number of varied and often conflicting goals: The rehabilitation of offenders, the isolation of offenders who pose a threat to community safety, the discouragement of potential offenders, the expression of the community's condemnation of the offender's conduct, and the reinforcement of the values of law abiding citizens.

Although in some cases these various goals may lead to the same result, in many other cases the judge must choose to enforce one goal while subordinating the others. Thus a person who violates the income tax or selective service laws may be sentenced to prison as an example to potential violators despite the fact that he presents no threat to the community's safety and is not apparently in need of correctional treatment. In another case a judge may properly impose a lenient sentence on a youthful offender who has committed a serious crime in order to maximize his chances for successful rehabilitation.

The burden of accommodating these values in each case falls primarily on the trial judge. Although his authority is limited by the statutory provisions which establish the range of sentencing alternatives, these statutes rarely provide any standards to guide the exercise of his discretion. Furthermore, his ability to impose an appropriate sentence is limited because knowledge about the deterrent or rehabilitative effect of any particular sentence is limited. And in many jurisdictions information about the offender's background, which is needed to predict the offender's potential for rehabilitation, is not furnished to the sentencing judge.

This chapter discusses the need for legislative reexamination of sentencing codes to give greater discretion to trial judges and to provide statutory criteria to guide the exercise of sentencing discretion. It also considers procedures for furnishing the sentencing judge with enough relevant information about the offense and the offender. Finally, this chapter discusses procedures which would help to reduce unjustified disparity of sentences and to ensure the fairness and purposefulness of the court's sentencing decision.

STATUTORY SENTENCING FRAMEWORK

Over half the States are now engaged in penal law revision, including reconsideration of their sentencing codes, and in October 1966 Congress, at the request of President Johnson, established a special commission to study and propose revisions of Federal penal laws and sentencing statutes. These revision efforts emphasize the importance of considering the problems in existing sentencing codes.

Statutory provisions affect sentencing decisions in individual cases in two primary ways. The statutes distribute sentencing authority among the legislature, the court, and the correctional agencies. They also determine the criteria used by the courts and correctional agencies to make the decisions delegated to them and place limits on their authority.[1]

The influence of the statutory sentencing framework may be illustrated by the case of a hypothetical adult offender who stands convicted of armed robbery and who previously has been imprisoned for a felony: Under typical American penal codes, at the time of sentence the court might impose imprisonment, probation, or a fine. In a few jurisdictions the death penalty is available for armed robbery, but it is rarely imposed.

If the offender is sentenced to prison, the two most important decisions are how long he may be kept there and when he will first become eligible for release on parole. In all jurisdictions the legislature fixes the maximum length of imprisonment for an offense, but in most States the courts are permitted to select a sentence for each offender within a range provided by the statute, such as "any term up to 20 years" or "any term between 10 and 20 years." In a few States, however, the judge is limited to the imposition of a fixed statutory maximum term, with all other aspects of the actual length of imprisonment later set administratively by correctional authorities.

The laws of many States would impose further limitations on the judge's authority. A number of States provide a mandatory minimum sentence of imprisonment, sometimes 10 years or more, for particularly dangerous crimes, such as armed robbery. In addition a majority of States require heavier punishment for repeated offenders by a mandatory provision applicable to all recidivists. In most of the remaining States heavier punishment is permitted at the judge's discretion.

Few prisoners serve their maximum terms of imprisonment. After serving a fraction of their maximum sentences most are released on parole or on conditional release earned because of good time credit. In many States prisoners are eligible for parole when they serve a fixed part, typically one-third or one-half, of their maximum sentences. In most, the courts have authority to impose a specific minimum sentence that an offender must serve in prison before he becomes eligible for parole. The date of parole eligibility is determined solely by the correctional authorities in a few States.

In all States the court may sentence an offender to serve a period of probation up to a maximum fixed by statute. But statutes in a number of States would prohibit probation for an armed robber with a prior felony conviction because of the seriousness of the offense or because of his criminal record.

The maximum amount of the fine which the court may impose is also fixed by statute. It is unlikely that the court would sentence an armed robber to pay a fine, since few judges would consider a fine adequate punishment for a violent offense, and in any event, few felons have the money to pay a substantial fine.

NUMBER OF PUNISHMENT CATEGORIES

The penal codes of most jurisdictions are the products of piecemeal construction, as successive legislatures have fixed punishment for new crimes and adjusted penalties for existing offenses through separate sentencing provisions for each offense. As a result the sentencing distinctions among offenses are in excess of those which could rationally be drawn on the basis of relative harmfulness of conduct or the probable dangerousness of the offenders. In Wisconsin, for example, there are 16 variations in the statutory maximum terms of imprisonment for felonies upon a first conviction: 2, 3, 4, 5, 6, 7, 8, 10, 14, 20, 25, 35, and 40 years and life imprisonment.[2] A study of the Oregon penal code revealed that the 1,413 criminal statutes contained a total of 466 different types and lengths of sentences.

The absence of legislative attention to the whole range of penalties may also be demonstrated by comparisons between certain offenses. A recent study of the Colorado statutes disclosed that a person convicted of first degree murder must serve 10 years before becoming eligible for parole, while a person convicted of a lesser degree of the same offense must serve at least 15 years; destruction of a house with fire is punishable by a maximum of 20 years' imprisonment but destruction of a house with explosives carries a 10-year maximum.[3] In California an offender who breaks into an automobile to steal the contents of the glove compartment is subject to a 15-year maximum sentence, but if he stole the car itself, he would face a maximum 10-year term.

Although each offense must be defined in a separate statutory provision, the number and variety of sentencing distinctions which result when legislatures prescribe a separate penalty for each offense are among "the main causes of the anarchy in sentencing that is so widely deplored." [4] Experience indicates that offenses may be grouped into broader categories for purposes of delimiting the permissible sentences. This is the approach taken in the Model Penal Code, which groups all felonies into three categories of relative seriousness.[5] The most serious grade of felony, felonies of the first degree, includes offenses such as murder and rape accompanied by serious bodily injury; second degree felonies include burglary at night, arson, and aggravated assault; and third degree felonies include theft in excess of $500, perjury, forgery of a check, and bribery. The Code provides a single range of prison sentence for all offenses in each grade of felony. For example, the prison term authorized for felonies of the second degree has a maximum of 10 years and a minimum to be set by the court of between 1 and 3 years.

The precise number of punishment categories and the penalties attached to each category are questions which must be resolved by each jurisdiction. In the recent revision of the New York Penal Law, for example, five grades of felony were thought necessary.[6] But it is clearly possible and helpful to reduce substantially the number of punishment classifications which exist in many jurisdictions.

IMPRISONMENT

Because of its severity as compared with fine or probation, imprisonment is believed to have a greater deterrent effect on potential offenders and on the prisoner himself. It isolates from society persons who are likely to commit further criminal acts, and it may provide a type of discipline and training in an institutional setting that would be helpful in beginning certain programs of rehabilitation.

Imprisonment is not without its costs, however. It is financially the most expensive way of dealing with a convicted offender, not only in terms of custodial costs but also in the loss of the prisoner's productive capacity and support for his dependents. The Commission's nationwide survey of correctional operations revealed that the average cost of probation supervision for an adult felony offender is $200 per year, while the average yearly cost of imprisoning such an offender is almost $2,000. Moreover, as the Report of the Corrections Task Force emphasizes, removing a man completely from the community may impede his successful reintegration later, and the atmosphere, associations, and stigma of imprisonment may reinforce his criminality.

An enlightened sentencing code, therefore, should provide for a more selective use of imprisonment. It should ensure that long prison terms are available for habitual, dangerous, and professional criminals who present a substantial threat to the public safety and that it is possible for the less serious offender to be released to community supervision without being subjected to the potentially destructive effects of lengthy imprisonment. Moreover, it should provide the courts and correctional authorities with sufficient flexibility to fix lengths of imprisonment which are appropriate on the facts of each case.

[1] See generally Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

[2] See TAPPAN, CRIME, JUSTICE AND CORRECTION 440 (1960).

[3] See Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1966).

[4] MODEL PENAL CODE § 6.01, comment 1 (Tent. Draft No. 2, 1954).

[5] MODEL PENAL CODE §§ 6.01, 6.06 (Proposed Official Draft 1962).

[6] N.Y. PEN. LAW § 15.05 (effective Sept. 1, 1967).

The statutory sentencing provisions in many jurisdictions, however, prevent the courts from making discriminating use of imprisonment. The clearest instances of restrictive provisions are those which require the courts to impose a specific prison sentence on certain offenders. These mandatory prison sentences are of three basic types.[7] The most prevalent requires the court to impose increased prison terms on recidivists. The second type specifies for a particular offense either the minimum period which an offender must serve before he becomes eligible for parole or the maximum period he may be required to serve before he must be released. Finally, in a few States the court must impose consecutive sentences on an offender who is convicted of several offenses at one trial.

Mandatory prison sentences often are extremely severe. The habitual offender laws in about one-third of the States make life imprisonment mandatory on the third or fourth conviction of a felony, and in more than one-half of the States the courts are required to impose increased terms on second offenders. Under certain sections of the Federal narcotics laws the court must sentence an offender to a prescribed mandatory 10-year prison sentence without eligibility for parole.

Because of the need to deter potential offenders and to isolate dangerous persons from the community, it is necessary that long prison sentences be available for those who have committed the most serious offenses or for those who are likely to commit further crimes. Mandatory sentences, however, prevent the courts from basing their sentences on the relative importance of these factors in each case. Judges and prosecutors often regard punishment by long mandatory terms as unreasonably harsh, and they are faced with the dilemma of adhering to the statutory requirement or avoiding it to produce results that seem to be just in individual cases. Furthermore, the avoidance of mandatory sentences may be almost a practical necessity, since an undermanned prosecutor's office depends on the possibility of leniency to obtain guilty pleas. An office which does not reduce charges for offenses carrying long mandatory terms or which routinely seeks to obtain convictions under mandatory habitual offender laws would become overwhelmed with trials because defendants would have no incentive to plead guilty.

There is persuasive evidence of nonenforcement of these mandatory sentencing provisions by the courts and prosecutors. For example, where certain offenses carry long mandatory prison terms, prosecutors frequently reduce the charge to a lesser offense if the defendant agrees to plead guilty. The result of this practice is that in a number of jurisdictions convictions for offenses carrying severe mandatory sentences are rare. As the American Bar Foundation's survey of criminal justice in Michigan revealed:

> [A]rmed robbery is so often downgraded that the Michigan parole board tends to treat a conviction for unarmed robbery as prima facie proof that the defendant had a weapon. And the frequency of altering nighttime burglary to breaking and entering in the daytime led one prosecutor to remark: "You'd think all our burglaries occur at high noon." [8]

Where prosecutors have sought the imposition of long mandatory sentences, the courts often have refused to enforce the statutes or have narrowed their application. In Detroit, for example, the judges' opposition to the mandatory 20-year minimum sentence for sale of narcotics is so great that they have almost always refused to accept guilty pleas to that offense and have instructed defense counsel and prosecutors to negotiate for a reduction of the charge to possession or use. During the first four years after the mandatory penalty was enacted in 1952, there were only 12 sale-of-narcotics convictions out of 476 defendants originally charged with sale. Under the former New York Penal Law the courts construed the term "convicted" in the statute requiring increased sentences for habitual offenders as not including instances where an offender had previously been found guilty of a felony but had received a suspended sentence.[9]

By denying adequate sentencing discretion to the courts, the legislatures have unintentionally increased the bargaining power of the prosecutor in plea negotiations. In the preceding chapter this report discusses the danger that guilty pleas may be induced improperly where there is great disparity between the sentence a defendant may receive after conviction at trial and the sentence offered by the prosecutor on a plea. The severity of most mandatory sentences and the prosecutor's ability to avoid them can give the prosecutor an undue advantage in plea negotiations. As Prof. Donald Newman has noted:

> Defendants with a number of prior felony convictions are potentially susceptible to long sentences or separate convictions as habitual criminals. It is not an uncommon practice for prosecutors to mention this to recidivistic defendants, and there is little doubt that this exerts a strong pressure on them to "cooperate" with the state by pleading guilty.[10]

The nullification of mandatory sentencing provisions suggests the need for a more flexible means of effectuating legislative sentencing policy. This need might be satisfied by repealing mandatory sentences which have proved unworkable and by enacting statutory standards to guide the courts and correctional authorities in the exercise of their discretion.

The enactment of statutory criteria also would tend to ensure that a consistent and rational sentencing policy is applied in the many cases in which mandatory sentences presently are not required. In most jurisdictions the length of prison sentences which a trial judge may impose is restricted only by broad statutory limits; he may be authorized to sentence an offender to any term of years not exceeding a specified maximum or to any term of years between an upper and lower limit designated by the statute, for example, 15 to 5 years. The trial judge generally must make this decision without guidance from the legislature and without the opportunity for a defendant to have his sentence reviewed by an appellate court. Furthermore, a common characteristic of American penal codes is the severity of sentences available for almost all felony offenses. In the Illinois penal code, for example, there are more than 20 offenses for which the court may impose any sentence from one year to life imprisonment.

[7] See generally Note, 60 COLUM. L. REV. 1134 (1960).
[8] NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 182 (1966).
[9] N.Y. STATE COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW A-10 to A-11 (1964).
[10] NEWMAN, *op. cit. supra* note 8, at 58 n.3.

The statutory lengths of sentences are reflected in the sentencing practices of the courts. More than one-half of the adult felony offenders sentenced to State prisons in 1960 were committed for maximum terms of 5 years or more; almost one-third were sentenced to terms of at least 10 years. And more than one-half of the prisoners confined in State institutions in 1960 had been sentenced to maximum terms of at least 10 years. There is a substantial question whether sentences of this length are desirable or necessary for the majority of felony offenders. The experience of a number of other countries throughout the world that rely on relatively short prison sentences for most offenders supports the view that long sentences properly may be reserved for the special case. In addition there are indications that despite the long sentences initially imposed, the administrators of penal systems in this country in practice have relied on shorter periods of confinement. Of the approximately 80,000 felony prisoners released in 1960 from State institutions, the median time actually served before first release was about 21 months; only 8.7 percent of the prisoners released actually served five years or more.[11]

The enactment of statutory criteria provides a way of directing the judge's attention to those factors which the legislature has determined to be relevant to the sentencing decision. Both the Model Penal Code and the Model Sentencing Act employ statutory criteria in conjunction with separate sentencing provisions which attempt to discriminate between offenders who require lengthy imprisonment and those who are likely to be released after relatively brief periods of custody. For each offense the Code and the Act provide an ordinary term, which is generally shorter than authorized under present statutes, and an extended term, which the court may impose when certain factors are present.[12] Under the Code, for example, the court may impose an extended term only if it finds that lengthy imprisonment is necessary for the protection of the public because the defendant is a persistent offender; a professional criminal; a dangerous, mentally abnormal person; or a multiple offender whose criminality was so extensive that an extended term is warranted.

Developing proper standards to guide the courts in determining the length of prison sentences is only in the elementary stages. Standards such as the Code's "dangerous, mentally abnormal person," or the Act's "severe personality disorder indicating a propensity toward criminal activity" are subject to many interpretations, and there is a risk that they may be used improperly by the courts. They are the most definite criteria, however, which have been formulated on the basis of limited ability to predict behavior. These standards will be revised should the behavioral sciences develop improved ways of identifying dangerous offenders. The advantage of the approach taken by the Model Penal Code and the Model Sentencing Act is that it provides a vehicle for incorporating improved criteria into the basic sentencing structure.

[11] See FEDERAL BUREAU OF PRISONS, CHARACTERISTICS OF STATE PRISONERS, 1960, at 43-46, 59, 68 (tables A3, P2, R2). For comparative sentencing data, see, *e.g.*, Mannheim, *Comparative Sentencing Practice*, 23 LAW & CONTEMP. PROB. 537 (1958).
[12] See MODEL PENAL CODE §§ 6.07, 7.03 (Proposed Official Draft 1962); MODEL SENTENCING ACT §§ 4, 7 (1963).
[13] Ex parte *Trombley*, 31 Cal. 2d 801, 811, 193 P.2d 734, 741 (1948).
[14] See MODEL PENAL CODE §§ 6.02, comment 3 (Tent. Draft No. 2, 1954).
[15] CAL. PEN. CODE § 1203.
[16] MODEL PENAL CODE § 6.02 (Proposed Official Draft 1962); N.Y. PEN. LAW § 25.00 (effective Sept. 1, 1967).
[17] MODEL PENAL CODE § 6.02, comment 3 (Tent. Draft No. 2, 1954).

PROBATION

The Report of the Task Force on Corrections discusses the desirability of probation as an alternative to imprisonment. Its central advantages are that it facilitates the reintegration of the offender into the community, avoids the negative aspects of imprisonment, and reduces the financial burden on the State. Despite these important benefits many courts still view probation only in its historical context, that is, as "an act of grace and clemency to be granted in a proper case." [13]

The statutory provisions authorizing the use of probation do little to dispel this image. Legislatures in almost all jurisdictions have restricted the courts' power to grant probation by limitations based on such factors as the type of offense, the length of prison sentence which could be imposed, and the offender's prior criminal record.[14] Moreover, the criteria for granting probation to eligible offenders are often so highly abstract that they provide very limited guidance to the courts. In California, for example, the court is authorized to grant probation when it determines "that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved." [15]

Restrictions on the courts' power to grant probation have produced the same practice of avoidance by courts and prosecutors discussed in the context of mandatory prison terms. The absence of meaningful legislative standards for granting probation aggravates the problem of disparity of sentences because each judge is left virtually unrestrained in applying his own theories of probation to individual cases. And it may decrease the use of probation, because the court may be more reluctant to risk public criticism in the event of further criminality by a probationer when it is unable to justify its action at least in part by legislative direction.

To enable the courts to utilize probation effectively, legislatures should reduce the number of restrictions on the courts' power to grant probation and provide statutory standards to guide courts in the exercise of their discretion. This is the approach taken by the drafters of the Model Penal Code and adopted by the New York Legislature in revising the State's penal law.[16] Both the Code and the New York statute permit courts to grant probation in all cases except murder and, in New York, kidnaping. The reason for enlarging the courts' discretion, as expressed by the drafters of the Model Penal Code, is that:

> However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused.[17]

The Code establishes a preference against imprisonment by directing the court to suspend sentence or grant probation unless it finds that imprisonment is necessary for the protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.'[18]

The New York statute, on the other hand, enumerates similar criteria as affirmative grounds for probation and directs the court to grant probation only where these affirmative grounds are present. Although the standards of the Code and the New York Penal Law are quite general, they are an improvement over current statutes because they direct the courts' attention to the correctional purposes of probation.

FINES

Two unfortunate characteristics of sentencing practices in many lower courts are the routine imposition of fines on the great majority of misdemeanants and petty offenders and the routine imprisonment of offenders who default in paying fines. These practices result in unequal punishment of offenders and in the needless imprisonment of many persons because of their financial condition.

Thirty years ago the National Commission on Law Observance and Enforcement called attention to the inordinate number of offenders who were imprisoned for failure to pay fines.[19] A more recent study of the Philadelphia County jail showed that 60 percent of the inmates had been committed for nonpayment. And in 1960 there were over 26,000 prisoners in New York City jails who had been imprisoned for default in payment of fines.[20]

The consequences of the failure to pay a fine are extremely severe in many States. The New York Court of Appeals only last year ruled unconstitutional a statute which permitted the court to imprison a defendant for one day for each dollar of a fine which he had not paid.[21] However, other jurisdictions still retain comparably harsh sanctions for nonpayment.

Legislative action should impose limitations on the common practice of imposing sentences which offer the offender a choice of paying the fine or serving a stated period of imprisonment, such as "$10 or 10 days." This type of sentence is inherently discriminatory because it determines the severity of punishment solely on the basis of a defendant's wealth. Statutes which authorize the imposition of fines should provide that if the court concludes that the public would be adequately protected by the payment of a fine, the fine itself is the appropriate sentence.

It is unlikely that all of the discriminatory consequences of fines will ever be eliminated. There will continue to be many instances in which offenders are deserving of punishment but the judges' realistic alternatives are limited to fines or jail. The fact that our society has not devised suitable alternative punishments gives rise to a vexing dilemma in the use of fines. For so long as jail is the routine alternative to a fine, those unable to pay will be punished more severely than those of greater means. Putting all offenders in jail is a wholly unacceptable alternative, as is relieving those unable to pay a fine of all penalties.

A reduction in the number of offenders imprisoned for nonpayment might be achieved through legislation providing the courts with more flexible methods for collecting fines. Under the Model Penal Code, for example, the court may grant permission for the fine to be paid within a specified period of time or in several installments, and the court may grant the defendant additional time to pay the fine if necessary;[22] a method of civil attachment and execution for the collection of unpaid fines is also available. In addition a defendant may not be imprisoned unless his default is due to a willful refusal to pay or to make a good faith effort to obtain the money. The difficulty with provisions of this type, however, is that they may make it possible for defendants to escape all penalties and thus make judges more hesitant to impose fines.

INFORMATION FOR SENTENCING

It is essential that there be systematic procedures for providing relevant information about the offense and the offender to the sentencing judge. This section discusses several procedures to satisfy the information needs for sentencing, including the presentence investigation and report, the sentencing hearing, and the diagnostic commitment. It also suggests the need for scientific evaluation of the usefulness of the information contained in presentence reports.

THE PRESENTENCE INVESTIGATION AND REPORT

The statutes or rules of court in about one-quarter of the States make a presentence report mandatory for certain classes of offenses, generally those punishable by imprisonment in excess of one year.[23] In the great majority of States and in the Federal system a request for a presentence report is discretionary with the trial judge,[24] although in some of these States probation may not be granted unless a presentence report has been prepared.[25]

Little information is available on the extent to which presentence reports are actually used in those jurisdictions where they are not mandatory. Data for the Federal courts show that presentence investigations were made in 88 percent of all felony convictions in 1963,[26] and it has been estimated that some form of presentence report is prepared in most felony cases in the country.[27] Studies of individual court systems, however, show that wide variations exist in the thoroughness of the investigation.[28]

Systematic gathering of sentence information is virtually nonexistent in many misdemeanor courts. In Detroit, for example, where probation facilities are available in misdemeanor cases, presentence reports were ordered in only 400 out of more than 12,000 misdemeanor convictions in 1965. The Commission's national corrections survey showed that few misdemeanor courts have

[18] MODEL PENAL CODE § 7.01 (Proposed Official Draft 1962).
[19] 3 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 140–41 (1931).
[20] See RUBIN, CRIMINAL CORRECTION 253 (1963).
[21] See *People* v. *Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686 (1966).
[22] See MODEL PENAL CODE §§ 7.02, 302.1–.3 (Proposed Official Draft 1962).
[23] See, e.g., CAL. PEN. CODE § 1203; IND. ANN. STAT. § 9-2252 (Supp. 1965); MICH. STAT. ANN. § 28.1144 (1954).
[24] See, e.g., MINN. STAT. ANN. § 609.115(1) (1964); FED. R. CRIM. P. 32(c)(1).
[25] See, e.g., OHIO REV. CODE ANN. § 2951.03 (Page Supp. 1964).
[26] 1964 ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 69.
[27] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CORRECTION IN THE UNITED STATES—A SURVEY FOR THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 170 (1966).
[28] See TAPPAN, *op. cit. supra* note 2, at 555–56.

probation services available to prepare reports. Whatever background information lower court judges receive before imposing sentence is generally furnished by the police or prosecutor or is elicited from the defendant through a few brief questions. The dangers of incomplete, inaccurate, and misleading presentation is great when this method is used.

The importance of adequate presentence investigation has long been recognized. The National Commission on Law Observance and Enforcement and many of the State crime commissions chartered in the 1920's recommended increased use of presentence reports.[29] More recently the drafters of the Model Penal Code stated that the use and full development of the presentence investigation and report offer the "greatest hope for the improvement of judicial sentencing."[30]

Providing all courts with enough probation officers to prepare presentence reports in all felony and serious misdemeanor cases would impose great burdens on many States, both in terms of financial costs and of the difficulties in obtaining trained personnel. Although all courts should strive to make the fullest use of presentence reports, where resources are inadequate, available manpower should be assigned to cases in which a presentence report is of particular importance. The Model Penal Code represents one attempt to establish priorities for presentence investigations. It provides that presentence reports should be required at least in all cases where the defendant is under 22 years, where he is a first offender, or where there is reasonable likelihood that he will be placed on probation or sentenced to an extended term.[31]

Procedures should be developed to furnish basic sentencing information to the courts in cases where full presentence reports are not prepared, particularly in less serious misdemeanor cases where the limited range of sentencing alternatives makes an extensive background report of little value. Among the facts which appear to be most important are the defendant's prior criminal record, his family status, his educational and employment history, and his financial and physical conditions. These basic facts could be obtained and verified quickly, with the cooperation of the police, prosecutor, defense counsel, and the defendant himself, by a person who need not possess the qualifications of a probation officer.

The method might resemble the factual investigation of the Manhattan Bail Project.[32] Prior to the bail hearing probation department employees or defender agency representatives interview defendants to obtain information on their personal history and roots in the community. This is verified by telephone calls, and a brief factual summary is provided to defense counsel for use in arguing motions for release on recognizance.

Use of a short form presentence report is at best a temporary step, although it may be dictated by existing manpower and financial problems. By providing a modicum of information the form represents an improvement over existing practice in many courts, but it is only an incremental step toward the goal of full presentence investigation. Its usefulness may be increased by experimentation and development of techniques for identifying facts particularly relevant to the sentencing decision.

DUTIES OF DEFENSE COUNSEL

The important role of defense counsel in helping to achieve the most appropriate disposition for his client is emphasized in chapter 5. This role extends to the gathering and evaluation of facts relevant to sentencing, and most important, to their presentation in court at the time of sentencing. Certainly in view of the shortage of competent lawyers to perform all the legal tasks in the criminal process, it would be unwise to rely exclusively on defense counsel to gather and evaluate sentencing facts. However, the ultimate responsibility for ensuring that facts are gathered and evaluated and for persuasively presenting them to the court rests with counsel.[33]

Too many attorneys appear to believe their task to be fulfilled when the issue of guilt or innocence has been decided. Their assistance in the preparation of the presentence report and their presentation to the court on sentence often are perfunctory. In part this may reflect the failure of law school training to make defense counsel sensitive to these issues. Financial considerations also may discourage counsel from investing the necessary time and effort in the problem of sentencing.

A project of the Legal Aid Agency of the District of Columbia shows one way to meet the lawyer's limitations in gathering sentencing facts. A staff, resembling that of the court probation office,[34] conducts investigations, sometimes beginning before conviction, with a view toward presenting a positive program for rehabilitation to the court through defense counsel. These services are made available to Legal Aid Agency attorneys and to appointed counsel in certain cases. The adoption of similar programs by other jurisdictions would do much to provide defense counsel with the facts and evaluation necessary for an intelligent presentation of the sentencing alternatives to the court.

Defense counsel's primary duty is to ensure that the court and his client are aware of the available sentencing alternatives and that the sentencing decision is based on complete and accurate information. Counsel must familiarize himself with possible dispositions and with the sentencing practices of the court so that he can make an intelligent and helpful presentation. In jurisdictions where the presentence report is disclosed to the defense, counsel should attempt to verify the important information in the report. He should be prepared to supplement it when it is incomplete and to challenge it when it is inaccurate. When the presentence report is not disclosed, the only way in which counsel can ensure that the sentencing decision is based on adequate facts is to gather and present information to the court himself, although this may involve wasteful duplication of effort if a presentence report has been prepared for the court.

When counsel believes that probation would be an appropriate disposition for his client, he should be prepared to suggest a positive program of rehabilitation. He should explore possibilities for employment, family services, educational improvement, and perhaps mental health

[29] See NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 135–38 (1931).
[30] MODEL PENAL CODE § 7.07, comment 1 (Tent. Draft No. 2, 1954).
[31] See MODEL PENAL CODE § 7.07(1) (Proposed Official Draft 1962) and comment 1 (Tent. Draft No. 2, 1954).
[32] See Botein, *The Manhattan Bail Project*, 43 TEX. L. REV. 319 (1965). See also pp. 38–39 *infra*.
[33] See generally Kadish, *The Advocate and the Expert—Counsel in the Penal Correctional Process*, 45 MINN. L. REV. 803 (1961).
[34] See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 296–99 (1966).

services and attempt to make specific and realistic arrangements for the defendant's return to the community.

Finally, defense counsel should explain to his client the consequences of the various types of sentences which he may receive. Most defendants are unaware of the effects of imprisonment or probation on their families or their own future. A defendant who understands the adjustments which his sentence demands is morely likely to respond favorably.

DISCLOSURE OF PRESENTENCE REPORTS

A serious obstacle to the full participation by defense counsel in the sentencing process is that in many jurisdictions he does not have access to the presentence report. The question whether the presentence report should be disclosed to the defendant or his counsel has engendered extensive debate among lawyers, judges, and correctional authorities.[35] At the present time disclosure is generally a matter of judicial discretion. In almost all States and in the Federal system statutes or rules either expressly give the trial judge the power to disclose the presentence report or their silence is interpreted as permitting disclosure.[36] In a few States disclosure is mandatory, and nowhere is it expressly forbidden.[37] The actual practice of disclosure varies from jurisdiction to jurisdiction and among the various judges of a single court.[38]

The principal argument for granting the defendant or his counsel a right to inspect the presentence report is that fundamental fairness requires that the accused be given a reasonable opportunity to challenge the accuracy of facts or the reliability of opinions on which the judge will base his sentencing decision. As Mr. Justice Douglas stated:

> [F]airness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. . . . It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.[39]

On the other hand, three arguments have been made against disclosure of the presentence report to the defendant or his counsel.[40] The first is that disclosure would tend to dry up sources of information. Members of the defendant's family and other informants would hesitate to be candid if they knew that the information they gave could be traced back to them by the defendant, and agencies which supplied information only on a confidential basis would close their files to probation officers. Second, it is argued that disclosure would cause unreasonable delay. Defendants could be expected to challenge everything in the report, and the resulting complexity of litigation might cause courts to dispense with presentence reports altogether. Finally, it is argued that disclosure of certain parts of the report would be harmful to rehabilitative efforts, especially psychiatric evaluations and unfavorable comments by the probation officer who might be assigned to supervise the defendant.

While these considerations indicate some limitations on the extent to which the report should be disclosed, a sound general rule would give the defendant or his attorney the right to examine the report, but it would also permit the court to withhold particular information when good cause is shown. Under the Model Penal Code, for example, the court must advise the defendant of the "factual contents and conclusions" of the presentence report but is not required to disclose the sources of confidential information.[41] Another accommodation of the competing interests might be to permit the court to withhold factual statements when there are reasons for nondisclosure that outweigh the defendant's interest in ensuring the accuracy of important information in the report. Such occasion may arise when disclosure of a statement would be harmful to rehabilitation or when disclosure of a factual statement is tantamount to disclosure of its source, and the identity of the source should be withheld.

Experience in several jurisdictions indicates that a general rule favoring disclosure can operate fairly and without undesirable consequences. In the U.S. District Court for the District of Maryland, for example, presentence reports are prepared in two parts: The bulk of the information is set forth in a document which is made available by the judge to defense counsel in chambers; at the same time a cover sheet containing the probation officer's recommendation, any confidential information, and any data which might injure the defendant's relationships with others is submitted separately. The latter document is not shown to defense counsel, although the judge discusses it with him. This disclosure policy has not resulted in any loss of sources of confidential information or in any instances of unfavorable reactions by defendants against sources of information or probation officers.[42]

As a first step toward fuller disclosure, jurisdictions should experiment with an expanding policy of partial disclosure to test the arguments against disclosure and to devise suitable procedures to protect information which should be withheld. This process might begin with the disclosure of information such as the defendant's prior criminal record, his marital status, his educational and employment record, his financial resources, and any other information obtained from the defendant himself. Disclosure of these data presents minimal risks, and if the practice is successful, it should be expanded to include more subjective information.

THE SENTENCING HEARING

Fuller participation by the defense counsel and disclosure of presentence reports do not mean that there must be a full trial on the question of sentence. The right to challenge material presented to the court can be afforded without encumbering the sentencing proceeding with rigid evidentiary rules and formal procedures. The scope of the presentation should properly be left to the discretion of the court.[43]

The interests both of fairness to the defendant and of imposing an appropriate sentence indicate that the prosecution and defense should be given a reasonable opportunity to contest the accuracy of important factual statements in the presentence report.[44] A sentence based on inaccurate information may be too lenient for the protection of society or unduly severe, in either case detracting from efforts to reintegrate the offender into the community.

To the extent that the competence of probation officers, prosecutors, and defense counsel can be kept at high levels, contests over the accuracy of presentence reports should be infrequent and within reasonable bounds. The court can limit the scope of the controversy by requiring the parties to give notice of the parts of the report which they intend to contest. When the prosecution or defense proposes to refute statements which the judge feels are cumulative or unimportant, he may announce that he will not consider the statements in determining sentence and refuse to hear the evidence.

The court also should permit both the prosecution and the defense a reasonable opportunity to present relevant facts not contained in a presentence report. It is unlikely that the report will include all significant information about the defendant, and a better sentencing decision can result if additional relevant information is brought to the attention of the court. Under the Federal Rules of Criminal Procedure, for example, the court, before imposing sentence, shall

> afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.[45]

DIAGNOSTIC COMMITMENTS

Even when there is a full presentence investigation, there is only a limited opportunity to observe a defendant prior to the time of sentencing. Such factors as a serious emotional disturbance or physical disease may be present, indicating a need for further study. To provide more information to the sentencing judge, several jurisdictions have established diagnostic facilities which administer psychological and physical examinations to prisoners during brief periods of confinement and report their findings and recommendations to the judge before a final sentence is imposed.[46]

Under the procedure employed in the Federal system, which is similar to that used in most of the States having diagnostic commitments, the judge imposes the maximum term authorized for the offense, and the offender is sent to a diagnostic facility maintained by the Bureau of Prisons.[47] Within three months the diagnostic facility prepares a report on the offender containing the results of its examinations and of tests to determine the offender's aptitude and vocational skills. The report also suggests a correctional program for the offender keyed to the facilities available at a particular institution. After reviewing these findings and recommendations, the court may affirm the original sentence, reduce it, or grant probation.

Experience in the Federal system indicates that most diagnostic commitments are requested in cases in which the court feels a need for a psychiatric evaluation of the defendant. In 1965, for example, only 442 diagnostic commitments were ordered, which was less than one percent of the total number of commitments.[48] In Kansas, on the other hand, the diagnostic facility is a part of the State center for reception and classification of prisoners, and about one-third of all felony offenders committed each year are given diagnostic studies.[49] The most extensive use of the diagnostic commitment is found in Hawaii, where diagnostic study is required by statute for every offender committed to a State penal institution.[50]

Most authorities agree that the diagnostic commitment is a valuable aid to the sentencing judge. It provides him with more comprehensive information on the personality of the offender and enables him to consider the recommendation of correctional experts in determining sentence.

CRITICAL ANALYSIS OF SENTENCING INFORMATION

The preceding discussion has considered methods for providing judges at the time of sentence with relevant information about the offense and the offender. There is an equally important need for research and evaluation of the usefulness of specific types of sentencing information. A long-term research program to improve the quality of information for correctional decision making is discussed in detail in the Report of the Task Force on Corrections. Although the information system proposed in that report is designed to service the courts as well as correctional agencies, it would be helpful to examine here some of the issues involved in the improvement of sentencing information.

The presentence investigation and report were developed at a time when the trend toward individualization of punishment began to require more background information about the offender than could be supplied by a brief sentencing hearing.[51] Although recognition of the importance of background information has increased, little attention has been given to what kinds of information are most relevant to the sentencing decision or to the converse question of what kinds of sentencing decisions result from the information which is furnished to the courts.

The content of presentence reports varies greatly among jurisdictions, but a "thorough" report, in the opinion of probation authorities, is one which contains an imposing assemblage of facts and opinions about the offender's whole life history.[52] The factual data may range from

---

[35] See, *e.g.*, Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206 (1965); Higgins, *In Reply to Roche, id.* at 225; Parsons, *The Presentence Report Must Be Preserved as a Confidential Document*, Fed. Prob., Mar. 1964, p. 3. See generally RUBIN, *op. cit. supra* note 20, at 90–101; TAPPAN, *op. cit. supra* note 2, at 558.

[36] See RUBIN, *op. cit. supra* note 20, at 90–91.

[37] See, *e.g.*, CAL. PEN. CODE § 1203; MINN. STAT. ANN. § 690.115(4) (1961).

[38] See *Symposium—Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 125–27 (1963).

[39] 383 U.S. 1087, 1092–93 (1966).

[40] See generally Roche, *supra* note 35.

[41] MODEL PENAL CODE § 7.07 (5) (Proposed Official Draft 1962).

Prior to the recent amendment of Rule 32 of the Federal Rules of Criminal Procedure, the Rules were silent on the question of disclosure. The proposed amendment to Rule 32, submitted by the Judicial Conference, would have required the court to permit defense counsel to read the presentence report or to provide a summary of the factual contents to an unrepresented defendant. In either case the court would have been permitted to exclude the sources of confidential information. As promulgated by the Supreme Court, Rule 32 is phrased permissively: "The court may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation."

[42] See Thomsen, *Confidentiality of the Presentence Report—A Middle Position*, Fed Prob., Mar. 1964, p. 8.

[43] See generally Parsons, *Aids in Sentencing*, 35 F.R.D. 423, 425–28 (1961).

[44] See generally RUBIN, *op. cit. supra* note 20, at 101–07. Under the Model Sentencing Act a defendant is entitled, subject to the discretion of the court, to cross-examine those who have prepared presentence or diagnostic reports. Model Sentencing Act § 4 (1963). The Model Penal Code provides that a defendant shall have "a fair opportunity . . . to controvert" the facts or conclusions in the presentence report. MODEL PENAL CODE § 7.07(5) (Proposed Official Draft 1962). Before an extended term may be imposed, however, the court must hold a hearing to establish the grounds for an extended term, at which the defendant "shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue." *Id.* at § 7.07(6). Under the amended Federal Rule 32, when disclosure of the presentence report is made to the defendant, the court must "afford the defendant or his counsel an opportunity to comment thereon." FED. R. CRIM. P. 32.

[45] FED. R. CRIM. P. 32. The language requiring the court personally to address the defendant was inserted as a result of the Supreme Court's opinion in *Green* v. *United States*, 365 U.S. 301 (1961), where the Court interpreted Rule 32 as embodying the defendant's historic right of allocution.

[46] See, *e.g.*, CAL. PEN. CODE § 1203.03 (Supp. 1966); N.J. REV. STAT. § 30:4A-1 to –17 (1964).

[47] 18 U.S.C. § 4208(b), (c) (1964). See generally Carter, *Use of Section 4208(b) and (c), Commitment for Study*, 27 F.R.D. 307–15 (1961).

[48] 1965 FEDERAL BUREAU OF PRISONS STATISTICAL TABLES 35 (table B-12-C).

[49] See Cape, *A New Look at a State's Penal System*, POLICE, Mar.–Apr. 1966, p. 47.

[50] HAWAII REV. LAWS § 252-58 (1955).

[51] See RUBIN, *op. cit. supra* note 20, at 75.

[52] See, *e.g.*, KEVE, THE PROBATION OFFICER INVESTIGATES (1961).

his prior criminal record and employment history to the cleanliness of his home, the presence of "cultural artifacts" in it, or his leisure time activities. It may contain the attitudes of neighbors, coworkers, employers, school teachers, and members of his family toward the offender. And as a manual for presentence investigation suggests, the report may include the offender's

> feelings about baffling problems in his life, including his offense and his reaction to opportunities, accomplishments, disappointments and frustrations. His moral values, his beliefs and his convictions, his fears, prejudices, and hostilities explain the "whys" and "wherefores" of the more tangible elements in his life history.[53]

While a skillful collection and presentation of this information can help the court to "understand" the causes of the defendant's offense, a general understanding of the offender's social problems does not itself answer the important question of which one of the alternative sentences available to the court will best protect society. Sentencing is to a great extent a question of prediction. If the sentencing decision is to become more than a matter of educated guesswork, it will be necessary to identify the items of information which bear directly upon the offender's responsiveness to correctional treatment.

In order to achieve this result there is a need for extensive and continuing research. Experience with the results of various courses of correctional treatment may provide a basis for sounder prediction. Through the use of computers, which can store and process data about a great number of offenders, it is possible to correlate offender characteristics with the outcome of particular types of treatment programs. Assumptions can be made as to the predictive value of certain kinds of background information. And as the results of sentences which rely on these assumptions are received and analyzed, the predictive value of sentencing information can be more carefully assessed. This research may enable probation officers to become more selective in their presentence investigations, and it may enable judges to sentence with greater confidence in the outcome of their decisions.

A first step in such an effort would be the systematic collection of offender, sentencing, and correctional data. A program to collect these data is proposed in the chapter on information systems of the Science and Technology Task Force Report. Beyond serving the long-term goal of improving sentencing information, such data would provide sentencing judges with a way to compare their practices with those of their colleagues and would assist in the development of more consistent sentencing practices. While the identification of demonstrably appropriate factors in sentencing decisions may require several years, judges and probation authorities might critically reexamine the factors upon which they have habitually relied and eliminate those which clearly are of limited predictive value.

THE EXERCISE OF COURT SENTENCING AUTHORITY

IMPROVEMENT OF JUDICIAL SENTENCING PROFICIENCY

The sentencing decision demands considerable expertise on the part of the trial judge. He must have a thorough knowledge of the whole range of sentencing alternatives and of their usefulness in dealing with the many types of offenders appearing before him. And he must develop sophisticated skills for interpreting presentence and psychiatric evaluations.

A number of programs have been developed to improve judicial sentencing proficiency. During the last five years the Joint Committee for the Effective Administration of Justice assisted in the organization of over 40 regional seminars which were available to almost every trial judge sitting in a State court of general jurisdiction.[54] Most of these seminars included discussion of sentencing theories and alternatives and the development of uniform sentencing criteria.

The National College of State Trial Judges, founded in 1964, annually conducts a four-week program of intensive study, primarily for judges who have recently assumed the bench.[55] In its first two years, 200 judges from 49 States attended classes at the College. A case method of instruction is used in the course on sentencing. The judges are given a set of presentence reports, and the sentence which each judge selects is discussed and evaluated by the other judges in the class.

Another technique for improving the sentencing skills of judges is through institutes devoted entirely to sentencing, which are presently conducted in the Federal system and in California, New York, and Pennsylvania. Since the Federal sentencing institute program was inaugurated in 1959,[56] 16 institutes have been held, and the judges of all circuits have had an opportunity to participate in at least 1 institute.[57]

The content of the programs of the Federal institutes has varied. For example, at the most recent institute, held in July 1966 for the judges of the 8th and 10th Circuits, papers were delivered on the identification and treatment of dangerous offenders and on the Model Sentencing Act's provisions for sentencing dangerous and nondangerous offenders. After each topic was introduced, the judges were divided into panels to discuss particular problems in sentencing and treatment for the two classes of offenders. Other institutes have used the same format to consider the problems presented by the mentally disordered offender and to develop standards for sentencing in certain types of cases, such as income tax evasion and interstate transportation of stolen automobiles.[58]

At the Federal Institute on Disparity of Sentences each judge selected a sentence on the basis of a presentence report, and a discussion of relevant sentencing principles followed.[59] This method, which revealed widely disparate sentencing philosophies among the judges, has been used in subsequent institutes where the problem of disparity was considered.

[53] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT 3 (1965).
[54] INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL EDUCATION IN THE UNITED STATES 89–111 (1965).
[55] *Id.* at 111–18.
[56] See 28 U.S.C. § 334 (1964).
[57] See 37 F.R.D. 115–16 (1965).
[58] See, e.g., 37 F.R.D. 111 (1965); 35 F.R.D. 381 (1961).
[59] 30 F.R.D. 401 (1961).

One important feature of the Federal sentencing institutes is that several have been held in the vicinity of Federal correctional institutions. This provides an opportunity for the judges to visit these facilities and to observe the type of rehabilitative programs which are available.

The California sentencing institutes have followed the procedures used in the Federal system.[60] The first California institute, held in 1964, explored standards for commitment to local correctional facilities and to State penal institutions, and the judges were informed of the adult authority's policies on term setting and parole eligibility.

It would be highly desirable for all jurisdictions to conduct sentencing institutes on a regular basis.[61] They provide a forum for judges to discuss the causes of disparity within their courts and to formulate uniform policies to be applied in individual cases. They open valuable channels of communication between the courts and correctional authorities on the most effective use of sentencing alternatives and on the content of correctional programs. And judges are given expert guidance on the characteristics and problems of certain types of defendants, such as the dangerous or mentally disordered offender.

In addition, the development of new opportunities for judges to meet and discuss the problems of sentencing should be studied. One type of program might be a summer session at a university, at which judges, correctional authorities, social scientists, law professors, and other interested specialists could meet in seminars to discuss the theories and practical problems of sentencing and treatment of offenders. Through such a program judges could enlarge their own knowledge while providing perspectives from which to evaluate the sentencing process.

THE PROBLEM OF DISPARITY

Within certain limits a lack of uniformity in sentences is justifiable. Indeed the reason for giving judges discretion in sentencing is to permit variations based on relevant differences in offenders. Unequal sentences for the same offense may also result from the fact that statutory definitions of crimes encompass a fairly broad range of conduct having varying degrees of seriousness. Finally, lack of uniformity may reflect geographic factors, such as differences in public apprehension of crime among communities in the same jurisdiction, or institutional considerations, such as the need to offer more lenient sentences to defendants who furnish information or testimony for the prosecution.

The problem of disparity arises from the imposition of unequal sentences for the same offense, or offenses of comparable seriousness, without any reasonable basis. The existence of unjustified disparity has been amply demonstrated by many studies.[62] It is a pervasive problem in almost all jurisdictions. In the Federal system, for example, the average length of prison sentences for narcotics violations in 1965 was 83 months in the 10th Circuit, but only 44 months in the 3d Circuit.[63] During 1962 the average sentence for forgery ranged from a high of 68 months in the Northern District of Mississippi to a low of 7 months in the Southern District of Mississippi; the highest average sentence for auto theft was 47 months in the Southern District of Iowa, and the lowest was 14 months in the Northern District of New York.[64]

Disparity among judges sitting in the same court is illustrated by the findings of a recent study of the Detroit Recorder's Court.[65] Over a 20-month period in which the sample cases were about equally distributed among the 10 judges, 1 judge imposed prison terms upon 75 to 90 percent of the defendants whom he sentenced, while another judge imposed prison sentences in about 35 percent of the cases. One judge consistently imposed prison sentences twice as long as those of the most lenient judge. The study also showed that judges who imposed the most severe sentences for certain crimes also exhibited the most liberal sentencing policy for other offenses.

Other illustrations of disparity may be found in the results of the workshop sessions at the Federal Institute on Disparity of Sentences.[66] The judges were given sets of facts for several offenses and offenders and were asked what sentences they would have imposed. One case involved a 51-year-old man with no criminal record who pleaded guilty to evading $4,945 in taxes. At the time of his conviction he had a net worth in excess of $200,000 and had paid the full principal and interest on the taxes owed to the Government. Of the 54 judges who responded, 3 judges voted for a fine only; 23 judges voted for probation (some with a fine); 28 judges voted for prison terms ranging from less than 1 year to 5 years (some with a fine). In a bank robbery case the sentences ranged from probation to prison terms of from 5 to 20 years.

Unwarranted sentencing disparity is contrary to the principle of evenhanded administration of the criminal law. As Attorney General Robert H. Jackson stated:

> It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance; namely, the personality of the particular judge before whom the case happens to come for disposition.[67]

Unjustified disparity adversely affects correctional administration. Prisoners compare their sentences, and a prisoner who is given cause to believe that he is the victim of a judge's prejudices often is a hostile inmate, resistant to correctional treatment as well as discipline.

Consistent differences in sentencing practices among the judges of a court interfere with the orderly scheduling of cases. Studies of several urban courts revealed that substantial delays were caused by granting continuances to defense counsel who hoped that a rescheduling would bring their clients' cases before a more lenient judge.[68] As the following comment on the District of Columbia Court of General Sessions indicates, the system of sched-

[60] See INSTITUTE OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 54, at 225–26.
[61] See generally Bennett, *Countdown for Judicial Sentencing*, Fed. Prob., Sept. 1961, pp. 22, 26; Youngdahl, *Remarks Opening the Sentencing Institute Program*, 35 F.R.D. 387, 390–91 (1964); Van Duzen, *Trends in Sentencing Since 1957 and Areas of Substantial Agreement and Disagreement in Sentencing Principles*, *id.* at 395 (1964).
[62] See, e.g., Gaudet, Harris, & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L., C. & P.S. 811 (1933); McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940). See generally RUBIN, *op. cit. supra note* 20, at 116–19; TAPPAN, CRIME, JUSTICE AND CORRECTION 441–46 (1960).
[63] See 1965 FEDERAL BUREAU OF PRISONS STATISTICAL TABLES 26–27 (table B–7).
[64] See Youngdahl, *supra* note 61, at 387, 389–90 (1961).
Substantial disparity among the district courts also exists in the use of probation. In 1964 probation was granted to 29 percent of all convicted defendants in the Eastern District of Kentucky, 38 percent in the Southern District of New York, 54 percent in the Southern District of California, 71 percent in the Eastern District of Pennsylvania, and 78 percent in the Southern District of West Virginia. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE DISTRICT COURTS, 1964, at 78–79 (app. table 2).
[65] Saul R. Levin Foundation, Report of Study of Recorder's Court (mimeo. 1966).
[66] See *Seminar and Institute on Disparity of Sentences*, 30 F.R.D. 401, 429–31 (1961).
[67] 1940 *Att'y Gen. Ann. Rep.* 5–6. See also Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966).
[68] RUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 74–75 (1966); Staff study, *Administration of Justice in the Recorder's Court of Detroit* (printed in appendix B of this volume).

uling cases may even be altered to accommodate the differences among judges.

> [T]he common tactic of judge-shopping . . . is used by defense lawyers seeking the lightest sentence possible. So important is it to the system to bring together the willing defendant and the accommodating judge that . . . a more sophisticated shopping plan was informally instituted. The Chief Judge and the U.S. Attorney agreed to permit a defendant whose case is pending . . . to plead [guilty] before the judge of his choice, if he does so at least five days prior to the date set for the jury trial. . . .[69]

Unjustified disparity cannot be eliminated completely, if for no other reason than because reasonable men applying the same standards will not always reach precisely the same result. There are several steps, however, that may reduce the range in which individual differences among judges can affect the length and type of sentences. Enactment of criteria for sentencing together with educational programs to improve judicial sentencing proficiency would aid in the development of uniform sentencing policies. Furthermore, the removal of inconsistencies in severity of punishment among offenses and the elimination of severe mandatory sentences would tend to reduce the wide disparities caused by prosecutorial and judicial nullification.

The following sections consider two procedures, sentencing councils and appellate review of sentences, which are particularly helpful in reducing disparity.

SENTENCING COUNCILS

The sentencing council is a procedure by which several judges of a multijudge court meet periodically to consider what sentences should be imposed in pending cases. Sentencing councils have been instituted on a regular basis in three U.S. district courts; [70] no evidence of their systematic use in State courts has been found. The basic operation of a sentencing council as it is employed in the Eastern District of Michigan, the first district court to develop the procedure, is described in the following comments:

> Under the practice of our district, these meetings are held at an hour in the morning, before the commencement of the day's routine, when the judges may give the matters their undivided attention. The judges meet in panels of three, each judge having the presentence investigation report from the probation department and having prepared a study sheet, not only for the offenders he must sentence, but also for those who are the primary responsibility of the other two judges. Customarily, the one judge will call his first case, merely stating the name of the offender and giving a brief statement of the offense. He will then state to his brother judges the factors, in his judgment, believed to be controlling as to disposition, and will recommend a disposition to be made. Each of the other two judges will then give, in turn, the factors believed by him to be controlling, together with his recommended sentence. The sentences will normally vary, although I have observed with a great deal of interest that the sentences of judges working together in this manner tend, as times goes on, to approach a common ground. It is in the discussion following the recommendation as to sentencing that the Council performs its most useful function. . . . The weights assigned the various factors thought to be controlling as to disposition of the case are sometimes modified by the sentencing judge in the light of the experience of his brother judges with their own previous sentences.[71]

Under the practice followed in the Northern District of Illinois [72] the 10 district court judges are equally divided into two panels. The first panel meets each week to consider the cases in which the judges of the panel must impose sentence during the following week. The second panel of judges devotes its full attention to reviewing cases certified to it by the other panel.

Although the ultimate responsibility for determining sentence in both jurisdictions rests with the judge to whom the case is assigned, the interplay among judges has tended to repress the imposition of excessively severe or lenient sentences. The Michigan council produced changes from the sentencing judge's initial recommendation in slightly over 40 percent of the cases considered during its first five months of operation.[73] Among the cases in which the judges altered their original disposition, the number in which sentence was made more severe was approximately equal to the number in which it was reduced.

Foremost among the advantages of the sentencing council is that it reveals to the participating judges their differences in sentencing philosophies, and it provides a forum in which these differences may be debated in the context of particular cases and from which a consensus on sentencing standards may emerge. It also promotes fuller consideration of the sentencing alternatives available to the court. Finally, where the sentencing council procedure is accompanied by the collection of data on the initial recommendations and final sentencing decisions, as in Michigan and Illinois, it provides a mechanism for periodic evaluation of the sentencing practices of the court.

One troublesome aspect of existing sentencing council procedures is that the judges meet prior to the sentencing hearing. The sentencing judge thus presides over the hearing after having heard the views of his colleagues about the case and after having taken a position himself within the sentencing council. This may impair the judge's ability to give openminded consideration to the arguments and information presented at the sentencing hearing. At the same time the judges participating in the council do not have the benefit of the facts and insights presented by the prosecutor, defense counsel, or the defendant himself. Particularly where there is disclosure of the presentence report, the hearing may reveal that the deliberations in the sentencing council were based on inaccurate or incomplete information.

Some of these difficulties might be avoided by permitting defense counsel and the prosecutor to make a presentation at the sentencing council. However, this would greatly encumber the procedure and perhaps make it impractical for busy urban courts. A preferable solution would be to hold the sentencing council after the hearing, at which time the sentencing judge could inform his colleagues of the arguments and information presented at the hearing and of his resolution of disputed factual questions. Although this would require a separate proceeding for the imposition of sentence, it is likely that the additional burden on the courts could be minimized by careful scheduling.

The relationship between the sentencing council and appellate review of sentences, which is discussed in the following section, also presents questions of economy of effort. Although a sentencing council should eliminate to some extent the grossly excessive sentences which appellate review is designed primarily to correct, appellate review would still be desirable to ensure that the council was applying the proper standards and to correct cases in which grossly disparate sentences were imposed despite the council procedure. It would be wasteful, however, for reviewing courts to give full consideration to all cases in which an appeal was taken from a sentence considered by a sentencing council. This problem might be alleviated if reviewing courts used summary procedures or other devices to dispose of appeals which do not raise susbstantial questions.

[69] SUBIN, *op. cit. supra* note 68, at 62–63.
[70] See generally Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, Fed. Prob., June 1963, p. 5; Doyle, *A Sentencing Council in Operation*, Fed. Prob., Sept. 1961, p. 27.
[71] Parsons, *Aids in Sentencing*, 35 F.R.D. 423, 431–32 (1964).
[72] *Id.* at 433–34.
[73] Doyle, *supra* note 70, at 29.

APPELLATE REVIEW OF SENTENCES

One of the most serious aspects of the disparity problem is the imposition of sentences which are grossly excessive in relation to the seriousness of the crime or the character of the offender.[74] As James V. Bennett, former Director of the Federal Bureau of Prisons, observed:

> In one of our institutions a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler with a fine past record and a fine family is serving 20 years, with 5 years probation to follow. At the same institution is a war veteran, a 39-year-old attorney who has never been in trouble before, serving 11 years for illegally importing parrots into this country. Another who is destined for the same institution is a middle-aged tax accountant who on tax fraud charges received 31 years and 31 days in consecutive sentences. In stark contrast, at the same institution last year an unstable young man served out his 98-day sentence for armed bank robbery.[75]

In all Western countries except the United States, grossly excessive sentences are subject to routine review and correction by appellate tribunals.[76] The great majority of jurisdictions in the United States, however, vest sentencing power solely within the discretion of the trial judge, with appellate review available only to correct sentences which do not conform to the statutory limits. Authority for appellate review of the merits of sentences has been expressly granted by the legislatures of about one-quarter of the States and by Congress for military courts.[77] In addition the appellate courts of a few States have construed general review statutes as including such authority.[78]

Among the States which have adopted appellate review of sentences there are two major variations in procedure. In most of these States sentences are reviewed by the regular appellate courts, and the appellate court has the power to review the merits of the sentences in any case over which it otherwise has jurisdiction. In four States, however, a specially created court staffed by experienced trial judges is convened solely for the purpose of reviewing the merits of sentences; [79] only sentences of imprisonment in the penitentiary may be appealed, and the review division is empowered to increase as well as to reduce sentences.

In recent years adoption of appellate review of sentences has substantially increased. Since 1964 three States have enacted legislation to permit appellate review.[80] The Council of State Governments recommended the adoption of procedures for appellate review and proposed model legislation in 1962.[81] Bills introduced in Congress to authorize appellate review of sentences in the Federal system have received the support of the Department of Justice and the Judicial Conference of the United States.[82] And this year the Advisory Committee on Sentencing of the American Bar Association's minimum standards project urged the enactment of appellate review legislation in all States.[83] The committee's report carefully considers the important procedural issues involved in appellate review, such as the type and length of sentences which may be appealed, the desirability of opinions by the reviewing court, the authority of the reviewing court to increase sentences, and the right of the prosecution to appeal sentences.

The most important contribution of appellate review is the opportunity it provides for the correction of grossly excessive sentences. Although appellate review will not totally eliminate the problem of disparity of sentences, by reducing the peaks of disparity, it would narrow the range in which individual differences among judges can affect the length and type of sentences.

Moreover, appellate review aids the development of a uniform sentencing policy within a jurisdiction. It tends to cause both trial and appellate courts to give sustained consideration to the justification for particular sentences. And the opinions of appellate courts in modifying excessive sentences can provide a body of law to guide trial courts in all cases.

Finally, appellate review would tend to reduce the number of anomalous decisions on procedural and substantive law which appellate courts have made in order to reverse cases involving unusually harsh sentences. As former Chief Judge Simon E. Sobeloff of the Fourth Circuit Court of Appeals has stated:

> Many appeals are docketed today only because of the severity of the sentence pronounced in the district

[74] See, *e.g.*, *Rogers* v. *United States*, 304 F.2d 520 (5th Cir. 1962), in which the defendant was charged with possessing a check stolen from the mail, forging an endorsement on the check, and cashing it. He was convicted on each of these three counts and sentenced to cumulative prison terms totaling 25 years; the amount of the check was $380.51. See generally *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 289–90 (1962) (remarks of Prof. Wechsler) [hereinafter cited as *Symposium*].
[75] Bennett, *Countdown for Judicial Sentencing*, Fed. Prob., Sept. 1961, pp. 22, 24.
[76] See *Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 83–102 (1966) [hereinafter cited as *Senate Hearings*].
[77] See, *e.g.*, CONN. GEN. STAT. ANN. § 51–195 to –196 (1964); ILL. ANN. STAT. ch. 38, § 121–9 (1964); MASS. GEN. LAWS ANN. ch. 278, §§ 28A–D (1959); N.Y. CODE CRIM. PROC. §§ 543, 764 (1958); 10 U.S.C. §§ 864, 866 (1964).
[78] See, *e.g.*, *State* v. *Johnson*, 67 N.J. Super. 414, 170 A.2d 296 (1961); *Hudson* v. *State*, 399 P.2d 296 (Okla. Crim. App. 1965). See generally Note, 60 COLUM. L. REV. 1134, 1162–64 & nn. 199–206 (1960).
[79] Connecticut, Maine, Maryland, Massachusetts.
[80] Illinois, Maine, Maryland.
[81] Council of State Governments, *Program of Suggested State Legislation—1962, Review of Sentences in Criminal Cases* (mimeo.).
[82] See *Senate Hearings* 7, 130–32.
[83] See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (Tent. Draft 1967). The Advisory Committee's report has been released for comment and discussion. Its recommendations are subject to final action by the full committee and by the ABA House of Delegates.

court and since the appellate tribunal cannot tackle the real issue in a forthright manner, it may, and often does, in its endeavor to strike down a harsh penalty, give the law a strained construction liable to work havoc in future cases.[84]

The primary objection to appellate review is that it might greatly increase litigation because review would become available for all those defendants who plead guilty—between 70 and 90 percent of all convicted offenders—and who are generally unable to obtain direct review of their convictions.[85] And it is possible that the expanded availability of counsel would encourage many of these defendants to appeal their sentences. Jurisdictions permitting appellate review, however, have not experienced an unreasonable burden on the reviewing court. From 1960 through 1965 in Massachusetts, for example, there was an average of about 300 sentence appeals per year, and the review division sat for an average of 15 days a year.[86] Judge Charles D. Breitel of the New York State Court of Appeals has estimated that although excessiveness of sentence is mentioned in about three-fourths of the criminal appeals heard in the Appellate Division of the Supreme Court, "this issue is seriously argued in very few, and . . . even then, little additional work is involved." [87]

A second objection to appellate review is that sentencing is a discretionary matter involving questions of judgment and not of law such as appellate courts are used to handling.[88] In view of the importance of sentencing to the defendant and to the effectiveness of the criminal processes it is unreasonable to consider sentencing as a matter of such exceptional discretion that it should be immune from appellate review. Appellate courts routinely are called upon to review discretionary rulings by trial judges in both civil and criminal cases. Appellate review is not an occasion for the appellate court to resentence the defendant to a punishment which it would have imposed had it been the trial court. The policy of the English Court of Criminal Appeal is that a sentence will be altered only when it represents such a substantial departure from the norm that the court is satisfied that the trial judge failed to apply the correct principles.[89] Experience with appellate review of sentences indicates that appellate judges in this country have not substituted their discretion for that of the trial court.[90]

A third objection is that appellate judges are less able to assess an appropriate sentence because of their inability to observe the defendant.[91] But inability to observe the defendant, although relevant in determining the latitude of appellate review, does not place the reviewing court at a great disadvantage. In the majority of cases the trial court's confrontation of the defendant is extremely brief because no trial is held. And even when conviction follows a trial, the unusual and difficult circumstances facing a criminal defendant are not the most favorable for a fair assessment of his character.[92]

JURY SENTENCING

Although a majority of States permit the jury to recommend or fix punishment at life imprisonment in capital cases, in about one-quarter of the States the jury determines the type and length of punishment for some or all offenses.[93] The jury's sentencing power in most of these States is limited to cases in which it has determined the guilt of the defendant,[94] but in a few States jury sentencing is available at the option of a defendant who pleads guilty,[95] and in Tennessee the jury is required to fix the sentence in all cases.[96] Where the sentence is imposed by a jury, the judge's role usually is confined to modifying a legal but excessive sentence or to conforming an illegal sentence to the statutory limits.

The origin of jury sentencing in this country has been assigned to the colonials' reaction to harsh penalties imposed by judges appointed and controlled by the Crown and to the early distrust of governmental power.[97] At the present time the principal arguments for its retention are that jurors will not become calloused to the fate of defendants, that jury sentences are less likely to be the result of individual prejudices or political considerations, and that jurors may be better able than judges to express the community sentiment with regard to the offense.[98]

There are serious disadvantages of jury sentencing which argue strongly for its abolition in noncapital cases.[99] The principal objection to sentencing by juries is that the transitory nature of jury service virtually precludes rational sentencing. Sentencing is a job for experts, and juries do not have the opportunity to develop expertise in this extremely complex area. The extent of the failings of jury sentencing was revealed by a recent study in Atlanta which showed that for some offenses first offenders received on the average more severe sentences than recidivists.[100]

Jury sentencing may result in confusion between conviction and punishment. Juries may compromise their doubts as to guilt with a light sentence, and unless the law provides for separate hearings on guilt and sentence, defense counsel may be put in the awkward position of arguing that his client is not guilty, but if he is, he should receive a light sentence.

Finally, jury sentencing makes it difficult to obtain a sentencing decision based on adequate background information about the defendant. Much of this information is properly inadmissible on the question of guilt, and its admission on the question of sentence when the jury considers both issues simultaneously may be highly prejudicial to the defendant. In order to provide the jury with a presentence report, the jury would have to be reassembled after the report was prepared or a new jury would have to be impaneled. The only alternative, which is used in some jurisdictions, is to have a separate hearing at which background information is presented to the jury after the verdict. This procedure increases the time and cost of jury trials, however, and it does not compensate for the jury's lack of expertise.

[84] *Symposium* 271.
[85] See, *e.g.*, Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 80–81 (1966).
[86] See *Senate Hearings* 137.
[87] Note, 60 COLUM. L. REV. 1134, 1166 (1960).
[88] See, *e.g.*, *Symposium* 281–85.
[89] *R. v. Ball*, 35 Crim. App. R. 164 (1951).
[90] The first 2,863 appeals to the Massachusetts Appellate Review Division resulted in only 437 sentence alterations (406 decreased, 31 increased); the Connecticut Review Division modified the sentences in 18 of the first 340 cases appealed (14 decreased, 4 increased). MARYLAND GOVERNOR'S COMM. TO STUDY SENTENCING IN CRIMINAL CASES, REP. 7 (1965). See generally Note, *Appellate Review of Primary Sentencing Decisions—A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).
[91] See Parsons, *Aids in Sentencing*, 35 F.R.D. 423, 425–26 (1964).
[92] See *Senate Hearings* 75–76.
[93] See Note, 60 COLUM. L. REV. 1134, 1154–55 (1960).
[94] *E.g.*, MO. REV. STAT. § 546.410 (1959).
[95] *E.g.*, TEX. CODE CRIM. PROC. art. 37.07 (1965).
[96] TENN. CODE ANN. § 40-2310 (1955).
[97] NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 27 (1931).
[98] See, *e.g.*, Betts, *Jury Sentencing*, 2 N.P.P.A.J. 369, 370 (1956).
[99] See, *e.g.*, RUBIN, CRIMINAL CORRECTION 107–08, 124–28 (1963); Betts, *supra* note 98; Jones, *On Modernising Missouri's Criminal Punishment Procedure*, 20 U. KAN. CITY L. REV. 299, 304 (1952); Note, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400 (1950).
[100] ATLANTA COMM'N ON CRIME AND JUVENILE DELINQUENCY, OPPORTUNITY FOR URBAN EXCELLENCE 72 (1966) (app. D-6).

CAPITAL PUNISHMENT

Whether capital punishment should be retained is the subject of legislative consideration, popular referendum, and public debate in many States. This question is not an easy one, for the use of the death penalty touches upon fundamental moral beliefs as well as utilitarian values. Whether capital punishment is an appropriate sanction is a decision properly left to each State. But it is appropriate here to point out several aspects of the administration of capital punishment which merit careful consideration.

The most salient characteristic of capital punishment is that it is infrequently used. During 1966 only 1 person was executed in the United States; the trend over the last 36 years shows a substantial decline in the number of executions, from a high of 200 in 1935 to last year's low of 1.[101] All available data indicate that judges, juries, and Governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence. Only 67 persons were sentenced to death by the courts in 1965, half the number of death sentences imposed in 1961; and 62 prisoners were relieved of their death sentences by commutation, reversals of judgment, or other means. In some States in which the penalty exists on the statute books, there has not been an execution in decades.[102]

This decline in the application of the death penalty parallels a substantial decline in public and legislative support for capital punishment. According to the most recent Gallup Poll, conducted in 1966, 47 percent of those interviewed were opposed to the death penalty for murder, while 42 percent were in favor of it; a poll conducted in 1960 on the same question reported a majority in favor of the death penalty. Since 1964 five States effectively abolished capital punishment. There are now eight States in which the death penalty is completely unavailable and five States in which it may be imposed only for exceptional crimes such as murder of a prison guard or an inmate by a prisoner serving a life sentence, murder of a police officer, or treason. In 1965 Great Britain experimentally suspended use of the death penalty for five years.

There has not been a uniform trend toward repeal of capital punishment laws, however. In 1961 the Delaware legislature reenacted the death penalty after having repealed it in 1958. Last year the voters in Colorado rejected a proposed constitutional amendment which would have abolished capital punishment. In Indiana an abolition bill passed by both houses of the legislature was vetoed by the Governor. And in a number of States bills providing for repeal of the penalty have been defeated in the legislature.

One of the principal arguments for the retention of capital punishment is that it is an effective and necessary deterrent against the commission of heinous crimes. While it is presently impossible to prove or disprove the validity of this argument, the most extensive study on the question, made by Prof. Thorsten Sellin, raises doubts as to the unique deterrent effect of the death penalty.[103] Professor Sellin charted the 1930–1937 homicide rates of several groups of neighboring and otherwise similar States; within each group one or more States had abolished capital punishment. He found that the trends in homicide rates were similar for comparable capital and noncapital punishment States, and "within each group of States having similar social and economic conditions and populations, it is impossible to distinguish the abolition State from the others." [104] He examined the experience of States which had experimented with the abolition of the death penalty and then restored it, and the data did not reveal any significant increase in homicide rates when it was abolished nor any significant decrease in the rates when it was restored. He also made a survey of the number of metropolitan policemen killed in the line of duty in States which abolished capital punishment and in States which retained it. His data revealed that there was no significant difference between the two types of States in the safety of policemen.

It is also argued that prisoners convicted of capital crimes, if not executed, pose an undue risk of danger to prison guards and other inmates and are likely to commit crimes of violence against the public if they are ever paroled. The available data on these questions are far from conclusive, but several prison wardens have expressed their belief that prisoners serving prison sentences for capital crimes pose no greater risk to the safety of other inmates or guards and often are model prisoners capable of assuming positions of responsibility. One study revealed that of 121 assaults with intent to kill committed in the penal institutions of 27 States during a 10-year period, none was committed by a prisoner whose death sentence for murder had been commuted to life imprisonment, 10 (or 8 percent) were committed by prisoners originally sentenced to life imprisonment for murder, and the remainder were committed by prisoners sentenced for other offenses. Although there have been instances where paroled murderers have committed another homicide, available data indicate that they have a substantially lower recidivism rate than other classes of offenders.[105]

Whatever views one may have about the efficacy of the death penalty as a deterrent, it clearly has an undesirable impact on the administration of justice. The trial of a capital case is a stirring drama, but that is perhaps its most dangerous attribute. Selecting a jury often requires several days; each objection or point of law requires excessive deliberation because of the irreversible consequences of error. The jury's concern with the death penalty may result in unwarranted acquittals and there is increased danger that public sympathy will be aroused for the defendant, regardless of his guilt of the crime charged.[106] In his testimony before the Royal Commission on Capital Punishment, Mr. Justice Frankfurter stated that he was

> strongly against capital punishment for reasons that are not related to concern for the murderer or the risk of convicting the innocent . . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar,

[101] See FEDERAL BUREAU OF PRISONS, EXECUTIONS, 1930–1965, at 8 (chart 1).
[102] In Delaware, Massachusetts, and North Dakota the last execution was held prior to 1950, in Montana prior to 1945, and in New Hampshire prior to 1910. *Id.* at 11 (table 2).
[103] See Sellin, *The Death Penalty*, in MODEL PENAL CODE (Tent. Draft No. 9, 1959).
[104] *Id.* at 31.
[105] See BEDAU, THE DEATH PENALTY IN AMERICA 397–99, 400, 495 (1964).
[106] See N.Y. TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REP. 69 (1965).

the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.[97]

The detection from the norm is not restricted to the trial level. As Mr. Justice Jackson said in *Shaw v. New York*: "When the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."[98]

The imposition of a death sentence is but the first stage of a protracted process of appeals, collateral attacks, and petitions for executive clemency. The decline in the number of executions has caused a sharp increase in the number of prisoners on death row: At the beginning of 1963 there were 180 prisoners under sentence of death in the United States, by the end of 1965 there were 331, and there undoubtedly was a substantial increase during 1966.[99] The prisoners awaiting execution at the end of 1965 had been under sentence for an average of almost 31 months; 61 of these prisoners had been on death row for 5 years or more. The 7 persons who were executed in 1965 had been under sentence for nearly 4 years. The spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies contradicts our image of humane and expeditious punishment of offenders. But no one would seriously propose to limit the right of a condemned man to have errors at his trial corrected or to obtain the mercy of the executive. Finally, there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is most frequently imposed and carried out on the poor, the Negro, and the members of unpopular groups.

[97] Quoted in Wechsler, A Work in a Work to Be Done (1964).
[98] 336 U.S. 558, 580 (1949).

[99] In August 1966 the State of California was forced to open a "Death Row Annex" at San Quentin Penitentiary to hold 42 additional prisoners because the existing death row, which has space for 60 prisoners, was filled to capacity.

Chapter 3

The Lower Courts

No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts. These courts are lower only in the sense that they are the courts before which millions of arrested persons are first brought, either for trial of misdemeanors or petty offenses or for preliminary hearing on felony charges. Although the offenses that are the business of the lower courts may be "petty" in respect to the amount of damage that they do and the fear that they inspire, the work of the lower courts has great implications. Insofar as the citizen experiences contact with the criminal court, the lower criminal court is usually the court of last resort. While public attention focuses on sensational felony cases and on the conduct of trials in the prestigious felony courts, 90 percent of the Nation's criminal cases are heard in the lower courts.

The importance of the lower courts was emphasized almost 50 years ago in Charles Evans Hughes' admonition to the New York State Bar Association:

> The Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and ignorant; its indifference to their misery and helplessness lies disaster.[1]

In 1922 the Cleveland Foundation Survey of the Administration of Criminal Justice concluded that

> [T]he office of the municipal prosecutor and the Municipal Court are the points of contact with the administration of justice of the overwhelming majority of the inhabitants who come into any contact with courts and court officials. There the great bulk of the population receives its impressions regarding the speed, certainty, fairness, and incorruptibility of justice as administered. For law to be effective there must not only be justice, but also the appearance of justice . . . . As a deterrent of crime, the Municipal Court is more important than any other of our institutions with the possible exception of the police force.[2]

The significance of these courts to the administration of criminal justice lies not only in sheer numbers of defendants who pass through them but also in their jurisdiction over many of the offenses that are most visible to the public. Most convicted felons have prior misdemeanor convictions, and although the likelihood of diverting an offender from a career of crime is greatest at the time of his first brush with the law, the lower courts do not deal effectively with those who have come before them. The Baltimore Criminal Justice Commission noted in 1929:

> Although it is almost invariably true that the serious offender has a long career in the minor courts, we wait until he graduates from such a career into a full-fledged burglar or highwayman before paying serious attention to his conduct.[3]

Nearly a decade later the National Commission on Law Observance and Enforcement (the Wickersham Commission) concluded that the lower courts were the most important in the criminal justice system and yet were the most neglected. In the following years numerous studies have echoed these findings.[4]

It is distressing to report that these warnings have gone largely unheeded. The Commission has gathered available studies and statistical data, and the staff has made brief field studies of the lower courts in several large cities. The inescapable conclusion is that the conditions of inequity, indignity, and ineffectiveness previously deplored continue to be widespread.

Burgeoning population and increasing urbanization have aggravated rather than ameliorated these problems. These courts still operate with the most meager facilities, with the least trained personnel, and with the most oppressive workload. Practices by judges, prosecutors, and defense counsel which would be condemned in the higher courts may still be found in these courts. The most dedicated persons working there are frustrated by huge caseloads, and they lack opportunity to screen and prepare cases carefully or to deal with the problems posed by individuals brought to the bar of justice.

No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality, and rehabilitation professed in theory, yet frequently denied in practice. The result may be a hardening of antisocial attitudes in many defendants and the creation of obstacles to the successful adjustment of others.

[1] Address by Charles E. Hughes, N.Y. State Bar Ass'n 42d Annual Meeting, in 1919 PROCEEDINGS OF THE N.Y. STATE BAR ASS'N 224, 240-41.
[2] CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND 89 (Pound & Frankfurter eds. 1922).
[3] 1923 BALTIMORE CRIMINAL JUSTICE COMM'N ANN. REP. 17.
[4] See, e.g., SHERIDAN, URBAN JUSTICE (1964); SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT (1966); 1-7 American Bar Foundation, The Administration of Criminal Justice in the United States—Pilot Project Report (mimeo. 1957); PA. ATT'Y GEN., REPORT ON THE INVESTIGATION OF THE MAGISTERIAL SYSTEM (1956); Dash, *Cracks in the Foundation of Justice*, 46 ILL. L. REV. 385 (1952); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *Metropolitan Criminal Courts of First Instance*, 76 HARV. L. REV. 320 (1962).
Even before the turn of the century a Philadelphia judge remarked that "complaints of the capacity of the local magistrates have come down to us continuously, from the earliest periods." *Commonwealth v. Alderman Hogen*, 9 Phila. Rep. 574 (1872), quoted in PA. ATT'Y GEN., *supra* at 1.

The disturbing condition of the lower criminal courts is not without noteworthy exceptions. In many courts conscientious judges, prosecutors, and lawyers have done much to alleviate some of the problems. While their work shows that reforms are practicable, only sweeping changes will successfully raise the quality of justice in the lower criminal courts.

A general description of the lower criminal court system in the United States is complicated by the fact that there is no single system. Within each State courts and procedures vary from city to city and from rural area to urban area. In most States the lower courts are separate entities having different judges, court personnel, and procedures from other criminal courts, but in some places an integrated criminal court handles all phases of all criminal cases, with an administrative subdivision or branch for petty offenses. Generally the lower courts process felony cases up to the point of preliminary hearing and misdemeanor and petty offense cases through trial and ultimate disposition. But the categories of offenses classified as misdemeanors and felonies vary, and an offense which is a felony in one State may be a misdemeanor in another.

Despite variations in organization, studies of practice and procedure in the lower criminal courts have exposed critical deficiencies common to most systems. No single system manifests every defect described, but the defects are so widespread that the problem clearly demands attention and action across the country.

THE URBAN COURTS

PRACTICES AND PROCEDURES OF THE LOWER COURTS

Every day in the courthouses of metropolitan areas the inadequacies of the lower criminal courts may be observed. There is little in the process which is likely to instill respect for the system of criminal justice in defendants, witnesses, or observers. Some representative observations are set forth below.

Initial Presentment. Following arrest, the defendant is initially presented in court, often after many hours and sometimes several days of detention. In theory the judge's duty is to advise the defendant of the charges against him and of his rights to remain silent, to be admitted to bail, to retain counsel or to have counsel appointed, and to have a preliminary hearing. But in some cities the defendant may not be advised of his right to remain silent or to have counsel assigned. In others he may be one of a large group herded before the bench as a judge or clerk rushes through a ritualistic recitation of phrases, making little or no effort to ascertain whether the defendants understand their rights or the nature of the proceedings. In many jurisdictions counsel are not assigned in misdemeanor cases; even where lawyers are appointed, it may not be made clear to the defendant that if he is without funds he may have free representation. One Commission staff report notes:

> In the cases observed no defendant was told that he had a right to remain silent or that the court would appoint a lawyer to represent him if he were indigent, notwithstanding the court rule that counsel will be assigned whenever a defendant may be sentenced to more than six months or fined more than $500. We were told that at least one judge takes great care to advise defendants fully, but the three judges we observed did not.[8]

The judges have little time to give detailed consideration to the question of bail. Little is known about the defendant other than the charge and his prior criminal record. The result is that bail is based on the charge instead of on the circumstances of each case; high money bonds are almost invariably set by established patterns, and large numbers of defendants are detained.

Disposition. The initial appearance is also the final appearance for most defendants charged with misdemeanors or petty offenses. While those who can afford to retain counsel are released on bond to prepare for trial at a later date or to negotiate a disposition, a majority of defendants pleads guilty immediately, many without advice of counsel. Pleas are entered so rapidly that they cannot be well considered. The defendant is often made aware that if he seeks more time, his case will be adjourned for a week or two and he will be returned to jail.

> Most of the defendants . . . pleaded guilty and were sentenced immediately, without any opportunity for allocution. When they tried to say something in their own behalf, they were silenced by the judge and led off by the bailiff. . . .[9]

Trial. An observer in the lower criminal courts ordinarily sees a trial bearing little resemblance to those carried out under traditional notions of due process. There is usually no court reporter unless the defendant can afford to pay one. One result is an informality in the proceedings which would not be tolerated in a felony trial. Rules of evidence are largely ignored. Speed is the watchword. Trials in misdemeanor cases may be over in a matter of 5, 10, or 15 minutes; they rarely last an hour even in relatively complicated cases. Traditional safeguards honored in felony cases lose their meaning in such proceedings; yet there is still the possibility of lengthy imprisonment or heavy fine.

In some cities trials are conducted without counsel for either side; the case is prosecuted by a police officer and defended by the accused himself. Staff observations in one city were summed up as follows:

> A few defendants went to trial, but the great majority of them did so without counsel. In these cases the judge made no effort to explain the proceedings to the defendants or to tell them of their right to cross-examine the prosecution's witnesses or of their right to remain silent. After the policeman delivered his testimony, the judge did not appear to make any evaluation of the sufficiency of the evidence but turned immediately to the defendant and asked, "What do you have to say for yourself?" Where counsel appeared at a trial, the procedure was slightly more formal, but the judge conducted most of the questioning himself.[7]

Sentence. Most defendants convicted in the lower criminal courts are sentenced promptly. Usually there are no probation services or presentence investigations. Unless the defendant has an attorney who has taken time to inquire into his background, little will be known about him. Sentence may be based on the charge, the defendant's appearance, and the defendant's response to such questions as the judge may put to him in the few moments allotted to sentencing. In the lower courts of one State

> the availability of violator's records is the exception rather than the rule. Even in the larger cities when the judge wishes to see the record of individual defendants he must send for the record and then delay the trial until it arrives. Delay and inconvenience so caused often lead to a situation where the judge merely asks the defendant what his record is and relies upon his word for its accuracy. . . .[8]

Short jail sentences of one, two, or three months are commonly imposed on an assembly line basis. A defendant's situation can hardly be considered individually. When a defendant is fined but is unable to pay, he may be required to work the penalty off at the rate of $1 to $5 for each day spent in jail.[9]

Petty Offenses. The conditions described above are found in more aggravated form in lower courts which handle petty offenses. Each day in large cities hundreds of persons arrested for drunkenness or disorderly conduct, for vagrancy or petty gambling, or for prostitution are led before a judge. Among the defendants are slum dwellers who drink in public and young men who "loiter" on street corners or "fail to move on" when ordered to do so. Typically, they have no private place to go, no money to spend, and no family or lawyer to lend them support.

Judges sometimes seem annoyed at being required to preside in these courts. Defendants are treated with contempt, berated, laughed at, embarrassed, and sentenced to serve their time or work off their fines.[10] Observers have sometimes reported difficulty in determining what offense is being tried in a given case,[11] and instances have come to light in which the disposition bears little relationship to the original charge. A trial of a defendant charged by police with drunkenness consisted of this exchange:

> MAGISTRATE: "Where do you live?"
> DEFENDANT: "Norfolk."
> MAGISTRATE: "What are you doing in Philadelphia?"
> DEFENDANT: "Well, I didn't have any work down there, so I came up here to see if I could find . . . ."
> MAGISTRATE (who had been shaking his head): "That story's not good enough for me. I'm going to have you investigated. You're a vagrant. Three months in the House of Correction."[12]

The offender subjected to this process emerges punished but unchanged. He returns to the streets, and it is likely that the cycle soon will be repeated in all its futility.

CAUSES OF THE PROBLEMS OF THE LOWER COURTS

The Volume of Cases. More than in any other courts in the system the problems of the lower courts center around the volume of cases. It is estimated that in 1962 over 4 million misdemeanor cases were brought to the lower courts of the United States. The crux of the problem is that there is a great disparity between the number of cases and the number of judges.

Data from various cities illustrate this disparity. For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, and to hear and determine 7,500 serious misdemeanor cases, 30,000 petty offenses and an equal number of traffic offenses per year.[13] In Detroit over 20,000 misdemeanor and nontraffic petty offense cases must be handled by the single judge sitting in the Early Sessions Division.[14] In Atlanta in 1964 three judges of the Municipal Court disposed of more than 70,000 cases.[15]

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

There are other less visible consequences of volume problems. In the lower courts the agencies administering criminal justice sometimes become preoccupied simply with moving the cases. Clearing the dockets becomes a primary objective of all concerned, and cases are dismissed, guilty pleas are entered, and bargains are struck with that end as the dominant consideration. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, in carefully sifting the facts at trial, or in determining the social risk he presents and how he should be dealt with after conviction. A former municipal court judge summed up his experiences in these words:

> The tremendous volume of cases which must pass through these arraignment courts in a given period of time necessarily limits the opportunity of the judge, city attorney, and the defendant or his attorney to give more than perfunctory attention to any individual case. Frequently, it is physically impossible for the deputy city attorney to know anything about the details of the charge, the background of the defendant, or his record. As a result, both the quality of law enforcement and the rights of the defendants are made to suffer. Police officers and complaining witnesses often feel that their case has not received proper attention. . . . Under such

---

[8] Staff Study, *Administration of Justice in the Municipal Court of Baltimore* (printed in appendix B of this volume).
[9] Staff Study, *Administration of Justice in the Recorder's Court of Detroit* (printed in appendix B of this volume).
[7] *Ibid.*
[8] SILVERMAN, *op. cit. supra* note 4, at 41.
[9] See chapter 2 *supra*.
[10] See, e.g., SILVERMAN, *op. cit. supra* note 4, at 72-76.
[11] Foote, *supra* note 4, at 610-11.
[12] *Id.* at 611.
[13] PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 272 (1966) (table 23).
[14] Staff Study, *Administration of Justice in the Recorder's Court of Detroit* (printed in appendix B of this report).
[15] ATLANTA COMM'N ON CRIME AND JUVENILE DELINQUENCY, OPPORTUNITY FOR URBAN EXCELLENCE 104 (1966).

conditions, remedial or beneficial results to the community or the defendant are only incidental.[16]

The heavier the volume, the greater the delay between arrest and disposition for many defendants. This delay weakens the deterrent effect of the criminal process. It can cause the collapse of the prosecutor's case as witnesses tire and fail to appear and as memories fade. In addition, continuing cases time and again needlessly expends witnesses' time, including that of a large number of police witnesses. From the point of view of the defendant delay increases the length of pretrial detention for those who cannot afford to post bail.

The Quality of Personnel. It is clear that the lower courts are generally manned by less competent personnel than the courts of general jurisdiction. There are judges, attorneys, and other officers in the lower courts who are as capable in every respect as their counterparts in more prestigious courts, but the lower courts regularly do not attract such persons.

In almost every city judges in courts of general jurisdiction are better paid, are more prominent members of the community, and are better qualified than their lower court counterparts. In some cities lower court judges are not required to be lawyers. The conduct of some judges reveals inaptitude and a lack of familiarity with rules of evidence or developments in case law.

In jurisdictions in which the State is represented by a district attorney, the most inexperienced members of the staff are usually assigned to the lower courts. As they gain experience, the more able assistants are moved to the felony courts to handle more "important" cases, a move commonly regarded as a substantial career advance. For example, in the District of Columbia, five members of the U.S. Attorney's office were transferred from the lower court to the felony court in a four-month period in 1965.[17] In some cities prosecutors are part time and police officers serve as prosecutors.

As has been noted, in many lower courts defense counsel are not provided for defendants without funds. In those places where counsel are assigned, frequently he is not compensated and often his performance is poor. A community gets the kind of legal service it pays for, and typically it pays little or nothing for defense counsel in its lower court.

Attorneys operating regularly in these courts rarely appear in other courts. Often they seem to be more concerned with extracting a fee from their clients than with defending them. They operate on a mass production basis, relying on the plea of guilty to dispose of cases quickly. Frequently these lawyers are unprepared, make little contact with their clients, fail to investigate their backgrounds, and make little effort aside from the plea bargaining session to protect their interests or to secure a favorable disposition. For all the shortcomings of these attorneys who regularly operate in the lower courts, however, probably most defendants are better off with them than without any lawyer at all.

Probation services in the lower courts frequently are not available. More than one-third of the sample counties in the Commission's national survey of corrections had no probation services for misdemeanants. In jurisdictions where probation departments are attached to the lower courts, the probation services are markedly inferior, with few exceptions, to those available in the felony courts. Salary schedules for misdemeanant probation officers are generally too low to attract competent personnel, and in some counties the position of probation officer is filled by persons of limited qualifications who must rely on a part-time job to supplement their inadequate salary.

However, the greatest obstacle to effective probation services in the lower courts is the insufficient number of probation officers. The corrections survey estimated a national average of 114 misdemeanant cases per probation officer, an average which is far in excess of the minimum standards recommended in chapter 6 of the Commission's General Report. Under such heavy caseloads probation is at best a checking rather than a counseling or assisting function. The result is that lower court judges are unable to make the fullest appropriate use of probation, and presentence reports, when possible at all, are likely to lack sufficient information for effective sentencing.

Administrative Problems. The lower courts usually have separate personnel, facilities, and budgets from courts of general jurisdiction, but they generally manifest the same administrative deficiencies. The problems of lack of coordination among judges of a single court and of burdening judges with administrative chores which are found in many court systems are discussed in chapter 7. However, it should be noted that the effects of these problems are greater in the lower courts because of the greater volume of business which must be processed. Moreover, such attention as is directed to problems of court administration tends to be focused on the higher courts, in which more prominent judges and more experienced prosecutors are far more likely to take the initiative than their counterparts in the lower courts. The absence of defense counsel in many lower courts, apart from the "regulars" in the courthouse who often have vested interests in the status quo, also eliminates a source of initiative for reform.

Commission staff research revealed a pervasive lack of statistical data necessary for any attempt to improve the operations of the lower courts. In the District of Columbia Court of General Sessions, for example,

> there is nothing which approaches a comprehensive profile of the offender, . . . [but] the problems are far more basic. There is no agreement among the agencies even as to the volume of business of the court . . . . There are no statistics on the rate or length of pretrial detention. The incidence of indigency at the court is unknown. There is no comprehensive analysis of the manner in which cases are charged, broken down, or disposed of by the prosecutor. There is no description of sentencing patterns or of the workloads of individual judges. And there are no reliable statistics on recidivism.[18]

In most cities cases are listed in terms of charges rather than defendants, and there is no way to determine how many persons entered the system. Quite often inconsistencies appear between statistics kept by the police and those kept by the court. In the District of Columbia, for example, some 5,000 defendants shown on police records to have reached court do not appear on court records at all.[19] The lack of data makes it difficult to pinpoint critical areas of need, renders comprehensive assessment of the performance of the court impossible, and restricts sound management control over court business.

UNIFICATION OF THE CRIMINAL COURTS

Division of the criminal courts has produced lower standards of judicial, prosecutorial, and defense performance in the misdemeanor and petty offense courts. Procedural regularity has been a prime casualty. The function performed by these courts, ultimate disposition of misdemeanors and petty offenses only, has meant that community attention is directed to the higher courts where felony cases are processed.

When community resources are committed to criminal justice, the lower courts, largely lacking in articulate spokesmen, are commonly ignored. The result has been the development of two separate court systems of strikingly disparate quality. The distinction between felonies on the one hand and misdemeanors and petty offenses on the other may be useful in fixing the range of punishment and the collateral effects of conviction, but it certainly does not justify the present dual court system. In many respects the distinction between felonies and misdemeanors is an artificial one. Misdemeanants are sometimes liable to lengthy imprisonment, and a large percentage of these offenders were initially charged with felonies which were reduced to misdemeanors as a result of plea bargaining; they may represent the same danger to society and the same need for rehabilitative measures as those processed through the felony courts.

It is hard to see why a defendant charged with a felony should be accorded so many more of the elements of due process than his counterpart charged with a less serious offense in a misdemeanor court: better representation, more care in disposition, and better facilities for rehabilitation.

The community and the offender both suffer when the offender is processed through the lower courts, for he often receives a lighter sentence than is appropriate, and he is denied access to the rehabilitative facilities of the higher courts. The hardened offender does not develop overnight; generally he has a history of repeated misdemeanor and petty offense violations. At the initial stage of a criminal career there should be reason to hope for successful rehabilitative efforts. Yet at just that crucial phase the community's resources fail to be effective. The disturbing rate of recidivism among offenders processed through the lower courts alone is reason enough to try another approach.

The problems of the lower courts can best be met by unification of the criminal courts and abolition of the lower courts as presently constituted. The National Commission on Law Observance and Enforcement reached this conclusion over 30 years ago. Conditions in the lower courts today have not improved, and increases in caseloads have multiplied the problems. The experience of this century suggests that the lower courts will remain a neglected segment of our criminal justice system unless sweeping reforms are instituted.

All criminal prosecutions should be conducted in a single court manned by judges who are authorized to try all offenses. All judges should be of equal status. Unification of the courts will not change the grading of offenses, the punishment, or the rights to indictment by grand jury and trial by jury. But all criminal cases should be processed under generally comparable procedures, with stress on procedural regularity and careful consideration of dispositions.

Complete unification of the criminal courts would entail central administration which may take a number of forms. The logistics may be handled by a court's chief judge, by a small administrative committee of judges, or by an administrative judge, an office established in the New York Criminal Court and in other cities. The services of professional court administrators to assist the judges charged with administrative duties will be needed for the larger courts, and the use of business management techniques, including the use of data processing equipment, should be developed.[20] It is in the lower court, with a higher volume of routine cases than the felony court, that mechanical and electronic equipment would have the greatest impact.

In addition to unification of the courts, centralization of the prosecutive function in a single office responsible for all criminal prosecutions and operating on a county level or on a citywide basis in major cities would result in more efficient use of manpower and a higher level of prosecution. The often found systems of special prosecutors, city prosecutors, part-time employees, and police prosecutors should be eliminated.

Two improvements may be anticipated in a unified court system. Such facilities as probation services and presentence investigations, currently of limited availability in most jurisdictions, would be available for all criminal cases, and all defendants would be entitled to assigned counsel to the extent suggested in chapter 5. High-volume courts present the opportunity for experimentation with ways of providing counsel to the poor, including variations of the familiar assigned counsel and defender approaches.

The precise form unification should take in each jurisdiction will have to be considered in light of local conditions. An initial question is whether the civil courts should be included in the unified court structure or whether separate civil and criminal courts should be maintained. The merits and demerits of specialization by judges, and the effects of the several approaches on

[16] Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 53 J. CRIM. L., C. & P.S. 215 (1962).

[17] SUBIN, *op. cit. supra* note 4, at 25 n.2.

[18] *Id.* at 155.

[19] *Id.* at 156.

[20] See chapter 7 *infra*, and the Report of the Science and Technology Task Force of this Commission.

the administration of the courts and the quality of court personnel must be weighed. Procedural and administrative differences in the processing of petty offenses may lead some jurisdictions to follow the pattern set by Detroit, where an integrated court handles all phases of criminal cases but a special branch of that court deals with petty offenses. At first there will be problems of housekeeping and of the use of the courthouse and other facilities of the merged courts, but the recent accomplishments of court integration efforts in a number of States have demonstrated that these problems can be met.

Unification of the criminal courts may place additional burdens on judges, prosecutors, and lawyers, and additional personnel may be required. More time and attention must be devoted to misdemeanor and petty offense cases by all participants in the administration of criminal justice. But the efficiency which will follow use of modern court administration and management techniques should help to meet some of these burdens. And implementation of proposals to reduce the volume of cases entering the criminal justice system by eliminating drunkenness and other offenses from the criminal law should also result in significant relief.

Inauguration of procedures to screen cases, for early diversion from the criminal process, and for referral to the appropriate social, medical, and psychiatric community services would free substantial resources now processing such cases through the criminal justice system. Other proposals of the Commission concerning court procedures should facilitate the processing of cases within a unified court system. Early assignment of counsel holds the promise of quantitative improvement in the disposition of offenders of the lower court: greater deliberation, more attention to procedural regularity, and careful sifting of evidence and of sentencing information.

Plea negotiations at as early a stage as possible in the proceedings and adoption of procedures for precharge conferences would focus the parties' attention on dispositional decisions at an early stage. Court business would be facilitated by scheduling more than one session each day for the initial appearance of defendants. This reform would enable the prompt arraignment of defendants, would permit the court's business to be spread over a longer period of the day with more time for each case, and would substantially reduce time lost for police witnesses. In most medium- and large-size cities the caseloads justify at least three sessions each day for initial appearances, one of which should be at night.

Communities may wish to experiment with the use of laymen to facilitate the initial processing of cases. Many arrested persons need information and advice on a variety of subjects—how to obtain a lawyer, what the charges are, and what the next steps in the proceeding are. These functions could be performed by a defendants' aide, a layman trained to provide basic information and advice and assigned to each precinct or a central detention point. This same person could be given the broader functions of conducting bail and indigency investigations. He might be an employee of a legal aid or public defender's office, or of a community social service agency or bail project. The services of a defendant's aide could help to speed the flow of cases through the courts by reducing the time required to process requests for assignment of counsel and to set the conditions of pretrial release.

JUSTICE OF THE PEACE COURTS

Justice of the peace courts are the rural counterparts of the urban lower criminal courts. These courts developed in an era of slow transportation and communication to provide isolated small communities with a quick means of hearing minor criminal cases and exercising committing authority locally. But the conditions which gave rise to the development of justices' courts largely disappeared with the advent of modern means of travel and almost instantaneous communication. As a result, the lay-manned, fee-paid court is an anachronism.

Legal authorities, reform groups, and laymen long have drawn attention to deficiencies in justice of the peace courts. While some improvements have been made, there is pervasive evidence that substantial problems still must be solved in the operation of these courts and in the quality of justice they dispense.

As of 1965, in 32 of the 35 States in which the justice of the peace heard criminal cases or exercised committing authority, he was remunerated for his services by a fee or assessment against the parties depending upon the outcome or volume of litigation.[21] In three States the justice still receives payment only when he convicts and collects his fee from the defendant, despite a Supreme Court decision 40 years ago holding such a practice unconstitutional.[22]

Use of the fee system in justice courts has been condemned for years.[23] Most authorities have agreed that it distorts the administration of justice. One writes:

> The primary evil . . . is the pressure it exerts on each justice who operates under it to get more business in order to enlarge his income . . . .
>
> . . . Most criminal complaints are made by officers exercising police powers. These officers naturally seek convictions, and would be expected to patronize justices who aid them in their efforts rather than those who insist too rigidly upon protecting the rights of the defendants. A sympathetic attitude toward the views of the police is therefore quite likely to result in more business and an increase in the justice's income.
>
> It is very common in all states where justices . . . compete for business, to find instances where the sheriff's office, or the state police, or any other agency engaged in enforcing the criminal law, take most or all of their cases to certain justices notwithstanding the fact that other justices may be more conveniently accessible. In such cases it is difficult not to conclude that the favored justice renders service acceptable to the officers who bring in the business . . . .[24]

Reports from States in which justices are paid on an annual basis by the county or State for cases resulting in acquittal indicate that justices tend to convict to avoid having to wait for the county to pay.[25] No matter what form of fee system is used, the public is unlikely to go beyond the fact that fees are collected and can draw only adverse conclusions from the fact.

Other widespread criticisms of the justice of the peace are that he lacks legal training and is ignorant of proper judicial procedure. Recent research indicates that the justice is not required to be a lawyer in all or some part of 34 States.[26] In addition, there are indications that justices occasionally fail to carry out the requirements of due process and keep abreast of current developments in the law and that they sometimes have disregarded or failed to understand jurisdictional limitations.[27]

Other defects in the justice-of-the-peace courts arise from the lack of supervision and control of their activities. Questionable practices may often go unchecked. One Maryland judge recently criticized local justices of the peace in these terms:

> [They have] "treated some good, decent citizens like common criminals."
>
> "The justice of the peace system is completely outmoded . . . If things keep going like they've been going, some of these people are going to get us into serious trouble." . . .
>
> "[M]any of the JP's are just plain nasty to people.
>
> "There have been all sorts of instances where they've been rude to people and when the person complains they tell him to 'go to see your congressman.'
>
> "These people aren't controlled by us. They deny they have any connection with the police department. They tell the police to jump—and they tell us the same thing.
>
> "It's time these people were put under us—or the Circuit Court—or somebody." [28]

The chaotic and disorganized nature of the system also makes difficult its improvement:

> [F]or the most part the individual justice works below the threshold of judicial visibility. His acts are very often discretionary in nature and are seldom subject to judicial review . . . . Moreover, the failure to maintain adequate records for all justices . . . means that the entire system is likewise obscure in its outline and workings.
>
> [J]ustices who earn over 2500 dollars per annum are required to disclose their entire source of income from the discharge of their duties . . . . Those who earn less than 2500 dollars per annum must file a statement to that effect . . . . One official . . . estimates that less than 50% of the justices comply with this requirement. . . .
>
> . . . No one knows exactly how many justices there are, how much aggregate income they receive, how many are active or inactive, or any of a host of other facts necessary for an intelligent appraisal of the system. . . .[29]

Because most of these courts are independent entities dependent on local financial resources, they are often unable to afford courtrooms, office facilities, or clerical assistance necessary for effective operation.[30] In Montana one justice reportedly tried a case while repairing an automobile; another justice disposed of a case while sitting on a tractor during a pause from plowing his field.[31] Where courtrooms are available, undignified and inconvenient physical conditions are the rule rather than the exception.

The unhealthy tendency to view these courts as local revenue-producing devices as well as the justice's political responsibility to a small area colors the quality of justice dispensed in these courts. It has often been noted that local offenders may have cases, usually traffic offenses, fixed in advance, while out-of-State defendants must pay the full fine or penalty.[32]

REMEDYING DEFICIENCIES

The defects of justice of the peace courts are in large part inseparable from problems involving the rest of the lower courts. What is needed is a basic revision of the judicial system. Careful consideration should be given to replacing local justice of the peace courts with a small number of State district or county courts of limited jurisdiction, having a wide territorial basis, and manned by salaried, law-trained judges. All fees and fines should go to the State.

An outstanding example of progress is found in Illinois. The legislature abolished some 4,000 fee system courts and replaced them with circuit courts. Salaried magistrates, appointed by circuit judges, are limited in number to 207 (no more than 1 for each 35,000 of population). Ordinarily, magistrates must be legally trained and must serve full time.

Other States also have eliminated justice of the peace courts. Connecticut abolished JP courts and created a system of circuit courts which began operating in 1961. Circuit court judges are appointed by the Governor, must be admitted to the bar, and must serve full time. Maine replaced its justices with a State district court system in 1961.

While elimination of the traditional justice of the peace system is preferable, until that is accomplished,

---

[21] Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUSTICE OF THE PEACE TODAY, tables 1 & 2 (1965).

[22] See *Tumey* v. *Ohio*, 273 U.S. 510 (1927). See also *Hulett* v. *Julian*, 250 F. Supp. 208 (M.D. Ala. 1966). In Delaware, Kansas, Nebraska, Mississippi, New Mexico, South Dakota, and Washington justices are paid by the defendant if he is convicted or by the State or county if he is acquitted. Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 393 (1964). Other less direct forms of nonsalaried payment to justices exist, but all are based on the volume or outcome of cases before the justice. See Reynolds, *The Fee System Courts—Denial of Due Process*, 17 OKLA. L. REV. 373 (1964).

[23] See, *e.g.*, ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 96 (4th ed., 1961); COE, A STUDY OF THE JUSTICE OF THE PEACE IN ONONDAGA COUNTY (1931); LUMMUS, THE TRIAL JUDGE 77, 80 (1937); MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 135 1908); WARREN, TRAFFIC COURTS (1942); Morris, *The "JP"—Should He Be Abolished?* Saturday Evening Post, Oct. 11, 1958, p. 19; Kennedy, *The Poor Man's Court of Justice*, 23 J. AM. JUD. SOC'Y 221 (1940); Reynolds, *supra* note 22, at 385; Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118 (1927); Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B.J. 300 (1947); Vanlandingham, *supra* note 22, at 392; Vanlandingham, *Pecuniary Interest of the Justices of the Peace in Kentucky—The Aftermath of Tumey* v. *Ohio*, 45 KY. L.J. 607 (1957). See also *State* ex. rel. *Osborne* v. *Chinn*, 146 W. Va. 610, 121 S.E. 2d 610 (1961).

[24] Sunderland, *supra* note 23, at 331–34. This same theme appears in a recent Virginia study. See Virginia Comm. of Judicial Conference of Courts of Record To Study Problems of Justices of the Peace, Report to Judicial Council of Comm. of Circuit Judges 32, 33 (1965) [hereinafter cited as Virginia Judicial Conference Rep.].

[25] Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 394 (1964).

[26] Alabama, Arizona, Arkansas, Delaware, Florida (admission to practice required in two counties), Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland (legal training required in some counties), Michigan (legal training required in larger cities), Minnesota, Mississippi (training course required of nonlawyer JP's beginning 1968), Montana, Nebraska, Nevada, New Mexico (justices must attend one justice of the peace conference a year), New York (completion of training course required of nonlawyers), Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington (must be admitted to practice in cities over 5,000 population), West Virginia, Wisconsin, Wyoming. INSTITUTE OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 21, tables 1 & 2. In Oregon during 1966 only 9 of 70 justices of the peace had law degrees. 1966 ORE. JUDICIAL COUNCIL ANN. REP. 24. In Nevada during 1963 only one lawyer served as a justice of the peace in the entire State. Vanlandingham, *supra* note 25, at 391.

[27] MORELAND, MODERN CRIMINAL PROCEDURE 165–66 (1959); Virginia Judicial Conference Rep. 23, 25; Sunderland, *supra* note 23, at 316; Vanlandingham, *supra* note 25, at 392.

[28] Sentinel (Montgomery County, Md.), Feb. 17, 1966, § A, p. 3, col. 3.

[29] Virginia Judicial Conference Rep. 7, 30–31, 35–36.

[30] Mason & Kimball, *Montana Justices' Courts—According to the Law*, 23 MONT. L. REV. 62, 65 (1961). Twenty-four States make no provision for clerical aid to justices of the peace. Twelve States provide clerks for justices in larger governmental units or leave the matter for local determination. INSTITUTE OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 21, tables 1 & 2.

[31] Montana Legislative Council, Report on Justice of the Peace Courts 3 (1960).

[32] See, *e.g.*, Vanlandingham, *supra* note 25, at 391; ABA SECTION OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 23, at 98.

there are other steps that should be taken to improve the high quality justice where these courts are retained.

First, fee systems of compensation, no matter how remotely related to litigation, must be replaced. Many jurisdictions have already done so. During 1965 Delaware revised its laws to provide for payment of salaries instead of fees; some counties in Florida have abolished the fee system; in North Carolina all judicial officers performing the functions of justices of the peace will be salaried as of 1970.

Changing to a salary system is complicated by the large number of justices. Many justices hear too few cases to justify a reasonable salary. The fact that several States have managed to replace justices of the peace with a smaller number of full-time judges indicates that the number of justices can be decreased substantially. Unnecessary concentrations of justices of the peace should be eliminated.

Second, all persons exercising judicial functions should either be lawyers or be required to complete rigorous judicial training prior to assuming office. Several States have instituted such requirements. All New Jersey judicial officers attaining office after 1947 must be trained to practice law; Washington's legislature has provided that all judicial officeholders in the State's three largest counties must be attorneys. New York, Mississippi, and Iowa justices have been required to complete training courses of various types. While such courses may prove beneficial, to ensure a better quality of training and higher interest in the work performed, it is far preferable that judicial officers be lawyers.

Third, the justice of the peace courts should be administratively accountable to and under the supervision of the court system of the State. They should be required to keep records, and they should be provided with administrative help, with an administrative officer for a set of courts.

U.S. COMMISSIONERS

U.S. Commissioners occupy positions comparable to justices of the peace in the State systems. They issue arrest and search warrants, arraign defendants on complaints, fix bail, hold preliminary hearings, and try petty offense cases on certain Federal reservations. Many of the criticisms leveled at the justice of the peace system are applicable to U.S. Commissioners. Under the present scheme established nearly 70 years ago, most Commissioners, with the exception of those serving in national parks, are compensated on a fee system, providing payment for each service performed, with a fixed annual ceiling on fees of $10,500 per year. In 1964 only 21 Commissioners reached this ceiling. The 16 Commissioners who serve in various national parks receive modest salaries ranging from $1,000 to $7,200 per year.

Only 7 Commissioners are considered full-time officers and therefore receive office expenses and clerical assistance provided by law. The remaining Commissioners rely primarily on outside employment, and there is a danger of conflicts of interest or activities inconsistent with the office. The complaint is sometimes heard that Commssioners allow private business to take precedence over official business.

Commissioners are appointed by the judges of the local district court, but their number in a given district appears to have little relation to needs. In Wyoming, where 116 cases were disposed of in 1964, there were 25 Commissioners, while in neighboring Utah, where 152 cases were disposed of, there was only 1. The Eastern District of Michigan on the other hand has operated satisfactorily for nearly 20 years without Commissioners by transferring their functions to judges and clerks.

About 30 percent of the more than 713 Commissioners are not lawyers, nor is there an existing training program designed to develop judicial skills.

The Senate Judiciary Committee is currently considering legislation to reform the commissioner system. One alternative to the present unsatisfactory situation would be to abolish the office and transfer its functions to full-time professional judges. Modern transportation has greatly reduced the problem of distance from a judge, and where it has not, the defendant could be arraigned before a State judge or magistrate, as already permitted by statute.

Another alternative would be to seek to improve the quality and performance of Commissioners by replacing the fee system with a salary and by providing an adequate training program. This approach is questionable for a group of officials most of whom earn less than $2,000 a year in fees for official services. But if the office is retained, the number of Commissioners should be reduced, and Commissioners should be assigned enough business to justify a reasonable salary; they should have a period of training and high professional qualifications.

Chapter 4

Court Proceedings

Specific aspects of court proceedings not dealt with elsewhere in this volume have great impact on the administration of justice. Methods of changing initial proceedings, through bail reform and summons procedures, are discussed in this chapter, as is the development of early factfinding techniques and mutual discovery between prosecution and defense. The possibility of appeal by the prosecution is considered, and ways to improve the present cumbersome habeas corpus process are proposed. Finally, the chapter discusses the problem of poverty and discrimination in the criminal process and also reviews current proposals that seek to balance the need for freedom of activity by news media and the requirements for a fair trial.

BAIL

Bail is a procedure for releasing arrested persons on financial or other condition to ensure their return for trial. Money bail is a prime example of a traditional practice in the criminal law that has not proven adequate to meet the needs of an evolving concept of criminal justice. Recent bail reform has shown that careful fact gathering for pretrial release decisions, experimentation with standards for release without bail, and the mobilization of broad public and professional interest can change long-established practices. The directions in which changes should be encouraged have become clear as a result of the work of the Vera Institute of Justice, bail and summons projects throughout the country, and the enlightened approach of the Federal Bail Reform Act of 1966.

THE BAIL SYSTEM IN OPERATION

The shortcomings of the traditional bail system are now widely known and well documented. The National Conference on Bail and Criminal Justice, held in 1964, focused attention on the wastefulness and unfairness of the system.[1] Numerous studies all over the country also have documented its deficiencies.[2] The system's major fault is exclusive reliance on the posting of money to ensure the defendant's return. Typically an arrested person is brought by the police before a committing magistrade or judge who fixes an amount of money as security for his appearance at trial. In some courts bail schedules set an amount for each offense, and if the defendant can post that amount, the judge seldom considers the case individually. Under either method if the defendant can post the required amount or can pay a bondsman to post it for him, he is released until trial. If he cannot, he remains in jail. If the defendant fails to appear for trial, the bond may be forfeited.

The standard rate of premiums paid to bondsmen is about 10 percent of the face amount of the bond, although rates as high as 20 percent have been reported.[3] When bail is set at more than $500, premiums become more than many defendants can afford. A study of New York bail practices indicates that 25 percent of all defendants failed to make bail at $500, 45 percent failed at $1,500, and 63 percent at $2,500.[4] Although the proportion of persons failing to make bail varies widely from place to place, a recent study of large and small counties shows that it often is substantial.[5]

	Felony defendants unable to make bail (percent)
Large counties:	
Cook (Chicago)	75
Hennepin (Minneapolis)	71
Jefferson (Louisville)	30
Philadelphia (Philadelphia)	14
Small counties:	
Brown, Kans	93
Rutland, Vt	83
Putnam, Mo	36
Anchorage, Alaska	28
Catoosa, Ga	6

The discriminatory aspects of money bail are graphically described in President Johnson's remarks at the signing of the Bail Reform Act of 1966:

> The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.
>
> He does not stay in jail because he is guilty.
>
> He does not stay in jail because any sentence has been passed.
>
> He does not stay in jail because he is any more likely to flee before trial.
>
> He stays in jail for one reason only—because he is poor.

[1] See NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REP. (1965).

[2] See ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REP. 58–59 (1963) [hereinafter cited as ATT'Y GEN. REP.]; Arce, Rankin & Sturz, *The Manhattan Bail Project—An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67 (1963); Rankin, *The Effects of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Foote, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958); Note, *Compelling Appearance in Court—Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

[3] FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 23–24 (1964).

[4] Foote, *supra* note 2.

[5] Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621, 626–27, 630–31 (1966).

There are hundreds, perhaps thousands, of illustrations of how the bail system has inflicted arbitrary cruelty:

—A man was jailed on a serious charge brought last Christmas Eve. He could not afford bail and spent 101 days in jail until a hearing. Then the complainant admitted the charge was false.

—A man could not raise $300 bail. He spent 54 days in jail waiting trial for a traffic offense, for which he could have been sentenced to no more than five days.

—A man spent two months in jail before being acquitted. In that period, he lost his job, and his car, and his family was split up. He did not find another job for four months.[6]

The jails in which persons unable to make bail are kept are often overcrowded. Most lack work and recreational facilities. Some do not have space for the inmates to visit with their families or to confer with counsel. Detainees are often indiscriminately mixed with persons convicted of crime, with a result, as Justice William O. Douglas has observed, "equivalent to giving a young man an M.A. in crime."[7]

Housing, feeding, and guarding a detained defendant may cost between $3 and $9 a day. In 1962 New York City detained 58,458 persons for an average of 30 days each, at a cost of more than $6 per person a day, or more than $10 million for that year.[8] Detention costs were approximately $1 million in Philadelphia for the year 1964,[9] and almost $500,000 in Washington, D.C., for the year 1962.[10] Projecting such figures on a national basis and allowing for lower costs and crime rates in smaller communities, pretrial detention expenses probably exceed $100 million per year.

Unnecessary detention costs the community more than jail expenses. Many persons who fail to raise bail have jobs and dependents. The consequences of their detention are plain: loss of employment and support for the family, repossession of household goods, and accumulation of debts. If the family is put on relief, community funds must be devoted to its support. Loss of employment also means a drop in tax revenues; for the employer it may mean the additional expense of training a replacement. If the defendant is detained and loses his job, or if he must spend his limited money for a bail bond premium, his ability to pay a lawyer is reduced, and the community may incur the additional expense of providing defense counsel.

Pretrial detention also involves serious costs for the defendant. The most obvious cost is imprisonment itself, which is particularly harsh and unjust for the accused when conviction does not result in imprisonment, as is often the case. A recent New York City study showed that defendants were detained prior to trial in 49 percent of 732 cases but sentenced to prison in only 40 percent.[11] In the Federal system in 1963 approximately 22,340 persons were detained before trial, but only 13,600 were later sentenced to prison.[12] This pattern suggests that factors relevant to both decisions, such as community ties, employment, and family responsibility, are not being reflected in pretrial release decisions although they are considered in connection with sentence. Jailing an accused prior to trial but releasing him or placing him on probation upon conviction undermines respect for the administration of justice and conflicts with rehabilitative goals.

There is in addition the possibility that the outcome of a case will be influenced by the defendant's detention. Although based on limited data, recent studies tend to confirm the view that pretrial detention increases the likelihood of conviction.[13] The limitations imposed by incarceration hamper preparation of the defense because the accused is unable to assist his lawyer in searching for evidence and witnesses. Some of the same studies indicate a correlation between pretrial detention and the imposition of a jail sentence rather than probation after conviction. A study of 258 convicted defendants in the District of Columbia showed that 25 percent of the 83 persons released on bail were later released on probation, while only 6 percent of 175 persons detained before trial were released on probation.[14] If the accused is free prior to trial to seek or retain employment, support his family, and demonstrate his reliability by reappearing in court, he is more likely to be considered a fit subject for probation or a suspended sentence.

BAIL REFORM

A central fault of the existing system is that it detains too many people, with serious consequences for defendants, the criminal process, and the community. The aim of reform, therefore, must be to reduce pretrial detention to the lowest level without allowing the indiscriminate release of persons who pose substantial risks of flight or of criminal conduct.

Another serious fault of the present bail system is that it fails to promote decisions founded on facts about the accused. Money bail is traditionally set on the basis of the alleged offense rather than on the background of the particular defendant, principally because little information about him is ordinarily available except his prior criminal record. As a result, prohibitively high bail may be set where there is in fact little risk of flight, while at the same time unreliable defendants are released with inadequate assurance that they will appear for trial.

The first step of reform is to introduce factfinding procedures which will furnish immediately after arrest verified information about the accused and his community ties. With this information a rational assessment of the risks can be made, and where there is no significant risk, the defendant can be released without bail. The Vera Institute's Manhattan Bail Project has provided the model for changes in bail practices in at least 100 communities in more than half the States. In this project arrested persons charged with crimes other than homicide and some narcotics and sex offenses were interviewed prior to arraignment to determine their employment history, the stability of their home and family contacts in the city, and any prior criminal record. Investigators verified the information, usually by telephone, and each factor was weighed to assess the risk of flight. If the defendant was determined to be a good enough risk, release without bail was recommended and the background information made available to defense counsel, the prosecutor, and the judge. As a report to the National Conference on Bail and Criminal Justice noted:

> The Manhattan Bail Project and its progeny have demonstrated that a defendant with roots in the community is not likely to flee, irrespective of his lack of prominence or ability to pay a bondsman. To date, these projects have produced remarkable results, with vast numbers of releases, few defaulters and scarcely any commissions of crime by parolees in the interim between release and trial.[15]

A second step in bail reform is to develop new methods to reduce the risk of flight where it is significant. Forfeiture of money bail is currently the principal sanction, but forfeiture is rarely enforced. When it is, its efficacy is questionable, since the risk of financial loss usually falls on the bondsman instead of on the accused; many bail bonds are written without collateral, and most defendants are virtually judgment proof.

The judge should therefore have a broader set of alternatives than money bail or outright release: He should be given authority to set certain conditions on release. This is the approach taken by the Federal Bail Reform Act of 1966, the first basic change in Federal bail law since 1789. The Act instructs the judge to release persons charged with other than capital offenses on a promise to appear or upon the execution of an unsecured appearance bond, unless the judge determines that such release would not reasonably assure appearance at trial. In that event the judge may release the defendant in the custody of another person or organization; he may place restrictions on the defendant's travel, associations, or place of abode; or he may require the execution of an appearance bond secured by a refundable deposit of not more than 10 percent of the amount of the bond. If these measures are found inadequate, he may demand execution of a bail bond or a cash deposit, or he may impose any other condition deemed reasonably necessary to assure appearance, including a condition that the accused return to custody after specified hours. Thus the Act diminishes reliance on money bail and allows imposition of conditions commensurate with the risks presented.

In addition, courts should clearly explain to the defendant at the time of release his duty to appear at trial and should notify him in advance of his scheduled return. More strictly enforced criminal penalties for willful nonappearance should provide a deterrent to flight. The Federal Bail Reform Act strengthens the penalties against those who fail to appear for trial. Few States now have laws which impose any penalty for failure to appear after release without bail. Such laws should be enacted or existing laws revised. In addition, persons who violate conditions of release short of actual failure to appear in court should be made subject to contempt penalties where this remedy does not already exist.

To permit review of decisions, judicial officers should be required to state in writing the reasons for imposing any conditions which the accused is unable to meet. Procedures for expedited review and appeal should be established as in the Federal Bail Reform Act.

Measures should be taken to shorten the length of pretrial detention. These should include giving detained defendants priority in setting trial dates and imposing a statutory limit on the length of time an unconvicted person may be detained. Courts should be charged with the duty of overseeing the detention of persons, and the prosecutor should be required to make regular reports to the court listing all defendants in custody and the reasons why they cannot be released. Rule 46(h) of the Federal Rules of Criminal Procedure is a useful model for legislation to deal with this problem. Furthermore, as provided by section 4 of the Bail Reform Act and by the Model Penal Code,[16] persons detained prior to trial and thereafter sentenced should be given full credit for all time spent in custody prior to commencement of sentence.

In a very short time a growing recognition of the need for reform of the bail system has led to impressive progress. Although the foundations of bail reform are now firmly laid, much remains to be done. In many jurisdictions there has been no bail reform, and heavy reliance on money bail continues to be the rule. Even in those jurisdictions that have reformed their bail practices, including the Federal system, an excessive rate of pretrial detention frequently prevails. Thus in many places defendants who were formerly released on bail now are released on recognizance, while those formerly detained for want of bail continue to be detained. Improved factfinding procedures have been instituted in some jurisdictions, but old habits persist, and high money bail continues to be set primarily on the basis of the offense charged.

PREVENTIVE DETENTION

Although the steps described above have the potential for reducing many of the abuses of the present bail system, the problem of releasing the dangerous defendant still presents a major dilemma. The bail system recognizes ensuring appearance at trial as the only valid purpose for imposing bail, but society also has an important interest in securing protection from dangerous offenders who may commit crimes if released before trial. In practice the result has been that judges have frequently gone beyond the sole recognized purpose of bail and have set high money bail to prevent release of an arrested person where danger to the community rather than flight is the principal concern. As reliance upon money bail has been challenged by bail reform, pressures to face the problems posed by pretrial release of potentially dangerous persons have increased.

Concern that persons released pending trial may commit crimes while on bail is not unfounded. A study by the District of Columbia Crime Commission found that 7.5 percent of all persons released while awaiting trial on felony charges were arrested and held for grand jury action for other offenses allegedly committed prior to trial.[17] In several instances multiple arrests took place before the first trial was held.

---

[6] 2 Weekly Compilation of Presidential Documents 819, June 27, 1966.

[7] N.Y. Times, Apr. 4, 1963, p. 37, col. 5.

[8] NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REP. 22 (1965); ATT'Y GEN. REP. 74 (1963).

[9] Defender Ass'n of Philadelphia, Proposal for the Establishment of a Pre-Trial Release Court Service Program in Philadelphia (1964).

[10] Junior Bar Section of the District of Columbia Bar Ass'n, *The Bail System of the District of Columbia*, in D.C. BAIL PROJECT, BAIL REFORM IN THE NATION'S CAPITAL A—33 (1966) (appendix).

[11] See Rankin, *supra* note 2, at 645.

[12] *Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 44–45 (1964).

[13] Ares, Rankin & Sturz, *supra* note 2, at 84–86; Rankin, *supra* note 2; Note, *Compelling Appearance in Court—Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1051–52 (1954).

[14] Junior Bar Section of the District of Columbia Bar Ass'n, *supra* note 10, at A-44.

[15] FREED & WALD, *op. cit. supra* note 3 at 62.

[16] See MODEL PENAL CODE § 7.09(1) (Proposed Official Draft 1962).

[17] PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REP. 515 (1966).

But money bail is just as inadequate a measure against criminal conduct pending trial as it is against flight. Dangerous persons with sufficient funds to post bail or pay a bondsman go free; in fact, a Commission study indicated that some professional criminals appear to consider the cost of bail bonds a routine expense of doing business. The condition of the bond is that the accused will return for trial; it typically contains no other conditions, and the defendant can do as he pleases during the pretrial period without forfeiting the set amount. Moreover, the need to raise funds for a bond premium may have the unintended effect of leading the defendant to commit criminal acts.

There would be obvious advantages if a system could be devised which would enable the issue of a defendant's dangerousness to be confronted candidly by a judge. But a number of interrelated obstacles stand in the way of such a system.

First, methods and data for predicting dangerousness have not been adequately developed. Although the preventive detention decision in some respects resembles the choice that a sentencing judge must make in deciding whether a defendant is to be granted probation or imprisoned, the degree of confidence in the accuracy of the decision must be far greater because there has been no finding that the defendant has committed a criminal act. Furthermore, many have been concerned that in view of the present inability to define clearly the standards of dangerousness, a system of preventive detention might result in a substantial increase in the number of persons incarcerated while awaiting trial. A helpful beginning has been made in identifying factors relevant to the risk of flight before trial and to the likelihood of success on probation or parole. An initial inquiry would be the extent to which some of these factors, such as the defendant's history of law abiding behavior, and whether he has a legitimate means of livelihood and a stable home life, bear on the likelihood of his committing serious offenses while released.

A second major obstacle is that imprisonment of an individual based on a prediction of future crimes raises constitutional questions that have not been passed on by the Supreme Court. The eighth amendment to the Federal Constitution provides that excessive bail shall not be required. But despite this broad language, the right to bail has well recognized limitations. There is no right to bail in capital cases, an exception that originated at a time when capital punishment was available for most serious felonies. The denial of bail where there are threats to witnesses or other evidence of obstruction of justice has been judicially approved.[18] In addition constitutional rights to be released on bail are lost after conviction while appeal is pending. Under the Federal Bail Reform Act convicted persons may be detained if the judge finds that "no one or more conditions for pretrial release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." [19]

On the other hand, strong arguments have been made for a system of preventive detention in lieu of the present use of money bail. It has been pointed out that the difficulty of predicting future dangerousness would be no more of a problem than under the present system, where a judge detains persons he believes dangerous under the rubric of setting money bail to ensure their appearance at trial. In fact, the present invisibility of the issue of dangerousness, by preventing judicial review of specific cases, undoubtedly impedes the development of standards and data concerning dangerousness.

An intermediate position, short of a full system of preventive detention, would be to impose conditions on a person's release designed to reduce the likelihood of criminal acts pending trial. Such restrictions might include requirements that the accused obey curfews, that he spend nights or other specified hours in jail, that he report any travel to the police, that he forgo narcotics or alcohol, that he discontinue possession of weapons, or that he avoid certain hangouts or associates. Violation of conditions could result in the imposition of further restrictions or in the revocation of release, perhaps in the exercise of the court's contempt power.

While this approach may not be effective for a person who has committed himself to a life of crime, it offers great promise with respect to marginal offenders. And while such conditions are by no means immune from constitutional challenge, they are less likely to be struck down on due process or excessive bail grounds than an authorization to incarcerate on the basis of predicted dangerousness. The common law procedure by which potentially dangerous persons may be placed under bond to keep the peace provides one type of precedent in this area. Experience with supervised release has been limited, however, and in most communities there is no existing agency clearly charged with the responsibility of supervising persons released before trial. The potential for this method must be further explored.

Court rules for expedited trials also should be adopted. In one study over two-thirds of the offenses allegedly committed by released defendants occurred more than 30 days after release. Obviously an important step in reducing the danger of criminality by released defendants is to shorten the time between arrest and trial.

Experimentation with intermediate steps, such as those described above, would provide data on the extent to which they fall short of providing adequate public protection. Research into the extent and results of present judicial application of preventive detention through use of money bail may provide information on both the dangers and the benefits of legitimatizing preventive detention, as well as expose any abuses of the present system.

RELEASE BY THE POLICE: CITATIONS AND SUMMONSES

Traditionally criminal cases begin with an arrest which is followed by detention until a judge can decide on what amount of bail the accused may be released prior to trial. Increased attention recently has been given to alternative ways to begin criminal proceedings.

Arrest of a person removes him from home and family, damages his reputation, and limits his future employment opportunities. Arrest calls for the expenditure of police time in transporting the offender to the stationhouse and guarding him until his court appearance, and it diverts resources and manpower from more important tasks.

In some situations the needs of law enforcement permit no alternative to arrest: If the crime is serious, if there is danger of flight or of further criminal conduct, or if the offense is in progress when the police arrive, the need to arrest may be great. Further, the offense may be such that identification, booking, search and questioning, fingerprinting, and photographing may be required. Yet there are cases in which an arrest is not necessary. For example, if the crime involves property, traffic, or local code violations or if the events occurred days or weeks earlier and investigation has been largely completed, the need for arrest may be minimal.

Similar considerations govern the need for custody after arrest. If questioning and search have been completed or are not necessary, booking the suspect and ensuring his appearance at trial may be the only relevant concerns. The existence of stationhouse bail is a clear indication that prolonged police custody is not considered necessary in all cases.

Promising alternatives to routine arrest and detention have been developed by the Federal courts, several States, and the American Law Institute.[20] Alternatives to arrest generally take two forms: A judicial officer issues a summons upon complaint of the prosecutor, or a police officer issues an on-the-spot citation or notice to appear in court.

Use of a summons in lieu of an arrest warrant is authorized under the Federal Rules. The summons has been successfully used for several years in the U.S. District Court for the Northern District of California in both major and minor offenses. A Department of Justice survey indicates no substantial default problem in any of the 60 districts which use the summons or informal letters to bring to court those accused of misdemeanors or of violations of regulatory statutes.[21]

A number of jurisdictions also authorize the use of an on-the-spot citation by a police officer. This is common in connection with traffic offenses. Several jurisdictions also employ a street citation or mail summons in cases involving municipal code offenses.

The extensive use of citations for all misdemeanor offenses in Contra Costa, Calif., offers a more far-reaching model.[22] Unless an arrest is necessary to protect the community, the processes of the court, or the defendant, a misdemeanor suspect is released at the scene of the offense if he can identify himself. Thus a summons is the norm in petty theft, minor assault, and municipal ordinance cases. The arresting officer decides upon summons release and checks with headquarters through a computer-based Police Intelligence Network System. In less than a minute he knows whether the defendant is wanted for another crime. If he is not, the summons is issued immediately. When further identification such as photographing or fingerprinting is needed, the defendant is brought to the stationhouse and released from there if the investigation reveals no reason to hold him. As a result of using this procedure Richmond, Calif., has been able to dispense with cooking facilities in its pretrial detention jail since there are so few detainees.

In cases in which there has been an arrest, stationhouse release has been the most promising development in preventing unnecessary detention before trial. It was pioneered by the New York City Police Department in its experimental Manhattan Summons Project. Begun in 1964 with the assistance of the Vera Institute, this program inaugurated police release procedures in cases involving minor offenses such as simple assault, petty larceny, and malicious mischief. In May 1966 Police Commissioner Howard Leary announced extension of the program to all Manhattan precincts, a projected extension to all of New York City, and a contemplated broadening of the program to include major misdemeanors and some felonies. Related programs are under way in Sunnyvale, Calif., Philadelphia, and several other cities, including the District of Columbia.

Stationhouse release programs recognize that arrest is necessary in many cases; that identification, booking, search, questioning, fingerprinting, and photographing may also be required; but that continued detention thereafter should be avoided whenever possible. Once arrested and brought to the stationhouse the accused is interviewed, and his residence, employment, family ties, and other community roots are verified as in a bail program. If the interviewer finds the accused to be a good risk, a recommendation for release is made to the precinct officer, who decides whether to allow release from the stationhouse or to hold the accused for a judicial bail hearing. If released by the police the accused is given a summons directing him to appear in court at a later date.

This procedure avoids unnecessary custody with its attendant hardships for the accused. Police time also may be saved. Former New York Police Commissioner Murphy has estimated that 4,000 police man-hours were saved in one year in three experimental precincts alone by eliminating the need to guard and transport such defendants to their first court appearances.[23] Bail hearings are simplified, since the defendant's appearance usually indicates that money bail is not needed.

EARLY FACTFINDING AND DISCOVERY

THE NEED FOR EARLY FACTFINDING

Attention to procedures for finding facts in the criminal process has centered upon the trial itself, which is the ultimate procedure for presenting evidence concerning the guilt of the accused. In addition, there has been a rapid, although uneven, growth in the use of presentence investigations to provide additional information to the judge after trial. To the extent that such procedures as the preliminary hearing and formal pretrial discovery are available for earlier factfinding, they operate in a context that looks forward to trial. Yet disposition of cases by trial is the distinct exception in our system.

Little attention has been given to procedures for

[18] *Carbo* v. *United States*, 288 F.2d 686 (9th Cir.), *cert. denied*, 365 U.S. 861 (1961), *application for bail denied*, 7 L. Ed. 2d 769 (Douglas, Circuit Justice), *application for review by full Court denied*, 369 U.S. 868 (1962).

[19] 18 U.S.C.A. § 3148 (Supp. 1966).

[20] ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.04 (Tent. Draft No. 1, 1966).

[21] Wald, Report to the National Bail Conference on the Use of Summons by U.S. Attorneys 5-6 (1964) (unpublished).

[22] See *Institute on the Operation of Pretrial Release Projects*, in BAIL AND SUMMONS: 1965, at 146-50 (1966).

[23] See *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 2d Sess., ser. 13, at 89 (1966).

gathering the facts needed for the many decisions which must be made earlier in the process, decisions as to whether to press criminal charges, whether to go to trial, and what the disposition should be if the case does not go to trial. There is a pressing need to develop new factfinding procedures and to make better use of the ones that now exist in order to ensure that such important decisions are based on fuller exploration of the facts of the case.

The prompt identification of those cases which should go to trial enables prosecutors and counsel to concentrate greater attention on pretrial preparation, and it encourages early disposition in the remaining majority of cases. It facilitates the scheduling of cases and substantially reduces the burden on jurors and witnesses. And for the defendant early disposition minimizes the deleterious impact of the period between arrest and disposition.

In addition to providing the information needed for these decisions, early factfinding procedures aid in obtaining much information needed at later stages of the criminal process, both for cases that ultimately go to trial and those that do not. After the charge is filed, the judge must consider motions addressed to the indictment, requests for particulars, severances of counts or defendants, changes of venue, and the like, many of which turn on an appreciation of the facts underlying the formal charge. Such facts as the defendant's employment record and his roots in the community are relevant to such different questions as whether he should be released on recognizance, whether probation should be granted, and if so what type of probation supervision is required. Substantial economies could result if these facts were obtained at an early stage and recorded for use at subsequent steps in the process. The recorded statement of a witness may be submitted to the court as part of the evidentiary basis for a guilty plea, it may be stipulated as the testimony of the witness if a noncriminal disposition is employed, it may be introduced at trial if the witness becomes unavailable, or it may be used for cross-examination. Early factfinding is not only more efficient, but it also improves the certainty of dispositions. It occurs when memories are fresh and detailed recollection more reliable.

EARLY FACTFINDING PROCEDURES

In recent years the subject of discovery procedures in criminal cases has been extensively discussed in legal journals, and it has been carefully considered by several courts, particularly in California. Discovery is currently the subject of a study by the American Bar Association Minimum Standards Project, and the recent amendments to the Federal Rules of Criminal Procedure contain a substantial revision of discovery rules. The discussion here does not develop a single, detailed scheme of factfinding procedures to be recommended to all jurisdictions. Rather, the aim is to establish certain basic principles of early factfinding, to identify those points in the criminal process at which it is necessary, and to suggest some of the more significant methods and opportunities for the gathering and sharing of information in the early stages of the process.

This section considers ways to encourage and enforce the sharing of information possessed by one of the parties, to obtain information not previously possessed by either of the parties, and to facilitate the preservation of facts developed at one stage of the process for later use. The aim should be to serve, to the extent possible, all three of these functions in a way that is relatively unburdensome in time and expense. Early factfinding is dependent upon and should be designed to encourage meaningful participation by counsel.

The Bail Decision. Gathering information relating to the defendant's ties to the community, job record, family situation, and personal stability at this stage in the criminal process improves the quality of bail decisions, and a record of this information also provides the prosecutor and defense counsel with a factual basis for prompt consideration of the range of possible dispositions. Such a record can also save considerable work for the probation officer conducting a presentence investigation.

Bail projects typically use a printed form to assist in collecting the information used in determining the arrested person's eligibility for pretrial release. These forms should contain as broad a range of relevant information about the defendant as can be quickly gathered. Copies of the completed forms should be made available to the prosecutor and defense counsel for their use. Of course, any statements about the offense made by a defendant should be excluded from this form, and in order to maintain the effectiveness of bail projects, defendants must be assured that any information they provide will not be used against them at trial.

Early Disclosure of Police Reports and Witness Statements. In chapter 7 it is recommended that a written statement of the facts of the case be prepared by the arresting officer so that the court may promptly determine whether there is cause to hold the accused without requiring the officer's appearance.[24] This brief statement, prepared for submission to the court at initial appearance, should be furnished to defense counsel to enable him to determine whether to challenge the arrest and to provide him with preliminary factual information about the case.

After the defendant's initial appearance, his counsel should begin immediately to consider whether he will press for a noncriminal disposition, seek to negotiate a plea, or litigate the question of guilt. If he is considering the last course, he must also decide whether to ask for a preliminary hearing. To make these decisions wisely counsel must first learn something about the strength of the prosecution's case and the nature of its proof. The simplest method would be for the prosecutor to furnish him with copies of the police report on the case and of statements by prosecution witnesses.

The proper scope and extent of discovery of police reports and witness statements is a matter of heated controversy, and the defendant's right of discovery will be considered later in this section. This discussion deals not with mandatory disclosure, but rather argues in favor of prosecutors exercising their discretion informally to reveal this information to defense counsel. It would not be desirable to require prosecutors to disclose this information in every case. Certain cases will fairly clearly be

[24] See p. 91, *infra*.

headed for trial, and in those involving professional or organized crime, national security, or particularly dangerous offenders, the scope of discovery should be left to litigation. But for cases not raising these problems prosecutors should make disclosure a regular part of the process at this early point. Such disclosure, when made on an informal basis, appears to operate satisfactorily because it serves not only the interest of fairness to the defendant but also the prosecutor's interest in the prompt disposition of cases.

It should be emphasized that most of the traditional arguments against discovery of the prosecutor's file are irrelevant in those cases that do not go to trial. Proof in most criminal cases tends to fall into a limited number of categories: eyewitness identification, accomplice testimony, possession of contraband or the fruits of crime, incriminating statements, or physical evidence. While it is impossible to predict with certainty immediately after the arrest which cases will go to trial and which will not, an experienced prosecutor should be able to make fairly accurate judgments after examining his case file. And since the key items of evidence clearly are sufficient basis for a finding of probable cause in most cases, defense counsel who has seen the police report or statements of key witnesses may often waive the preliminary hearing.

On the basis of bail information and the prosecutor's file, counsel can rationally decide whether to undertake a broader social investigation with a view toward proposing a noncriminal disposition or negotiating a guilty plea. Various means of gathering additional information at this stage, such as making the court's probation service available to the parties or developing a new community agency to provide such a service, are discussed in chapter 1.

The Preliminary Hearing. In most jurisdictions in the United States the preliminary hearing is not a useful factfinding device.[25] The prosecution rarely introduces more evidence than the minimum required to show probable cause and generally may meet its burden with hearsay testimony. In many places testimony at the hearing is not recorded or otherwise perpetuated. In some jurisdictions the defense does not have the right to subpoena witnesses, and quite often counsel is not appointed for the accused until the time for the preliminary hearing has passed.

One major reason for these deficiencies is the fact that the preliminary hearing is designed to serve a function that is relevant to a small minority of cases, that is, to test whether there is cause to hold an accused person for trial. Yet this standard is clearly met in almost all contested cases. An overburdened system will not hold a large number of carefully conducted and deliberative hearings when they are meaningful in only a small percentage of the cases.

By deciding at an early stage which cases are likely to proceed to trial and which are not, defense counsel can identify cases in which the preliminary hearing is a useful procedure. This should limit the number of hearings, thereby allowing the system to devote the necessary time to them. The rules governing preliminary hearings should be changed, where necessary, to make the hearing more useful by the perpetuation of testimony, fuller examination of witnesses, and the participation of defense counsel.

Depositions. Another device for discovering and recording evidence which has received limited use in criminal cases is the deposition. In civil cases depositions and other forms of pretrial examination of witnesses have been increasingly and successfully used. A criminal defendant in almost all jurisdictions may take the deposition of a witness who may be unavailable to testify at trial,[26] and the prosecution has the same right in about half the States. But depositions for broader discovery purposes in criminal cases are available only in three States.[27]

It is undesirable to confine the use of depositions only to the preservation of testimony of witnesses who may be unavailable at trial. Depositions may be used to find facts as well as to preserve testimony. A deposition could resolve a factual dispute during the negotiating stage, and it could provide the basis for a stipulation of witnesses' testimony at trial. In cases where it is not necessary to conduct a full preliminary hearing before a judge, depositions may be submitted to the court for determination of probable cause.[28] Finally, the depositions of certain witnesses may be made a part of the record in order to demonstrate in court the basis for a negotiated guilty plea.

Depositions would be valuable in preserving the testimony of witnesses even when a trial is not immediately contemplated. When a consent decree is permitted, for example, the prosecutor might need a means of preserving his case against a defendant in the event that he violates the conditions agreed upon. In such cases key witnesses might be deposed and their testimony filed as part of the decree, with an agreement that the depositions may be used as testimony if trial becomes necessary.

With the exception of a few jurisdictions neither the prosecutor nor defense counsel has legal power to compel the appearance of witnesses for pretrial examination after indictment. Defense counsel often encounter difficulties in getting potential witnesses to discuss a case with them. The prosecutor's official status is such that most witnesses will cooperate with him while he is investigating the case, although in some places subpoenas and the grand jury process are used for these purposes without legal authority.

The flexibility and utility of the deposition make it an extremely valuable factfinding procedure in the criminal process. Jurisdictions should amend their statutes or rules to permit the taking of a deposition whenever the prosecutor and defense counsel agree, and a compulsory process should be made available for this purpose. Even when they cannot agree, it would be desirable to allow prosecutors and defense counsel, with the permission of the court, to take depositions.

DISCOVERY UNDER JUDICIAL SUPERVISION

In order for an adversary trial to promote accurate factfinding, each party must have an opportunity to test the evidence submitted by the other side. Advance knowledge of the evidence to be used is essential to pre-

[25] See Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164 (1965). Compare DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 81–135 (1958).
[26] See, e.g., FED. R. CRIM. P. 15.
[27] See Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376 (1957); Note, *Criminal Procedure: Depositions and Change of Venue*, 36 TEMP. L.Q. 326 (1963).
[28] The Government in Great Britain has recently proposed use of depositions in lieu of preliminary hearings. This proposal is designed to reduce the burden of holding two judicial hearings in a case, as well as to avoid undesired pretrial publicity. N.Y. Times, Sept. 13, 1966, p. 16, col. 8.

pare for the cross-examination of a witness or to gather evidence to refute testimony. Discovery is also important in cases that are disposed of without trial. The negotiated guilty plea, for example, should reflect a competent judgment by both parties on the outcome of a trial of the case. When discovery is not available, the parties negotiate in ignorance.

One major factor inhibiting fuller discovery in criminal cases is that the criminal defendant, unlike the civil defendant, cannot constitutionally be compelled to testify or produce proof. Thus criminal discovery is sometimes seen as a unilateral benefit to the defendant at the expense of the prosecution. In part this difficulty may be met by expanded discovery by the prosecution within constitutional bounds, along the lines suggested by recent amendments to the Federal Rules of Criminal Procedure and by court decisions in some States. Undoubtedly the problem of mutuality and other unique features of the criminal process make it unlikely that the broad mandatory discovery found in civil cases will soon be common in criminal cases. But there is a clear need to expand the exchange of information between the parties before trial within the special limitations of criminal prosecutions.

The extent to which a defendant has a right of discovery of the prosecution's evidence varies throughout the country, both with respect to the information which is discoverable and the procedures which are available.[29] In California, where discovery rules have developed as a result of appellate decisions, the broadest discovery for defendants is recognized. There a defendant has a right to copies of his own statements, to copies of witnesses' statements, to the results of any scientific tests, to the names of witnesses, and to a transcript of any grand jury proceeding if the trial judge believes that they are necessary for a fair trial.

In most other States and in the Federal system the defendant's right of discovery is defined by statute or court rule and is somewhat more limited. Under the Federal Rules of Criminal Procedure, for example, a defendant is entitled to inspect his own statement, his testimony before a grand jury, medical and scientific reports, tangible evidence in the control of the government, and reports of expert witnesses for the prosecution.[30] The statements of other witnesses are immune from pretrial discovery under a special Federal statute.

In many States the defendant's right of discovery is given little recognition either by court rule or appellate decision, and the defendant must rely upon informal disclosure by the prosecutor. Practices vary even among prosecutors in the same office, but informal disclosure is generally reserved for those defense counsel who have a reputation for integrity. There is also evidence that informal disclosure is more extensive in jurisdictions in which defendants have broader formal discovery rights.

Although maximum discovery is the ideal,[31] there are circumstances in which discovery by the defendant should be withheld. Thus limitations on discovery of witnesses' names or statements are justified when a reasonable likelihood of intimidation exists. In prosecutions against the members of a large criminal syndicate or against violent offenders, government witnesses have been intimidated or even killed in order to prevent their testifying at trial. Limitations on discovery also are justified to protect the national security or to maintain a continuing investigation.

The court should, therefore, be given discretion to refuse discovery to a defendant. In the Federal system, for example, the court may order that discovery be denied, restricted, or deferred upon a sufficient showing by the prosecutor. And the court may issue a protective order on the basis of an in camera memorandum by the Government.[32]

The importance of maintaining an adversary system that is capable of revealing the facts also argues in favor of permitting discovery of the defendant's case by the prosecution. Concepts of self-incrimination prevent the prosecution from coercing the defendant into furnishing information which may weaken his defense or strengthen the prosecution's case. But statutes and court orders directing defendants to disclose in advance of trial whether they will tender certain defenses, particularly insanity or alibi claims, what witnesses they will call, and what physical evidence they will introduce have been held by the appellate courts not to violate the privilege against compulsory self-incrimination. Recent judicial decisions in California have granted prosecutors discovery of reports of defendants' expert witnesses and other documents and have required advance notice of alibi defenses.[33] And under amended Rule 16, Federal courts may condition discovery by the defendant of physical evidence, scientific reports, and other documents in the custody of the prosecution upon the defendant's making available to the prosecution similar evidence which he intends to introduce at trial.

The timing of discovery also merits attention. When statements of witnesses have been withheld from the defense before trial, there remains little reason to continue to withhold such statements once the witness has testified. At this stage the danger of evidence being manufactured to meet the line of testimony and the danger of witness intimidation are not increased by discovery, while the defendant's need for such statements to facilitate cross-examination is great. In the Federal courts there is a statute which provides that prior statements of a witness be made available to the defendant as a matter of right after the witness has testified.[34] Many States, however, continue to require that defense counsel make a special showing of need or that the judge review the statements to determine whether they can be of use to the defense before granting discovery. The former practice places upon counsel the almost impossible burden of establishing the usefulness of a document he has never seen; the latter requires the judge, whose knowledge of the case is limited to what he has heard in the courtroom, to make a judgment as to the significance of the statements to the defendant's case, a judgment which defense counsel alone is competent to make. Therefore, to the extent that a witness' statements relating to his testimony have not been made available to the defense prior to the witness' appearance in court, they should be made available as of right prior to cross-examination.

[29] See, e.g., *Symposium—Discovery in Federal Criminal Cases*, 33 F.R.D. 56 (1963).
[30] FED. R. CRIM. P. 16.
[31] See Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).
[32] See FED. R. CRIM. P. 16.
[33] See, e.g., *Jones v. Superior Ct.*, 58 Cal. 2d 56, 372 P.2d 919 (1962).
[34] 18 U.S.C. § 3500 (1958). Under the Supreme Court's recent decision in *Dennis v. United States*, 384 U.S. 855 (1966), a similar procedure applies to a witness' testimony before the grand jury.

HABEAS CORPUS AND FINALITY

In the last 10 years there has been a striking growth in the number of petitions filed by prisoners seeking release by writs of habeas corpus or statutory remedies of similar scope. In the 1940's the number of petitions by State and Federal prisoners filed in the Federal courts annually numbered in the hundreds. In 1962 the number had risen to 1,523. By 1965 it had climbed to 5,786. The consequences have been a source of great concern in the administration of criminal justice. Complaints from judges and prosecutors about the burdens imposed by the vast increase in the number of petitions, many of which are without substance; public dismay about cases where prisoners are released and then retried long after their original conviction; and the friction developing between State and Federal courts—all have stimulated critical reevaluation of the administration of postconviction remedies.

As a result there have been extensive studies in the past few years by the National Conference of Commissioners on Uniform State Laws and a committee of the ABA Project on Minimum Standards for Criminal Justice, which has recently published a tentative draft of its report. Their recommendations for procedural simplification of the remedy, substantial improvement in State postconviction systems, increased availability of counsel in habeas corpus cases, and expeditious decisions on the merits of a petition underlie the discussion in this section.

The function and scope given the writ of habeas corpus is the result of a balance between our desire to assure a sense of finality in criminal judgments and our concern for the fairness of the criminal process. Finality of judgment, a feeling that a case is over and decided, is an important value both for the defendant and for society. In all jurisdictions the desire for finality yields initially to the right of a defendant to appeal his conviction. A defendant convicted in a State court may have the record of his trial reviewed for error by at least one appellate court, normally the highest court of the State. When he has exhausted his State appeals, he may petition the Supreme Court for review of claimed violations of Federal rights in the process leading to his conviction. The appeal process in the Federal system is similar: first to a court of appeals and then to the Supreme Court, usually on petition for certiorari. When these direct appeals are exhausted or when the time for taking an appeal has passed, the defendant who has not obtained a reversal of his conviction and a new trial must begin to serve his sentence.

For the defendant who is sentenced to prison, it is then that the process of seeking release through habeas corpus may begin. Despite a longing for certainty and for a point in time when the defendant and the public may be told that a particular case is finished, a remedy must be available for those who can demonstrate that they are unjustly held. That is the function of the writ of habeas corpus ad subjiciendum. Habeas corpus has had a long and illustrious history stretching back through colonial and English law; it has been the traditional recourse of the famous and the obscure, confronted by the power of government. "Its root principle," as the Supreme Court has noted: "is that in civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." [35]

On the other hand, once an offender begins to serve his prison sentence, the interests of finality are strongest. The relitigation of claims that were raised and rejected at trial or on appeal involves a duplication of judicial effort and creates uncertainty among judges as to whether their rulings may be overturned at any time. Raising claims for the first time on habeas corpus involves delayed and hence less reliable determinations of facts, with respect both to the habeas corpus claim itself and to the issue of guilt in those cases in which the petitioner must be retried. In some cases retrial takes place so long after the original conviction that the prosecution's witnesses are unavailable or its evidence has been destroyed. For these reasons, only claims of the deprivation of fundamental rights in the trial process may be raised on habeas corpus. Once a defendant has been given the opportunity to test his conviction on appeal, he is not entitled to retry the issue of guilt on each day of his confinement. It would be intolerable, however, for a man in prison or under sentence of death to have no method of pressing a claim that his conviction did not conform to standards of fundamental fairness.

In part the tremendous increase in the number of habeas corpus petitions has occurred because there has been a substantial increase in the kinds of claims which may be raised. Formerly the writ could be issued only if the trial court had no jurisdiction, in a narrow technical sense, over the defendant or the offense. But during the last two decades the grounds for habeas corpus have been expanded by State and Federal courts to include situations where the petitioner was deprived of his constitutional rights in the process leading to his conviction.

It follows that, as constitutional protections for criminal defendants are given broader interpretation by the courts, new grounds for collateral relief become available. The primary source of the flood of habeas petitions has been the expansion in the meaning of "due process" and "equal protection" in criminal procedure. In the last two decades the courts, particularly the Supreme Court, have given vastly broader interpretations to the constitutional rules regarding the admissibility of confessions and seized evidence, the right to counsel, and a number of other critical areas. At the same time the Supreme Court has held that a number of the specific guarantees of the Bill of Rights apply to State criminal proceedings through the due process clause of the 14th amendment. This has resulted not only in an increase in the habeas corpus grounds available to prisoners but also in the release and retrial of a number of prisoners whose convictions did not conform to newly announced constitutional standards.

In addition to the extension of Federal constitutional standards to State trials, an increase in the number of peti-

[35] *Fay v. Noia*, 372 U.S. 391, 402 (1963).

tions for Federal habeas corpus by State prisoners has resulted from a reinterpretation of the statute requiring a State prisoner to exhaust State remedies before he can obtain relief in the Federal courts. For some time the Federal courts had held that a prisoner who failed to present his Federal constitutional claim to the State appellate courts was barred from raising that claim on Federal habeas corpus, although a State appeal was then no longer available to him. But in *Fay* v. *Noia*,[36] decided in 1963, the Supreme Court held that a State prisoner need only pursue State remedies that are available to him at the time he files his petition for Federal habeas corpus. This holding permits a prisoner to raise questions for the first time in a Federal habeas corpus petition after the time has expired for him to seek State remedies.

These developments have caused a good deal of concern. There is a fear that some defendants and their lawyers will delay the assertion of claims until the government is no longer able to obtain a conviction if retrial is necessary. And when the constitutional standards are unclear, as is presently the case, prisoners will urge unjustifiably broad interpretations, and most petitions will be without merit. The complexities of the present state of the law often confound sophisticated constitutional and criminal lawyers. For the optimistic but often uneducated prisoner poring through recent decisions, it no doubt seems that it is only a matter of time until a writ of habeas corpus grants him freedom.

All the problems that exist when there is the possibility that a conviction is not absolutely final are multiplied in this country, because the Federal courts have jurisdiction to order the release of State prisoners. Even when the prisoner seeks habeas corpus from a court in the same jurisdiction that tried him, there is an extraordinary number of complications. When a State prisoner seeks relief in the Federal courts, all the difficulties converge. Not only is one judge reviewing the findings of another, but a single Federal district court judge may release a prisoner whose conviction was affirmed with care and consideration by the full supreme court of a State.

Because of the vast increase in habeas corpus petitions there have been a number of proposals to modify the habeas corpus jurisdiction of the Federal courts and to narrow the grounds available to prisoners seeking collateral relief. In 1966 Congress amended the statutes governing applications for Federal habeas corpus by State prisoners in order to reduce the friction between Federal and State courts and to reduce the burden on Federal district judges in reviewing successive petitions.[37] The legislation provides that a prior determination of a factual issue by a State judge in a habeas corpus hearing shall be presumed to be correct in any subsequent Federal habeas corpus proceeding if the prisoner was given a full and fair hearing in the State court and if the State judge's finding is fairly supported by the record. The new statute also provides that a Federal judge need not entertain a subsequent petition from a State prisoner based on a claim already fully heard and decided against the prisoner in an earlier Federal application.

There is some evidence that the system itself is beginning to cope with some of the problems in the administration of the writ. In the last two years the Supreme Court has limited the principle of retroactivity in those cases in which habeas corpus petitions might have been most numerous. The decisions in *Mapp* v. *Ohio*, which prohibited the use of illegally seized evidence in State trials, and in *Escobedo* v. *Illinois* and *Miranda* v. *Arizona*, which imposed new standards on the admissibility of confessions, were held not to be retroactive.[38] It is too soon to determine whether there will be an actual decrease in petitions as prisoners learn that certain recent constitutional doctrines cannot be employed as grounds for release.

The best means of avoiding great numbers of habeas corpus petitions is the improvement of trials. This means ensuring not only that constitutional rights are fully protected but also that the fact of the protection appears in the record. When a defendant pleads guilty, the judge should carefully inquire into the voluntariness of the plea and the availability of counsel. He should inform the defendant of the consequences of his decision. Constitutional defenses not raised by defense counsel should be raised by the judge. For example, at an early stage of the case the judge should ascertain by inquiry that the defendant is aware of his constitutional right to make a motion to suppress evidence obtained as a result of an illegal search or in violation of the rules relating to confessions. Failure to make such a motion after receiving this advice could provide a basis in the record for a later finding of waiver in the event that the defendant collaterally attacks his conviction on these grounds.

A second important need is for the improvement of State procedures for dealing with postconviction claims, especially where Federal constitutional issues are raised. Much criticism of the habeas corpus system is based on the feeling that Federal courts are involving themselves too intimately in State criminal processes. But when the Federal district court entertains a habeas corpus petition and orders release, it is often because there was no way in which the petitioner could get relief in his own State. As Mr. Justice Brennan recently explained,

> None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure.[39]

The answer, as many commentators have stressed, is a dramatic improvement in State postconviction procedures. Mr. Justice Clark recently said:

> Believing that the practical answer to the problem is the enactment by the several States of post-conviction remedy statutes, I applaud the action of Nebraska. This will enable prisoners to "air out" their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts. This has proven true in Illinois where it is reported that federal applications from state prisoners dropped considerably after its [post-conviction] Act was adopted.[40]

Far fewer than half the States now have satisfactory postconviction procedures. The Uniform Post-Conviction Procedure Act, which many consider a model, has been adopted in only seven States (an eighth repealed it two years after passage). This Act was recently amended to reflect changes in Federal law and to coordinate its approach more closely with the ABA Minimum Standards Project. Six other States have developed post-conviction remedies through rules of court rather than through legislation. Most of the remainder rely on a jerrybuilt system of common law remedies which fall far short of the protection available in Federal courts. It is no surprise, then, that so many attempts to assert constitutional rights fall into the Federal courts.

Mr. Justice Brennan has described in some detail the characteristics of an adequate State postconviction procedure:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of Fay *v.* Noia . . . it should eschew rigid and technical doctrines of forfeiture, waiver, or default . . . It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings . . . It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts.[41]

A third major need is improving the quality of habeas corpus petitions or, in the alternative, providing methods for judges to screen quickly the meritorious from the frivolous. Most habeas corpus petitions are almost wholly without merit, and reading and reviewing them imposes on judges an unjustified burden. Here again the system itself is producing some solutions. For example, Judge James M. Carter of the Southern District of California has begun to use pretrial inquiries which clarify and test a petitioner's allegations before a formal hearing is held. The judges in the Northern District of Illinois have designed a tabular form for the use of prisoners which permits the judge to determine with some celerity exactly what grounds the petitioner is pressing and whether the complaint has any merit.

Another solution lies in improving the quality of petitions by providing counsel to prisoners seeking release. Adequate legal advice can be of service to the public as well as to the individual. Making lawyers available to prisoners who want to petition for habeas corpus should curtail many worthless petitions and may also unearth worthy claims which are not now presented because of the inmate's ignorance. Programs in Kansas, Wyoming, and Pennsylvania provide this assistance to prisoners through law professors and students.[42]

Trial judges hearing postconviction petitions should be encouraged to reach and dispose of a case on the merits rather than to postpone consideration on the grounds of procedural technicalities. Their decisions should include clearly articulated findings of fact and rulings of law so that subsequent judges will know which issues were heard and decided, and thus can more easily determine whether a new petition is frivolous or raises a new and meritorious issue.

APPEALS BY THE PROSECUTION

In all jurisdictions in this country the right of the prosecution to appeal in criminal cases is more limited than the comparable right afforded the accused. This limitation results primarily from the double jeopardy clauses contained in the Federal Constitution and in the constitutions of 45 States.[43] Double jeopardy prevents the retrial of the defendant for the same offense after he has once been acquitted. The right to appeal from a trial ruling made after jeopardy has attached, therefore, is of little value to the prosecution.[44]

Double jeopardy, however, does not preclude appeals by the government from all rulings in criminal cases. Under the Federal constitutional provision and provisions in most States jeopardy attaches when the jury is impaneled and sworn or when the court in a nonjury trial begins to hear evidence.[45] Thus in the Federal system and in the majority of States, statutes allow the prosecution to take an appeal from pretrial rulings dismissing the indictment or information or sustaining a plea in bar to the prosecution. If the government is successful on appeal, it may continue the prosecution.[46]

The recent growth of constitutional law in the areas of search and seizure and confessions, including extension of the exclusionary rules to govern State criminal prosecutions, has increased the number of situations in which prosecutions may be stymied by a pretrial order suppressing seized evidence or a statement by the accused. In many cases the prosecution cannot proceed to trial without the suppressed evidence. And even where it has other evidence for trial, the chances of obtaining a conviction may be severely weakened by the suppression order. Although appeals by the prosecution from pretrial suppression orders are constitutionally permissible, this right is available in only a few States, and in the Federal courts the right to appeal is limited to narcotics cases.[47]

The importance of permitting the government to appeal from pretrial suppression orders is most evident in prosecutions involving professional criminal enterprises. Successful prosecutions in these cases often depend upon whether seized evidence, such as gambling equipment or stolen property, can be introduced at trial. If a pretrial order suppressing such evidence is not appealable, an erroneous decision by a trial judge may result in the inability of the prosecution to obtain a conviction in a case where law enforcement interests are particularly strong and in the waste of months or years of extensive investigation.

But the importance of allowing the government to appeal goes beyond the significance of any particular pros-

[36] 372 U.S. 391 (1963).
[37] PUB. L. NO. 711, 89th Cong., 2d Sess. (Nov. 2, 1966).
[38] *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).
[39] *Case* v. *Nebraska*, 381 U.S. 336, 346-47 (1965) (Brennan, J., concurring).
[40] *Id.* at 340-41 (Clark, J., concurring).
[41] *Id.* at 345-47 (Brennan, J. concurring).
[42] See p. 62 *infra*.
[43] See generally MORELAND, MODERN CRIMINAL PROCEDURE 278-82 (1959); Note, *Double Jeopardy—The Reprosecution Problem*, 77 HARV. L. REV. 1272 (1964).
[44] In about 13 States the prosecution has the right to appeal from trial rulings in cases where the defendant is acquitted, but the appellate court does not have the power to reverse the judgment below. See, *e.g.*, OHIO REV. CODE ANN. §§ 2945.68-.70 (Page 1964). The rationale for providing this type of appellate review is that it enables the prosecution to have erroneous rulings corrected so that they do not affect future trials. However, it appears that this right is exercised infrequently by prosecutors, and the lack of truly adversary proceedings on this type of moot appeal may produce ill-considered decisions by appellate courts.
[45] See *Downum* v. *United States*, 372 U.S. 734 (1963); *McCarthy* v. *Zerbst*, 85 F. 2d 640 (10th Cir. 1936).
[46] See, *e.g.*, 18 U.S.C. § 3731 (1964); Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 STAN. L. REV. 71 (1959); Kronenberg, *Right of a State to Appeal in Criminal Cases*, 49 J. CRIM. L., C. & P.S. 473 (1959).
[47] See 18 U.S.C. § 1404 (1964); Kronenberg, *supra* note 46, at 476-79; Note, 32 TENN. L. REV. 449 (1965).

ecution. The rules on search and seizure and confessions are today characterized by a high degree of uncertainty. If lower court rulings restricting police conduct cannot be appealed and if inconsistent lower court decisions can be resolved only on an appeal by a defendant, it is most difficult to formulate law enforcement policies.[48] Although it may be argued that erroneous rulings by trial courts will eventually lose their effect as appellate courts consider search and seizure and confessions questions raised by defendants, this is an unsatisfactory remedy. When the prosecution is not permitted to appeal, law enforcement officials faced with a restrictive ruling which they feel is erroneous have two choices: They may follow the lower court decision and abandon the practice, in which case an authoritative decision by an appellate court may never be obtained, or they may continue the practice, hoping that in a future case a trial court will sustain it and that the defendant will appeal. The first course results in the abandonment of what may be a legitimate police practice solely because of the lack of any vehicle for testing it in the appellate courts. The second course puts the police in the undesirable position of deciding which lower court decisions they will accept and which they will not.

Where the prosecution is permitted to appeal, on the other hand, the soundness of a restrictive pretrial suppression ruling may be settled promptly. All jurisdictions should enact statutes permitting the prosecution to appeal pretrial orders suppressing statements or seized evidence; granting the prosecution a more general right to appeal from adverse pretrial rulings on pleadings and motions also merits careful consideration. It is particularly desirable that the prosecution be given a broad right to appeal from pretrial suppression orders in the Federal courts, because of the importance of Federal prosecutions against organized crime and because of recent Supreme Court decisions indicating that the conduct of State law enforcement officers must be governed by Federal standards in these areas.

Where the prosecution is permitted to appeal from pretrial orders, rules should be established to protect the defendant's interest in obtaining a speedy trial. In the Federal system, for example, the statute provides that an appeal from a pretrial suppression order must be taken within 30 days and must be "diligently prosecuted." [49] Moreover, government appeals should not be taken routinely from every adverse pretrial ruling. They should be reserved for cases in which there is a substantial law enforcement interest. Control over the type of cases appealed may be exercised in several ways. In the Federal system the Solicitor General's office must approve any appeals by U.S. Attorneys or Department of Justice prosecutors. In the States an appeal might be conditioned on approval by the State attorney general.

THE NEWS MEDIA AND THE ADMINISTRATION OF JUSTICE

The widespread concern over newspaper, television, and radio reporting of criminal cases is justified. Proper functioning of the police, prosecutors, and courts depends heavily on public knowledge and review of their activities, and it is important that these activities be fully and candidly reported. At the same time the judicial process and particularly the jury system can operate fairly only if the triers of fact are not prejudiced by inaccurate or inadmissible information gained through exposure to publicity before or during trial.

The essence of a fair trial is that the conclusions reached in a case will be based only on evidence and argument presented in open court, not on extrajudicial reports or outside pressures. Two recent cases decided by the Supreme Court illustrate the adverse effect of news coverage before and during trial on the fairness of the proceedings. In *Sheppard* v. *Maxwell*,[50] the accused was tried for the murder of his wife in an atmosphere in which

> murder and mystery, society, sex and suspense were combined . . . in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life.[51]

In *Estes* v. *Texas*,[52] the presence of television and still cameras during pretrial hearings and the trial itself was found to have destroyed the "judicial serenity and calm" which should characterize a criminal trial. The Supreme Court set aside the convictions in both cases because the defendants had been denied their constitutional right to a fair trial, and it recommended that the lower courts take effective measures to insulate their proceedings from prejudicial interference.

COURT CONTROL OVER JUDICIAL PROCEEDINGS

The unmistakable teaching of *Sheppard* and *Estes* is that the courts must make full use of existing techniques to protect the defendant's right to a fair trail. If there is a reasonable likelihood that prejudicial news coverage will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another district not permeated with publicity. The court should adopt effective rules governing the use of the courtroom by newsmen and cameramen to assure a fair trial without interfering with legitimate, nondisruptive newsgathering. Juries should be carefully instructed to disregard any information not introduced at trial, and if potentially prejudicial reporting continues during the trial, the jury should be sequestered.

These measures may in some cases alleviate the prejudicial effects of improper public statements or comment, but continuances, changes of venue, and sequestration of jurors entail substantial costs and inconveniences for the State, jurors, and the defendant himself. In some instances they may require the defendant to give up his constitutional rights to a speedy, public, and local trial. As the Supreme Court noted in *Sheppard*, "the cure lies

[48] See Friedenthal, *supra* note 46, at 96.
[49] 18 U.S.C. § 1404 (1964).
[50] 384 U.S. 333 (1966).
[51] *State* v. *Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956).
[52] 381 U.S. 532 (1965).

in those remedial measures that will prevent the prejudice at its inception." [53]

STATEMENTS BY POLICE, PROSECUTORS, AND DEFENSE COUNSEL

Recent studies have revealed that prejudicial reporting of misleading, inaccurate, or inadmissible information is often the result of extrajudicial public statements made by law enforcement officials, prosecutors, or defense counsel. In order to stem the flow of this type of information, some police departments and bar associations, as well as the Department of Justice, have promulgated rules or adopted guidelines to control the dissemination of statements about a pending case to the news media prior to trial. The Department of Justice statement of policy [54] specifies types of information that properly may be disclosed, including the defendant's personal status, the substance of the charge, the agency conducting the investigation, and the circumstances immediately surrounding the arrest. The policy goes on to indicate some kinds of information that officers should refrain from making available, including observations about a defendant's character; confessions, admissions, or alibis of defendants; references to investigative procedures such as fingerprints, polygraphs, or laboratory tests; and statements concerning the testimony of prospective witnesses or other trial evidence. Department of Justice personnel are not to encourage or assist news media in photographing or televising accused persons in custody. The New York City Police Department has indicated that in certain cases its officers should not disclose any information except the name and address of a suspect and the fact that he has been arrested. No information will be provided about the suspect's race, his prior record, the circumstances of his apprehension, or the existence of a confession. Bar associations in Massachusetts, Colorado, and other States have adopted similar guides, sometimes in conjunction with representatives of the media.

On the basis of a study of reported decisions, a content analysis of newspapers in 23 metropolitan centers, and other research, the American Bar Association's Advisory Committee on Fair Trial and Free Press also concluded that there have been a substantial number of cases in which serious problems of potential prejudice were caused by the content and timing of public statements by the officers of justice.[55] The committee proposed amendments to the Canons of Professional Ethics, rules of court, and departmental rules for law enforcement agencies, specifying the types of information which should not be the subject of extrajudicial public statements prior to and during trial. It further recommended that these rules be enforced against those making statements for public dissemination through disciplinary action by bar associations and police departments and in limited instances through use of the contempt power by the courts.[56]

The criminal justice system has a significant interest in preventing its officers from making certain kinds of statements concerning a pending criminal case. Efforts by lawyers or law enforcement officers to prove their case in the news media necessarily diminish respect for the process that takes place within the courtroom itself. Disclosure becomes a matter of competition as the defense feels a need to counter through the press the impressions made by the prosecution. Moreover, having recorded their views before the trial begins, the police and prosecution may be hard put to alter them as new evidence emerges.

When police, prosecutors, and defense counsel rush to tell the media of their successful performance, the public is likely to assume that it is proper to draw conclusions before trial about the guilt or innocence of the suspect. A public that has been exposed to pretrial assessments of guilt by officers of justice is not likely to produce a jury which will wait until all the evidence is in before it makes a finding. Moreover, the prospective juror's attitudes about the criminal process, as well as his view of a particular case, may be shaped by what he has read. Thus pretrial statements that mention the defendant's record of convictions or his unwillingness to speak or to take a lie detector test prepare a future juror to consider those elements as relevant to his judgment whether or not they become part of the trial record.

Representatives of the news media have been concerned lest proposals for regulating the sources of information interfere with the first amendment right of freedom of the press.[57] It is argued that limiting the flow of information to the press is equivalent to regulating the press itself, which is permissible under the Constitution only in cases where news reporting presents the clearest threat to the integrity of the judicial process.

The Supreme Court has said that the first amendment is intended to give a freedom to the press of the "broadest scope that could be countenanced in an orderly society." [58] A responsible press can make many contributions to the effective enforcement of the criminal law. The reporting of crime alerts the public to the seriousness of the crime problem, and it can bring forward persons with knowledge that may lead to the conviction of an offender or to the exoneration of one improperly charged. Publication of the arrest and conviction of an offender serves to assure the community that law enforcement officers are doing their job. Numerous instances may be cited in which news reporting was responsible for the prosecution and conviction of persons against whom the authorities were reluctant to proceed. News coverage guards against miscarriages of justice and abusive practices by subjecting the police, prosecutors, and courts to extensive public scrutiny and criticism. Certainly defense counsel should be permitted the broadest latitude in bringing to public attention instances of abuse by public officials.

Furthermore, in order to have full public support for the improvement of the criminal process, it is necessary for the public to understand the important problems that exist in the administration of criminal justice. The need for more and better qualified judges and prosecutors has real meaning to the public only if it is aware of the serious consequences of attempting to handle the tremendous volume of cases with inadequate manpower. The per-

[53] 384 U.S. at 363.
[54] 28 C.F.R. § 50.2 (1965).
[55] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL AND FREE PRESS 22–25 (Tent. Draft 1966).
[56] *Id.* at 2–15.
[57] See AMERICAN NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL (1967).
[58] *Bridges* v. *California*, 314 U.S. 252, 265 (1941).

formance of the prosecutor cannot adequately be appraised by a public that does not understand his responsibilities. On these and other issues in the criminal process the new media must inform the public.

The central question, therefore, is whether the news media can effectively perform their important functions if police, prosecutors, and defense counsel are permitted to disclose only certain basic facts about a criminal case from the time of arrest to the completion of the trial. It is hoped that the present dialogue among interested groups will focus on the difficult practical issues raised by the disclosure of specific kinds of information and will not be obscured by dogmatic generalizations. The thoughtful studies recently published by the American Newspaper Publishers Association and the ABA Advisory Committee on Fair Trial and Free Press have carefully examined these problems, and they provide sound approaches to the difficult issues involved. It would seem desirable for the agencies and interests involved to participate in the formulation of rules designed to prevent potentially prejudicial statements by police, prosecutors, and defense counsel. Professional discipline by police, prosecutors, and the bar appears to be the appropriate primary method to enforce those rules, with the imposition of sanctions by the court reserved for situations where they are necessary to ensure the integrity of the trial.

DISCRIMINATION AND POVERTY

Justice is most seriously threatened when prejudice distorts its capacity to operate fairly and equally, whether the prejudice that blinds judgment operates purposefully, as in discrimination in jury selection or sentencing based on racial factors, or unintentionally, through substantially disadvantaging the poor.[59]

These threats to justice may be seen in disparate settings. While important progress has been made in all sections of the country, in some rural southern courts practices persist that are the product of a system in which Negroes long have been excluded from juries and from the electorate which selects judges and prosecutors, a system which operates in blatant violation of Federal constitutional amendments and statutes almost a century old. Discrimination in dispensing justice is accompanied by less glaring but equally vicious practices, courtroom segregation and continuing displays of disrespect for Negro defendants, witnesses, and attorneys. There is evidence that the same segregated system often results in enforcement of a dual standard of justice: Charges and sentences habitually are more severe in cases where Negro defendants are asserted to have committed crimes against the person of white victims than in other cases involving identical crimes.

But discrimination, racial or otherwise, certainly is not an exclusively southern phenomenon. In many places throughout the Nation court personnel, judges, lawyers, prosecutors, and clerks are disproportionately drawn from the white members of the community, reflecting at least in part the limited educational and political opportunities that have been open to the Negro. Even the fairest of men find their judgment distorted by stereotypes and prejudice.

The problems of the Nation's cities which are not directly racial in character contribute to the problems of the courts. The populations of many cities are collections of groups that have little understanding of each other's ways. The law and court procedures are not understood by and seem threatening to many defendants, and many defendants are not understood by and seem threatening to the court and its officers. Even such simple matters as dress, speech, and manners may be misinterpreted. Most city prosecutors and judges have middle-class backgrounds and a high degree of education. When they are confronted with a poor, uneducated defendant, they may have difficulty judging how he fits into his own society or culture. They can easily mistake a certain manner of dress or speech, alien or repugnant to them but ordinary enough in the defendant's world, as an index of moral worthlessness. They can mistake ignorance or fear of the law as indifference to it. They can mistake the defendant's resentment against the social evils with which he lives as evidence of criminality. Or conversely, they may be led by neat dress, a polite and cheerful manner, and a show of humility to believe that a dangerous criminal is merely an oppressed and misunderstood man.

It also is evident that the treatment of the poor is often disproportionately harsh in the courts, principally because of the litigation disadvantages which they suffer. They lack resources demanded by an adversary procedure, and there is a relatively restricted range of dispositional possibilities available for poor defendants. These problems mirror the disadvantages to which the poor are subject in almost every aspect of social and economic life. Clearly a major effort must be made to make poverty as irrelevant as possible in criminal justice as well as other vital areas.

The unfairness of the disadvantages which poor persons accused of crime often suffer because they are poor is a discrete and obvious major flaw. The most serious of those disadvantages, inadequate defense representation, inadequate access to investigative resources and expert assistance needed to prepare and conduct a defense, commitment to jail pending trial for inability to make bail, commitment to jail after conviction for inability to pay fines, disproportionate susceptibility to sentences of imprisonment for want of community relationships which facilitate programs of supervised release, are dealt with in detail elsewhere in this report. It deserves emphasis here that these disabilities are cumulative; they often combine to deny equal justice to the impoverished defendant, regardless of his innocence or guilt, at every step in the proceeding.

Held in default of bail in an amount that he cannot afford, the defendant without funds may be shut up in jail for weeks or months prior to the trial at which he may be found not guilty or, if found guilty, found also to be a fit subject for probation. While in jail he may lose his job, and his family ties may be shaken. An acquittal will not repair these harms, and in the event of a conviction his joblessness and any lack of sympathy of members of his family will weigh strongly against a nonprison disposition. Appointed counsel is likely to be overburdened and undercompensated; he is unlikely to be an effective investigator himself in the portion of the city where the defendant's witnesses live and in which a stranger wearing business clothes is unwelcome. Counsel feels that it is inconvenient enough that he is required to go across town to the jail and undergo the lengthy visiting procedures merely to visit the defendant in a nonremunerative case. He may find it difficult to understand or believe his client, who is inarticulate and inattentive in a jail interview and whom he is likely to view as an irresponsible type. Certainly a jury is less likely to regard the defendant favorably, particularly as they see him come escorted into the courtroom through the lockup door. Every relevant indication, therefore, is that the defendant's case is weak. The prosecutor knows this and may be unwilling to make concessions that he would make in a stronger case. The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice emphasized that "one of the prime objectives of the civilized administration of justice is to render the poverty of the the litigant an irrelevancy." [60] That committee wrote:

> When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.
>
> The Committee, therefore, conceives the obligation of government less as an undertaking to eliminate "discrimination" against a class of accused persons and more as a broad commitment by government to rid its processes of all influences that tend to defeat the ends a system of justice is intended to serve. Such a concept of "equal justice" does not confuse equality of treatment with identity of treatment. We assume that government must be conceded flexibility in devising its measures and that reasonable classifications are permitted. The crucial question is, has government done all that can reasonably be required of it to eliminate those factors that inhibit the proper and effective assertion of grounds relevant to the criminal liability of the accused or to the imposition of sanctions and disabilities on the accused at all stages of criminal process? [61]

[59] See generally Wald, *Poverty and Criminal Justice*, printed as appendix C of this volume.

[60] ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REP. (1963).

[61] *Id.* at 10.

Counsel for the Accused

The right of a criminal defendant to be represented by counsel is a fundamental protection for individual liberty in our system of criminal justice. While it is clear that a defendant who is able to retain a lawyer is entitled to the effective assistance of counsel at all stages of the process,[1] the vital issue at the present time is the extent to which and how society should provide counsel for defendants who are financially unable to obtain adequate representation.

Recent court decisions have moved significantly toward requiring fulfillment of our ideal of equal justice for all criminal defendants. These decisions have inspired more effective and widespread efforts by legislatures, courts, and private individuals and organizations to provide counsel for the accused. The questions now facing all jurisdictions are: In what proceedings shall counsel be provided; what methods shall be used to provide counsel; and what criteria of eligibility for free legal services shall be applied? Moreover, the expanded right to counsel has intensified the need to improve the status and competence of the private criminal bar, to increase the numbers of qualified defense counsel through programs of continuing education in criminal law, and to attract competent young lawyers into service in criminal justice agencies.

THE IMPORTANCE OF COUNSEL

For two basic reasons representation by counsel is essential in our system of criminal justice. An individual forced to answer a criminal charge needs the assistance of a lawyer to protect his legal rights and to help him understand the nature and consequences of the proceedings against him. As the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice stated: "[A] situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." [2]

The vital importance of counsel is obscured by asking simply whether a lawyer is needed to handle the trial of a criminal charge, for representation at trial is only a part of defense counsel's role. More often than not the defendant is lacking in education, intelligence, and capacity for insight. Standing alone he may be incapable of developing facts which could either convince the prosecutor to dismiss the charge or favorably affect the prosecutor's decision in guilty plea negotiations or the judge's decision as to sentence. Without the support and perspective of counsel the defendant may have little understanding of what is happening to him or why.

The importance of counsel also proceeds from values transcending the interests of any individual defendant. Counsel is needed to maintain effective and efficient criminal justice. Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime. Reliance upon the judge or prosecutor to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious defense counsel.[3] Limiting the right to counsel "gravely endangers judicial search for truth." [4]

Although the number of cases that reach trial represents only a small percentage of the total defendants prosecuted, these cases have a significance far greater than the statistics suggest. They are the most visible occasions of justice or injustice, the focus of public conscience and of public confidence in the administration of the criminal law. An unfair public trial casts a broad shadow of doubt upon the disposition of the far more numerous cases resolved without trial. "The public conscience must be satisfied that fairness dominates the administration of justice." [5]

In cases disposed of without trial the presence of defense counsel serves to promote well-reasoned and efficient decision making. The need to obtain factual information and to explore all alternatives early in the proceedings calls for fuller participation by defense counsel.[6] The court's ability to maximize rehabilitative potential in sentencing also depends to a great extent upon the advice, advocacy, and knowledge of the defendant's legal representative.[7] In collateral attack proceedings counsel helps to ensure complete presentation of all issues in the first collateral motion, thus avoiding repeated petitions for relief.[8]

It must be recognized, however, that the provision of counsel often will serve to delay the criminal process and complicate the finding of facts. Counsel will require that the courts deal deliberately with his client. He will make motions for discovery and suppression of evidence. Sometimes he will seek delay for tactical advantages, cast doubt on a truthful witness, or challenge legitimate proof. Many of the burdens counsel will impose are costs which must be borne for the sake of an effective adversary system. Although firmer controls on delay, clarification of the ethical standards governing the conduct of counsel, and insistence on strict adherence to these standards can minimize these burdens, they probably cannot be eliminated. Yet far higher costs would be paid and far greater sacrifices would be made in the quality of justice if the system were not built on the energetic participation of counsel for the accused.

[1] See *Ferguson* v. *Georgia*, 365 U.S. 570 (1961); *Chandler v. Fretag*, 348 U.S. 3 (1954).

[2] ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REP. 11 (1963) [hereinafter cited as ATT'Y GEN. REP.].

[3] "The contentious nature of the adversary system makes it impossible for the prosecuting attorney effectively to safeguard the interests of the defendant. Regardless of his fairness and the quasi-judicial nature of his office, the prosecutor must act as a protagonist; he cannot divorce himself from the part he must play and the duties he must fulfill as the advocate for the state. . . . The presiding judge cannot adequately substitute for defense counsel. No one can sit at the same time on the bench and at the counsel table." ASS'N OF THE BAR OF THE CITY OF NEW YORK & NAT'L LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 36–37 (1959) [hereinafter cited as EQUAL JUSTICE FOR THE ACCUSED]. See also *Powell* v. *Alabama*, 287 U.S. 45, 61 (1932).

[4] EQUAL JUSTICE FOR THE ACCUSED 38.

[5] *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

[6] See chapter 1 *supra*.

[7] See pp. 19–20 *supra*.

[8] See p. 47 *supra*.

COUNSEL AT TRIAL

Courtroom procedure is highly technical. Experts in trial practice have written volumes on the complexities of the rules of evidence and on techniques for cross-examining witnesses and selecting jurors. An intelligent civil litigant of means would not consider hazarding his fortunes in this process without obtaining the services of experienced and specialized counsel. The need for counsel in a criminal trial was forcefully expressed by the Supreme Court of the United States more than 30 years ago:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[9]

The Supreme Court has held that the Constitution requires the appointment of counsel at trial in State and Federal courts for felony defendants who are unable to retain a lawyer.[10] Although the Court has not yet extended this rule to trials on other offenses, it is clear that counsel may be equally important in cases involving less serious charges.[11] Many misdemeanors carry substantial jail sentences and heavy fines; they may involve complicated factual or legal questions that require the technical resourcefulness of a lawyer. Moreover, a misdemeanor charge may be the defendant's first criminal involvement, and the disposition of the charge may have great bearing on his potential for a productive future. The presence of counsel helps to ensure that at the time of sentencing the court is furnished with information about the defendant's background and about the availability of community rehabilitation programs.

THE NEED FOR EARLY APPOINTMENT OF COUNSEL

The accused's right to effective assistance of counsel is not satisfied by the appointment of counsel at or shortly before trial. The Supreme Court has held that counsel must be provided at the preliminary examination [12] or arraignment [13] where these are critical stages in the criminal process. Under the Court's recent decision in *Miranda v. Arizona*,[14] statements obtained as a result of police interrogation of a suspect in custody are inadmissible at trial unless counsel has been made available to him or he has waived his right to counsel.

The lawyer can help his client meet some of the problems directly associated with a pending criminal charge. An attorney can present to the court facts about the accused's family status, employment history, and ties in the community to prove that he should be free pending trial. Counsel often can persuade an employer, landlord, creditors, or others not to act against his client as a result of his arrest. When there is a detainer issued by another jurisdiction, counsel sometimes can arrange for disposition of these charges. Because of the shortage of defense counsel, it would be unrealistic to suggest that an appointed counsel or a defender must himself perform all of these functions, particularly those which call for investigation. Services which do not require the particular expertise of a lawyer can be performed by a nonprofessional staff, but it is essential that counsel be appointed early in the process so that this assistance can be made available when it is most needed.

Early provision of counsel is equally important for discovering facts bearing upon the ultimate disposition of the case, whether by trial or otherwise. Trial is a procedure for exhibiting or demonstrating facts, not for discovering them. The adversary system rests on the assumption that both the prosecution and defense will be prepared at the time of trial to present their respective versions of the facts by the testimony of witnesses or by other evidence. Preparation of a case ordinarily requires a considerable amount of pretrial investigation, which can be done only under the direction of an attorney. He understands the legal issues which would arise at trial and can assemble a coherent image of the relevant facts from many bits and pieces of information.

In many cases investigation can be effective only if it is begun very soon after the criminal event. Persons at the scene may then recall the presence of other persons and characteristics identifying them which might otherwise soon be forgotten. Locating witnesses requires an immediate beginning, particularly in areas where the population is highly mobile. A defense attorney who enters the case early can make that beginning himself, or he can direct the police or investigating authorities toward exculpatory information.

Furthermore, both defense and prosecution must have enough time before trial to make appropriate use of techniques for identifying weapons, fingerprints, or clothing or to obtain psychiatric evaluations of the defendant or a witness. These techniques improve the reliability of the factfinding process in criminal trials, and pretrial exchange of information may facilitate disposition without trial. As investigation becomes more technical, the inability of a layman adequately to prepare his own defense becomes more evident.

[9] *Powell* v. *Alabama*, 287 U.S. 45, 68–69 (1932).

[10] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (State prosecution); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) (Federal prosecution). Although *Gideon* on its facts is limited to felony cases, one Federal Court of Appeals has interpreted the ruling to require the appointment of counsel for an indigent defendant charged with a misdemeanor punishable by a maximum penalty of 90 days in jail and $500 fine. *Harvey* v. *Mississippi*, 340 F.2d 263 (5th Cir. 1965). The lower Federal courts have applied *Johnson* to misdemeanor cases, see *Evans* v. *Rives*, 126 F.2d 633 (D.C. Cir. 1942).

[11] In several States, either by judicial decision, statute, or rule of court, defendants charged with certain misdemeanors are entitled to appointment of counsel if they are financially unable to retain a lawyer. See *People* v. *Witenski*, 15 N.Y.2d 392, 207 N.E.2d 358 (1965); *Hunter* v. *State*, 288 P.2d 425 (Okla. Crim. App. 1955); ILL. ANN. STAT. ch. 38, § 113-3(b) (Smith-Hurd 1964) ("all cases except where the penalty is a fine only"); N.Y. COUNTY LAW § 722-a ("all offenses "for which a sentence to a term of imprisonment is authorized"); MD. CT. APP. R. 719 (offenses punishable by imprisonment for six months or more or $500 fine); MASS. SUP. JUD. CT. R. 10 (all offenses punishable by imprisonment).

[12] *White* v. *Maryland*, 373 U.S. 59 (1963); *cf. Pointer* v. *Texas*, 380 U.S. 400 (1965).

[13] *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

[14] 384 U.S. 436 (1966).

The fact that a great percentage of criminal cases is disposed of without trial, either by dismissal of charges or by a guilty plea, further increases the need for early appointment of counsel. Quite often these dispositions result from negotiations occurring early in the process at which the prosecution agrees to dismiss or to reduce the charges or recommend a particular sentence if the defendant agrees to plead guilty.

At the initial stages of the process when the prosecutor must decide whether to make a formal charge, defense counsel in acting to achieve a desirable outcome for his client may aid the State in evaluating its case. Without the intervention of counsel the prosecutor must reach his decision unilaterally or on the basis of such ordinarily unilluminating argument as the defendant himself can offer. Counsel may provide information that will induce the State to drop charges having no substance or to find suitable alternatives to trial and imprisonment for minor offenses. Furthermore, if the practice of proceeding noncriminally, discussed in chapter 1, is recognized as a norm in more cases, the provision of counsel will be necessary to ensure that all defendants have an effective opportunity to bring relevant factors to the attention of the prosecutor.

In guilty plea negotiations questions both of law and fact are resolved without the oversight of an impartial judge.[15] There are dangers that the defendant may be overreached, and he needs support and guidance. And since the defendant's consent is a vital component of the disposition, care must be taken to ensure that his decision is as enlightened as it can be made.

Early provision of defense counsel is essential to satisfy the concerns of the accused and of the system for the fairness and accuracy of the guilty plea process. Counsel can provide the defendant with a reasoned basis for considering the advantages and disadvantages of the negotiated disposition. He can enlist the acceptance and support of the defendant's family, employer, or other persons whose cooperation may be imperative. He can help the defendant to understand the rightness and fairness of what is happening and thereby help to avoid the destructive sense with which many uncounseled or ill-counseled defendants are left after a negotiated plea: that they have either "conned" the system or been treated unfairly by it.[16]

COUNSEL ON APPEAL AND COLLATERAL ATTACK

Appointment of counsel for an indigent defendant who seeks to appeal his conviction is constitutionally required where appeal is a matter of right.[17] The Supreme Court has not extended this rule to require the appointment of counsel in collateral attacks upon a conviction, such as applications for a new trial on the grounds of newly discovered evidence or petitions for habeas corpus or statutory remedies of similar scope. But a few States, including New York and California, regularly provide counsel for petitioners in collateral attack proceedings.

In most instances collateral relief may be granted only on the basis of significant facts discovered after trial or the denial of constitutional or other fundamental rights in the trial process. The need for counsel is particularly acute because the issues often are important and highly technical, and the offender seeking collateral relief is confined in an institution and is less able to investigate relevant legal and factual matters. Petitions from prisoners are often a jumble of rambling factual assertions and legal conclusions culled from the latest appellate reports that have made the prison rounds. It is often impossible to identify the claims made or to discern their factual or legal bases. Hours may be spent by the judge or prosecutor in determining from the prisoner's papers and from previous records of the case whether he has grounds to justify collateral relief. Moreover, the petitioner may have additional facts or claims which are not reflected in his papers and which will be the basis of subsequent attempts to gain freedom.

In many States as in the Federal system the principle of finality of judgment has restricted application in postconviction proceedings. Claims may be repeatedly raised, and their final resolution may take years. State prisoners with substantial claims based upon Federal law are entitled to evidentiary hearings on habeas corpus in the Federal courts unless prior State proceedings have provided adequate opportunity for full presentation of these claims.[18] When a petitioner has not been represented by counsel, any disposition is not likely to be conclusive in a subsequent State or Federal proceeding. On the other hand, if counsel is provided and adequately represents a prisoner in his first postconviction proceeding, it would obviate the need for subsequent hearings on claims once raised and litigated and would substantially reduce the burden of reviewing the merits of successive petitions.

COUNSEL AT PROBATION OR PAROLE REVOCATION HEARINGS

Probation and parole revocation hearings may involve both disputed issues of fact and difficult questions of judicial or administrative judgment. These hearings lack some of the evidentiary and other technical complexities of trials, but where the facts are disputed, the same process of investigating, marshaling, and exhibiting facts is often demanded as at trial. A lawyer for the defense is needed in these proceedings because of the range of facts which will support revocation, the breadth of discretion in the court or agency to refuse revocation even though a violation of the conditions of release is found, and the absence of other procedural safeguards which surround the trial of guilt.

* * *

The foregoing discussion argues for the provision of counsel to every criminal defendant who faces a significant penalty and who is financially unable to obtain adequate representation. As the estimates in the following section indicate, however, this would now impose severe burdens on the practicing bar and on State and local governments. These burdens can and should be met, perhaps over the next few years, but it will require a nationwide effort to increase the number of qualified criminal lawyers and a willingness on the part of every jurisdiction to increase its financial support for defense of the accused.

[15] An indigent defendant who pleads guilty has the same right to counsel as a defendant who demands a trial. See *Doughty* v. *Maxwell*, 376 U.S. 202 (1964) (per curiam).

[16] For an extensive discussion of the functions of counsel in guilty plea negotiations, see NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 197–230 (1966).

[17] *Douglas v. California*, 372 U.S. 353 (1963).

[18] See *Townsend* v. *Sain*, 372 U.S. 293 (1963).

The process leading toward the goal of full representation already has begun, although priorities may have to be established to ensure that limited resources are first applied to the most essential needs. In some communities, for example, it may be necessary initially to emphasize trial proceedings, where only a lawyer can adequately protect a defendant's interests. It would appear to be a realistic initial goal for all jurisdictions to require the appointment of counsel in every case in which a defendant who cannot afford adequate representation may suffer a substantial loss of liberty.[19] As the capacity of the bar to provide criminal representation is increased, the requirement should be expanded to encompass all criminal cases in which the defendant faces a substantial penalty and proceedings after conviction.

LEGAL MANPOWER AND FINANCIAL NEEDS FOR DEFENSE OF THE ACCUSED

Any proposal for expanding the availability of defense counsel invites three fundamental questions: How many lawyers will be required; how much will their services cost; and is the supply of lawyers adequate to meet the increased demand for legal services?

An attempt to estimate the dimensions of these requirements was recently made at the Airlie House Conference on Legal Manpower Needs of Criminal Law, jointly sponsored by this Commission, the American Bar Association, and the National Legal Aid and Defender Association.[20] The conference was attended by members of the bench, bar, and government who are devoting their efforts to the improvement of criminal justice. The discussion in this section and throughout this chapter relies substantially upon their experience and judgment.

The actual needs of the system may be substantially greater or substantially less than the following estimates indicate. Much of the data upon which they are based are themselves only approximations because accurate statistics generally do not exist. A more important limitation is that it is impossible to estimate the required amount and cost of legal services without making some subjective judgments about the quality of these services. The following estimates depend on assumptions concerning the number of defendants a lawyer can adequately represent per year under optimal conditions; they may not be realistic in some jurisdictions.

THE NEED FOR LAWYERS

This estimate of the size of the legal manpower need is based upon the total number of criminal cases in the United States, without regard to whether counsel is retained by the defendant or appointed by the court. The estimate assumes that all defendants will choose to be represented, although it is likely that some defendants will waive their right to counsel.[21]

Because of recent court decisions, cases involving felony charges present the most immediate need for legal manpower. According to the only available estimate, there are approximately 314,000 felony defendants formally charged by the filing of an indictment or information each year in State courts, and about 24,000 felony defendants are prosecuted in Federal courts.[22] The amount of time required to represent a felony defendant will, of course, vary with the complexity of the case and the method of disposition. The experience of several defender offices that restrict their caseloads to ensure thorough preparation of cases indicates that a full-time lawyer with the support of adequate investigative services could effectively represent between 150 and 200 felony defendants each year.[23] From this it may be estimated that the amount of legal services required for the adequate representation of all felony defendants in State and Federal courts is equivalent to the full-time services of between 1,700 and 2,300 lawyers each year.

It is more difficult to estimate the need for lawyers in misdemeanor cases because there are few reliable data on the number of cases and because of the variety of offenses included in that category. Silverstein's estimate that there are 5 million misdemeanor cases each year is based on a projection of data from 12 States that may include some juvenile cases.[24] On the other hand, arrest data from the 1965 Uniform Crime Reports, adjusted for assumed percentages of arrested persons discharged before prosecution or referred to the juvenile courts, suggests that the number of adult misdemeanor cases each year may be 4 million or less.[25] It seems reasonable to assume, therefore, that there are between 4 and 5 million adult misdemeanor court cases each year, exclusive of traffic offenses.

Some misdemeanor cases, such as simple assault and petty larceny, are less serious counterparts of felonies. Many such cases originate with felony arrests and are reduced to misdemeanor charges, often as a result of guilty plea negotiations. They may present legal or factual issues as difficult as their comparable felony offenses, and the result of conviction may be incarceration for as long as a year or a substantial fine. Data of limited reliability from four large cities and from the Uniform Crime Reports suggest that cases of this type represent approximately 30 percent of all misdemeanor cases.[26]

At the other extreme, approximately 40 percent of all misdemeanor offenders are charged with "social nuisance" offenses, such as drunkenness, disorderly conduct, and vagrancy. While some of these cases present substantial issues and while the provision of counsel should result in more trials, it seems reasonable to assume that the questions of guilt and sentence in these cases require much less lawyer time per case than misdemeanors with felony counterparts.

The remaining 30 percent of misdemeanor cases includes a miscellany of minor offenses: gambling, prostitution, liquor offenses, weapons charges, and violations of

[19] This rule has been adopted, for example, in Massachusetts and New York. See note 11 *supra*.

[20] See Report of the Conference on Legal Manpower Needs of Criminal Law, Airlie House, Virginia (June 24–26, 1966) (unpublished report to the President's Commission on Law Enforcement and Administration of Justice) [hereinafter cited as Airlie House Rep.].

[21] It is impossible to estimate the percentage of defendants who waive their right to counsel. The docket study made by the Attorney General's Committee revealed that approximately two-thirds of all defendants in one U.S. District Court were unrepresented by reason of waiver, while in three other districts the waiver rate was less than 5 percent. ATT'Y GEN. REP. 134 (table 1). The American Bar Foundation's docket study of 152 State courts showed that in 62 counties 11 percent or more of the felony defendants were without counsel, and in 17 counties more than 40 percent were unrepresented; waiver of counsel appears to be the chief reason why these defendants were unrepresented. SILVERSTEIN, DEFENSE OF THE POOR 91, 96–67 (table 28) (1965). The defendant's decision to waive counsel may be affected by the apparent attitude of the judge or other person who informs him of his right to counsel, by the defendant's familiarity with the functions counsel can perform, and by the defendant's familiarity with his right to appointed counsel if he is unable to retain a lawyer. See *id.* at 100–01.

[22] See Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, June 1966 (printed as appendix D of this volume).

[23] See, *e.g.*, 1965 LEGAL AID AGENCY OF THE DISTRICT OF COLUMBIA ANN. REP. 28–31.

[24] See SILVERSTEIN, DEFENSE OF THE POOR 123 (1965).

[25] See 1965 FBI UNIFORM CRIME REPORTS, tables 18, 21, at 108–09, 112.

[26] See 1965 ATLANTA POLICE DEP'T ANN. REP. 43; 1965 LOS ANGELES POLICE DEP'T STATISTICAL DIGEST 39; 1964 N.Y. CITY POLICE DEP'T STATISTICAL REP. 34–35; 1965 SAN DIEGO POLICE DEP'T STATISTICAL REP. 15; 1965 FBI UNIFORM CRIME REPORTS, table 18, at 108–09.

administrative codes, such as business, health, and building ordinances. In terms of the work of defense counsel, these cases would seem to occupy a middle position. They are likely to present more difficult issues than the social nuisance offenses, but not as frequently as the misdemeanors with felony counterparts.

Participants at the Airlie House Conference suggested that the average number of misdemeanor cases in which a lawyer working full time could provide adequate representation might vary from between 300 to 1,000 cases per year.[27] The estimates at both ends of this wide range may well be reasonable for different kinds of cases. The lowest figure may be appropriate for misdemeanors having felony counterparts, while the highest figure may be reasonable for social nuisance offenses. But it is unlikely that adequate representation for all misdemeanor cases could be provided by lawyers handling 1,000 cases per year or, at the other extreme, that adequate representation requires the services of lawyers who appear in only 300 cases per year.

Using the Airlie House estimates as a starting point, one may assume that each year a single lawyer working full time could provide representation in 300 to 400 serious misdemeanor cases, in 1,200 social nuisance cases, or in 600 of the remaining misdemeanor cases. On the basis of these assumptions it may be estimated that the full-time services of between 6,300 and 9,200 lawyers would be required for all adult misdemeanor cases, excluding traffic offenses. This estimate assumes that a high percentage of misdemeanor cases will continue to be disposed of by guilty pleas. To the extent that more trials result from expanded provision of counsel in these cases, the required amount of legal services will be greater. On the other hand, to the extent that the Commission's recommendations for removing some social nuisance offenses from the criminal process are adopted, the need for counsel in misdemeanor cases will be less than the estimate.

To estimate the amount of legal services required for all other cases in which counsel should be available is to explore virtually uncharted lands. On the basis of a projection of available data[28] it may be estimated that the total number of appeals, collateral attacks, and revocation proceedings is approximately 168,000 cases per year. This estimate is probably lower than the actual number, but sufficient data on which to estimate an upper limit are not available.

Representation in a collateral attack proceeding involving a factual hearing may take as much time as representation in a felony trial. On the other hand, a probation revocation hearing where the facts are not in dispute may not require any more time than a simple misdemeanor disposition. One may reasonably assume, however, that on the average, representation in these cases will not require more time than in felony cases nor less time than in misdemeanor cases. Under this assumption the full-time services of between 300 and 1,000 lawyers would be required each year for appeals, collateral attacks, and revocation hearings.

The aggregate range of these estimates is between 8,300 and 12,500, which represent the upper and lower limits of the number of lawyer years needed to provide adequate representation for adult defendants in all criminal cases except traffic offenses each year. The actual number of lawyers needed will, of course, be much larger than the number of lawyer years, perhaps several times greater, because a large part of the need will be met by lawyers who practice only part of the time in criminal matters. Furthermore, this estimate does not include lawyers for delinquency proceedings in the juvenile courts, as is recommended in the Report of the Task Force on Juvenile Delinquency. Implementation of this recommendation would increase the need for lawyers, but because experience with lawyers in the juvenile courts has been so limited, a realistic estimate of the required amount of legal services cannot be made at this time.[29]

FINANCIAL NEEDS

According to Silverstein's estimate approximately 60 percent of all felony defendants and between one-quarter and one-half of all misdemeanor defendants are unable to contribute anything to the cost of their defense,[30] and it is reasonable to assume that at least 50 percent of the defendants in appeals and postconviction proceedings need appointed counsel.

One way to estimate the cost of providing representation for these defendants is to project for the entire country the present rate of spending in certain jurisdictions. Data collected by the American Bar Foundation indicate that governmental contributions for defense of the poor in State courts, primarily for felony representation, are approximately $17 million a year; private contributions from local communities or charitable foundations provide an additional $1 million.[31] About one-half of the State public appropriations is spent in just three States, New York, Florida, and California. In the Federal system Congress has appropriated $3 million per year to provide compensation to counsel representing about 15,000 to 20,000 defendants, including some charged with misdemeanors, at trial or on appeal. At this rate of compensation, $150 to $200 per case, payment for counsel representing 188,000 felony defendants in the State courts would require between $28 million and $38 million.

The financial needs also may be computed on the basis of the above estimate that the total manpower need is equivalent to the full-time services of between 8,300 and 12,500 lawyers per year. It is assumed here that one-half of the total amount of legal services must be allocated for defendants who are financially unable to obtain adequate representation. If representation for these defendants is performed entirely by full-time defenders, between 4,200 and 6,300 lawyers would be required. If it were assumed that an average yearly allocation per defender of between $20,000 and $25,000 would provide adequate salary for the defender, office expenses and overhead, and necessary auxiliary services, the financial needs would fall somewhere between $84 million and $158 million per year.

[27] Airlie House Rep. 9.

[28] The Annual Report of the Administrative Office of the U.S. Courts for 1964 shows that about 1,000 felony and misdemeanor defendants appealed their convictions. This represents approximately 35 percent of those defendants for whom appeal was available. In addition, approximately 1,700 State and Federal criminal defendants file appeals or petitions for certiorari in the U.S. Supreme Court. Silverstein estimates that there are about 40,000 felony defendants who are convicted at trial each year and who are thus eligible to appeal their convictions. See SILVERSTEIN, *op. cit. supra* note 21, at 10. Applying the Federal rate of appeals to this figure produces an estimate of about 14,000 State-court appeals and a total of about 17,000 appeals each year for the country as a whole. This figure does not include misdemeanor appeals in the States.

In 1964 approximately 1,900 Federal prisoners, or approximately 9 percent of the total number of the adult felony prisoners in Federal institutions, petitioned for collateral relief. In addition, the Federal District Courts received about 3,700 habeas corpus petitions from State prisoners. Applying the Federal rate to the total number of adult felony prisoners in State institutions (193,000) produces a State estimate of about 17,400 collateral attacks and a total of about 23,000 collateral attacks each year for the country as a whole. This estimate is probably higher than the actual figure, because collateral relief is more readily available in the Federal system than in most State systems and hence more likely to be requested by Federal prisoners.

There are not sufficient data on which to base an estimate of the number of parole revocation hearings held each year. Approximately 20,000 adult felony parolees are reimprisoned each year for violations (not including those who were sentenced for new crimes). This figure represents an absolute minimum of the number of hearings actually held.

The corrections survey prepared for the Commission indicates that there are approximately 431,000 adult offenders on probation in the country as a whole and that the average rate of revocation is roughly 25 percent per year. Using these figures produces an estimate of about 108,000 probation revocations each year. This estimate is undoubtedly lower than the number of hearings actually held.

[29] One juvenile court in which defense lawyers appear on a regular basis is the Juvenile Term of the New York City Family Court. There are 19 Legal Aid Society attorneys, called law guardians, who work full time defending juveniles; they are assisted by five full-time investigators and a clerical staff. In 1965 these lawyers handled approximately 14,500 cases, of which about 11,000 involved delinquency or similar charges. Statistics collected by the Children's Bureau of the U.S. Department of Health, Education, and Welfare indicate that there were approximately 690,000 juvenile delinquency cases in the United States in 1960.

[30] See SILVERSTEIN, DEFENSE OF THE POOR 8–9, 125 (1965).

[31] See Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, June 1966 (printed as appendix D of this volume).

THE IMPACT OF EXPANDED CIVIL LEGAL AID

The problem of increasing manpower and financial allocations to meet the requirements of criminal justice will be aggravated by the drain on these resources caused by expanded civil legal services programs. In 1965 the total expenditure in the United States for civil legal aid was slightly more than $5 million; 267 communities maintained legal aid offices, of which only 157 had any staff at all. In 1966 the Office of Economic Opportunity began to fund legal services programs as part of the nationwide poverty program. In its first year of operation OEO distributed $25 million for legal assistance programs in 150 communities, including all but 5 of the Nation's 50 largest cities.

These offices, which are primarily devoted to civil legal assistance, employ approximately 1,000 full-time lawyers at salaries generally higher than those offered in criminal defender offices. In addition to competing with criminal programs for the supply of legal manpower, the OEO offices also compete for local financing, because communities are generally required to contribute at least 10 percent of the cost of any legal services program.

MEETING THE LEGAL MANPOWER NEEDS

It is clear that the legal manpower needs as estimated above are not now being met. Data furnished by the National Legal Aid and Defender Association show that there are about 900 defenders in the United States, of whom about half are full time. At the Airlie House Conference it was estimated that there are between 2,500 and 5,000 lawyers who accept criminal representation more than occasionally.[32] Where counsel must be provided as a matter of constitutional or statutory requirement, the need is often met by the appointment of lawyers who are unfamiliar with the criminal process and sometimes who have had no trial experience. In many States counsel are not appointed for misdemeanor defendants who are unable to retain a lawyer, and in most States counsel are not provided for probation or parole revocation hearings.[33]

If numbers were the sole consideration, there would be enough lawyers to meet the legal manpower need for criminal cases. An American Bar Foundation survey reveals that there are about 200,000 lawyers engaged in private practice in the United States, excluding those who are employed by private business.[34] But representation in a criminal case demands the services of a lawyer who is familiar with the criminal process and often the services of a competent trial lawyer. Because legal practice in this country has become highly specialized, experienced trial lawyers are in a minority, and most trial lawyers have had limited experience in criminal cases.

Unfortunately, at a time when reform of the criminal process is essential and legal manpower needs are acute, there are not enough competent criminal lawyers available to serve even those defendants who can afford to retain counsel. This is a problem which strikes hardest at the class of defendants just above the poverty line, those who can pay a few hundred dollars for defense representation. But to some extent it affects defendants at all levels of financial ability.

The significance of having able defense counsel goes beyond the importance of providing effective representation. Experience has shown that when good lawyers are brought into criminal practice, their impact is felt far beyond the cases they handle. They ask questions and put pressure on everyone in the system to examine what he is doing and why. They organize reform and become a powerful force for change.

Some of the reasons for the shortage of qualified defense counsel may be found in the very nature of criminal law practice. The general practitioner is likely to look with some distaste at criminal practice. In part this results from the impression that many criminal defendants are not very nice people. It also arises from an impression that the authorities who administer the criminal law, particularly the court officials and judges of the minor criminal courts, are professionally incompetent and sometimes venal. The lack of decorum and the disrespect for defendants and defense counsel often seen in these courts confirms this impression.

A defense lawyer must expect to lose more cases than he wins, generally not for reasons related to his legal capabilities, but because most defendants whose cases are not dismissed early in the process are ultimately convicted. Men with enough dedication and self-assurance to accept repeated defeats without coming to doubt the value of their efforts are no easier to find in the bar than anywhere else. All but the most eminent criminal lawyers are bound to spend much of their time in overcrowded, physically unpleasant courts, generally dealing with people who are educationally, economically, and socially underprivileged. It is not the sort of working environment that most professional men choose.

A few criminal lawyers are in effect "house counsel" for criminal groups engaged in gambling, prostitution, and narcotics traffic, and their reprehensible conduct sometimes leads the public unjustifiably to identify honest, competent practitioners as "mouthpieces."

In many of our larger cities there is a distinct criminal bar of low legal and dubious ethical quality. These lawyers haunt the vicinity of the criminal courts seeking out clients who can pay a modest fee. Some have referral arrangements with bondsmen, policemen, or minor court officials. They negotiate guilty pleas and try cases without investigation, preparation, or concern for the particu-

[32] See Airlie House Rep. 10.

[33] See SILVERSTEIN, DEFENSE OF THE POOR 126–27, 141 (1965); Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, June 1965 (printed as appendix D of this volume); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., C. & P.S. 175, 189, 192–93 (1964).

[34] AMERICAN BAR FOUNDATION, THE 1964 LAWYER STATISTICAL REPORT, table 6, at 32 (1965).

lar needs of their clients. Because the prosecution is frequently willing to recommend a light sentence in exchange for a guilty plea in a routine case, the dispositions which these lawyers arrange often appear satisfactory to defendants and other laymen who are ignorant of the fact that the result owes little to the capability of the lawyer. Fed by this ignorance, the reputation of the courthouse lawyer grows, and he attracts a substantial portion of the paying criminal business. The insufficiency of his performance thereby comes to taint in large measure the image of all defense counsel.

Defendants often have no choice but to accept representation from this specialized and inadequate criminal bar. Many lawyers in general practice are unwilling to handle criminal matters. Criminal business, when it pays, does not pay well. The lawyer who appears frequently in criminal court runs the risk that the judge will appoint him to serve without compensation in indigent cases. Thus assignment systems which conscript unpaid counsel deter lawyers from undertaking even paid criminal representation.

Often the lawyer in general practice feels incapable of handling criminal matters skillfully. It is commonly known that criminal courts function under a system of rules and practices familiar only to insiders, which in some cases supersedes the written codes of criminal procedure. The nonspecialist legitimately doubts his capabilities in the practice of criminal law, a field that received little attention in his formal legal education. Furthermore, many lawyers are troubled by the complex ethical problems concerning the lawyer's duties to his client and to the court which arise in criminal practice.

Under these circumstances it is tempting to put aside the problem of recruiting more and better criminal lawyers as an insoluble one. That, in effect, is what society has done for many years, but it is no longer possible to do so. The movement to expand the availability of counsel is powerful and irreversible. And the very strength and inexorability of this movement contribute importantly to solving the manpower problem.

Although some deterrents to criminal practice are unavoidable, much can be done to improve the quality of private defense representation and the public image of defense counsel. Opportunities are available through the establishment of systems for representation of defendants who are unable to retain counsel, discussed in the following section. Careful selection of qualified lawyers for these defendants is essential, and more flexible standards of eligibility for appointment of counsel could improve the quality of representation for those defendants now forced to resort to courthouse lawyers.

As more defender systems are established, more young men who would like to practice criminal law either as a prelude to a career in general practice or as a career in itself will be able to obtain jobs that do not carry the "mouthpiece" stigma. As more coordinated assigned counsel systems are set up, more lawyers from other specialties will gain experience in the criminal law. The Office of Economic Opportunity's program of neighborhood legal assistance has been valuable. While the many existing programs represent important progress, they do not approach all that can and must be done to provide the enormously expanded pool of criminal lawyers required to meet the country's needs.

It was noted at the Airlie House Conference that in every community there are a number of lawyers who are able and willing to absorb more work than their practice now provides. They often have some trial experience in personal injury and domestic relations cases, and they may welcome the opportunity to expand their practice to include criminal cases at reasonable compensation. Every effort should be made to encourage these lawyers to accept appointments in criminal cases by adequately compensating them. Additional incentives may be provided through coordinated assigned counsel programs, which monitor their performance, offer investigative and other ancillary assistance, and incorporate continuing legal education programs to help these lawyers develop skills in criminal practice.[35]

It seems appropriate that criminal defense work should attract a high proportion of young lawyers. Even with substantially greater governmental support, compensation in this area is unlikely to be competitive with other kinds of practice, although the experience in understanding the problems of our society, in negotiation, and in trying cases makes it attractive and valuable for young lawyers. The infusion of young lawyers, likely to make greater demands on the system, has already been shown to have had a healthy effect in the continuing improvement of criminal administration.

A young lawyer who has served as an assistant prosecutor or defender is a valuable asset to any firm because he has had far greater experience in litigation than his contemporaries in civil practice. The experience in public service makes him a more responsible member of the legal profession, a lawyer who is sensitive to the important issues in the administration of justice and who can contribute to the growth of the law.

A major contributant to the low status of the criminal bar in large cities is the isolation of large law firms from criminal practice. These firms often attract the most able young lawyers, and the attitudes of their members greatly influence the legal community and the public. It is important that law firms contribute their services and their prestige to the defense of the accused.

As the report of the Airlie House Conference recommended:

> Every effort should be made to elevate the image of the defense lawyer, in the eyes of the bar and in the eyes of the public generally. Prominent members of the bar in the community should be asked to take the lead, both by participating in criminal defense work and by encouraging others to participate.[36]

At present many able and energetic law school graduates are deterred from criminal work because of the concern that unless they get on the ladder in a successful civil practice firm early, they will not be hired by such firms or progress in the firms will be impaired. Because the bar as a whole has a professional obligation to

[35] See pp. 60, 62-63 *infra*.

[36] Airlie House Rep. 45.

strengthen criminal practice and because young men with breadth of experience can contribute greatly to the life of a firm, law firms should not discourage prospective associates from a two- to five-year stint of defense or prosecution work and should be willing to grant leaves of absence to those of its young lawyers who would like to spend a period in criminal practice and then return. In addition, of course, it is essential that law firms make lawyers available to handle criminal cases, either as assigned counsel or as assistants in a defender office.

In order to make the best use of those lawyers who are available for criminal cases, it is obviously desirable to employ persons who are not members of the bar for tasks such as investigating facts and exploring the availability of alternative forms of treatment for certain defendants. Residents of the poor neighborhoods who are knowledgeable about the backgrounds and social problems of the people involved in many cases are a promising source of manpower for these jobs. A number of the Neighborhood Legal Services offices financed by the Office of Economic Opportunity are experimenting with the use of such personnel. Furthermore, in many communities programs described below in the section on legal education have demonstrated the advantages of using law students to assist assigned counsel or defenders by researching legal issues, interviewing witnesses, and under appropriate supervision conducting the trial defense in misdemeanor cases. Several schools have developed programs which meet part of the long-neglected need for legal assistance to prisoners by providing law students to interview prisoners and help them to perfect appeals or collateral motions or to obtain the removal of unjustified detainers from other jurisdictions.

Clearly these suggestions do not exhaust all possibilities for meeting the critical need for more and better qualified defense counsel. There are sufficient imagination and freedom of action in the American bar to devise ways, orthodox or unorthodox, to satisfy this need, and the public's estimate of the capability and responsibility of the bar may be influenced by how well it performs this task.

PROVIDING COUNSEL FOR DEFENDANTS UNABLE TO OBTAIN ADEQUATE REPRESENTATION

Two basic methods of providing legal services to poor defendants are employed in the United States. The most prevalent, the assigned counsel system, is the only method used in about 2,750 of the 3,100 counties in the country, including many of our largest cities. Under an assigned counsel system lawyers in private practice are appointed on a case-by-case basis by the court to represent defendants who cannot afford to hire an attorney. In some communities appointments are generally made from among the younger members of the bar; in Detroit appointments generally go to the seasoned veterans of the Recorder's Court; in Houston the entire active bar is expected to serve a turn as assigned counsel. Compensation for appointed counsel may be paid from State or county funds, and Congress has appropriated money for the compensation of appointed counsel in Federal courts.[37]

Under a defender system salaried lawyers devote all or a substantial part of their time to representing defendants who are unable to retain counsel. Defender systems are presently in operation in about 250 counties having approximately one-third of all felony defendants in the country.[38] Although the defenders represent a majority of indigent defendants in these counties, their efforts are generally supplemented by appointment of individual practitioners. Some defender offices receive all of their financial support from charitable foundations or the local bar association, from individual lawyers, and from other private sources. Other offices are financed solely through State or local governmental appropriations, and a third type of defender office is generally organized on a private basis but receives public financial support.

A third method, popularly known as "judicare," has had only limited experience in the United States, but it is modeled after procedures which have been developed in England and in the Scandinavian countries. Under this system a defendant who is unable to retain a lawyer is permitted to select an attorney from a list maintained by the court or a legal aid agency, and the lawyer is paid out of the program's funds. This method of representation is currently being employed in a few of the legal aid programs funded by the Office of Economic Opportunity, and evaluation of its utility for criminal defense is not possible at this time.

The problem of providing adequate representation has generated an extensive debate over the relative merits of assigned counsel and defender systems. Both of these methods have elements of strength, and the appropriateness of one plan as opposed to another depends ultimately upon such circumstances as the volume of criminal cases, the geographic area to be covered, and the size and skills of the practicing bar which prevail in a given locality.

A high volume of criminal cases, for example, argues strongly in favor of the establishment of a defender office. Defender systems, through the use of permanent criminal specialists, make more efficient use of available legal manpower. Moreover, defender offices are much better suited to provide representation in early stages of the criminal process that is particularly needed in areas having a large number of arrests.

On the other hand, in sparsely populated areas where crime is occasional, a local defender office is generally impractical. Under such conditions an organized assigned counsel system or a circuit defender would seem preferable. In rural areas in Minnesota county defenders are retained on a part-time basis and are also permitted to represent paying clients.[39]

CONTINUED USE OF APPOINTED COUNSEL

In communities where a defender system is instituted, it is highly desirable to continue to appoint individual practitioners in a number of cases. Coordinating the services of assigned counsel and a defender office is likely

[37] SILVERSTEIN, DEFENSE OF THE POOR 15–17 (1965).

[38] Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, June 1966 (printed as appendix D of this volume).

[39] See MINN. STAT. ANN. § 611.26 (Supp. 1965).

to improve the performance of both. As the Report of the Airlie House Conference noted:

> Each method of providing counsel can be expected to challenge and test the other; the use of private counsel should prevent the public defenders' offices from becoming too much concerned with "efficiency" and too little with the need for a personal relationship between lawyer and client, while the public defenders should establish standards of efficiency to guide private counsel.[40]

Private counsel may bring to the defense of criminal cases the insights and fresh approaches of those who are not accustomed to established ways. The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice emphasized that:

> [M]any problems in the administration of criminal justice, both at the federal and state levels, result from absence of involvement of most lawyers in the practice of criminal law. An almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole. There is no better way to develop such interest and awareness than to provide wider opportunities for lawyers to participate in criminal litigation at reasonable rates of compensation. . . .[41]

SUPERVISION AND ASSISTANCE FOR COUNSEL

Unorganized appointment of individual practitioners tends toward unfair allocation of burdens and may leave undue opportunities for venality and patronage where attractive compensation is provided. More important, the goals of protecting the integrity of the adversary system and of ensuring fairness to the accused cannot be satisfied when counsel is appointed without regard to professional competence and without supervision or assistance in the performance of his duties.[42]

All assigned counsel systems should have a central agency to administer the program. The three principal duties of such an agency would be to maintain a list of attorneys who are competent to represent criminal defendants; to supply consultative, investigative, and other auxiliary services to appointed counsel; and to evaluate the performance of counsel and advise the court with regard both to the amount of compensation and to the lawyer's eligibility to receive future appointments.

Where appointment of individual practitioners is the sole mechanism for defense of the poor, this function could be performed by an independent agency. One promising example of such an agency is the Houston Legal Foundation, which was established by the county bar association. The Houston plan is organized around a full-time administrator with a staff of six lawyers and five investigators. The administrator has assembled detailed professional data about each member of the bar; these data are programmed on a computer system to ensure that cases are equitably distributed and that the lawyer assigned to a particular case is an appropriate choice. Assigned counsel have at their disposal the assistance of the professional staff and investigators in preparing cases. At the end of each case the lawyer's performance is evaluated by the judge and prosecutor, and this information is included in his record.

In communities where a defender office has been established, it could help administer the assigned counsel system. Lawyers in the defender office would be available to discuss legal problems with which they may be more familiar than assigned counsel, and the supportive services of the defender office, including investigators and social workers, would be of valuable assistance to appointed private practitioners.[43]

Control and supervision of defender officers is also important. In order to ensure adequate representation, it is necessary that qualified defenders be selected and that they be given proper training. Procedures for thorough preparation of cases must be devised. And the defender office must be careful to avoid accepting too many cases, or the quality of its representation will suffer. A defender office should have the support of the court, the local bar, and the local community, and it would be desirable if the performance of a defender office were monitored continuously by an independent group of judges, lawyers, and civic leaders.[44]

ADEQUATE COMPENSATION OF COUNSEL

In a few States assigned counsel in felony cases are not paid for their services or even reimbursed for out-of-pocket expenses. Where they are paid, compensation is often so low that defense of the poor is a burdensome obligation and a sacrifice.[45] Defender offices also appear to be inadequately funded. A recent survey by the American Bar Foundation concluded that more than half of these offices lacked sufficient finances or required additional staff.[46] The criminal process is seriously disabled by procedures which rely upon uncompensated or inadequately paid assigned counsel or upon undersalaried defenders for representation of the poor.

> [T]he proper functioning of the adversary system of justice, in which the nation as a whole has an important stake, demands that the defense of accused persons proceed at a level of zeal and effectiveness equivalent to that manifested in their prosecution. The notion that the defense of accused persons can fairly or safely be left to uncompensated attorneys reveals the fundamental misconception that the representation of financially deprived defendants is essentially a charitable concern. On the contrary, it is a public concern of high importance. A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.[47]

All systems for representation of defendants should provide adequate compensation for counsel. Defender offices should be sufficiently financed so that enough lawyers may be hired to give thorough preparation to all cases. The salary paid to the defender should be commensurate with that paid to a lawyer of comparable experience in the prosecutor's office.[48]

[40] Airlie House Rep. 39.
[41] ATT'Y GEN. REP. 40.
[42] See generally EQUAL JUSTICE FOR THE ACCUSED 63-68.
[43] See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 291 (1966).
[44] EQUAL JUSTICE FOR THE ACCUSED 83-85.
[45] See SILVERSTEIN, DEFENSE OF THE POOR 16-17, 32-33, 253-67 (1965).
[46] *Id.* at 43.
[47] ATT'Y GEN. REP. 48-49.
[48] See District of Columbia Legal Aid Act, D.C. CODE ANN. § 2-2206 (1961): "[T]he salaries of all employees of the [Legal Aid] Agency . . . shall be fixed by the Board of Trustees, following the salary scale for employees of similar qualifications and seniority in the office of the United States Attorney for the District of Columbia."

Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice.[49] It has been argued that these standards are sufficient because it is part of a lawyer's obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the defense bar is to be upgraded and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.

FLEXIBLE STANDARD OF ELIGIBILITY

In most jurisdictions representation by appointed counsel or a defender is available only for defendants who are almost totally unable to retain counsel. In some places a defendant is disqualified if he obtains his release on bail.[50] This standard denies counsel to defendants who are in fact unable to retain a competent private attorney although they have managed to pay a bond premium.

Even where ability to post bond is not the only criterion, tests based on the concept of indigency fail to recognize that defendants of limited means may have some money but not enough to pay for an adequate defense. They also afford no protection for a defendant who may have sufficient money to retain a lawyer at the outset of the proceeding but whose funds are exhausted before the end of a long trial. The need for socially provided services arises whenever any aspect of adequate representation is financially out of reach of a defendant, even though he is able to bear some expenses of his defense.[51] One way in which this need may be satisfied is through the standard of financial inability to obtain adequate representation, which has been incorporated into the Federal Criminal Justice Act of 1964.[52]

Under the Criminal Justice Act a defendant who, at any stage of the proceedings, becomes unable to pay for counsel whom he has retained may have counsel appointed for him by the court. Defendants who have retained counsel may also receive payments under the Act for the cost of necessary investigative or other services which they are unable to afford. And the Act also provides that a defendant may obtain the services of appointed counsel or investigators although he can, and is required to, pay some part of their cost.[53]

EDUCATION AND TRAINING IN THE CRIMINAL LAW

LAW SCHOOL EDUCATION

One of the causes of the inadequate supply of qualified defense counsel has been the content of formal legal education. Until recent years most law schools offered only a basic course in criminal law, emphasizing the substantive law of crimes, with perhaps an advanced course in some aspects of criminal procedure.[54] This lack of attention to criminal law, as compared to the emphasis on commercial law, may be partly explained by the bar's general disregard for the field and the lack of financial reward. Law schools feel obligated to provide training related to the work their graduates will do. But the subordination of criminal law in legal education has served to reinforce the attitudes which produced it.[55]

It is now widely recognized that the traditional course offerings are not adequate to present to students the important issues in the administration of criminal law and certainly are inadequate as a grounding for criminal practice.[56] Many schools have instituted courses or seminars in criminal procedure, postconviction remedies, criminal evidence, trial practice, and sentencing and corrections.[57] The ethical problems of criminal lawyers and their professional responsibilities also are being given more careful attention. Moreover, the current interest in the administration of criminal justice has attracted criminal law professors more concerned with the improvement of the criminal process and better able to impart their enthusiasm to their students.

Undergraduate Clinical Programs in Criminal Law. Many law schools also have instituted programs through which students may obtain practical experience in the administration of criminal justice. The most prevalent form of student participation in actual cases is the assignment of students during the school year to assist appointed counsel or defenders. At the University of Utah, for example, each student participating in the program is periodically assigned for one day to the Salt Lake City Legal Defender Association to assist the public defenders on any matters which may arise during that day. Under the Chicago Federal Defender Program, which involves 60 third-year students from six law schools in the Chicago area, the students are assigned in teams of two by the project director to assist appointed counsel throughout a case by preparing memoranda and documents and interviewing witnesses.[58]

In order to enlarge upon the students' practical experience, several schools have developed courses in criminal procedure to be taken in conjunction with legal aid participation. Georgetown University, for example, offers a

[49] See, *e.g.*, *State* v. *Rush*, 46 N.J. 399, 217 A.2d 441 (1966): "The rate should reimburse assigned counsel for his overhead and yield something toward his own support. In approximate terms, the overhead of the average law office runs about 40 percent of gross income. To meet that expense and yield something to assigned counsel, this court suggests compensation at 60 percent of the fee a client of ordinary means would pay an attorney of modest financial success." *Id.* at 413, 217 A.2d at 448. See also *Schwartz* v. *Rock County*, 24 Wis. 2d 172, 128 N.W. 2d 450 (1964) (two-thirds of minimum bar association fee).
[50] See SILVERSTEIN, DEFENSE OF THE POOR 106-08 (1965).
[51] See ATT'Y GEN. REP. 46-47.
[52] 18 U.S.C. § 3006A (1964).
[53] See also MINN. STAT. ANN. §§ 611.20-.21 (Supp. 1965).
[54] See Pye, *Law School Training in Criminal Law—A Teacher's Viewpoint*, 3 AM. CRIM. L.Q. 173 (1965).
[55] See Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEXAS L. REV. 289 (1965).
[56] "Much needs to be done if we are really to subject our system for the administration of justice to critical analysis. . . . The student must understand what present law provides, the object sought to be served by such a provision, what actually occurs in practice and the effects upon the overall system and its objectives which result from compliance or noncompliance with the law. Special attention must be devoted to 'low visibility' areas where custom and usage replace statute, rule, or cases as the basic structure." Pye, *supra* note 54, at 178.
[57] The University of Wisconsin Law School, for example, has six faculty members teaching courses in criminal law and administration. The courses offered are a basic course in criminal law, half of which is devoted to procedure; an advanced course in criminal justice administration; and seminars on police practices, administration of criminal justice, mentally disordered offenders, administration of juvenile justice, corrections, and criminal responsibility and special treatment programs. See Kimball, *Correctional Internships—A Wisconsin Experiment in Education for Professional Responsibility*, 18 J. LEGAL ED. 86, 93 n.3 (1965). See also George, *The Imperative of Modernized Criminal Law Teaching*, 53 KY. L.J. 461 (1965); Rubin, *The Law Schools and the Law of Sentencing and Correctional Treatment*, 43 TEXAS L. REV. 332 (1965); Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL ED. 73 (1958).
[58] A similar Federal defender program, involving 20 students from the University of San Francisco Law School, is described in Woodruff & Falco, *The Defender Workshop: A Clinical Experiment in Criminal Law*, 52 A.B.A.J. 233 (1966).

four-hour course in criminal procedure for third-year students in Washington area law schools. The course is taught by five members of the Georgetown faculty, assisted by representatives from various legal service agencies. The students are required to devote 150 hours of work with the Legal Aid Agency of the District of Columbia during the year in which they are enrolled in the course.[59]

Representation of Misdemeanor Defendants. In at least nine States [60] third-year law students may represent at trial indigent defendants charged with misdemeanor offenses. This has provided an opportunity for the law schools in these States to give their students valuable training in actual trial work while relieving the strain on the resources of the practicing bar.

The Boston University Roxbury Defender Project, a part of the Boston Unified Legal Service program,[61] involves 30 third-year law students. The students are given an intensive series of lectures on criminal procedure and trial practice and are then divided into teams of two for assignment to indigent defendants in the Roxbury District Court. The project's director, a full-time faculty member with extensive criminal trial experience, supervises the students' preparation of the cases. He is present during the trial to provide assistance when necessary, and he reviews the students' performance in each case after final disposition.

The Harvard Law School's Voluntary Defenders, a student organization of about 40 members, also represents misdemeanor defendants in other district courts in the Boston area. The students are supervised by practicing lawyers, but they often appear in court without a lawyer being present, a situation which gives the students a greater sense of responsibility. In the 1964–65 school year members of the Voluntary Defenders made 157 appearances representing 125 defendants in misdemeanor trials and probable cause hearings in the district courts.[62]

Assistance to Prisoners, Prosecutors, and the Courts. Law student participation in the criminal process is not limited to preparing for or conducting trials. For many years the Harvard Voluntary Defenders has provided legal assistance to prisoners in local institutions and has done postconviction research for prisoners throughout the country. At the University of Wyoming law students visit the State penitentiary to interview prisoners who feel that they have grounds for postconviction relief. The students research the legal questions raised by the prisoners and discuss the cases with the student program's faculty adviser. If the student and the adviser agree that the prisoner has colorable claim, the faculty adviser will request the court to appoint counsel for him, and the student will continue to assist the lawyer. When it is decided that a prisoner does not have such a claim, the faculty adviser goes to the penitentiary to explain his opinion to the prisoner.

A similar program in which students from the University of Kansas School of Law provide legal services to inmates at the Federal penitentiary at Leavenworth, Kan., was initiated in 1965.[63] In the first year of operation the 30 students who participated in the program interviewed and advised 104 prisoners on such matters as postconviction remedies and detainers imposed by other jurisdictions. The University of Pennsylvania Law School has recently established a comparable program at the Federal prison at Lewisburg, Pa. At the University of Montana students participating in the law school's legal aid program not only prepare postconviction relief papers but also represent indigent parolees at revocation hearings.

Summer programs developed by the Duke University Law School [64] and by a few U.S. Attorneys [65] are the only examples found of student assistance to prosecutors' offices. Many prosecutors' offices are understaffed, often to the extent of being unable to provide prosecutors in the lower courts, and might benefit from assistance by law students. Furthermore, law student participation in the prosecutorial function would provide interested students with a more balanced view of the criminal process. In 1966 the Massachusetts Rules of Court were amended to permit law students to represent the Commonwealth in criminal cases in the district courts,[66] where cases are now prosecuted by the police. Both the Harvard and Boston University Law Schools have developed programs for third-year law students to prosecute cases under the supervision of lawyers in the district attorney's office.[67]

Law students may also assist the courts in performing services for which financial resources have been unavailable. Under the University of Mississippi program law students work in several counties preparing presentence reports, which are not provided in other counties, and memoranda on petitions for habeas corpus.

Summer Internships. A few law schools have summer intern programs that provide a small group of students with intensive experience in criminal law administration.[68] Under the University of Wisconsin Law School correctional internship program, for example, eight students are assigned during the summer after their second year to work in penitentiaries or juvenile detention homes or with probation and parole supervisors or the State parole board. The students advise prisoners on civil legal questions, prepare presentence and preparole reports, and actually supervise probationers or parolees. In their third year the internship students evaluate their experiences in a four-hour criminal law seminar.[69]

The University of Wisconsin Law School has also instituted a police internship program modeled on the format of the correctional program. Students participating in the program are placed with a metropolitan police department, where each student focuses on a particular problem of police practices, such as stopping and questioning individuals on the street. After extensive field observations each student drafts proposals for department policy on the area which he has studied and presents his proposals for consideration by the department heads.

* * *

At the present time undergraduate clinical programs in criminal law have been instituted in approximately one-half of the approved law schools in the United States. It may be estimated that about 10 percent of this year's law school graduates have received some form of practical experience in the criminal process.

These undergraduate programs should help to alleviate the criminal law manpower shortage. The very existence of such programs dispels the impression that criminal law is unworthy of the students' consideration as a possible career. By exposing students to the important services which lawyers must perform, these programs may encourage some students to enter criminal practice, and students who choose a predominantly civil practice will be better qualified to accept appointments as defense counsel. At the same time the participation of law students helps to relieve some of the pressure on the inadequate criminal law manpower resources. Many of these programs have demonstrated the opportunities for greater involvement by the lawyer in all segments of the criminal justice system. There are great advantages to bringing the skills and insights of lawyers into the police and correctional agencies, and there are opportunities for lawyers to pursue worthwhile careers with these agencies.[70]

Graduate Programs. Another recent development in criminal law education is the graduate internship program. Three law schools have such programs, all of which award masters of law degrees to successful participants.

The Georgetown University program, now completing its sixth year, provides a two-year internship for six graduates each year. They begin their studies with a series of seminars, lectures, and demonstration trials. After admission to the bar they serve as associate counsel to legal aid or assigned counsel and finally are appointed as sole counsel for indigent defendants.

In their second year the interns continue to represent criminal defendants, but they spend about half of their time as assistants to Neighborhood Legal Service lawyers. They handle the civil matters of the internship program's clients and also are available for appellate and postconviction proceedings. The interns are required to take seminars in criminal, civil, and juvenile court practice and poverty law and also to do graduate work in either psychiatry, social work, or criminology.

The University of Pennsylvania program, which was begun in 1966, offers two-year fellowships to three law school graduates each year. The fellows begin their work during the summer by serving as assistants to the staff of the Defender Association of Philadelphia; after admission to the bar they assume duties as full-time assistant defenders, which they continue to perform during their residency. The fellows meet with the faculty supervisor each week for about four hours to discuss problems arising in the course of the defender work. The faculty supervisor also assigns to each fellow two undergraduate students to assist in researching and investigating cases. Each fellow must submit a master's thesis in the field of criminal law, but no other course work is required.

The Northwestern University program, now in its second year, is divided between a year's residency at the law school and a second year as a full-time police legal adviser. Five law school graduates are presently participating in the program. During the first year each student completes 10 semester hours in criminal law courses and submits a master's thesis on a subject related to police work. He also observes at close hand the operation of the Chicago Police Department. The second year in the program is spent as a legal adviser to a metropolitan police department. The student's performance is audited by the program's director, and he returns to the law school several times each year to participate in seminars which the school conducts for police legal advisers from various parts of the country.

The Georgetown internship program is the only graduate program which has been in operation long enough to provide meaningful data on the careers of its participants. Of its first 39 graduates 11 are presently serving as either public defenders or prosecutors; 7 additional interns have worked in prosecutors' offices, and several other graduates have indicated that they would have entered criminal practice if they could have obtained positions at adequate salaries.

Graduate programs are extremely expensive measured on a cost-per-student basis. However, they do attract qualified lawyers into criminal practice. In addition, graduate students are an immediate source of legal manpower to satisfy part of the unmet need for legal services.

CONTINUING EDUCATION IN CRIMINAL LAW

The legal profession has become increasingly aware of the importance of continuing education in all areas of legal practice. The need is nowhere more urgent than in the criminal law. It is needed to ensure a high standard of performance by the many civil lawyers who will be called upon to represent criminal defendants and to give these lawyers confidence in their own skills so that they will be willing to accept criminal representation. Continuing education in criminal law also provides an opportunity to improve the quality of representation by the criminal defense bar. The American Bar Association emphasized the need for continuing criminal law education in its 1964 statement of policy:

> The proper training of lawyers to represent indigent defendants in criminal cases and to administer defender services and assigned counsel systems is of great importance and the agencies of the Association and of State and local bar associations, concerned with continuing legal education, should be encouraged to interest themselves in providing such training.[71]

For the recent law school graduate and for the prac-

[59] See Pye, *supra* note 54, at 181.

[60] Colorado, Connecticut, Florida, Massachusetts, Montana, New Jersey, New Mexico, New York, and Wyoming. See, *e.g.*, MASS. SUP. JUD. CT. R. 11; N.Y. PENAL LAW §§ 270, 271. See also SILVERSTEIN, DEFENSE OF THE POOR 148, 153 n.6 (1965).

[61] See Spangenberg, *The Boston University Roxbury Defender Project*, 17 J. LEGAL ED. 311 (1965); Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445 (1965).

[62] 1965–66 HARVARD VOLUNTARY DEFENDERS ANN. REP.

[63] This program was developed with the assistance of the Office of Criminal Justice in the Department of Justice and the Federal Bureau of Prisons. Financial support has been provided by the Metzenbaum Human Relations Fund of Cleveland, Ohio.

[64] See Everett, *The Duke Law School Legal Internship Project*, 18 J. LEGAL ED. 185 (1965).

[65] See Purver, *Operation of the United States Attorney's Student Assistant Program*, 2 AM. CRIM. L.Q. 175 (1964).

[66] MASS. SUP. JUD. CT. R. 11.

[67] The Office of Law Enforcement Assistance has provided funds for the first year's operating expenses of these programs (1966–67 school year). The Boston University grant includes salaries for 10 students who will work full time in the district attorney's office during the summer after their second year.

[68] See Everett, *supra* note 64. The Duke University Legal Internship Project involves seven students who are selected on the basis of their performance in the prerequisite course in criminal procedure. During the summer following the second year, the students are assigned by the courts in Durham and Raleigh to assist appointed counsel. Several of the students have participated in more than 1,000 cases during the summer, performing tasks such as interviewing witnesses and preparing memoranda and legal documents. Interns also have assisted the county prosecutors in reviewing files of pending cases to determine which cases are appropriate for *nolle prossing*.

[69] See Kimball, *supra* note 57.

[70] See Katzenbach, *President's Law Enforcement Commission Urges the Legal Profession's Cooperation*, 52 A.B.A.J. 1013 (1966).

[71] Quoted in Seymour, *Foreword* to SILVERSTEIN, DEFENSE OF THE POOR 2 (1965).

ticing lawyer who is unfamiliar with the criminal process, training programs should refresh the lawyer's knowledge of substantive criminal law and provide a basic understanding of local criminal procedures. It is also important that the lawyer is made aware of how the criminal process actually operates. Instruction is needed on issues such as: What are the practices of the prosecutor's office concerning plea bargaining, noncriminal dispositions, and discovery; what can the lawyer do to obtain release on recognizance for his client; and what community resources are available to aid the lawyer in formulating a dispositional plan for his client?

For attorneys with wider experience in criminal practice, either as private lawyers or defenders, continuing education may be a means of improving basic skills, such as cross-examination of witnesses and the use of scientific evidence or expert testimony. These lawyers also need periodic courses to keep them abreast of recent changes in the law. Valuable programs already have been developed through the cooperation of the organized bar, defender offices, and the law schools. The bar association and the Legal Aid Society in the District of Columbia sponsor an annual criminal practice institute, a day and one-half program attended by more than 700 lawyers and law students. The institute provides instruction and demonstrations in criminal trial tactics and strategy and a review of recent developments in criminal law.[72] A second program, consisting of six two-hour classes, is designed to give about 40 lawyers in general practice more comprehensive coverage of criminal law and procedure, with the expectation that these lawyers will make themselves available for appointments in criminal cases.

State coordination of continuing legal education programs facilitates the use of regional institutes for lawyers in smaller communities. The State bar associations in California, Florida, and Texas, for example, have sponsored regional institutes with the cooperation of law schools. In some jurisdictions a single, statewide program of intensive training may be helpful in supplementing local efforts. Last year the Minnesota public defender, the State bar association, and several law schools collaborated in presenting the first annual continuing legal education criminal justice course. The course, attended by about 50 lawyers and public defenders from all parts of the State, consisted of two and one-half days of classes each week over a period of four consecutive weeks.

Criminal law training for members of the bar has been given added impetus through the efforts of the Joint Committee on Continuing Legal Education of the American Bar Association and the American Law Institute. Since its inception in 1948 the Joint Committee has assisted in the organization and conduct of educational programs at the State and local level. It is now developing a course on criminal law practice and is a sponsor of a national defense manual for trial of criminal cases, which will be annotated for use by counsel in every jurisdiction.

Programs consisting solely of 1 or 2 days of lectures or trial demonstrations can make only a limited contribution to the immediate need for qualified defense counsel. While these programs can be valuable as refresher courses or when there has been a significant change in law or procedure, they would not seem adequate to ensure effective representation by lawyers who are unfamiliar with the criminal process or to relieve the civil practitioner's misgivings about his qualifications to handle criminal cases. A more intensive course of instruction like the programs conducted in the District of Columbia and in Minnesota is needed to satisfy these concerns.

The organized bar in each State and local community should play a leading role in developing appropriate criminal law training programs for practicing lawyers. In metropolitan areas there may be a sufficient number of lawyers to justify holding a one- or two-week seminar, perhaps in the late afternoon or evening. This type of program entails no traveling or living expenses, and it permits the lawyers to keep in touch with their private practice. In less populated communities it may be necessary to hold regional seminars or a single program for lawyers and defenders from all parts of the State.

It is likely that a large-scale criminal law training program will require outside financial support. Refresher courses and advanced training for criminal law specialists may be able to operate largely from tuition fees and from proceeds from the sale of printed material. But lawyers in private civil practice may be deterred from enrolling in intensive introductory courses if they must pay full tuition and possibly traveling and living expenses, in addition to giving up time from their paying clients. Although bar associations and charitable foundations may be expected to continue their financial support for criminal law training programs, broader financial support is needed.

[72] See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 293 (1966).

Chapter 6

The Officers of Justice

The recommendations of this report for statutory and procedural reform can be successful only if the criminal justice system is manned by able and conscientious personnel. The preceding chapter emphasizes the need for competent and energetic counsel for the accused, and the Corrections Task Force Report discusses the qualifications for probation officers. This chapter proposes improvements in the selection and training of judges and prosecutors and the coordination of State prosecutorial functions.

JUDGES

The quality of justice depends in large measure on the quality of judges. Good judges are essential for settling all types of legal controversies, whether the issue involves the custody of a child, the interpretation of a private business agreement or a will, or the power of the government to enforce a regulatory statute. But the demands which the criminal law makes on the judicial process are unique. For the criminal law contains rules of conduct essential to the maintenance of an orderly society and gives government the power to deprive an individual of his liberty or his life.

The trial judge is at the center of the criminal process, and he exerts a powerful influence on the stages of the process which precede and follow his formal participation. Many decisions of police, prosecutors, and defense counsel are determined by the trial judge's rulings, by his sentencing practices, and even by the speed with which he disposes of cases. His decisions on sentencing and probation revocation affect the policies and procedures of correctional agencies. And to a great degree the public's impression of justice is shaped by the trial judge's demeanor and the dignity he imparts to the proceedings in his courtroom.

Because appellate judges enunciate rules and principles to govern future cases, it is essential that they have both wisdom and a sensitivity to the practical problems of law enforcement. But the trial judge exerts a far greater influence on the quality of justice. For the principles of appellate decisions are viable only when they are applied to facts, and the trial judge supervises the fact-finding process. When he serves as trier of the fact on issues such as search and seizure and confessions, the trial judge has almost absolute power to assess the credibility of witnesses and to resolve conflicting testimony. A trial judge's decision to acquit even in the face of strong evidence of guilt may not be appealed, and it bars further prosecution. Through his attitude or expressions the trial judge may influence the jury's determination of factual issues in a way which will not be reflected in the record before an appellate court.

The power of the trial judge in sentencing is another example of his virtual autonomy. In most jurisdictions today the trial judge's sentence cannot be adjusted by an appellate court if it is within the statutory limits, no matter how harsh or arbitrary it appears to be. And even appellate review of sentences, proposed in chapter 2 as a useful procedure for correcting unjust sentences, would leave the trial judge with broad discretion in most sentencing decisions.

Although the great majority of defendants appear before the judge only to enter a guilty plea, which often is the result of negotiations with the prosecutor, his influence on these dispositions is nonetheless substantial. Much like the out-of-court settlement of a civil case, the informal disposition of a criminal charge is based largely upon the parties' expectations of what result would be reached if the case were brought to trial. In addition it is not uncommon for individual judges to regard certain offenses as too trivial to merit any substantial penalty or even to merit the court's time in hearing them. An experienced prosecutor is reluctant to antagonize the judge by bringing these cases to court despite the availability of sufficient evidence to convict the defendant.

A judge's attitude toward prosecutions for certain offenses also affects arrest practices of the police. In one large city, for example, it was noted that the number of arrests for prostitution and solicitation declined sharply during the months that a judge who routinely dismissed such cases was sitting in the misdemeanor division.[1]

For most Americans the trial judge is the symbol of justice in our criminal courts. Few persons have witnessed an appellate argument; personal impressions are formed through appearing in a trial court as a juror, witness, or defendant. A public which has been taught to believe that judges are wise, fair, and dignified men who possess all the virtues traditionally associated with the judiciary will measure the judges whom they encounter

[1] 2 American Bar Foundation, The Administration of Criminal Justice in the United States—Pilot Project Report 139–40 (mimeo. 1957).

against this image. When judges are rude or inconsiderate or permit their courtrooms to become noisy, crowded dispensaries of rapid-fire justice, public confidence in the fairness and effectiveness of the criminal process is diminished.

Because the judge plays such a critical role in the criminal process, every effort must be made to ensure the highest quality judiciary. The first step is to employ selection procedures which will bring to the bench lawyers who are likely to be excellent judges. Although it is possible to identify such factors as professional incompetence, laziness, or intemperance which should disqualify a lawyer from becoming a judge, it is much more difficult to choose confidently the potentially superior judge from among a number of aspirants who appear generally qualified. And many of those who can become excellent judges come to the bench without certain skills or experience. Therefore it is important to provide training for judges, especially for those who are newly selected. Finally, there must be fair and expeditious procedures for disciplining or removing judges who are unwilling or unable to perform their duties properly.

SELECTION OF JUDGES

Are the methods for selecting judges rationally designed to put good judges on the bench? What can be done to improve the quality of the judiciary by improving the way in which judges are chosen? For many years the American Bar Association, the American Judicature Society, State and local bar associations, and civic organizations have endeavored to answer these questions, and their efforts have significantly improved the judicial selection process in many States.

There is a variety of procedures for selecting State court judges, and in many States different procedures are used for different levels of the judiciary.[2] In about nine States judges are appointed by the Governor or by a local governing authority. This is similar to the procedure used in the Federal system, where judges are appointed by the President with the advice and consent of the Senate. The legislatures have exclusive power to select some or all of the judges in five States.

Judges are selected by popular election in more than half the States. In about 19 States candidates for the bench run in partisan elections after receiving their party's nomination at a political convention or after winning a primary election. In other States candidates run without party designation, having obtained a place on the ballot on their own initiative, usually by petitions circulated by friends. Although over 80 percent of the judicial positions in the United States are elective, the Institute of Judicial Administration's recent survey of American judges revealed that about one-half of the responding judges were initially appointed to fill vacancies occasioned by death or retirement.[3]

Approximately 10 States have amended their constitutions to provide for the merit selection of judges. The basic elements of the merit selection system, called the "Missouri plan" after it was first adopted by that State in 1940, are: nomination of qualified candidates by a nonpartisan commission, appointment by the executive, and approval by the voters. In Missouri merit selection is used for all appellate judges and for trial court judges in St. Louis and Kansas City. The nominating commission for the appellate courts is composed of the chief justice of the State supreme court as chairman, three lawyers elected by the State bar, and three laymen appointed by the Governor. When a vacancy occurs, the commission carefully investigates the background and reputation of prospective judges and submits to the Governor a list of three lawyers, all of whom are recommended as being well qualified for judicial office. The Governor must appoint one of these lawyers to fill the vacancy. At the general election following his appointment the judge runs, without opposition from other candidates, on the question whether he should be continued in office. If he receives a majority of affirmative votes, he may remain on the bench until the expiration of his term. The same proposition is put to the voters in the case of a judge seeking reelection.[4]

The nominating commission procedure has also been used on a voluntary basis in several other States. In 1960 Mayor Robert F. Wagner of New York City established a nonpartisan commission to nominate persons for the approximately 100 judgeships under his appointive power, and his successor, Mayor John V. Lindsay, has continued and formalized this procedure. The Governors of Pennsylvania and Colorado have utilized similar commissions in making judicial appointments.

Merit selection plans have been adopted largely as a result of dissatisfaction with popular election of judges. Indeed, except for parts of Switzerland, the United States is the only democracy in the world where the practice of selecting judges by popular vote still survives. Election of judges was a basic principle of the Populist movement that flourished in the United States in the latter half of the 19th century. Guided by the conviction that judges should be responsive to the will of the majority, each State admitted to the Union between 1846 and 1912 provided in its constitution for the popular election of judges. At the present time, however, exclusive reliance on popular election is of dubious merit.

In our largely urban society where only a small portion of the electorate knows anything about the operation of the courts, it is usually impossible to make an intelligent choice among relatively unknown candidates for the bench. The inevitable result is that in partisan elections the voters tend to follow their party's nominations without any serious attempt to evaluate the relative merits of the candidates. In normally Democratic or Republican districts designation as the majority party's nominee for a judgeship ordinarily assures election. The remarks of Judge Samuel I. Rosenman of New York concerning his experience as a judicial candidate describe the realities of the political election of judges:

> I learned at first hand what it means for a judicial candidate to have to seek votes in political club houses, to ask for the support of political district leaders, to receive financial contributions for his campaign from lawyers and others, and to make nonpolitical speeches about his own qualifications to audiences who could not care less—audiences who had little interest in any of the judicial candidates, of whom they had never heard, and whom they would never remember.
>
> . . . Their concern is centered on the executive and legislative candidates because these candidates are identified with the only issues and causes which interest the voters. Most often, when they reach the judicial candidates down on the ballot, they vote blindly for the party emblem.[5]

The true judgemakers are the leaders of the dominant party who select its candidates. The process of selection is apt to be carried on in private meetings. Intricate bargaining patterns may evolve in which certain political leaders will assert dominion over certain judgeships, and balances must be struck to reward the party's principal financial supporters or those who have labored for the party organization. All too frequently in this bargaining process scant attention is given to the abilities of the proposed candidates.

Although the election of judges without party labels is designed to diminish the impact of partisan politics, it may create other substantial evils. As two authorities have noted,

> it nullifies whatever responsibility political parties feel to the voters to provide competent candidates and thereby closes one of the avenues which may be open to voter pressure for good judicial candidates. Indeed, experience indicates that where appeal to the voters on political grounds is made impossible . . ., other considerations equally irrelevant to a candidate's qualifications for judicial office are injected into the election. . . .[6]

The Journal of the American Judicature Society has called the nonpartisan election of judges the "worst of the five traditional judicial selection methods used in this country," because

> having the same name as a well-known public figure, a large campaign fund, a pleasing TV image, or the proper place on the ballot are far more influential in selecting judges than character, legal ability, judicial temperament or distinguished experience on the bench.[7]

Moreover, the nonpartisan ballot tends further to reduce popular interest and participation in the election.[8]

There are other disadvantages of the elective system, whether partisan or nonpartisan, which argue strongly for its modification. In the first place it may discourage qualified lawyers from seeking judicial office. A lawyer with a good private practice and a distinguished reputation at the bar may be unwilling to curry the favor of the politicians or to undertake a personal campaign in order to get his name placed on the ballot. Without political experience he may have legitimate doubts about his ability to appeal to the voters, and he may be reluctant to subject his character and reputation to public criticism.

When a sitting judge has to run for reelection, he must take time off from his work to campaign. In closely contested elections campaign expenses can be substantial, and the sense of obligation that a successful candidate incurs to his financial supporters may strain his vow of impartiality. Because of the power attached to judicial office, including as it often does the authority to make lucrative appointments, the public may be treated to the unedifying spectacle of organized lawyers' committees building up credit with a judicial candidate through campaign endorsements. Finally, it is possible that a judge who must shortly stand for reelection may be unduly influenced by what he conceives to be the popular view of how a case should be decided.

Proponents of the elective system argue that other important values will be preserved through its retention. They contend that the members of a Missouri-plan nominating commission frequently are not representative of the community at large and, therefore, that the nominees will not be drawn from all segments of the community. It is argued that minority group representation among the judiciary will be decreased if an appointive system is adopted and that minority groups will continue to regard the courts with distrust because representative numbers of their group are not raised to the bench. It is also contended that the nominating commissions are more likely to choose lawyers whose professional careers have been spent in large business law firms or prosecutors' offices than lawyers whose experience has included the defense of criminal cases.

Experience with merit selection plans, however, suggests that these objections are not well taken. Studies of the first quarter century of merit selection in Missouri show that many of the nominees have been individual practitioners, and that the majority of those who were in law firms came from offices of no more than three lawyers.[9] As Judge Rosenman stated, the New York City Mayor's Committee on the Judiciary

> has tried also to pay attention to the one political motive which, in my view, has been an asset of the elective system—the recognition of ethnic and other groups of the community in the lists which it has submitted. I am not suggesting that a man should be appointed to judicial office merely because he belongs to some particular ethnic, religious or other group. But practical politics require that a man be not overlooked merely because he belongs to one of those groups—and this realism the committee has sought to preserve in its lists of recommendations. As a result, the Mayor has been able to make his appointments from all such groups—religious, racial and foreign born.[10]

In sum, merit selection plans provide a more rational procedure for selecting judges than popular election alone. The essential elements of merit selection are that the qualifications of prospective judges are screened and the field is narrowed to a panel of a few nominees

---

[2] See COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES: 1966-67, table 3, at 116-17 (1966).

[3] INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL EDUCATION IN THE UNITED STATES 12 (1965). The Commission is grateful to the Institute of Judicial Administration for making available to the staff unpublished tabulations and other material from the survey of 982 State and Federal judges conducted in 1963 and to Mrs. Barbara Roffwarg for their assistance and advice in the use of these data.

[4] Winters & Allard, *Judicial Selection and Tenure in the United States*, 1 AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 146, 152-53 (Jones ed. 1965).

[5] Rosenman, *A Better Way To Select Judges*, 48 J. AM. JUD. SOC'Y 86-88 (1964).

[6] Winters & Allard, *supra* note 4, at 158.

[7] Editorial, 48 J. AM. JUD. SOC'Y 124, 125 (1964).

[8] Winters & Allard, *supra* note 4, at 159.

[9] Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, 48 J. AM. JUD. SOC'Y 126, 128 (1964).

[10] Rosenman, *supra* note 5, at 91-92.

whose legal training, character, and temperament mark them as potentially superior judges. Whether the ultimate method of selecting a nominee from this panel is appointment or election by the voters, a good judge is likely to be selected. Because the nominating commission plays an important role, it should be a permanent agency with a professional staff. The members of the commission should be drawn from a variety of disciplines and backgrounds including the legal profession and should be representative of the entire community. They should serve for terms that are sufficiently long to give them a chance to become sensitive to the qualities of good judges.

The most difficult problem involved in merit selection is the development of standards on which to choose nominees for the bench. The New York Mayor's Committee relies on several broad categories of criteria: a prospective nominee's personal qualities, his character, patience, and industry; his education and training; and his professional attainments and specialized experience.[11] Trial experience is not a sine qua non for nomination, but it is a qualification of major importance. Political activity is regarded as being in a lawyer's favor, and in no sense is it a disqualification or demerit. These factors are illustrative of the type of criteria which a nominating commission should consider. But no way has been found to give a uniform meaning to imprecise terms such as "character" and "patience," and there is no agreement on the relative importance of, for example, trial experience or age. These problems may never be resolved; therefore the success of the merit system depends largely on the intelligence and wisdom of the nominating commission and the appointing official.

Another way to remove judges from undue political influence and to increase their independence is to provide lengthy tenure. Yet in a number of States the judges of major criminal trial courts must seek reelection as frequently as every four years.[12] Federal judges hold office for life during good behavior, and in many States they sit to a fixed retirement age or for a term of from 10 to 14 years. Under both of these approaches giving long tenure, generally higher judicial standards have been maintained. It is important that there be liberal provisions for the dignified retirement of judges at a fixed age. Many States and the Federal Government have authorized the continued service of vigorous retired judges, enabling the use of their experience while making room for the appointment of younger judges.

JUDICIAL TRAINING

The American trial judge receives no formal training or apprenticeship in the judicial function. He generally assumes the bench with no knowledge of the art of judging other than perhaps some experience as a trial lawyer, an experience which rarely includes extensive criminal practice. About 25 percent of the judges responding to the Institute of Judicial Administration's survey reported that their private practice had included no criminal cases; nor did any judge say that he had specialized in criminal practice. A substantial percentage of trial judges responding did report prior experience as a prosecutor. But it is still possible for a judge who the day before had made his living drafting corporate indentures to be called upon to rule on the validity of a search or to charge a jury on the law of entrapment.

When decisions do not have to be made on the spot, the fledgling judge can read precedent or consult with his senior colleagues. But many decisions have to be made without time to obtain help, and in such circumstances his inexperience is a factor which increases the probability of error. Although this problem might be mitigated in a multijudge court where a new judge can be assigned to less complex cases, this breaking-in process is frequently accomplished at the expense of lawyers and litigants.

The length of judicial careers in this country justifies a substantial investment in preservice and inservice training. There are indiciations that judges of courts of general jurisdiction serve on the average more than 25 years.[13] In several Western European countries, where the choice between the practice of law and a career on the bench is usually made immediately after graduation from law school, one who aspires to be a judge undergoes a specialized course of instruction, often consisting of a number of years of post-law school training.[14] In many countries there are requirements for lengthy periods of inservice training, first as court clerks, then as apprentice judges with gradually increasing responsibilities in actual cases. Finally, those who survive the training and apprenticeship programs are rated by the judicial hierarchy, and only those who best meet defined criteria are chosen to become judges.

Recognition of the need for specialized training, both before and after a judge is elevated to the bench, has been slow in the United States. The Institute of Judicial Administration survey revealed that only 12 percent of the judges had received any formal training or orientation when they assumed office. Only in recent years have there been sustained efforts to educate judges in the intricacies of their craft. The impetus for judicial education was provided in large part by the Joint Committee for the Effective Administration of Justice, under whose aegis the first State and regional judicial seminars were convened some six years ago.

The Joint Committee assisted in the organization of 40 seminars, and virtually all of the approximately 3,000 State trial judges have had an opportunity to participate in at least one seminar. Each program discussed several problems in the criminal law area with which a new judge feels ill equipped to deal. Some of the problems were how to impanel and instruct a jury; how to keep abreast of the expanding boundaries of due process; how to establish and maintain communication with police, community officials, and local news media; how to reduce the backlog of cases; how to rule on sensitive evidentiary issues including those involving real or demonstrative evidence; and in conjunction with correctional authorities, how to develop consistent sentencing patterns. In seminars which it has helped organize, the Joint Committee has encouraged participation by social scientists, psychiatrists, penologists, and other nonlawyers whose special fields of competence have relevance to law enforcement. The judges who participated in these programs emphasized the value of exchanging ideas and experiences about legal and administrative problems in the criminal process.

In 1964 the National Conference of State Trial Judges, affiliated with the American Bar Association, established the National College of State Trial Judges, now located in Reno, Nev., to provide a permanent institution for judicial education.[15] Under the present program, financed by a private foundation grant, about 100 State trial court judges from all parts of the country attend a four-week summer session. Most of the judges who attend have been on the bench for less than two years. The faculty consists of senior judges and several law professors, all of whom serve without pay. Because of space and staff limitations, however, the college can accept only one-third of the judges who apply.

Among the individual States, California has had perhaps the most ambitious program for the education of its judiciary. The California Judicial Council holds seminars for judges of courts of general jurisdiction and sponsors special institutes for juvenile and municipal court judges. These seminars have been financed by State and county government appropriations supplemented by private funds.

Training for Federal district court judges has consisted of the sentencing institutes, discussed in chapter 2, and a series of seminars for newly appointed judges. These seminars were developed in 1962, shortly after Congress created 63 new district court judgeships. The Judicial Conference, which conducts the seminar program, felt that it was important to give new judges an opportunity to discuss problems of the judiciary with more experienced colleagues and to develop an understanding of the role of the Federal trial judge. Since that time there have been four seminars, each lasting five days, and more than 100 new district judges have participated.

In September 1966 the Judicial Conference of the United States established a Special Committee on Continuing Education, Research, Training, and Administration to study the need for additional appropriations for the training of Federal court personnel, including judges, referees in bankruptcy, probation officers, and U.S. Commissioners. The committee, under the chairmanship of Justice Stanley Reed, is conducting a broad investigation of promising new programs to meet these needs.

Since 1956 New York University Law School has conducted a two-week summer forum for State and Federal appellate court judges. In all about 250 judges have attended these forums, which are taught mainly by State supreme court judges and law school professors. The curriculum has dealt with a variety of topics including the style of writing opinions, improving court administration, appellate control of the judge and jury relationship, and the scope of appellate review of criminal cases.

As the foregoing discussion indicates, programs for judicial training and education in this country are still in the early stages of development. The recent survey revealed that less than half of the judges in trial courts of general jurisdiction attended training programs after assuming the bench.[16] One of the most serious problems is the lack of funds. State legislatures have been reluctant to appropriate the necessary money to set up experimental programs. Groups of lawyers assisted by distinguished judges have provided most of the momentum for the development of judicial training programs, and most of the money has come from private foundations. The limited financial support has restricted the scope of existing programs, and uncertainties about the continued availability of foundation money have made it difficult to make any long-range plans.

There is general agreement among lawyers and judges that programs for the training of judges would be helpful in improving the administration of justice. Almost 85 percent of the judges responding to the Institute of Judicial Administration's survey expressed an unqualified interest in judicial training programs, and nearly all of these judges felt that such programs should be of at least one week's duration. More than half of the judges said that they would be willing to devote part of their vacation time to training programs.

If training programs are to be effective, however, judges should be required to attend, either before or immediately after they assume office. The existing programs, which are wholly voluntary, provide training for only a small proportion of new judges, and it is likely that those most in need are those least likely to attend. Moreover, legislatures must provide the necessary funds for the establishment and maintenance of such programs on a regular basis.

MAINTENANCE OF JUDICIAL STANDARDS

Dealing with judges who are unfit to discharge their responsibilities is a difficult problem, because any method for correcting judicial misconduct must not unreasonably weaken the independence of the judiciary. Moreover, only certain types of judicial conduct which impairs the administration of justice are amenable to discipline. Criminal, unethical, or indecent conduct, whether or not connected with judicial functions, clearly warrants strong disciplinary action or removal, but instances of such conduct fortunately have been infrequent. More difficult problems calling for disciplinary action or removal concern judges who become senile or who lose their intellectual faculties due to physical or emotional illness or intemperate habits.

Erroneous, uninformed, or careless judging is equally damaging. The resort to an appeal to correct trial court errors is time consuming and costly, and a trial judge's error in favor of the defendant in a criminal case may result in an unjustified acquittal which cannot be appealed. However, to discipline or to remove a judge for intellectually inadequate performance not caused by age or disease would threaten the independence of the judiciary. The average judge with no more than average self-confidence might become anxious or timid were reversals to be included in a dossier upon which his judicial employment depended.

[11] See Rosenberg, *The Qualities of Justices—Are They Strainable?* 44 TEXAS L. REV. 1063, 1074–77 (1966).
[12] See COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 2, table 2, at 114–15.
[13] Derived from data provided by the Institute of Judicial Administration.
[14] See INSTITUTE OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 3, at 14–27.
[15] See *Project Effective Justice*, 48 J. AM. JUD. SOC'Y 93, 95–97 (1964).
[16] Unpublished data from the Institute of Judicial Administration.

The traditional method of dealing with unfit judges in the United States is through impeachment proceedings, which involve indictment by one house of a legislature and trial by the other house.[17] A judge who is impeached and convicted is removed from the bench and barred from holding any other public office. Thus impeachment is suitable only for the most serious types of judicial misconduct, and it is such a cumbersome and expensive procedure that it is usually impractical.

In Florida, for example, there have been two impeachment trials in the last decade. In each instance a special session of the legislature had to be called, and the total cost of the two trials was approximately a quarter of a million dollars. Although it is reported that many Senators believed that the judges' conduct warranted censure or discipline, removal proved to be too harsh, and both judges were acquitted.[18]

Records show that impeachment trials for Federal judges have lasted from six to eight weeks and that only a few Senators are present to hear most of the evidence. Since the establishment of the Federal judiciary only eight judges have been impeached, the last in 1936. It is questionable whether the Senate today would allow its calendar to be disrupted by the trial of a single judge.[19]

Two other procedures for removing unfit judges include address to the executive, a concurrent resolution by both houses of the legislature requesting the Governor to remove the judge, which is available in about 10 States, and recall, which requires a popular referendum on whether a judge should be removed prior to expiration of his term. These methods have been used infrequently and are of even less practical significance than impeachment.

A recent incident in the Federal judiciary illustrates the need for better procedures to deal with cases of alleged judicial unfitness. In December 1965 the Judicial Conference of the Court of Appeals of the Tenth Circuit, acting under a general statutory authority to make orders for the effective administration of business for the courts of the circuit, ordered a district judge to relinquish all control over his pending cases and to accept no new cases on the ground that he was unwilling or unable to discharge the duties of his office.

Whether the Judicial Conference was authorized to issue this unprecedented order is subject to serious question. The matter has twice come before the Supreme Court without being decided on the merits. But in any event the remedy which the Judicial Conference applied is clearly unsatisfactory. Its order, in effect, stripped the judge of all duties, although it permitted him to retain his salary and the other perquisites of office. Since the order did not create a vacancy which could be filled by the President, it increased the workload of the other judges on the court. Moreover, the judge was given no notice that action was about to be taken against him, no specification of charges, and no opportunity to present evidence or argument in his defense.

The Senate Judiciary Committee has undertaken a study of legislation that would provide expeditious and fair procedures for correcting judicial unfitness in the Federal system. Although a constitutional amendment may be required, there is general agreement that impeachment should be supplemented by simpler procedures for the removal of Federal judges and that there is need for a variety of devices and remedies suited to various judicial failings.

Discipline and Removal by the Judiciary. Several States have constitutional provisions permitting the judiciary itself to discipline or remove a judge. As far as can be ascertained, the judges of these States have not protested, which would suggest that discipline of judges by the judiciary is not inconsistent with judicial independence. A judge in our polity is a commanding and respected figure, whose occasional impatient and overbearing conduct must be tolerated within limits. The safeguard against excessive discipline is the fact that judges themselves, who may be expected to be sympathetic with the personal aspects of judging, review the conduct of their colleagues.

The procedure employed in New Jersey illustrates the use of a supreme court's supervisory powers to control judicial behavior. Under the State constitution the chief justice is the administrative head of the entire court system, and the supreme court may certify to the Governor its belief that a judge has become so incapacitated that he is unable to perform his duties.[20] Although the constitution also gives the supreme court power to remove a judge, the legislation necessary to implement this power has not been enacted.[21] The ability of the supreme court to correct judicial misconduct, therefore, rests upon its authority to issue administrative orders to lower courts, the exercise of contempt power, and most important, the court's position at the head of the judiciary. Complaints about judicial misconduct are received and investigated by the State court administrator. When investigation reveals that a complaint is well founded, the administrator notifies the chief justice, who decides what action should be taken. Informal contacts between the justices of the court and judges whose conduct is in question have proven successful. In many cases a supreme court justice knows the judge personally and is able to elicit his cooperation. On two recent occasions, one involving a judge who falsified a weekly report to the administrator and another involving a judge who had become an alcoholic, the supreme court requested and obtained the resignation of lower court judges. The New Jersey system is the least expensive disciplinary procedure, since it requires no organization beyond the supreme court and its administrative office.

On the other hand, the fact that the system relies primarily on informal procedures initiated by judges is perhaps its most serious disadvantage. Although informal communications are useful in dealing with many types of judicial misconduct, there is substantial opinion that judges may be reluctant to begin disciplinary action against other judges. A disciplinary system employing procedures entirely hidden from public view may be discredited by the suspicion that the supreme court is not diligent in correcting judicial misconduct.

[17] See generally Note, *Remedies for Judicial Misconduct and Disability*, 41 N.Y.U.L. REV. 149, 16 2–65 (1966).
[18] Winters & Allard, *supra* note 4, at 167–68.
[19] See National Observer, Feb. 28, 1966, p. 1, col. 6.
[20] N.J. CONST. art. VI, § 6, ¶ 5, § 7, ¶ 1.
[21] N.J. CONST. art. VI, § 4.

Another type of disciplinary system, convening a court on the judiciary on an ad hoc basis to try specific complaints, is used, for example, in New York State for cases involving judges of the court of appeals and the supreme court (the court of general jurisdiction).[22] That the court is convened only when action is necessary is economical, but a procedure which relies on specially created courts to handle specific cases is unlikely to provide effective remedies for the many types of judicial unfitness. Under the New York procedure there is no agency to make a prompt, confidential investigation for the elimination of groundless complaints; there is no way to make an informal suggestion to a judge that although his conduct does not yet warrant removal, it should be improved.

Because it is impossible to file a complaint and to investigate it without making a public declaration, lawyers and litigants understandably may be reluctant to raise whatever legitimate grievances they may have. Furthermore, because accusations quickly become a matter of public record, the reputation of an entirely innocent judge may be severely damaged. The experience in New York, where the court has been convened only three times since its establishment in 1948, suggests that this type of disciplinary process is useful only for the most serious cases of misconduct.[23]

A third type of disciplinary system, the commission plan, was first instituted by California in 1960.[24] Texas adopted a similar procedure in 1965, and several other States are considering variants of the commission plan. Under the California procedure a permanent Commission on Judicial Qualifications, composed of five judges, two lawyers, and two nonlawyers, assisted by a full-time staff, has been established to receive complaints on judicial unfitness. The members of the commission receive no compensation for their services.

Under the supervision of the executive secretary the staff makes a preliminary investigation of all complaints that are not patently frivolous. Where the investigation appears to substantiate the complaint, the matter is referred to the commission for further action. Many cases are closed by an exchange of letters with the judge whose conduct is in question. The judge may show that the complaint is ill founded, or he may promise to improve his conduct. If the commission is not satisfied with the judge's response, it may hold a hearing on the charges or request the supreme court to appoint three masters to hold a hearing. If after the hearing the commission believes that the judge should not continue in office, it may recommend to the supreme court that he be removed or involuntarily retired. Until the record is filed in the supreme court, all inquiries and correspondence are confidential.

Although a judge has the right to review by the California supreme court, during the commission's first four years of operation 26 judges voluntarily resigned or retired because they were under investigation; only 1 judge sought review by the supreme court.[25] At the present time the only sanctions available to the supreme court are removal or involuntary retirement. But in its latest report the commission suggested that the supreme court be empowered to censure a judge whose misconduct does not warrant a more stringent penalty.

The California procedure meets most of the objections that can be raised against other disciplinary systems. The significance of the commission plan is the existence of a permanent organization acting on a confidential basis to receive and investigate complaints and to take informal action when it is desirable. Confidentiality is maintained until a recommendation for removal or retirement is made to the supreme court. Since four of the nine members are not judges, the problem of judges' reluctance to initiate action against other judges is alleviated.

One problem of the California system is that

> the vast majority of California attorneys interviewed either had never heard of the Commission on Judicial Qualifications, or were acquainted only with the name, believing that the Commission was concerned with approving the Governor's judicial appointments.[26]

As long as lawyers do not know about the commission, it cannot be wholly effective. Apparently the commission has hesitated to seek extensive publicity for fear of undermining public confidence in the judiciary and alienating judges.

In any system for disciplining or removing judges by the judiciary, it is essential that there be some permanent agency or officer to receive, process, and present charges to the court. Whether the California commission plan is preferable depends upon local conditions. Smaller States might find the commission system unnecessarily cumbersome and expensive and decide to use a court administrator or a special officer to perform these functions.

Retirement Systems. There is an important relationship between retirement provisions and procedures for dealing with judicial inadequacy. If a judge can elect to retire at full salary or a generous percentage of his salary, he may be more easily persuaded by his colleagues to retire, particularly if he faces the threat of removal or involuntary retirement.

There is a great variety of retirement provisions, both voluntary and involuntary. A combination of the two, as provided for in the Federal system, would seem to be most effective in procuring the retirement of an inadequate or disabled judge.[27] A Federal judge is eligible for voluntary retirement at full salary at the age of 65 or 70, depending upon the number of years he has served on the bench. He may retire for disability at any time and receive full salary if he has served 10 years or half salary if he has served less than that time, but he must secure a certificate of disability from the chief judge of his circuit. A judge also may be involuntarily certified as disabled by a majority of the members of the judicial council of his circuit. The certificate is presented to the President, who then may appoint an additional judge to the court. The retired judge may continue in office at full salary, but he loses all seniority.

For voluntary retirement to be most useful in persuading disabled judges to leave the bench, it is undesirable

[22] N.Y. CONST. art. VI, § 22.
[23] See Note, 41 N.Y.U.L. REV. 149, 185 (1966). The power to remove judges below supreme court level is vested in the four departments of the Appellate Division of the Supreme Court. Each department has a presiding judge, an administrative judge, and a court administrator who are ready both to receive and to investigate complaints, thus avoiding many of the problems associated with the Court on the Judiciary. See *id.* at 186–89.
[24] See generally Burke, *Judicial Discipline and Removal—The California Story*, 48 J. AM. JUD. SOC'Y 167 (1965); Allard, *A Comparative Study of the Commission Plan for Retirement, Discipline, and Removal of Judges*, *id.* at 173.
[25] Winters & Allard, *supra* note 4, at 168–69.
[26] Note, 41 N.Y.U.L. REV. 149, 178 (1966).
[27] See 28 U.S.C. §§ 371(b), 372(a), (b) (1958).

to attach service requirements to the retirement pension, because financial considerations may induce a judge to continue in office until these requirements are met. The ideal would be to give full retirement benefits to a disabled judge, with no minimum service requirement. A workable compromise might be to base the amount of the pension on the length of service, but have a minimum pension available to all. Even if the State has compulsory retirement for disability, minimum service requirements are probably unwise. Since compulsory retirement proceedings generally are initiated by fellow judges, it is likely that they would be reluctant to retire a disabled colleague until he has served the required number of years.

Reporting and Assignment Systems. Although removal, forced retirement, or censure is appropriate in cases of misfeasance or chronic disability, less stringent correctives are available for other problems of inadequate judicial performance, such as laziness, intemperate habits, or persistently erroneous decision making. Several jurisdictions have found that requiring judges to report on the disposition of their cases and assigning judges to hear certain cases or to sit in certain courts encourage improved judicial performance.

A reporting system requires each judge or his clerk to report periodically to a central authority, particularly on the disposition and status of his cases. The reporting requirement, if followed up with compilation and comparison of statistics on judicial performance, may help a judge to review and to improve his work habits. It may also be combined with a power in the administrative authority to assign additional judges to a court, an embarrassment which the incumbent would normally seek to avoid.

When there is more than one judge in a trial jurisdiction, there must be a method of distributing the business of the court. In Massachusetts all trial judges of the superior court (about 42 in number) constitute a single, statewide pool. They may be assigned to hold regular terms in the various counties, and the chief judge may also assign cases requiring special capacity to particular judges. Similar systems are used in a number of States, although the assignment unit may be a county or a metropolitan area. The assignment system permits better use of the talent and experience of judges. And since most assignments are made on a term or calendar basis rather than for individual cases, they less obviously reflect on the competence of particular judges.

Assignment systems would appear to be particularly useful in allocating civil and criminal cases among judges in courts of general trial jurisdiction. There are some judges who by temperament or inclination are less suited to hear criminal cases. Although they may be excellent trial judges in civil matters, they may be rude to criminal defendants and their counsel, or they may consistently impose sentences which vary substantially from the normal practices of the court. It would be desirable if such judges were, to whatever extent possible, relieved of criminal assignments. However, care must be taken to ensure that the assignment power is not used to influence the outcome of cases.

There are certain difficulties in administering an assignment system in which ability is a consideration. It normally is operated by a single judge, whose criteria are mostly subjective. And his assignments may cause some dissatisfaction and perhaps resentment among his colleagues.

Despite these difficulties an assignment system such as that used in Massachusetts is to be recommended. It makes use of special talents without unduly emphasizing limited abilities, and it can act as a mild corrective in jurisdictions where the payment of political debts plays a role in judicial appointments. Only if the administrative judge is willing to incur occasional resentments will the system realize its potential, however.

PROSECUTORS

Earlier chapters of this report have considered a number of the prosecutor's responsibilities in the criminal process, including his authority to determine whether an alleged offender should be charged and to obtain convictions through guilty plea negotiations. The decisions he makes influence and often determine the disposition in all cases brought to him by the police. The prosecutor's decisions also significantly affect the arrest practices of the police, the volume of cases in the courts, and the number of offenders referred to the correctional system. Thus, the prosecutor is in the most favorable position to bring about needed coordination among the various law enforcement and correctional agencies in the community.

The prosecutor has the responsibility of presenting the government's case in court, and his skill as a trial lawyer can be a crucial determinant of whether an offender is convicted. And at a time when police practices are coming under increased judicial scrutiny, law enforcement agencies rely upon the prosecutor to advocate their position in the courts.

Finally, the prosecutor is often an investigator and initiator of the criminal process. Prosecutors work closely with the police on important investigations. Many jurisdictions have found that investigations and prosecutions for crimes such as homicide, consumer fraud, governmental corruption, and organized crime, which typically involve difficult problems of proof and require lengthy and careful investigation, are best conducted under the direct supervision of the prosecutor's office. The extent to which such offenses are detected and successfully prosecuted depends directly upon the prosecutor's diligence.

In many jurisdictions, unfortunately, the potential of the prosecutor's office is not realized. In many cities the prosecutor must operate under such staggering caseloads with a small staff of assistants that sufficient attention cannot be given to each case. In many lower courts prosecution is left to police officers. Meeting the day-to-day trial business of the office leaves little time for developing policies within the office or for attempting to coordinate the efforts of other agencies. Responsibility for making charging decisions and trying cases is often delegated to inexperienced young assistants who have had no training for their job and who receive only limited guidance from their superiors. Yet needed changes frequently depend on the vigorous leadership of the prosecutor. Implementation of alternative methods of dealing with offenders for whom criminal prosecution is inappropriate, new procedures for the negotiation of guilty pleas, bail reform, regulation of statements to news media, and expanded pretrial discovery of evidence in criminal cases depend heavily on the support and sympathetic involvement of the prosecutor. They highlight the importance of improving the quality of the men who serve as district attorneys and their assistants.

OBSTACLES TO EFFECTIVE PROSECUTION

The district or county attorney in most States is a locally elected official.[28] In larger communities the prosecutor has a staff of assistants, as many as 216 in Los Angeles County or 153 in Chicago. But the great majority of the country's more than 2,700 prosecutors serve in small offices with at most one or two assistants, and frequently the prosecutor and his assistants are part-time officials. Their official duties are to prosecute all criminal cases and in most jurisdictions to represent the local government in civil cases, but when not engaged on a case they are free to practice law privately. This pattern of outside practice is common in the rural counties and smaller cities, although it may be found in our largest cities.

The conception of the prosecutor's office as a part-time position is one of the consequences, as it is one of the causes, of the low salaries paid to prosecutors and their assistants. In response to a recent survey conducted by the National District Attorneys Association, some prosecutors in 21 States indicated that their annual salary was less than $4,000.[29] Even in large cities the compensation of both the district attorney and his assistants tends to be extremely low in comparison to the earnings of lawyers of similar experience in private practice. A high proportion of prosecutors in almost all States reported in the American Bar Foundation's 1964 survey that they did not receive adequate funds to operate their offices effectively.[30] For example, the highest paid assistant in the State's Attorney's Office in Baltimore, an office with 32 assistants serving a city of almost a million persons, receives slightly more than $10,000, and comparably low salaries are common elsewhere.

Obviously a talented attorney, even one dedicated to public service, cannot be expected to remain long at such a position if it is his only source of income. Many prosecutors and their assistants must and are expected to engage in private law practice. Pressures are likely to develop for a part-time prosecutor not to permit his public office to interfere with his private practice.[31] These pressures are strengthened by the economic reliance on private practice and by the common view that a prosecutor's position is a temporary stepping stone in a political career.

While direct conflicts of interest between the prosecutor's public office and his private practice are clearly unlawful and, we may assume, rare, there are many indirect conflicts that almost inevitably arise. The attorneys he deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients. Similar problems may arise in the prosecutor's dealings with his private clients whose activities may come to his official attention. It is undesirable to place a prosecutor in a position in which he must always be conscious of this potential for conflict and be careful to avoid improprieties or the appearance of conflict.

The high political orientation of the prosecutor's office contributes to the problems of low pay and part-time service. In almost all States local prosecuting attorneys are chosen by the voters of the community. Only four States and the Federal system provide for the appointment of prosecutors, and even in these jurisdictions partisan considerations appear to play a vital part in their selection. While in a few communities highly competent men have made a career in the office, in most places the incumbent moves on after one or two terms.

The prosecutors in most cities select a high proportion of their assistants primarily on the basis of party affiliation and the recommendations of ward leaders and elected officials. Highly qualified practicing lawyers and recent law school graduates may be prevented from entering the prosecutor's office because they are unable or unwilling to acquire political sponsorship. Lawyers who are considering a career in the prosecutor's office may be daunted, even if they have the required political support, by the likelihood of discharge if their party does not retain control of the office at the next election. Furthermore, the obligations usually attached to a patronage position, such as purchasing or selling tickets to fund-raising dinners, campaigning, or systematically contributing to the party, may be distasteful to many lawyers.

Political factors and noncareer tenure of prosecutors have certain advantages. Local election increases the likelihood that the prosecutor will be responsive to the dominant law enforcement views and demands of the community. Since he is not dependent on another official for reappointment, the prosecutor possesses a degree of political independence that is desirable in an officer charged with the investigation and prosecution of charges of bribery and corruption. The frequency of election, the turnover in the job, and the noncareer attitude toward it all have affirmative values. A new man is likely to come to the office without a comfortable acceptance of the status quo; turnover reduces the dangers of stultification.

But many of these same factors interfere with the full development of the prosecutor's office. Political considerations make some prosecutors overly sensitive to what is safe, expedient, and in conformity with law enforcement views that are popular rather than enlightened. Political ambition does not encourage a prosecutor to take the risks that frequently inhere in reasoned judgments. In dealing with offenders, with the police and other law enforcement agencies, and with the courts, the prosecutor is safer sticking to the familiar and most limited connotation of his job.

---

[28] See generally Nedrud, *The Career Prosecutor* (pt. 1), 51 J. CRIM. L., C. & P.S. 343 (1960).

[29] Derived from *The Prosecuting Attorneys of the United States*—1965, 2 N.D.A.A. 191, 193–95 (1966).

[30] See SILVERSTEIN, DEFENSE OF THE POOR 149 (1965).

[31] See Nedrud, *The Career Prosecutor* (pt. 2), 51 J. CRIM. L., C. & P.S. 557–59 (1961).

THE PROSECUTOR'S OFFICE AS A FULL-TIME CAREER

The problems of low pay and part-time employment must be approached together. High quality attorneys who should be encouraged to seek the position will do so only if it offers reasonable economic rewards. Full-time devotion to duty cannot be demanded unless the pay is raised and salary scales are based on the assumption that the prosecutor will not have a second income from outside law practice. In most city offices there is little apparent justification for the continuation of part-time prosecutors. These offices are faced with very heavy workloads that require the fullest attention from men who are not distracted by other obligations and interests. Several cities have successfully established full-time offices in which neither the district attorney nor his assistants are permitted to practice law. Other communities should follow their example.

The smaller county presents other problems because there is generally not sufficient work to keep a prosecutor busy full time, even if he has civil law responsibilities. In part this is an indication that the county unit of prosecution is too small to be efficient in such situations. Some States have moved in the direction of creating district attorneys' offices covering judicial districts larger than one county. Oklahoma in 1965 eliminated the part-time office of county attorney and created in its place the full-time office of district attorney.[32] Each district attorney is responsible for criminal prosecution in a number of counties comprising a prosecutorial district. Local influence over criminal prosecutions is maintained by requiring the district attorney to select one assistant, who may serve part time, from each of the counties in his district.

It seems unlikely that the basic elective method of selecting prosecutors will soon be changed. The election of local prosecutors is ingrained in our political traditions. Moreover, experience in several large cities has shown that the elective process can produce dedicated career prosecutors who are highly professional and competent. Rather than replace the elective method, steps should be taken to reduce some of the political pressures on the job.

First, political leaders in the community should raise their sights in selecting candidates and should give preferment to men who see the office as a relatively long-term professional opportunity rather than a short-term step to another office. In addition, the appointment of assistant district attorneys should be removed from political patronage. This might be accomplished through the traditional civil service method, which has been relatively successful in some large cities. Many communities may not find this approach desirable, however; nor would it appear to be the only way to deal with the problem. Certainly the appointment of assistants should not depend upon political sponsorship. Assistants should be free from political obligations to campaign or to contribute, and prosecutors should be given full authority to appoint and discharge assistants on the basis of merit. Experience in New York and Los Angeles shows that this approach is feasible, provided only that political leadership recognizes that the patronage and political leverage surrendered by such a reform is more than compensated for by the greater potential for effective law enforcement.

PROSECUTOR TRAINING

The high proportion of lawyers who become prosecutors without any prior experience in the criminal process creates a need for programs to train prosecutors. This need has long been neglected. Assistant prosecutors, especially in large metropolitan offices, frequently are hired after limited experience in practice, typically all in the civil law. The NDAA study also revealed that many district attorneys themselves were elected to office without substantial criminal law experience.

An assistant prosecutor in a typical city office learns by doing. In some offices there is a routine progression of assignments: An assistant initially may be assigned to the fraud and complaint bureau or the traffic court, where he is expected to make judgments on what complaints should be pursued, on what petty charges should be reduced or dismissed, and on other discretionary matters. As experience is gained, he will be given misdemeanor and later felony trial assignments.

In other offices the inexperienced assistant is immediately given important responsibilities. New assistants in the U.S. Attorney's Office in the District of Columbia, for example, are often assigned to the Court of General Sessions, where they make the initial charging decision in almost all felony cases and prosecute all serious misdemeanor charges. No period of adjustment is available for the inexperienced district attorney himself, because he must begin immediately to make important decisions and to represent the state in serious cases.

Whatever training a new assistant prosecutor receives in addition to his experience on the job usually is limited to informal discussions with senior assistants or the heads of departments to which he is assigned. Sometimes these discussions are held formally as a periodic review of the assistant's work. In a few offices seminars or lectures are regularly held to discuss elements of trial tactics or office policies. In a very few offices written policies and manuals are available for guidance and instruction.

There are very few inservice training programs offered by agencies other than prosecutors' offices. Each year Northwestern University Law School conducts a one-week course for prosecuting attorneys, which is attended by about 200 prosecutors from all parts of the country. The course material is divided between such current topics as recent decisions on search and seizure and such basic subjects as trial techniques and the use of scientific evidence. A similar one-week program, which has been in operation for about 10 years, is offered by the Practicing Law Institute in New York City. Attendance ranges from 100 to 150 prosecutors from various States. The course is taught by local prosecutors and criminal court judges. Although lectures are given on special topics, for example, wiretapping and search and seizure, primary emphasis is placed on trial tactics and procedures.

The National District Attorneys Association recently has held two- or three-day regional training seminars, and additional seminars to be financed by a Federal grant from the Office of Law Enforcement Assistance have been planned. The Department of Justice has conducted several regional seminars for U.S. Attorneys and their assistants, but these seminars have been devoted primarily to the consideration of prosecution policies in certain types of cases. In 1966 Congress for the first time appropriated modest funds to begin a training program for assistant U.S. Attorneys.

It is clear that existing programs do not meet the need for prosecutor training. There has been deplorable inattention to the development of curricula and training techniques in the investigative, administrative, and broader law enforcement policy roles played by the prosecutor. These matters have not been seen as suitable subjects for the attention of law schools and the legal scholarly community. Clinical programs offering law students an opportunity to participate in the criminal process, especially as prosecutors, are helpful, but the major burden will fall on the prosecutors' offices and outside organizations. The problems posed are challenging, and their resolution should be the object of Federal, local, and professional projects.

Large metropolitan prosecutors' offices should develop a formal training program for new assistants. This program should be designed to give incoming assistants an early understanding of the issues which involve the prosecutor's discretion and the policies of the office on these issues. It should also provide instruction in basic criminal procedure and trial tactics.

There is also a need for training programs on a State or regional level to reach prosecutors and assistants in small offices. A one- or two-week seminar held shortly after election would ensure that incoming prosecutors and their assistants who have had no criminal law experience will not take office totally unprepared. Such programs could be developed through the State prosecutors' council discussed in the following section. Seminars for new prosecutors also would be helpful in implementing the council's ideas on policy formulation within the office and on coordination of local prosecuting attorneys.

COORDINATION OF STATE PROSECUTORIAL FUNCTIONS

Although each State has a single code of criminal laws, the State prosecutorial function, like the police and the courts, is fragmented among a number of independent agencies. The States are geographically divided into districts or counties, each of which has a prosecutor's office headed by an elected or appointed official. In many urban areas one prosecutor, typically the district attorney, is responsible for felony cases while another independent officer, perhaps the corporation counsel or city attorney, deals with less serious offenses and sometimes the early stages of felony cases. The number of county and local prosecutors may be as high as 317, in Texas, or as few as 4, in Hawaii. Each of these prosecutors' offices is virtually autonomous. Apart from informal communication there is often little or no coordination among them.

THE ADVANTAGES OF COORDINATION

The existing system is not without advantages. A local prosecutor is usually a product of the community which he serves. He is locally elected and is likely to be responsive to his constituency. Most important, since marked variation in the crime problem and in community resources may exist from area to area within a State, he is in a position to adjust prosecutorial policy to local conditions.

But division of the prosecutorial function and lack of coordination among local offices within a single State is also likely to have deleterious consequences. A strict enforcement policy in one county may simply divert criminal activity into neighboring areas. A community's effort to deal with crime will be limited if criminal groups can operate from a nearby jurisdiction with relative impunity. This may be seen in large metropolitan areas where prostitution, gambling, and bootlegging become exceedingly difficult to suppress when they are operated from a nearby haven.

Our traditional notion that the criminal law will be applied within a State with a reasonable degree of uniformity is weakened by a fragmented system of prosecution. Prosecutors exercise enormous discretionary authority within their jurisdictions. They decide whether to prosecute and for what offense; they decide whether to negotiate a plea of guilty and on what terms. Exercise of this broad discretion by many prosecutors scattered throughout a State inevitably results in an uneven application of the law. While such subtle decisions cannot and should not be confined by rigid rules, sufficient policy coordination is desirable to ensure a reasonable degree of consistency. The challenge is to devise a system which strikes an acceptable balance between the needed flexibility and our traditional notions of evenhanded administration of the criminal law.

Closer communication among local offices within a State and greater involvement by the State in their operations would have a number of advantages. County prosecutors' offices frequently are too small to maintain specialized personnel and technical facilities. They are generally unable to maintain formal training programs of the sort that could be conducted on a regional or statewide basis. A State agency could make manpower and special services available to local prosecutors, including fingerprint experts, medical specialists, and technical assistance in the form of a central laboratory. Supplemental legal, investigative, and trial specialists could be provided to meet the demands of extraordinary caseloads or unusually difficult cases.

Another important aspect of the coordinated statewide approach to law enforcement would be to maintain a uniform, high caliber of personnel and quality of work throughout the State. To a large extent this would not require continuous overseeing of the internal operations of local offices. Statewide provisions could regulate matters like basic manpower requirements, perhaps described as a function of population or caseload; standards for se-

[32] See OKLA. STAT. ANN. tit. 19, § 215.1–.20 (Supp. 1966).

lecting assistants; requirements and opportunities for preservice and inservice training; rates of compensation for assistants; permissibility of part-time employment; and programs for encouraging lateral movement from county to county within a State.

Law enforcement on the county level has occasionally faltered because of corruption or incompetence. A State agency with power to intervene in such situations is needed. In most States either the attorney general or the Governor does have the power to supersede local prosecutors or to appoint special prosecutors when the elected district attorney has not adequately performed his duties. This is a power usually exercised only in extreme cases. In situations short of outright misfeasance State officers may be unwilling or unable to use such a drastic sanction, and in the absence of continuing contacts with local prosecutors the State officers may find themselves without a remedy.

Better communication among prosecutors' offices within a State should contribute to the development of cooperation among local prosecutors' offices in different States and between local prosecutors' offices and Federal agencies. Stronger State government participation could ease the problem of determining priorities and allocating resources in connection with a Federal program providing financial assistance to local law enforcement. A State agency would provide a logical forum for consideration of joint law enforcement problems by prosecutors, police, correctional authorities, and the courts.

EXISTING STRUCTURES

As the highest legal officer in the State the attorney general might be expected to provide needed leadership in developing ties among prosecutors within the State and with law enforcement agencies in other States and in the Federal Government. The powers of the various State attorneys general include a number of ways in which this leadership may be exercised. At one extreme the attorneys general in Alaska, Delaware, and Rhode Island have full responsibility for all criminal prosecutions, and those who prosecute cases locally work under their direct supervision. At the other extreme there are a few States, Ohio, Tennessee, and Wyoming, for example, where it appears that the attorney general has no authority over local enforcement activities. In several States the attorney general has little involvement in any criminal matters; the attorney general of Connecticut is exclusively a civil law officer.

In most of the States, however, the attorney general has broad authority, through constitutional or statutory provisions or inherent common law powers, which provides a basis for coordination of the activities of local prosecutors. Some of these grants of authority include concurrent jurisdiction to prosecute or the power to supervise, assist, consult, or advise local prosecutors. In practice, however, there is little actual coordination. The attorneys general in a few States, Indiana, Kansas, Massachusetts, and Texas, for example, hold statewide prosecutors' meetings once or twice a year. California is divided into zones, and zone meetings called by the attorney general are held bimonthly. In Ohio the attorney general annually conducts two courses for county attorneys. Some attorneys general also require periodic reports from local prosecutors.

The prevailing pattern then is that most of the State attorneys general do possess formal authority to coordinate local law enforcement activity; that in most States this authority has not been exercised; and that even in those States where some coordination is attempted, much more could be done.

The lack of coordination of local prosecutors in the States may be compared with the organization of the prosecutorial function in the Federal system. The entire country is divided into 93 Federal districts, each of which has a prosecutor's office headed by a U.S. Attorney. As in many States the U.S. Attorney General formally occupies the position of chief prosecution officer. Efforts have been made to coordinate and supervise the prosecutorial activities of U.S. Attorneys' offices by the Department of Justice Criminal Division, which furnishes research and manpower assistance, performs certain training functions, and establishes major prosecutorial policy for the entire country. It also assumes more direct responsibility for decisions in certain kinds of cases when centralized control is deemed particularly important.

PROBLEMS OF DEVELOPING EFFECTIVE STATE COORDINATION

Recognition of the need for greater State responsibility for local law enforcement is not a recent development. The Wickersham Commission in 1931 called attention to the changing nature of this country's law enforcement needs:

> In the formative era we had a great and justified fear of centralization. But overdecentralization may be quite as bad as overcentralization. Under the conditions of transportation to-day and with the facilities for and coming of highly organized crime, the State is as natural a unit as the county or town was a century ago. . . . When but little in the way of administration was needed and legislative regulations were relatively few, occasional exercise of local private judgment as to enforcement of laws of statewide application did little or no harm. With the coming of great urban centers, the rise of industrial communities, and the development of communication and transportation, this private judgment on the part of local officials has become an obstacle to efficient administration. In more than one State refusal of local prosecutors to enforce State laws in the locality led to legislation providing for removal by some central authority long before the national prohibition act. But this is a crude substitute for a control over prosecutions by a central responsible office, beyond the reach of local politics, analogous to what obtains in the Federal system.[33]

In the 35 years since the Wickersham Commission recommended greater State action, some halting steps have been taken by a few States, notably California and Alaska, but for all practical purposes the prevailing pattern remains substantially the same. Why has so little been done when the need has been so clear?

There are the inherent problems involved in promulgating constitutional or legislative enactments on the State level where that is required. Any proposals which require legislative action face the possibility of substantial delays. Any proposals for government reorganization, the establishment of new agencies, or the granting of new powers to old agencies inevitably meet resistance from vested interests.

The political dimensions of the problem should not be underestimated even when no constitutional or legislative action is required. Local prosecutors' offices are often heavily involved in the intricacies of politics on the local government level. Similarly the State attorney general or any similar State officer or agency which might be looked to as a focal point for coordination will also often be heavily involved in State politics. When attempts to coordinate law enforcement begin to be interpreted as involving State control and State supervision, friction may develop between State and local government.

While progress toward a more coherent law enforcement organization is beset by difficulties, the need to move in this direction is compelling. County prosecutorial lines which made little sense in the 1930's often make no sense today. The growth of enormous urban complexes that transcend county and even State lines, the rapid mobility of the modern day criminal, and the increased incidence of organized criminal activity make the need for coordination of prosecutorial efforts greater today than it was 30 years ago. Realistic recognition of the difficulties, however, should be helpful in planning programs for action.

STATE COORDINATION OF LOCAL PROSECUTION

To accomplish the desired coordination, different administrative approaches may be desirable in different States, depending on the governmental structure and political practicalities. Consequently it is not feasible to describe in detail the type of State machinery required, but it is possible to sketch the basic features of a State-level operation geared to policy coordination and the provision of services to local prosecutors.

State coordination of local prosecution implies involvement of a State office in local prosecutions. This State coordination could mean control of all prosecutorial decision making by the State attorney general or a similar officer. It could mean that local prosecutors would be required to obtain approval from the State officer at each key point in processing a case or that decisions would be made initially in the State capital or by agents sent out by the State office. Although this is the approach followed in a few small States, in most places it would present unacceptable disadvantages. It would be unduly cumbersome and inefficient, requiring a large investment of manpower at the State level and resulting in decisions by persons too far from the scene. Moreover, most of the advantages of locally centered prosecution would be forfeited.

There are of course certain instances where such detailed control by a State officer is desirable. The attorney general in some States has direct responsibility for the enforcement of certain laws, such as the antitrust laws or consumer fraud statutes. And as already noted, in many States the attorney general may send in a special prosecutor to deal with cases of official corruption or with other cases of special importance. But these limited situations do not provide a basis for a general assumption of the prosecutorial function at the State level.

Coordination by the State Attorney General. A preferable type of coordination would involve the State attorney general in providing technical and statistical services, engaging in training operations, and developing rules of general applicability for the various kinds of discretionary decisions prosecutors make. Some examples of the kinds of policies that are appropriate for State formulation are:

A State attorney general, perhaps in response to developing court decisions or rules, might formulate guidelines on the circumstances under which local prosecutors should routinely make certain information and evidence available to defense counsel before trial.

A State attorney general, after consultation with State youth and correctional authorities, might develop a program under which local prosecutors obtain probation reports before proceeding with the prosecution of certain classes of youthful offenders.

A State attorney general might establish rules requiring local prosecutors to reveal in open court the negotiations leading up to the tender of a guilty plea.

A State attorney general might formulate guidelines on the types of cases in which noncriminal dispositions should be pursued and the circumstances under which court approval should be obtained.

Under this approach there would often be a need for local prosecutors to formulate still more detailed rules. For example, local prosecutors might be required to make rules for preservice and inservice training of their assistants within broad State guidelines describing the extent and nature of the training. The State function in such an area would consist of establishing such guidelines; assisting the local prosecutors with curriculum development and providing training materials, specialized instructors, and other forms of technical assistance; and inspecting and reviewing the local operation to ensure compliance with the basic State standards.

There are other kinds of State policy coordination that might be adopted. The attorney general might perform a purely advisory or consultative function either for the individual cases or with respect to general policies. State involvement might be limited simply to requirements that local prosecutors develop policies covering given subjects. Such limited coordination might reduce existing fragmentation in many States, but it would not appear to strike the appropriate balance between centralized control and autonomous local prosecutorial operation.

[33] NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 13–14 (1931).

State Council of Prosecutors. To assist in the development of prosecutorial policy a council comprised of the attorney general and all the local prosecutors in the State would be desirable. Such a council would be helpful both in those States where the attorney general already has the power to promulgate policy, as well as in those where it is not feasible, legally or politically, for him to do so. The State attorney general would ordinarily be an appropriate person to assume a large role in organizing the council. In Texas, for example, since 1951 the attorney general has annually called a statewide conference of county attorneys, district attorneys, and other law enforcement officers.

Such a council might simply be a group which meets periodically to exchange views on common problems. Although even this limited beginning might involve somewhat more statewide coordination than presently exists, it would be far better for the council to have a real policy making function. The meetings of local prosecutors already established or provided for in California, Indiana, Kansas, Massachusetts, and Texas may be used as a limited model, although it is not clear whether these bodies have a substantial policy making function.

Creation of the council would tend to ensure adherence by local prosecutors to the State policies. Pronouncements resulting from collegial decisions in which all participate will be more readily acceptable to independently elected officials. The council may also have the advantage of allaying the fears of local prosecutors that their authority is being subverted by a powerful State officer. Implementation is a less formidable problem when the policies and standards represent the consensus of those who must carry them out at the operating level. Most important, use of the council in setting statewide standards would ensure their relevance to local operating conditions because they would reflect the views of a group of seasoned practitioners.

The fact that the council could meet only periodically would limit its effectiveness. It could not, for example, assist in the day-to-day interpretation of previously formulated policies or deal promptly with problems which may arise. Nor could it perform other significant functions which require continuing activity or availability throughout the year. In all States, however, the attorney general's office could bring a continuity of effort that a sporadically meeting council cannot. His staff could give direction to the council's work by suggesting the areas in which statewide standards, programs, and policies are needed and by providing the research and other assistance required. Review of how the standards work in practice could also be a function of the attorney general, with the council participating in efforts to obtain compliance from local prosecutors.

There is a need for a regular mechanism by which the State officer can ascertain the extent to which local prosecutors apply State policies. When the attorney general represents the State in criminal appellate litigation, as he does in many States, he will have a partial check through his control over the cases that are appealed. The development of statewide statistical and case monitoring systems, proposed in chapter 7, would provide additional sources of information. Limited auditing or inspection services for local prosecutors' offices might also be established. And if statewide policies are made public, it may be expected that deviations will arouse the attention of the bench or bar.

Enforcement of Statewide Policies. A difficult issue would be presented if a local prosecutor refuses to apply a statewide policy or consistently applies it in a way that distorts its purpose. It seems clear that a State body, whether the attorney general or a prosecutors' council, should have final authority on such an issue. Whether such authority already inheres in the general powers of the attorney general is a question which can only be answered on a State-by-State basis. To give a council of prosecutors such authority would clearly require constitutional or legislative action by the States.

In any event direct confrontation between local and State officers on such matters may be expected to occur rarely. The interests on both sides normally tend toward accommodation rather than confrontation, for political officers usually seek to avoid disputes calling into play basic questions concerning their ultimate powers. The possibility of conflict is minimized by the involvement of local officials in the policy-formulation process and by their need for the kind of service and assistance which the State officer can provide.

The American Bar Association Commission on Organized Crime and the National Conference of Commissioners on Uniform State Laws promulgated in 1952 a Model Department of Justice Act designed to clarify how the role of the State attorney general or a State director of criminal justice might be used to encourage cooperation among law enforcement officers and to provide general supervision at the State level over prosecution within the State. It is a useful starting point for consideration of the types of problems which may arise.

The following three sections of the Model Act are the key provisions dealing with the powers of the State Department of Justice headed by the State attorney general or director of the Department of Justice, with cooperation between State and local law enforcement officials, and with surveys of law enforcement:

SECTION 7. POWERS AND DUTIES OF THE DEPARTMENT OF JUSTICE.

(1) The powers and duties of the Department of Justice shall be the powers and duties now or hereafter conferred upon or required of the Attorney General, either by the Constitution or by the common and statutory law of this State, and also as provided in this act.

[*Alternative Section 7, Powers and Duties of the Department of Criminal Justice.*

The powers and duties of the Department of Criminal Justice shall be the powers and duties, in respect to the enforcement of the criminal laws of the State, now conferred upon or required of the Attorney General, either by the common or statutory law of the State, and also as provided in this act.]

(2) The Attorney General [Director] shall consult with and advise the several prosecuting attorneys in matters relating to the duties of their office. The Attorney General [Director] shall maintain a general supervision over the prosecuting attorneys of the State with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State.

(3) Any prosecuting attorney may request in writing the assistance of the Attorney General [Director] in the conduct of any criminal investigation or proceeding. The Attorney General [Director] may thereafter take whatever action he deems necessary to assist the prosecuting attorney in the discharge of his duties. Whenever the Attorney General [Director] shall take any such action, he shall be authorized to exercise all powers and perform all duties which by law are conferred upon or required of the prosecuting attorney making such request.

(4) Whenever requested in writing by the Governor, the Attorney General [Director] shall, and whenever requested in writing by the grand jury of the county or by [insert other appropriate agencies], the Attorney General [Director] may supersede and relieve the prosecuting attorney, intervene in any investigation, criminal action, or proceeding instituted by the prosecuting attorney, and appear for the State in any court or tribunal for the purpose of conducting such investigations, criminal actions or proceedings as shall be necessary for the protection of the rights and interests of the State.

(5) Whenever in the opinion of the Attorney General [Director], the interests of the State will be furthered by so doing, the Attorney General [Director] is authorized and empowered to supersede and relieve the prosecuting attorney. The Attorney General [Director] may also intervene or participate in any pending criminal action or proceeding, initiate any criminal action or proceeding that he deems necessary and appear for the State in any court or tribunal for the purpose of conducting such criminal actions or proceedings as shall be necessary, to promote and safeguard the public interests of the State and secure the enforcement of the laws of the State.

(6) Whenever the Attorney General [Director] shall supersede and relieve any prosecuting attorney or shall intervene or participate in, or initiate or conduct any criminal action or proceeding as heretofore provided in subsections (4) and (5) of this Section, he shall be authorized and empowered to exercise all the powers and perform all the duties in respect to such criminal actions or proceedings which the prosecuting attorney would otherwise be authorized or required to exercise or perform, including specifically but not exclusively the authority to sign, file and present any and all complaints, affidavits, informations, presentments, accusations, indictments, subpoenas and process of any kind, and to appear before all magistrates, grand juries, courts or tribunals; and the Attorney General [Director] shall have full charge of such investigations, criminal actions or proceedings, and in respects to the same, the prosecuting attorney shall exercise only such powers and perform such duties as are required of him by the Attorney General [Director].

(7) Except as provided in this Act, the powers and duties conferred upon or required of the Attorney General [Director] by this Act shall not be construed to deprive the prosecuting attorneys of any of their authority in respect to criminal prosecutions, or relieve them from any of their duties to enforce the criminal laws of the State.

SECTION 11. COOPERATION BETWEEN SHERIFFS, POLICE, PROSECUTING OFFICIALS, AND ATTORNEY GENERAL [DIRECTOR].

(1) It shall be the duty of the sheriffs of the several counties and of the police officers of the several municipalities of this State to cooperate with and aid the Attorney General [Director] and the several prosecuting attorneys in the performance of their respective duties.

(2) It shall be the duty of the several prosecuting attorneys of this State to cooperate with and aid the Attorney General [Director] in the performance of his duties.

(3) The Attorney General [Director] may, from time to time, and as often as may be required, call into conference the prosecuting attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this State or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices with the view to the adequate and uniform enforcement of the criminal laws of this State. Each prosecuting attorney, sheriff or chief of police shall be allowed his actual and necessary expenses incurred in attending a conference with the Attorney General [Director].

SECTION 12. SURVEY OF LAW ENFORCEMENT.

The Attorney General [Director] is authorized and empowered to make studies and surveys of the organization, procedures and methods of operation and administration of all law enforcement agencies within the State, with the view toward preventing crime, improving the administration of criminal justice, and securing a better enforcement of the criminal law. Such studies may include the procedures and results of sentencing, where sentences are open to discretion. Upon completing any such study and survey, the Attorney General [Director] shall forward his report of said study and survey, together with his recommendations, to the Governor and to the General Session of the Legislature.

Chapter 7

Administration of the Courts

There is widespread consciousness of the archaic and inefficient methods used in many courts to process, schedule, and dispose of their business. Judges, attorneys, and professional organizations have pointed out ways in which the courts are poorly structured and organized, instances in which their administrative and business methods are inadequate, and their common failure to treat jurors and witnesses decently.

Many authorities have also expressed concern that the criminal law system is not as fair or effective as it should be because it fails to work expeditiously. In those courts in which high volume interferes with the orderly movement of cases and creates tremendous pressure to dispose of business, one may observe concomitant delay in the disposition of cases and hasty consideration when these cases come to be heard. Undue delay is as inconsistent with the goals of the system as a hasty process in which decisions are made without opportunity for deliberation.

In contrast with Great Britain, where the period from arrest to final appeal often is as short as four months,[1] in many States one and one-half years are required to process litigated cases from arrest through trial to final disposition on appeal. In Passaic and Essex Counties, New Jersey, during March 1965 the median times in felony cases from accusation to trial were approximately 13 and 12 months respectively.[2] At the same time in the parish of New Orleans, criminal defendants waited as long as two years for trial.[3] These jurisdictions are not singled out as extreme. Indeed, the fact that delay statistics are available at all indicates a degree of administrative management not available in many courts.

The courts' inability to handle their volume of cases has many deleterious effects. Most criminal cases are disposed of by dismissal or by plea of guilty. Dismissals often result from the prosecutor's desire to keep his caseload down to a more manageable size and from the loss of evidence due to the reluctance of witnesses to appear. Defendants often manipulate the system to obtain sentencing concessions in return for guilty pleas. Conversely defendants unable to secure pretrial release on bail are under heavy pressure to plead guilty and begin serving their terms promptly.

As the backlog of cases mounts, delay increases and the pressure to dispose of cases becomes overwhelming. Clearing the dockets comes to be an end in and of itself, and haste rather than intelligent deliberation is the norm of practice. Disposition by dismissal or by guilty plea is often characterized by hasty decision with little attention given to penal and correctional considerations.

Delay prior to trial is most dramatic, but much of the delay in the total criminal process occurs after trial and sentence, at the stage of appellate review. In many States 10 to 18 months may elapse between imposition of a sentence and final disposition of an appeal.[4] Delay at the appellate level often prolongs the release on bail of potentially dangerous convicted offenders. For many offenders, including those placed on probation, it may mean the postponement of needed correctional treatment.

Delay may diminish the deterrent effect of our system of justice in the eyes of potential offenders. It may also undermine the public's confidence in the system. If a prime function of the criminal law is to embody and express through its judgments community standards of proper social conduct, delay casts a shadow on our commitment to these values.

The causes of delay are manifold: lack of resources, inefficient management, and an increasing number of cases to be decided. In no court has a quantitative relationship been drawn to show how much each cause contributes to the problem.

Criticism has led to movements for court reform and reorganization in which capable and conscientious persons acting individually or in professional or community groups have sought to improve the operation and structure of courts. Many improvements in State court organization, in the minor courts, and in other areas of judicial administration have resulted from such efforts.

Despite important advances made in a dozen or more States, the operation of many of the courts in this country remains cumbersome and disjointed. Internal management tends to be archaic, inefficient, and wholly out of tune with modern improvements in management and communications. After commenting on the absence of change over the years in methods of presenting, recording, and preserving judicial records Chief Justice Warren noted:

> [A] federal court in one of our large metropolitan areas . . . was far behind in its dockets and was having obvious administrative difficulties . . . In the course of [a] survey it was observed that one of the deputy clerks whose desk was next to the wall made frequent trips, disappearing into the corridor, and it was then observed that these trips appeared to be in response to a knocking from the other side of the wall. In due course the reason for this mysterious conduct was disclosed. On the other side of the wall was the probation office which had a telephone, while there was no telephone in the clerk's office. Consequently, knowledgeable lawyers who needed to telephone to the clerk's office would call the probation officer who would knock on the wall so that the deputy clerk would come to answer the telephone.
>
> This strange practice arose because the clerk did not permit a telephone in the office. He said he was opposed to the telephone on principle. This incident is not from the dark ages. It happened as recently as 1958. Even in the Supreme Court, we haven't kept pace with the times. For instance, when I became Chief Justice in 1953, the docket entries were still being made in longhand. It wasn't until the 1957 Term that we began using a typed loose-leaf docket.
>
> Incidents such as this, and there are others, of themselves suggest the need for a thorough systems analysis of the mechanical operations involved in our court system.[5]

The Chief Justice's description is indicative of the widespread inefficiency in our courts. Members of the Commission staff have observed that judicial vacancies often remained unfilled for considerable periods, despite an overwhelming backlog, and that judges failed to appear in court or sat only part of the day. In some cities branches of the criminal court are administratively separated so that although one judge may dispose of most of his work within two hours, there is no system for alleviating the overload of others who are unable to dispose of all of their cases. During the summer months it is not uncommon to find few judges available for criminal cases; judicial vacations may be as long as four months. Since vacation periods usually are not staggered, the handling of criminal cases slows dramatically during this period.

Frequently a court system has no procedure for shifting judges when one falls ill, goes on vacation, or takes the day off, or when case pressures in one court build up because of increases in arrests. Many States have attempted to meet these problems by informally using visiting judges; however, "this is a haphazard, spur-of-the-moment solution the success of which depends on chance rather than planning." [6]

Far too many courts cannot effectively perform their housekeeping chores. Operation of today's courts requires the professional and continuous gathering and assessment of up-to-date information and statistics for scheduling, calendaring, and budgeting. Business affairs of the courts not directly related to the disposition of cases must also be taken care of. Court personnel must be hired, paid, and supervised; supplies must be ordered and inventoried; facilities and equipment must be kept working and available. Accurate records must be kept to provide career data on criminal offenders and to provide a basis for decisions on deployment of judicial manpower and for long-term research and planning.

Often the ultimate responsibility for handling these matters falls to judges. In more than 20 jurisdictions judges must not only supervise these tasks but must actually do them, usually aided only by untrained court clerks. Even where the workload is small enough to allow adequate attention to administrative and judicial duties, judges rarely have background or training in administration; nor are they ordinarily selected on that basis.[7]

These defects in administration are compounded by a lack of administrative control unparalleled in other segments of government or in industry. As one judge explained this development:

> The stuff with which judges deal is controversy. From earliest times it has been recognized that judges should be as free as possible from outside pressures so that their decisions might rest on the very merits of the cases. From this it came to be assumed that judges should be completely independent in general. Hence they should be independent in their time and schedules and in the administration of their courts.
>
> As a result, in the judicial department of most states, no one is in charge. . . .[8]

Independence in rendering decisions should not be carried over to administration. Yet not even the chief judge in most States has been delegated the power to administer; there is no focal point for control within the courts.

This lack of internal control is illustrated in a recent study of the judicial system of Tennessee.

> The predominant characteristics of the administration of Tennessee courts are the absence of centralized controls and the resulting lack of coherence and uniformity. Each court is generally administered separately and independently from all other courts. There is little centralization even within individual counties. . . .
>
> The administrative affairs of the municipal courts are handled altogether on the municipal level. Few, if any, meaningful generalizations can be drawn with respect to their administrative practices, other than to say that they vary widely.
>
> The general sessions, county and similar courts of limited trial jurisdiction are . . . generally . . . administered on a county-by-county basis. The circuit, chancery and criminal courts, while they are State courts, are dependent upon county governments for many of their administrative functions or affairs.
>
> There is, accordingly, a diffusion of responsibility and resulting divergence in administrative practices across the state. . . .[9]

The Iowa Court Study Commission pointed out that

> below the courts of general jurisdiction we have a plethora of separate courts which have grown up like Topsy without any over-all view of the court

[1] *Report of the Interdepartmental Committee on the Business of the Criminal Courts*, CMD. NO. 1289, at 4 (1961); ABA Comm. on Appellate Delay in Criminal Cases, *Appellate Delay in Criminal Cases: A Report*, 3 AM. CRIM. L.Q. 150 (1964).

[2] 1965 ADMINISTRATIVE OFFICE OF THE N.J. COURTS, ANN. REP. 13 (table B-9).

[3] From the State Capitals, April 1965, at 1.

[4] ABA Comm. on Appellate Delay in Criminal Cases, *supra* note 1, at 151.

[5] American Law Institute annual meeting, May 18, 1966, 43 ALI Proceedings 151-52 (1966).

[6] ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 14 (4th ed. 1961).

[7] See, *e.g.*, Kandt, *The Judge as Administrator—Let Us Look at Him*, 8 KAN. L. REV. 435 (1960).

[8] Uhlenhopp, *Judicial Reorganization in Iowa*, 44 IOWA L. REV. 6, 39 (1958).

[9] Tennessee Law Revision Comm'n, The Judicial System of Tennessee—A Background Survey 31-33 (mimeo. Mar. 1, 1966).

system: municipal courts, superior courts, justice of the peace courts, mayors courts, and police courts. Largely they are founded on the town and township. Those were the governmental units generally employed in 1846.[10]

Systemic and structural disorganization is often seen in its worst form in the lower criminal courts. Such disorganization, when coupled with a lack of administrative cohesiveness, may lead to confusion and illegal practices in the administration of justice. In Tennessee, for example, all but 3 of the more than 200 city courts have no jurisdiction to imprison offenders; their power is limited to levying fines. Yet a recent survey revealed that 48 of 99 city court judges thought themselves able to imprison for violations of city ordinances; 9 of 90 judges thought that they could imprison defendants for violations of State statutes.[11] Although judges of the State courts are precluded from practicing law,[12] in one lower court the city attorney was also the city judge.[13]

Disorganization also makes it difficult to communicate changes in case law and legislative changes down to the lower courts. In Virginia one-third of the justices of the peace responding to a survey indicated that they did not inform defendants of their right to remain silent, and a substantial number of justices were unaware that changes had been made in their power to impose contempt sanctions.[14]

Many lower courts cannot support the probation officers, social workers, and psychiatrists who make the disposition of offenders more than a mere choice between jail, fine, or freedom. A Wisconsin judge has noted the effects of such conditions:

> Later on, when attitudes have become hardened and the pattern of anti-social conduct has become fixed, felony courts and prison authorities try to rehabilitate the offender. Then they appoint court psychiatrists, order pre-sentence social investigations and staff prisons with experts in human salvage. But that is . . . often too late . . .[15]

In a number of cities an offender may be charged, for example, with petit larceny in any one of three or more courts: a city or municipal police court, a county court, or a State trial court of general jurisdiction. Each of these courts may have different rules and policies resulting from differences in judges, prosecutors, and traditions. One court may be overloaded with cases, while the docket of another is current, and the court can take time for its work. In one set of courts the judges may be nonlawyers, the cases may be prosecuted by police officers, and probation services may be unknown. In other courts there may be judges trained in the law, professional prosecutors, and probation officers, but great disparities still may exist in the quality of personnel. Judicial and prosecutorial salaries and the budgets for probation services in the same city may differ.

An arbitrary choice by the arresting police officer of the court to which he will bring a defendant may determine the offender's final disposition, the type of treatment he will receive, or his chances for eventual reintegration into the community.

The public is financially burdened by the existence of two or more parallel sets of courts. When each court orders its supplies separately or keeps its records separately, or when more judges are used than are necessary, taxpayers must pay the additional costs.

All of the defects delineated do not exist in every court system; most States and localities do exhibit at least one of these deficiencies, and many exhibit quite a few. Law enforcement, the offender, and the public must pay the price for the continued operation of these largely outmoded practices.

The public must pay the social and financial costs of crimes committed by offenders released pending consideration of their cases, of crimes committed by persons who might have avoided a life of crime but for the lack of correctional treatment, and of crimes committed by persons prematurely released because of caseload pressures that the court is unable to handle.

Participants in a trial must also pay, in time or dollars or both. Policemen must await the calling of cases in which they are to testify; other witnesses wait for their cases to be called, sometimes from one day to the next and often at a considerable financial loss. The same is true for jurors.

The current status of the operation of the courts has consequences for the offender as well. Whether ultimately adjudged guilty or innocent, days drift by while his status remains unclarified. His job is lost. Bills and obligations accumulate. His family is unprovided for; it may start to disintegrate or become dependent on public assistance.

STRUCTURAL AND ORGANIZATIONAL REFORM OF THE COURTS

The complex problems of court administration will not yield to any one simple solution, but a well-structured and efficiently organized system is a condition precedent to further change. Rebuilding the structure and organization of the administration of criminal justice has two aspects, the creation of a unified, simplified court structure within a State and the establishment of clear and direct administrative responsibility within that system.

A UNIFIED COURT SYSTEM

Proposals for the unification and simplification of court structures have long been part of programs for court reform.[16] The Model State Judicial Article, which has been endorsed by the American Bar Association [17] embodies the most recent statement of these principles. This Article, together with the drafters' comments, is reprinted at the end of this chapter. Other model constitutional provisions have been drafted by the National Municipal League and the American Judicature Society.

Integration of all courts in a State into a single State court system which consolidates courts at the same level is

[10] Iowa Court Study Comm'n, Report to the Sixty-First General Assembly of Iowa, pt. 1, at 3 (mimeo. Jan. 4, 1965).
[11] SHERIDAN, URBAN JUSTICE 43 (1964).
[12] Tennessee Law Revision Comm'n, *op. cit. supra* note 9, at 70.
[13] SHERIDAN, *op. cit. supra* note 11, at 18.
[14] Virginia Comm. of Judicial Conference of Courts of Record to Study Problems of Justices of the Peace, Report to Judicial Council of Comm. of Circuit Judges 23–24 (1965).
[15] Hansen, *Inside a Police Court*, Trial, Feb.–March 1966, p. 33.
[16] See generally ELLIOTT, IMPROVING OUR COURTS (1959); POUND, ORGANIZATION OF COURTS (1940); VANDERBILT, *Essentials of a Sound Judicial System*, 48 NW. U. L. REV. 1 (1953); Winters, *State Court Modernization*, 38 STATE GOV'T 181 (1965).
[17] Winters, *A.B.A. House of Delegates Approves Model Judicial Article for State Constitutions*, 45 J. AM. JUD. SOC'Y 279 (1962).

a recurring element of reform. The unseemly and potentially venal institution of the profit-making court, which is seen primarily as a source of local revenue, is eliminated, and all fines and fees are paid to the State treasury. At the same time local inability to finance adequate courts and related facilities is alleviated.

Arizona in 1960 unified its judicial system under the administrative direction of the chief justice. In 1962 Colorado similarly unified its judiciary, transferring the work of justice of the peace courts to county courts. A New York constitutional amendment in 1961 accomplished major court unification within New York City by merging several minor city courts into the State trial court of general jurisdiction. Connecticut, New Mexico, North Dakota, Ohio, and Wisconsin have reformed their lower courts within the last decade,[18] and Vermont created district courts to replace municipal courts in 1965.[19]

In 1947 the judicial power of New Jersey was vested in a Supreme Court, a Superior Court, 21 county courts, and courts of limited jurisdiction.[20] A dozen or more courts, including justice of the peace courts, were abolished. The highest court was empowered to make rules governing the administration, practice, and procedure in the State courts. According to one authority,

> though county and municipal courts were not consolidated into the main trial court, the experience of that state has demonstrated how much may be accomplished by effective provision for administrative authority coupled with a reasonable degree of unification of the court system. . . .[21]

In 1964 a new judicial article became effective in Illinois. It vested the judicial power of the State in a Supreme Court, an Appellate Court, and Circuit Courts. The Supreme Court was granted administrative authority over all State courts.[22] Administrative control in each circuit was vested in the Chief Judge of the circuit.[23] Local courts were either assimilated into the State court system or abolished, and all courts became courts of record.[24]

In 1961 Maine replaced 74 local municipal and justice of the peace courts with a statewide system of district courts, at the same time centralizing administrative authority.[25] Similarly, Michigan has provided for a fully unified court system, including one statewide court of general jurisdiction and statewide courts of limited jurisdiction to be established in place of justice of the peace courts by 1968. The Supreme Court was given rulemaking and administrative power over the entire State judicial system.

Traditionally jurisdictional lines have primarily followed county lines, with the county court as the unit of judicial management. In an era of rapidly shifting population, however, jurisdictional lines must accurately reflect current community growth so that there will be enough judges to handle cases and so that all sitting judges will be kept busy. In some States the county court has been superseded by judicial districts which may include several counties or cut across county lines. In 1965 the Oklahoma and Arkansas legislatures provided for judicial redistricting.[26] In Oklahoma the Supreme Court is to divide the State into zones of equal judicial workload, while in Arkansas certain district lines are to be redrawn on the basis of recommendations of the Arkansas Judicial Commission.

CLEAR AND CENTRALIZED ADMINISTRATIVE AND RULEMAKING AUTHORITY

As the foregoing examples of State reform indicate, development of clear authority and responsibility for court management have been considered essential for effective administration. Under the Model State Judicial Article the chief justice is executive head of the judicial system. In Connecticut this power is exercised by a specially appointed administrative judge and in New York by a committee of judges. In any event it is important that power be vested in a single group, or preferably in one person, to ensure that decision making does not become unwieldy, responsibility dispersed, and accountability lacking.

On the local court level there is a parallel need for administrative power, including superintendence of calendars, assignment of physical and personnel resources, and control over budgets. The most common solution has been to vest this power in a presiding or administrative judge within a court.

To supplement its administrative responsibility and authority, the judiciary in most States has been given varying degrees of rulemaking power over the procedures for handling its business. This power is needed because legislatures cannot deal with these problems effectively. As Justice Cardozo noted:

> The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.[27]

Rulemaking authority ordinarily is vested in the highest court, as in the Federal system, although in some States the power rests with a judicial conference or judicial council. Both approaches lodge the power in men continuously and intimately involved with the procedures that form the basis of the rules. Under either approach a group of experts may be called upon to assist in developing rules.

For centralized administration of the court system to prove effective, the need for careful selection and proper training of those who are to exercise administrative responsibility must be recognized. Administrative judges and judges of one-man courts should be specially trained. Consideration should be given to the education of judges and court administrators in graduate schools of business administration. Curricula including such subjects as cost analysis, budgeting, statistical analysis, and production scheduling must be developed for specialized preservice and inservice training. Judicial conferences may also serve as useful vehicles for transmitting information and experience on court administration.

[18] See generally Winters, *State Court Modernization*, 38 STATE GOV'T 181, 182–83 (1965).
[19] KLEIN & HARRIS, JUDICIAL ADMINISTRATION—1965, at 611 n.129 (1966).
[20] American Judicature Society, A Selected Chronology and Bibliography of Court Organization Reform, Information Sheet No. 26, Aug. 1, 1963, p. 3.
[21] Trumbull, *The State Court Systems*, 328 ANNALS 134, 139 (1960).
[22] Freels, *Illinois Court Reform—A Two-Year Success Story*, 49 J. AM. JUD. SOC'Y 206 (1966).
[23] Klein & Wilson, *Judicial Administration*, in 1964 ANN. SURVEY AM. L. 653, 665.
[24] American Judicature Society, *supra* note 20, at 11.
[25] *Id.* at 9.
[26] KLEIN & HARRIS, *op. cit. supra* note 19, at 621 n.179.
[27] Quoted in ABA SECTION OF JUDICIAL ADMINISTRATION, *op. cit. supra* note 6, at 52.

Judges should be freed from unnecessary administrative chores. Some 30 States have provided for an administrative office to aid the judiciary by collecting judicial statistics, managing fiscal affairs, furnishing supplies and equipment, supervising court personnel, performing duties in connection with the assignment of judges, and carrying out various other duties. In many of these States, however, the duties of this office are very limited and its potential has not yet been realized. Models for the assignment of functions to this office are provided by the Administrative Office of the U.S. Courts, similar offices in several large States,[28] and the work of the American Bar Association and the National Conference of Commissioners on Uniform State Laws in developing the Model Act to Provide for an Administrator for the State Courts, which is printed at the end of this chapter.

Judges of local courts also can be relieved of burdensome administrative duties by the delegation of administrative chores to the office of the court administrator. In statewide systems administrators should be provided for each level of court within the system or perhaps for a set of courts encompassing a county or district.

Resistance to change commonly found in the judiciary and in related institutions must be overcome. To some extent this can be brought about by education. In many States administrative positions go to judges strictly on the basis of seniority, rather than on the bases of interest or talent in management. Administrative capability and innovation should become a key element for selection and advancement of judges and court administrators within the State court system.

A MODEL TIMETABLE FOR THE PROCESSING OF CRIMINAL CASES

In part delay can be avoided by improved administration of the courts and by new methods for scheduling and monitoring cases. Delay can also be alleviated by committing more money and more manpower to deal with caseloads. Yet a certain amount of delay is inherent in a criminal case. Mobilization of police and civilian witnesses, prosecution, defense, and judiciary is a complex task. Each part of the process requires certain key participants, whose behavior cannot be predicted with certainty. Last-minute plea negotiations free judges and courtrooms unexpectedly. Last-minute postponements because of the unavailability of key witnesses or conflicting engagements of counsel unbalance court scheduling. Predicting when a trial will end is necessarily inexact and rigid schedules for pretrial and judicial events are impossible. Even with these limitations it is possible to establish boundaries for permissible time intervals, both for individual steps in the process and for the case as a whole.

In this section a model timetable for scheduling a criminal case is suggested. It proposes reasonable intervals between specific steps in the proceedings, for example, that preliminary hearing for jailed defendants follow initial appearance before the magistrate by not more than 72 hours. Adherence to this timetable would result in the disposition through trial of almost all criminal cases within four months and the decision of appeals within an additional five months. While any time limit is somewhat arbitrary, nine months would appear to be a reasonable period of time to litigate the typical criminal case fully through appeal; it would be difficult to justify any longer period.

Development of such a timetable can serve a number of ends. First, it can emphasize the potential of the process to deal with its business with alacrity, and it can suggest the kinds of steps necessary to dispose of cases within a reasonable time. Second, it can help to distinguish between the necessary and the needless delay. Third, it can help to eliminate the commonly observed passage of time during which nothing happens.

Inclusion of the timetable is intended to indicate the usefulness of the approach and to suggest guidelines to be used by jurisdictions in developing a timetable for their local conditions. There may be cases in which local circumstances will require longer periods for particular steps in the process, although in many cases it would appear possible to set substantially shorter intervals than suggested here. In any event, the proposed intervals would provide a standard against which local practice may be measured.

When examining these time intervals, courts should not be content with comparing their average performance in criminal cases with the timetable standard. For even in the most congested courts many cases pass through quickly to a guilty plea, and the average, therefore, may appear deceptively short. The timetable represents an effort to state a minimum standard which should be met not only by the average case but by all cases, save only perhaps a very small percentage of truly exceptional situations.

No model will hold for all types of crimes. The scheduling problems of a disorderly conduct case are different from those of a homicide trial, as are those of a stock fraud violation or antitrust case from a burglary prosecution. Within these broad confines it is still possible to provide guidelines for those who are concerned about the impact of delay on fair and effective law enforcement. The general guidelines are not arbitrary rules.[29]

At least 7 points in the process deserve special attention:

1. Arrest
2. First judicial appearance (presentment or preliminary hearing)
3. Formal charge (indictment or filing of the information)
4. Pretrial motions and applications
5. Trial
6. Sentencing
7. Appellate review

1. *Arrest to First Judicial Appearance.* In the absence of a requirement, statutory or otherwise, that an arrested person be brought before a committing magistrate within a specified time, this appearance should be within 24 hours after arrest.[30]

[28] *Id.* at 17.

[29] This approach resembles that of the Laws of Sweden, ch. 24 (1942), which uses timetables for suspects in custody. It is also similar to the approach used in the *Report of the British Interdepartmental Committee on the Business of the Criminal Courts*, CMD. No. 1289 (1961).

[30] Rule 5(a) of the Federal Rules of Criminal Procedure requires judicial presentation "without unnecessary delay." This rule has been interpreted as requiring production of the accused in far less than 24 hours. *Mallory v. United States*, 354 U.S. 449 (1957). Twenty States provide that an arrested person be brought before a magistrate "without unnecessary delay," while nine others use slightly different language, but without specification of a particular time interval. See ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 230 (Tent. Draft No. 1, 1966).

Because of the need to secure the attendance of witnesses and to prepare cases, the prosecutor and defense counsel are seldom able to proceed immediately with the preliminary hearing to determine probable cause. A date for the preliminary hearing should be fixed at the initial appearance if the defense does not waive the preliminary hearing.

Compliance with this standard would be facilitated by, and in some cases may require, extension of the operating hours of courts. In some cities it may prove desirable to have magistrates continually available to make prompt judicial appearance possible.

Because defendants are usually unrepresented by counsel at the time of their arrest, arranging for the accused to appear before a committing magistrate within this 24-hour period must rest largely with police and prosecution. To comply with this standard and because it is desirable that the prosecutor rather than the police make the decision whether to charge,[31] it is essential that the police immediately refer to the prosecutor's office all arrests other than those in which they have made a determination to refer the arrested person to some other community agency for treatment. The court can review the prosecutor's adherence to the 24-hour requirement by demanding that he periodically file a list of all cases with the time of arrest and the time for presentment in court or release. Programs for the early assignment of counsel to the accused and for assistance to arrested persons at the stationhouse would strengthen compliance with standards for speedy judicial appearance. In communities where stationhouse bail is used for the early release of arrested persons and where police summonses are used to avoid unnecessary arrest, the accused need not appear in court until the scheduled preliminary hearing.

If the defendant is jailed, the preliminary hearing should be held within 72 hours. If the defendant has been released, a period of up to seven days before the preliminary hearing may be justified. In those cases in which these standards cannot be met because of the unavailability of necessary witnesses, it should be the prosecutor's duty to report this fact to the court before the time for hearing. The court would then set the hearing for the earliest possible date. A calendar of such scheduled hearings, separately listing jailed defendants, should be established in each court to enable the judges to maintain effective control and to prevent delay.

2. *Appearance to Formal Charge.* When the formal charge is in the form of an information, it should follow judicial appearance and preliminary hearing or waiver thereof by not more than 72 hours for incarcerated defendants and seven days for released defendants.

In jurisdictions where formal charge is by grand jury indictment and the preliminary hearing is not designed to serve as a discovery device, presentment to the grand jury might replace the preliminary hearing. In most of these jurisdictions the prosecution should be able to present the matter to the grand jury within the time scheduled for the preliminary hearing. In jurisdictions where the grand jury does not sit throughout the year, the preliminary hearing must be held, and the indictment should be sought the next time the grand jury convenes.

Where the preliminary hearing serves as a discovery device, presentment of the case to the grand jury on the same day as the preliminary hearing would avoid bringing the witnesses to the courthouse twice. In any event, a grand jury should sit frequently, and where it does not, defendants should be freely permitted to waive indictment by the grand jury. Allowing one day after grand jury consideration for the preparation of the indictment, the filing of the indictment or information should follow first judicial appearance within 15 days for released defendants and 7 days for jailed defendants.

Arraignment of jailed defendants on the indictment or information should take place the following court day. For those released on bail arraignment should promptly follow filing of the charge, allowing three days to enable the prosecutor to notify the defendant that a charge has been filed.

In many court systems the preliminary hearing is held in a lower court, and felony charges then must be filed in a different court. After the preliminary hearing has been held or waived, the lower court has finished its role, but the felony court may as yet know nothing about the case. To remedy this the lower court or the prosecutor should regularly prepare a list of all cases bound over to the felony court, indicating the date of disposition. Submission of such a list to the felony court will alert it to the pendency of specific cases, and the prosecutor's office should be required to furnish an explanation for delays that exceed the court's time norms. Of course, these problems would be largely avoided by unification of the felony and lower courts, as recommended in chapter 3.

A modified standard will be desirable where the prosecutor's office has instituted a precharge conference as described in chapter 1 of this report. Such a conference, or preparation for it, should be regarded as an acceptable reason for delay in filing the charge. In such instances the prosecutor's reasons for delay should include a statement of the time needed for investigation and decision.

3. *Formal Charge to Pretrial Proceedings.* At the time of arraignment a trial date is set and a time fixed within which defense counsel may make motions challenging the formal charge, seeking discovery and inspection, asserting pleas in bar, seeking suppression of evidence, or raising questions as to the defendant's mental or physical capacity. Barring exceptional circumstances such as unusually complicated cases, all motions and other pretrial applications should be filed within 10 days of arraignment on the indictment and entry of the plea. Motions should be heard within one week of filing.

4. *Pretrial to Trial.* Pretrial motions are a major source of delay in most systems. Often delay is occasioned by a judge's failure to decide these motions promptly. Judges should be required to decide pretrial motions within three weeks of hearing.

Postponement of trial dates with the consent of both the prosecution and defense is common during this period. The defendant may want to postpone the day when he will have to start serving his jail term. Or he may

[31] See p. 5 *supra*.

hope that time will dim the interest of the prosecutor and witnesses. The prosecutor, perhaps because he hopes for an eventual guilty plea and because he has other cases to occupy his time, too readily acquiesces to defense requests for adjournment. During most of this time the parties do nothing to move the case closer to resolution, and when it again appears on the calendar, it is often at the same stage of preparedness as it was before the adjournment.

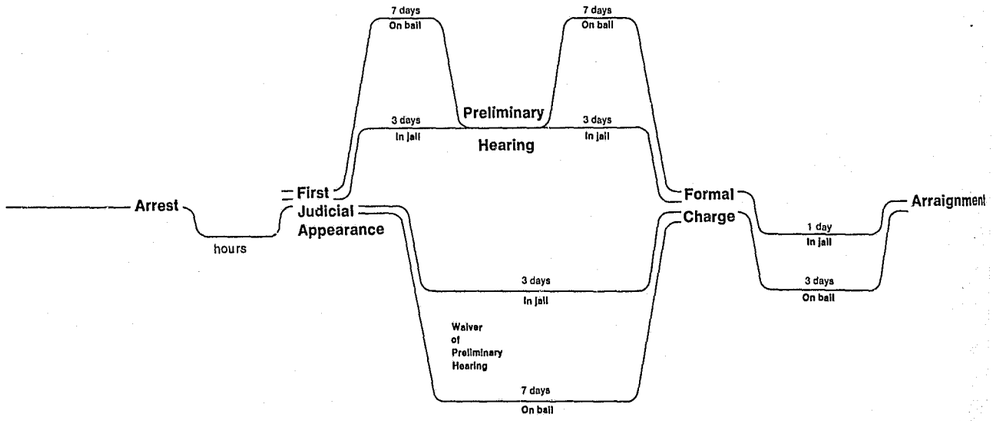
In many cases delay at this stage reflects the parties' attempts to jockey for position in negotiations for a plea of guilty. Use of the conference procedure recommended in chapter 1 should help provide a formal point in time for these negotiations and should obviate some of this delay.

Delay is also commonly created by defense counsel who has not obtained a fee from his client. The courts have a legitimate interest in seeing that those who defend persons charged with crime are paid, and it is well known that after conviction defendants often lose interest in paying counsel. Steps should be taken to ensure that the case is not unduly delayed, that defense counsel does not use this period to extort an exorbitant fee, and that the defendant is not able to delay trial merely by declining to pay his lawyer. When the judge hears a request for an adjournment based on nonpayment, he should inquire into the reasonableness of the fee and the defendant's ability to raise it by legitimate means. This inquiry may reduce the incidence of crimes committed to obtain money for legal fees. A solution suggested by the Federal Criminal Justice Act is to provide legal services to marginally poor defendants, with the defendant paying that part of the fee which he can and public funds underwriting the rest.

Responsibility for managing the court's calendar and for the orderly hearing of cases should lie primarily with the court, not with the parties. If courts are to exercise effective calendar control and to expedite the cases before them, they must reject consent of the parties as a basis for granting adjournments. The court must inquire into the reasons for the parties' request for adjournment and determine the adequacy of the grounds upon which adjournment is sought. The question of allowable delay must be thought of in terms of broader interests than the convenience or desires of the primary participants in the proceedings. Barring exceptional circumstances trial should follow within nine weeks of arraignment on the indictment or information. If no motions are made, this period should be substantially shortened.

5. *Conviction to Sentencing.* Time is needed at this stage for making postconviction motions and for preparing a presentence investigation report by the probation officer and occasionally by defense counsel. Absent exceptional circumstances, sentencing should follow conviction within 14 to 21 days.

Model Timetable for Felony Cases



Arrest to First Judicial Appearance. *Many States and the Federal courts require appearance "without unnecessary delay." Depending on the circumstances, a few hours—or less—may be regarded as "unnecessary delay." Compliance with this standard may require extension of court operating hours and the continual availability of a magistrate.*

First Judicial Appearance to Arraignment. *Standards here are complicated because: (a) a shorter period is appropriate for defendants in jail than for those released; (b) preliminary hearings are waived in many cases, and the formality and usefulness of the hearing varies; (c) formal charge in some cases is by grand jury indictment, while in others by prosecutor's information—usually the right to indictment can be waived by the defendant; and (d) in many jurisdictions proceedings through preliminary hearing in felony cases are in one court while grand jury charge and subsequent proceedings are in another. While in all cases*

CONTINUED

1 OF 2

hope that time will dim the interest of the prosecutor and witnesses. The prosecutor, perhaps because he hopes for an eventual guilty plea and because he has other cases to occupy his time, too readily acquiesces to defense requests for adjournment. During most of this time the parties do nothing to move the case closer to resolution, and when it again appears on the calendar, it is often at the same stage of preparedness as it was before the adjournment.

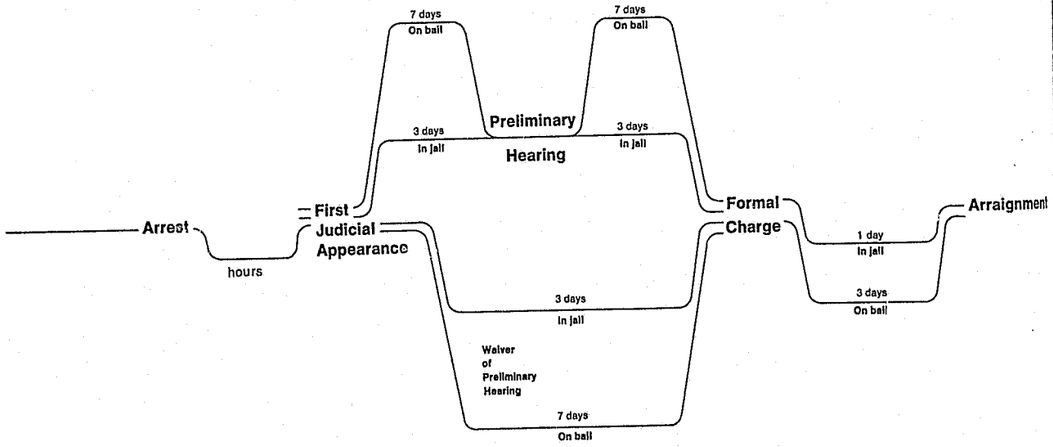
In many cases delay at this stage reflects the parties' attempts to jockey for position in negotiations for a plea of guilty. Use of the conference procedure recommended in chapter 1 should help provide a formal point in time for these negotiations and should obviate some of this delay.

Delay is also commonly created by defense counsel who has not obtained a fee from his client. The courts have a legitimate interest in seeing that those who defend persons charged with crime are paid, and it is well known that after conviction defendants often lose interest in paying counsel. Steps should be taken to ensure that the case is not unduly delayed, that defense counsel does not use this period to extort an exorbitant fee, and that the defendant is not able to delay trial merely by declining to pay his lawyer. When the judge hears a request for an adjournment based on nonpayment, he should inquire into the reasonableness of the fee and the defendant's ability to raise it by legitimate means. This inquiry may reduce the incidence of crimes committed to obtain money for legal fees. A solution suggested by the Federal Criminal Justice Act is to provide legal services to marginally poor defendants, with the defendant paying that part of the fee which he can and public funds underwriting the rest.

Responsibility for managing the court's calendar and for the orderly hearing of cases should lie primarily with the court, not with the parties. If courts are to exercise effective calendar control and to expedite the cases before them, they must reject consent of the parties as a basis for granting adjournments. The court must inquire into the reasons for the parties' request for adjournment and determine the adequacy of the grounds upon which adjournment is sought. The question of allowable delay must be thought of in terms of broader interests than the convenience or desires of the primary participants in the proceedings. Barring exceptional circumstances trial should follow within nine weeks of arraignment on the indictment or information. If no motions are made, this period should be substantially shortened.

5. *Conviction to Sentencing.* Time is needed at this stage for making postconviction motions and for preparing a presentence investigation report by the probation officer and occasionally by defense counsel. Absent exceptional circumstances, sentencing should follow conviction within 14 to 21 days.

Model Timetable for Felony Cases



Arrest to First Judicial Appearance. *Many States and the Federal courts require appearance "without unnecessary delay." Depending on the circumstances, a few hours—or less—may be regarded as "unnecessary delay." Compliance with this standard may require extension of court operating hours and the continual availability of a magistrate.*

First Judicial Appearance to Arraignment. *Standards here are complicated because: (a) a shorter period is appropriate for defendants in jail than for those released; (b) preliminary hearings are waived in many cases, and the formality and usefulness of the hearing varies; (c) formal charge in some cases is by grand jury indictment, while in others by prosecutor's information—usually the right to indictment can be waived by the defendant; and (d) in many jurisdictions proceedings through preliminary hearing in felony cases are in one court while grand jury charge and subsequent proceedings are in another. While in all cases these steps should take no more than 17 days, in most cases it should be possible to accomplish them in substantially less time.*

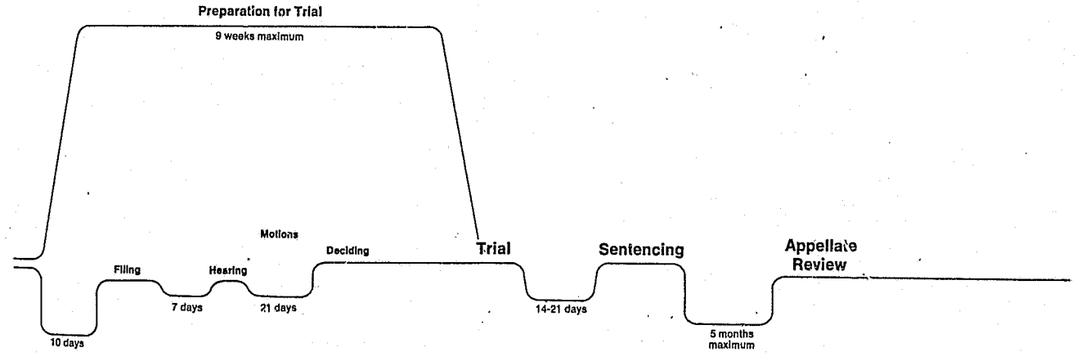
6. *Sentencing to Appellate Review.* A considerable period of time often passes in the prosecution of the appeal. The appeals process involves many steps, some of which must be taken within a certain time, depending upon the various State rules.[32]

First, an appeal must be noted. In Colorado and Kansas, for example, the notice of appeal may be filed up to six months after imposition of sentence; several other States require filing of the appeal within 10 days of the imposition of sentence.

Second, a record must be prepared. Here the permissible time interval varies from 20 days in Georgia to two years in Minnesota. Frequently it is difficult to obtain a stenographic transcript. Many State appellate courts still require printed records, and extensions for this purpose are liberally granted.

Third, briefs must be prepared. The time permitted varies from 3 weeks to 105 days, and extensions are common. In addition there is a lapse between filing of the brief and the oral argument or final submission. While some States give priority to criminal cases, this practice also varies widely, particularly when the summer or Easter recess intervenes.

The final stage, the interval between argument and the announcement of decision, varies from an average of 11 days in Nevada to 6 months in New Mexico. Some appellate courts follow the practice of affirming convictions without opinion or by *per curiam* memorandum if no novel principle of law is involved.



Trial to Sentence. *During this period a presentence investigation should be completed.*

Sentence to Appellate Review. *This standard is based on the time periods of the proposed Uniform Rules of Federal Appellate Procedure. Many jurisdictions would have to change existing practices concerning printing and preparation of records to meet this standard.*

A 1964 American Bar Association study revealed that time intervals between sentence and final disposition of an appeal ranged from 10 to 18 months; in no State was the time less than 5 months.[33]

An appeal should be prosecuted and the decision announced within five months from the time of sentence. Much of the present delay is attributable to unreasonably long statutory periods for steps in the process. Since assigned counsel are available to bring appeals for most indigent defendants, there appears to be no reason why an appeal should not be noted within 10 days of conviction, as in the Federal system. While exceptionally long and complicated cases may require granting additional time on application to the court, the rules should provide for docketing the record on appeal within 40 days of the notice of appeal, with the appellant's brief 30 days thereafter and another 30 days for the respondent's brief. These are the time periods proposed by the Committee on Rules of Practice of the Judicial Conference of the United States in its Proposed Uniform Rules of Federal Appellate Procedure. Reply briefs should be allowed only with leave of the court granted at the time for oral argument. The court should hear oral argument in criminal appeals within two weeks of the filing of the respondent's brief.

As with the stage between the preliminary hearing and filing of the formal charge, the filing of a notice of appeal in the trial court does not alert the appellate court to the pendency of the case. The case is usually brought to that

[32] ABA Comm. on Appellate Delay in Criminal Cases, *supra* note 1, at 151–54.
[33] *Id.* at 151.

court's attention only when the record on appeal has been prepared and is ready for docketing, which may be weeks or months after the time for docketing permitted by court rules. Yet at that point dismissal of the appeal for failure to comply with the rules is too drastic a sanction, and the court has no choice but to accept the late filing. What is needed, therefore, is a device whereby the appellate court may exercise control at an earlier stage of the proceedings. The simplest device seems to be to require the trial court clerk to notify the appellate court as soon as notice of appeal is filed. The court will then be able to set up a calendar of cases in which the record is due for filing. Any delay in complying with the court rules will be reflected immediately on such a calendar, enabling the court to make prompt inquiry into the reasons for the delay.

IMPLEMENTATION TECHNIQUES

A court could establish a timetable by local rule or by calendar order, and where rulemaking power is totally lacking, permissive legislation should be enacted. Implementation of the timetable would require firm management and calendar control by the local courts. A timetable for the steps in a criminal proceeding will be of no value unless there is enough manpower to enable the courts and the prosecutors to comply with it. The problems of delay stem in part from overloading the system of justice; often there are too many cases to be processed by too few people. Long-range solutions lie in increased public expenditures that will permit staffing the system with many more qualified persons. Without substantial expansion of personnel and facilities, reform will fail.

Legislatures of 12 States have recently increased the number of judgeships to alleviate congestion and delay resulting from growing caseloads.[34] Research needed on the optimal workload of a judge and on the development of guidelines for when more judicial positions are required. Some States have moved in this direction by constitutional provisions automatically increasing the number of judicial positions with the population.

In addition to the creation of more judgeships, the problem of manpower can also be alleviated by more efficient use of available judges. One immediate step is to curtail judicial vacations, particularly over the summer.

As recently as four years ago in the District of Columbia the entire trial bench took three months' vacation. Since that time vacations have been gradually shortened to eight weeks for most judges. There is a need not only to shorten vacations but to stagger them so that the criminal backlog does not dramatically increase over the summer months. The foregoing applies not only to trial courts but also to those appellate courts in which excesses exist.

Public Reporting of Delayed Cases. A timetable should be integrated with a court recordkeeping system, whether manual or electronic data processing are used. This system could be keyed to produce at least once a week a list of cases in which the time between steps has exceeded the norm by more than a stated amount. For example, if a formal charge has been filed and the seven days have passed without arraignment of the defendant, the case would appear on that week's list. The list could be circulated to the chief judge, the local prosecutor, and the State attorney general. To be publicly accessible, the lists should be filed with the clerk as a public record of the court. A tabulation of cases which appeared on such a list during the course of the year should be included in the published annual report of the court administrator.

Special Calendars. Consideration should be given to the establishment of special calendars to handle delayed cases, particularly those in which the delay occurs after arraignment on the formal charge and before trial. Cases which fall behind schedule might be transferred to a special calendar in which special efforts will be made to move them. The experience of the Supreme Court of New York County with its special "blockbuster" calendar provides a useful example.[35]

CASE MONITORING AND SCHEDULING

Courts have not developed a system for monitoring their workload to ensure that necessary priorities are established and that routine cases are not unduly delayed. Traditionally court management and scheduling have centered around three types of documents. The first is the case file, in which original documents, warrants, indictments, motions, judgments, and the like are maintained as the permanent and official historical record of the case. The second, the docket, typically a looseleaf volume made up of separate sheets for each case, is an operating document consisting of entries for each important event in a case from beginning to end. The third, which is generally used by the court to determine its future operations, is the calendar, a list of all cases pending in court or those at a particular stage of the process, for example, those awaiting trial. The term "calendar" is also used to describe the list of cases to be considered by a court on a particular day or at a particular sitting of the court.

In a court with a small workload a judge can easily keep track of every defendant and every case pending or to be heard at a particular term. He can readily see from the docket how long a case has been pending, what is its current status, and where delay is occurring; by a glance at the calendar he can see if he has too many cases scheduled for a given sitting and can set cases for convenient times. The calendar also tells him how many cases he has to deal with and how many are waiting at each stage of the process.

In a badly congested court or in a busy urban court this simple system often breaks down. The number of cases increases, and it becomes harder to keep track of the dockets and to monitor individual cases. Cases pile up and the calendar grows, causing problems in scheduling and in establishing priorities to dispose of complex cases.

In some multijudge courts each judge individually operates his own calendar with cases being assigned to him for all purposes. Other courts are divided into parts in which a judge performs only one judicial function, such as hearing motions, trying jury cases, or sentencing defendants. The cases move from part to part, and each

[34] Arkansas, California, Connecticut, Georgia, Indiana, Kansas, Maryland, Missouri, Nebraska, New York, North Carolina, and Oregon did so in 1965. KLEIN & HARRIS, *op. cit. supra* note 19, at 619–20.

[35] 21 RECORD OF N.Y.C.B.A. 159 (1966).

stage of the case is likely to be handled by a different judge. This approach may increase the efficiency of individual judges and enable them to deal with more cases, but it results in the loss of an overall view and control of cases as they move through the process.

A key limitation of the calendar system in a busy court is that cases tend to be scrutinized one by one as they appear on a particular day's calendar. In the scheduling of the next appearance of a case, attention is directed at the single case without consideration of its relation to the entire caseload of the court in terms of priorities, delay, attorney commitments, and the availability of judges and courtrooms. Rather than monitor the flow of cases, the calendar system catches them only as they come up. Cases are not measured against fixed standards or timetables for disposition; nor are priorities assigned among cases. Moreover, the calendar system does not allow the court a simple method of identifying those cases which have not met time standards at various stages of the trial process.

In the discussion of pretrial release the importance of giving priority to the trial of detained defendants over those released before trial was mentioned. Similar priorities are recommended for cases involving defendants threatening dangerous behavior while awaiting trial. A third sort of priority might be assigned on the basis of the type of crime charged, for example, ensuring speedy dispositions of serious charges or of particularly dangerous and threatening activity. In Philadelphia special priorities have been established to assure that defendants charged with violent crimes come to trial within 30 days of indictment.

An obvious limitation to the priority technique is that for each case granted preference, another must be held up. While limited priorities are both necessary and desirable, little would be accomplished by an approach that inevitably results in even greater delay for the general run of cases. Priorities and timetables, therefore, are two parts of a whole, one designed to provide a standard for disposition of routine cases and the other aimed at ensuring disposition of the unusual case.

Scheduling cases for some stages of the trial process is usually simple. Arraignment, motions, and sentence require relatively little court time. They do not require the numbers of witnesses and jurors that must be brought together in a trial, and the tactical interests in delay are low at these stages. It is the scheduling of the trial itself that is difficult.

Of all the variables in trial scheduling, including the priorities to be assigned other cases on the calendar, the availability of judges, courtrooms, prosecutors, witnesses, and jurors, the most troublesome one is the availability of defense counsel. Particularly in those communities where the trial practice tends to be concentrated in a few lawyers, lengthy delay in the trial of criminal cases may result from actual or claimed conflicts in engagements of counsel. In some metropolitan areas retaining certain busy practitioners is equivalent to obtaining an automatic 12- to 18-month delay in the trial of the case. But because of the frequency with which cases are adjourned or settled by guilty plea or by dismissal, many claimed conflicts are in fact not conflicts at all.

Sound case scheduling must take greater account of attorney availability and priorities than is possible under existing calendar practices. In urban areas attorneys typically appear before more than one judge and in more than one court. An apparent solution lies in a centralized record of attorney commitments for use in scheduling cases. In large jurisdictions data processing equipment may be called for. Denver maintains three master computer tapes, one containing all active civil cases, one all pending criminal cases, and a third all attorneys and their commitments. In the preparation of the civil trial calendar cases ready for trial from the civil case tape are compared with the attorney commitments on the attorney tape, producing a tentative trial schedule. There are plans to extend this technique to the criminal trial schedule and to include in the computer evaluation such priority factors as whether and how long the defendant has been detained awaiting trial, and the seriousness of the crime charged.

Denver is also experimenting with the use of electronic computers to collect, compare, and display court management and scheduling information to enable courts to deal more effectively with their caseloads. In appendix E to this report is a preliminary examination of alternative methods to improve court business procedures. It seems clear that use of electronic computers is efficient for only the largest courts. But computer costs may be justified if the machines are shared with other courts and perhaps with other governmental users. As more communities employ computers for taxation, motor vehicle and other licensing, and payrolls, these computers may be shared with the courts.

Aside from its application to the daily administrative tasks of the court, computer technology provides useful techniques for the analysis and improvement of court methods. The Report of the Science and Technology Task Force describes the application of one such technique, computer simulation, to the flow of cases through a metropolitan court. Data on court operations are fed into the computer, and statistical estimation and prediction techniques are applied to operations, time lags, personnel, workloads, etc.

The most important feature of computer simulation is that potential court changes may be evaluated without disturbing the court process. For example, this technique allows a prediction of the additional resources needed to dispose of court business within certain time standards, the effect on delay of empaneling two grand juries instead of one, or the number of prosecutors needed if a certain number of judges were to be appointed.

The chart in appendix E of this report estimates equipment that would appear appropriate for use in jurisdictions of varying sizes and workloads. It is based on the assumption that all court business operations in the jurisdiction are integrated in a single judicial management center using the most sophisticated machines justified by the workload. The chart indicates that in only about 300 of the largest jurisdictions have the caseloads reached proportions that justify a punched card or computer sys-

tem. For the remaining jurisdictions improved manual systems should be adequate.

These 300 courts are the city and suburban courts, and it is here that the great volume of criminal cases and court delay are found. Greater attention to modern management techniques, even by rural courts, can be productive because the traditional methods of court management in many respects are cumbersome and inefficient. Small communities can economize in the operations of their courts by adopting, for example, the design and application of more efficient manual forms, preprinted for common entries with multiple copies and carbon paper inserts so that one entry can be used for several purposes. A simple multiple-ply complaint form could contain carbon copies to serve as an initial docket entry form, index card, calendaring entry, and statistical records form, all to be completed by one set of entries. Moreover, as local courts become more fully integrated into a statewide court system, local court business and trial methods should be made compatible with those of other courts.

TREATMENT OF JURORS AND WITNESSES

Citizens who serve as witnesses and jurors are vital to the handling of a criminal case. For many citizens it is almost entirely through this service that their impressions of the system are formed.

In recent years there has been growing concern that the average citizen identifies himself less and less with the criminal process and its officials. In particular, citizens have manifested reluctance to come forward with information, to participate as witnesses in judicial proceedings, and to serve as jurors. The causes of these negative attitudes are many and complex, but some aspects of the problem may be traced directly to the treatment accorded witnesses and jurors.

Facilities for witnesses and jurors, as a rule, are either inadequate or nonexistent. Sensitivity to the needs of witnesses who are required to return to court again and again, often at considerable personal sacrifice, is usually lacking.

Compensation is generally so low that service as a juror or witness is a serious financial burden. In the District of Columbia, for example, the Court of General Sessions compensates witnesses at the rate of 75 cents per day. Most witnesses, however, are unaware that provision for compensation exists. In the U.S. District Courts witnesses are paid $4 a day. But problems still exist.

> Sam is a $40-a-day truck driver. Last year, he appeared 16 times in District Court as a witness in a murder case. Each time, he was paid a $4 witness fee by the court. His boss refused to pay him his usual $40-a-day during the appearances.[36]

As a result, Sam, the father of six children, lost $574 in wages. The impact of jury service is often equally harmful. Jury fees are usually higher than those for witnesses, but they still do not approach a reasonable approximation of normal daily wages.[37]

The problem is more than one of inadequate compensation. Jury service and appearance as a witness are duties of citizenship to be assumed even if they involve financial sacrifice. But repeated court appearances occasioned by adjournment of trials interfere with the private and business lives of witnesses and jurors. This waste of time, compounded by inadequate compensation, cannot be justified.

In courts in many cities witnesses must come to court each time the case is called and must sit through the entire calendar call, although most cases on the calendar will be settled by a guilty plea. Only a small number of the scheduled cases could possibly be tried that very day because of the shortage of judges. Adjournments are frequently requested and almost routinely granted. Rarely is an attempt made to notify the witnesses that the trial will not proceed as scheduled. A noted former prosecutor from New York writes:

> In my job as District Attorney I frequently received serious complaints from witnesses who were greatly inconvenienced, and at times their jobs were put in jeopardy because of the necessity of coming back again and again when cases appeared on the calendar and were adjourned. In addition to that, there is never proper provision made for their full compensation for loss of time. Of course, I realize some limit must be put on compensation, but today any worthwhile mechanic can earn anywhere from $25.00 to $40.00 a day at his regular job.
>
> In many instances, witnesses . . . develop an attitude that henceforth they will never act as witnesses again. Complainants and witnesses are innocent victims in these situations, and some real thought should be given as to how to minimize the inconvenience to which they are subjected and to make them feel that what they are doing is appreciated by the people and the authorities.[38]

The full impact of these problems does not become apparent until one realizes that a witness may be the victim of the offense and that he is often from the same low stratum of the community as the defendant. The economic impact bears most harshly on people whose wages are usually paid on an hourly or daily basis. Such experiences can only aggravate the feeling of a major segment of the community that the law does them no good.

In addition, complainants commonly have difficulty recovering stolen property held by the police for periods substantially longer than would appear necessary. The process for reclaiming the property often is cumbersome, involving the preparation of numerous forms and the necessity of going from office to office. Police and prosecutive agencies should simplify procedures for the prompt return of property. Where photographing the evidence will suffice for purposes of evidence at trial, this technique should be more broadly used. Of course, in many cases the property must be available for trial, but return of the property should be expected immediately after disposition of the case.

[36] Valentine, *Witnesses Who Help Insure Justice Deserve Justice in Fees, Bar Feels*, Washington Post, Feb. 28, 1966, § B, p. 1, col. 3.

[37] In the Federal District Court jurors are paid $10 a day. In the Milwaukee County, Wis., Circuit Court witnesses are paid $5 per day, jurors $12.

[38] Letter from Edward S. Silver, former District Attorney of Kings County (Brooklyn), N.Y., to James Vorenberg, Director, Office of Criminal Justice, U.S. Department of Justice, Nov. 18, 1964.

In nearly every criminal case at least one police officer appears as a witness for the prosecution. Police waste many hours at court awaiting the call of cases which will be disposed of by plea or continued to a later date. Their attendance, sometimes daily, substantially drains law enforcement resources. If an officer makes an arrest late in the evening during a 4:00 p.m.-to-midnight tour of duty, he must appear the next morning in court, wait all morning for his case to be called, and then return to work again at 4:00 p.m. Or he may be required to appear on his day off. Often these court appearances are uncompensated.[39] The overall effect is to tempt officers to avoid arrests prior to their day off or when they are on the midnight or four o'clock tour, to make them overtired when they return to work, and to lower morale generally. And when additional compensation is provided, the effect of repeated appearances is to expend public funds unnecessarily.

Much waste of police time occurs when an arrested person makes his initial court appearance. Almost always the hearing is either waived by the defendant or adjourned to a later date to permit both sides to prepare. Police officers should not be required to appear in court at this point. A written statement of the facts of the offense prepared by the officer immediately after the arrest and signed by him should suffice until the hearing is actually held. This should help solve the problem of police being required to appear in court during the day between night tours of duty.

The juror who comes to court to hear evidence and help render a verdict and then spends most of his time being shuffled about has good reason to feel "manipulated, used and otherwise treated as a pawn in a game."[40] The lack of minimally decent physical facilities in many courthouses, particularly the lower courts, increases their frustration and resentment. Witnesses and jurors must often spend idle hours in crowded courtrooms or noisy corridors because many of these courts do not provide lounges or other facilities. Telephones for those who could conduct some of their business at the courthouse and reading material for those in forced idleness are lacking almost everywhere.

IMPROVING TREATMENT OF JURORS AND WITNESSES

Adequate compensation must be provided for jurors and witnesses. This need not mean paying exorbitant sums, or even compensating a man at the same wage he ordinarily earns, but it does envision more than a token payment. Such payment should reduce financial sacrifice without encouraging "professional witnesses" and possible perjury. With respect to physical facilities, separate lounge facilities for witnesses and jurors should be provided. These rooms should be supplied with reading matter, telephones, and perhaps a television set.

One solution to problems of better use of these persons' time lies in more efficient calendaring and scheduling of cases and in more efficient management of the courts and prosecutors' offices. The disposition of most cases, particularly those involving guilty pleas and adjournments, can be ascertained by the prosecutor in advance of court appearances so that witnesses are not made to appear unnecessarily. Prosecutors should have a rough idea of which of the remaining cases are ready for trial and will be tried promptly. Plea negotiations should precede the calendar call by several days so that where agreement to enter a guilty plea has been reached, witnesses could be advised that they need not appear.

To some extent the unnecessary repetition of court appearances by witnesses is caused by archaic subpoena practices under which witnesses must be directed to appear in court on a specified date. In the absence of advance knowledge of the precise date of trial, some courts and prosecutors feel obliged to direct witnesses to appear each time the case is on the calendar. Courts should provide a procedure whereby witnesses can be instructed to appear when directed by the prosecutor or the court clerk.

Finally, technology may develop new techniques for procuring the attendance of witnesses or jurors. For example, those with a fixed place of work or residence might be placed on telephone alert and called shortly before their appearance is needed. Under special circumstances witnesses might be furnished transistorized radios similar to those used by doctors in radio page systems.

Better scheduling of cases for trial will result in better assignment of jurors and earlier release of jurors not called upon to serve during a given day so that they may return to work. Metropolitan areas can substantially reduce the number of jurors called for service and can ensure their more effective use by instituting central jury parts in which the juror needs of a number of courts are met from a centrally administered pool. Jurors not needed in one court are used elsewhere. This procedure is successful in New York County. Communities might also provide incoming jury panels with a presentation concerning their role and importance in the criminal justice process. For example, officials in New York have recently produced a film, "The True and the Just," for jurors.[41] It discusses the background of the jury system and examines a juror's actions and reactions from the time he is notified to serve until the time the jury deliberates. The film was financed by the Ford Foundation and is designed for use elsewhere in the United States.

Of course, even if every court system in the Nation accepted the programs suggested, the problems of citizens' apathy and hostility would not vanish. But our system of justice would function more effectively if citizens emerged from their courtroom experience with a deeper understanding of and appreciation for the problems of the administration of justice.

* * *

[39] Recently several jurisdictions have provided for compensation to police witnesses. A 1965 Congressional enactment provides compensation for officers in the District of Columbia testifying during nonworking hours. In April 1966 Boston allocated $250,000 for this purpose; Mayor Collins commented that " 'It is only right that police officers should get this extra pay or time off.' . . . 'They are entitled to it. Night officers should be compensated for any time they spend in court.' " Prior to this enactment Boston police officers "spent many hours in court on their days off without compensation after making arrests while on night duty." Record American (Boston), Apr. 16, 1966, p. 5, col. 1.

[40] Wainwright, *A Legal Miscarriage of Justice*, Life, Nov. 19, 1965, p. 30.

[41] Moscow, *Film for Jurors*, N.Y.L.J., Apr. 22, 1966, p. 1, col. 6.

ABA MODEL STATE JUDICIAL ARTICLE (1962)

SEC. 1. THE JUDICIAL POWER.

The judicial power of the State shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals, one Trial Court of General Jurisdiction known as the District Court, and one Trial Court of Limited Jurisdiction known as the Magistrate's Court.

Committee comment: It is contemplated to set up by this section a single unified judicial system with a single court of original jurisdiction. This follows the recommendation of advocates of judicial reform from Pound to Vanderbilt. And this is one of the recommendations made by the American Bar Association in 1938. It is a reflection of the unfortunate experiences too many states have had with multiple courts of original jurisdiction.

Thirteen states with large populations and consequently with an extremely busy judicial system now provide for an intermediate appellate court. It is expected that more and more states will find this kind of a court to be a real aid in dealing with problems of congestion in the appellate system. The Model Judicial Article, therefore, provides for such a court.

The titles of the trial courts may, of course, vary from jurisdiction to jurisdiction. The ones chosen here are merely for purposes of example.

SEC. 2. THE SUPREME COURT.

Par. 1. *Composition.* The Supreme Court shall consist of the Chief Justice of the State and (four) (six) Associate Justices of the Supreme Court.

Committee comment: The question of the number of justices is not one which has an ideal solution and the number may vary from state to state. The experience of the United States Supreme Court would indicate that any number above nine has passed the point of diminishing returns. On the other hand, the number must be large enough to divide the tasks sufficiently to give the justices ample time for reflection and deliberation in the preparation of opinions.

The Committee is of the view that the number of justices should be fixed by the Constitution to avoid such suggestions as that of McReynolds when he was Attorney-General, adopted by President Franklin D. Roosevelt in his court-packing plan, to increase the number of justices in order to effect a change in the substance of the Court's opinion.

The Committee is of the opinion that the Supreme Court should not sit in divisions, but has not made provisions to prohibit it. Such a practice has been utilized by several state jurisdictions. Its main purpose is, of course, to allow the high court to increase the number of cases which it can hear in order to overcome or prevent delay and congestion. It must be recognized, however, that decisions by divisions, even if provided for by the Constitution, will not have the same force and effect as a decision of the whole Court. Moreover, sitting in divisions creates the possibility of minority views on the Court becoming controlling doctrine because of the accident of the make-up of a division. It is the Committee's belief, therefore, that while divisions could be utilized for clearing temporary congestion or delay, an intermediate appellate court and/or a limitation on the Supreme Court's appellate jurisdiction are more appropriate long-term remedies.

Par. 2. *Jurisdiction.*

A. *Original jurisdiction.* The Supreme Court shall have no original jurisdiction, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.

Committee comment: It is the view of the Committee that no original jurisdiction be imposed on the high court. That court lacks facilities for the fact finding process inherent in every question of original jurisdiction. References to masters and referees, in the pattern of the United States Supreme Court, do not seem so adequate or desirable as requiring the case to enter the judicial system by way of the trial court.

Silence on the question of the issuance of writs has generally been interpreted as authorizing the Supreme Court to issue original writs. It is proposed to eliminate this power for the same reasons that call for the elimination of original jurisdiction. By way of its appellate jurisdiction, the high court can review all grants or denials of writs below and can properly, in the extraordinary cases, remove a case from the lower court to the high court even before judgment on the petition for the writ has been made by the lower court.

B. *Appellate jurisdiction.* Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed.

Committee comment: The only categories of cases in which the Committee felt that it was necessary to impose compulsory jurisdiction were those involving the life of the defendant and those involving liberty of the defendant for an extensive period of time. Most high courts now exercise this power in capital cases. For this purpose the Committee was unable to rationalize a distinction between capital cases and long-term sentences of imprisonment.

As to all other matters it was believed that the appellate power should be exercised in accordance with the demands of the times. On the question whether this allocation of power should be in the Court or in the legislature, the Committee chose the Court for several reasons. Among others, these reasons included: 1) the fact that such power in the Court would enhance the independence of the judiciary; 2) the fact that it would place the power to meet current problems in the hands of those most likely to be expert in the subject; 3) the fact that the rule making power was more flexible than the legislative power in its capacity to meet the demands of judicial administration.

The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which that power has been put by the Court of Criminal Appeals in England. Recognizing the possibility of undesirable imposition on the appellate processes, the Committee thought it desirable to leave the Court with the power to limit the categories of cases in which sentences would be reviewed.

SEC. 3. THE COURT OF APPEALS.

The Court of Appeals shall consist of as many divisions as the Supreme Court shall determine to be necessary. Each division of the Court of Appeals shall consist of three judges. The Court of Appeals shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the State and it may be authorized by rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

Commitee comment: The necessity for intermediate courts of appeal, already existent in thirteen states and likely to become necessary in others, was the reason the Committee felt that provision should be made in the Constitution for their creation. The primary function of such a court would be to hear appeals in cases which the Supreme Court should not be expected to handle because of the importance of its business. The jurisdiction of the court of appeals has, therefore, been framed in the same terms, except for the Supreme Court's compulsory jurisdiction, as is the jurisdiction of the Supreme Court itself. The same reasons exist for allotting the power to the Supreme Court rather than the legislature to specify the jurisdiction.

SEC. 4. THE DISTRICT AND MAGISTRATE'S COURTS.

Par. 1. *Composition.* The District Court shall be composed of such number of divisions and the District and Magistrate's Courts shall be composed of such number of judges as the Supreme Court shall determine to be necessary, except that each district shall be a geographic unit fixed by the Supreme Court and shall have at least one judge. Every judge of the District and Magistrate's Courts shall be eligible to sit in every district.

Committee comment: The number of District Court judges and magistrates and District Court divisions must be flexible in order to allow for adjustment to new conditions. The authorization to provide for "divisions" was thought desirable in terms of the need for specialized courts, such as probate and divorce courts. But it was also thought to be desirable that these specialized courts be manned by judges whose functions need not be confined to such courts. Thus, all branches will be administered as one court with no conflicts of jurisdiction and no waste of judicial manpower.

The Committee believed that the Supreme Court would be the most expert body to decide how many judges and magistrates are required in each district.

The authority of a district judge and magistrate to sit in any district is complementary to the authority of the Chief Justice to assign judges anywhere in the State in order to make the most efficient use of judicial manpower.

Par. 2. *District Court Jurisdiction.* The District Court shall exercise original general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the Magistrate's Court by the Supreme Court rules. The District Court may be authorized, by rule of the Supreme Court, to review directly decisions of State administrative agencies and decisions of Magistrate's Courts.

Par. 3. *Magistrate's Court Jurisdiction.* The Magistrate's Court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the Supreme Court shall designate by rule.

Committee comment: It was the Committee's view that cases involving minor matters such as traffic offenses and small claims should be delegated to magistrate's courts, and that this would be necessary to avoid an unreasonably large number of district judges with general original jurisdiction. It was also thought that where the districts covered a large geographic area or temporary congestion occurred in any district, magistrates might appropriately be used to relieve the district court of undue burdens. Because of the need for flexibility in the use of such courts it was deemed best to leave the terms and conditions of the magistrate's court jurisdiction in the control of the Supreme Court by rule.

SEC. 5. SELECTION OF JUSTICES, JUDGES AND MAGISTRATES.

Par. 1. *Nomination and Appointment.* A vacancy in a judicial office in the State, other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the Judicial Nominating Commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the Chief Justice or the Acting Chief Justice from the same list. Magistrates shall be appointed by the Chief Justice for a term of three years.

Committee comment: The method of selecting judicial officers of all but the lowest courts here proposed follows essentially the American Bar Association plan recommended in 1937. The provision directing the Chief Justice to appoint where the governor fails to act is designed to prevent a stalemate between the governor and the nominating commission which has occurred in States using this system.

The importance of removing the process of judicial nomination from the political arena is probably the most essential element in any scheme for adequate judicial reform.

Because the exigencies of the calendar will vary so much, the Committee thought that great freedom was necessary in the appointment of magistrates. This meant a necessity for rapid appointment and comparatively short tenure. The power of appointment was, therefore, placed in the Chief Justice. It was also felt, however, that the tenure had to be long enough to attract competent lawyers to accept appointment.

Par. 2. *Eligibility.* To be eligible for nomination as a justice of the Supreme Court, judge of the Court of Appeals, judge of the District Court, or to be appointed as a Magistrate, a person must be domiciled within the State, a citizen of the United States, and licensed to practice law in the courts of the State.

Committee comment: The requirements of citizenship and membership in the bar are those which are usually demanded in the States. The Committee is of the view that no other qualifications should be specified. The selection procedure will provide all other necessary safeguards, at the same time allowing the nominating commission the broadest opportunity to secure nominees of the highest calibre

SEC. 6. TENURE OF JUSTICES AND JUDGES.

Par. 1. *Term of Office.* At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter, so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the Supreme Court, the electorate of the entire State shall vote on the question of approval or rejection. In the case of judges of the Court of Appeals and the District Court, the electorate of the districts or district in which the division of the Court of Appeals or District Court to which he was appointed is located shall vote on the question of approval or rejection.

Committee comment: This provision also follows the American Bar Association plan. The periods between appointment and election and between election and re-election have no ideal duration. They must be long enough to permit the character of the judge's work to become known, long enough so that competent persons will not reject appointment for fear of hasty rejection by the electorate. But it must be short enough to remove reasonably promptly judges who are not performing their functions adequately.

Par. 2. *Retirement.* Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The Chief Justice is empowered to authorize

retired judges to perform temporary judicial duties in any court of the State.

Committee comment: Most States have a fixed retirement age. The Committee is of the opinion that the legislature should be free to fix a retirement age, so long as it does not reduce it below sixty-five. The Committee has reluctantly chosen a fixed retirement age rather than indefinite tenure because it is of the view that the interests of sound administration of justice will be better served by the possibility of retiring competent judges than by risking the continuance in office of judges with truly limited capacities.

Par. 3. *Retirement for Incapacity.* A justice of the Supreme Court may be retired after appropriate hearing, upon certification to the governor, by the Judicial Nominating Commission for the Supreme Court that such justice is so incapacitated as to be unable to carry on his duties.

Committee comment: This provision follows the Alaska plan to have an independent body make the determination whether a high court judge has become incapitated while in office. The nominating commission seems to be a logical agency to charge with this responsibility. The difficulties which seem to arise when this power is put in the hands of fellow judges are avoided by this process.

Par. 4. *Removal.* Justices of the Supreme Court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the Supreme Court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, during his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.

Committee comment: The first two sentences of this section derive from the New Jersey and Puerto Rican Constitution. The impeachment process is not utilized with reference to lower court judges because it is the Committee's view that the Supreme Court, in its supervisory capacity over the judicial system, is better qualified and the more logical body to determine the issues than is the legislature.

The last two sentences are for the purpose of requiring that the judge devote his full time to his job as judge and to remove all judges from politics to the extent possible. Several jurisdictions have had the sorry spectacle of a judge running for the governorship, accepting contributions from lawyers, etc., while retaining his judicial office. Certainly this is conduct unbecoming a judicial officer and hardly compatible with the idea of safeguarding the judicial system from political ravages. The last clause of the last sentence is taken from the Missouri Judicial Article Par. 29 No. f.

SEC. 7. COMPENSATION OF JUSTICES AND JUDGES

Par. 1. *Salary.* The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the State government other than the governor.

Committee comment: Certainly one of the greatest drawbacks to securing an adequate judiciary has been the niggardly salaries which most of the States pay to their judicial officers. While the Committee was cognizant of the fact that the Constitution of the State is not the appropriate place to fix salaries in terms of dollars and cents, it was the hope of the Committee that the lower limit set forth in this section would afford some base for more adequate compensation for judges.

Par. 2. *Pensions.* Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the case of justices and judges who have served ten years or more, and their widows, the pension shall not be less than fifty per cent of the salary received at the time of the retirement or death of the justice or judge.

Committee comment: Again, the Committee understood that the pension program could not be spelled out in the Constitution. It has endeavored nevertheless to fix a floor on such pensions so that the requirement of a pension does not become meaningless.

Par. 3. *No Reduction of Compensation.* The compensation of a justice, judge or magistrate shall not be reduced during the term for which he was elected or appointed.

Committee comment: This is the usual provision for the protection of judicial independence by removing the legislative power to reduce the salaries of judges while in office. Without such a provision all attempts to secure tenure of office would be futile.

SEC. 8. THE CHIEF JUSTICE.

Par. 1. *Selection and Tenure.* The Chief Justice of the State shall be selected by the Judicial Nominating Commission from the members of the Supreme Court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of Chief Justice without resigning from the court. During a vacancy in the office of Chief Justice, all powers and duties of that office shall devolve upon the member of the Supreme Court who is senior in length of service on that court.

Committee comment: Many alternatives presented themselves on the question of the proper agency for appointing the Chief Justice. The Committee sought an agency outside the Court itself to avoid contributing to politics and factions within the Court. To avoid political intervention, the power was not vested in the governor. The nominating commission was thought to be the most knowledgeable and non-political alternative. Tenure of office was also thought necessary to the effective functioning of the judicial administration of the courts of the State. The evils of constant rotation of the office of Chief Justice have been only too cogently demonstrated by experience.

Par. 2. *Head of Administration Office of the Courts.* The Chief Justice of the State shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid the administration of the courts of the State. The Chief Justice shall have the power to assign any judge or magistrate of the State to sit in any court in the State when he deems such assignment necessary to aid the prompt disposition of judicial business, but in no event shall the number of judges and justices exceed the number of justices provided in section 2. The administrator shall, under the direction of the Chief Justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary administrative functions relating to the courts.

Committee comment: The vesting of administrative authority in the Chief Justice follows the recommendation of the American Bar Association. The desirability of the concept has been proved by the experience in the New Jersey system which adopted such a method of administering its courts.

SEC. 9. RULE MAKING POWER.

The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

Committee comment: The vesting of the rule making power in the Supreme Court has long been an objective of those interested in judicial reform. This is another of the recommendations of the American Bar Association. Rule making power over all the courts of the States is already exercised to a large degree in 28 States. Several states provides that the judicial council should fulfill this function, but the Committee thinks that the Supreme Court, because of its responsibility for the operation of the judicial system, is the proper body to exercise this power. Of course, the Supreme Court can call upon a judicial council or any other body of experts to advise it in the formulation of rules.

The provision giving to the Supreme Court the power to promulgate rules of evidence is a more controversial issue than the other rule making powers. In only eight states does the Supreme Court have control over rules of evidence, and in most of these states the power is conferred by statute rather than by the Constitution. The Committee follows the recommendation of the American Bar Association as most consistent with the proper concept of rules of evidence as procedural and most conducive to the effective administration of justice in the court system.

The last sentence of Section 9 contains language broad enough to authorize the Supreme Court to deal with either an integrated or an unintegrated bar of the State in connection with supervision of its members, discipline of its members, and other regulation or supervision of the bar. The language is broad enough to permit the Supreme Court to order an integrated state bar to be organized as was done in Wisconsin. If it is preferred that an integrated bar be a constitutionally created corporation, the following sentences may be added to Section 9.

"The State Bar of _____ is a public corporation, having, as an agency of the Supreme Court, perpetual existence and succession. Membership in it shall be a condition precedent to practicing law in this State. The Supreme Court by appropriate orders may provide for its organization and its regulation and supervision."

SEC. 10. JUDICIAL NOMINATING COMMISSION

There shall be a Judicial Nominating Commission for the Supreme Court and one for each division of the Court of Appeals and the District Court. Each Judicial Nominating Commission shall consist of seven members, one of whom shall be the Chief Justice of the State, who shall act as chairman. The members of the bar of the State residing in the geographic area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the State, from the residents of the geographic area for which the court or division sits. The terms of office and compensation for members of a Judicial Nominating Commission shall be fixed by the legislature, provided that not more than one-third of a commission shall be elected in any three-year period. No member of a Judicial Nominating Commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a State judicial office so long as he is a member of a Judicial Nominating Commission and for a period of five years thereafter.

Committee comment: The proposed Judicial Nominating Commission also follows the American Bar Association plan, which recommended that the list of nominees be made by an independent agency. The make-up of the Commission could be a combination of a number of variables. The Committee feels, however, that no group should have fixed representation and that all appropriate interests in the State can be represented through appointments as provided in this section. Provision is made for the participation of nonlawyers in the selection process. The disqualifications are self-explanatory.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL ACT TO PROVIDE FOR AN ADMINISTRATOR FOR THE STATE COURTS (As Amended) (1960)

AN ACT

[Providing for the Creation and Operation of the Office of Administrator of Courts.]

Comment: In the amendments to follow no provision is included comparable to Section 5, Judicial Conference, of the original Model Act. It is felt that provision for a judicial council or judicial conference is properly the subject of a separate law or rule of court.

(Enacting Clause)

SECTION 1. In this Act, unless the context otherwise requires, "court" means any tribunal recognized as a part of the judicial branch of government including any tribunal having jurisdiction in traffic cases [with the following exceptions: _____ (insert name of any court to be excluded)].

Comment: This section establishes the scope of the act at the outset and shifts the burden of restriction to individual states that adopt it. In some states consideration should be given to the necessity of specifically mentioning justices of the peace, magistrates and other officers and tribunals which may not be a "court" or a part of the judicial branch. Approval of this section removes the necessity for Section 6 of the original Model Act.

SECTION 2. The Office of Administrator of Courts is created with an administrative director who shall be the head thereof.

SECTION 3. The administrative director is appointed by and serves at the pleasure of the [the court of last resort]. He shall devote full time to his official duties to the exclusion of engagement in any other business or profession for profit. [His salary shall be fixed by [the court of last resort] in an amount not to exceed the minimum salary of any judge of court with primary state appellate jurisdiction.]

Comment: In some states compensation may be required to be fixed in some other manner and appropriate changes made in this section.

SECTION 4. The administrative director, with the approval of [the court of last resort,] shall appoint and fix

the compensation of such assistants as are necessary to enable him to perform his duties.

Comment: See comments to Section 3.

SECTION 5. The administrative director shall, under the supervision and direction of [the court of last resort]:

(a) Formulate and submit to the [court of last resort] recommendations for the improvement of the judicial system, including traffic case procedure.

Comment: The traffic case procedure should include one statewide form of complaint or information and summons, issuances of which are subject to quarterly audit by the administrative director. An annual report of the director to the court of last resort and to the legislature should include a statistical resume of these audits as well as a list of all courts and tribunals with jurisdiction to hear and determine traffic violation cases.

(b) Examine the administrative and business methods and systems employed in the offices of the clerks of court and other offices related to and serving the courts and make recommendations for necessary improvement.

(c) Collect and compile statistical data and other information on the judicial work of the courts and on the work of other offices related to and serving the courts and publish periodic reports with respect thereto.

(d) Examine the state of the dockets and practices and procedures of the courts and make recommendations for the expedition of litigation.

(e) Prepare and submit budget estimates of state appropriations necessary for the maintenance and operation of the judicial branch.

(f) File requests for permission to spend funds appropriated for the judicial branch and approve all vouchers for the expenditure of such funds.

(g) Secure and maintain accommodations and purchase, exchange and distribute equipment and supplies for the judges, clerks, and other offices, officers, and employees of the courts supported by state appropriations.

(h) Collect and compile statistical data and other information on the expenditures and receipts of the courts and related offices and publish periodic reports.

(i) Consult with and assist the clerks of court, and other officers and employees of the courts and of offices related to and serving the courts.

(j) Investigate complaints with respect to the operation of the courts and make such recommendations as may be appropriate.

[(k) Act as secretary of the judicial [council, conference] and for the committees thereof.]

(l) Perform such additional duties as may be assigned by rule of the [court of last resort.]

(m) Prepare and publish an annual report on the work of the courts and on the activities of the administrative office of the courts.

Comment: Section 5 is a complete restatement of Section 3 of the original Model Act defining the powers and duties of the administrative director of the courts. The sphere of duties is broadened. Subsection (l) leaves the door open for the performance of services in addition to those specifically enumerated.

SECTION 6. All judges, clerks of court, and other officers or employees of the courts and of offices related to and serving the courts shall comply with all requests made by the administrative director for information and statistical data relative to the work of the courts and of such offices and relative to the expenditure of public moneys for their maintenance and operation.

The [court of last resort] may provide by rule for the enforcement of this section.

SECTION 7. The administrative director shall use a seal approved by the [court of last resort]. Judicial notice shall be taken of the seal.

SECTION 8. The authority of the courts to appoint administrative or clerical personnel is not limited by any provision of this Act.

SECTION 9. This Act may be cited as the Model Court Administrator Act.

[SECTION 10. The following acts and parts of acts are hereby repealed:

(a)
(b)
(c) (Enumeration)]

Comment: The repeal section contemplates repeal and reenactment rather than amendment and to this effect and for purposes of original enactment the amendment may be considered as an independent act.

Care should be exercised to exclude any "Judicial Conference" law from repeal unless it is so intended.

SECTION 11. This [amendatory] Act shall take effect on _____.

Substantive Law Reform and the Limits of Effective Law Enforcement

The substantive criminal law is of fundamental and pervasive importance to law enforcement and the administration of justice. In defining criminal conduct and authorizing punishment it constitutes the basic source of authority, directing and controlling the State's use of the criminal sanction. It has a profound effect upon the functioning of law enforcement. Sir Robert Peel, the father of the English police, saw this early in the last century. Before undertaking to reform the police system he insisted on the need to reform the criminal law itself. A leading British police historian has noted:

> Peel realized what the Criminal Law reformers had never done, that Police reform and Criminal Law reform were wholly interdependent; that a reformed Criminal Code required a reformed police to enable it to function beneficially; and that a reformed police could not function effectively until the criminal and other laws which they were to enforce had been made capable of being respected by the public and administered with simplicity and clarity. He postponed for some years his boldly announced plans for police, and concentrated his energies on reform of the law.[1]

SUBSTANTIVE CRIMINAL LAW REFORM IN GENERAL

American criminal codes reflect a broad consensus on the appropriateness of employing the criminal law to protect against major injuries to persons, property, and institutions. But the absence of sustained legislative consideration of criminal codes has resulted in the perpetuation of anomalies and inadequacies which have complicated the duties of police, prosecutor, and court and have hindered the attainment of a rational and just penal system.

Some examples of these substantive inadequacies are the failure in most cases to treat as crimes highly dangerous conduct which does not produce injury, whether the conduct is undertaken negligently or recklessly; the unsatisfactory delineation of the line that separates innocent preparation from criminal attempt; the absence of laws that make criminal the solicitation to commit crimes; the amorphous doctrines of conspiracy that have grown unguided by considered legislative direction; the inconsistent and irrational doctrines of excuse and justification that govern the right to use force, including deadly force, self-defensively or in the prevention of crime, or in the apprehension of criminals; and the confusion that surrounds the definition of the intent or other culpable mental states required for particular crimes.

Legislative criteria for distinguishing greater and lesser degrees of criminality are in no less need of reexamination than legislative definitions of criminal conduct. For these criteria determine such matters as eligibility for capital punishment, applicability of mandatory minimum sentences, availability of probation, and length of authorized maximum terms of imprisonment—matters that may be even more significant issues in a particular case than whether the defendant is in fact guilty. Yet here too legislative inattention has been marked. For example, the traditional concepts of premeditation and deliberation do not adequately distinguish the most serious kind of murder from lesser degrees of homicide.[2] New York recently has revised the definition of murder in its penal code to eliminate the element of premeditation and deliberation.

Another example of unsuitable grading of offenses is the crime of burglary which, under the common law and the definition still used in most States, requires proof that the defendant broke into, as well as entered, the premises. The distinction between burglary and other forms of unlawful entry always has been tenuous.

> Raising a closed window was a breaking, but raising a partly open one was not; entering through an aperture in a wall or roof was not a constructive breaking, but crawling down a chimney was, breaking open a cupboard within a dwelling was not a breaking for the purposes of burglary, whereas entering a closed room was. . . .[3]

Such distinctions do not adequately distinguish the seriousness of the offense or mark the cases in which greater punishment is justified.

The whole problem of sentencing structure, the laws governing judicial sentencing alternatives, the range of authorized imprisonment for particular crimes, and the distribution of authority between courts and correctional agencies, is also in need of legislative consideration. The chapter on sentencing considers the serious shortcomings

[1] KEITH, THE POLICE IDEA—ITS HISTORY AND EVOLUTION IN ENGLAND IN THE EIGHTEENTH CENTURY AND AFTER 236 (1938).

[2] "As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A, passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as 'aforethought' in 'malice aforethought,' but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word." 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1883).

[3] Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 412 (1951).

that pervade penal codes, such as the indefensibly large number of different prison terms for various offenses, the long mandatory minimum terms, the lack of appropriate sentences for the career or professional criminal, and the restrictions on judicial and administrative discretion in dealing with convicted individuals.

These and other problems have been confronted by the American Law Institute's Model Penal Code. The code, the product of 10 years' work, is a thoughtful and comprehensive examination of the substantive criminal law. It was designed not as a ready-made statute for adoption by the States but as a plan for criminal law revision, a source of research material, and a guide to the development and modernization of the law. With the Code as a guide Illinois and New York have already revised their penal codes. At the present time 30 States, including California, Michigan, and Texas, are taking a new look at their criminal codes. In 1966 at the request of President Johnson, Congress created a commission to conduct a three-year study of the Federal Criminal Code.

Forms of substantive law reform projects vary. Louisiana conducted one of the earliest significant criminal law reforms in this century in 1942 under the auspices of the Louisiana State Law Institute with financial support from the State legislature. Wisconsin used an interim legislative group or council. In Illinois criminal law revision, supported by private funds, was achieved by a voluntary committee selected from members of the bar. The New York revision was conducted by the Temporary Commission on Revision of the Penal Law and Criminal Code established by the legislature. The 13-member commission, on which 7 members of the legislature served, was assisted by a staff consisting of a chief counsel and about a dozen full-time associates. California is now performing the task through the Joint Legislative Committee for Revision of the Penal Code. The actual research and drafting of the code, however, is being done by a staff of five law professors and a number of consultants.

High priority should be given by the States to comprehensive revision of their penal laws through an adequately financed project with a qualified, professional staff. The words of Prof. Herbert Wechsler, chief reporter for the Model Penal Code, eloquently express the imperative of substantive law reform:

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[4]

THE LIMITS OF EFFECTIVE LAW ENFORCEMENT

The prohibitions of the criminal law are not limited to conduct that involves major injuries to persons, property, and institutions. Not all cases involve assault, homicide, kidnapping, arson, burglary, robbery, theft, bribery, perjury, and the like. How and to what extent the criminal law, rather than other means of social control, is the appropriate vehicle for dealing with such conduct as gambling, public drunkenness, disorderly conduct, and vagrancy should receive closer examination.

In many instances legislatures have responded to difficult problems of social control by making the undesired conduct criminal. And many people are prepared to argue that if the legislature has not included a criminal penalty as a means of enforcement, it is not really serious about the matter.[5]

> If we are deeply disturbed by something which we know to be happening, and feel that we ought to be doing something to prevent it, this feeling can be partly relieved by prohibiting it on paper. Even if we merely succeed in persuading some organization to issue a statement deploring whatever it is, we have done something: but of course, the supreme form of prohibition on paper is the act of Parliament.[6]

The criminal law is not the sole or even the primary method relied upon by society to motivate compliance with its rules. The community depends on a broad spectrum of sanctions to control conduct. Civil liability, administrative regulations, licensing, and noncriminal penalties carry the brunt of the regulatory job in many very important fields, with little additional force contributed by such infrequently used criminal provisions as may appear in the statute books. Internal moral compunctions and family, group, and community pressures are some of the obvious informal sanctions that often are more effective than the prohibitions of the criminal law. The overready assumption that the way to control behavior is by making it criminal may interfere with the operation of the criminal law and inhibit the development of solutions to underlying social problems. Too infrequently have the limits of the effectiveness of criminal law been critically examined and the costs that must be paid for its use appraised.

Dean Francis Allen has described the extent of overreliance upon the criminal law:

> No one scrutinizing American criminal justice can fail to be impressed by the tremendous range of demands that are placed upon the system. This can be demonstrated in various ways. First, we may note the sheer bulk of penal regulations and observe the accelerating rate at which these accretions to the criminal law have occurred. . . .
>
> More interesting than the mere volume of modern criminal legislation is the remarkable range of human activities now subject to the threat of criminal sanctions. Many years ago, before the most striking modern developments had occurred, the late Professor Ernst Freund remarked: "Living under free institutions we submit to public regulation and control in ways that appear inconceivable to the spirit of oriental despotism." . . .
>
> Moreover, we should not assume that this striking expansion of criminal liability has proceeded in a rational and orderly fashion or that, until recently, it has attracted any substantial amount of thoughtful and scholarly inquiry. The precise contrary is very nearly true. Thus, it is more than poetic metaphor to suggest that the system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden of responsibilities relating to public policy in its various aspects. This we have done thoughtlessly without inquiring whether the burden can be effectively borne.[7]

This chapter examines several types of conduct which has been declared criminal but for which criminal enforcement has proven either ineffective or unduly costly. It tries to identify some circumstances in which the criminal law proves ineffective and the nature and extent of the costs paid for its use, costs measured in terms of the sacrifice of other social values and in terms of law enforcement generally. For this purpose the instances selected are principally exemplitive. Often the problem lies in excessively broad definitions of the crime. Appropriate redefinition might leave as criminal most of the kinds of conduct now proscribed in some categories, although in other instances there would be a substantial contraction of the area of criminality. This contraction of the formal proscription would in all cases tend to bring the written law in closer conformity with the law as it in fact operates.

In the final analysis each legislature must decide whether preserving a given criminal penalty is justified by the costs. The difficulty of this choice was aptly put by Michael and Adler over 30 years ago:

> If the social consequences of the enforcement of a law are themselves undesirable, for one reason or another, it may be difficult to determine whether the behavior in question should be prohibited. The decision may rest in part upon the balance of the disadvantages involved or upon the availability of other than legal means of preventing the undesirable behavior. Empirical investigation may be needed to decide questions of this sort. In some cases it may be impossible to answer the question except by the hazard of guesses or opinions.[8]

But precisely because of the subtlety and elusiveness of the considerations involved and the common legislative tendency to ignore them in favor of the easy remedy of remitting difficult social problems to the police and to the courts, it may be useful to call attention to the undesirable consequences of indiscriminately dealing with undesirable conduct by making it criminal.

DRUNKENNESS

Almost all jurisdictions treat public drunkenness as criminal either by laws expressly so providing or by disorderly conduct statutes. Few would question the need to retain criminal provisions to protect the public against disorderly behavior, whether committed by sober or intoxicated persons. The problem is the stuporous drunk in the public streets or alleyways who constitutes a danger to himself and an ugly inconvenience to others. Since these problems are discussed in greater detail in chapter 9 of the Commission's General Report, only the principal ways in which the use of the criminal process has proven costly and ineffective are summarized here. They indicate that a major reconsideration of alternatives is imperative.

The costs are a substantial burden upon law enforcement resources, since approximately one-third of all reported arrests are for drunkenness.[9] In addition there is a substantial amount of prosecutors' and magistrates' time expended dealing with the public drunk, and there is added strain upon courtrooms, jails, and correctional facilities. Should the right to counsel and other procedural protections be expanded to include drunkenness proceedings, the cost of employing the criminal process would be a financial and administrative burden of even greater proportions.

The return for these costs is disappointing. The public drunk is rarely the normal but undisciplined drinker who might be deterred from public intoxication by the prospect of a spell in the city jail. He is usually the alcoholic and the homeless for whom alcohol, poverty, and rootlessness have become a way of life. The data reveal that a large percentage of those swelling the arrest figures for public drunkenness are the compulsive repeaters, drunks who have been arrested and run through the process time and time again.

From every indication, therefore, deterrence is virtually inoperative. Rehabilitation also proves illusory because a correctional regimen for these persons is largely nonexistent. Some relief to the public and protection to the drunk are afforded, to be sure, by the temporary removal from the streets of some of the public drunks. This is about the only return the public receives for the costly labors of the criminal process.

The search for alternatives is imperative, for it would at least identify the problem for what it really is, a social problem of alcoholism and poverty, for which social services, not the penal-correctional process of the criminal law, are indicated.

GAMBLING

The laws of most States prohibiting gambling sweep within their ban various activities with significantly different social and law enforcement connotations. Many Americans engage in casual social gambling, the weekly poker game, the wager among friends on Saturday's football game, the church-sponsored evening of bingo. But the Report of the Organized Crime Task Force describes a very different kind of gambling activity. This is a

[4] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[5] See, e.g., an editorial on automobile safety device legislation, Washington Post, Aug. 30, 1966, sec. A, p. 18, col. 2.

[6] Walker, *Morality and the Criminal Law*, 11 HOWARD SOC'Y J. 209, 215 (1964).

[7] ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE, 3–4 (1964).

[8] MICHAEL & ADLER, CRIME, LAW AND SOCIAL SCIENCE 357 (1933).

[9] Derived from 1965 FBI UNIFORM CRIME REPORTS 108–09 (table 18).

highly organized illicit business, involving large and sometimes national organizations dealing in billions of dollars a year. Gambling is reported to be a prime source of funds for organized crime and is inevitably associated with political and police corruption. It is a substantial social evil preying particularly on the poor and the gullible.

Most States now countenance some legalized forms of gambling, commonly betting at race tracks, bingo, or limited forms of lotteries. The laws of some States attempt to distinguish between the casual player and the professional gambling promoter. Because of the variety of gambling activity and the costs of the approach now commonly followed, more careful legislative definition of the evil sought to be prohibited is needed.

The substantial demand for gambling, like the demand for alcohol during Prohibition, has survived the condemnations of the criminal law. The conduct proscribed by gambling laws is basically a commercial transaction between a willing seller and a willing buyer. People have been arrested, prosecuted, and convicted, but the prohibited conduct has flourished. The law may operate in some measure to diminish demand, but it is clear that criminal enforcement does not begin to control the problem. Illicit suppliers, protected against competition by the ban of the criminal law itself, enter the market to seek the profits made available by the persistence of the demand and the reduction of legitimate sources of supply. The risk of conviction appears to have a very limited effect.

The use of the criminal sanction serves to raise the stakes, for while the risk becomes greater, so do the prospects of reward.[10] The process of filling the demand under these circumstances encourages the formation of large-scale, organized criminal groups, often of national scope, with a multitude of persons each carrying out a phase of an integrated and continuous operation.

Once created these organized systems of crime tend to extend and diversify their operations much after the fashion of legitimate business. Racketeering organizations which found their market flooded by prohibition repeal moved into gambling and the illegal drug market. Organizations which purvey drugs and supply gambling find it profitable to extend their successful organization and mode of operation into loan sharking and labor racketeering. And in order to enhance their effectiveness as business operations, they are led to engage in collateral forms of crime of which murder and governmental corruption are the most notable examples. Hence in some measure crime is encouraged, and successful modes of criminality are produced, by the criminal law itself. As is made clear in the Report of the Task Force on Organized Crime, the ordinary processes of criminal law enforcement are particularly ineffective in dealing with crime conducted in these businesslike ways.

The difficulties of enforcement produced by the consensual character of the illegal conduct and the organized methods of operation have sometimes driven enforcement agencies to excesses in pursuit of evidence. Not only is this excessive enforcement activity undesirable in itself, but it has produced an adverse reaction by the public and the courts, often in the form of restrictions upon the use of evidence. No single phenomenon is more responsible for the whole pattern of judicial restraints upon methods of law enforcement than the unfortunate experience with enforcing laws against vice. Thurman Arnold's observation on this in 1935 has been further documented in the subsequent 30 years:

> Before . . . prohibition . . . the problem of search and seizures was a minor one. Thereafter, searches and seizures became the weapon of attack which could be used against prohibition enforcement. For every "dry" speech on the dangers of disobedience, there was a "wet" oration on the dangers of invading the privacy of the home. Reflected in the courts the figures are startling. In six States selected for the purpose of study we find 19 search-and-seizure cases appealed in the 12 years preceding Prohibition and 347 in the 12 years following.
>
> Because the creed of law enforcement has a habit of arising out of laws which are impossible of being enforced, it seems to be more of an influence in this country today than in any other.[11]

A considerable amount of police, prosecutorial, and judicial time, personnel, and resources is invested in enforcing laws against gambling. At a time when the volume of crime is steadily increasing and the burden on law enforcement agencies is becoming more onerous, this diversion of resources impairs the ability of law enforcement to deal effectively with more dangerous and threatening conduct.

This catalog of practical costs should not be understood as a recommendation for the elimination of the criminal penalty from all forms of gambling. The exploitation of the weaknesses of vulnerable people often results in economic loss and deprivation of major proportions, and as the Task Force Report on organized crime indicates, gambling is a major source of funds for criminal syndicates. The criminal law is necessary to deal with these evils, but its use should be carefully and objectively explored and measured against the costs to law enforcement.

Such reexamination may lead to abandoning the traditional approach which sweeps all forms of gambling within the scope of the prohibition and relies on the discretion of the police to exempt private gambling and charitable and religious fundraising enterprises. One of the objectives of reexamination might be to relieve the latter types from criminal penalties while seeking to bring the law to bear more effectively on the organized gambling promoter. This should be accomplished by legislative definition rather than by the haphazard and uneven application of police or prosecutorial discretion.

NARCOTICS AND DANGEROUS DRUGS

Although the conduct forbidden by narcotics and dangerous drugs laws has a more serious direct effect on those who engage in it, it shares many of the same characteristics as gambling. Those who use narcotics and dangerous drugs, like those who gamble, do so voluntarily. Similarly the profits available because of the illicit nature

[10] See Packer, *The Crime Tariff*, 33 AMERICAN SCHOLAR 551 (1964).

[11] ARNOLD, THE SYMBOLS OF GOVERNMENT 164 (1935).

of the activity encourage persons to engage in the business of supplying drugs despite the legal risks involved. And these profits, coupled with the continued demand, have contributed to the growth of organized criminal groups. In addition there is a substantial investment of law enforcement resources seeking to suppress or deal with drug abuse. But it is evident that law enforcement alone cannot handle the problem.

Chapter 8 of the Commission's General Report considers these matters in some detail and suggests the need for careful study of the criminal laws controlling the possession, sale, and use of drugs. Change should include provision for severe penal sanctions against those who trade in drugs for profit, with appropriate provision for alternate treatment for those who have some psychic or physical dependence on drugs.

A new approach in Federal legislation was taken by the Drug Abuse Control Amendments of 1965, which restrict criminal penalties to persons who unlawfully sell and distribute nonnarcotic stimulant, depressant, and hallucinogenic drugs and provide no criminal penalty for those who use these drugs or possess them solely for personal use.

In 1966 Federal legislation was enacted which provides alternate civil commitment procedures for persons addicted to the use of narcotics. This legislation is a first step toward reducing the anomalous disparity between the criminal treatment of those dependent on narcotics and the approach taken with those dependent on other dangerous drugs.

BAD CHECKS AND NONSUPPORT

Laws pertaining to insufficient fund checks and nonsupport are often used as a means of supplementing civil remedies for obtaining payment of debts. Like public drunkenness these offenses are examples of how the criminal process is sometimes employed to perform services unrelated to the punishment or inhibition of conduct declared criminal. Such use of the law must, of course, be distinguished from bad check offenses in which the conduct is clearly criminal. The signing of a false name either as the drawer or endorser of a check for purposes of obtaining payment is a serious offense, and the false identity makes it difficult for the defrauded person to find the perpetrator and enforce his civil claim. Drawing a check on a bank in which the drawee has no account is also clearly criminal in character.

The situation becomes less clear when a bad check has been drawn in a true name on a bank in which the drawer has an account but the amount of the check drawn exceeds the amount then on deposit. A few such cases involve complex and ingenious kiting schemes or other serious fraud. An unknown but undoubtedly substantial number, however, involves neither criminality nor fraud. There is, for example, the housewife who hopes that her husband's paycheck will arrive at the bank for presentation ahead of the check which she writes in payment of household bills. These insufficient fund checks are often regarded by police and prosecutors not as the basis for prosecution but for using the threat of criminal prosecution to press the drawer to pay speedily the amount owing to the drawee.

A description of the treatment of insufficient check cases in Detroit contained in the American Bar Foundation's Pilot Project Report on the Administration of Criminal Justice in the United States illustrates procedures which appear to be used in many jurisdictions:

> When a complaint of an "insufficient funds" check has been filed, the detectives will first determine the character of the individual passing the check. If it is learned that he passed a number of such checks with intent to defraud or if there is other indication that he habitually engages in the practice of passing such checks, the matter will be turned over to the check detail for investigation and processing. When the check passer obviously had no intent to defraud, the police make an effort to dispose of the case by arranging for restitution. The precinct detective with whom the complaint is filed will endeavor to contact the person alleged to have passed the check and notify him of the complaint. Most such complaints are disposed of without further effort on the part of the police. If precinct efforts fail at this stage, the case is turned over to the check detail. Before it is, however, the investigating detective obtains the assurance of the complainant that he is willing to "go the long, hard route" to prosecution. The check detail attributes a drop in the number of complaints filed with them to their "greater selectivity" in the cases they take from merchants who indicate from the outset that they would be unwilling to prosecute on a "not sufficient funds" check. When a case is referred to them with the assurance that the complainant is desirous of prosecuting, the check detail again contacts the person who wrote the check and endeavors to arrange for restitution under the threat of prosecution. If their effort fails, the case is returned to the precinct detectives for prosecution.[12]

Studies of other jurisdictions reveal that sometimes it is the prosecutor instead of the police who assumes the burden of selective enforcement.[13] In any event, except for cases involving a repeated offender, law enforcement officials routinely use the threat of prosecution to obtain redress for the victim, and do not prosecute if payment is forthcoming.[14]

A similar pattern appears in family nonsupport cases. In some jurisdictions an adjustment division of the court probation department attempts to obtain the payment owed,[15] and in others an assistant in the prosecutor's office or a municipal welfare agency performs this duty. In all such cases, however, it is clear that the object of the criminal penalty provision is not to make the defaulting spouse or father an object of punishment, nor certainly to rehabilitate and correct an offender with threatening proclivities. The object is to obtain support for the family. Actual prosecutions are used only as the last resort, for it is apparent that jailing the defendant provides the least likely means of obtaining the funds for the needy wife or children. "[T]he threat to invoke or, if necessary, the

[12] 3 American Bar Foundation, The Administration of Criminal Justice in the United States—Pilot Project Report 570 (mimeo. 1957).

[13] See LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 118 (1965).

[14] See Miller & Remington, *Procedures Before Trial*, 339 ANNALS 111, 124 (1962).

[15] A.B.F. Pilot Project Report, *supra* note 12, at 571.

actual invoking of the criminal process is only the ultimate sanction to enforce the payment of support." [16]

In addition the support problem is often only one part of a complex family situation with which the criminal court is not equipped to deal, unlike other agencies such as a family court with social services. Using the criminal process does serve to provide legal aid to indigent families, for these criminal proceedings usually obtain support for persons of low economic status. It would seem, however, that explicit provision of more legal aid services for civil proceedings is plainly preferable.

The pattern is the same as that found in other areas of criminal law administration. A social service which communities are unwilling to fund and support is imposed on criminal law enforcement agencies which are obliged to perform the service as best they can. The job is usually done less well than it might be by a civil agency specially designed for the task, and it is performed to the detriment of the primary law enforcement function of protecting the public against dangerous and threatening conduct. In effect the addition of each service constitutes a withdrawal of limited resources from genuine crime prevention.

There are no easy answers. However much one might prefer that merchants themselves bear all the burden of collecting their debts through the civil process designed for that purpose, it is no doubt true that some cases involving checks drawn on insufficient funds come close to fraud and that the protection of the credit economy is a legitimate social interest. In the case of nonsupport the threat of the criminal penalty may often bring funds to needy families where other remedies are unavailing. Still it must be remembered that the price paid for these benefits is a limitation of the effectiveness of law enforcement.

Narrowing the legislative definition of the criminal conduct would help. In the case of the bad check this might be done by confining the offense to cases where fraud is clear, the amount of the check is high, or the conduct is repeated. In the case of nonsupport the crime might be confined, as the Model Penal Code provides, to cases where the default is persistent, thereby expressing "a legislative policy in favor of resort, in the first instance, to non-penal measures." [17]

DISORDERLY CONDUCT AND VAGRANCY

Disorderly conduct and vagrancy laws, found in virtually all jurisdictions, are another example of statutes that are used to achieve purposes other than controlling the proscribed conduct by punishing those who engage in it. Disorderly conduct laws grant the police authority to act in numerous minor situations where it is considered desirable for them to do so, but where the conduct has not otherwise been specifically defined as criminal. Vagrancy laws provide authority to hold a suspect for investigation and interrogation when the police could not legally arrest him for another offense.

Disorderly conduct statutes vary in their precise formulation, and the conduct is variously labeled, as, for example, riot, breach of the peace, unlawful assembly, disturbing the peace, or loitering. These laws tend to embrace an excessively broad range of conduct, some of it dangerous, some merely annoying, some harmless, some constitutionally protected. While these statutes protect important interests, they often are excessively general and do not adequately discriminate and identify the kinds of behavior legitimately to be prohibited. In California, for example, it is a misdemeanor to make noise in the area of a religious meeting which disturbs the solemnity of the meeting; willfully to disturb any assembly or meeting without authority of law; to commit a lawful act with another in a violent, boisterous, or tumultuous manner; maliciously and willfully to disturb the peace or quiet of any neighborhood by loud or unusual noise or offensive conduct; to commit any act willfully and wrongfully which seriously disturbs or endangers the public peace or health or which openly outrages public decency.

The generality and imprecision of most disorderly conduct statutes allow the police to exercise a broad discretionary authority in deciding which conduct to treat as criminal. More arrests are made for disorderly conduct than for any other crime except drunkenness. Of all arrests reported by the 1965 Uniform Crime Reports over 10 percent were for disorderly conduct, over 500,000 out of a total of nearly 5 million arrests.[18] Studies of reported decisions and of the activities of lower courts reveal that a wide gamut of conduct is covered by these statutes.[19]

These excessively broad laws are applied in excessively broad ways that lead to convictions for some conduct that properly is subject to criminal control and to convictions for some conduct that is harmless or should be protected. Some of these convictions are reversed, but not the overwhelming majority. There is little appellate review of the work of the often ill-trained magistrates who work with these vague laws. A New York study revealed that although over 70,000 disorderly conduct arraignments occurred in 1957 alone, there have been only approximately 150 reported opinions since the enactment of the statute in 1923.[20]

As observed in the commentary to the Model Penal Code, "If the disorderly conduct statutes are troublesome because they require so little in the way of misbehavior, the vagrancy statutes offer the astounding spectacle of criminality with no misbehavior at all!" [21] Vagrancy laws define criminality essentially in terms of a person's status or a set of circumstances reflecting a judgment that such persons are apt to commit antisocial acts. For some forms of the offense no conduct need be committed at all, although other forms rest on the commission of an act. As the offense developed through the common law, it came to include idle and disorderly persons and vagabonds; persons who refused to work or engaged in begging, threatened to desert their families, or returned from whence they were legally removed; and persons who wandered abroad without giving a good account of themselves.

The usual components of vagrancy in its modern statutory form include living in idleness without employment and having no visible means of support; roaming, wandering, or loitering; begging; being a common prostitute, drunkard, or gambler; and sleeping outdoors or in a nonresidential building without permission.

[16] Miller & Remington, *supra* note 14, at 114.
[17] MODEL PENAL CODE § 207.14, comment 1 (Tent. Draft No. 9, 1959).
[18] Derived from 1965 FBI UNIFORM CRIME REPORTS 108–09 (table 18).
[19] See, *e.g.*, MODEL PENAL CODE 4–5 (Tent. Draft No. 13, 1961); Note, *Disorderly Conduct in New York Penal Law* § 722, 25 BROOKLYN L. REV. 46 (1958).
[20] Note, 25 BROOKLYN L. REV. 46, 70 (1958).
[21] MODEL PENAL CODE § 250.12, comment 1 (Tent. Draft No. 13, 1961).

These laws have an ancient lineage. In feudal days they served to protect the rights of the lord in his fugitive serfs. As feudal ties began to dissolve, they were used to control wandering bands of rootless workmen turned robbers. During the acute labor shortage following the Black Plague they served to hold laborers to their jobs. Subsequently they served the purpose of protecting against abuse of the poor laws by wandering indigents. Their current and widespread use, as documented in a number of recent studies,[22] is to afford police justification, which otherwise would not be present under prevailing constitutional and statutory limitations, to arrest, search, question, and detain persons because of suspicion that they have committed or may commit a crime. They are also used by the police to clean the streets of undesirables, to harass persons believed to be engaged in crime, and to investigate uncleared offenses. An American Bar Foundation study found that although brief on-the-street or stationhouse detention without a formal arrest occurred fairly frequently in the absence of express legal authority, most investigations were carried out under the guise of a vagrancy or a related minor statute arrest.[23]

Persons held for investigation purposes were found to be frequently booked for "vagrancy and investigation." This practice was advocated in one police duty manual in cases in which there is some specific crime for which the person should be investigated, or there is some specific reason for general investigation. The American Bar Foundation study found that detectives obtained an arrest warrant for vagrancy when they were uncertain whether there were adequate grounds for arrest on a serious charge.[24]

Precisely because disorderly conduct and vagrancy charges are so commonly relied upon by law enforcement authorities, as well as because penalties involved are generally minor, and defendants are usually from the lowest economic and social levels, they have proved largely resistant to scrutiny and change. Yet

> this is a most important area of criminal administration, affecting the largest number of defendants, involving a great portion of police activity, and powerfully influencing the view of public justice held by millions of people.[25]

The Model Penal Code offers some constructive guidelines for redefining these offenses. It confines disorderly conduct to behavior that is itself disorderly and excludes that which "tends to provoke a breach of peace." Although inevitably imprecise the definition is much less vague and commodious than usual disorderly conduct laws. To constitute disorderly conduct the defined disturbances must be genuinely public.[26]

The code also provides a model for defining the crime of vagrancy which eliminates all traces of the ancient offense except that thought justified by the legitimate needs of law enforcement, namely, situations in which a person "loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." [27] Although the concept of justifiable "alarm" for the safety of persons or property rather than justifiable "suspicion" of criminality is employed, the net effect appears to authorize arrest and search in circumstances short of probable cause.

It is evident that the real issue in vagrancy cases is not one of defining criminal conduct but of defining the circumstances in which police may intervene short of arrest to make inquiries and dispel suspicion. The police must have reasonable, though carefully limited, authority to make this type of inquiry. In attempting to meet this problem, New York has authorized a police officer to "stop any person abroad in a public place [who] he reasonably suspects is committing, has committed or is about to commit" a felony or serious misdemeanor and to demand his name, address, and an explanation of that person's action.[28] A section of the American Law Institute Model Code of Pre-Arraignment Procedure offers a similar solution.[29] Both offer a more direct response to the central problem of providing the police with a means other than a vagrancy arrest for dealing with persons encountered in suspicious circumstances.

Improvements in laws such as these are of great importance. The high price paid for extending to the police wide and largely uncontrollable power of traditional disorderly conduct and vagrancy laws should be recognized. Foremost among its disadvantages is that it constitutes an abandonment of the basic principle upon which the whole system of criminal justice in a democratic community rests, close control over exercise of the authority delegated to officials to employ force and coercion. This control is to be found in carefully defined laws and in judicial and administrative accountability. The looseness of the laws constitutes a charter of authority on the street whenever the police deem it desirable. The practical

[22] Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950); See N.Y. LAW REVISION COMMISSION REPORT 591 (1935): "The underlying purpose [of vagrancy laws] is to relieve the police of the necessity of proving that criminals have committed or are planning to commit specific crimes."
[23] LAFAVE, *op. cit. supra* note 13, at 354–63.
[24] The transcript of *District of Columbia* v. *Ricks*, Crim. No. 2208–66, D.C. Ct. Gen. Sess. 1966, provides another indication of the use of vagrancy statutes by police.

An officer testified that he arrested Miss Ricks for vagrancy because he and other officers had observed her loitering in or near the doorway of a house of ill fame on three previous occasions within a 20-day period and because she was unable to give a satisfactory account of herself. The basis of the arrest, he stated, was that she was a known convicted felon, thief, prostitute, vagrant, and narcotic violator who was observed at late and unusual hours without visible means of support and leading an immoral and profligate life.

Upon cross-examination, the officer defined giving a good account of oneself as "being employed." When asked why the arrest had not been made for prostitution, he replied, "I didn't hear the conversation, and the man wouldn't come to court and testify."

The transcript continues:

"DEFENSE COUNSEL. So that in practical effect vagrancy is used as a charge or ground for arrest in cases where you felt that there is prostitution or sodomy going on but you cannot make a case?

"[OFFICER.] That's correct. It used to get the undesirables off the street.

"DEFENSE COUNSEL. What is an undesirable?

"[OFFICER.] It is a prostitute—In my estimation it is a prostitute, a junkie, a thief, a pervert, and what have you. . . .

"DEFENSE COUNSEL. So that . . . the good effect of this statute is that it puts people in jail who might be about to commit a crime or who might commit a crime in the near future in this neighborhood?

"[OFFICER.] Yes, sir. . . .

"THE COURT. . . . do you arrest any people under the vagrancy statute who have not committed or on whom you have no observation for, say, immoral or criminal acts, but people who simply are on the street late at night and don't have any employment and don't have any money, can't support themselves?

"[OFFICER.] Yes, sir. . . .

"DEFENSE COUNSEL. Is there any reason for arresting someone as a vagrant when you know that he has committed some other crime?

"[SECOND OFFICER.] That person . . . might not be able to catch them doing these other things. . . . If I felt that she weren't familiar with me and I could go out here and buy some narcotics from her, then perhaps she would be charged with the Harrison Narcotics Act or the Jones-Miller Act. None of these things were involved. That's why she was charged with vagrancy. [Miss Ricks had five previous narcotics convictions, and on the occasions on which she was observed by police, including the vagrancy arrest, was reported to have needle scars on her arm.]

The Assistant Corporation Counsel in charge of the Law Enforcement Division testified that the purpose of the statute, as laid down by the Court of Appeals was "to prevent crime, to stop crime from coming into being in the first place. . . . [T]he very persons that we are attempting to pick up are the very persons who certainly are showing by their act and deed that it is their intent and purpose to commit crime." Such persons, he admitted, usually dwelled in the poorer, slum-ridden sections of town where the practice of vagrancy, though not arrests for this offense, was known to be more prevalent. "I have no doubt," he added, that "a great deal has to do with the economic status of the people."

[25] MODEL PENAL CODE 2 (Tent. Draft No. 13, 1961).
[26] MODEL PENAL CODE § 250.2(1) (Proposed Official Draft 1962).
[27] *Id.* § 250.6.
[28] N.Y. CODE CRIM. PROC. § 180-a (1964).
[29] ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966).

costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. It is unjust to structure law enforcement in such a way that poverty itself becomes a crime. And it is costly for society when the law arouses the feelings associated with these laws in the ghetto, a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate.

SEXUAL BEHAVIOR

In virtually all States the criminal law is used to govern sexual relationships and activities between consenting adults. There are laws against sexual intercourse between unmarried people (fornication), between persons one or both of whom is married to another (adultery), and where the woman is paid for her services (prostitution). There are laws against deviant sexual activities such as those between males or between partners, even persons married to each other, where unnatural modes of intercourse are used (sodomy).

Basic social interests demand the use of the strongest sanctions to protect the individual against forcible sexual acts and those induced by fraud and overreaching, to protect the young from the sexual advances of more mature individuals, to protect the public against open and notorious solicitation and commercialized vice, and to protect the institutions of marriage and family. Protection of these interests warrant criminal sanctions for their violation. Thus in recent statutory revisions, notably the Illinois Criminal Code of 1961 and the Model Penal Code, they were the interests protected by criminal prohibitions. When these interests are not at stake, as in the case of most consensual misbehavior between adults, the situation is less clear.

Available information indicates that laws against fornication, adultery, and heterosexual deviancy are generally unenforced. In New York, where adultery was the only ground for divorce until recently, there were countless divorces based on documented instances of adultery but no adultery prosecutions. Certainly there is no greater enforcement of prohibitions against premarital sexual relations. In many if not most jurisdictions adultery and fornication laws have been repealed in practice, although in form they persist on the books. There is surely some truth in Thurman Arnold's comment that these laws "survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." [30]

But widespread and obvious winking at violations of the criminal law by those charged with their enforcement may well influence law enforcement generally. It tends to breed a cynicism and indifference to the criminal law which augments the tendency to disrespect those who make and enforce the law.

Homosexual practices are condemned as criminal in virtually all States, usually as a felony with substantial punishment. There are some attempts at enforcement, particularly in cases involving public conduct, solicitation, or corruption of the young. When the activity is private and consensual, however, the deterrent efficacy of law enforcement is limited; only the indiscreet have reasons for fear.

Homosexuality entails deviation from social mores and the flouting of community attitudes having greater apparent capacity to deter and shape conduct than that possessed by the criminal law. It is questionable whether there is significant additional deterrent force provided by the criminal sanction above that coming from other forms of social pressure not to engage in such acts. Moreover, the present penal system is no better suited than other social institutions to deal with the homosexual or to rehabilitate or reintegrate him. In addition, the presence of these laws creates opportunities for extortion, and opens the door for discriminatory enforcement.

Despite this nonenforcement and the costs the presence of these laws on the books can impose, there is understandable and deeply felt reluctance to repeal them. This stems from a fear that the affirmative act of repeal might be mistaken as an abandonment of social disapproval for the prohibited acts and an invitation to license. Opponents of repeal emphasize the symbolic effect of unenforced laws and the difficulty of removing what may be an inappropriate sanction without appearing to condone the forbidden act. The appropriateness and the scope of criminal sanctions with respect to these sexual activities deserves discussion and analysis by those concerned with the improvement of criminal administration.

Prostitution is an ancient and widespread social problem which has proven virtually immune to the threats of the criminal sanction. It is a consensual crime for which the market is persistent. Although it is prohibited in all States, the laws are widely violated. Enforcement tends to be associated with degradation of the image of the police, harassment, discriminatory treatment, and endemic official corruption.

The social interest in repressing prostitution is strong, primarily because of the elements of commercialism and exploitation that are involved in its more organized forms. Society is also concerned with controlling venereal disease and with reducing the affront involved in public acts of solicitation. These interests justify the maintenance and enforcement of laws directed against pandering, operating disorderly houses, public solicitation, and the commercial forms of meretricious behavior.

But a more careful definition of the offense would seem desirable to ensure that it is limited to situations where a person engages in sexual activity as a business or where public solicitation is involved.

[30] ARNOLD, *op. cit. supra* note 11, at 160.

ABORTION

Abortion laws are another instance in which the criminal law, by its failure to define prohibited conduct carefully, has created high costs for society and has placed obstacles in the path of effective enforcement. The demand for abortions, both by married and unmarried women, is widespread. It is often produced by motives and inclinations that manifest no serious dangerousness or deviation from the normal on the part of the people who seek it. These factors produce the spectacle of pervasive violations but few prosecutions.

It has been estimated that as many as a million abortions are performed each year in this country, while the arrest rate is not more than one per thousand abortions performed. Two-thirds of all abortions are reportedly performed on married women. Available indications are that only 8,000 to 10,000 of these are legal abortions conducted in a hospital setting.

The reasons for seeking abortions vary; they include direct danger to the physical health of the mother; the likelihood that the fetus, if born, will be deformed or nonviable; the circumstances of conception, particularly rape, incest, extreme immaturity of the mother, or her unmarried state; the mother's mental health; the low income of the family and its inability to support more children; or simply that the family does not want any more children. In some 40 States abortions are lawful only if necessary to preserve the life of the mother. In two States the standard is broad enough to include preventing "serious bodily injury," while in three other jurisdictions the "health" of the mother is a justification. In Maryland abortions are permitted to "secure the safety of the mother." [31]

A recent survey indicated that 83 percent of a national sample of adults were opposed to permitting abortions where the mother is married but does not want any more children, and almost as high a percentage was opposed to legalizing abortions in cases of unmarried women who did not want to marry the father of their child or in cases of low-income families that could not afford any more children. But most of those surveyed favored legal termination of pregnancy if the mother's health would be seriously endangered, if she became pregnant as a result of rape, or if there would be a strong chance of a serious defect in the baby. [32]

The present state of the law presents particularly acute problems for conscientious parents and physicians faced with weighty reasons for terminating pregnancy in a jurisdiction where the law is restrictive or its standards are vague and uncertain. Since some highly reputable physicians regard the law as an injustice and want to protect their patients against incompetent abortions available on the black market, large numbers of reputable citizens find themselves in the position of law violators. This tends to contribute to antagonism and resentment toward those who enforce the law. Moreover, as observed by the drafters of the Model Penal Code:

> To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. . . .
>
> . . . Criminal liabilities which experience shows to be unenforceable because of nullification by prosecutors or juries should be eliminated from the law. Such nullification usually points to a situation of divided community opinion. Also, "dead letter" laws, far from promoting a sense of security in the community, which is the main function of penal law, actually [impair] that security by holding the threat of prosecution over the heads of people whom we have no intention to punish. [33]

A black market of illegal abortions has sprung up to meet the demand created by the criminal prohibition. Most abortions are conducted by those ready to run the risk to earn the high fees. As a consequence abortions are performed under conditions that maximize the very danger to a woman's physical and mental welfare that the abortion laws in part are designed to prevent. Moreover, since legitimate physicians frequently are available to those who have resources and relationships in the community, it is primarily the uneducated and poor who must resort to hole-in-the-wall abortionists.

The assistant chief of the Division of Preventive Medical Services of the State Department of Public Health testified as follows before the California Assembly Interim Committee on Criminal Procedure in 1964:

> Recently published findings from the joint study of maternal mortality conducted by the California State Department of Public Health and the California Medical Association indicate that illegally and improperly performed abortions account for a significant segment of maternal mortality. Of the first 551 maternal deaths studied since August 1, 1957 (occuring during or within 90 days of termination of pregnancy), 109 have been due to abortion. Seventy-eight percent of these abortion deaths are identified as being illegally induced. Almost two-thirds of these abortion deaths were of married women, 15 percent of women never married, and the remainder were women who were divorced, separated, or of unknown marital status. These were first pregnancies for only 15 percent of the women and almost half were 30 years of age or older. In this study, we found that deaths due to abortions accounted for one-third of the obstetrical deaths, while in 1950, they accounted for only one-sixth of obstetrical deaths. This is due to a decline in the general maternal death rate per 10,000 live births from 5.5 to 2.6 in 1961, a decline of 53 percent, with the death rate from abortions remaining constant. The absolute number of recorded deaths from septic abortions have more than doubled. [34]

These data offer macabre documentation of the conclusion of the reporters for the Model Penal Code that

> experience has shown that hundred of thousands of women, married as well as unmarried, will continue to procure abortions . . . in ways that en-

[31] Harper, *Abortion Laws in the United States*, in CALDERONE, ABORTION 187, 189 (1958).
[32] Rossi, *Abortion Laws and Their Victims*, Trans-action, Sept.-Oct. 1966, pp. 7, 9.
[33] MODEL PENAL CODE § 207.11, comment 1 (Tent. Draft No. 9, 1959).
[34] Transcript 64.

> danger their lives and subject them to exploitation and degradation. We cannot regard with equanimity a legal pattern which condemns thousands of women to needless death at the hands of criminal abortionists. This is a stiff price to pay for the effort to repress abortion . . . .[35]

The evils of uninhibited abortion are sufficiently serious to warrant discriminating use of the criminal penalty. But abortion is justifiable under certain circumstances, and the law should distinguish between the justifiable and unjustifiable abortion.[36] Most abortion statutes do not now draw this distinction with the requisite breadth or clarity. The Model Penal Code formulation represents one possible approach to this needed clarification. It authorizes an abortion where two physicians certify to their belief that

> there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.[37]

The time is overdue for realistic reexamination of the abortion laws.

CONCLUDING OBSERVATIONS

This chapter has sought to examine the problem of overreliance upon the criminal law as a means of social regulation by identifying instances in which the use of the penalties and processes of the criminal law have proven particularly ineffective or costly or both. Certain generalizations emerge.

The absence of a complaining victim appears to mark many ineffective criminal laws. Any system of law enforcement must rely heavily upon the cooperation of those who are unwillingly victimized. When the conduct is consensual on both sides and particularly when it occurs in private, the normal techniques of law enforcement inevitably tend to be frustrated. The laws prohibiting certain consensual sexual relations, both heterosexual and homosexual, as well as the laws against abortion, drunkenness, gambling, and narcotics, display these characteristics in varying degrees.

Where the nature of the crime is such that there are added difficulties of detection and proof, a lack of strong enthusiasm for the criminal prosecution, plus a persistent demand to engage in the conduct, the potential effectiveness of the criminal process is further reduced.

The criminal prohibitions against some types of sexual behavior reflect an idealized moral code, not what a substantial percentage of the population, judged by their conduct, regard as beyond the margin of tolerability for the average fallible citizen. Consensual homosexuality, on the other hand, is repugnant to large segments of the community. But the general feeling that those who engage in such acts are psychologically disturbed rather than wicked, tends to sap enthusiasm for criminal prosecution. Prostitution is certainly not viewed as a tolerable form of behavior by the general community. Yet the existence of professionalized sex, not only in this country but historically in all cultures, availed of by otherwise reputable citizens in all walks of life, plus the mildness of the usual sanctions, are sure evidence that it is not regarded unequivocally as condemnable.

Abortion and gambling share these qualities in varying degrees. There are compelling reasons for liberalizing abortion laws to accommodate manifest health needs. Gambling attracts a legal response that is ambiguous on its face: Within the same jurisdiction some kinds of gambling are prohibited and some are permitted, on the basis of distinctions with scarcely any relevance to the moral quality of the participant's conduct. Narcotics use does commonly arouse sentiments of condemnation and fear. But the continued demand for drugs, generated by deep-rooted and complex social and psychological drives, and the sentiment that it should be treated as a sickness serve to limit the efficiency of criminal law enforcement.

In several instances the criminal process is directed at objectives quite different from deterring the outlawed conduct through surveillance, prosecution, and correction of offenders. The role of law enforcement in the case of public drunkenness, for example, is to remove unsightly annoyances from the public streets, to protect the drunk against physical dangers, and to provide a respite for him from his self-destructive habits. In the case of family support laws its role is largely to ensure the performance of family obligations. With the insufficient fund check writer its role is often to collect debts in behalf of creditors. Obviously measuring effectiveness in traditional law enforcement terms is inappropriate in these cases. The issue is how well the use of the criminal process in these instances attains its special objectives. There is evidence to support the hypothesis of one observer that "when the criminal law is relied upon to perform social services, those services are not likely to be effectively rendered." [38]

No doubt the criminal process is filling a need in these situations. It would seem, however, that civil processes or institutions designed to handle particular social problems would be more effective than the criminal process in many cases. The increasing demands of due process in all criminal proceedings, the requirements of appointment of counsel, prohibition of interrogation in certain circumstances, high standards with respect to waiver of constitutional rights, and others, add to the difficulty of enforcing the criminal law in many of the situations described in this chapter.

One substantial cost of overextended use of the criminal process is the risk of creating cynicism and indifference to the whole criminal law and its agencies of enforcement at a time when precisely the opposite is needed. This indifference tends to occur particularly where the criminal sanction is generally unenforced. As observed by Roscoe Pound many years ago,

> However impressive the state-declared ideal may be to the contemplative observer, the spectacle of statutory precepts with penal sanctions, which are not and perhaps are not intended to be put in force in practice, casts doubts upon the whole penal code and educates in disrespect for law more than the high pronouncement can educate for virtue.[39]

[35] MODEL PENAL CODE § 207.11, comment 6 (Tent. Draft No. 9, 1959).

[36] See Rossi, *supra* note 32, at 8: "A representative sample of 1,484 adult Americans were asked their views on the conditions under which it should be possible for a woman to obtain a legal abortion, in a survey conducted by the National Opinion Research Center in December 1965. . . . The survey results . . . show the majority of the American population support the view that women should be able to obtain a legal abortion under the following circumstances:
"71 percent if the woman's own health is seriously endangered by the pregnancy.
"56 percent if she became pregnant as a result of rape.
"55 percent if there is a strong chance of serious defect in the baby."

[37] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962).

[38] ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 5 (1964).

[39] POUND, CRIMINAL JUSTICE IN AMERICA 67 (1930).

These attitudes also occur when the substantive criminal law is used as a device for circumventing constitutional restrictions upon police practices. The disorderly conduct and vagrancy laws are cases in point. The same consequence is also produced by inherent difficulties in enforcement which sometimes lead police to excesses degrading to themselves as well as to the public.

Another kind of cost is imposed when criminal enforcement itself produces social behavior which may be more undesirable than that prohibited by the law. We have seen how the bans on gambling tend to foster organized forms of criminality which, with alarming business efficiency and the use of systematic means of coercion, violence, and governmental corruption, continue to supply the persistent demand. In the case of the abortion laws the criminal prohibition forces thousands of women each year to incompetent abortionists, with the loss of a substantial number of lives as a consequence.

Still another variety of cost is the substantial impairment of the effectiveness of the police in performing the tasks, which only they can perform, of protecting the public against serious threats. This occurs when men and resources that could be employed in meeting problems of serious criminality are diverted into areas where the use of the criminal law is problematical. Every man-hour spent in running down bad check passers or in rounding up or processing drunks is a man-hour lost to other purposes. As a representative of the FBI stated to the Commission:

> The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement both because of human inability to enforce the law and because, as in the case of prohibition, society legislates one way and acts another way. If we would restrict our definition of criminal offenses in many areas, we would get the criminal codes back to the point where they prohibit specific, carefully defined, and serious conduct, and the police could then concentrate on enforcing the law in that context and would not waste its officers by trying to enforce the unenforceable as is now done.

There is also the loss of morale and self-esteem among police who are obliged to engage in tasks which must seem to them demeaning or degrading or of little relevance to the mission of law enforcers. What must be counted as another indirect impairment of police effectiveness is the whole pattern of judicial restraints upon police surveillance, detection, and interrogation which have been provoked in substantial measure by excesses growing out of attempts to enforce laws which are particularly resistant to enforcement.

Also associated with overreliance upon the criminal law is the creation of undesirably wide areas of discretionary authority by law enforcement agencies. Excessive discretion is invited when the substantive law creates an implicit authorization for agencies to employ the process for purposes other than deterring the prohibited conduct and correcting the offender. This is the case in varying degrees with disorderly conduct and vagrancy laws, public drunkenness and family support laws, and laws relating to insufficient fund checks. Excessive discretion also occurs when the criminal prohibition is one that is generally not enforced or probably not intended to be enforced, for example, certain of the sex laws. Finally, it occurs where the legislature has deliberately defined the prohibited conduct to include conduct beyond the borders of the target social evil in order to ease prosecutorial burdens of proof. Of those crimes discussed, the ban on all forms of gambling, including such innocuous forms as church and charitable socials and the friendly poker game, is the clearest example. Some ameliorative discretion is of course inevitable as well as desirable in any system, but discretion becomes excessive and threatening when it is used as a substitute for law itself. Moreover, when exercised under a broad charter of discretion, police authority tends to be viewed in many sections of the community, usually those in which crime is a serious problem, as an episodic and arbitrary exercise of naked power rather than as the impartial command of the law. And finally the delegated authority affords the opportunity for abuse and discrimination either through malice or untempered zeal. What Professor Wechsler wrote concerning prosecutorial discretion is equally applicable to all law enforcement agency discretion:

> A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law. Indeed, one of the major consequences of the state of penal law today is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law—and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.[40]

Undoubtedly a great deal of research is needed on the uses and limitations of the criminal law as a means of social regulation, on the circumstances in which it is more likely to be effective, and on the situations in which its use overbalances social disadvantages and consequences and those in which it does not. But enough is now known to warrant abandonment of the common legislative premise that the criminal law is a sure panacea for all social ailments. Only when the load of law enforcement has been lightened by stripping away those responsibilities for which it is not suited will we begin to make the criminal law a more effective instrument of social protection.

[40] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952).

PERSPECTIVES ON PLEA BARGAINING

by Arnold Enker

Despite the fact that the large majority of criminal cases are disposed of by guilty plea, the major focus of attention to the criminal process traditionally has been upon disputed cases. We have made substantial modifications in the investigatory stages of the process and are devoting ever-increasing attention to pretrial and trial procedures in order to assure a fairer resolution of disputed issues at the trial. Far less attention has been devoted to the dynamics of the guilty plea and its impact on later stages of the proceedings. Even here, to the extent that modifications have been adopted in guilty plea procedures, the focus of attention understandably has been upon the most visible parts of the process, namely, representation by counsel and judicial inquiry at arraignment into "the factual basis for the plea." (Rule 11, Federal Rules of Criminal Procedure.)

Indeed, one gets the impression that our law does not feel quite ready to face up to the theoretical and practical problems involved. Thus, in *Shelton* v. *United States*, 356 U.S. 26 (1958), in which the propriety of the practice of plea bargaining seemed to be squarely presented, after thorough exploration of the issues by a panel of the Fifth Circuit Court of Appeals and then again by that court en banc, the Supreme Court accepted a somewhat dubious confession of error by the Solicitor General and vacated the conviction on the ambiguously stated ground "that the plea of guilty may have been improperly obtained." It is not clear whether the case was reversed because the arraigning judge failed to comply with Rule 11 in his examination to inquire of the defendant—this was the narrow basis for the Solicitor General's confession of error—, or because the Supreme Court determined that the plea in this case was not voluntary, or because the Supreme Court was of the view that any plea induced by a promise concerning the sentence to be imposed is invalid.

More recently, in *Marder* v. *Massachusetts*, 377 U.S. 407 (1964), only three Justices would have noted probable jurisdiction in a case in which the statutory scheme itself—relating admittedly to insignificant parking violations—contained differential penalties for those who admitted the charge and those who chose to defend the case.

Likely, this judicial shyness expresses a recognition that we really do not know very much about the practice of plea bargaining. Absent carefully collected factual information about the practice, we are unable to assess its potential dangers, both practical and theoretical, and recommend its improvement or abolition. To some extent, this gap in our information has recently been tightened up by the publication of the findings of the American Bar Foundation's study of the problem in NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966). In this paper, based on Newman's findings and other sources, I shall try to evaluate the practice and put it in perspective, assess its dangers and implications, and suggest some—admittedly imperfect—approaches toward improving the process.

Arnold N. Enker is a Professor of Law at the University of Minnesota. A graduate of Yeshiva University and Harvard Law School, Professor Enker is a member of the New York Bar. He served as an Assistant U.S. Attorney for the Southern District of New York from 1960–63, trying cases in the criminal division. During 1962–63 he was Chief Appellate Attorney of that office. Professor Enker is coauthor of Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 MINN. L. REV. 47 (1964). During 1966–67, the author is Visiting Professor of Law at the Hebrew University, Jerusalem.

I. DESCRIPTION OF PLEA BARGAINING

A. PLEADING GUILTY TO A REDUCED CHARGE

1.

"Plea bargaining," or its popular euphemism "the negotiated plea," actually takes on a variety of forms and occurs in varied legal and factual contexts. In what is probably its best known form, the "plea bargain" consists of an arrangement between the prosecutor and the defendant or his lawyer, whereby in return for a plea of guilty by the defendant, the prosecutor agrees to press a charge less serious than that warranted by the facts which he could prove at trial. "Less serious" in this context usually means an offense which carries a lower potential maximum sentence. In such instances the defendant's motivation for pleading guilty is to limit the judge's sentencing discretion to the lesser maximum. Similar results are obtained when the defendant agrees to plead guilty to a given charge in return for a prosecutor's promise not to charge him with being a multiple offender or to drop added counts in a multicount indictment.

The court has no control over the initial charge brought by the prosecutor, so that in cases where such a bargain is struck before any charges have been filed in court, it is not subject to any formal judicial supervision to prevent undesirable reduction of a charge. Presumably a judge has other unofficial ways of expressing his displeasure with a reduced charge, but I have never heard of such judicial expressions. This is probably due to the judge's ignorance of the facts which would warrant a higher charge and to a reluctance to interfere in the conduct of the prosecutor's office. I suppose a judge who disapproves of a low charge could refuse to accept the guilty plea and leave the prosecutor to choose between no prosecution or prosecution for a more serious charge, but that too has been unheard of.

Where the bargain is struck after a higher charge has been filed, there is greater opportunity for judicial control. Still, little control appears to be exercised. New York has a statute which requires the prosecutor to file a statement giving his reasons for accepting a plea to a lesser charge, but a review of the filed statements indicates that they are very vague and general and do not furnish a vehicle for judicial control.[1] A more recent unpublished study in Minneapolis of prosecutors' statements required by a similar statute in Minnesota reveals equally disappointing results. Another reason such statutes are of limited value is that they deal only with pleas to an offense less than that originally charged. As already suggested, the bargain may be struck before any charges have been filed in court. For example, the Minneapolis study disclosed that in the year 1962, out of 91 cases of burglary, only 1 was originally charged as first degree burglary. In the remaining 90 cases the initial charge was third degree burglary.[2] It is difficult to believe that the facts supported a first degree burglary charge in only 1 out of 91 cases. (Compare the comment of one Michigan prosecutor reported in NEWMAN, p. 182, "You'd think all our burglaries occur at high noon.")

As suggested, one reason the court exercises little or no control over charge reduction is that at this early stage of the proceedings, the judge usually has absolutely no information about the crime or the defendant and is in no position to review the prosecutor's judgment. Probably still another reason is that the determination of an appropriate offense category or charge, as distinguished from sentence, is viewed as a matter of prosecutor's discretion. Yet, the ability to control the offense category brings with it control over the sentence, or at least its outside limits. We have never really given any careful thought to the interplay of these forces and roles.[3] When such a problem arose in *United States* v. *Nagelberg*,[4] the Supreme Court, again aided by the Solicitor General's confession of error, failed to grapple with the problem.

Equality of opportunity for such sentencing leniency is also a matter of concern. As would be expected from the above description of prosecutor and judge roles in this instance, judges are not likely to take the initiative in suggesting to the defendant that he use his guilty plea as a bargaining tool. Under the circumstances, the unrepresented defendant, or the defendant represented by counsel inexperienced in criminal matters, may find himself more severely treated than a wiser defendant with an identical background. And even if the judge imposes a light sentence, the felony conviction which might have been avoided may result in collateral disabilities which the judge cannot control.

2.

It is equally common for plea bargaining for reduced charges to be motivated by the opposite goal, namely, to maximize the judge's sentencing discretion. In this type of agreement the defendant pleads guilty to a lesser charge than is warranted by the facts, not to reduce the potential maximum sentence, but to avoid a legislatively mandated minimum sentence or a legislative direction precluding the availability of probation. A typical example is narcotics prosecutions, where Federal law and some States impose severe mandatory minima for sale. It is common in such instances for defendants who have sold narcotics to plead guilty to a "tax count" in Federal cases or possession of narcotics in State cases, thereby avoiding the minimum sentence.

Because of common judicial antipathy to statutes so limiting their sentencing discretion, the problem of possible judge-prosecutor conflict is not significantly present. In fact, Newman reports that judges sometimes take the initiative in these cases to obtain a reduction of the charges. Other problems arise, however. First of all, the threat of a mandatory sentence places a high price on a not-guilty plea that might induce a defendant not to risk the hazards of a trial. This point will be elaborated upon below. Secondly, as Professor Newman's findings suggest, although the practice of accepting such lesser pleas begins as a discretionary device to individualize sentences, "the pattern of downgrading is such that it becomes virtually routine, and the bargaining session becomes a ritual" (p. 182). Under these circumstances, the public interest in heavy penalties for serious offenders may not always be served. Control in this instance remains, of course, with the prosecutor who can refuse to acquiesce in a request for charge reduction in the case of a serious offender. It is far from clear, however, that this is where such decisions ought to be made.[5] There is a danger, for example, that given two defendants equally guilty of a particular offense, the crucial factor which distinguishes them—the alleged professional character of the one's criminal behavior—is never placed on the record and is determined by the prosecutor on the basis of untested (in court at least) information available only to him. The conviction label becomes a weapon in the hands of the prosecutor to be applied in his uncontrolled discretion against those whom he judges to be dangerous. The "official" facts of the crime bear little relation to the

[1] See Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L. & CRIMINOLOGY 506 (1939).

[2] First degree burglary carried a minimum sentence of 10 years and second degree 2 years. There was no minimum sentence for third degree burglary. MINN. STAT. §§ 621.07, 621.09, 621.10 (1961) (subsequently repealed).

[3] Compare the judge's power to review a decision to file a nolle prosequi, FED. R. CRIM. P. 48(a), where a similar conflict arises.

[4] 377 U.S. 266 (1964).

[5] See Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 470 (1961).

ultimate disposition, which is reached upon extra-record facts. It is, admittedly, not infrequent that the real dispute between the parties is not over those facts which constitute the necessary elements of the crime but over facts which mitigate or aggravate the offense and are relevant only to sentence.

Our law has thus far paid scant attention to the proper procedures for determining these facts other than to accept the position that something less than a trial hearing is permissible.[6] But in those situations, the sentencing judge retains his factfinding powers, and defense counsel has a forum in which to present his facts and arguments. Combined with the tendency to require increasing disclosure of the contents of presentence reports,[7] the defendant has the opportunity to argue his case visibly and with a chance of a favorable result. When it is the prosecutor who determines whether to accept a plea to a lesser count or to insist on pressing a charge carrying a mandatory sentence, the judge may be deprived of all sentencing discretion by an invisible decision in a "non-forum." Surely, the resolution of what will often be the sole issue of dispute and the single relevant fact, such as whether the defendant was armed, merits some greater formality and some forum more visible and equally accessible to all defendants.[8]

3.

There is a third type of charge reduction which is motivated not by a desire to alter the sentencing powers of the judge but rather to avoid undesirable collateral aspects of a repugnant conviction label. This apparently occurs with some frequency in sex crimes. Thus, to avoid a record of conviction as a rapist, a sexual molester, or a homosexual, the defendant may offer to plead guilty to a charge carrying a vaguer label, such as disorderly conduct. Here, again, there is danger that, apart from sentencing consequences, the risk of having such a repugnant label attached to him may impel an innocent defendant to plead guilty to the nondescript charge. The danger is even greater here, for even the defendant who has a good chance of acquittal at trial may prefer to avoid the adverse publicity of such a trial.

4.

Changes in the conviction label to accomplish these varied purposes raise additional problems for the administration of criminal justice. The lack of a comprehensive record of the proceedings and the misleading conviction label undermine attempts to achieve some degree of equality between defendants and may complicate the job of correctional authorities, who receive meager information about the defendant, the factual background of the case, and the judge's objectives, if any, in sentencing. And the unreliability of the conviction label can be misleading to others who have occasion to make reference to it at later stages in the same proceeding or in later proceedings. Thus, a prison classification committee or a parole board, relying on the conviction label in the case of an armed robbery charge reduced to unarmed robbery may mistakenly conclude that the prisoner was unarmed when he committed the robbery and may release a potentially dangerous offender too early. Perhaps the reverse danger is even more present. Because of the prevalence of plea bargaining and reduction of charges, the parole board may assume that all prisoners who pleaded guilty to charges of unarmed robbery were in fact armed. Or, upon a later conviction, a sentencing judge may assume that the earlier crime was in reality armed robbery. A defendant who pleads guilty to an accurate charge of unarmed robbery, therefore, may in the long run be treated more harshly than he deserves because of an erroneous assumption by others that he bargained to avoid a charge of armed robbery. In other words, where such plea bargaining is widely practiced, conviction records become unreliable and may be misused to the disadvantage of the community or of the defendant.

B. "ON THE NOSE" GUILTY PLEAS

1.

Plea bargaining need not necessarily take the form of a reduction of the charges. A defendant may plead guilty to a charge that accurately describes his conduct in return for a general promise of leniency at sentencing or a more specific promise of probation or of a sentence that does not exceed a specified term of years. To the extent that plea bargaining occurs in Federal courts, except for narcotics cases which carry a mandatory minimum sentence, it usually takes this form. This is probably so because the Federal law contains few lesser included offenses to which charges can be reduced.

In these instances, appearances can be extremely misleading. Superficially, at least, the judge retains complete discretion as to sentence and is able to control the proceedings so as to insure both an accurate guilty plea (protection of the defendant) and a sentence appropriate to the defendant's conduct (protection of the public interest). Closer examination of the process suggests, however, that this may not really be so.

Negotiations usually are handled between the prosecutor and the defendant or his attorney. The judge's isolation from this stage of the negotiations creates a risk that the bargaining will be limited to protection of the interests of the defendant and the prosecutor without anyone being present to protect the "public interest." The defendant's interest in receiving as low a sentence as possible and the prosecutor's interest in maintaining a steady flow of guilty pleas—to preserve a good public image and to induce guilty pleas from other defendants—can easily merge into agreement upon a guilty plea in return for a sentence that is meaningless in terms of the defendant's offense and his need for treatment or control. Related to this is the possibility of inadequate knowledge of the facts, either as to the crime itself or the defendant's background, on the part of the prosecutor who negotiates the guilty plea. Under the pressure of a heavy, time-consuming caseload, the prosecutor may easily be seduced at an early stage of the proceedings, before such facts are more fully developed, by the offer of a quick guilty plea in exchange for a light sentence, only to discover too late that the offense, or the offender, was far more serious than originally thought. It is possible, indeed likely, that the full facts may never be discovered since the quick disposition usually eliminates the need or the impetus for further investigation. Thus, there is a good chance that the judge will never become aware of facts which indicate that the agreement is not in the public interest.

Nor can defense counsel be counted on to provide this protection. Rarely does a defense attorney conduct a thorough investigation of the case and his client's background; thus he usually provides little additional insight into the causes of the defendant's problems. Also, defense counsel regards his professional responsibility to be exclusively to his client. The public interest in these instances need not necessarily mean a longer sentence; it may include identification of the sources of defendant's problems and the development and suggestion of a program of correctional treatment that is relevant to these problems. But defense counsel, perhaps in part because of legitimate skepticism over the availability of meaningful correctional treatment and of doubts as to the fairness of such programs, seem to regard their duty to the client solely in terms of obtaining for him as lenient a sentence as possible. Perhaps a broader view of the lawyer's role should include within the counseling function the duty to attempt to make the client aware of the fact that he has a problem and of his need for some correctional program. Thus far, however, lawyers have preferred to avoid the welfare implications of their role as counselors and the conflicts this role would create and to limit their role to getting the client "as good a deal" as they can.

Thus, neither prosecutor nor defense counsel is likely to bring before the judge such facts as would undermine the basis for the negotiated agreement. But even if the judge should become aware of such facts through another source, say a presentence report, the dynamics of the present system would prevent close judicial supervision over the negotiated agreement. First of all, the judge's theoretical role as protector of the public interest is limited by judicial reluctance to intervene and repudiate an arrangement accepted by the prosecutor as agent of the state. In other areas of the law it is rare for judges to reject consensual arrangements even when one of the parties represents the public. Thus, it is easy for the judge to sit back and approve anything to which the lawyers agree.

Moreover, it is essential to the successful working of the system that the judge accept the arrangements worked out between defense counsel and the prosecutor. Because of doubts over the legality of the negotiated plea, prosecutors and defense counsel typically avoid all reference in court to the sentence to be imposed until after the plea has been tendered and accepted, and engage in the pious fraud of making a record that the plea was not induced by any promises. Since the judge's sentence remains to be pronounced, the defendant does not achieve the control he sought in negotiating unless he has confidence that the judge will accept the arrangement. The defendant is interested in controlling the exercise of sentencing discretion, not in a lawsuit over a motion to withdraw his guilty plea because of disappointment over the sentence later imposed. The typical unreviewability of the exercise of sentencing discretion only sharpens the point. The credibility of the system requires, then, that the judge hold his power to reject the agreement in careful reserve. If there is to be any effective judicial participation in the process, rather than mere judicial acquiescence in an agreement worked out between the parties, such participation must come at an earlier stage of the proceedings.

Finally, this type of negotiated plea is even less visible than the negotiated plea which results in the reduction of charges. So far as the record reveals, the defendant was charged with a crime appropriate to the acts he committed; he has pleaded guilty to that charge voluntarily; he has asserted in open court that his plea was not induced by any threats or promises, and this assertion has gone unchallenged by his lawyer or the prosecutor; appropriate arguments, pleas, and recommendations have been addressed to the judge at the time of sentencing to influence his decision; and the judge has exercised his discretion and imposed what appeared to him to be the most appropriate sentence based on all of the relevant facts. Not a hint appears on the record to suggest that some relevant facts were not adduced or that the key determinant of the plea decision was not some appropriate peno-correctional end but the prosecutor's desire to induce a guilty plea. Of course, little of this appears in the record when the defendant pleads to a lesser offense, but in that case a comparison of the plea and the original charge suggests at least the possibility of some noncorrectional factor in the process.

The invisibility or low visibility of the process precludes outside control to protect the public interest. It also, to say the least, complicates the process when the defendant, experiencing a change of heart, alleges some abuse in the negotiations. Most such allegations are, probably correctly, suspect. But a system that requires the defendant to deny the negotiations at the very moment he tenders his guilty plea contains potential for overreaching and unfairness. Under such circumstances, it becomes extremely difficult to sift the valid from the false allegations.

2.

One further type of plea bargain merits attention. This may be called the "tacit bargain." In this instance, there are no formal or explicit negotiations between the defense and the prosecution. Defendant, aware of an established practice in the court to show leniency to defendants who plead guilty, pleads guilty to the charges in the expectation that he will be so treated. This expectation is almost invariably satisfied without the need to enter into any negotiations or make any explicit promises. To an extent, the areas of concern discussed with respect

[6] *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959); *Williams* v. *New York*, 337 U.S. 241 (1949). For the barest minimum standards, see *Townsend* v. *Burke*, 334 U.S. 736 (1948).

[7] See the proposed Rule 32(c), FED. R. CRIM. P.

[8] Compare the remarks of Mr. Justice Fortas, writing for the Court in *Kent* v. *United States*, 383 U.S. 541, 561-63 (1966).

to other types of plea bargaining are here eliminated or at least mitigated. But, even apart from the fundamental question of the propriety of placing any premium on a guilty plea,[9] some problems remain. Such pleas do not represent a true acknowledgment and acceptance of guilt by the defendant—universally regarded as a first step toward rehabilitation—but are more likely viewed by him as an expedient manipulation of the system. And, again, the overriding desire to keep the calendar moving can easily cause the practice to degenerate into routine and can direct the judge's attention away from consideration of sentencing goals in his determination.

Cutting across the entire system of plea negotiation is the fear that the low visibility of the proceeding lends itself to possible corrupt manipulation. In actual practice such corruption seems rare. But a real vice in the procedure may be that it often gives the defendant an image of corruption in the system, or at least an image of a system lacking meaningful purpose and subject to manipulation by those who are wise to the right tricks. Cynicism, rather than respect, is the likely result.

II. ADMINISTRATIVE CONSIDERATIONS

The most commonly asserted justification of plea bargaining is its utility in disposing of large numbers of cases in a quick and simple way. The need to induce such summary disposition of cases has been most forcefully stated by Judge Lummus:

> Let us suppose that five hundred cases are on the list for trial at a sitting of court. Of these, one hundred cases are tried, and four hundred defendants plead guilty. Seldom is there time in a sitting to try more than a fifth of the cases on the list. . . . [T]he prosecutor must subordinate almost everything to the paramount need of disposing of his list during the sitting. Rather than dismiss the excess by nolle prosequi, with no penalty, he must induce defendants in fact guilty to plead guilty, in order that some penalty may be imposed. Half a loaf is better than no bread. . . .
>
> If all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him. . . . The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty.[10]

Administrative need no longer seems to command the consideration it once received when challenged in the name of due process of law. It is easy to minimize administrative convenience and need. Simply increase the staff of prosecutors, judges, defense counsel, and probation officers if the present complement is insufficient to handle the task, it is said. Even if the money were readily available, it would still not be clear that we could call upon sufficient numbers of competent personnel. A lowering of standards in order to man the store adequately may well result in poorer justice. It may also divert both funds and personnel from other segments of the criminal process, such as corrections work, where they are arguably more needed.

But there are other reasons to maintain a high proportion of guilty pleas and a low proportion of trials. To suggest the least important of these first, a substantial increase in criminal trials would entail an equally substantial increase in the burden of jury duty on citizens. Many citizens prefer to avoid jury service because it interferes with their private and business lives. Would a disproportionate increase in this burden produce resentment against or a sense of alienation from the criminal process that might be directed against defendants and make other "pro-defendant" reforms less politically acceptable? Probably the best that we can say is that we do not know the answer to this question, but it should cause us to pause before throwing administrative considerations to the winds.

Maximization of adjudication by trial may actually result in more inaccurate verdicts. So long as trials are the exception rather than the rule and are limited, by and large, to cases in which the defense offers a substantial basis for contesting the prosecutor's allegations, the defendant's presumption of innocence and the requirement of proof beyond a reasonable doubt are likely to remain meaningful to a jury. The very fact that the defendant contests the charges impresses upon the jurors the seriousness of their deliberations and the need to keep an open mind about the evidence and to approach the testimony of accusing witnesses with critical care and perhaps even a degree of skepticism. If contest becomes routine, jurors may likely direct their skepticism at the defense. Prosecutors too readily apply the overall, and overwhelming, statistical probability of guilt to individual cases; we do not want jurors to do the same. It makes some sense, then, to screen out those cases where there is no real dispute and encourage their disposition by plea, leaving for trial to the extent possible only those cases where there exists a real basis for dispute.

I shall suggest later that there also are some cases in which the price we pay for contested disposition is the posing to the jury of extreme alternatives, due to the law's need to maintain its generality, under circumstances in which compromise may actually yield a more "rational" result.

III. THE RISK THAT INNOCENT DEFENDANTS MAY PLEAD GUILTY

Thus far we have examined plea bargaining from the impersonal perspective of the "system." Some additional perspective can be gained by viewing the practice from

[9] For discussion of the propriety of showing leniency to defendants who plead guilty and expression of judicial attitudes toward this practice, see Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956); *Pilot Institute on Sentencing*, 26 F.R.D. 231, 285–89 (1960).

[10] LUMMUS, THE TRIAL JUDGE 43–46 (1937).

the defendant's point of view. A prominent defense lawyer has put it thusly:

> These plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently far too tough. . . .
>
> The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations. . . .[11]

And, further:

> If a man is guilty, and the prosecution has a good case, there is little satisfaction to the lawyer or his client in trying conclusions, and getting the maximum punishment. A great deal of good can be done in the plodding everyday routine of the defense lawyer, by mitigating punishment in this manner. Anyone who has ever spent a day in a prison and experienced, even vicariously, the indignity and suffering that incarceration entails realizes full well that the difference between a three-year sentence and a five-year sentence is tremendous, not only for the wrongdoer who is being punished, but for the innocent members of his family who love him, and who suffer humiliation and worse while he is away. This is something that the criminal lawyer can rightfully and usefully do for the "guilty" man. In this regard, the criminal lawyer is daily fulfilling a useful function in our society.[12]

Viewed from this perspective, the negotiated plea is not solely a corrupting inducement offered defendants to waive their constitutional rights but is also a device by which defendants and their counsel can manipulate an imperfect system to mitigate its harshness and excesses. It is all too easy to assert that "there is no such thing as a beneficial sentence for an innocent defendant."[13] There is also no such thing as a beneficial conviction for an innocent man. But innocent men may be convicted at trial as well.

The possibility that innocent defendants might be induced to plead guilty in order to avoid the possibility of a harsh sentence should they be convicted after trial is obviously cause for concern. Because of the emotional potential of this problem, it is easy to overstate. The truth is that we just do not know how common such a situation is. Indeed, this may be the very vice of the current system of plea negotiation. Because of the invisible, negotiated, consensual nature of the handling of the case in terms which avoid exploration of those factors deemed relevant by the law, we do not really know whether there is in fact cause for concern or not. It is this very uncertainty about such serious consequences that creates uneasiness.

Still, perhaps the problem can be put in a better perspective. In the first place, trials, too, may not always result in truthful or accurate verdicts. It is interesting to note that disposition by trial and by negotiated plea are similar in that in neither instance do we have any relatively accurate idea of the incidence of mistaken judgments. On one level, then, the significant question is not how many innocent people are induced to plead guilty but is there a significant likelihood that innocent people who would be (or have a fair chance of being) acquitted at trial might be induced to plead guilty?

Further, concern over the possibility that a negotiated plea can result in an erroneous judgment of conviction assumes a frame of reference by which the accuracy of the judgment is to be evaluated. It assumes an objective truth existing in a realm of objective historical fact which it is the sole function of our process to discover. Some, but by no means all, criminal cases fit this image. For example, this is a relatively accurate description of the issues at stake in a case in which the defendant asserts a defense of mistaken identity. If all other issues were eliminated from the case, there would still exist a world of objective historical fact in which the accused did or did not perpetrate the act at issue. And if he did not, a negotiated guilty plea would represent an erroneous judgment. In this instance, then, the issue suggested is the comparative likelihood of such erroneous decisions as between trial and negotiation.

But not all criminal cases fit the above picture. The conventional dichotomy between adjudication and disposition in which the adjudication process is thought of as one of fact determination tends to obscure the nonfactual aspect of much of the adjudication process. Much criminal adjudication concerns the passing of value judgments on the accused's conduct as is obvious where negligence, recklessness, reasonable apprehension of attack, use of unnecessary force, and the like are at issue. Although intent is thought of as a question of fact, it too can represent a judgment of degrees of fault, for example, in cases where the issue is whether the defendants entertained intent to defraud or intent to kill. In many of these cases, objective truth is more ambiguous, if it exists at all. Such truth exists only as it emerges from the fact-determining process, and accuracy in this context really means relative equality of results as between defendants similarly situated and relative congruence between the formal verdict and our understanding of society's less formally expressed evaluation of such conduct.

The negotiated plea can, then, be an accurate process in this sense. So long as the judgment of experienced counsel as to the likely jury result is the key element entering into the bargain, substantial congruence is likely to result. Once we recognize that what lends rationality to the factfinding process in these instances lies not in an attempt to discover objective truth but in the devising of a process to express intelligent judgment, there is no inherent reason why plea negotiation need be regarded any the less rational or intelligent in its results.

Indeed, it may be that in some instances plea negotiation leads to more "intelligent" results. A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any intermediate judgment. And this is likely to

[11] Steinberg & Paulsen, *A Conversation With Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW. 25, 31–32 (1961).

[12] Steinberg, *The Responsibility of the Defense Lawyer in Criminal Cases*, 12 SYRACUSE L. REV. 442, 447 (1961).

[13] Comment, *Official Inducements To Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 181 (1964).

occur in just those cases where an intermediate judgment is the fairest and most "accurate" (or most congruent).

Clearly, the line between responsibility and irresponsibility due to insanity is not as sharp as the alternatives posed to a jury would suggest. It may be that such a dividing line exists in some world of objective reality and that the ambiguity arises from the difficulties of accurate factfinding. It is more realistic, however, to view responsibility as a matter of degree at best only roughly expressed in the law's categories of first and second degree murder, manslaughter, etc. The very visibility of the trial process may be one factor that prevents us from offering the jury this compromise in order to preserve the symbolism of uniform rules evenly applied. The low visibility of the negotiated plea allows this compromise which may be more rational and congruent than the result we are likely to arrive at after a trial.[14] While the desire to protect the symbolism of legality and the concern over lay compromises may warrant limiting the jury to extreme alternative, it does not follow that to allow the defendant to choose such a compromise is an irrational or even a less rational procedure.

There is, moreover, a significant difference between conviction upon trial and by consent that merits further consideration; that relates to the role of defense counsel. Despite defense counsel's best efforts, his innocent client may be convicted at trial. But he cannot be convicted on a plea of guilty without defense counsel's participation and consent. Defendant's consent is also necessary for a guilty plea, but that provides less of an independent check on inaccurate pleas since defendant's prime interest is in minimizing unpleasant consequences. Counsel, on the other hand, as an officer of the court, has a duty to preserve the integrity of the process as well. When the system operates as it is supposed to, defense counsel's control over the plea affords added assurance that the plea is accurate.

We are safe in assuming that the system still works less than ideally. Waiver of counsel is still common in guilty plea cases, and even when the defendant is formally represented, his representation is often perfunctory.[15] But Professor Newman also reports increased inquiry into the factual basis for guilty pleas in all three States studied.[16] This suggests that judges accepting such pleas, if alert to the problem, can exercise greater control by refusing to accept waivers and by careful selection of assigned counsel, particularly in those cases in which some lingering doubt as to the defendant's guilt remains.

There is, however, another side to the participation of counsel in the guilty plea. Even counsel may see the occasional practical wisdom of pleading an innocent man guilty. Sworn to uphold the law and at the same time to serve his client's best interests, counsel may be faced with an insoluble human and professional conflict. While such a compromise may serve the defendant's interest in making the best of a bad situation, it can never serve the lawyer's interest in protecting his professional integrity and self-image. At present we have no idea of the extent of this role conflict and its consequences to the profession.[17]

Thus far I have suggested that for those cases in which the key determinant of the plea bargain is experienced counsel's assessment of the chances of conviction, plea bargaining is not likely to impair the accuracy of the guilt determining process. This assumption, of course, does not always prevail. Additional factors may enter into the bargain. Probably the most significant factor is the possibility that the defendant may be convicted of a crime which carries a mandatory nonsuspendible sentence. Where the sentencing judge retains complete discretion in the imposition of sentence, defense counsel is under less pressure to negotiate a plea and is under little pressure to give up a triable defense. If the defense has sufficient merit so that some doubt may linger even after conviction, there may be a fair chance that such doubt will be reflected in the judge's sentence. Because of the rules relating to cross-examination of a defendant, defense counsel are usually of the view that a defendant ordinarily stands little chance of acquittal unless he has a relatively unblemished background. Where sentencing discretion prevails, such a background is likely to result in a light sentence upon conviction. Under such circumstances, a plea bargain has the effect of changing a substantial probability of leniency to a certainty, hardly a sufficient inducement for a man to plead guilty to a crime he has not committed. This becomes even more certain in the case of the defendant with an unblemished background, where the conviction is probably more damaging than any sentence he is likely to receive.

The removal of sentencing discretion by the enactment of mandatory sentences alters the picture completely. Once the defendant has been convicted, lingering doubts as to guilt and the defendant's exemplary prior life can no longer be considered. Under such circumstances, the defendant may be forced to give up a fair chance of acquittal by pleading guilty to a different, usually a lesser, charge upon which the judge can impose a more lenient sentence. The impact of legislatively mandated sentences on plea negotiations was suggested some time ago by prominent writers.[18] Professor Newman's book reports that there was a far greater incidence of bargaining and charge reduction in Michigan, which has legislatively mandated sentences for certain crimes, and in Kansas, whose statutes do not permit the sentencing judge to impose probation as an alternative to a prison term for some crimes, than in Wisconsin, where the legislative sentencing structure leaves judges considerably greater discretion.[19]

An additional extraneous factor influencing counsel's judgment was suggested above, namely, the fear of conviction of a crime carrying a label suggesting abnormality or perversion, and even the fear of going to trial in such a case with its ensuing publicity. Mandatory minimum sentences can be eliminated; adverse publicity of this sort probably cannot. It is difficult to say with confidence that an innocent defendant's plea of guilty to disorderly conduct in such a case is never in the defendant's best interest if he is innocent. It is presumably not in the best interests of the criminal process, but I would hesitate to insist to a client that he owes the system a duty to defend himself and besmirch his family and reputation. In any event, we can encourage greater judicial sensitivity to this problem and closer judicial supervision of the plea in such cases. New Rule 11 of the Federal Rules of Criminal Procedure and the practice in some courts of holding postplea hearings or investigations to develop the facts relating to the offense provide methods for such control.

The discussion in this section has not been designed to suggest that there is no reason for concern over the possibility that innocent persons might be induced to plead guilty by a system of plea negotiations. Rather, my purpose has been to place the problem in what appears to me to be its proper perspective, to demonstrate that there is nothing inherent in such a system that would increase the risks of inaccuracy beyond those present in adjudication by trial, to suggest that plea negotiation has possibilities for more intelligent and more humane disposition of many cases than are available in trial disposition, and to indicate that the problem is not beyond effective judicial control.

IV. VISIBILITY AND INVISIBILITY: SOME SKEPTICAL OBSERVATIONS ON THE NONNEGOTIATED PLEA

At several previous points I have commented on the invisibility or low visibility of key elements of the decision-making process in the case of negotiated pleas. The assumption has been that where there have not been any out-of-court negotiations, where the sentence is truly determined by the judge after argument by counsel and perhaps a presentence investigation, the process is fully visible. I would suggest that the present process for nonnegotiated pleas is not really very visible either. In fact it is less visible to the persons most directly involved, the defendant and his counsel, than the negotiated plea.

Visibility depends on one's vantage point. While the negotiated plea may be of low visibility to the public at large (and to law professors), it is highly visible to the defendant. Whether the factors entering into the bargain are or are not meaningful as sentencing goals, they are at least visible to the defendant and his attorney. The defendant is able to influence the sentence, he may set forth bargaining factors and determine their relevance to the decision, and he may use his bargaining power to eliminate the grossest aspects of sentencing harshness and arbitrariness, be they legislative or judicial. The defendant, if he does not like the bargain, may reject it and stand trial. If he accepts the bargain, he cannot help but feel that his sentence is something that he consented to and participated in bringing about, even if he at the same time resents the process that induced his consent. And while he may find his "correctional treatment" brutal and meaningless on one level, his sentence is meaningful on another level in that at least he participated in it and influenced the final result.

Current sentencing practice for a nonnegotiated plea is to defense counsel, and I suspect to the defendant as well, an even more meaningless, less comprehensible procedure. The defendant and his counsel rarely see the sentencing decision take shape and even more rarely feel that they have participated in its formulation. At the point at which the process is most visible to the public, the imposition of sentence, it is least visible to the defendant. The prosecutor and defense counsel make their arguments and the judge decides. One frequently does not know what influenced the judge and how he went about making up his mind. (When the defendant reaches prison, the prison authorities are often at a similar loss to understand the judge's sentencing goals, although this is in part a product of the division between the probation service, which is an arm of the court, and correctional authorities, who are an arm of the prison.) One often gets the impression that the judge had his mind made up before argument and that counsel played no meaningful role in influencing the final result.

This is particularly true where the judge has had the benefit of a presentence investigation. Armed with all sorts of information and recommendations, and probably having discussed the case in chambers with the probation officer, the judge is rarely influenced by the highly visible argument of counsel. Rather, he has been influenced by the usually invisible report and conference with the probation officer. Even competent defense counsel who has devoted the time since pleading to furnishing the probation officer with helpful information about his client and perhaps has attempted to arrange employment for his client often has little idea how this information was used and whether he has really helped his client. This is particularly true when the defendant is disappointed by the sentence, a not infrequent occurrence. In short, both defendant and defense counsel emerge from the process with a sense of frustration and purposelessness. Often, neither feels he has played any meaningful and influential role in the sentencing process.[20]

The bargain may be looked at then as an attempt by the defendant, and even by his counsel, to preserve their dignity in the process by finding a role for themselves even if it means a sentence based upon criteria logically irrelevant to the goals of the process.

I cannot document these comments. They are merely impressions and observations accumulated during several years of criminal practice. Admittedly this practice was almost entirely on the prosecution side, and my impressions may have been distorted by the fact that office policy forbade us to make any specific recommendations as to sentence. But we were free to present and argue to the court those facts we considered relevant. Still, I always regarded my role in the sentencing process as professionally unsatisfying. With but one or two exceptions, I have rarely had the sense that defense counsel participated very meaningfully either. And on the few occasions that I have served on the defense side, the only occasions on which I had any feeling that I was rendering some pro-

[14] The defense of diminished responsibility seeks to accomplish similar ends.

[15] See NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 200-05 (1966). These pages contain an excellent discussion of the dynamics of the process and the problems faced by a conscientious attorney.

[16] *Id.* at 7-21, 233-35.

[17] Lawyers handling divorce cases are often faced with similar conflicts. For a selection of materials related to this problem, see FOOTE, LEVY & SANDER, CASES AND MATERIALS ON FAMILY LAW 682-83, 696-711, 752-69 (1966).

[18] Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

[19] NEWMAN, *op. cit. supra* note 16, at 53-56, 177-84.

[20] Compare the observations of Professor Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961):

"Hearings on sentence and release determinations are commonly attenuated interviews when they are given at all." *Id.* at 804.

"[T]he use of ex parte presentence investigation reports, whose contents are only sometimes made available to the offender, has largely muted the adversary character of sentencing processes." *Id.* at 806.

"[There exists a] traditional value, associated closely with the root idea of a democratic community, that a person should be given an opportunity to participate effectively in determinations which affect his liberty." *Id.* at 830.

fessional service to my clients in the sentencing process were when I bargained on their behalf for some sentencing consideration.

In other words, in that moment of dread before a nonnegotiated sentence is imposed, counsel at least, and probably the defendant, have the feeling that they await the pronouncement of an arbitrary fiat which they are helpless to shape. The pronouncement of sentence, particularly if it is an unpleasant one, rarely mitigates this sense, for rarely does a judge articulate any reasons for imposing the sentence he has chosen other than to engage in an occasionally harsh speech excoriating the defendant and his like.

V. THE LEGAL DIALECTIC: VOLUNTARINESS

Current doctrine has it that a guilty plea, to be constitutionally valid, must be voluntary.[21] This notion apparently stems from several sources. Since the Constitution guarantees all defendants a right to trial, the entry of a guilty plea constitutes a waiver of that right which, as with all waivers, must be intelligently and voluntarily made. So viewed, the requirement of voluntariness is a function of the specific rights guaranteed by the sixth amendment.

The requirement of voluntariness may also be viewed as emerging directly from notions of due process. At a minimum, due process requires a fair factfinding procedure designed to find the relevant facts accurately. Conviction by judicial admission satisfies this requirement unless the admission has been induced by unfair means or means which might induce an innocent person to plead guilty.

In addition, the defendant's fifth amendment right not to be compelled to incriminate himself covers not only testimonial self-incrimination but compelled judicial admissions as well. In this context, the requirement of voluntariness bespeaks the ethical and political right of an accused to demand that the state not force him to become the instrument of his own undoing, but be prepared to prove his guilt by so-called objective or extrinsic evidence.

It should be recognized immediately that the term "voluntary" is an exceedingly ambiguous term. This stems not only from the difficulties involved in trying to discover a past state of mind but also from the fact that we do not even have a clear idea of what, if any, psychological facts or experience we are looking for. The choice to plead guilty rather than face the rack is voluntary in the sense that the subject did have a choice, albeit between unpleasant alternatives. The defendant who decides to plead guilty and seek judicial mercy also makes a choice between what are to him two unpleasant alternatives. If we call the first choice involuntary and the second voluntary, what we are really saying is that we are convinced that in the first case almost all persons so confronted will choose to admit their guilt but that the defendant's decision is based on more personal and subjective factors in the second instance.[22]

We also are saying that we approve of judicial mercy but disapprove of the rack. In other words, "voluntariness" expresses not merely judgment of fact but an ethical evaluation. When only certain extreme forms of pressure are disapproved, the difference between those pressures and the milder pressures we are here concerned with is sufficiently great that, while only a matter of degree, the voluntary-involuntary distinction is descriptive and useful. But as milder and less clearly improper inducements fall under the ban, it becomes more difficult to distinguish them from pleas which we regard as valid, at least so long as we are led by our dialectic to look for a nonexistent psychological difference. Thus, it is difficult to distinguish the psychological experience of a defendant who is induced to plead guilty by a prosecutor's or judge's promise of sentencing leniency from that of a defendant who is induced to plead guilty by his desire to begin service of his sentence immediately so that he will be released sooner. There is a danger that so long as we adhere to the terminology of voluntariness, our very inability to distinguish these cases will lead us to hold involuntary all pleas induced by any considerations beyond the defendant's sense of guilt and readiness to admit it publicly.

Both at common law and pursuant to recent Supreme Court decisions, a confession is deemed coerced and hence inadmissible if it was induced by any promises or threats. A typical inducement invalidating a confession is the proffer of leniency. Because the terminology and underlying constitutional sources are the same for guilty pleas as for coerced confessions, the inducement test for confessions may be thought to extend to guilty pleas as well.[23] Indeed, because a guilty plea is itself a conviction and leaves the court nothing to do but impose sentence, while a confession is merely evidence which must be corroborated and may be explained, rebutted, or contradicted, some judges might apply an even stricter standard to a guilty plea than to a confession.[24]

To apply the confession cases in this way would be to ignore some vital differences between the two situations. In the first place, even at common law the inducement test was riddled with arbitrary exceptions such as upholding confessions induced by a promise not to arrest or prosecute a relative of the defendant. Secondly, to the extent that it rests on concern for the reliability of the resulting confessions, the extreme sanction of exclusion bespeaks mistrust of the jury's ability to evaluate the confession properly in light of the inducement.[25] As we have suggested above, the accuracy of the guilty plea is not beyond effective judicial inquiry and evaluation.

Also, the particular inducements held improper in the coerced confession cases usually appear against a background of lengthy interrogation and other pressures to confess, factors not usually present when the same inducement is offered for a guilty plea. And in the confession cases, the defendant succumbed to the inducement without the advice of counsel. Any valid system of plea negotiations would presumably require that the defendant have counsel for this and other reasons.[26] Finally, the coerced confession cases must be viewed against the background of secrecy in the interrogation

[21] *E.g.*, *Machibroda* v. *United States*, 368 U.S. 487 (1962).

[22] See Bator & Vorenberg, *Arrest, Detention, Interrogation, and the Right to Counsel—Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72–73 (1966).

[23] See, for example, the dissenting opinion in *Shelton* v. *United States*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 12 (1958).

[24] See *ibid.* But compare *Haynes* v. *Washington*, 373 U.S. 503 (1963), with *Cortez* v. *United States*, 337 F.2d 699 (8th Cir. 1964).

[25] See the discussion in *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 954–59 (1966).

[26] See *Davis* v. *Holman*, 354 F.2d 773 (5th Cir. 1965), *cert. denied*, 384 U.S. 907 (1964); *Shupe* v. *Sigler*, 230 F. Supp. 601 (D. Neb. 1964); *Anderson* v. *North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963).

room and the recurring conflict of testimony between police and defendants over whether more serious "inducements" had been offered. Under such circumstances, the very ambiguity and flexibility of the term "voluntariness" made it easy for skeptical courts to grab onto a conceded inducement, albeit a minor one, and hold that this inducement standing by itself rendered the confession involuntary. The coerced confession cases, then, are hardly controlling with respect to plea bargaining which occurs in a wholly different context, despite the similarity of the legal formula.

The fifth amendment approach is more difficult, largely because the ethical principle it expresses often diverges from the accuracy goal of the criminal process, whereas the two tend to converge in the sixth amendment right to trial. Thus, the problem here is in part to determine at what point the preservation of the dignity of all men before the state is undercut by inducements to plead, or what kinds of inducements undermine this dignity. The mere statement of the issue in this form suggests again some room for play, but the problem is complicated by the coerced confession precedents discussed above. But our notions of dignity seem to require that some room be left to the defendant to judge and act intelligently, knowingly, and with competent professional advice in his own self-interest.

Although the sixth amendment guarantees the right to trial, it is not to be assumed that the constitutional scheme requires or even envisions that defendants will always avail themselves of this right. Indeed, as suggested above, the full exercise of this right by all defendants might even thwart some of the goals of the right to trial. Adjudication by trial may be viewed not as a preferred or desired procedure but rather as an available procedure. Its availability to all defendants stands as a check against governmental arbitrariness and as a device for rational factfinding in case of disagreement between the government and the defendant. Defendants then must be informed of and given the tools necessary for the meaningful exercise of this right. It is not necessary, however, that they be encouraged to exercise this right. Again, each single defendant's own self-interest will determine whether or not he should exercise it.

In light of these considerations, including the benefits to both the system and to defendants that can be derived from a controlled system of plea negotiations, it would not be desirable to lay down a broad constitutional dictum forbidding the practice. It would be a mistake to push valid legal, even constitutional, insights to the ultimate of their logic. Accommodation of conflicting interests is a more sensible pursuit.

VI. WHERE DO WE GO FROM HERE?

To recapitulate for a moment, I have suggested that plea bargaining serves several useful ends: It eases the administrative burden of crowded court dockets; it preserves the meaningfulness of the trial process for those cases in which there is real basis for dispute; it furnishes defendants a vehicle to mitigate the system's harshness, whether that harshness stems from callous infliction of excessive punishment or from the occasional inequities inherent in a system of law based upon general rules; and it affords the defense some participation in and control over an unreviewable process that often gives the appearance of fiat and arbitrariness. These are not insignificant accomplishments.

But we have also seen that the system pays a price for these accomplishments. It bears a risk, the extent of which is unknown, that innocent defendants may plead guilty; negotiation becomes directed to the issue of "how many years a plea is worth" rather than to any meaningful sentencing goals; factual information relating to the individual characteristics and needs of the particular defendant are often never developed; and a sense of purposelessness and lack of control pervades the entire process. This is a high price.

Statement of these areas of concern suggests possible remedies designed to encourage the early development and availability of facts concerning the offense and the offender, the candid exchange of attitudes between the parties, and perhaps even the closer and earlier involvement of the judge in the process, *i.e.*, a sort of preplea conference.

Negotiation is not solely a matter of bazaar bargaining. It also involves the narrowing down of areas of disagreement, the recommendation and exploration of alternative courses of action, and the exchange of information, ideas, and insights. Such a process could result in greater disclosure of relevant information than is presently the case. The scheduling of a conference prior to the entry of a guilty plea would eliminate some of the factors discussed above which at present disable the judge from exercising a degree of control. And, it may be hoped, the participation of the judge might direct discussion along more meaningful lines.

Judicial participation is, of course, no panacea. Judges, too, may misdirect their attention to bargaining over the number of counts and years. The earlier use of presentence investigations should also be encouraged. The judge might order such an investigation after the hearing in order to confirm the facts developed and represented at the hearing. Or, the prosecutor and defense counsel might be authorized to request such an investigation before the conference to serve as a basis for discussions.[27]

The suggestion of greater judicial involvement in the process undoubtedly raises some fears.[28] The principal objections relate to the risk that the defendant may be pressured into pleading guilty because of the impression that he will not receive a fair trail if he rejects the judge's recommended disposition.[29] But this cause for concern can be eliminated by requiring that if the defendant rejects the judge's proposal, the trial and sentence shall be before a different judge, a particularly feasible solution in metropolitan courts where the bulk of plea bargaining takes place. Scheduling the trial before a different judge would also eliminate any prejudice that

[27] Probation investigations are frequently conducted prior to adjudication in juvenile delinquency cases. Under this proposal, a preadjudication investigation would be held only upon the defendant's consent.

[28] See, *e.g.*, *United States* ex rel. *Elksnis* v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966).

[29] See Comment, 32 U. CHI. L. REV. 167, 180–83 (1964); Note, *Guilty Plea Bargaining—Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 891–92 (1964).

could otherwise result from the judge's reading the probation report and participating in the preplea conference.

It would be a mistake to deny the judge any role in the process of negotiations, particularly since his power of subsequent review seems at present ineffective. It is not contemplated that such a conference would be required for all cases or even ordinarily called at the judge's initiative. Rather, the parties would call such a conference usually after they have reached agreement. In cases in which defense counsel and the prosecutor are agreed upon a disposition, no harm can come from allowing the judge to review their decision before the guilty plea is entered. Such a review may serve to bring up for consideration matters that would otherwise have been ignored by the parties. At worst, the judge will rubberstamp their agreement.

Even when there is disagreement, a conference might be held if the parties think it could be useful and indicate a desire for it. In such instances, the judge's role in eliciting the relevant facts is likely to be somewhat lessened. Since counsel disagree, each, or at least defense counsel, is likely to adduce all the facts he can in favor of the disposition he is seeking. Such a hearing can be a very real adversary proceeding. Here, too, as in any adversary proceeding, the judge should be alert to elicit any new facts counsel may have ignored, to make use of probation office facilities for investigation if they have not as yet been called upon to open up possible new avenues for exploration, and to offer additional insights into the case. He may be sufficiently persuaded to bring his prestige to the support of one of the parties' views. Such a development could further encourage the use of probation as a sentencing alternative.

The core problem seems to be whether judges can participate in such a process without becoming quasi-prosecutors.[30] What will happen if, notwithstanding his desire to "settle" the case, the judge agrees with the prosecutor's view as to what is an appropriate disposition of the case? Can defense counsel maintain their independence, or might some lawyers feel themselves under pressure to go along with the judge, lest they develop a reputation for being obstructive and damage their position for future clients? When somewhat similar objections were raised against the establishment of public defender offices, they were rejected. And, it should be noted, pressures to cooperate with the judge usually weigh far more heavily upon the prosecutor than upon the defense. If thought necessary, one might require that such a conference be held only at the defense's initiative.

Moreover, the availability of a record of the proceeding should provide added protection. While it would probably be difficult to control the less formal conference that would follow upon agreement between the parties, the more formal adversary hearing that would follow upon disagreement could and should be entirely "on the record."

Even in the best of worlds, however, negotiation involves some give and take, some compromise. Would it tarnish the image of the law and of the judge to concern him in a procedure that involves compromise? It is no easier to answer this question than those that preceded it. But it may properly be suggested that if there is one area of the law that does not lend itself to the rigidity of either/or, it is sentencing. If we were correct in our suggestion above that adjudication is not always a search for objective truth, the point is all the more valid with respect to disposition, and our search for meaningfulness must be directed not so much to the result as to the process of decision making.

The answers to the above questions are far from clear. They are problematic. Still, the suggestions for new directions seem to be worth careful experimentation. When the parties agree on a disposition, the emphasis should be on improved early factfinding, largely through the probation service, with some greater measure of judicial control. Where there is disagreement, there should be available, perhaps only at defendant's option, opportunity for argument and conference with the judge before a plea is entered.

VII. THE ROLE OF DEFENSE COUNSEL

It is likely that the key participant in any scheme of negotiated pleas would be defense counsel. I suggested earlier that defense counsel typically take a narrow view of their role in representing their clients: to do their best within honorable means to secure an acquittal and to do their equal best after conviction to obtain for the client as "light" a term as possible. The implications of a lawyer's role as counselor are ignored.

This is not the place to explore the possibilities of altering that professional self-image. But it is appropriate to suggest, at least, that it is particularly timely now as a role is being found for the lawyer at more and more stages of the total criminal process that new thought be given to the nature of that role. Is it also the lawyer's function to suggest to his client his need of and the availability of correctional devices which may aid him? Is it his duty to the client to get the client to understand himself better, to advise him that there are procedures and techniques available today for such indepth study in many cases? Should he advise his client that the development of such information and the formulation of a correctional program are more in his long-term interest than the year less in jail he can probably get from hard bargaining?

This is not to suggest, of course, that the ultimate decision as to which course to pursue is to be the lawyer's. Decisions in issues of such moment and consequence must under our system remain in the hands of the defendant.[31] The question is whether it is counsel's duty to explore these issues with his client and perhaps even advise his client which course the lawyer thinks he ought to follow.

Implicit in the foregoing is the requirement that counsel have a thorough understanding of correctional theories and practices—their successes and failures, be trained in the understanding of human behavior so that he may identify the sources of his client's difficulties, and be familiar with the public and private agencies to which the client may be referred for more professional assistance. Such professional skills are vital to the lawyer even today, when he plays a more limited role. Yet it is the rare criminal lawyer who has any real grasp of the correctional aspects of the criminal process. This should be an area of concern to the bar and the law schools in the training of future lawyers.[32]

[30] See, *e.g.*, *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).

[31] *Cf. Brookhart* v. *Janis*, 384 U.S. 1, 7–8 (1966).

SOME CONCLUDING OBSERVATIONS

In a very significant sense, the problems involved in the plea bargaining process reflect the context in which it arises, the broader sentencing process. The absence of "legal standards to govern the exercise of individualized correction," [33] both procedural and substantive, the subjectivism and unreviewability of most sentencing decisions, and the failure to articulate goals beyond the most general and unhelpful are not only attributes of plea bargaining but are endemic to the entire peno-correctional process. It is precisely because of this ambiguity in the total process that it lends itself to the kind of manipulation described above.

The ultimate answers to the problems outlined in this paper cannot come from a mere tinkering with the process of negotiations but must be sought in improvement of the total process. One line of inquiry could be directed toward the development of standards which could serve as frames of reference for individual cases. More precise factfinding might be another approach. Adjudication is, of course, a form of factfinding directed to correctional decision making, but the definitional elements of a given crime represent the minimally relevant facts. They are in a sense jurisdictional facts designed at best merely to indicate generally that the case is appropriate to the correctional process. But they do not carry us very far along that process. A listing of facts deemed relevant to the determination of an appropriate sentence for various crimes [34] would provide an agenda or reference points for argument and decision, and would provide a basis for review. Such a listing might serve as a sort of checklist in negotiated pleas to direct the negotiations along more desired lines.

At the same time attention must be given to the development of new types of correctional programs so that defendant and his counsel might themselves become interested in seeking correction of the defendant's problems rather than merely getting as light a sentence as possible. Exploration of these suggestions is, of course, beyond the scope of this paper. But it is important to stress the point at which the two groups meet and to suggest the broader context in which solutions must be sought.

[32] *Cf.* the observations of Professor Newman, *Functions of the Police, Prosecutor, Court Worker, Defense Counsel, Judge in Aiding Juvenile Justice*, 13 JUV. CT. JUDGES J. 6, 11–12 (1962).

[33] Kadish, *supra* note 21, at 828.

[34] See, *e.g.*, MODEL PENAL CODE §§ 7.01–.04, 210.6(3), (4) (Proposed Official Draft 1962).

239–114 O—67——9

STAFF LOWER COURT STUDIES

The discussion of the problems of the urban lower criminal courts in chapter 4 is in part the product of several field studies made by members of the Commission staff and of the Office of Criminal Justice in the Department of Justice. The first of these studies, of the District of Columbia Court of General Sessions, has been published under the title Criminal Justice in a Metropolitan Court. *That study was the work of Harry I. Subin and other members of the Office of Criminal Justice with the participation of members of the Commission staff. The General Sessions study was conducted in preparation for the work of this Commission and of the President's Commission on Crime in the District of Columbia. The reports of the studies of the Municipal Court of Baltimore and the Recorder's Court of Detroit are printed in this appendix. Each of the following reports is the result of a week-long study of these courts in the spring of 1966 by two lawyers. The researchers' time was divided between observations of court proceedings and interviews with judges, prosecutors, defense counsel, police and court officials, and civic leaders. In addition to the visits to these cities, reports and statistical material were collected and briefer visits were made to other cities.*

The report of a one-week study of a criminal court must be incomplete and must rest on personal impressions, either of the observers or of those who were interviewed. Preliminary drafts of these reports were circulated to a limited number of persons in the cities studied, and the present drafts have been amended to reflect their suggestions. In both cities there may have been significant changes in the operation of the courts since the time of these studies.

ADMINISTRATION OF JUSTICE IN THE MUNICIPAL COURT OF BALTIMORE

THE POLICE DEPARTMENT—THE INITIAL STAGES OF PROSECUTION

ARREST PATTERNS

During 1964, the latest year for which statistics are available, the 3,000-man Baltimore Police Department made 56,160 nontraffic arrests and brought a total of 62,437 charges against those arrested.[1] Three broad groupings of arrest procedures are used in Baltimore:

1. *Arrests without warrants.*—As in the District of Columbia arrests without warrants for felonies may be made on probable cause, and misdemeanor arrests may be made without warrants only when the offense was committed in the presence of the officer.[2]

2. *Arrests on warrants.*—The number of arrests on warrants in Baltimore, as in other cities, is small. It is apparently common practice for the police to obtain warrants without submitting written affidavits in support thereof.

3. *Investigative arrests.*—In 1964, as table 1 shows, there were 3,719 investigative arrests. Of these, 3,654 were dismissed, 1 was charged and referred to criminal court, 2 were returned to institutions, 5 were given probation in Municipal Court,[3] and 57 were delivered to other authorities. In addition to the investigative arrests that were dropped before presentment, there were over 7,000 other charges listed as "dismissed" without designation as to whether they were dismissed in the stationhouse by the police or in municipal court by a judge.

We were told that defendants usually are held for up to three days and then almost always released. The

Table 1.—Processing of Cases in Municipal Court

Charge	Number of charges	Fined or sentenced to jail in municipal court	Processed [1] in municipal court	Referred to criminal court	Referred to juvenile court	Other
Assault, common	3,171	1,038	1,960	93	51	29
Assault, aggravated	3,473	1,229	1,718	365	124	37
Assault on officer	181	93	31	42	13	2
Assault to murder	27	1	4	21	0	1
Assault, threats	956	229	619	81	10	17
Bogus checks	580	147	260	171	1	1
Burglary	1,979	6	87	1,308	574	4
Carnal knowledge	125	0	11	113	1	0
Deadly weapons	1,326	629	453	215	11	11
Disorderly conduct	11,490	5,834	4,819	189	63	585
Disturbing the peace	2,837	1,020	1,087	24	0	706
Drunkenness	9,288	5,527	3,611	23	1	126
False pretenses	270	33	98	135	1	3
Firearms ordinance	299	104	135	53	5	2
Forgery	304	5	20	274	5	0
Gambling	742	59	155	439	17	2
Investigation, held for	3,719	0	3,659	1	0	59
Larceny	4,154	1,249	1,421	518	893	28
Larceny, auto	374	22	27	107	218	0
Liquor law	709	179	498	32	0	0
Malicious destruction	943	213	476	36	20	16
Manslaughter	88	0	77	9	1	1
Minors, possession of alcohol	953	406	530	3	14	0
Murder	134	0	13	111	8	2
Narcotics	368	36	38	287	5	2
Prostitution	215	120	124	37	7	6
Parole violator	383	166	186	6	25	0
Rape, forcible	107	0	20	83	4	0
Receiving stolen goods	171	32	74	62	3	0
Resisting police	170	82	59	26	1	2
Robbery	812	9	43	647	105	8
Rogue and vagabond	58	3	2	53	0	0
Sodomy	81	1	10	54	14	2
Welfare fraud	258	25	231	2	0	0
Vagrancy	275	174	61	5	0	2
Vehicles, unauthorized use	904	381	431	70	12	10

[1] Includes acquitted and probation without verdict. These figures also include the approximately 1,800 persons who received probation after conviction in Municipal Court as well as all defendants who were convicted but received suspended sentences.

SOURCE: 1964 Baltimore Police Dep't Ann. Rep. 33-37.

[1] The breakdown of the important charges appears in table 1. In Baltimore statistics are published on the basis of the charge. It is not known how many charges were lodged against any one defendant. For some crimes there are data indicating that there was one charge per defendant—*e.g.*, drunkenness, where 9,288 charges were brought against as many defendants. On the other hand, 1,600 persons were arrested for burglary, but 1,979 charges were made.

[2] In Detroit, on the other hand, misdemeanor arrests may be made without a warrant on probable cause.

[3] This is a practice known as "probation without verdict," which will be discussed below.

investigative arrest creates a special problem for the indigent defendant, who without counsel is unable to bring his frequently illegal detention to the attention of the court.

One judge indicated that the common use of the investigative arrest is a major source of problems in police-community relations. Another judge stated that the court is unable to prevent the practice, largely because of the political power of the police. Whether the statements of these judges reflect the views of most of the judges is not known.

POSTARREST PROCESSING

After arrest, the defendant is taken to the stationhouse in the police district (precinct) where the crime occurred. The arresting officer relates the facts to the officer in command, who reviews the case and decides what charges, if any, should be made. In cases presenting legal or factual difficulties he may call the State's Attorney's office for advice. Unless stationhouse bail is posted, the defendant is jailed until his first court appearance. The police follow a stationhouse bail schedule which sets collateral at approximately twice that usually set by the court, but no statistics are kept on the rate of stationhouse release. It is believed to be low.

The defendant may also be released if he posts bail or collateral at the Central Municipal Court, where a clerk is on duty at all times. In addition, judges may be contacted at any time and will release defendants on their own recognizance in appropriate cases.

APPEARANCE IN COURT

The defendant's first judicial appearance is normally in the Municipal Court, a branch of which is located in the stationhouse in each of the nine districts. Exceptions occur when the police dismiss the charges, or when there is a serious crime in which an indictment will probably be returned and the State is anxious to avoid revealing its case in a preliminary hearing.

The system of decentralized courts is favored by the police because it lessens a number of logistical problems, including their own appearances, availability of witnesses, and movement of prisoners. Historically there was another advantage to having courts in the precincts: The judges, according to one police official, were always considered "conservators of the peace" as well as magistrates and could be called upon to give advice and even to conduct interrogation in difficult cases. Recent court reforms have decreased reliance on the judges, but the former practice helped compensate for the limited participation of the prosecutor in the charging process.

The time between arrest and the first appearance appears to vary with the offense. In drunkenness, disorderly conduct, and most assault cases, the appearance is usually at the next session of the Municipal Court. Sessions are at 9 a.m. and 2 p.m., five days each week, and at 9 a.m. on Saturdays, Sundays, and holidays. In more serious cases there may be delays of up to 72 hours before the first appearance.

A police officer generally acts as prosecutor in Municipal Court. Prosecutors from the State's Attorney's office appear in serious or complex cases in which the police or the court requests assistance, but it is possible for a defendant to be prosecuted for a crime carrying a three-year sentence without a prosecutor being present. In one recently observed case a police officer argued for the state on a motion to dismiss brought by defense counsel. The issue involved an interpretation of the gambling laws, and although a prosecutor was present, he did not participate until the judge requested his opinion.

In drunk cases the arresting officer often is not present when he knows in advance that the defendant is going to plead guilty. The judge reads the police statement of facts to the defendant, and the case proceeds on the basis of the charges made in it. When a prosecutor is present, the proceeding is often not much more elaborate. The prosecutor, generally unfamiliar with the case, merely puts the officer on the stand and asks him to relate the facts, which he usually reads from a written statement.

Police complain about the lack of participation by the State's Attorney's office, in charging or presenting cases. The resulting dependence upon the police, radically different from the District of Columbia system, is said to cause many misinterpretations of the law and many lost cases. Seeking advice on an ad hoc basis is not felt to be a satisfactory alternative.

Police officers are paid $3 for each appearance in court on off-duty time. The police feel that this affords a needed measure of financial relief to officers. One judge said, however, that he has seen a dramatic rise in arrests for certain types of petty offenses, such as public intoxication, which may result from attempts to obtain additional compensation. It is not known whether other judges have observed a similar increase in arrests.

THE MUNICIPAL COURT

ORGANIZATION

The Municipal Court of Baltimore City is the criminal court of first instance for all cases arising within the city limits.[4] The court is five years old; it replaced the old police courts which had been manned by relatively untrained, highly political police magistrates.[5] The court is manned by a chief judge, who sits primarily at police headquarters in the central district, and by 15 associate judges, who rotate every three months or so among the eight other districts and the four separate traffic courts located in the central district. The court also has a housing part to which one judge is assigned on an annual basis.

When the court was created, all judges were appointed by the Governor for staggered terms, at the expiration of which they had to run for election for full 10-year terms. Only attorneys with five years' practice are eligible for the Municipal Court bench.

[4] Outside of the city in Baltimore County the comparable court is known as Magistrate's Court.

[5] Efforts to disband the police courts date back at least to 1923, when the Baltimore Criminal Justice Commission, in its annual report, found them undignified, corrupt, and unjust.

Election of judges appears to be widely disliked by persons concerned with the administration of justice in Baltimore, and particularly by some judges who feel that it is impossible to conduct their business without assessing the possible political effect of an unpopular decision. Political sensitivity is also said to make judges reluctant to screen out weak cases involving serious charges. In addition, the judges are frequently pressured to help politically powerful persons, especially near election time. Finally, it was suggested that the expense of election campaigns frequently compels judges to accept contributions from the bar association, professional bondsmen, and others, thus creating obligations which may impair the judges' impartiality.

One judge said that decentralization of the Municipal Court is the major problem facing the court. In keeping with the police court tradition, the judges have remained closely associated with the police, both physically and by reputation. Some of the judges are now concerned with creating an image of independence. But according to one judge, this image is difficult to maintain when the courtroom is in the police station. In fact, one judge stated that judges sometimes are referred to as "officer" by defendants. Moreover, actual independence is hard to achieve because the police traditionally have tried to establish a close relationship with the judges and to seek their advice. This relationship, according to several judges and prosecutors, places the judges under considerable pressure to comply with the wishes of the police and sometimes results in less than careful scrutiny of police charges.

Decentralization of the municipal court also causes unbalanced workloads among the judges. In districts that are not busy, judges frequently complete morning calendar calls in an hour and afternoon calendar calls in even less time. Other judges have heavier schedules, but because the judges are scattered throughout the city, it is difficult to distribute the work.[6] In the District of Columbia Court of General Sessions, the two judges sitting in criminal cases can obtain help from a judge momentarily freed from civil duties. In Baltimore, the nine judges hearing criminal cases do not assist each other at all.

A study in 1963 by the Criminal Justice Commission revealed that about 40 percent of the business of the court was handled in just two districts:

District:	*Percent of cases*
Central	22
Western	18
Eastern	10
Northern	8
Southern	7
Southwestern	9
Southeastern	8
Northeastern	7
Northwestern	5
Housing	6

It appears that most of the judges favor partial, if not total, centralization of the court. But there are several obstacles to centralization of any kind. As already noted, the police are opposed to changing the present system. Some defense counsel apparently feel that defendants benefit from a neighborhood-oriented court and that defense witnesses are more easily obtained.[7] In addition, the local court has some historical appeal, although it has been argued that the neighborhood court with its friendly magistrate is an unworkable myth. Perhaps most important, Baltimore has recently spent substantial amounts of money building new stationhouses containing modern, attractive courtrooms.

JURISDICTION

Like most lower courts the Municipal Court has jurisdiction to dispose of cases involving certain offenses and to hold preliminary hearings in other cases. But unlike most lower courts, where jurisdiction to dispose of cases is determined with reference to the maximum permissible punishment for the crimes charged, the jurisdiction of the Municipal Court is determined by a statutory provision enumerating the offenses within the jurisdiction of the court.[8] It has original and exclusive jurisdiction over ordinance violations and over traffic, drunkenness, disorderly conduct, vagrancy, and related offenses. It has original jurisdiction over most simple assaults, over larcenies of property up to $500, and over some cases involving possession of weapons. These offenses account for most of the court's important criminal caseload.[9] In those cases in which the court has original and exclusive jurisdiction, the State cannot proceed by indictment after a dismissal of the charges in the Municipal Court. Few charges, however, are ever dismissed at this stage.

Some of the crimes over which the court has jurisdiction are common law crimes which still exist in Maryland. These crimes, assault for example, have no fixed maximum sentence, and it is theoretically possible for an offender to be sentenced to any term not "cruel and unusual." If such a charge is tried in the Municipal Court, however, the maximum sentence which the court may impose is three years and/or $1,000 on any one count.[10]

The legislature has imposed certain exceptions to the exclusive jurisdiction of the Municipal Court. In Maryland there is a right to jury trial in all criminal cases, but there are no jury trials in the Municipal Court. When a jury is demanded, therefore, the case must be transferred to Criminal Court. Jury trials, however, are not often demanded. When the defendant is charged with several crimes, some within and some outside of the jurisdiction of the Municipal Court, trial takes place in Criminal Court. As table 1 indicates, relatively minor charges frequently are disposed of in Criminal Court. In those infrequent instances in which charges emanate in the first instance from the grand jury, trial takes place in Criminal Court. Finally, trial may take place in Criminal Court when other charges are pending against the defendant in that court or against another person when the defendant is also involved in the crime. In these cases the state must show that a trial in Criminal Court is in the interest of justice.

[6] It should be noted, however, that even in the busiest districts some judges sit for no more than four hours a day. Several of those observed during the study sat about three hours.

[7] Others, however, object to the difficulty of having to travel all over the city and would prefer a downtown location.

[8] MD. ANN. CODE art. 27, § 110 (1961).

[9] Use of the felony-misdemeanor dichotomy is not meaningful in Maryland, where all crimes not specifically designated felonies are misdemeanors. Some strange results occur: Robbery is a felony, but until June 1966 the use of a machine gun in a crime of violence was a misdemeanor; one misdemeanor carries a 40-year sentence, and many carry sentences of 10 years. The State's Attorney has asked the legislature to clear up this problem.

[10] Consecutive sentences are possible, however, and a defendant may receive far more than three years on a series of charges. It appears that consecutive sentences are rarely imposed.

PROCEDURE

Procedure in Municipal Court is uncomplicated. The court begins its session at 9 a.m., when the judge takes the bench. A police officer assigned to the courtroom calls the cases. The defendant is led to the bar of the court, sometimes with the arresting officer, sometimes with the complainant or other witnesses for both sides, and sometimes alone. In rare instances he may be accompanied by an attorney, and as indicated above, a prosecutor may also be present. There is no court reporter, except in cases when one is ordered in advance, usually by the State.

The judge, generally before identifying the charge, addresses the defendant directly: "You can be tried by a jury or you can be tried right now before me. Which do you want?" The defendant almost invariably elects an immediate trial. Then the judge typically says, "You can get a lawyer, or you can proceed right now without one." Most defendants elect to proceed without an attorney. When counsel is desired, the court grants a continuance of from 1 to 10 days. If the defendant does not request counsel, he is then asked how he wishes to plead.

Whether the defendant pleads guilty or not guilty, the facts of the case are presented, either by the judge reading the police statement or through the testimony of the officer or a complainant. The defendant is then given the opportunity to speak in his own behalf or to call witnesses. Some of the judges apparently review the defendant's police record before he is called upon to plead, and they may ask the defendant about his record during the trial. Other judges do not look at the defendant's record until after conviction, unless the defendant elects to take the stand and his reputation for truth and veracity is at issue.

In the cases observed no defendant was told that he had a right to remain silent or that the court would appoint a lawyer to represent him if he were indigent, notwithstanding the court rule that counsel will be assigned whenever a defendant may be sentenced to more than six months or fined more than $500. We were told that at least one judge takes great care to advise defendants fully, but the three judges we observed did not.

Trial of drunk and disorderly cases is a major part of the court's work. These cases are disposed of summarily, mostly on guilty pleas, within a minute or so. The procedure in assault and other more serious cases is slightly more complex. It is more likely that counsel will be present, although the only estimate obtained was that counsel appear in about 30 percent of these cases.

Preliminary hearings are conducted in much the same manner as other proceedings, except that the defendant is advised that he cannot plead in Municipal Court, because the court does not have jurisdiction over the case. The arresting officer is usually the only witness. The hearing may be waived, but no defendant observed did so. Because the court does not assign counsel for a preliminary hearing, defendants who cannot obtain a lawyer are not represented, regardless of the seriousness of the crime.

In homicide cases there is a special session of court held in the central district. A representative of the State's Attorney's office is always present, and the proceedings are transcribed. Defense counsel are usually retained, although we observed one preliminary hearing in which a man charged with murder was unrepresented. Although this is the only kind of hearing in which both sides are usually represented by lawyers, the hearings often are perfunctory, and we observed little effort by defense counsel to use the hearings as a discovery procedure.

In the typical Municipal Court case detention is no more than a day or two, with disposition occurring on the first appearance in court. Any delay after the first appearance generally occurs because the defendant seeks time to retain a lawyer. Defendants are said to be well aware of this, and they frequently decide to proceed without counsel.

In more serious cases, primarily those in which the defendant is held for a preliminary hearing, there may be substantial delay. Estimates by some prosecutors are that up to 3 days pass prior to initial appearance, another 10 days until indictment, and a month more until trial. A total of six weeks' delay, therefore, is common. Although it is believed that a high percentage of these defendants are detained, statistics are not readily available.

DISPOSITIONS IN THE MUNICIPAL COURT

Municipal Court statistics have been available only since March 1965, and they are not broken down by crime. Police department crime statistics, on the other hand, do not show exactly how cases are disposed of in Municipal Court. We have combined the data from both sources to obtain a rough estimate of how cases are disposed of in the court.

Total dispositions [1]		61,500
Number convicted		39,000
Fined	27,000	
Committed in default	16,000	
Fines paid	11,000	
Sentenced to prison	4,000	
6 months or less	3,200	
Over 6 months	800	
Fine and prison	200	
Suspended sentence	6,000	
Probation	1,800	
Number not convicted		15,500
Probation without verdict	7,000	
Not guilty/dismissed	8,500	
Bound over to grand jury		7,000

[1] For 10 months beginning March 1965. Figures refer to charges not to defendants; the number of charges is approximately 10 percent greater than the number of defendants.

Of the 39,000 convictions only 20,200, or about 50 percent, resulted in commitments, and 16,000, or about 80 percent, of these were commitments in default of payment of fines. Many such commitments appear to occur in drunk, disorderly conduct, and disturbing the peace cases, which together amount to nearly 50 percent of all the convictions in the court. Fines for these offenses typically vary between $5 and $25, with credit given for prison time at the rate of $1 per day. In November 1965 a procedure authorized by statute since 1941 was put into use in minor cases. Under this procedure a defendant who cannot immediately pay a fine may avoid commitment by paying in installments if he passes a screening test similar to the one used in release-on-recognizance projects. All the judges on the court have approved the idea, but as of February 1966 only seven judges had tried it, releasing a total of only 47 defendants. Although the return rate has been very good, the judges appear to be extremely selective in applying the plan. The warden of the city jail indicated that 25 persons pay their way out of jail daily and that fuller use of the plan could reduce the jail population by 15 percent.

In more serious cases disposed of in the municipal court the rate of fines or imprisonment is equally low. For example, of 2,947 convictions for aggravated assault only 1,229, or 41 percent, resulted in fines or jail sentences. Similarly, of 2,670 larceny convictions, only 1,249, or 46 percent, resulted in fines or jail terms.

These figures suggest a judicial screening of cases which parallels that done by the prosecutor in the District of Columbia, especially when the disposition "probation without verdict" is considered. This disposition, used in about 11 percent of the cases, implies that the judge believes the defendant to be guilty but does not want to convict him, perhaps to avoid the stigma of a criminal record. The result is similar to the prosecutor's "first offender treatment" and "no papering" in the District of Columbia and the "suspended prosecution" practice in Detroit.

Typically, sentence is imposed as soon as a defendant is convicted. In most cases there is no presentence investigation, little postconviction interrogation of the defendant by the judge, and little participation by the State probation department, whose services are not regularly available in Municipal Court. A judge may call a probation officer in on a particular case, but generally this is not done. While detailed statistics are not available, it appears that 80 percent of the sentences in Municipal Court are for six months or less. One judge observed, however, that a defendant recently received consecutive sentences totaling seven years and that such sentences occasionally occur.

ISSUING WARRANTS ON CITIZEN COMPLAINTS

Applications for warrants on citizen complaints are made directly to a Municipal Court judge, frequently in open court. This is unlike the practice in the District of Columbia, where applications are first processed through the U.S. Attorney's office, or Detroit, where police assigned to the prosecutor's office screen complaints. An estimated 18,000 applications for warrants were made in Municipal Court in 1965.[11] No figures are available on the number of warrants issued, but some observers stated that they are issued freely. It appears that many of these cases are disposed of by the complainant dropping the charges, by a dismissal of the charges after a lecture from the judge, and occasionally by the imposition of fine. A less official disposition is the informal hearing conducted by Municipal Court judges,[12] which appears to be much like the U.S. Attorney's "afternoon hearing" in the District of Columbia.

In one case observed a judge would not allow a complainant to withdraw her complaint. The judge said that he did not like the court to be used to frighten another person. Notwithstanding the complaining witness' denial of the statements in her affidavit at the trial, he convicted the defendant and fined him $50.

[11] Some of these may have been police warrants; no breakdown of the statistics is available.

[12] In 1965 approximately 2,400 informal hearings were conducted by Municipal Court judges.

APPEALS FROM MUNICIPAL COURT

Defendants convicted in the Municipal Court have a right to appeal and receive trial de novo in the Criminal Court. In 1964, 926 appeals were disposed of in Criminal Court, with the following results:

Convictions	380	(41 percent)
Acquittals	176	(19 percent)
Probation before verdict	63	(7 percent)
Dismissed	283	(31 percent)
Not guilty confessed by State's Attorney	10	(1 percent)
Nolle prosequi	14	(1 percent)

According to the State's Attorney's office the high rate of acquittals and dismissals results largely from legal errors committed in the Municipal Court and from the inability of the prosecution to locate witnesses at the time of retrial. It is said that sentencing in Criminal Court is harsher than in Municipal Court, which may account in part for the fact that few defendants attempt to take advantage of the low conviction rate on appeal. Perhaps more important, however, is that most defendants probably do not know of their right to appeal. In no case observed did a judge advise a defendant of this right.

THE STATE'S ATTORNEY'S OFFICE

The regular staff of the State's Attorney's office consists of one elected State's Attorney, a deputy State's Attorney, and 25 appointed assistant State's Attorneys. The State's Attorney is a full-time officer; the assistants devote most of their time to the office but are permitted to practice privately as long as it does not interfere with their official duties. The State's Attorney's salary is $20,000 per year. Assistants' salaries begin at about $7,800, and the maximum is $10,000. None of the regular staff prosecutes cases in Municipal Court. They occasionally give advice by telephone to police officers, particularly on search and seizure questions, and they participate in preliminary hearings in homicide cases and sometimes in other important cases.

For the past two years in addition to the office's regular staff there have been special assistant State's Attorneys, who are assigned exclusively to the Municipal Court. These five part-time employees are paid $5,000 per year. Each special assistant covers two or three branches of the court, the number varying with the volume of business in those branches. The special assistants appear regularly at the morning sessions, but less frequently during the afternoon sessions. Their duty is to participate in those cases in which the police request their help, either in reviewing legal questions or in presenting evidence in court. It is not clear in what percentage of cases the special assistants participate, but many cases are conducted by the police officer alone. When the special assistant appears in a case, he rarely knows the details prior to his appearance. In the cases observed his participation appears to be limited, with the judge conducting a far more extensive inquiry.

PARTICIPATION IN THE SCREENING OF CASES

The State's Attorney's office does not screen cases at the Municipal Court level, although a special assistant, when called upon, may advise an officer that a case is legally insufficient. There are no discussions with defense counsel concerning pleas, and no attempt is made to reduce charges brought by the police in order to facilitate guilty pleas. Neither does the special assistant participate in any screening of cases done by the court, but occasionally he may suggest to or agree with the judges that a particular case is weak.

The only screening by the office occurs after the case reaches Criminal Court, and even this is done on a limited basis. Several members of the State's Attorney's office emphasized that there was no tradition of screening by plea bargaining in the city, and that the public, and especially the press, would react harshly to such practices.

The striking difference in the prosecutor's involvement in the process, more than any other factor, accounts for the differences between the Municipal Court in Baltimore and the Court of General Sessions in Washington. When asked about this, most respondents, including prosecutors and police officials, strongly favored a larger role for the State's Attorney's office. The police feel the need for more legal advice at the charging stage, for more protection for the officer in court, and for better presentation of cases. A member of the State's Attorney's office indicated that the office would like to screen out many of the trivial cases which now pass into Criminal Court and to avoid the prosecution of weak or defective cases. Some defense counsel said that they would favor the increased opportunity for plea bargaining.

THE DEFENSE BAR

There appears to be no regular retinue of defense attorneys in the Municipal Court such as is found in the District of Columbia Court of General Sessions. A few attorneys appear with some regularity, but almost entirely at preliminary hearings. The reason for absence of counsel seems clear: Unlike the Criminal Court there is no compensation provided for appointed counsel in the Municipal Court. The small criminal bar, estimated as about 6 attorneys who control 90 percent of the retained business and another 25 who receive most assignments, concentrates its efforts in Criminal Court. We were told that attorneys sometimes offer their services without pay at the preliminary hearing in order to have an edge in obtaining an assignment of the case in Criminal Court. This in turn may explain why defense counsel rarely appear to seek a dismissal of the charges at the preliminary hearing.

Most judges are said to be reluctant to assign counsel because no compensation is available. There is a standing rule of the court that counsel will not be assigned if the defendant has made bail, regardless of his present financial condition. We were told that it is not uncommon for the judge to advise the defendant that a demand for counsel will result in further delay of the case, which otherwise would be disposed of at once. A similar suggestion is made to defendants who demand jury trials rather than trials to the court.

Generally, then, the defendant is unrepresented, although there is some disagreement on this point. One judge said that defendants are represented in "most serious cases" in the Municipal Court. Another stated that there is no representation in 90 percent of all cases, and counsel appears in at most 30 percent of the serious ones.

When counsel is assigned, however, there appears to be little difference in the proceedings. Cross-examination is scant and often of low quality. Inadmissible evidence is presented by the state without objection. Statements by the defendant are read into evidence in most cases, and little or no attempt is made to challenge their admissibility.

It appears, however, that represented defendants may fare better than unrepresented ones when sentence is imposed. There were several instances observed in which probation without verdict or suspended sentences were imposed upon defendants with attorneys, when in similar cases unrepresented defendants were fined or imprisoned. One defense attorney said, after defending a man for setting off a false fire alarm, that his presence saved the defendant from at least a three-, or even a six-month sentence. The man received 25 days in jail and a $50 fine. The attorney said that the judge had been lenient out of courtesy to him.

There is no public defender in Baltimore. Recently a proposal for an organized assigned counsel system for defendants facing sentences of over six months and/or $500 fines was rejected.

THE CRIMINAL COURT

To understand more fully the Municipal Court in Baltimore, it is necessary to describe briefly the Criminal Court, in which all the more serious offenses are prosecuted. The Criminal Court is composed normally of five parts, in which trial priority is given to the following types of cases:

Part I.—Narcotics, liquor, lottery, and special or very serious cases. Defendants 17 years old or over are tried here for these offenses.

Part II.—Sex cases, including abortions, and all appeals from Municipal Court.

Part III.—Youth court, ages 16 to 21, except Part I cases.

Part IV.—Overflow from youth court and, two days each week, the domestic docket.

Part V.—Catchall, including motions.

PROCEDURE

Cases come to the Criminal Court from two main sources: indictments by the grand jury[13] and appeals from Municipal Court. According to statistics kept by the State's Attorney's office, the Criminal Court disposes of about 6,500 cases each year.

[13] Or after waiver of indictment.

The normal route for a case is from the preliminary hearing in Municipal Court, through the grand jury, and then to trial. The prosecutor plays a limited role with respect to the grand jury and appears to exercise little control over its action. The grand jury indicts in almost every case presented to it and was described by one prosecutor as a rubber stamp for the police. According to statistics kept by the police department, the grand jury returned an indictment in all but 96 of 6,251 cases in 1964. The result is that many cases which would have been either dropped or handled in a lower court in other systems reach the Criminal Court.

Even after indictment there is little formal plea bargaining. The bargaining that occurs is generally in the form of an agreement to submit the case on an agreed statement of facts; the defendant may then plead guilty to some of the charges contained in the indictment without objection from the prosecutor, or he may submit to the court only certain issues concerning the events in question. This kind of negotiation is made possible by the access that the defense attorney is given to the prosecutor's official files in the case. Bargaining of a sort takes place through the State's Attorney's power to assign cases to a particular part for trial when the case is not within one of the enumerated categories or when assignment according to the jurisdictional division of the court is impossible because of an overload in one or more of the parts. The office can then steer cases before the most amenable judge. Since each part quickly fills up with its priority cases, there is considerable opportunity for maneuvering.

Indictments are usually followed by trials, most of which are completed in less than a few hours. Of 6,990 defendants prosecuted in 1964, only 758, or 17 percent, pleaded guilty. There were 5,514 court trials, almost 80 percent of all dispositions, and only 43, or less than 1 percent, of the trials were jury trials.

Historical precedent has been given as the reason for the great number of dispositions by trial. The newspapers, it was stressed, would raise havoc if cases were disposed of without trial. Another possible explanation is that defense attorneys use the trial as justification for their fees in assigned cases (averaging about $70 per case in 1964).

The extremely small number of jury trials is also explained partly on historical grounds. In the past juries were usually white, and many Negro defendants were reluctant to have their cases tried by white juries. Moreover, in Maryland the jury determines law as well as fact; thus appeal on any technical legal claim is essentially barred if a jury trial is held. Finally, it has been suggested that defense counsel, dependent upon the judges for appointments, are not anxious to tie up the court with extended trials. And the fact that these lawyers rely on a volume business creates a tendency to move new cases as quickly as possible.[14]

In recent years several changes are said to have occurred in Criminal Court. Today the prosecutor, the defense bar, and the court make pronounced efforts to create a record showing that a defendant was advised of all his rights at the time he waived jury trial, entered a plea, or stood for sentencing. All this sharply contrasts with practice in the Municipal Court, where no record is made and the defendant frequently is not advised of all his rights.

CALENDAR MANAGEMENT

Apart from the frequent delay of one or two days before charges against arrested defendants are brought to the Municipal Court, the courts appear to handle their business quickly. Binding over in Municipal Court is generally followed by presentation within a day or two to the grand jury, which usually acts within about a week. All cases in which indictments are returned or in which there have been waivers are then assigned to the appropriate part of the court, as described above. They remain there for all purposes (except for certain motions heard in part V), although a judge momentarily free in one part may handle the overflow from another part. Generally cases are tried within a month. The time between arrest and disposition is said to average about six weeks, a comparatively short time for the disposition of felony cases, especially since most dispositions follow an abbreviated form of trial instead of a guilty plea.

Perhaps the most significant factor contributing to these speedy dispositions is the absence of jury trials. In 1964 about 5,500 trials were held, an average of between 3 and 4 trials per judge per court day. If cases were tried to juries, such a rapid rate of disposition would not be possible.

Another factor is that in many cases agreed statements of fact or stipulations as to certain facts obviate the taking of most or all testimony. Even in such cases the judge makes a careful effort to ascertain from the defendant and the complaining witness that the statement of facts is accurate, and that the defendant knows what he is doing when he admits complicity. The total time taken to explain the defendant's rights appears, in many instances, at least to equal the time taken to try simple criminal cases.

A third factor apparently responsible for the rapid rate of dispositions is that the court does not tolerate delay. Judge-shopping is reduced, although as mentioned not eliminated, by the division of the court into parts dealing with specific offenses; once a nonpriority case is assigned to a judge, it is apparently not possible to maneuver it to another part. The judges also demand that attorneys justify requests for continuances, a requirement not always made in other courts.

CONCLUSIONS

MUNICIPAL COURT

Baltimore's Municipal Court does not appear to have a volume problem in the same sense as other courts. It disposes of twice as many comparable cases as the District of Columbia Court of General Sessions; there are, however, three times as many judges available in Municipal Court.

[14] Prosecutors indicate that there is a trend toward more jury trials. Figures for December 1965 indicate that jury trials were up to 2 percent from the average of less than 1 percent during 1964, but this rate is still substantially lower than that in comparable courts in most jurisdictions.

Moreover, the Municipal Court has no jury calendar, which is the real bottleneck in General Sessions Court. But cases which reach trial in Municipal Court are not treated more carefully than those in General Sessions.

The most likely reason is the presence of defense counsel and a prosecutor in cases in General Sessions, as compared with the infrequent appearance of either in Municipal Court. In addition, the absence of jury trials prosecutors, and defense attorneys in Municipal Court lessens the dependence of that court on the guilty plea as a method of disposing of cases. At present the difference between the two courts in terms of the quality of justice does not seem pronounced: The General Sessions Court, with more of the features of a due process model, is so overwhelmed by its volume problem that their benefit is largely lost. The Municipal Court, with fewer of these features, can take somewhat more time to scrutinize cases, however informally.

In terms of court organization the contrast is almost complete between the two systems. The centralized court in the District of Columbia has advantages in terms of optimum use of judicial manpower and prosecutors, with the added benefit of much easier administrative control by the latter. The Baltimore system, however, may serve the public better in terms of convenience for defendants and witnesses, especially the large number of police officers who must attend trials.

Baltimore's system is dominated by the police and the judges, while the District of Columbia system depends heavily on the prosecutor. The police do not appear to have sufficient legal background to make prosecutive decisions, and the result in Baltimore is unnecessary litigation, poorly prosecuted cases, and treatment of minor cases as major ones. Without a massive infusion of judicial resources, it would appear that the court's ability to screen cases must be limited. It would seem, therefore, that a prerequisite to any properly run lower court would be to have an adequately paid, full-time staff of prosecutors.

The Baltimore practice of all complainants applying to court for warrants appears to waste judicial manpower. These cases might better be initially screened by the prosecutor's office.

THE CRIMINAL COURT

Our examination of the Criminal Court was too brief to permit formulation of many conclusions. Features warranting notice are the large number of trials, in part made possible by the virtual elimination of the jury trial, and the absence of large numbers of guilty pleas. It appears that a trial in Criminal Court parallels the administrative process typically used throughout the country to dispose of criminal cases. In Baltimore, however, it is the judge who is the dominant figure, while the prosecutor's administrative function is less fully developed. The prosecutor plays a negligible role early in the charging process. He engages in no direct bargaining for a guilty plea. He does not appear to control the grand jury, as is commonly the case elsewhere. But he does fashion the charges against the defendant by selecting which form of indictment will be presented. These indictment forms contain a range of charges which may be used to dispose of the case. After indictment, the prosecutor makes his files on the case available to defense counsel and will negotiate with him to agree on a set of facts on the basis of which the judge is led to select a particular offense for conviction. What seems to occur in cases of this kind is a judicial review, conducted with considerably more care than is frequently observed in the acceptance of a guilty plea, of the facts of the case, and of the state of mind of the defendant in agreeing to those facts. It must be stressed that this appears to be only one of the methods of disposition in Criminal Court. However, it is an interesting alternative to the typical administrative model for the disposition of criminal cases and warrants further study.

NOTE: Field research for this paper was conducted by Harry I. Subin of the Office of Criminal Justice and several members of the Commission staff. A fuller discussion of the practices in the District of Columbia Court of General Sessions referred to in this paper may be found in SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT (1966).

ADMINISTRATION OF JUSTICE IN THE RECORDER'S COURT OF DETROIT

PHYSICAL FACILITIES, JURISDICTION, AND ORGANIZATION OF THE COURT

The Recorder's Court and its associated agencies are the sole occupants of a six-story, turn-of-the-century building on the fringes of the downtown commercial district of Detroit. This building shares an entire block with the police department headquarters, a much larger building in which the Prosecuting Attorney's office is located. Adjacent to the police department, but across a narrow street, is the Wayne County Jail, in which are detained approximately one-third of the defendants of the Recorder's Court. An underground tunnel for the conveyance of prisoners between the court and the jail forms the hypotenuse of a rough triangle of buildings for the disposition of the city's criminal business.

The Recorder's Court has jurisdiction over all criminal cases arising within the city limits [1] and over all condemnation cases in the city.[2] The Recorder's Court constitutes an integrated criminal court system; all of the judges are competent, by statute, to conduct any stage in the process of any criminal case.[3] For internal administration, however, the judges have divided their duties along functional lines which are similar to the jurisdictional division of authority found in two-court systems.

At the time of the study there were 10 judges in the Recorder's Court; 3 additional judges will be added to the court at the general election in November 1966. Each month three judges are assigned by rotation to specialized functions. One judge presides over the "early sessions" branch, [4] which tries all misdemeanor offenses punishable by a maximum of 90 days imprisonment (in a county house of correction) or $100 fine. A second judge, the examining magistrate, conducts all preliminary examinations and arraignments on warrants [5] in felony and high misdemeanor [6] cases. A third judge sits as presiding judge. He conducts arraignments on informations, accepts pleas of guilty, assigns cases for trial, appoints counsel for indigent defendants, and hears a variety of motions, the most numerous of which are

[1] Criminal cases arising in the out-city area of Wayne County are processed through suburban magistrates' courts and the Circuit Court, the court of general jurisdiction in the county.

[2] Under the new constitution a judge must preside over all proceedings in such cases; in 1964, 23 condemnation cases were heard, requiring 188 judge-days.

[3] The only major division of the business of the Recorder's Court has been the creation of a Traffic and Ordinance Division, staffed by two judges and nine referees, which disposes of almost all of the traffic offenses in the city. The Traffic and Ordinance Division occupies a separate building.

[4] "Early sessions" is the popular name for the Misdemeanor Division of the Recorder's Court.

[5] The "warrant" is an arrest warrant, but in most cases it is used when the defendant is already in custody. The purpose of the warrant is to have a record of the charge recommended by the prosecutor so that the examining magistrate can inform the defendant and the parties can prepare for the preliminary examination.

[6] High misdemeanors are offenses punishable by jail sentences in excess of 90 days or fines in excess of $100, but not by imprisonment in the State penitentiary.

petitions for habeas corpus. The remaining judges are available to conduct trials in felony and high misdemeanor cases. [7]

A DESCRIPTION OF CRIMINAL PROCEDURE IN THE RECORDER'S COURT

The police made approximately 46,800 arrests for nontraffic, local offenses in 1965. Of these arrests 2,386 were "golden rule" drunk arrests, in which the police released the offenders after they became sober without charging them in court. No prosecution resulted against 16,627 suspects (35 percent), and prosecution was instituted in approximately 27,800 cases (60 percent).

Table 1.—Arrests—Detroit Police Department

	1965	1964
Total arrests	73,984	83,135
Arrests for other authorities	2,104	2,051
"Golden rule" drunks	2,386	2,532
Detention		8,140
Traffic offenses	25,073	20,010
Arrests not resulting in prosecution	16,627	25,374
Arrests resulting in prosecution	27,794	24,627

SOURCE: Detroit Police Department.

After arrest the arresting officer reports to his precinct lieutenant or bureau chief, who reviews the case for sufficiency of evidence. If the evidence is insufficient, the charges may be dropped or further investigation may be conducted. When the evidence is deemed sufficient, the officer or detective in charge of the case takes a statement of facts to the prosecutor's office, where an assistant prosecutor again reviews the sufficiency of the evidence. If the assistant decides to prosecute, he recommends the issuance of a warrant on a specific charge or charges. In drunk and disorderly cases the police may obtain a warrant without first obtaining the recommendation of the prosecutor.

Having obtained the prosecutor's recommendation, the officer goes to the warrant clerk of the Recorder's Court, who types a complaint and a warrant. The officer or the complaining witness [8] then finds a court clerk to swear him on the complaint and a judge to sign (issue) the warrant and the complaint.

The warrant is usually signed by a judge on the day on which the defendant is first to appear in court. In cases within the jurisdiction of the early sessions branch the great majority of cases will be adjudicated at the defendant's first appearance. If a defendant desires a trial, he may be tried immediately or may request a continuance to retain counsel, in which case bail is set, and the trial is postponed for about a week. Counsel are not appointed to defend indigent misdemeanor defendants. An early sessions defendant has a right to a jury trial, but it is infrequently demanded.

If the defendant is charged with a felony, he is first brought before the examining magistrate for arraignment on the warrant. The judge informs the defendant of the charge against him, determines whether he desires a preliminary examination and whether he has counsel or desires appointment of counsel, and sets bail for his return. If the defendant requests a preliminary examination, a date is set for the examination, usually in about 10 days or 2 weeks. The preliminary examination is conducted before the examining magistrate, and if probable cause is found, the case is returned to the prosecutor's office for the drafting of an information. Preliminary examinations were waived by two-thirds of all defendants in 1965; there were 1,988 preliminary examinations, in which 1,606 defendants were bound over for trial, and 382, or about 20 percent, were dismissed.

There is no indicting grand jury in Michigan; the information is prepared on the basis of the evidence at the preliminary examination or of the charge in the complaint if examination is waived.

The drafting of the information generally takes about 10 days from the time the case is referred back to the prosecutor's office; after it is prepared, the defendant is brought before the presiding judge for arraignment on the information. At this time a plea of guilty may be accepted if counsel is present. A date is set for trial, generally in about three weeks depending upon whether a jury is demanded, and bail is continued. On the date set for trial the case is assigned by the presiding judge to one of the trial judges.

The probation department prepares a presentence report on every felony conviction. The presentence report is usually returned at the end of two weeks, and the defendant is sentenced by the judge who tried the case or accepted the plea.

THE BUSINESS OF THE RECORDER'S COURT—1965 [9]

Felony Dispositions: There were 6,307 felony warrants issued in 1965, and 5,253 cases were processed through final disposition (including sentencing). Convictions were obtained in 73 percent (3,828) of the cases; 3,235 defendants, or almost 85 percent of those convicted, pleaded guilty, 403 (10 percent) were convicted by a judge, and 190 (5 percent) were convicted by a jury. Of the 1,430 defendants who were not convicted, 8 percent were acquitted at trial.

Early Sessions Dispositions: There were 21,111 misdemeanor warrants issued in 1965, and 20,193 cases were processed through final disposition. Convictions were obtained in 88 percent (17,681) of the cases; 12,066 defendants, or 68 percent of those convicted, pleaded guilty, and 5,615 were convicted at trial. Of the 2,512 defendants who were not convicted, 1,467 were found not guilty at trial, and the charges were dismissed in 1,045 cases, or 42 percent of the nonconvictions.

[7] Because the procedure is identical for both felony and high misdemeanor cases, the term "felony," where used in this paper, refers to all cases not disposed of in the early sessions branch.

[8] In almost all cases, apparently, a policeman may sign a complaint on the basis of information furnished by a private citizen.

[9] The statistics in this section are derived from published and unpublished data of the Detroit Police Department and of the clerk of the Recorder's Court.

For purposes of interpreting these data a "case" is begun with the issuance of a warrant; "misdemeanor" refers to cases within the jurisdiction of the early sessions branch; and "felony" refers to all cases not within the jurisdiction of early sessions.

Table 2.—Warrants, Method of Disposition of Cases, Examinations, and Miscellaneous Matters—1965

	Total warrants	Total dispositions	Total trials	Total jury trials	Total jury days	Total nonjury trials	Total without trial	Total waived examinations	Total examinations held	Total habeas corpus	Total search warrants	Total miscellaneous
Felonies:												
Warrants issued	6,307											
Dispositions (total)		5,258										
With trial			708									
Jury				299								
Jury days					743							
Nonjury						409						
Without trial							4,550					
Examinations:												
Waived examination								3,876				
Examinations held									1,988			
Bound over									(1,606)			
Dismissed									(382)			
Misdemeanors:												
Warrants issued	21,111											
Dispositions (total)		20,193										
With trial			7,082									
Jury				30								
Jury days					54							
Nonjury						7,052						
Without trial							13,111					
Miscellaneous:												
Writs of habeas corpus										3,846		
Search warrants											125	
Fugitive warrants												(49)
Waivers of extradition												(56)
Other												(19)
Total miscellaneous												4,095
Total 1965	27,418	25,451	7,790	329	797	7,461	17,661	3,876	1,988	3,846	125	4,095
Total 1964	25,706	25,539	[3] 863	375	877	[3] 539	[3] 5,038	3,982	1,581	4,211	41	4,353
									[1] (1,258)			
									[2] (323)			
Total 1963	26,612	26,632	[3] 1,111	435	999	na	[3] 5,536	3,941	1,706	3,938	66	4,094
									[1] (1,372)			
									[2] (334)			

[1] Bound over.
[2] Dismissed.
[3] Felony only.

Cases Remaining: At the beginning of 1965 there were approximately 1,600 felony and 500 misdemeanor cases awaiting final disposition. Of the felony carryovers approximately 1,100 were actively being processed toward adjudication on the merits; the remainder were awaiting sentence or were in a state of suspension because of sanity hearings or the inability of the police to apprehend the defendant.[10] The Recorder's Court closed the year 1965 with a backlog of 1,937 active felony cases, an increase of approximately 800 cases from the year end 1964 figures. An additional 190 defendants were awaiting sentence or sanity hearings, and no figures are available on the number of unserved warrants. The backlog on the misdemeanor docket increased by almost 1,000 cases, but there are no data available with respect to the stage of disposition of these cases.

Table 3.—Input-Outflow Statement—Felony Division

	1965	1964	1963
Input:			
Cases awaiting disposition, prior year	1,568	1,557	
Warrants issued	6,307	5,912	6,081
Total	7,875	7,469	
Dispositions	5,258	5,901	6,647
Remaining at year end—pending cases:			
Scheduled for trial	1,222	717	574
Pending examination	139	102	146
prosecutor's office	96	17	73
Ready for prosecutor's office	54	39	36
Awaiting justice returns	88	75	11
Awaiting transcripts	134	82	48
Awaiting arraignment on information	204	145	125
Total pending cases	1,937	1,177	1,013
Awaiting sentence	146	123	184
Awaiting sanity hearings and motions	45	31	50
Warrants issued but not served		214	235
Capias orders issued but not served		59	75
Total cases awaiting disposition	2,128	1,604	1,557
Less . . . to balance		(36)	
Total		1,568	

SOURCE: Detroit Recorder's Court.

AN EXAMINATION OF THE RECORDER'S COURT PROCESS

A. THE SCREENING OF CASES

1. *Initial Screening Prior to Prosecution*

a. By Police.[11] With the exception of drunk and disorderly arrests, all arrests by the police are subject to two screening processes prior to formal institution of charge. The first evaluation of the case is made by a precinct lieutenant or bureau chief. According to the police commissioner the only inquiry at this time is with respect to the sufficiency of the evidence; the department's policy appears to be that the decision of whether or not to pros-

[10] This category includes cases in which the defendant failed to appear for trial or other proceedings and cases in which the defendant was not in custody when the warrant was issued.

[11] With the exception of the citizen complaint bureaus in the prosecutor's office (described below), we have no knowledge of the method of screening of complaints not resulting in the immediate arrest of a suspect.

ecute is not within the competence of the police. Thus with the exception of drunk arrests and certain domestic or neighborhood flareups, the police say that they exercise no discretion at the stationhouse level with respect to leniency toward first offenders or referral of cases to other agencies.[12]

Table 4.—Number of Offenses, Prosecutions, and Dispositions for Certain Offenses—1965

Offense	Number of offenses	Cleared by arrest	Prosecutions	Convicted [1]	Not convicted [1]	Pending Dec. 31, 1965
Murder and nonnegligent manslaughter	148	130	128	37	12	79
Negligent manslaughter	33	33	25	5	0	20
Rape	648	318	188	70	35	83
Robbery	5,498	1,413	711	274	103	334
Assaults (total)	6,410	4,914	2,045	1,225	410	410
(Felonious)	(3,728)	(2,937)				
(Simple)	(2,682)	(1,977)				
Breaking/entering	18,460	3,120	799	381	115	303
Larceny-theft (total)	32,499	6,132	2,301	1,762	271	268
(Over $50)	(7,416)	(968)				
(Under $50)	(25,083)	(5,164)				
Forgery/counterfeiting	(1,400)	867	173	94	24	55
Embezzlement and fraud	2,817	1,737	654	414	146	94
Sex offenses (except rape, prostitution, and commercial vice)	1,671	1,000	159	71	19	69

[1] 1965 cases only; does not include dispositions of cases begun in 1964.

SOURCE: Detroit Police Department.

The 1957 American Bar Foundation study of the Recorder's Court suggested that the police attempt to shape their arrest practices for misdemeanor offenses to suit the disposition of the judge sitting in the early sessions branch. Thus where a judge had a reputation for being hostile to accosting and soliciting cases, for example, it was reported that the police would reduce the number of arrests for that offense during the month that this judge was presiding in early sessions. We were unable to verify the existence of this practice.

Citizen Complaints and Domestic Violence. The police department maintains two details in the prosecutor's office. The misdemeanor detail deals with assault and battery, simple assault, malicious destruction of property, and other minor crimes of violence. When a precinct lieutenant feels that a family or neighborhood fracas is not serious enough to require immediate prosecution, he refers the case to the misdemeanor detail and generally releases any arrested suspects on stationhouse bond. The complainant is then told to report to police headquarters where one of the three plainclothes officers interviews him (generally her) to obtain more facts than are in the police writeup. The misdemeanor detail also investigates all complaints of persons who bring cases directly to them without prior police action. In certain cases the complainant may be asked to return with medical proof of injury before further action is taken.

If the officer decides that the offense is not serious, he will recommend dropping the complaint and may send a letter of warning to the offender. If he decides that further inquiry is warranted, he will request the offender to appear[13] and will hear his side of the story in the presence of the complainant. The parties are then brought before an assistant prosecutor permanently assigned to the detail. Because this prosecutor is blind, the officer must recite the facts of the case to him. The prosecutor decides whether a warrant should be recommended, or if no prosecution is to be brought, whether the offender should be required to sign a peace bond. In 1965 the misdemeanor detail investigated 6,901 complaints, resulting in 595 prosecutions and 456 convictions. A total of 3,418 persons was placed on peace bonds.

The criminal fraud division investigates offenses such as embezzlement, larceny by conversion, and false pretenses. Its work is more investigatory than adjudicatory, and it deals with fewer offenders who have been arrested than does the misdemeanor detail. The officers assigned to this division attempt to use the threat of prosecution to induce restitution, which is the primary concern of the complainants in most of the cases. In 1965 this division investigated 990 complaints, resulting in 116 prosecutions; 31 persons were convicted and 62 cases are still pending.

b. By Prosecutor. Cases sent by the police department to the prosecutor's office are initially reviewed by one of several young assistants assigned to perform that function. The Chief Assistant Prosecuting Attorney said that the assistant interrogates the police officer and perhaps the complaining witness about the case; the assistant's primary inquiry concerns the sufficiency of the evidence. He also has some discretion to dispose of cases without prosecution by referral to other agencies, but the discretion apparently is rarely exercised.[14] The assistant's decision whether or not to recommend a warrant is reviewed by a senior assistant.

In the few instances in which an arrested suspect has counsel, the lawyer may become involved in the decision to charge, but counsel rarely takes part in the process at this stage. The assistant's only sources of information, therefore, are the police officer, the suspect's prior record, and perhaps a complaining witness.

It is impossible to determine how many of the 16,627 police arrests not resulting in prosecution were dismissed by internal police screening and how many were refused by the prosecutor. However, from the statements of the police commissioner and the influence of the police in later stages of the process, it may be inferred that the police officer's desire to prosecute is generally accepted by the prosecutor.[15]

c. By Judge. The complaint and warrant, by their terms, require the judge to examine the complainant prior to the issuance of the warrant. We were informed that in practice, however, an examination rarely takes place; the judges hurriedly sign warrants before they go on the bench or during pauses in the proceedings. The complaint and warrant forms are phrased in statutory language, and a policeman may swear out a complaint on information and belief. When a complainant does come to the courthouse to sign a complaint, he is rarely brought before the judge who signs the warrant. The only variation on this procedure is that some judges require the person signing the complaint to come to his courtroom to be sworn by his clerk; other judges issue a warrant on any complaint put before them.

2. Screening After Prosecutor's Decision To Charge—Felony Cases

a. Arraignment on the Warrant. The arraignment on the warrant is conducted by the examining magistrate, usually in the afternoon after the preliminary examinations have been concluded.[16] Very few defendants have counsel at this stage; there is a prosecutor in the courtroom, but he knows nothing about the cases, and the arresting officer is not present. Thus there is no opportunity for the accused to test the legality of his detention even if he wanted to, and the judge can exercise no supervision over the police because the papers on which the defendant is arraigned contain no facts about the alleged offense.

We witnessed about 15 arraignments over a two-day period. The defendants to be arraigned were lined up in the courtroom and brought before the bench as the judge's clerk, his daughter,[17] called their names and the charge. The judge's initial question was, "Do you want an examination?" Many of the defendants said that they were not guilty, and the judge repeated his question in a louder voice. If the defendant still did not answer the question, the judge set the case down for an examination. Occasionally he would attempt to explain the nature of an examination in terms of a "prima facie" case, while remarking that it would "take more time."

The judge's next question was, "Do you have a lawyer?" Most of the defendants said that they had no money for a lawyer. The judge's typical response to this answer was: "I didn't ask you whether you had any money; I asked you whether you had a lawyer. You can't go to trial without a lawyer. Now are you going to get one?" Several of the defendants who had said that they had no money then said that they would get lawyers. The defendants who continued to maintain that they had no money were then told, "Well, sign this paper and you will get a lawyer." The judge's last act was to set bail. None of the arraignments which we observed took more than two minutes per case. This particular judge did not inform defendants that they had a right to remain silent when questioned about the offense. We were informed, however, that most judges on the court are careful to advise defendants of their constitutional rights.

The prosecutor assigned to the examining magistrate's courtroom appears to have a very minor role in the bail decision. The police department has recently assigned a detective to serve permanently as arraigning officer to relieve the investigating officers in each case from the duty of appearing at the arraignment.[18] The department estimates that this change will save from 100 to 300 manhours and about $1,200 each week. The arraigning officer has prepared for each defendant a brief summary of the defendant's family connections and community background to assist the judge in setting bail.[19] In the arraignments which we observed, however, the arraigning officer did not give this information to the judge; instead he only informed the judge of any prior arrests or convictions which were on the defendants' records.

b. The Preliminary Examination. The preliminary examination is the only formal screening device in the Recorder's Court. It is also a potentially more valuable discovery mechanism than is available in jurisdictions where the examination can be avoided by grand jury action.

Despite the opportunity for obtaining discovery or perhaps dismissal of the case, defense counsel waived the preliminary examination in two-thirds of all cases in 1965. Many of the lawyers with whom we spoke said that the examination was an ineffective procedure for weeding out unsupportable charges and for obtaining discovery because the prosecution only had to prove probable cause, which the judges routinely found. However, the court statistics show that about 20 percent of all examinations result in dismissal.[20] And from our observations it appeared that the examinations were fairly comprehensive and that the defense attorneys gained valuable information for later use at trial or for their negotiations with the prosecutor.

The high waiver rate may suggest that adequate informal discovery devices are available to the defense[21] and that preexamination screening by the prosecutor's office eliminates most weak cases. On the other hand, it may suggest that since most lawyers anticipate eventually pleading their clients guilty, they may not feel that expending their time on an examination is of great advantage.

B. THE DISPOSITION OF CASES

1. Early Sessions Cases[22]

Early sessions defendants are generally brought to court on the day following their arrest. Most of the defendants are tried at this time, although a defendant may be granted a continuance to obtain counsel.

The volume of business in the early sessions branch is staggering. The single judge sitting in that branch disposed of more than 20,000 cases during 304 judge-days in 1965. Almost 60 percent of the early sessions defendants pleaded guilty; approximately 35 percent of the dispositions required a trial,[23] but only a few defendants requested jury trials.[24] The defendants who demanded trials were not, on the whole, very successful: About 80 percent of them were convicted.

On the basis of these statistics the judge sitting in early sessions heard an average of 66 cases a day, 22 of which required a trial. If the judge spent five hours on the bench each day, which is a high estimate, he would have had to dispose of 13 cases, including 4 by trial, during each hour.

[12] This disclaimer perhaps should be viewed with some skepticism, unless it can be accepted that 35 percent of the arrests made did not have sufficient evidentiary bases upon which convictions could be maintained (see table 1). The police undoubtedly exercise some discretion other than with regard to the sufficiency of the evidence, but we were unable to determine the extent of the discretion or the standards applied.

The data on police arrests and prosecutions in table 4 provide a rough estimate of the effect of police and prosecutor screening in certain types of offenses.

[13] The letter which the police send is similar to the one used in the District of Columbia. See SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 54 (1966). It notifies the recipient that a hearing will be held on a complaint against him and that prosecution may result if he does not appear.

[14] When the prosecutor's office refuses to recommend a warrant, one of the following alternatives is possible: (1) the case may simply be dropped; (2) the case may be referred to one of the police complaint details described above; (3) the case may be referred to juvenile court; (4) prosecution may be deferred indefinitely (a kind of pretrial probation); (5) the case may be set for mental competency hearing, especially under the sexual psychopath law; (6) in nonsupport cases, the case may be referred to the adjustment division of the probation department, which, as will be described, handles most of this work.

[15] If the assistant declines to recommend a warrant, the police may appeal the decision to his superiors or take the complaint directly to a judge, an alternative very rarely employed.

[16] The arraignment on the warrant and all subsequent in-court proceedings are recorded. The Recorder's Court has a staff of 11 court reporters.

[17] In another court the judge's clerk is his son; in a third court the judge is the clerk's son.

[18] The arraigning officer is used only in cases arising out of precinct arrests; the investigating officer appears in cases in which the arrest was made by one of the specialized bureaus.

[19] The form used is similar to the one designed by the Vera Institute.

[20] We do not know how many of these dismissals were granted on the motion of the prosecutor or with his acquiescence. The monthly dismissal rates suggest that certain judges at least screen the cases carefully. However, the preliminary examination would also seem to provide an opportunity for the prosecutor to eliminate weak cases which the office assistants may have accepted.

[21] The Chief Assistant Prosecuting Attorney indicated that the prosecutor's office is candid about revealing the nature of its cases to defense counsel, and the lawyers with whom we spoke said that the prosecutor's office did disclose some information.

[22] All proceedings in the early sessions branch are recorded.

[23] The remaining 5 percent of the dispositions were dismissals.

[24] There were only 30 jury trials in the early sessions branch in 1965.

Table 5.—Misdemeanor Dispositions

	1965	1964	1963
Total dispositions	20,193	19,638	19,985
With trial	7,082		
Without trial	13,111		
Not convicted:			
Not guilty	1,467	1,325	1,496
Dismissed	1,045	831	835
Total	2,512	2,156	2,331
Convicted:			
Plea	12,066		
Found guilty	5,615		
Total	17,681	17,482	17,654
Committed:			
Detroit House of Correction	2,769	3,006	3,323
Wayne County Jail	867	670	712
Total	3,636	3,676	4,035
Not committed:			
Fine	5,517	5,561	5,816
Suspended sentence	5,036	4,899	4,754
Probation	3,492	3,346	3,049
Total	14,045	13,806	13,619

SOURCE: Detroit Recorder's Court.

Under such pressure the judge cannot be expected to give very much attention to each case. And from our observations the speed with which some cases are decided may be much greater than the data suggest. The judge who was presiding in the early sessions branch during our visit disposed of about 50 or 60 cases between 9:15 and 12:30 in the morning. The drunk and disorderly cases, which averaged about 25 a day, were presented first, and all were completed within the first hour and one quarter.

Most of the defendants whom we observed pleaded guilty and were sentenced immediately,[25] without any opportunity for allocution. When they tried to say something in their own behalf, they were silenced by the judge and led off by the bailiff. A few defendants went to trial, but the great majority of them did so without counsel.[26] In these cases the judge made no effort to explain the proceedings to the defendants or to tell them of their right to cross-examine the prosecution's witnesses or of their right to remain silent. After the policeman delivered his testimony, the judge did not appear to make any evaluation of the sufficiency of the evidence but turned immediately to the defendant and asked, "What do you have to say for yourself?" When counsel appeared at a trial, the procedure was slightly more formal, but the judge conducted most of the questioning himself.

In 1965, 88 percent of the early sessions defendants were convicted. Sentencing practices in early sessions, however, do not appear to be severe. Only 21 percent of the 17,681 convicted defendants were imprisoned. Probation was ordered in 3,492 cases (19 percent); sentence was suspended in 5,036 cases (29 percent); and 5,517 defendants (31 percent) were sentenced to pay fines.[27]

a. The Decorum in Early Sessions. The Recorder's Court courtrooms are large and well lighted; the area between the bench and the bar is about 40 square feet, and there is seating capacity for about 120 spectators. But the proceedings in the early sessions branch make no attempt to retain the dignity that could be captured from the physical setting. The spectator's area is often overflowing, and many persons must stand along the side and back walls. The area before the bench is similarly crowded. Police witnesses, sometimes numbering as many as 35 or 40, crowd into the jury box and mingle about in a corner. Clerks, court reporters, and jail and probation personnel wander about, seemingly impervious to the proceedings, and the five or six court policemen do little to correct the disorganization.

At the beginning of each session there were a great many police officers present because the arresting officer must be present in all cases, even drunk offenses. All of the policemen were sworn in a group at the beginning of each session; some who were smoking in the room behind the bench poked their arms out into the courtroom at that time. Prisoners were brought up in groups of 25 from a detention room in the basement and placed in a dimly lighted cubicle outside the courtroom. When their cases were ready to be heard, they formed a line stretching from the side door of the courtroom to the front of the bench. Each prisoner was led forward as his name was called by a court policeman.

When a defendant decided to plead not guilty, all of the other prisoners had to stand during the trial. As each group was processed, another group was brought up to take its place. The cases were called in a regular order: first the drunks, vagrants, and beggars, then the prostitutes, then the gamblers and loiterers, and finally the petty larceny and simple assault cases. The principal value in the process appeared to be speed rather than deliberation; sentence followed conviction, and case followed case without pause. And the noise and confusion was so great that the judge often had to raise his voice to be heard by the prisoner.

2. Felony Cases

In 1965 a total of 1,886 judge-days was required to dispose of 5,258 felony cases. Only 13 percent (708 cases) of the felony dispositions were by trial; 299 cases (or 40 percent of the total number of trials) were jury trials, which consumed 743 days, or almost 40 percent of the total judge-days.

Convictions were obtained in 73 percent of the felony dispositions in 1965. The great majority of nonconvictions (92 percent) were accomplished without trial. Approximately 1,100 cases were dismissed on the motion of the prosecutor. Only 16 percent of the defendants who went to trial were acquitted.[28]

All felony defendants are represented by counsel, but it is impossible to determine the effectiveness of counsel in securing favorable dispositions for their clients. Approximately 85 percent of the nonconvictions in felony cases were obtained at the instance of the prosecutor, and it is possible that many of these cases were old cases which the prosecution was clearing off the books or meritless cases which had evaded the initial screening process.

[25] In a few cases in which the judge said that he thought that the defendant had an emotional problem, he ordered a presentence report from the probation department or an examination by the psychiatric clinic.

[26] There are no statistics available on the number of early sessions defendants who are represented by counsel, but we were informed that it is a very small percentage of the total.

[27] There are no data available on the number of persons imprisoned for default in the payment of fines.

[28] Sixty-two defendants were acquitted by a judge, or 15 percent of the defendants tried by the court; 53 defendants were acquitted by a jury, or 18 percent of the defendants tried by a jury.

Table 6.—Felony Dispositions

	1965	1964	1963
Total dispositions	5,258	5,901	6,647
With trial	708	863	1,111
Without trial	4,550	5,038	5,536
Not convicted:			
With trial:			
Acquitted by court	62	115	117
Acquitted by jury	53	58	88
Total	115	173	205
Without trial:			
Dismissed by court	201	200	180
Dismissed on motion of prosecutor	906	895	1,203
Nolle prosequi	201	164	171
Information quashed	7	11	30
Total	1,315	1,270	1,584
Total	1,430	1,443	1,789
Convicted:			
With trial:			
Guilty by court	403	492	619
Guilty by jury	190	198	287
Total	593	690	906
Plea	3,235	3,768	3,952
Total	3,828	4,458	4,858
Committed:			
Jackson	1,263	1,517	1,741
Detroit House of Correction	834	1,005	1,015
Wayne County Jail	40	56	31
Ionia State Hospital	43	52	79
Department of Mental Health	8	1	0
Total	2,188	2,631	2,866
Not committed:			
Fine	211	165	190
Suspended sentence	34	64	68
Probation	1,395	1,598	1,734
Total	1,640	1,827	1,992

SOURCE: Detroit Recorder's Court.

It is fair to say that the entire system depends upon the guilty plea, by which almost 85 percent of all convictions are obtained, and the judges, prosecutors, and defense counsel appear to shape their attitudes toward individual cases in anticipation of that result.

Very few defendants enter guilty pleas at their arraignment on the information. We were informed that counsel, although appointed prior to that time, rarely appear at the arraignment, and the judges will not accept a guilty plea when counsel is not present. Plea negotiations rarely begin until the case is called for trial, although in a few instances counsel may approach the trial assistant to whom the case has been assigned if the case presents any complications. When the case is called for trial by the presiding judge, the defense counsel asks the judge for a brief continuance to discuss the case with the prosecutor.

The prosecutor is a senior assistant permanently assigned to the presiding judge's court. He operates in the room behind the bench of whatever judge happens to be presiding. He is virtually the sole bargaining agent for the prosecutor's office, and the lawyers wait their turns for an audience with him.

We have no firsthand knowledge of the standards applied by this very powerful figure because we did not interview him, but observation of the process and other discussions revealed several facts. The prosecutor appears to rely heavily upon the advice of the police. On the day a case is to be called for trial, all of the policemen concerned with the case are in the courtroom; the lawyers were seen to go first to the police detective to discuss the case with him, and then both of them went to the prosecutor. When the police are willing to accept a reduced charge, the prosecutor generally agrees to the defense counsel's offer. Discussions with the prosecutor were very brief, perhaps because of the number of hearings which he must hold each day; there were few "hard luck" stories or pleas for leniency. If the police and the lawyer could not strike a bargain, the prosecutor agreed to an adjournment so that negotiations could be resumed at a later date.

The incentive for the prosecutor's office of a system of disposition by guilty plea is clear: There are not enough judges or prosecutors to try a substantial number of additional cases. The incentives for the police seem to be the desire to save the time necessary to attend a trial and the belief that the judge will not be overly lenient with the defendant because he has entered a plea. The incentive for the defendant is less clear. Most bargains result in a plea to one of several offenses charged or to an attempt to commit the crime charged.[29] The advantage to the defendant from such bargains often appears to be illusory.[30] The court is prohibited by statute from imposing consecutive sentences in multiple prosecutions, and although the maximum penalty, which the judge is required to impose, for attempt is one-half of that prescribed for the substantive crime, there is a strong belief that the judges will impose the same minimum irrespective of the label given the offense.[31] However, the great majority of defendants would probably be unaware of these factors, and the existence of apparent consideration for the plea may provide lawyers who are reluctant to undertake the burden of trying cases with persuasive arguments to encourage their clients to plead guilty.

Because of the way in which statistics are kept in the Recorder's Court, it is impossible to determine how many cases originally instituted as felonies were disposed of on misdemeanor charges; all dispositions in the felony division are recorded as felony dispositions. Of the 3,828 convicted felony defendants in 1965, only 2,188 (57 percent) were incarcerated. Probation was ordered in 1,395 cases, or 36 percent of the total convictions.

Table 7.—Felony Convictions and Sentences—1965

Sentence	Plea of guilty	Trial by court	Trial by jury	Total, each sentence
Jackson State Penitentiary	999	129	135	1,263
Probation	1,276	85	34	1,395
Fine	201	10	0	211
Suspended sentence	33	1	0	34
Detroit House of Correction	690	123	21	834
Wayne County Jail	36	4	0	40
Ionia State Hospital	0	43	0	43
Department of Mental Health	0	8	0	8
Total	3,235	403	190	3,828

SOURCE: Detroit Recorder's Court.

[29] The latter device has resulted in such crude formulations as "attempted possession of narcotics."

[30] In cases involving certain crimes the standard bargain does result in advantage to the accused; for example, armed robbery, which is punishable by imprisonment for life or for any number of years and which renders the defendant ineligible for probation, is generally reduced to unarmed robbery, which carries a 15-year maximum sentence and no probation disability, in return for the defendant's guilty plea.

[31] This belief was confirmed by one judge of the Recorder's Court, who said that the judges will sentence on the basis of the facts of the offense and the presentence report and that there is not much consideration given for the guilty plea.

a. Decorum in the Presiding Judge's Court. At the beginning of each session the presiding judge's courtroom was more crowded than the early sessions courtroom. There was a large number of police witnesses and lawyers awaiting the calling of their cases. The assignment clerk set up his office on a corner of the judge's bench and shared the center of attraction with the judge, whose main activity was reading off the names of the cases. As the cases were called, the assignment clerk notified the judge of cases in which the lawyers had already requested an adjournment and had not bothered to appear in person. When lawyers were present, they requested time to see the prosecutor, walked off in front of the bench with the police detectives to the hallway, returned and passed beside the bench to the bargaining room, and then reappeared to get the judge's attention to inform him of the result. The presiding judge went rapidly through the day's list to discharge the lawyers and witnesses who were not needed. When a case was ready for trial, the lawyer so informed the judge while negotiating with the assignment clerk for a favorable trial judge. After the list was completed, the judge began to accept guilty pleas; by this time the crowd had thinned out, but the din from the bargaining room could still be heard in the court.

C. PRETRIAL DETENTION AND DELAY

1. Early Sessions Defendants

Early sessions defendants are usually able to obtain a trial within 1 day after their arrest; thus pretrial detention does not present a serious problem. The few misdemeanor defendants who request continuances in order to obtain counsel may be required to post bond, but trial generally is held within a week, and we were informed that the judges do not impose high bonds. Since 1962 an interim bond procedure has been operated by the police to provide for the overnight or weekend release of defendants held on misdemeanor warrants. Cash bonds ranging from $25 to $100 may be posted at the precinct. More persons are released under this system than under bonds set in felony cases by the examining magistrate and the trial judge combined. In 1964, 4,737 interim bonds were written by the police.

2. Felony Defendants

It is not unusual for felony defendants to be detained for three days before their initial appearance. When a defendant is able to retain counsel shortly after his arrest, the lawyer frequently will seek to obtain the release of his client through a petition for a writ of habeas corpus.[32] The judges appear to treat these petitions quite lightly. When the police claim that they need more time to investigate the case, the judges often will deny the petition provided the defendant is arraigned within two or three days.[33]

Statistics indicate that of 5,955 defendants arraigned in 1965, surety bonds were set in 4,485, or 77 percent of the cases, and personal bonds in 1,365, or 23 percent of the cases. Of the defendants required to post surety bonds 2,919, or 66 percent, were able to do so. The remaining 34 percent were detained.[34]

With respect to the length of pretrial detention, the Recorder's Court data show that an average of about 40 percent of the felony defendants incarcerated prior to trial were detained 30 days or less; 27 percent were detained from 30 to 60 days, 15 percent from 60 to 90 days, and 18 percent over 90 days.[35]

If a preliminary examination is requested, it generally takes from six to seven weeks before a case is first called for trial; waiver of the examination may reduce this delay by two weeks. Unless a satisfactory bargain can be made with the prosecutor at the time of the initial trial date, the case will be continued for four to six weeks. There are no data with respect to the average time from arraignment to disposition, but the problem of delay is thought to be severe. On the days during which we observed the presiding judge's court, more than half of the cases were adjourned, many for the second time.

One judge said that he would grant a continuance in a case in which he knew that the lawyer needed more time to collect his fee. The pervasive practice of judge-shopping also aggravates the delay problem. Before signifying their readiness for trial, the lawyers will go to the assignment clerk to determine what judges are available. If none of the judges whom the lawyer feels will favor his client are available, he will request an adjournment; the next time the case is called, one of these judges may be free, or more conveniently, may be the presiding judge, and a plea will be entered immediately.

We are unable to determine whether there is any significant correlation between the length of time from arrest to disposition and the nature of the disposition made. From our brief tour through the county jail we feel that the likelihood of a long period of detention to obtain a trial would be a powerful incentive for a defendant to plead guilty. On the other hand, the lawyers could use adjournments to wear down the prosecution and its witnesses. However, neither the prosecutor nor the judge appeared to object when a request for a continuance was made. This may suggest that the delay prior to disposition influences the outcome of few cases.

In a system in which there is an adequate district attorney's staff and in which cases are disposed of by trials, it would be remarkable if the prosecution would be as willing to agree to continuances as they are in Detroit. However, where disposition by plea is the anticipated result in most cases after they have reached a certain stage, the prosecution would not be reluctant to acquiesce in defense counsel's requests for postponements.

D. REPRESENTATION

It is estimated that there are between 50 and 75 full-time criminal defense lawyers in Detroit; they monopolize almost the entire practice in the recorder's court. The range of competency among these lawyers appears to be comparable to that in other cities, with a small group of prosperous, well-respected lawyers at the top and about 15 "police court lawyers" (the Clinton Street Bar) at the bottom.

1. Early Sessions Cases

Defendants in the early sessions branch are rarely represented by counsel. Although the court has funds for the appointment of counsel in misdemeanor cases, the judges refuse to make such appointments "until the Supreme Court tells us we have to." Data on the effect the presence of counsel has on the method of disposition of cases and sentencing in the early sessions branch are not available.

2. Felony Cases

Counsel are appointed for all indigent felony defendants. In 1965 vouchers were issued for payment of appointed counsel in 2,312 cases. Appointed counsel may participate in more than half of the dispositions of active cases, according to the statistics clerk's estimate that a substantial percentage of the total dispositions involved old, uncontested cases where the defendant could not be found or was in custody in another jurisdiction.

Counsel are paid a minimum fee of $75, supplemented by further sums for attending preliminary examinations or trials. One judge told us that a few years ago the court instituted an effort to encourage the use of preliminary examinations by paying counsel an additional $25 for each examination attended. The major issue now confronting the court is whether to award this additional compensation if the lawyer is present but waives examination on the day set. Many judges now do so because they feel that the pay scale is inadequate. The average payment to assigned counsel was $107 per case in 1965.

There is no public defender's office or any organized system for assigning counsel in the Recorder's Court. Each month the indigent felony defendants arraigned in that month have counsel assigned to them by the then presiding judge. Assignments are supposed to be rotated, but several lawyers told us that friendship with the presiding judge is an important factor.[36]

With regard to the quality of representation, many of the observers whom we interviewed expressed the opinion that the lawyers work the system the way it is meant to be worked for the advantage of their clients—a function which they can perform with little effort. It was suggested that counsel seem willing not to resist overcharging because they know that the charges eventually will be reduced in exchange for a guilty plea. From our observations of sentencing hearings the defense lawyers rarely appeared to have made any independent investigation of the facts of the offense and the background of their clients, and arguments in mitigation of sentence were perfunctory. In the plea bargaining sessions the lawyers asked for and appeared satisfied with the standard and predictable charge reduction given the statement of facts in the police writeup.

E. PROSECUTORS AND JUDGES

1. The Prosecutors

We know very little about the size, composition, and personnel of the Prosecuting Attorney's office. The most significant fact we could obtain from the Chief Assistant, whom we interviewed, was that the organization of the office had not changed substantially from the description contained in the 1957 American Bar Foundation study.[37] According to the Chief Assistant the only change in the organization of the office has been a significant increase in the size of the appellate section necessitated by the recently granted right to a hearing in the court of appeals for all criminal defendants. We did not interview any other assistants in the office, although it would have been helpful to have obtained the impressions of one of the younger men in the office, especially one in charge of screening cases. Some members of the criminal bar whom we interviewed expressed the opinion that many of the assistants are of poor quality. The office has been placed under civil service, which apparently has resulted in the retention of many old political appointees.

The courtroom performance of the assistants assigned to the permanent courts appeared to be minimal. The prosecutor whom we observed in early sessions knew nothing about the cases prior to the defendants' appearance; when a trial was demanded, he was given the police writeup so that he could ask a few routine questions. He did very little cross-examining and was often silenced by the judge, who dominated the proceedings.

The assistant in the presiding judge's court is confined to the bargaining room during the morning hours, and the proceedings are conducted without a prosecutor, even when guilty pleas are being taken. During the afternoon session the prosecutor rested on a corner of the judge's bench while defense counsel argued motions. He made no formal responsive arguments but was asked occasionally by the judge to comment on the matter from the side of the bench.

Prosecutors are present for preliminary examinations, but their presentation suggests scant preparation. The assistant assigned to the examining magistrate's court is present during the afternoon arraignments on warrants, but he did not appear to have any role in the proceedings; the amount and type of bond are matters to be decided between the judge and the police.

2. The Judges

The 10 judges of the Criminal Division of the Recorder's Court are elected officials who run on a nonpartisan basis for 6-year terms. All of the judges are elected at the same time. The judges are paid $27,000 per year, $12,000 of which is paid by the City of Detroit and $15,000 by Wayne County.

Unfortunately, we visited Detroit at the nadir of judicial performance and morale in the Recorder's Court. The executive judge of the court, who was considered one of the most qualified judges, had just resigned be-

---

[32] There were 3,846 petitions for habeas corpus in the Recorder's Court in 1965.

[33] Michigan has a "prompt production" statute which provides that a person arrested without a warrant must be brought before a judicial officer "without unnecessary delay." MICH. STAT. ANN. § 28.872(1) (Supp. 1963).

[34] A total of 500 capias orders was issued for defendants who failed to appear. The default rate was 6 percent for surety bond cases and 17 percent for personal bond cases.

[35] The jail census for the week preceding our visit to Detroit showed a Recorder's Court population of 685 inmates, of whom 50 were awaiting sentence. The periods of detention by months were as follows:

Under 1 month	180
1–2 months	182
2–3 months	142
3–4 months	96
4–5 months	33
5–6 months	27
6–7 months	10
7–8 months	4
8–9 months	3
9–10 months	1
10–11 months	3
11–12 months	2
More than 12 months	2

[36] One radio commentator reported that in one month the presiding judge gave 30 appointments to one lawyer, who collected $2,800; all of his clients pleaded guilty. We were unable to verify this report.

[37] The ABF study was conducted at a time when there were 31 assistants in the office. Their duties were divided as follows:

(a) Review of police and citizen complaints	6
(b) Review of the decisions of the assistants in (a)	2
(c) Prosecution of nonsupport cases	3
(d) Confiscation of property cases, the so-called "padlock division"	1
(e) Traffic and ordinance cases	3
(f) Trial staff, including one assistant permanently assigned to the presiding judge and one to the examining magistrate	10
(g) Appellate section	3
(h) Release bureau—(assistants who remained on duty between 4:30 and 8:30 p.m. and on weekends and holidays to review misdemeanor cases for possible pretrial release without surety bond, to take statements in homicide and fatal accident cases, and to prepare papers for detention of prisoners displaying homicidal or suicidal tendencies)	2
(i) Miscellaneous—(review of juvenile court waiver cases, sanity proceedings, and proceedings under the sexual psychopath law)	1

cause of a pending Federal indictment for income tax evasion. Another judge had retired, and his office was unfilled because the Governor is not empowered to make interim appointments. Many of the remaining judges are old and come to the courthouse infrequently; four judges are not standing for reelection in November 1966. The problem of absenteeism was particularly striking during our visit. On one day only four judges came to the courthouse; on another day the presiding judge began the calendar call by announcing to the lawyers that there were no judges present in the courthouse to whom he could assign cases for trial.[38]

We had an opportunity to observe the performance of four judges, one of whom was presiding over a jury trial in an organized crime case. The examining magistrate and the early sessions judge appeared to be hostile toward the defendants, many of whom did not seem to understand the nature of the proceedings. On one day the early sessions judge offered a man convicted of begging and arrested with 6 cents on his person an alternative between paying a $30 fine or spending 60 days in the house of correction. The bailiff informed this judge that he would have to speak loudly because a vagrancy defendant was almost deaf. The judge's immediate response was, "Well, he'll hear this! Seventy days in the house of correction." The defendant never uttered a word in the nature of a plea and discovered his fate only through a slip of paper handed to him by a police officer.

The only judge whom we interviewed is the only Negro judge on the court. He was serving as presiding judge and conducted lengthy examinations of defendants before accepting their guilty pleas, being careful to ascertain whether there was any factual basis for the charge, whether the defendant had made any statement to the police, and whether he had been advised of his rights. In our interview this judge expressed his concern that the great volume of cases in the court caused hasty dispositions, an excessive number of guilty pleas, and unreasonable delay. His only solution for these problems was the addition of more and better qualified judges.

F. TREATMENT OF JURORS AND WITNESSES

For many years the Recorder's Court never had any facilities for jurors; they were left to wander about the building while awaiting assignment or during recesses. There is now a small sealed-off lounge with a few benches for the use of jurors, but the jury in the organized crime case still wandered about the halls during recesses. The jury panel awaiting assignment sat smoking and reading newspapers in an empty courtroom.

There are no facilities for witnesses in the Recorder's Court building. All the witnesses are required to be present whenever a case is to be called for trial by the presiding judge. The police witnesses lounge in the jury box or in the room behind the bench; public witnesses sit in the courtroom or wait in the hallway. If the case is adjourned, the witnesses are dismissed and told that they will be notified when they must appear again. Although the agreement to adjourn a case is often made before the date set for calling the case, no attempt is made to notify the witnesses that their services will not be required.

G. THE PROBATION DEPARTMENT

The Recorder's Court probation department, claimed by the court to be the Nation's largest exclusively adult municipal department, has 129 officers and clerical assistants. It also maintains a psychopathic clinic staffed by an executive director, three psychiatrists, a physician, and nine psychologists. All mental competency examinations are conducted by the clinic, and in most cases a clinic report is included in the presentence report.

The other units of the department are as follows: [39]

(a) Men's felony (26 officers)—conducts presentence investigations in all felony and some misdemeanor convictions, and supervises all male felony probationers over 21. There were 1,670 men under supervision in 1964.

(b) Men's misdemeanor (3 officers)—supervises all adult males placed on probation in the early sessions branch; 973 men were under supervision in 1964.

(c) Women's (11 officers)—prepares presentence reports for female defendants and supervises all women probationers over 17; 1,326 women were under supervision in 1964.

(d) Domestic relations (9 officers)—supervises convicted defendants in nonsupport cases and collects support payments. There were 1,984 persons under supervision in 1964, and more than $500,000 in support payments were collected.

(e) Adjustment—handles nonsupport cases on a pretrial basis, after referral from the prosecutor; participation by potential defendants is voluntary. There are nine officers who attempt to arrange settlement and avoid prosecution; they do no investigative or supervisory work. In 1964 the adjustment division screened 66,578 persons, processed 35,788 complaints, held 3,084 interviews, and recommended 902 nonsupport warrants. The division collected over $1,700,000 in support payments.

(f) Youth (15 officers)—supervises all male probationers between 17 and 21. There were 2,069 youths under supervision of the youth division in 1964.

In 1964 the department as a whole had 12,019 [40] persons under supervision and an average caseload of 106 probationers per officer.

NOTE: Field research for this paper was conducted by Joseph J. Connolly of the Commission staff and Harry I. Subin of the Office of Criminal Justice.

[38] According to the clerk's data for 1965 the 10 judges sat for an aggregate number of 2,190 judge-days, or about 70 percent of a possible 3,040 days if all judges sat during every day the court was in session. These figures may be misleading, however, because a judge is recorded as having served a full day on any day in which he comes to the courthouse, no matter how short a time he spends in court.

[39] The description of the organization of the department and the distribution of personnel are taken from the 1957 ABF study.

[40] In addition to the probationers listed in the preceding paragraphs, the department also supervised 4,057 persons placed on probation by the traffic and ordinance division.

Appendix C

POVERTY AND CRIMINAL JUSTICE

by Patricia M. Wald

The great majority of those accused of crime in this country are poor. The system of criminal justice under which they are judged is rooted in certain ideals: that arrest can only be for cause; that defendants, presumed innocent until shown guilty, are entitled to pretrial freedom to aid in their own defense; that a guilty plea should be voluntary; that the allegations of wrongdoing must be submitted to the truthfinding light of the adversary system; that the sentence should be based on the gravity of the crime, yet tempered by the rehabilitative potential of the defendant; that, after rehabilitation, the offender should be accepted back into the community.

To the extent, however, that the system works less fairly for the poor man than for the affluent, the ideal is flawed.

How *does* the system work for the poor?

On almost any night in any metropolitan jurisdiction in the United States a wide range of arrests is made: petty offenses, serious misdemeanors, felonies, juvenile misconduct. These are typical:

Defendant A is spotted by a foot patrol officer in the skid row district of town, weaving along the street.[1] When the officer approaches him, the man begins muttering incoherently and shrugs off the officer's inquiries. When the officer seizes his arm, A breaks the hold violently, curses the officer and the police. The patrolman puts in a call for a squad car, and the man is taken to the precinct station where he is booked on a double charge of drunk and disorderly.[2]

Defendant B, a woman, is apprehended for shoplifting a $10 dress in a downtown department store. A store detective who has been watching stops her near the door and finds the dress under her skirt. He calls a police officer who takes her to the precinct for booking on a charge of petty larceny.

Defendant C is charged with holding up a liquor store and seriously wounding the proprietor while making his getaway. His arrest follows an informer's tip and the victim's identification of his mug shot. The mug

Patricia M. Wald served as a member of the President's Commission on Crime in the District of Columbia. She is a graduate of Yale Law School, is a member of the D.C. Bar, and has practiced law in Washington. Mrs. Wald served as law clerk to the late Judge Jerome N. Frank, of the U.S. Court of Appeals. She is a member of the Board of Directors of the Vera Institute of Justice and was a staff member of the National Conference on Bail. She is the author of LAW AND POVERTY (1965) and a coauthor, with Daniel Freed, of BAIL IN THE UNITED STATES: 1964.

[1] The majority of arrests for drunkenness, disorderly conduct, and vagrancy are made in the run-down sections of the city. A research project interviewing several hundred Philadelphia skid-row residents disclosed 71% had been arrested sometime during their lifetime. Blumberg, Shipley & Shandler, *The Homeless Man and the Law Enforcement Agencies*, 45 PRISON JOURNAL 29, 32 (1965). HARRINGTON, THE OTHER AMERICA, 95 (1963), reports impressions of the police pickups in the Bowery:

"I never understood how the exact number to be arrested was computed, but there must have been some method to this social madness. The paddy wagon would arrive on the Bowery; the police would arrest the first men they came to, at random; and that was that."

A variety of forces are at work to explain the disproportionate number of poor arrested. High crime and low income inhabit the same quarters. As a result, saturation patrols designed to deter major crime produce increased surveillance of slum residents, and a greater likelihood they will be picked up for minor offenses: noisy corner gatherings, neighborhood arguments, drunks staggering home. The slum resident lives a good part of his life "on the street" where the police can see him.

"The rooms of Harlem are, more often than not, small, dingy, and mean. Everyone wants to get out, to get away . . . . There are jukeboxes in the candy stores, so there is dancing in the streets . . . There are places to sit—fire escapes and car fenders and curbstones. In short, there is society in the street among neighbors from the block." STRINGFELLOW, MY PEOPLE IS THE ENEMY 8 (1964).

Yet failure to "move on" or "to give a good account" of one's presence to a policeman is an offense under many laws.

"Court: What did you do? How did you wind up in jail here?

"Def.: I don't know. I was just standing there.

"Court: I am going to give you 90 days in the Onondaga County Penitentiary but I am going to suspend that sentence on one condition, that in the future you don't give the cops a hard time. Am I getting through to you?

"Def.: Yes.

"Court: One more time, and if you are brought in for anything like this again you are going up to the Penitentiary for 90 days. Do I make myself clear?

"Def.: Yes.

"Court: The next time a cop tells you to move, you move, understand?

"Def.: Yes."

Transcript, *People* v. *Trotter*, City Ct., Syracuse, N.Y., June 29, 1965.

[2] The more affluent drunk with money in his pocket is often put in a taxi and sent home instead of being arrested. PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REP. 475–76 (1966) [hereinafter cited as D.C. CRIME COMM'N REP.]

shot is a leftover from an "investigative arrest" two years before.[3]

Defendant D, a 17-year-old Negro male, unemployed and a school dropout, is stopped by a Youth Division officer at 12:30 a.m. on a street corner while loitering with a noisy gang.[4] There is a 10:00 p.m. curfew in effect for juveniles. The officer tells the gang to disperse and go home; D retorts that he doesn't have to and "no . . . cop can make me." The officer takes him in custody, frisks him for weapons, marches him to the precinct station, and calls his home. A man answers the phone, but is either intoxicated or unable to understand what the officer says. D is taken to the juvenile detention center for the night.[5]

All of these defendants are poor. At every stage of the criminal process they will face the cumulative handicaps of poverty.

IN THE STATIONHOUSE

Defendant A's belt is removed to balk any attempts at suicide, and he is put in the drunk tank to sober up.

> "His cellmate lies slumped and snoring on the cell's single steel bunk, sleeping off an all-day drunk, oblivious to the shouts . . . There are at least two men in each 4 x 8 foot cell and three in some . . . . The stench of cheap alcohol, dried blood, urine and excrement covers the cell block. Except for the young man's shouts, it is quiet. Most of the prisoners are so drunk they gaze without seeing, unable to answer when spoken to. There are no lights in the cells, which form a square in the middle of the cell block. But the ring of naked light bulbs on the walls around the cell block throw light into the cells, each of which is equipped with a steel bunk. There are no mattresses. 'Mattresses wouldn't last the night,' a policeman explains. 'And with prisoners urinating all over them, they wouldn't be any good if they did last.' The only sound in the cell block is the constant flowing of water through the toilets in each cell. The toilets do not have tops, which could be torn off and broken." [6]

Every half hour or so a policeman checks to see if the inmates are "still warm." [7]

After sobering up, a drunk or disorderly can usually leave the lockup in four to five hours if he is able to post collateral, $10–$25. No matter how many times he has been arrested before, he will not have to appear in court if he chooses to forfeit the collateral. The drunk without money stays in jail until court the next morning. At 6 a.m., the police vans collect the residue of the precinct lockups and take them to the courthouse cell blocks to await a 10:00 arraignment.

Defendant B is booked at the precinct. Her offense is an "open and shut" case with witnesses; she is charged with petty larceny, and the files are checked to see if she has a record. Because of the frequent association among shoplifting, prostitution, and narcotics addiction, she is subjected to a compulsory physical examination. Clean, she is eligible for stationhouse bail of $500. This means cash in the full amount or a $50 premium for a bondsman. She may make one or several phone calls to a bondsman (a list hangs by the pay phone), a friend, relative, or an attorney if she knows one or can pick one out of the yellow pages. But the timing and the number of phone calls are usually a matter of police discretion, and it may be an empty right if no one answers, or if there is no telephone in the rented rooms or tenements of her friends and family. Unable to raise bail,[8] she must await arraignment—any time from an hour to several weeks after booking.[9]

Defendant C, suspected of robbery and aggravated assault, both felonies, is properly warned of his right to remain silent or to consult counsel before any questioning takes place. But he has no right to an appointed lawyer before his first court appearance, and since he cannot afford his own lawyer, his real choice is to keep quiet or sign a waiver of the right not to be questioned. For the present he prefers not to talk.

C's fingerprints and mug shot are taken, and a record check is made for any other arrests in the police files. The FBI is sent a copy of the fingerprints to check for out-of-jurisdiction offenses. He is taken to the hospital for identification by the owner-victim, then back to the liquor store so the police can replay the event and verify the victim's story as well as watch C's reaction. Street witnesses brought to the station point him out as the man they saw running from the store. C is placed in a lineup, made to strike a variety of poses and repeat the words of the holdup man.[10] A blood smear is taken to match against some stains on the sidewalk outside the store. His room is searched for weapons, and ballistics tests are made on a gun found there.

This investigative process, steady or interrupted, may go on for many hours, even days.[11] He is allowed to call or see his family, but their entreaties to tell all, their own woes—"what will happen to me and the kids now"—offer little solace.[12] He may not want to involve others who can help him because they, too, would come under police scrutiny and questioning.

The interrogation (if there is any) and the investigation often precede the actual booking, so he is unsure of what charges are lodged against him. The duration of his custody is open-ended; he is not told how long it will last. If he has not been able to reach a friend or relative, no one knows for sure where he is.

In the back of his mind may linger stories he has heard about police brutality: telephone books which leave no marks, psychological bullying.[13] Only the police are present to hear what he actually says or to observe in what condition he is when he says it.[14] Often, in the tension of the moment and the rush of later events, he forgets what he said.

The morning following juvenile defendant D's apprehension, the arresting officer finds he has a record of prior juvenile offenses, minor thefts, truancy, gang activity. Several years ago, he was put on juvenile probation, and completed the period without further incident. The officer goes to see his parents and finds the mother, unmarried with several younger children, working a 3:00–12:00 shift in a bar. The home consists of two rooms in a dilapidated, overcrowded tenement. The mother reacts to the news by bitterly complaining of the boy, the company he keeps, the troubles he has already caused her, and the miseries yet to come. Based on the interview and D's past record, the officer decides to petition the case to juvenile court.

PRELIMINARY HEARING AND ARRAIGNMENT

Defendant A, charged with drunk and disorderly, is brought into court from the bullpen in a shuffling line of dirty, beat, unshaven counterparts, many still reeking of alcohol. Each spends an average of 90 seconds before the judge, time for the clerk to intone the charge and for the judge to ask if he desires counsel and how he pleads. Rarely does a request for counsel or a "not guilty" break the monotony of muttered "guilties." [15] Lawyers are not often assigned in police court, and anyone who can afford his own counsel will already have been released from jail on bond—to prepare for trial at a later date or to negotiate with the city prosecutor to drop the charges.

Occasionally, an unrepresented defendant will ask for trial. If the arresting officer is present, he will be tried on the spot. There are no jury trials in drunk court. The policeman will testify that the man was "staggering," "his breath smelled of some sort of alcoholic beverage," his speech was "slurred"—"his eyes were bloodshot and glassy." The man may protest that he had only a few drinks, but there are no witnesses to support his testimony, no scientific evidence to establish his alcoholic blood level at the time of arrest, no lawyers to cross-examine the officers.[16] If the defendant pleads not guilty and hopes he can get counsel (his own or court-assigned),

---

[3] Dubious police practices like the investigative arrest fall heaviest in the slums. Slum residents bring few suits for false arrest, and the police are aware of this. The New York City newspapers reported the case of two young Puerto Ricans picked up by the police on their 119th Street stoop and held eight months in jail for murder before a ballistics test in another case implicated a different suspect. The boys were finally released, but:

> "These people around here,' Ramon said, 'a lot of them still think we had something to do with it. Who's going to give me a job now? They don't want me.'
> "Orlando is lucky. A relative gave him a job in a warehouse on Park Avenue a few days after he got out of jail.
> "'But I don't go nowhere,' he said the other day. 'I'm not going to give the police another chance to pick me up. When I go out, I don't go alone. I go with an adult, like my stepfather, someone who the police will believe.'"

N.Y. Herald Tribune, April 10, 1966.

The poor are also the most apt to suffer from illegal searches of their homes. In Baltimore, 300 Negro families were subjected to wholesale invasion of their homes by the police without warrants on unverified anonymous tips on the whereabouts of suspected police killers. *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966). "Four officers carrying shotguns or submachine guns and wearing bulletproof vests would go to the front door and knock . . . other men would surround the house, turning their weapons on windows and doors." *Id.* at 199. The Court of Appeals, in granting an injunction against such practices, said:

> "The invasions so graphically depicted in this case 'could' happen in prosperous suburban neighborhoods, but the innocent victims know only that wholesale raids do not happen elsewhere and did happen to them. Understandably they feel that illegal treatment is reserved for those elements who the police believe cannot or will not challenge them." *Id.* at 204.

[4] *Cf.* FRIEDENBERG, THE VANISHING ADOLESCENT 121 (1959):

> "In our major cities merely to be young and cheaply dressed, in the company of friends like yourself and in such resorts as will let you hang around is to invite the grim attention of the Youth Squad."

Police have wide discretion not to refer minor cases to juvenile court. Some of the grounds on which a referral decision may be made are "uncooperative parents," "past failures with social agencies," "inadequate supervision." District of Columbia Metropolitan Police Dept., General Order No. 6.

In a questionnaire sent to over 6,000 police officers throughout the United States by the International Association of Police Chiefs, 50% of those replying considered the following statement correct:

> "In most cases involving lower-class, under-privileged, slum-type juveniles, strong police and court action are necessary because the families of these offenders are incapable of exercising proper control." O'CONNOR & WATSON, DELINQUENCY AND YOUTH CRIME—THE POLICE ROLE 134 (1964).

[5] Typical detention criteria for juveniles include inability to locate a parent, presumption the parent cannot produce the child in court, lack of a "suitable home," failure of the parents adequately to control a child, "physical or moral danger" in the home. See, *e.g.*, District of Columbia Metropolitan Police Dept., General Order No. 6.

[6] Hoagland, *Cell Blocks' Common Denominator: A Stench of Alcohol and Dried Blood*, Washington Post, March 29, 1966, p. A1, col. 3.

> A policeman complains: "We don't have the manpower for constant surveillance. We can't pull the men off the streets . . . . If a man really wants to commit suicide, he'll find a way. We've found them strangled by tying a handkerchief around the bars behind them and slumping forward, looking like they were asleep. It only takes a minute . . . as for the natural deaths . . . well, many of our 'clients' spend ¾ of their lives in jail. So they've got a 75% chance of being in a cell when they go." *Ibid.*

In 1964–65, 16 men arrested for intoxication died in Washington, D.C., lockups. D.C. CRIME COMMISSION REP. 476.

[7] Hoagland, *supra* note 6.

[8] In Silver Spring, Md., a man arrested for disorderly conduct and detained for want of $16 bond premium was "lost" two and one-half months in jail before coming to trial. Montgomery County (Md.) Sentinel, February 18, 1967, p. 1. A New York woman arrested for possession of narcotics subsequently found to be thyroid pills spent 20 days in jail for want of a $20 bond premium. Jackson, *Who Goes to Prison?* Atlantic Monthly, Jan. 1966, p. 54.

[9] Between arrest and arraignment, a minor defendant out on bail with his own counsel can often negotiate successfully with the corporation counsel to drop the charges if he has no extensive record, can demonstrate the injury to his reputation from such a conviction, and offer desirable alternatives to prosecution, such as medical or psychiatric treatment. The initiative in proposing such plans usually lies with the defense. See, *e.g.*, Washington Post, September 9, 1965, p. C24, col. 1 (charges of sexually assaulting a 17-year-old dropped against Virginia defendant on condition he undergo treatment with private doctor); The (Washington) Evening Star, January 28, 1966 (Maryland man who kept police at bay six hours by threatening to shoot infant placed on probation without verdict on condition he undergo psychiatric care). Similarly, if a potential defendant can offer immediate restitution to his victim, the complainant can often be persuaded not to pursue the case.

[10] See Note, *Indigent Jailed for Lack of Bail is not Denied Equal Protection by Forced Participation in Lineup*, 79 HARV. L. REV. 844 (1966).

[11] In Dallas, Texas, an accused may be held in jail for investigation up to seven days without being "filed on." During that period he cannot be released on bail without a writ of habeas corpus. The power of the court to appoint an attorney for an accused prior to his being "filed on" is in doubt. Vera Foundation Newsletter, May 14, 1966, p. 1. Experienced defense counsel have ways of coping with such police practices. See *America's Foxiest Lawyer*, Life, April 1, 1966, p. 98.

> "Three days after the murder was discovered Foreman's telephone rang. Melvin Lane Powers was being grilled by the Houston police. Just a couple of hours earlier, Powers had been hauled out of his office without being allowed to make a phone call. But on the way out he had said to his cousin, 'Get in touch with Percy Foreman.'
> "Foreman responded instantly—but not by rushing down to the jail. First he called the Houston newspaper and announced that he was on his way to 'storm the Bastille.' He needed witnesses he could depend on and there were none more observant than reporters. Flanked by three reporters he descended on the Harris County jail demanding to see his client. But the police had Powers hidden away and wouldn't produce him until the next morning. Foreman's accusation of illegal police tactics blared in the newspapers."

[12] See, *e.g.*, D.C. CRIME COMMISSION REP. 604 (suspects who consulted attorneys made admissions 23% of the time; those who consulted no one, 37%; those who consulted friends or relatives, 44%).

[13] "There is no doubt . . . that a substantial segment of the community believes that Negroes in the custody of the police are physically mistreated. Twenty-five percent of the Negroes interviewed . . . expressed this opinion." *Id.* at 207. See also Washington Post, March 28, 1966 (21-year-old Negro charged with assaulting a white police officer counter-charges officers "beat him to the ground, threw him into a patrol wagon, chained him to a radiator in the Tenth Precinct interrogation room, slapped him, kicked him and knocked a chair out from under him after telling him to sit down"); Washington Post, May 5, 1966, p. 22:

> "When Robert arrives, he finds his brother sitting in a chair in an interrogation room, his face bloodied and bruised. Police refuse to send brother to hospital unless he signs a release. Robert refuses for him. After two hours they relent, drive brothers to D.C. General Hospital. At six a.m., the brother is treated. The official police report: 'Subject experienced a seizure and fell against the wall, scraping his face.'"

[14] In the pre-*Miranda* period, "uneducated," "underprivileged," and "persons of low social status" were considered peculiarly vulnerable to sophisticated interrogation techniques. See INBAU & REID, CRIMINAL INTERROGATION AND CONFESSION 72, 115 (1962). Less subtle pressures used with poor suspects in the past have included threatened cutoffs of welfare benefits to children. *Lynumn* v. *Illinois*, 372 U.S. 528 (1963).

[15] Philadelphia interviews of "skid rowers," Blumberg, Shipley & Shandler, *supra* note 1, at 33–35, showed a "low verbal facility" among the men, characterized them as "extremely vulnerable" to dubious police and magistrate practices, unlikely to "express hostility verbally," and seeking to "survive by external conformity to the demands of authority such as the missions, the police, social welfare agencies."

[16] See the following:

> "At night, in the drama of dereliction and indifference called Night Court in New York, the alcoholics would be lined up. Sometimes they were still drunk. The magistrate would tell them of their legal rights; they would usually plead guilty, and they would be sentenced. Some of the older men would have been through this time and time again. It was a social ritual, having no apparent effect on anything. It furnished, I suppose, statistics to prove that the authorities were doing their duty, that they were coping with the problem."

HARRINGTON, *op. cit. supra* note 1, at 95.

In March 1965, 1,590 homeless men were arraigned in New York City's Criminal Court for disorderly conduct; 1,259 pleaded guilty, 325 were acquitted, and 6 were convicted after trial. In March 1966, after Legal Aid representation was introduced into the court, 1,326 were arraigned, 1,280 were acquitted, 45 pled guilty, and 1 was convicted after trial. Botein, N.Y. GOVERNOR'S CONFERENCE ON CRIME 149 (1966).

he may have his trial postponed a week or two. Meanwhile, he must make bond or return to jail.[17]

Police Court sentencing is usually done immediately after a plea. A few courts with alcoholic rehabilitation court clinics may screen for likely candidates—those not too far along on the alcoholism trail—in the detention pens. Counsel, when available, can ask for a presentence report, but delay in sentencing means jail or bail in the meantime. On a short-term offense it is seldom worth it.

Other kinds of petty offenders—disorderlies, vagrants, street ordinance violators—follow a similar pattern in court. Guilty pleas are the rule. Without counsel or witnesses it is the defendant's word against the police. Even when counsel is present, defense efforts at impeachment founder on the scanty records kept by the police in such petty offenses. The only defense may be the defendant's word—impeachable if he has a record—and hard-to-find "character witnesses" without records from his slum neighborhood.

Defendant B, the shoplifter, is arraigned in a misdemeanor court the same morning:

> "The audience section of the courtroom is usually jammed with relatives of the defendants involved, and with witnesses and complainants, as well as with defendants themselves who have been released on parole or bail. . . .
> "The number of reserved seats is usually inadequate for all of the attorneys and police involved in the day's cases. As a result, the attorneys usually gather close to the bench; and the police invariably also congregate inside the rail close to the door leading to the detention pen. As each case is called, the policeman will fetch from the pen the defendant whom he has arrested and bring him before the judge." [18]

B is told of her rights, in a mass of a hundred other accused, crushed into the space between counsel table and spectators "like New Yorkers in a subway at rush hour." Marched slowly to the judge's bench "like assembly line workers in a factory, all parties operate under a climate which makes it appear that nothing may be permitted to interfere with the smooth operation of the line." [19]

When B is before the judge, the clerk reads her a summary statement of the charges against her and recites her rights to trial and counsel, phrased in the words of the pertinent statute or court ruling. "Spoken at high speed, in a dull monotone, phrased in legal jargon, the charges and the rights are frequently unintelligible." [20]

B can plead guilty at her first appearance or ask for a trial. She can also request an adjournment to consult or obtain counsel. The various jurisdictions differ on whether a misdemeanant who cannot afford counsel [21] is entitled to appointed counsel. Until recently in Washington, D.C., the court appointed counsel from a "mourners' bench" and left it to the lawyer and his new client to negotiate a fee. In New York City, a Legal Aid lawyer is appointed minutes before the arraignment of an indigent defendant. In Miami, there is no representation provided for indigent misdemeanants; in Los Angeles, less than 10% of all misdemeanants have counsel at arraignment. In all events, more misdemeanants than felons lack representation. It may be harder for the defendant to qualify as an indigent misdemeanant than as an indigent felon, either because he has scraped up a small, automatically disqualifying bail bond [22] or because the counsel fees involved are so small. Without counsel, defendant B is almost certain to plead guilty.

Even with counsel, however, pressures are strong in a high volume misdemeanor court to plead guilty and hope for, or bargain for, leniency. Assigned counsel often get no pay for representation at this level; retained counsel put into the case only the time equivalent of the $50 or $75 they can get out of it, and public defenders have only a few minutes' frantic conference with their clients outside the courtroom to decide on a plea or request for adjournment.[23]

Trial is not an attractive prospect for an indigent misdemeanant or his lawyer. It can mean a new round of bail bonds or weeks in jail awaiting trial. Complexities of proof may be just as great as in felony trials; thorny legal issues can arise: problems of illegal search and seizure, unlawful arrests, or coerced confessions. But public funds are almost never available for investigators or expert witnesses in these courts.[24] Preliminary hearings are usually waived because lawyers cannot take the time. Witness fees—75 cents a day in misdemeanor cases in the

[17] See the following:
Q. How do you plead to the charge?
A. I am not guilty of drinking. I don't think. I haven't drunk anything in several months. They might have thought I was drinking because I have epilepsy, but I don't drink.
Court: Then, I am not going to accept your plea of guilty. I will enter a plea of not guilty on your behalf and give you a week to get a lawyer. April 16th for counsel. Do you want any bail here, Mr N. (the prosecutor).
Mr. N.: $250.00 bail.
Court: All right, bail is $250.00 property or cash. Have you got any relatives here in the city?
A. No.
Q. Do you have any friends here in the city?
A. No, not here. They are all in Rochester.
(Later, at the same session of Court.)
Court: Will you just listen to me for a moment? We have a procedure here that we have to follow. When you appeared before me earlier this morning, you pleaded not guilty to the charge. Do you now wish to change your plea?
A. I don't have no choice.
Q. No, you have a lot of choices. You can continue your plea of not guilty and get a lawyer and have a trial.
A. But they will take me back upstairs and I want to get out.
Q. If you plead not guilty to the charge, the only thing I can do is give you a trial . . . I have no jurisdiction to do anything unless you are convicted after trial or unless you plead guilty.
A. I told you before I plead guilty.
Q. You understand that you are entitled to an attorney and that you can plead not guilty to the charge.
A. I know that, but I don't want to go back upstairs.
Transcript, *People* v. *Wimberly*, City Ct., Syracuse, N.Y., April 9, 1965.

[18] JUDICIARY COMM. OF THE N.Y. ASSEMBLY, REPORT ON THE INVESTIGATION OF THE PRACTICES AND PROCEDURES IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 67–68 (1963) [hereinafter cited as N.Y. ASSEMBLY REP.].
". . . there is great danger of undue influence by either Police Officer or defendant when the two are in frequent unsupervised personal contact, as they are on each court appearance day. . . . Many persons have told us that police officers have advised them, when they were being brought before the court, how they should plead, or what course of conduct they should follow." *Id.* at 68.

[19] Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 53 J. CRIM. L., C. & P.S. 215 (1963).

[20] N.Y. ASSEMBLY REP. 65. "We doubt that one in five of those persons to whom their rights are recited could assimilate . . . usefully the least part of what he has been told." *Ibid.*

[21] A typical misdemeanant defense in New York City was estimated by lawyers interviewed for this paper to cost $250–$300 for a plea, up to $500 for a trial. The exact fee reflects the number of court appearances the lawyer has to make, which may be up to five in a misdemeanor case. Throughout the country 1,250,000 indigent misdemeanants go to court annually. In 175 out of 300 sample counties studied by the American Bar Foundation no counsel was assigned to misdemeanor cases. SILVERSTEIN, DEFENSE OF THE POOR 125, 132 (1965) [hereinafter cited as SILVERSTEIN].

[22] Id. at 107–08.

[23] See the following:
"The very frequency of assignment at times becomes so great that the Legal Aid lawyer can do no more than make a cursory examination of the case papers, without any hope of familiarizing himself sufficiently with the facts to determine whether a preliminary hearing, motion to suppress evidence, or some other preliminary relief, is indicated.
* * *
". . . the attorney . . . has no alternative but to exchange a few whispered words in the courtroom with his client. At very best, he may be able to spend a few moments outside the gates of the detention cell where he is compelled to speak to his client packed in along with dozens of other prisoners." N.Y. ASSEMBLY REP. 19–20.

[24] An interview with a Legal Aid lawyer in New York City revealed that the eight investigators on the staff are used solely for felony cases; expert witnesses too are practically available to Legal Aid only in serious cases. Grand jury minutes (if an original felony charge has been ignored and the defendant recharged as a misdemeanant) often cannot be secured for use in misdemeanor trials because of a shortage of typists. In assigned counsel jurisdictions, there may be provision for investigative expenses for upper court but not lower court representation. See, *e.g.*, Montgomery County (Md.) Sentinel, Jan. 13, 1966, p. B–10, col. 1.

General Sessions Court of the District of Columbia—are noncompensatory. Constant adjournments and calendar breakdowns wear down even a persevering defendant, his underpaid lawyer, and his reluctant witnesses. Few legal reputations are made in misdemeanor courts. The trials are more informal, the judges apt to be less learned in the law than in higher courts. There is generally no court reporter unless the defendant hires his own, which he seldom can afford. In general, upsetting the routine of misdemeanor court by demanding a trial is a risky proposition; it can operate as a lever to bargain with the prosecutor for a shorter sentence or dismissal, but it can also antagonize the prosecutor and judge, resulting in a stiffer sentence on conviction.[25]

Only defendants with money can afford to play the waiting game. Lawyers assured of reasonable fees can invest the time and energy to prepare for trial if bargaining for leniency ends in a stalemate. Their clients do not suffer from tactical maneuvers that delay the ultimate trial. The prosecutor, cannily recognizing their potential "follow through," may capitulate earlier in the game. In contrast the indigent's attempts at bargaining are confined to a few hours or days after arraignment and, declining in vigor, reflect the inescapable fact that he has the most to lose from each new delay.

After the police have completed their investigation, defendant C is brought before a judge for preliminary hearing. Charged with robbery and aggravated assault, a determination is made on whether he should be bound over to the grand jury.[26] If the police cannot justify the charges, they could be dismissed at this juncture, but if C has already confessed, his admissions can be introduced against him; so can other incriminating post-arrest developments, including lineup identifications, fingerprints, etc. At the preliminary hearing, the defendant has the option of asserting his right to have the government present its case. Appearance of counsel here may be crucial. The defendant may not fully understand that if he waives, he loses one of his best and most effective chances to discover the identity of the government's key witnesses and the nature of the government's evidence. Adroit cross-examination at the preliminary hearing can expose and freeze inconsistencies in testimony before government witnesses have time to reflect and to consult extensively with the prosecution; valuable ground work may be laid for later impeachment at trial.

But the indigent defendant may not always be offered assigned counsel at his first appearance before a judicial officer.[27] Without counsel, few felony suspects are adept enough to probe evidentiary weaknesses by cross-examining prosecution witnesses; few are experienced enough to weigh the pros and cons of taking the stand themselves.[28] Since he has been in police custody from the time of his arrest, the defendant has had no opportunity to line up defense witnesses. Even if, by some extraordinary effort, he succeeded in constructing a plausible defense or in challenging the government's case, no stenographic record of the preliminary examination would be available without costly advance arrangements.[29]

Bail in felony cases is ordinarily set for the first time at the preliminary hearing. For armed robbery and aggravated assault, it may be as high as $25,000, requiring a $2,500 premium that poor defendants cannot raise.[30] With no defense lawyer to argue for lower bail, the prosecutor's recommendation will ordinarily stand. Even in cities where projects are operating to release worthy defendants without bail, the indigent's roots in the community usually must be solid, his record comparatively clean of past felonies.[31] On the other hand, financial ability to make bail can be a mixed blessing. It may disqualify him from obtaining assigned counsel then, or later on arraignment.[32]

When he is bound over to the grand jury, the detained defendant enters a legal limbo. Even if counsel were appointed for the preliminary hearing, his duties have ceased, and appointment of new counsel awaits action of the grand jury. Without a lawyer, the defendant can do nothing to affect the grand jury's deliberations or to identify key witnesses.

In jail, the defendant is thrown among convicted criminals. He marks out his days in idleness.[33] Outside problems proliferate and contacts crumble.[34] He is the

[25] Washington Post, February 5, 1966:
"In open court recently, [Judge X] told the lawyer for a man charged with negligent homicide (his speeding car had run down and killed a woman): 'I'll give your man probation if he pleads guilty right now.'
"Later, [Judge X] told the lawyer for another defendant appearing before him in court: 'So your client wants a jury trial. If he is found guilty by that jury and I ascertain that his defense was a lie, I'll throw the book at him.'"

[26] The period from arrest to court appearance is as long as two to three weeks in Miami, Florida. Only warrant cases are immediately brought before a judge, despite a prompt arraignment statute. The public defender in Miami believes this period to be the greatest detriment to successful handling of an indigent's defense. Lineups, trips to the scene, and, before *Miranda*, questioning go on without any defense intervention. Interview with Robert Koeppel, Dade County Public Defender, April 15, 1966.

[27] The majority of jurisdictions surveyed by the American Bar Foundation offered counsel in felony cases only after the indictment or information had been filed. SILVERSTEIN 75; *cf. White* v. *Maryland*, 373 U.S. 59 (1963).

[28] On the other hand, some retained counsel advocate waiver of the preliminary hearing. They feel previewing the government's case on preliminary examination highlights and publicizes morbid details of the crime, commits the witness to the testimony he has given before any defense representative has a chance to discuss it with him, and identifies him in his own mind with the prosecution. They prefer to see the government witnesses privately, and to feel out the prosecutor on a plea bargain before there is a record in the case. Interview with Gary Bellow, former Deputy Director, Washington, D.C., Legal Aid Agency, April 9, 1966. The government itself can often forestall a preliminary hearing by asking for an adjournment and getting an indictment in the meantime.

[29] See N.Y. ASSEMBLY REP. 23:
"One of the great values of requesting a preliminary hearing is that the defendant can thereby make a record of the evidence and testimony upon which the charge is based. But if the defendant cannot afford a certified transcript of the preliminary hearing, he is incapable of effectually refuting a change in the testimony of the complainant or a prosecution witness. For an indigent defendant, then, the preliminary hearing loses much of its value."
Legal Aid in New York City is empowered to order these transcripts where it considers them essential to an adequate defense, but refrains from routine requests for them in order to save money. Interviews with present and former staff members, N.Y. Legal Aid Society, April 1966.

[30] The higher the bail, the lower the percentage of defendants who can make it. In a New York City survey, 35% of defendants with bail of $500 or less could not make it, while 61% with bail above that amount could not. Rankin, *Effect of Pre-Trial Detention*, 39 N.Y.U.L. REV. 650 (1964); ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REP. 135 (1963) [hereinafter cited as ATT'Y GEN. REP.]. $500 or less—29% failed to make bail in one Federal district; $500–$1,000—60%; $5,000–$10,000—80%. Ironically a richer defendant loses less in a bail transaction; he can put down cash or a property bond for the total amount and recover it all on his appearance. A poorer man must use a commercial bail bondsman, and his 10% premium is nonrefundable.

[31] See MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL—FINAL REPORT OF THE D.C. BAIL PROJECT 25 (1967) (two felony convictions or one conviction on the present charge render defendant ineligible for bail project recommendation).

[32] This proved true in 21 out of 300 counties in the Silverstein study. Failure to make bail was a prime test for eligibility in 40 others, a serious factor to be considered in 181 counties. SILVERSTEIN 107,
"If a defendant owns a home occupied by his wife and two children, but owns nothing else, is he an indigent? If he has a couple of hundred dollars but can find no $200 lawyer, what does the judge do with him? If he is gainfully employed and can make all periodic payments, should counsel be appointed to serve without charge? Or if he is the son of rich parents or the husband of a rich wife, owning nothing of his own, does he qualify? The more common case and the one we see with increasing frequency is that of the defendant who by some means has been able to raise $1000 or $1500 to pay a professional bondsman to assure him of freedom during a period of perhaps 60 days between his appearance before the Commissioner and the date of trial, but who stands in the court room and says that he cannot possibly raise another few hundred dollars to pay his lawyer." Connally, *Problems in the Determination of Indigency for the Assignment of Counsel*, 1 CA. S.B.J. 11, 12–13 (1964).

[33] "Whether contaminated or not, however, we doubt whether any innocent person (as all before trial are presumed to be) can remain unscarred by detention under such a degree of security as New York's detention houses impose. The indignities of repeated physical search, regimented living, crowded cells, utter isolation from the outside world, unsympathetic surveillance, outrageous visitors' facilities, Fort Knox-like security measures, are surely so searing that one unwarranted day in jail in itself can be a major social injustice." N.Y. ASSEMBLY REP. 33.

[34] See, *e.g.* memorandum to D.C. Crime Commission, October 25, 1965 from Workhouse Supt., M. C. Pfalzgraf, D.C. Dep't of Corrections, listing as a major "factor causing much unrest and anxiety among the inmates" "the difficulty of making contacts and getting welfare assistance for families of the incarcerated individual."

target of constant jailhouse advice on "copping a plea" [35] from fellow inmates. Weeks, months go by, often with no word from the courts or the lawyers on the progress of his case. If the grand jury finally declines to indict, his case may be "kicked downstairs" for reinstatement of misdemeanor charges. This process may take additional weeks while witnesses are recalled to swear to the new complaint and a new prosecutor assigned to the case. Only when the misdemeanor information is filed and a new arraignment date set is he notified that the felony charges have been dismissed.

When an indictment is handed down, the accused felon is brought from jail for arraignment, this time in the felony court where he will be tried. Counsel is now offered the indigent defendant.[36] Bail must be reset by the judge to cover the period until trial, sometimes months away. An adjournment may be necessary to decide on a plea. Many indigents, energies sapped by prolonged periods in jail, waive counsel and plead guilty immediately.[37] Yet a plea of not guilty is often necessary to buy time for negotiating with the prosecutor on reduction of the charges, dropping some charges in exchange for a plea to others, prosecuting multiple charges or indictments separately or concurrently.[38] Occasionally only a token bargaining effort is required because of the pressures of the calendar on the court and prosecutors,[39] but usually defense counsel's success is comprised of many factors: his reputation and the intensity of his commitment to the case; his capacity for engaging the prosecution with pretrial motion and writs; his resources for proceeding to a full-scale trial; his willingness to challenge illegal police or prosecutorial tactics. To bargain expertly, counsel must be able to probe the strengths and weaknesses of the prosecution's case, to realize and fulfill the potential of his own. He must acquire a sure knowledge of all the permutations and combinations of pleas and penalties that are possible under the indictment.[40] Intangibles enter the picture; [41] the defendant must impose full trust in his counsel's strategic judgment, be willing to accept his assessment of the prospects and alternatives.[42]

As soon as the petition involving defendant D is filed in juvenile court, the court's intake worker decides whether to proceed with the case. If she thinks the family can control the boy and he is likely to avoid trouble again, she can dismiss the case or place him on informal probation for a few months. To make the decision, she has to assess the child himself, his home situation, his school, and police record.

In D's case, the lack of home supervision, his mother's self-admitted defeat in holding him in line, and his record of one previous probation rule out dismissal. The decision is made to charge him with violation of the curfew and disorderly conduct and to bring him before the juvenile court that afternoon. (Had the offense been more serious, he might have been waived to an adult court for a full-scale criminal trial.)[43] In a few jurisdictions, the child and parents will be asked if they want a lawyer when a decision to petition the case is made; if they have no money, counsel will be assigned.[44] In most jurisdictions, however, there is no procedure for assignment of counsel before hearing.

The first hearing before the juvenile judge decides whether D has committed some act which, under the statute, gives the court jurisdiction. Juvenile court proceedings are informal, not open to the public, not usually recorded. The judge, in the presence of D's mother, will ask the boy if he wants counsel. Most juvenile court defendants lacking funds waive counsel.[45]

[33] N.Y. Herald Tribune, April 10, 1966, quoting detainee:
"And those other guys in The Tombs (City Prison), they can drive you crazy. Asking questions: 'Why you kill a boy Tito? See you upstate Tito. If you got money, you'll get justice; if you ain't got no money you better cop-out.' They can get you crazy."
Cf. GLASER, EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 263 (1964) [hereinafter cited as GLASER]:
"The often long interval of idleness in jail, between arrest and delivery to prison, is frequently reported by prisoners as a period in which they and their jail mates assist each other in making out a rationalization of their failures, thus salvaging a favorable conception of themselves."

[34] In 1964, 70% of indigent felony defendants were indicted in counties using an assigned counsel system (judges' panels, Bar Association lists, courtroom lawyers). In 35 States the assigned lawyers were paid moderate fees ($25-500) for such representation, nothing elsewhere. SILVERSTEIN 15. New York City's Legal Aid Society handles over 60,000 cases on an annual $250,000 budget compared with the District Attorney's $4 million. See N.Y. ASSEMBLY REP. 18:
"The Legal Aid lawyer is so hampered by the case burden he must carry in the Criminal Court that he will seek shortcuts to the detriment of defendants. At times stalwart representation of a defendant requires counsel to do battle with the Assistant District Attorney or the judge. Where the penalty may be damage to the rapport between court and counsel, and defense counsel has 25 more defendants to represent the same day, he will be reluctant, perhaps, to seek a preliminary hearing or to challenge a bail failure, and eager to see the case disposed of somehow."
Public defender offices are often administratively forced to use different counsel at each stage of the proceedings to represent the same indigent.
"Persons who have been defended by Legal Aid have complained to us that they never knew who their lawyer was, and that they had to educate a new lawyer with respect to their case each time they appeared in court."
Id. at 17.

[37] The great majority of unrepresented defendants apparently plead guilty to the principal offense. SILVERSTEIN 91-93. Fifteen counties in the Silverstein survey automatically assumed a waiver of counsel from a plea of guilty. Fifty counties merely asked if the defendant wanted counsel, *e.g.*, Baltimore: "Do you want counsel or to proceed without it?" The defendant may assume he must pay for it and say, "No," not wishing to impose on his family. In some cases it has been found he does not know what "counsel" is. Silverstein also relates the number of waivers to the stage at which counsel is offered; when it is offered at an early stage, more defendants appear to take advantage of it. SILVERSTEIN 89-90, 95.

[38] SILVERSTEIN 72, indicates that clients of retained counsel get more dismissals than indigents.

[39] See, *e.g.*, STRINGFELLOW, *op. cit. supra* note 1, at 52-53 (four boys picked up on heroin possession; one boy was designated to "take the rap"):
"I had decided, partly on the advice of another attorney, to go to court before it convened and discuss the case with the prosecutor and try to persuade him to reduce the charge, in exchange for a guilty plea. There were not any serious legal grounds for the district attorney to agree to this, but there were practical arguments in favor of it. For one thing, the defendant had been in prison three other times, and since this had not deterred his addiction, there was no reason to think that a long felony sentence would be of any help to him or advantage to society. For another thing, there is a shortage of prison space in New York, and that constitutes a pressure on the courts to hand down short sentences, at least in minor cases, which is what this was, even though it was a felony charge.
"When I arrived at the courtroom, several other lawyers were standing in line, waiting to speak to the D.A. I overheard their discussions of other cases on the day's calendar. They were terse to say the least, and seemed to me to be quite disinterested and even indifferent to the merits of the cases being negotiated. Finally my turn came. I identified myself to the district attorney, whom I had never met before, this being my first court case.
"I told him whom I represented, and then he said, 'Well, counselor, what do you want?' 'I want a misdemeanor,' I replied. And then to my astonishment he said, 'O.K. When the case is called, we'll talk to the judge.'
"We did. The judge agreed to the guilty plea to a misdemeanor and the defendant was sentenced to seven months in prison.
"It was all over in no more than two minutes. After the hearing, I went back to the 'pen'—where the prisoners are kept, pending their appearance in court and awaiting their return to jail—and talked with the defendant. He was very pleased with the way the case had gone. He assured me that this was the best solution, certainly better than for all four of them to be imprisoned. Besides, he said, he knew how to get along in jail, and some of the other guys did not, so it was better that he should go in their place."

[40] A New York robbery indictment typically has 4 counts: robbery in 1st degree (10-30 years); assault in 1st degree (up to 10 years); grand larceny in 1st degree (up to 10 years); unlawful weapon (up to 7). There are 22 lesser pleas possible, many carrying the same penalty (*i.e.*, 5 years for attempted robbery in 3d degree, grand larceny in 2d degree, assault in 2d degree). A second or third conviction for robbery in 1st degree carries a mandatory sentence of 15-30 years and a 4th felony conviction, life.

[41] Interviews with public defenders in New York City and Miami (April 1966) disclosed they did not feel at a disadvantage in plea bargaining to any but the most prominent criminal lawyers. They stressed that the rapport or lack of it between the prosecutor and defense is a personal matter. In this respect, the Legal Aid lawyer in New York City said that the big city defender offices had "devoted and rigorous lawyers—differing in abilities but all competent," superior to the "marginal" criminal lawyer who takes a case for a small fee ($100), is often "ignorant of the law, does not keep abreast of new developments, cannot command funds to hire investigators or experts or purchase transcripts," and is held in disdain by the district attorney's office.

[42] Public defenders admit that their clients may view the relationship as too "impersonal"; this condition, they say, stems not from a lack of commitment on their part but "rather, from a vague feeling on the part of some defendants that because they have not paid for the services of a defense attorney, that attorney has no commitment to them and to their interests." Segal, *The Indigent Defendant and Defense Counsel*, 45 PRISON J. 22 (1965).

[43] *Kent* v. *United States* 383 U.S. 541 (1966).

[44] See N.Y. FAMILY CT. ACT § 242.

[45] In the D.C. Juvenile Court, between 85% and 90% of the alleged delinquents waive counsel. D.C. CRIME COMM'N REP. 682; *cf.* New York City, where 92% of alleged delinquents used to be unrepresented. 17 RECORD OF N.Y.C.B.A. 10, 15 (1962). Under the new system, where counsel is offered before going to court and is physically available in the building, the vast majority of juvenile delinquency respondents (over 70%) take advantage of the right.

The judge asks if D admits the allegation of the petition; nothing is said about his right to remain silent. Most juveniles concede "involvement" readily.[46] If the child denies the facts alleged, the case is set down for trial at a later date, and he is either sent back to the detention home or released to his own parents in the interim. D, who has been this route before, admits his offense, and the judge postpones disposition until a social study can be made by the court. In the meantime, out of school without a job or 24-hour supervision at home, he is remanded to detention.

At the detention home, D is one of the older inmates. In the group are other 16–18-year-olds awaiting waiver decisions, trials or dispositions for auto thefts, housebreakings, burglaries, and narcotics offenses. They are questioned by the police while detained. Because of the transient, short-term population, the school program is a haphazard, undisciplined one. D has been out of school over a year and has no interest in renewing his formal education. The home provides a different kind of education: He learns details of other inmates' exploits, tricks for dealing with the police, names of friends to contact or stay clear of in training schools; he gets a first exposure to the future jailhouse crowd, is initiated into homosexual rites.

> "I could do everything I wanted to do—steal, fight, curse, play, and nobody could take me and put me anywhere. I was already in the only place they could put me. I had found a way to get away with everything I wanted to do . . . I was doing things to people that I never would have done out on the street, but I didn't care. It didn't make sense to be in the Youth House if you were only going to do the things you did out on the street." [47]

PREPARATION AND TRIAL

C prepares for trial, although plea bargaining continues up to the time of entering the courthouse. As the momentum of pretrial preparation mounts, pressures to compromise increase. Pretrial motions involving full-scale hearings are time-consuming, require extensive research and investigation,[48] and can delay trial for months. Yet they are often the vitals of the defense strategy. The suspect should be taken to the scene of the arrest to replay his account of what happened. Other witnesses to the incident have to be located and their stories recorded. The legal precedents must be researched. New counsel must familiarize himself with any evidence adduced at an earlier preliminary hearing. All of this takes time and money while the defendant languishes in jail.

Challenging a confession before trial means obtaining a copy of the admission itself and since the *Miranda* decision a copy of any written waiver of the defendant's right to counsel. A moment-by-moment account of how and when it was obtained from the defendant must be developed by subpoenaing the police log in the case, and having the defendant examined—physically and psychologically—for signs of incapacity or compulsion, as soon as possible after he made the statements. A motion for severance means a painstaking analysis of the prejudice of a joint trial, as well as discovery motions to obtain a codefendant's admissions. Motions for a change of venue must assess the prejudice of pretrial publicity and obtain assurances that the new forum is in a jurisdiction willing to accept the burden of an indigent defendant. Efforts to exclude wiretaps or electronic bugs may demand acoustical engineers, debugging experts, blueprint specialists.[49] Search and seizure motions in narcotics cases require that the arresting officers be interviewed on the details of the seizure, and what probable cause they had for suspecting possession or making the arrest.

And there are larger problems. Motions for tactical delay have little appeal to a client in jail. Even a successful motion to dismiss the indictment—unless it concludes the case—merely signals the start of the process all over again and interminable months more in detention.

If he proposes to plead his client not guilty by reason of insanity, an indigent's counsel encounters formidable obstacles. He can have him committed to a public hospital for observation and diagnosed by government psychiatrists, who then report back to the court on the defendant's capacity to stand trial and his mental responsibility for the alleged criminal acts. If they report him sane and responsible, counsel has the option of abandoning the defense or relying on cross-examination to discredit the examiner. If, however, the defendant can afford to hire his own psychiatrist—or better still, several (at $25 an hour)—to examine the patient, he may produce a contradiagnosis to put before the jury. The defense psychiatrist can speak confidently of the quality of the state's psychiatric report, the talents of the staff, and the acceptability of the methodology employed. With an expert stalemate, the jury will be less inhibited in making up their own minds.[50]

Perhaps more important, the psychiatrist preparing the state's initial diagnosis does so in the sobering knowledge that it will undergo the close scrutiny of an outside professional who has had ample opportunity to observe and examine the patient. His participation in the psychiatric dialogue that precedes the formal report may make the difference between a contested and an uncontested plea.

Tracking down ordinary defense witnesses in the slums to support the defendant's alibi or to act as character witnesses often has a Runyanesque aspect to it. The defendant in jail tells his counsel he has known the witnesses for years but only by the name of "Toothpick," "Malachi Joe," or "Jet." He does not know where they live or if they have a phone. If he could get out and look himself, he is sure he could find them at the old haunts, but his descriptive faculties leave something to be desired. Since a subpoena cannot be issued for "Toothpick," of no known address, counsel sets off on a painstaking, often frustrating, search of the defendant's neighborhood. He stops children at play; he attempts door-to-door conversations with hostile and suspicious slum-dwellers; he haunts the local bars; he even asks the police on the beat

[46] Seventy-four percent in the District of Columbia. D.C. CRIME COMMISSION REP. APPENDIX 484.

[47] BROWN, MANCHILD IN THE PROMISED LAND 61 (1965).

[48] The defendant in jail cannot aid in investigation, and investigative expenses are paid to assigned counsel in only a small minority of jurisdictions. Only 23 out of 72 public defender offices had paid investigators. SILVERSTEIN 16, 45. *Cf.* ATT'Y GEN. REP. 34: "In the judgment of the Committee, present practices sometimes induce a plea of guilty because appointed counsel recognizes the futility of electing a contest in the absence of resources to litigate effectively."

[49] For a detailed account of the time-consuming requirements of defense preparation for a successful attack on evidence obtained by a spike microphone, see WILLIAMS, ONE MAN'S FREEDOM 80-81 (1962).

[50] For a vivid step-by-step account of how this process works, see Arens, *The Defense of Walter X. Wilson—An Insanity Plea and a Skirmish in the War on Poverty*, 11 VILL. L. REV. 259 (1966). How skillful and detailed an examination the private psychiatrist conducts may depend, however, on whether his fee is $100 or $1,000. Travel time to the state mental hospital—usually far removed from his midtown offices—must be compensated as well as time spent examining the patient and studying his hospital files. Five such observations is considered a minimum for an adequate examination. A private doctor must also be paid for any wait in court as well as for time on the witness stand.

for help.[51] If he finally locates the witnesses, they must be "collared" and cajoled into coming to court; otherwise, they will probably ignore a subpoena.[52] They must be reassured—if possible—that there will be no retaliation from police or prosecutors,[53] that they will not themselves be held in jail as material witnesses. Fare for the trip to court must be dredged up from somewhere, lost days' pay replaced.[54] Rarely can they tolerate more than one trip, if their testimony is postponed, they slip back into oblivion.

A defendant in jail cannot help counsel locate witnesses, persuade them to testify, nor restage his story on the actual scene.[55] He is unavailable for spot calls to check details or last-minute conferences to plan strategy; jail may be on the edge of town and the visiting hours inconvenient for busy counsel.[56]

But often there is no alibi, no insanity plea, no defensive pyrotechnics. The indigent must meet the government's case head-on and seek to exploit evidentiary weaknesses. Ideally, he needs to size up his opposition in advance of trial, to know who the witnesses are and what they will say; to obtain the results of scientific tests on blood, narcotics, fingerprints, handwriting, ballistic tests on weapons, exhibits taken from the scene or from the defendant himself, and reports on medical examination of the victim.

In the absence of a cadre of independent investigators, the defendant has to rely for this information on pretrial criminal discovery. But neither the names of government witnesses nor their prior statements to the police or to the grand jury, even those of a codefendant, are generally available in advance through discovery;[57] their stories cannot be checked out for error—purposeful or inadvertent. They cannot even be contacted personally to see if they have any information helpful to the defense. Their FBI records cannot be secured.[58]

The indigent defendant, on the other hand, must often disclose what he expects his witnesses to testify in order to obtain a free subpoena.[59] The government has its corps of fingerprint, ballistics, and handwriting specialists; it has laboratories in which to test and analyze the evidence. The government also possesses the real evidence itself: the prints, the bullet, the blood, the signature. The results of these tests may be available through discovery,[60] but to counter these tests effectively the defense needs its own experts to view the original evidence. This means double trips and double expert fees, once to analyze and again to testify. Funds from public sources for expert defense witnesses are always limited;[61] often they are nonexistent.

The defendant can have his case tried to a jury or a judge. Detained defendants and those with assigned counsel are more apt to choose a judge;[62] jury calendars are notoriously backlogged, and the penalty for demanding a jury trial may be a stiffer sentence.[63] Adjournments are frequent, and the attrition rate for defense witnesses high. There may be subtler reasons, too, for bypassing a jury. The make-up of many juries is middle-class oriented—small businessmen, accountants, housewives. Slum residents are not so likely to be on the voter registration lists from which the juries are drawn.[64] If they are, they are not attracted to jury duty; usually they cannot afford long absences from their jobs.

The outcome of D's trial depends on a number of factors: his counsel's ability to discredit government witnesses on cross-examination; his successful refutation of scientific evidence or tests; his ability to keep any confessions out of evidence; his success in convincing the judge that the defendant could not be the man involved or that he was somewhere else at the time.

Skillful cross-examination is most effective "when the questions are based on facts rather than on intuition . . . it often takes days or weeks to secure a witness or scientific proof which can destroy a fabricated story. If the fabricated story is not revealed until trial, it may be too late." [65]

But indigent defense counsel must rely too often on spotting surface inconsistencies in a witness' testimony or on comparing testimony on the stand with prior statements made available in the courtroom only after the witness has testified. The statements must then be perused under the impatient eyes of judge and jury while the trial is stalled.[66]

Defense witnesses pose strategic obstacles, even when they actually appear. They are likely to be shabbily dressed, inarticulate, unsophisticated, testy, nervous, and vulnerable to prosecution efforts at impeachment. The effect on a predominantly white collar jury can be prejudicial.

The defendant himself runs a similar risk. A detained defendant often comes to the courtroom pallid, unshaven, dishevelled, demoralized, a victim of the jailhouse blues.[67] He comes and goes through a special door that the jury soon learns leads to the detention pen beyond. He is always closely accompanied by a police escort or marshal.[68]

A defendant under courtroom guard raises tactical as well as psychological problems. During the trial his lawyer may need to consult with him privately in the courtroom, but his guard is always in range. There can be no productive lunch or recess conferences, no quick trips to locate last-minute rebuttal witnesses, no pretrial warm-ups or post-trial replays. Should surprise witnesses or evidence materialize, the indigent's defense counsel must face such crises alone.

In most cases, the trial will end in a guilty verdict.[69] But even an acquitted defendant often faces debts, no job, broken family ties.[70] Should there be a hung jury and retrial ordered, a transcript of the trial becomes an urgent necessity: to find contradictions in the prosecution's case, to prepare to impeach witnesses, to reevaluate trial strategy. But transcripts for retrial are not routinely provided indigents. Nor is the defendant now likely to be any freer to participate in the crucial work of preparing for his second trial than he was for the first.

After the verdict, the judge can admit the defendant to bail pending sentence, or he can refuse bail altogether. A new bail premium may be necessary to continue his freedom. If he has been detained to this point, it is unlikely that he will be released now.

Had defendant D chosen to deny the charges against him in juvenile court, he would have faced many of the same problems of locating witnesses and refuting prosecution evidence that confront his adult counterparts. In most juvenile courts, he would not, however, have had the benefit of assigned counsel, let alone investigative help. Even with counsel the chances of acquittal would be slim. The rules of evidence applicable in many juvenile courts do not bar hearsay or illegally obtained evidence to establish his involvement. He may even have been forced to testify himself. The child can be excluded from the courtroom at the judge's discretion. There may be no court record to appeal from; in only a few places can he demand a jury. The standard of proof is a preponderance of evidence, not guilt beyond a reasonable doubt.[71] If adjudicated a delinquent, there could be an immediate disposition at trial; more likely he will be sent back to the detention center while the court's staff conducts a social study into his background to recommend what should be done with him.[72]

[51] See HARRINGTON, *op. cit. supra* note 1, at 23:
"In almost any slums there is a vast conspiracy against the forces of law and order. If someone approaches asking for a person, no one there will have heard of him, even if he lives next door. The outsider is a 'cop,' bill collector, investigator (and, in the Negro ghetto, most dramatically, he is 'the Man')."
See also GEORGETOWN LAW CENTER, LAW AND TACTICS IN FEDERAL CRIMINAL CASES 9 (1963):
"It is extremely important for counsel attempting to locate a defense witness to properly identify himself as a lawyer for Mr. X and that he is not a police officer or a bill collector."
One poverty program neighborhood lawyer in Washington, D.C., commented it was equally hard to find his clients during this pretrial period. Typically, the client will not have a phone, and contacts will be limited to a few unscheduled "dropping in" visits to the lawyer's office. Interview with Brian Olmstead, attorney, D.C. Neighborhood Legal Services Program, April 5, 1966.

[52] See the following:
"We are told that subpoenas issued by this Court are all too often disregarded. Among the very poor, any risk to one's job is to be avoided, and obedience to a subpoena means a day or more spent in court. As a result the best hope for a defendant (if he be detained in jail, as most Legal Aid's clients are) is to have an investigator personally seek out the witness and explain to him the importance of appearing." N.Y. ASSEMBLY REP. 18.

[53] STRINGFELLOW, *op. cit. supra* note 1, at 60–62 gives an account of his futile attempts to persuade Harlem eyewitnesses to testify in a police assault case.
". . . a great effort was made to locate and interview eyewitnesses who could either confirm or refute the boy's testimony. Of the many who were contacted and questioned, six (as I recall) essentially repeated the boy's own version of what had happened—that he had been assaulted by the policeman, rather than the other way around. Each of them admitted this in private conversation; none was willing to be a witness for the defense. They all had many excuses for their reluctance. They wanted to stay out of trouble—any trouble, all trouble, especially trouble involving the cops. It was none of their business, they kept saying. Clearly, they were afraid. These were the policemen from the beat; they would be around tonight and tomorrow and after that, and they might find something to arrest you for if you were going to be a witness against them in this case. Some had things to hide—illegal activities of their own—which argued against having anything to do with anybody else's problems with the law. Some—the most sympathetic—just had no confidence that, even if they did testify for the defense, their testimony (since they, too, were Negroes) would be given any credence by the court. They felt that since there was no chance for a fair and impartial hearing and verdict, why take the time from work or home to testify for this boy. . . . There were, in consequence, no witnesses for the defense respecting the policeman's alleged assault upon the defendant. Even the defendant refused, despite urgent entreaties, to testify in his own defense. He viewed the case as hopeless."

[54] The public defender in Miami reports that an out-of-town defense witness must pay his own fare to court, refundable (up to $3) only after "a good deal of rigamarole." The state's attorney has a fund to advance transportation costs to prosecution witnesses. Interview with Robert Koeppel, Dade County Public Defender, April 15, 1966.

[55] One defense lawyer interviewed emphasized the value of replaying the incident at the scene with the defendant. His man was charged with gouging his victim's eye out during a fight. On a visit to the scene the defendant pointed out the sharp pebbles in the gutter; defense counsel evolved a theory that the pebbles caused the eye injury when the victim fell. He was acquitted. Interview with Richard Arens, April 13, 1966.

[56] District of Columbia appointed lawyers cited the inconvenient 8:00–3:00 weekday visiting hours at the D.C. Jail as a serious obstacle to defense participation. COMM. ON THE ADMINISTRATION OF BAIL OF THE JUNIOR BAR SECTION OF THE D.C. BAR ASS'N, REPORT ON THE BAIL SYSTEM OF THE DISTRICT OF COLUMBIA 26 (1963) [hereinafter cited as D.C. BAIL STUDY].

[57] See, *e.g.*, Edward Bennett Williams' account of an indigent defense:
"In 1947 I was assigned as court-appointed counsel to defend a forty-year-old musician named Paul Collins. He had been indicted by a grand jury and charged with the felony of embezzlement, a crime punishable by imprisonment. He had never before been arrested and, except for his alcohol problem, his record was unblemished.
"Collins was without funds or friends. Before I was assigned to the case he had languished in jail for twenty-three days because he couldn't afford a bail bond and no one had made any effort on his behalf. I was able to secure his release before trial by getting his bail sharply reduced.
"As I began preparation for trial of the case, my mind automatically turned toward the conventional weapons that I had so often employed for the firm's corporate clients when they were sued for money damages. But none of those weapons was now available to me. I could not get the names of the prosecution witnesses. I could not take their testimony before trial, even if I knew who they were.
"If the dairy had filed a civil suit against Collins for $700 alleging that he owed them this as a result of a shortage in his accounts, he would have had available to him all of the procedural safeguards that any civil litigant can employ. He could have ascertained the names of all the witnesses against him and taken their depositions before trial to find out what their testimony at trial would be. In other words, in the defense of $700 he could have availed himself of what we lawyers call pre-trial discovery procedures.
"But this was a criminal case. His liberty was at stake. He faced a possible sentence of five years in the penitentiary, the loss of his civil rights and the destruction of his reputation. Under the criminal rules, the procedural safeguards available to the parties in a civil case were not available to him.
"When we went to trial in the spring of 1947, for the first time in the two years I had been trying cases I had the feeling of going into court unprepared. It was not for lack of work. I had never before worked so hard on a case. It was just that under the criminal rules I couldn't prepare to defend Collins' liberty the way I had become accustomed to prepare for the defense of corporate bankrolls." WILLIAMS, *op. cit. supra* note 49, at 132–34.

[58] Access to prior records of prosecution witnesses for impeachment is particularly vital in narcotics prosecutions.
"The pattern of testimony in these cases is frequently similar. An informant testifies that he received the narcotics from the defendant. An officer of the police department corroborates his testimony. The defendant testifies and claims either that he did not transfer the narcotics or that he was induced into making the sale under circumstances which constitute entrapment. The defendant usually has a criminal record which is used effectively to impeach his credibility. The informant frequently has a criminal record also. The FBI maintains a record of such convictions, but will not provide them to the defense. They cannot be reached by the present discovery procedure." Pye, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 87–88 (1963).

[59] Only recently has Rule 17(b) of the Federal Rules of Criminal Procedure eliminated this requirement.

[60] The new amendment to Rule 16 of the Federal Rules of Criminal Procedure allows inspection and copying of recorded statements made by the defendant, scientific tests, the defendant's grand jury testimony, books, papers, tangible objects "material" to the defense. Witnesses' names are not available except in capital cases.

[61] The public defender in Miami, Florida, commented that a judge who authorized a $1,000 fee to fly in a handwriting expert in an indigent forgery case would "never be elected next time around." Interview with Robert Koeppel, April 15, 1966. A New York City Legal Aid lawyer interviewed in April 1966 said his staff is forced to rely on charitable appearances by experts and to "improvise," i.e., ask a psychiatrist to answer a hypothetical question about the defendant's sanity at the time of the offense.

[62] See ATT'Y GEN REP. 138–44 (defendants with retained counsel or out on bail in four Federal districts pled guilty less often and chose jury trials more often than those with assigned counsel or those who were detained in lieu of bail).

[63] See D.C. CRIME COMM'N REP. 385, 396 (54% of those convicted in the felony court after a jury trial sentenced to over 5 years; only 21% of those who pled guilty received over 5 years in prison).

[64] See JACOB, JUSTICE IN AMERICA 111 (1965). Los Angeles, Milwaukee, and Baltimore studies have shown professionals, managers, and proprietors overrepresented on juries, workingmen under-represented.

[65] Pye, *supra* note 58. Professor Wigmore once said that the "difference between getting the same facts from other witnesses and from cross-examination is the difference between slow-burning gunpowder and quick flashing dynamite; each does its appointed work, but the one burns along its marked line only, the other rends in all directions." Quoted in WILLIAMS, *op. cit. supra* note 49, at 135.

[66] See, *e.g.*, 18 U.S.C. § 3500.

[67] See description of the average Women's Court defendant in New York City:
"Against these highly skilled witnesses (Police Vice Squad officers) the usual testimony is that of the defendant herself, in most instances a person of limited intelligence, often suffering from addiction to narcotics, and frequently not articulate in the English language."
N.Y. ASSEMBLY REP. 72; *cf. People* v. *Moore* 274 N.Y.S.2d 518 (1966) (D.A. said, ". . . his wife tells us . . . that they are on welfare, and maybe he wanted to supplement that welfare allowance a little bit by a little extracurricular activity").

[68] Defense lawyers in the District of Columbia agreed:
"There is an appearance of guilt that attaches to the accused's entry into the courtroom from the cell block with marshals and usually in attire not suitable to the occasion." D.C. BAIL STUDY 26.

[69] See ATT'Y GEN. REP. 138–44, for correlations in 4 federal district courts between pleas, trials, convictions and whether the defendants had assigned or retained counsel and were free on bail or detained pending trial: One example (N.D. Cal., S.F. Div.):

	Bail	Detained	Assigned counsel	Retained
Initial plea:	(Percent)	(Percent)	(Percent)	(Percent)
Not guilty	51	25	20	42
Guilty	43	71	76	54
Mode or trial:				
Jury	18	7	6	31
Court	6	3	4	5
None	76	90	90	82
Outcome:				
Dismissal	20	13	9	17
Acquittal	2	1	1	2
Guilty plea	60	79	81	68
Guilty adjudged	18	7	8	13

But see the Committee's caveat, at 131, on drawing from such samples oversimplified causal conclusions between poverty and outcome.

[70] See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 298 (1966).
"A defendant who has been acquitted may need assistance as much as one who has been convicted and placed on probation. In the first place it is obvious that some defendants who have committed crimes are able to escape conviction. Furthermore, individuals who may not be guilty of an offense may be plunged back into an environment in which the probability of future crimes is great."
See also *Giaccio* v. *Pennsylvania*, 15 L. Ed. 2d 447 (1966) (Pennsylvania law authorizing jury to impose costs on defendant acquitted of misdemeanor and commit him to jail in lieu of payment held unconstitutional).

[71] See Quick, *Constitutional Rights in Juvenile Court*, 12 NOW. L.J. 101 (1966).

[72] In some jurisdictions the judge looks at the social study even before he adjudicates the child as a delinquent. *Ibid.*

SENTENCING AND APPEAL

Defendant A, drunk and disorderly, will be sentenced on the spot.[73] The sentence may be suspended if he has no lengthy record. Otherwise, he may be fined $30 (or 30 days)[74] or given a short sentence (10–90 days) in the local jail or workhouse. But even a short jail sentence can play havoc with a marginal offender's precarious existence—day-to-day jobs and rented rooms are gone when he gets back, his tenuous ties to the neighborhood cut.

A poor, petty offender rarely appeals his conviction. Appeal is often discretionary with the courts if the fine does not exceed $50. There is a 3-day limit on filing, and no mention of his appeal right is made in court.[75] Usually, he has no counsel. By the time an appeal would be heard, his sentence is served; a stay would have to be conditional on an appeal bond of perhaps $500–1,000.

Misdemeanant B, convicted of petty larceny, will probably not receive a presentence investigation.[76] If she has counsel, her lawyer can, of course, present his own information and plea to the court, citing her job status, her family responsibilities, her penitent attitude—all the reasons why the court should not disrupt a life with some semblance of normality. An offer to make restitution to the victim for any monetary loss or to pay hospital bills can be effective at this juncture. It may also be impossible if the defendant is impoverished.

In certain kinds of cases, the court will realize that a promise to seek private psychiatric treatment on release holds out a better promise of recovery and safety to the community than a nontherapeutic jail sentence. However, if the defendant or her lawyer can satisfy none of these alternatives, she may go to prison for several months. And any appeal rights may be illusory. Free counsel may not be available on appeal, even in serious misdemeanors.

When felony defendant C appears for sentencing, there will probably be a presentence report in his file. The contents of the report, however, will usually be inaccessible to him or his counsel in accordance with a general policy of nondisclosure.[77] The probation officer will have been to the jail to talk to him and to report his "attitude," "his rehabilitative potential." He will also have been to see his family and friends, employers, neighbors, and enemies. The report will contain a potpourri of their narratives and the investigator's own conclusions.[78] Dedicated counsel may try to supplement this report with an investigation of his own. If possible, he will advance rehabilitation plans for his client in an effort to avoid prison. But often harried by other business, assigned counsel may have to defer judgment to the probation office.[79] For whatever reasons—the defendant's appearance or demeanor, his lack of a job or strong family ties after months in jail—defendants with assigned counsel and defendants detained before trial receive prison sentences more often than the rest.[80]

After sentence, if there is a right to appeal, the indigent must be furnished counsel and a transcript or whatever record is necessary for an adequate appeal.[81] But often there are time limits on how promptly the appeal must be filed, even if counsel has not been appointed. In such cases, the defendant will have to write the petition or file the notice of appeal himself. In any event, he or his lawyer may still have to absorb much of the cost of appeal.[82]

Appeals can prolong the proceedings excruciatingly. Unable to raise new bail, the indigent defendant may languish months in jail—without credit toward his sentence. If he elects to begin serving sentence, he may be sent to a state penitentiary, far from counsel.[83] And successful appeal, while sometimes bringing release, more often means only a new trial and an interminable replay of the whole process.

In the period after D is adjudicated a delinquent, a court social worker will conduct a background investigation preparatory to holding a dispositional hearing. She will talk to D in the detention home and to his supervisors to see how he is "adjusting." His mother, his school teachers, his neighbors will be contacted. His earlier probation file will be checked. If there is any possibility of emotional or mental aberration, psychological or neurological studies can be ordered. All this will go into her report, along with her conclusions: "He is a bad influence on younger boys;" he "disobeys" his mother; he is "untruthful."

In D's case, the factual recitation will be typical of that of a majority of youths before the court: No father in the home, mother works, intermittent periods on welfare, home life overcrowded, turbulent and disorganized, constant evictions, poor early school adjustment, habitual truancy, dropout at 16,[84] suspected vandalism, early sex adventures, neighborhood a drop-site for stolen cars, a hangout for addicts, pushers, prostitutes, a battleground for gang wars.[85] Since school, he has held a few jobs, for short periods only: car washer, kitchen help, road gang. Mother is ambivalent toward him, alternatively possessive and rejecting. He is a loner, with no active membership in church or social organizations.

The report is complete, and D is brought under guard from the detention center to court. He may not have seen his mother since the last visiting day—if she came to see him then. He has no lawyer. The judge has been handed the social study prior to court, and the social worker is there to elaborate on the report or to answer questions. The child or his parent has no right to see the study. The social worker may have concluded that the boy must be removed from his home because his mother cannot control him, or because there are no day-time or evening supervision resources in his neighborhood to see that he stays in line.

Theoretically, the mother (or counsel if the youth were represented) could counter with job offers, possible rehabilitative programs, vocational training, or Job Corps placement to prove institutionalization was not necessary. A more affluent parent could offer a special private school, outpatient psychiatric treatment, or group counselling for the whole family. Witnesses could be offered to show the boy's redeeming features and his potential for constructive action and growth.

In D's case none of these possibilities are available. The judge listens to the social worker and to the child and his mother—often antagonistic to one another—then commits the boy to juvenile training school for an indeterminate period, not to exceed his twenty-first year.[86]

PRISON, PROBATION, AND PAROLE

Defendant B, the shoplifter, is ultimately granted probation. She will be required to report to a probation officer downtown at the court at his convenience. She must stay in the area. She cannot change jobs, move, alter her marital status without permission, frequent places where liquor is sold, or stay out late. She cannot associate with other law offenders. She must obey all laws.[87] If she does not have a job, she must try "diligently" to get one. Restitution may have to be made. In some counties, the costs of providing her with a legal defense must be repaid as a condition of probation.[88]

In the slum areas where life is lived on the streets and in the bars, where a sizable percentage of local residents are past offenders, the conditions of probation may not be realistic.[89] Probationers, like other slum-dwellers, probably have a greater chance of being "picked up" for a minor street offense because of where and how they live. Now, because of their special status (probationers' names are generally listed at their local precinct), they may attract even closer official attention in areas which police are trying to "keep clean."

Probation officers exercise their discretion as to how to handle "technical violations" in different ways. If the officer and his probationer hit it off well, the officer will hesitate to be rigid, but in many cases the wide social gap between the middle-class officer and his lower-class client inhibits such rapport. The officer can ignore minor rule infractions, recognize the day-to-day pressures of existence, help the probationer to overcome his antiauthority bias. Or he can blow the whistle on every technicality, assuring the probationer's quick return to jail.

If revocation is threatened, the probatitoner in many jurisdictions will get neither notice nor a hearing. Assignment of counsel to indigent probationers is an accident of jurisdiction.[90] An unrepresented probationer can be refused access to the probation officer's reports or files; confrontation and cross-examination of unidentified accusers may be impossible. Bail may or may not be available during the proceeding. A full-scale probation hearing, like a trial on the main offense, often involves a contest of facts and requires witnesses, evidence, searching cross-examination, for which the indigent is totally without resources.

Defendant C, the indigent hold-up man, has been sentenced to prison. Left behind are a wife and children, snowballing debts. In prison, he can contribute nothing to his dependents' existence. His prison earnings, if any, are meager and are consumed primarily in commissary items—cigarettes, soap, candy.[91] He may be drawn into

---

[73] In many lower courts the defense counsel or judge may specifically ask for a presentence report, but an unrepresented defendant seldom gets one. A Legal Aid lawyer interviewed in New York City reports that he asks one only for "middle class" defendants in misdemeanor cases; in others it is more likely to do harm than good.

[74] The $1 or a day in jail rate must be compared with a workman's minimum wage of $1.25 an hour. The D.C. CRIME COMM'N REP. 394 showed half of those fined for misdemeanors could not raise the money and went to jail. *Cf. People* v. *Saffore*, 18 N.Y.2d 101 (1966) (holding unconstitutional a statutory penalty of one day's imprisonment for each dollar of unpaid fines).

[75] In some jurisdictions, there is a right to appeal from convictions in minor cases for a trial de novo in a higher court. In the Baltimore Municipal Court an unrepresented defendant is not advised of his right to a trial de novo in another court. Yet in 856 such appeals to the Circuit Court, only 320 convictions were upheld, 176 acquittals resulted, 283 cases were dismissed, 14 nolle prossed, 63 given probation without verdict. Staff Study, *Administration of Justice in the Municipal Court of Baltimore*, printed in appendix B *supra*.

[76] About 10% of serious misdemeanants in the U.S. Branch of the D.C. Court of General Sessions had presentence reports in 1966. D.C. CRIME COMM'N REP. 412-13. In New York City, only 29% of misdemeanors were investigated by the Probation Department even though such investigation is a statutory requirement for serious misdemeanors or for any misdemeanant put on probation. Vera Foundation, Study of Misdemeanor Sentencing (1965) (unpublished).

[77] See, e.g., FED. R. CRIM. P. 32(c).

[78] One defense lawyer interviewed commented on the high value probation officers typically put on "middle class" values like neatness, promptness, steady employment, education. He also scored the inclusion in the reports of hearsay statements and subjective evaluations such as "the subject seemed evasive—refused to cooperate." Also noted was the psychological premium in a neatly dressed defendant coming to the probation office for his interview rather than having the officer go to the jail to see him. Interview with Richard Arens, April 13, 1966.

[79] In most jurisdictions counsel is provided at sentencing. In 70 counties surveyed, however, counsel was provided only on request to defendants who pleaded guilty. SILVERSTEIN 137; *cf. Townsend* v. *Burke*, 334 U.S. 736 (1948); *Hill* v. *United States*, 368 U.S. 424 (1962).

[80] SILVERSTEIN 25, states that indigent defendants who plead guilty are more likely to go to prison than defendants represented by retained counsel. See also Rankin, *The Effect of Pre-Trial Detention*, 39 N.Y.U.L. REV. 641 (1964) (36% of bailed sample of New York felons got probation, only 9% of detained sample; 17% of bailed defendants went to prison, 64% of detained). The Rankin study attempted to exclude as relevant factors prior record, assigned or retained counsel; amount of bail and social integration. Jailed first offenders were shown to be half again as likely to receive prison sentences as repeaters who made bail.

A middle class defendant returning to a comfortable home and job in a crime free atmosphere with supportive services available is usually a better probation risk than a defendant returning to a poverty stricken tenement, without a job, on a street frequented by drug addicts, bootleggers, prostitutes, and policy operators.

[81] See *Burns* v. *Ohio*, 360 U.S. 252 (1959) (filing fee must be waived); *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (indigent defendant cannot be denied free transcript or equivalent where it is prerequisite to appeal); *Coppedge* v. *United States*, 369 U.S. 438 (1962) (in forma pauperis application must be granted unless appeal is clearly frivolous); *Draper* v. *Washington*, 372 U.S. 487 (1963) (indigent needs counsel and transcript to show appeal is not frivolous); *Douglas* v. *California*, 372 U.S. 353 (1963) (indigent must have assistance of counsel on first appeal of right). Many States have different levels of intermediate appellate courts, and the indigent's right to free counsel or transcript may not extend beyond the first level.

[82] Practice varies as to what appellate costs, expenses, and fees are absorbed for indigents. Sometimes no costs are paid other than the transcripts. Briefs may have to be typewritten at counsel's expense; he must always pay his own personal and travel expenses at oral argument. In some States appellate counsel are not compensated although trial counsel are. Some States assess the fees, expenses, and costs of an appeal against the defendant if he loses the appeal. SILVERSTEIN 139; *cf. Renaldi* v. *Yeager*, 384 U.S. 305 (1966) (New Jersey law requiring payment of appeal transcript costs from prison pay of unsuccessful appellants in forma pauperis held invalid).

[83] See recent amendment to FED. R. CRIM. P. 38 (court may request Attorney General to designate place of confinement near counsel while appeal is pending).

[84] The D.C. CRIME COMM'N REP., ch. 3, surveyed over a thousand juvenile court case files and found that the typical offender referred to the court was a Negro, the product of a broken home, has done poorly in school, or was a dropout. Most frequently he committed his offense in his own neighborhood.

[85] See the following:

"Take the gangs. They are violent, and by middle-class standards they are antisocial and disturbed. But within a slum, violence and disturbance are often norms, everyday facts of life. From the inside of the other America, joining a 'hopping' gang may well not seem like deviant behavior. It could be a necessity for dealing with a hostile world." HARRINGTON, *op. cit. supra* note 1, at 125.

[86] The D.C. CRIME COMM'N REP., ch. 3, and staff surveys showed that among juveniles referred to the court 53% were from broken homes; 12% were from homes on welfare; 61% had been to court before. Among those committed to juvenile institutions, a higher percentage (66%) were from broken homes; 31% were from homes on relief. Among the latter sample 88% were from homes with less than $5,000 annual income, 75% from homes receiving less than $3,000.

[87] See the following:

"(1) Report to your probation officer as directed. In other words if your probation officers tells you to report every Tuesday at 2 o'clock you report to him at that time—that doesn't mean 2:30 or 2:10.

"(2) Continue to live with your wife—don't live elsewhere—don't get mad at your wife and decide to live someplace else. If you do, you will be violating the terms of your probation. . . .

"(3) You aren't to quit that job and take another job until and unless you get permission to do that from your probation officer. If you find a job where you make a hundred dollars a week instead of 60 dollars a week, you have to tell your probation officer about it and if he agrees then you can change jobs, it's up to him, and you have to get his permission first, is that clear? . . .

"(4) You are not to associate with anyone on probation or parole or anyone of known questionable character—you are not to hang around with people like that, do I make myself clear?

"(5) You are to make restitution for this money thereof to the probation department. They will decide how much you are to pay, and you are to make the payments regularly every week or every month as they direct.

"(6) You are not to use any intoxicants at all, no type of alcohol, wine, beer, whiskey, tequila, anything that has alcohol in it, and you try to stay out of any place where they sell or serve intoxicants—you are not to go in these places, now do you understand that . . . . If you have occasion to go to a restaurant you pick out a place where they don't sell alcoholic drinks of any kind." Transcript, *People* v. *Tirado*, City Ct., Syracuse, N.Y., Oct. 5, 1965.

[88] SILVERSTEIN 113. The defendant may not be told this at the time he asks for assigned counsel but only when he is placed on probation. In other counties the judge "strongly urges" the defendant to pay the assigned counsel a fee, although it is not made a condition of probation. In Ohio and Virginia costs (including attorneys' fees) are taxed against a convicted defendant. In Florida the public defender may file a claim against the defendant for services which constitute a continuing lien against his real and personal property.

[89] "[T]he street is also a precarious, primitive society; it is the locale of bookies and the numbers racket, of pimps and dope pushers and pay-offs and other parasites of poverty. The street is violent: three times I have witnessed shootings there. For some, the street means the threat of raids from rival gangs; for addicts, there is the risk of being fingered by a stooge purchasing his own immunity from arrest; for most, there is the fear of harassment by the police who seem somehow like an occupation army." STRINGFELLOW, *op. cit. supra* note 1, at 8. See also GLASER, 390–91.

[90] Counsel is provided in over 20 States and the Federal courts for probation revocation hearings. The Supreme Court of Pennsylvania has ruled it a constitutional necessity. *Commonwealth* v. *Maloney*, 204 A.2d 451 (1964).

[91] The average monthly earning of working prisoners in 1960 was $31. Only about, a third of the States have compulsory savings programs for earned money. Many times only inmates assigned to prison industries can earn money. An inmate's urgent need for funds to help those on the outside or to provide for minimal comforts in jail is sometimes cause to assign him to prison industries rather than to a type of vocational training more potentially valuable to his future earning power on the outside. GLASER 237, 318.

the prison rackets to earn more.[92] If the prison is distant from his neighborhood, he can expect few visitors to make the time-consuming and expensive trip.[93]

His prison work duty often reflects the same educational and skill deficiencies that plagued him on the outside.[94] He is apt to relate poorly to the prison's middle-class staff.[95]

While in prison, he may try to institute collateral attacks on his conviction by writing judges and public officials his version of how he was wronged. Occasionally such a letter with surface merit will provoke a judge to grant a hearing, but the aid of counsel and supporting investigative resources, seldom available, may be indispensable to success.

At the end of one-third of his sentence, he may petition for parole, and reapply yearly if he is turned down.[96] Parole applications take into account the nature of the man's crime, his pre-prison record, his "institutional adjustment." [97] Even when granted, however, parole may depend on his having a job waiting for him and an approved place to live.[98] A prisoner may wait months after parole has been granted for these conditions to materialize, or until he can be mandatorily released—when his sentence less "good time" is finished.

Back on the street, living on the dole of relatives, or working at a transient job, he starts anew.[99] Parole conditions prevent him from leaving the area, from associating with ex-cons like himself, from carrying weapons, drinking, going to "undesirable places," changing addresses, marrying or cohabitating extramaritally, from driving a car without permission. Because of his record, he cannot work in a bar, restaurant, hospital, and in some places not even in a barber shop. He cannot afford the compensating luxury of further training or education.[100] Old debts have mounted while he was in prison, or he has acquired new debts since his return.

In desperation, some parolees actually ask to be returned;[101] others revert to crime for supplemental income. The parolee can always be sent back to jail for technical violations or new offenses. He is troubled by the threat of police harassment—rightly or wrongly—which can lead to revocation.[102] If he is charged with a new offense, he can go back to prison before, not after, the revocation hearing. He usually has no right to assigned counsel at such a hearing.

In the juvenile training school (typically in a rural setting far from the inner city, where he lives and often inaccessible by public transportation), D sees his family infrequently; his companionship is concentrated in the ranks of fellow delinquents.

> "Warwick had real criminals . . . it seemed like just about everybody at Warwick not only knew how to pick locks but knew how to cross wires in cars and get them started without keys. Just about everybody knew how to pick pockets and roll reefers, and a lot of cats knew how to cut drugs. They knew how much sugar to put with heroin to make a cap or a bag. There was so much to learn . . . One of the most interesting things I learned about was faggots. Before I went to Warwick, I used to look down on faggots like they were something dirty. But while I was up there, I met some faggots who were pretty nice guys . . ." [103]

Insufficient staff and an overcrowded institution provide little casework, no therapy, too much opportunity for abuse of the weak and nonconforming inmates. For persistent misbehavior he can in many instances be transferred administratively to an adult prison.[104] The institution decides when he is ready for release, and even then it may be delayed if his home remains "unsuitable." [105] When release does come, it is usually conditional, revocable for "unsatisfactory adjustment" as well as for infringement of rules or new law violations. He can be kept on a ward status indefinitely until the agency asks the court to terminate it. If he commits a new violation, the boy goes back into detention to await new court action.[106] When he is finally discharged, D's juvenile record, while not open to public inspection, can be used to impeach him in later court proceedings, or included in any pre-sentence report for an adult court. It follows him into the Army. A potential employer's request for a police clearance as a prerequisite to employment will expose it.[107]

[92] A District of Columbia Department of Corrections official interviewed (April 1, 1966) said:

> "When a man has no money at all in prison he will grub for some. That means he is more likely to get into the prison rackets to earn money for bare essentials, i.e., cigarettes. He will more easily become a participant in the illegal inmate markets for dope, liquor, etc. or even more subject to homosexual pressures. It also means he will borrow from his more opulent buddies, and in prison a man always pays his debts, by some form of barter, be it menial personal services, illegal altering of records, or homosexual activity."

[93] Prisoners with active family ties are rated better parole success risks. GLASER 299, 362–66. See also testimony of Attorney General Katzenbach before House Judiciary Subcommittee No. 3 on H.R. 6964 (May 20, 1965):

> "At present, when adult prisoners have deaths in their families and are considered good risks, we may permit them to visit their home communities under escort of one of our officers. The prisoners or their families pay all transportation expenses and the salaries and per diem of the employees involved. This is an expensive privilege for these families, who are often poor.
>
> "Also, on occasion, when a prisoner is nearing his release date and his home community is fairly close to the institution, one of our employees may accompany him as a custodial escort to his home community while he looks for a job. The employee, in such instances, donates his own time; it is a tangible gesture of his faith in the accomplished rehabilitation of the prisoner.
>
> "But if a prisoner or his family cannot afford the cost of a guard, or no employee is available to volunteer his time, the prisoner cannot see a dying relative, or attend the funeral, or accept a job interview."

[94] Skills can, of course, be acquired in prison (N.Y. Times, May 5, 1966—Missouri defendant asks 2 year sentence to study carpentry in prison shop). But only one-fourth of the inmates in one sample got jobs on release related to their prison work experience. Most initial outside jobs followed the pre-prison occupational pattern of the inmate instead. GLASER 251.

[95] Glaser points out that the inmate's contact with institutional social workers is a function of his educational attainment. In one Wisconsin survey, 20% of those inmates above 8th grade had frequent social worker contacts in prison, compared with only 12% of those below 8th grade level. The survey concluded that the higher education of the social workers may actually inhibit their ability to communicate with the lower income undereducated inmate. GLASER 136–37.

[96] Some inmates do not bother to apply:

> "The inmate, I think, never looked better in his life—he was clean, fed, and fairly content. He said that it was not such a bad place to be and that he liked the regime of the prison: he always knew when something was to be done; there was a structure to prison society to which he had known no parallel in his family or in Harlem, and he liked that about jail." STRINGFELLOW, *op. cit. supra* note 1, at 54–55.

[97] "Even if it were not true that the poor and stupid are shortchanged in the police station and courthouse, they surely are after they get to prison. Parole boards are generally composed of reasonable, honest, well-meaning men, and when an inmate comes before them, they consider with as much fairness as they can muster his past record, his conduct while in prison, the likelihood of his success outside. What determines the likelihood of success? The man's economic situation, his associates, his place of habitation. The offender with money or connections can easily demonstrate that he will be able to get along without difficulty; so can most professional criminals. The noncriminal impulse offender and the professional tend to serve time quietly in prison; they're smart enough to stay out of trouble. But the offender whose social and intellectual inadequacies were responsible for his getting into trouble in the first place—where will he go and what will he do?

> "The answers are obvious: back to the same street, the old crowd, the old routine. It is not surprising that he doesn't find early release. No wonder that he spends a long time behind bars. No wonder, but no fairer. We can understand why the poor go to jail more frequently than the affluent, why the smart spend less time behind bars than the stupid, but we should understand also that this same set of conditions makes the failures more antisocial, more bitter." Jackson, *Who Goes to Prison?* Atlantic Monthly, Jan. 1966, p. 57.

[98] SANDS, MY SHADOW RAN FAST 184 (1965):

> ". . . frequently men were still in prison futilely trying to get jobs—months and even years after the parole board had pronounced them fit to be free. The longest wait for any I knew personally was thirty-four months—he had spent more time trying to get a job after he had been paroled than some men spend in prison altogether. And many men I knew had waited as long as a year to eighteen months."

Lack of a job was the cause of two-thirds of the overdue parole cases in one sample, and of 91% of those delayed more than 20 days in another. GLASER 325–26.

[99] On release, prisoners generally get a set of civilian clothes, frequently complained of as "illfitting, cheap-cloth—wrinkles easily." Some States give a small gratuity ($10–50) and transportation costs. GLASER 343:

> "It is difficult to visualize a man so ill-equipped suddenly faced with the necessity of finding a place to stay, a way to eat and the means to look for a job. If there is no home with a welcome mat out, he can stay at a mission, as there is no centralized shelter program, or ask and qualify for money to get a room. He can apply for public assistance, where most often, there is a waiting list or delay. He can go to a private agency where he is faced with other policies and regulations. These private agencies have very limited funds for emergency needs." Goldsborough, *After-Care Agencies and the Indigent*, 45 PRISON J. 44 (1965).

[100] See the following:

> "Experience has taught us that for those who are ambitious to secure needed education or training, a major problem presents itself in the area of maintenance. Even with a part-time job the pressures of economy became too great, with the result that the objectives are abandoned and they seek better paying jobs or unfortunately, revert to delinquent or criminal activities." Oswald, *Poverty and Parole*, 45 PRISON J. 41 (1965).

[101] See the following:

> "I thought of old Tony, paroled after 39 years in prison; in less than a week he was back at the Front Gate, begging to be let in. He had found no comfortable place in that strange outside world. He had been allowed back in. Even he knew where he belonged." SANDS, *op. cit. supra* note 98.

[102] Most parole revocations are apparently on charges of violating technical conditions or committing new misdemeanors. D.C. CRIME COMM'N REP. 445.

Thirty-two percent of the Glaser prisoner survey feared police harassment from arrests and pickups. Some police do enforce a policy of keeping tabs on ex-cons and discouraging their presence in their districts. GLASER 393.

[103] BROWN, MANCHILD IN THE PROMISED LAND 138, 141 (1965).

CONCLUSION

Poverty breeds crime. The poor are arrested more often, convicted more frequently, sentenced more harshly, rehabilitated less successfully than the rest of society. So long as the social conditions that produce poverty remain, no reforms in the criminal process will eliminate this imbalance. But we can ease the burdens of poverty by assuring the poor those basic procedural rights which our society ostensibly grants all citizens: the right to be represented by competent counsel early enough in the process to preserve other rights; the right to prepare an adequate defense, the right to be free until convicted, the right not to be jailed solely because of lack of money to remit a fine or make restitution, the right to parole, the right to a clean start after prison. In withholding these fundamentals from any citizen, society reveals a poverty of its own.

[104] See NCCD, STANDARD JUVENILE COURT ACT § 24, comment (6th ed. 1959).

[105] See D.C. CRIME COMM'N REP. 710. On November 1, 1965, there were 30 children at the local delinquent institution who could have been returned to the community if they had a "suitable" home to return to.

[106] During the average after-care period of one year, 42% of juvenile releases commit new offenses in the District of Columbia. D.C. CRIME COMM'N REP. 709.

[107] Ketcham, Unfulfilled Promise of the Juvenile Court (NCCD, 1961).

MANPOWER REQUIREMENTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

by Lee Silverstein

This paper surveys the types of criminal cases to which the right to counsel has been extended and the volume of criminal prosecutions in the courts. It estimates the current need, in terms of manpower and of money, for adequate operation of both the defense and prosecutorial functions. The paper also projects the needs of the criminal justice system by the end of the next decade.

I. THE NEED FOR LAWYERS

The need for lawyers in the administration of criminal justice is a function of both the constitutional and statutory framework which requires lawyers to represent the State and the accused and the number of defendants who are processed through the State and Federal systems each year.

A. CONSTITUTIONAL AND STATUTORY REQUIREMENTS

1. State Courts. The primary requirements for counsel are in prosecutions for felonies, defined for the purpose of this paper as crimes punishable by death or by imprisonment for longer than a year. The State is typically represented by a county or district prosecutor. See Nedrud, *The Career Prosecutor,* 51 J. CRIM. L., C. & P.S. 343 (1960). At present there are approximately 3,200 prosecutors' offices in the States. In any kind of proceeding where lawyers are provided for indigent defendants, the prosecutor's office usually appears for the State. Thus, as constitutional and statutory requirements for defense counsel are extended, the prosecutor's office also has additional work.

On the defense side, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), requires that counsel be offered to an indigent State court defendant. As the Supreme Court has indicated in a series of per curiam rulings following the *Gideon* decision, the requirement applies not only at trial but also at the stage of arraignment on the indictment or information, when the defendant is required to plead. It also applies at the stage of sentencing. Moreover, counsel is required at the preliminary examination if it is or may be a critical stage of the prosecution, *White* v. *Maryland,* 373 U.S. 59 (1963), and testimony at the preliminary examination taken in the absence of counsel is inadmissible at trial because of the lack of opportunity for cross-examination, *Pointer* v. *Texas,* 380 U.S. 400 (1965). The decisions in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), require that counsel be provided shortly after arrest in certain circumstances. Before the police may question a suspect, they must tell him that he has a right to remain silent, that he has a right to employ a lawyer, and that if he cannot afford a lawyer, one will be provided for him at no charge. If this procedure is not followed, any incriminating statement taken from the accused is inadmissible at trial. From the viewpoint of legal manpower, these cases suggest not only a need for early availability of defense counsel but also a need for legal advice to policemen and sheriffs, either from the prosecutor or, in larger cities, from a police department attorney. If an appeal is available as a matter of right in a felony case, the State must provide counsel to an indigent appellant. *Douglas* v. *California,* 372 U.S. 353 (1963).

Beyond these minimum constitutional requirements that apply throughout the Nation, counsel must be provided in additional kinds of cases in certain States. The Fifth Circuit Court of Appeals has extended the *Gideon* rule to misdemeanors. *Harvey* v. *Mississippi,* 340 F.2d 263 (1965); *McDonald* v. *Moore,* 353 F.2d 106 (1965). This rule has been accepted in Texas, *Braden* v. *State,* 395 S.W.2d 46 (1965), and Georgia, *Taylor* v. *City of Griffin,* 149 S.E.2d 177 (1966) (dictum in intermediate appellate court), but rejected in Florida, *Watkins* v. *Morris,* 179 So. 2d 349 (1965). New York, first by judicial decision, *People* v. *Witenski,* 15 N.Y.2d 392, 207 N.E.2d 358 (1965), then by statute, N.Y. County Law § 722–a, requires counsel for misdemeanors. The statute applies to any crime where a sentence of imprisonment may be imposed. In California the *Gideon* rule has been extended to misdemeanors. *In re Johnson,* 62 Cal. 2d 325, 398 P.2d 420 (1965). See also *Patterson* v. *State,* 231 Md. 509, 191 A.2d 237 (1963); *State* v. *Anderson,* 96 Ariz. 130, 392 P.2d 790 (1964). In Massachusetts a rule of court adopted in 1964 requires counsel for any charge punishable by imprisonment. Counsel are also being provided for misdemeanors by statute or court rule in New Hampshire, Maryland, Illinois, Wisconsin, Minnesota, Texas, California, Oregon, and other States. A recent decision in Washington applies *Gideon* to a misdemeanor. *Tacoma* v. *Heater,* 409 P.2d 867 (1966) (strong dictum). Three States have ruled that counsel need not be appointed for a misdemeanor. They are Connecticut (see *De Joseph* v. *Connecticut,* 385 U.S. 982 (1966); North Carolina, *State* v. *Bennett,* 147 S.E.2d 237 (1966); and Arkansas, *Winters* v. *Beck,* 297 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966); North Carolina, *State* v. *Bennett,* 147 S.E.2d 237 (1966). Two courts have ruled specifically that the constitutional right to counsel does not extend to mere traffic offenses. *People* v. *Letterio,* 16 N.Y.2d 307, 213 N.E.2d 670 (1965); *McDonald* v. *Moore,* 353 F.2d 106, 108 (5th Cir. 1965) (strong dictum). Both courts mentioned the problem of obtaining sufficient defense lawyers. It is possible that the Supreme Court will extend the *Gideon* rule to at least the more serious misdemeanors.

Many States, by statute or rule of court, are providing counsel for a petitioner in a habeas corpus proceeding or comparable postconviction remedy, although the pattern is uneven from State to State. At the time of the Bar Foundation survey in 1963, 38 States were providing counsel to some extent for postconviction remedies, while 12 States had no provision for counsel or no experience, or appointment was rare. SILVERSTEIN, DEFENSE OF THE POOR 141 (1965). Although the Supreme Court has not ruled on the precise question of a right to counsel in postconviction proceedings, see *Lane* v. *Brown,* 372 U.S. 477 (1963), the Court has several times expressed the desirability of adequate State remedies to raise Federal questions by way of collateral attack on a State conviction, so that the Federal courts need not entertain so many writs of habeas corpus. See *Case* v. *Nebraska,* 381 U.S. 336 (1965) (concurring opinions). The National Conference of Commissioners on Uniform State Laws, partly because of the *Case* decision, adopted a Revised Uniform Post-Conviction Procedure Act in 1965. Section 5 of the Act provides for appointment of counsel in both the trial and reviewing court.

Under various statutes, decisions, and local practices, counsel are being provided for the poor in certain other criminal and quasi-criminal proceedings. These include hearings on revocation of probation or parole, sexual psychopath hearings, juvenile court delinquency proceedings, extradition hearings, and coroners' inquests. See SILVERSTEIN, DEFENSE OF THE POOR 143–44 (1965); Skoler & Tenney, *Attorney Representation in Juvenile Court,* 4 J. FAMILY L. 77 (1964).

a. Time of Appointment of Counsel. The procedure in the States varies greatly as to the stage of a criminal prosecution when counsel is first provided. If lawyers are provided for the poor at the stage of first judicial appearance or at the preliminary examination, a considerable amount of additional lawyer service is needed, especially if the committing magistrates sit in several scattered locations in the county. The requirements of the *Escobedo* and *Miranda* cases, *supra,* have led at least one city to experiment with providing counsel on a 24-hour basis, and the matter is under discussion in other cities.

b. Standards of Indigency. Another factor that varies greatly among the States is the method of determining eligibility for assignment of counsel. The stricter the system for determining how indigent a defendant must be to qualify, the less the amount of legal services needed. Rules of eligibility are usually unwritten, but in most courts financial ability to raise bail is considered, and in a few courts it precludes appointment of counsel. This practice raises a serious constitutional question of equal protection. See SILVERSTEIN, DEFENSE OF THE POOR, ch. 7; Silverstein, *Bail in the State Courts—A Field Study and Report,* 50 MINN. L. REV. 621 (1966). Other factors frequently considered are wages or salary of the accused, ownership of real property, ownership of automobile and other tangibles, ownership of stocks and bonds, and bank accounts.

In many courts the test of eligibility is extremely simple, consisting of the single question, "Do you have money to hire a lawyer?" Some courts require an affidavit of poverty or its equivalent before counsel may be appointed. A few courts, chiefly located in larger cities, employ a detailed written questionnaire or affidavit.

c. Manner of Offering Counsel. Another factor affecting the demand for legal service for the indigent is the manner of offering counsel. The Bar Foundation survey disclosed a spectrum of practices, ranging from a virtual insistence that the defendant accept the appointment to an omission to inform the defendant that he has a right to counsel, thereby leaving it to him to take the initiative and request counsel. Obviously, the more fully defendants are informed of their rights, the more lawyers will be needed.

2. Federal System. The constitutional and statutory requirements in the Federal courts are much simpler to state since they are uniform. In the civilian courts the Federal Government is represented by lawyers in the Justice Department and U.S. Attorneys appointed for each Federal district court. Under *Johnson* v. *Zerbst,* 304 U.S. 458 (1937), the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, and the Federal Rules of Criminal Procedure, a lawyer must be provided in felony and mis-

Lee Silverstein is a research attorney of the American Bar Foundation. He is a native of West Virginia and practiced law in Charleston for seven years following his graduation from Columbia Law School. He also received a Master of Laws degree from Harvard Law School. Mr. Silverstein was a member of the faculty of the University of Pittsburgh Law School for four years. He is the author and editor of the three volume study, *Defense of the Poor in Criminal Cases in American States Courts,* published by the American Bar Foundation in 1965.

This paper was originally prepared for a conference on legal manpower needs sponsored by the Commission, the ABA Special Project on Minimum Standards for Criminal Justice, and the National Defender Project of the National Legal Aid and Defender Association. The paper follows an outline provided by the Commission staff for use at this conference. Opinions expressed are those of the author and not necessarily those of the American Bar Foundation.

demeanor cases and from the first appearance before a U.S. Commissioner through appeal.[1]

B. VOLUME OF CASES

1. State Courts. Table 1 reports the number of defendants prosecuted for felonies in the State courts, based on the filing of an indictment or information. The total is 314,000, including the District of Columbia and Puerto Rico. If the defendants are counted at the stage of first appearance before a magistrate, the numbers would be somewhat larger, and if the count is made at the stage of arrest, the numbers would be still larger.

Table 1.—Felony Defendants in State Courts, 1965 or Latest Available Year

State	Population, 1965 (estimate)	Felony defendants	Estimated proportion indigent	Present budget for counsel in trial court
	Thousands		Percent	Thousands
Alabama	3,463	4,638	60	[1] $75
Alaska	253	587	30	[1] 25
Arizona	1,609	1,600	25	[1] 100
Arkansas	1,960	4,111	57	[1] 22
California	18,605	35,614	65	[1] 6,000
Colorado	1,969	4,000	51	[1] 320
Connecticut	2,833	1,898	51	[1] 146
Delaware	505	630	44	[2] 96
District of Columbia	803	1,510	61	207
Florida	5,805	6,588	50	1,040
Georgia	4,357	8,738	60	[3] 40
Hawaii	711	350	38	[1] 30
Idaho	692	813	66	[1] 55
Illinois	10,646	9,576	60	[1] 700
Indiana	4,886	4,557	55	[1] 150
Iowa	2,760	7,004	47	[1] 75
Kansas	2,234	4,971	59	[1] 160
Kentucky	3,179	5,300	60	0
Louisiana	3,534	8,739	60	0
Maine	993	1,100	55	[1] 45
Maryland	3,521	8,666	60	[1] 200
Massachusetts	5,384	5,731	41	[2] 187
Michigan	8,219	10,093	49	[1] 375
Minnesota	3,555	2,768	61	185
Mississippi	2,322	2,444	60	[1] 22
Missouri	4,498	6,639	57	[1] 100
Montana	706	712	80	[1] 60
Nebraska	1,477	2,991	71	[1] 290
Nevada	440	1,350	60	[1] 130
New Hampshire	669	954	66	[2] 50
New Jersey	6,775	11,382	37	[4] 154
New Mexico	1,029	1,601	55	[1] 7
New York	18,075	21,264	47	2,407
North Carolina	4,914	7,000	60	492
North Dakota	652	355	58	24E
Ohio	10,247	13,871	53	[1] 500
Oklahoma	2,483	3,380	50	[1] 135
Oregon	1,900	4,452	56	[1] 160
Pennsylvania	11,521	19,686	52	394
Puerto Rico		4,554	55	[1] 290
Rhode Island	895	859	[1]	[1] 53
South Carolina	2,543	11,870	60	0
South Dakota	703	1,409	60	[1] 38
Tennessee	3,846	12,221	43	[2] 250
Texas	10,552	23,000	62	[1] 200
Utah	990	1,519	55	10
Vermont	397	554	67	53
Virginia	4,456	6,705	61	459
Washington	2,990	4,818	55	[1] 100
West Virginia	1,812	2,388	63	60
Wisconsin	4,145	5,848	55	[1] 250
Wyoming	340	450	67	[1] 20
Total	193,818	314,358		16,941
Median			58	

[1] Estimate.
[2] State appropriation.
[3] Compensation is paid only in capital cases.
[4] Average for years 1963 ($177,000) and 1964 ($130,000). This is for capital cases only.

Note.—The felony figures for each State are the most recent reliable information available. In some instances the figure from Silverstein, Defense of the Poor, table 1, is used for lack of more recent data. The percentage of defendants who are indigent is based on the docket study as reported in that table, or, in a few instances, on more recent data.

As indicated in table 1, most defendants are unable to afford counsel for their defense.[2] The median figure for all the States is 58 percent, which is probably a fairly reliable national average. This would mean that counsel must be provided, or at least offered, to approximately 175,000 felony defendants in the State courts each year.

Except for 12 States, it is impossible to obtain reliable statewide information about the number of misdemeanor prosecutions. The Bar Foundation report includes an estimate of 5 million misdemeanor cases a year for the State courts, excluding traffic cases, based on a projection from figures for these 12 States. Probably no more than 25 percent of such defendants are unable to afford counsel.

2. Federal System. The Annual Report of the Director of the Administrative Office of the U.S. Courts for 1964 shows 31,733 cases commenced, including 1,255 in the District of Columbia, and 33,381 defendants disposed of, not counting those in the District. The Report does not separate felonies and misdemeanors, but an analysis of the manner of commencement of actions suggests that about 24,000 of these cases were felony prosecutions.

The Report does not show what proportion of the defendants was indigent. The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice found that in the four Federal district courts surveyed, the proportion of defendants with assigned counsel varied from 11 to 52 percent, although high waivers in one district and lack of records in another cause the figures to be on the low side as an indication of poverty. The proportion of defendants who did not make bail is no doubt a better indication of poverty: Here the figures ranged from 23 to 83 percent. It is probably fair to say that at least 50 percent of the defendants in Federal district courts are eligible for appointment of counsel under the Criminal Justice Act, or some 16,000 defendants a year. A 75 percent figure, a generous estimate, would mean 25,000 defendants. The actual number almost certainly lies between these two estimates.

II. MANPOWER AND FINANCIAL NEEDS OF THE PRESENT SYSTEM

A. MANPOWER NEEDS

1. State Courts. On the prosecution side the position of district attorney is full time in many large cities and part time in most small ones. The extent of civil duties varies from State to State. Information about the time required of prosecutors for their official duties was gathered in the Bar Foundation survey in 1963. Data from 27 States are summarized in table 2. In States of the Southeast and a few other States, the prosecutor is responsible for several counties, and the job tends to be full time. Elsewhere, the job is usually limited to one county and is usually part time except in large and some medium-size cities. In some places the office has a mixture

[1] The military courts require lawyers for prosecution, defense, and judging. Under the Uniform Code of Military Justice, 10 U.S.C. §§ 827, 838, the authority convening a general or special court-martial is required to appoint a trial counsel and defense counsel. The trial counsel represents the prosecution, and defense counsel represents the accused, although he is entitled to obtain other counsel if he wishes.

[2] The estimated percentages for each State are based on data gathered by the Bar Foundation in its 1963 survey, as updated by more recent information where available.

Table 2.—Time Spent by Prosecutors in Selected States, 1963

State	Responses from Bar Foundation survey (interviews and mail questionnaires combined)	Page numbers in Defense of the Poor, vols. 2 and 3
Alabama	19 circuit solicitors out of 37 in State responded; all devoted full time to duties (over 30 hours per week).	6–7.
Alaska	3 out of 4 district attorneys responded; all were full time.	26.
Arizona	10 out of 14 county attorneys replied; in the larger counties the office was full time, elsewhere part time.	37–38.
Arkansas	13 out of 18 prosecuting attorneys replied; Little Rock office was full time with 5 full-time and 1 part-time assistant for 2 counties; elsewhere position was mostly part time.	50.
Colorado	All 18 district attorneys replied; of 6 interviewed, only Denver is considered by law to be full-time position, but 4 others said that they actually spent over 30 hours per week, and 1 spent 20–29 hours. Of 12 replying by mail, 8 said they put in over 30 hours a week; all others said 20–29 hours.	98–99.
Connecticut	4 out of 8 State's attorneys replied; 1 was full time, the others part time with varying amounts of time.	114.
Delaware	Prosecution was handled by deputy attorneys general, who were part time. All devoted at least half their time to the office.	124.
Georgia	11 solicitors general were interviewed from 11 judicial circuits including over half the State's population. All were full time except 1, who spent over 30 hours per week. Also 15 other solicitors general replied out of 29 circulated; all but 6 of these 15 were part time.	168.
Hawaii	County attorney in Honolulu was full time and had staff of 13 attorneys. Hawaii County attorney had staff of 3 and devoted most of his time to civil duties. Other 2 counties similar to Hawaii County.	177.
Idaho	All 44 prosecuting attorneys responded. Position was full time in only 2 counties. Elsewhere average was 20 to 30 hours per week.	189–190.
Louisiana	Of 6 district attorneys interviewed, 5 were full time and 1 part time; 5 of the 6, including the part-time man, spent considerable time on civil duties. 14 out of 26 other district attorneys answered by mail; of the 14, 5 were full time, 8 were part-time, and 1 did not answer.	294.
Massachusetts	6 out of 9 district attorneys replied; 1 was full time, 3 spent over 30 hours, 1 spent 10 to 29 hours, 1 spent less than10 hours.	339.
Mississippi	14 out of 18 district attorneys replied; all but 2 were part time. Under Mississippi law district attorneys may elect to be full time at larger salary or part time at smaller amount.	406.
Missouri	7 district attorneys devoted more than 30 hours to duties, 2 devoted 20–29 hours. 76 of 115 prosecuting attorneys replied. All were permitted private practice, and only 9 devoted full time to official duties.	(Gerard, 1964 Wash. U.L.Q. 270,324)
Montana	Nearly all county attorneys were part time, even in larger counties where they were authorized to employ deputies.	429.
Nevada	7 out of 17 district attorneys replied; those who did not were in thinly populated counties with minimal criminal business. Of the 7, 3 were full time, 3 spent over 30 hours a week, and 1 spent 10–19 hours.	452–453.
New Hampshire	8 out of 10 county attorneys replied. 4 spent 20–29 hours a week on official duties, 4 spent 10–19 hours. None had any assistants.	462.
New York	48 out of 62 district attorneys replied. In counties approaching a million population or more, position was full time (New York County district attorney had 92 full-time assistants). Of 10 interviewees, all spent at least 20 hours on official duties. Of 38 mail respondents, 2 spent less than 10 hours, all others spent 10 or more.	536.
North Carolina	15 out of 24 solicitors replied; 2 were full time, and all others spent over 30 hours per week.	557.
Ohio	Of 88 prosecuting attorneys 10 werei nterviewed and 50 replied by mail. 6 of 10 interviewees and 8 of 42 mail respondents said they were full time. Among part-time replies, 20 spent more than 30 hours a week, 13 spent 20–29 hours, 11 spent 10–19 hours, and 2 spent less than 10 hours.	596–597.
South Carolina	Almost all solicitors in State replied. All were part time. 5 spent more than 30 hours a week 7 spent 20–29 hours, and 1 spent 10–19 hours.	667.
Tennessee	19 out of 23 attorneys general replied. Most had heavy case loads, and many needed additional staff, but others operated on a part-time basis.	695.
Texas	17 district attorneys were interviewed; most felt their office was a full-time duty; 9 felt the number of assistants was inadequate. Of 72 district attorneys queried by mail, 42 replied. Of the 42, 23 were full time, 19 part time. Of the 19, 12 spent over 30 hours a week, 7 spent 20–29 hours, and 1 spent 10–19 hours.	714, 716.
Vermont	9 out of 13 State's attorneys replied. 1 was full time, 3 spent over 30 hours a week, 4 spent 20–29 hours, and 1 spent 10–19 hours.	744–745.
Washington	28 out of 39 prosecuting attorneys replied. In the larger counties they served full time. Of 22 responding by mail, 2 were full time, 5 spent over 30 hours a week, 13 spent 10–29 hours, and 2 spent less than 10 hours.	777.
Wisconsin	47 out of 71 district attorneys replied. Of the 47, 13 were full time, and 32 part time.	805.
Wyoming	22 out of 23 county attorneys replied. None was full time. 3 spent over 30 hours per week on their duties, including civil duties, 11 spent 20–29 hours, and 8 spent 10–19 hours.	823.

of full-time and part-time lawyers. For example, in Peoria County, Ill., population 202,000, the State's Attorney and two assistants are full time, while eight other assistants are part time.

The amount of lawyer time devoted to prosecution is undoubtedly inadequate in many communities. The Bar Foundation survey uncovered widespread dissatisfaction among prosecutors, many of whom said they lacked sufficient legal assistance.

> The problem of adequate funds for representation in criminal cases is not limited to the defense. Although the primary focus of the present survey has been on representation of indigent accused persons, each prosecutor who participated in the survey was asked, "Do you feel the funds you have are adequate to run your office?" Replies indicated that the problem is serious in many states, especially in rural areas. For example, of 73 county attorneys responding in Kansas, almost all complained of inadequate funds. They mentioned specifically lack of sufficient professional staff, lack of investigative staff, and inadequate salaries. In Louisiana 67% of the prosecutors said they lacked adequate funds, in Idaho, 68%, in New York, 56%, in Vermont, 89% (8 out of 9). A prosecutor in Tennessee, located in a county where law students assist assigned counsel in preparation of cases, said, "I'd like to see a public defender office established, then he'd be as busy as I am and wouldn't have his cases any better prepared." The conclusion that emerges is that in a great many counties neither the prosecution nor the defense side is adequately financed. Money is lacking to prosecute all who

violate the law, while at the same time funds are too low to provide a completely adequate defense for those who are prosecuted. More resources are needed on both sides of the scales of justice. SILVERSTEIN, DEFENSE OF THE POOR 149 (1965).

Information gathered in 1965 by the National District Attorneys Association from prosecutors in 45 States confirms the Bar Foundation findings on full-time and part-time prosecutors. The NDAA survey also reveals great variations from State to State and within certain States as to the time required for civil vis-a-vis criminal duties. For example, the prosecutors of Alabama spend almost all their time on criminal duties, whereas those in Arizona spend a significant proportion of their time on civil duties, ranging from 25 to 60 percent in different counties.

The NDAA survey shows that the number of assistant prosecutors varies considerably among cities of approximately the same population. The number apparently depends on whether they are full time or part time, the number of assistants assigned to civil duties, the volume of felonies and misdemeanors, and other factors. These variables make it difficult to state the manpower needs of prosecutors' offices. Table 3 shows the number of assistants for counties between 500,000 and 1,000,000 population in 1960.

Data for counties with a population of more than a million, obtained either from the NDAA survey or the Bar Foundation survey of 1963, show similar variations:

City or county	County population, 1960 (Thousands)	Number of assistants
Los Angeles	6,038	178
Detroit	2,666	55
Buffalo	1,065	23
Kings (Brooklyn)	2,627	85
New York (Manhattan)	1,698	96
Nassau County, N.Y.	1,300	39
Philadelphia	2,002	50
Pittsburgh	1,628	20
Cleveland	1,648	30
Milwaukee	1,036	16
Houston	1,400	52

On the defense side lawyers are needed for all of the 314,000 defendants prosecuted for felonies, except those who waive appointment of counsel. Waivers should decrease as the implications of *Gideon* v. *Wainwright* are fully realized in the State courts. Even though a large majority of defendants plead guilty, a lawyer is needed for the plea bargaining process and to make sure that the sentence is proper. See NEWMAN, CONVICTION 215–17 (1966); TREBACH, THE RATIONING OF JUSTICE 84–91 (1964); SILVERSTEIN, DEFENSE OF THE POOR 137–38 (1965). Of the 314,000 defendants, at least 175,000 are financially unable to employ counsel. An unknown additional number can pay something, but not the full cost of their defense. Perhaps 1 defendant in 10 can afford to retain good private counsel at the minimum fee recommended by the bar association or established by the going

Table 3.—Salaries of State Prosecutors and Salary Range of Assistants in Medium-size Cities, 1965

City	County population, 1960 (Thousands)	Prosecutor's salary	Number of assistants	Salary range of assistants
Birmingham	635	$14,200	8	$9,000–$13,800
Phoenix	664	15,000	32	6,750– 11,580
San Francisco	740		26	8,860– 23,470
Miami	935	26,000	38	6,000– 18,000
Atlanta	556	19,750	11	8,400– 12,000
Honolulu	500	17,000	12	7,560– 16,150
Crown Point (Gary)	513	16,500	14	3,600– 10,500
Louisville	611	7,200	10	6,300– 7,500
New Orleans	628	17,500	20	7,200– 12,000
Minneapolis	843	17,000	18	8,260– 13,680
Kansas City	623	15,000	21	5,500– 9,000
Suffolk County, N.Y	667	25,000	21	6,500– 18,122
Weschester County, N.Y	809	26,880	16	9,950– 20,270
Cincinnati	864	16,500	19	8,200– 12,400
Memphis	627	15,000	12	8,700– 11,200
Seattle	935	13,500	33	6,660– 12,060

Source: National District Attorneys Association.

practice, while another 1 or 2 defendants can afford to employ an attorney of lesser ability at a more modest fee.

Lawyers are also needed for felony appeals, postconviction remedies, misdemeanors, and other proceedings. Again we find the threefold division of clients into the poor, the self-sufficient, and the middle group who can pay part of their own way or afford only legal service that may be substandard.

What are the manpower needs on the defense side in the State courts? Limited available information on the actual caseloads of defender offices indicates that one lawyer can handle 150 felony cases a year with a fair degree of thoroughness, at least in an office located in a large city where the staff consists of several full-time lawyers. Indeed, some defender offices have caseloads considerably larger than this figure. The lawyer time involved for 150 cases, on a basis of 1,600 working hours per year, would average 10.7 hours per case. For a conservative figure of 150,000 indigent defendants per year (about one-half of 314,000 in the State courts), the full-time services of 1,000 lawyers would be required. This need could be satisfied either by 1,000 full-time defenders or a combination of full-time and part-time defenders. If a high estimate of 200,000 indigents is considered, then 1,333 lawyers would be required.

It is unrealistic to assume that all defendants would be represented by defenders. At present no more than about one-third of the indigent defendants are represented by defenders; the others have assigned counsel, or at least they are located in counties with assigned counsel systems. We can expect that on the average it probably will require more lawyer time per case on an assigned counsel basis than under a defender system. Allowing 1½ times the defender figure for assigned counsel representation, and assuming that defenders continue to represent about one-third the total indigent felony defendants, it may be estimated that 1,333 lawyers would be required for 150,000 defendants, and 1,777 lawyers would be required for 200,000 defendants.

If we assume that defenders represent one-half instead of one-third of all indigent defendants, the number of lawyers required for 150,000 indigents would be 1,250 per year, and for 200,000 indigents, the number of lawyers would be 1,667.

Thus, under the various assumptions stated here, the lower and upper limits of the lawyer need can be bracketed at 1,000 and 1,800 (rounded from 1,777) per year.

These computations do not allow for representation in appeals, postconviction proceedings, misdemeanors, juvenile delinquency cases, or miscellaneous other proceedings. Based on the limited data available from large offices providing virtually complete services, such as the public defenders of Los Angeles and San Francisco and the Legal Aid Society of New York City, it is probable that the total lawyer time required for all these other needs would not exceed that described for felonies, or certainly would not exceed it by a great amount. Thus it is probably safe to say that the total manpower needs for representation of all indigents lies somewhere in the range of 2,000 to 3,600 lawyers per year. This should be compared with a current total of between 300 and 400 defenders, of whom about three-fourths are full time. The need also should be compared to the total national manpower pool of about 200,000 lawyers in private practice.

2. Federal System. There are 94 U.S. Attorneys and approximately 725 Assistant U.S. Attorneys who represent the Federal Government in criminal and civil cases in the Federal District Courts and Courts of Appeals. The Department of Justice has a staff of 140 attorneys in the Criminal Division stationed in Washington and 2 assigned to other cities. In addition, much criminal work is done in the Tax and Antitrust Divisions.

On the defense side lawyers are needed for approximately 33,000 defendants prosecuted each year in the district courts for felonies and misdemeanors, also for appeals and for at least some habeas corpus proceedings. As stated previously, it is estimated that 50 to 75 percent of the Federal defendants are eligible to have counsel provided under the Criminal Justice Act of 1964. This includes not only defendants who can pay nothing toward the cost of their defense, but also those who can pay something but not enough to retain private counsel. A provision of the Criminal Justice Act (18 U.S.C. § 3006A(f)) authorizes the court to order partial payments by such a defendant, to be paid to defense counsel, to a legal aid agency or bar association, to an investigator, or to the clerk for reimbursement of the Federal appropriation.

B. FINANCIAL NEEDS

1. State Courts. Information gathered by the National District Attorneys Association shows that the salaries of prosecutors and their assistants vary greatly among cities of comparable population located in various parts of the country. The differences show up clearly in table 3, *supra*, listing offices that serve a population of 500,000 to 1,000,000. The salary of the head of the office ranges from $7,200 in Louisville to $26,880 in Westchester County, while that of the chief assistant is from $7,500 to $23,470. Moreover, there is some variation among offices within each State, apparently depending on population and volume of criminal business.

The National District Attorneys Association has gathered information on the total budgets for individual prosecutors' offices in the States, but the information is not available at this time. However, by projecting information that is available for certain counties as to salaries, number of assistants, and number of secretaries, it is possible to make a very rough projection of the amount being spent in individual States. From this a total national figure of $94 million can be estimated; this should be regarded as only a very rough figure to be refined as additional information is obtained.

On the defense side it is difficult to obtain information about most of the State systems, since payments to assigned counsel or defender offices are most commonly made by the counties rather than the States, and no State office collects information about the amounts paid. Nevertheless, it is possible to make at least an informed guess based on information gathered from 300 sample counties in the Bar Foundation survey in 1963, supplemented by current information from the National Legal Aid and Defender Association and a few States where accurate financial information is available. The figures appear in the last column of table 1, *supra*. The total of $16.9 million should be considered a very rough estimate of what is being spent currently by the States for defense of indigent persons. It is hoped that more exact estimates can be developed later on the basis of information to be gathered from individual counties. Moreover, any significant change in a State system could seriously affect the amount being spent, *e.g.*, extension of service to misdemeanors, change in policy on waiver of counsel, liberalization of eligibility rules, or establishment of public defender offices.

Another point is that the amounts in table 1 constitute *public* contributions to defense of the poor. Private and private-public defender offices provide a considerable amount of defense services from *private* funds in New York, Philadelphia, Buffalo, Rochester, Cleveland, Kansas City, New Orleans, and additional cities in New York, Pennsylvania, Ohio, and other States. The total amount is not much over $1 million. Many of the grants from the Defender Project of the National Legal Aid and Defender Assoication have been made to establish or enlarge such offices. Legal service grants from OEO covering criminal cases should also be considered. Another type of private defender service is the law school defender program. Several services of this type have also been funded by the Defender Project. (This Project originally received a grant of $2.3 million from the Ford Foundation in 1962 for a five-year program. A supplemental grant of $2 million was made in 1964. In 1965 a second supplemental grant was made in the amount of $1.8 million for the development of coordinated assigned counsel systems as distinguished from defender offices.)

Another way to view State and local support of systems for defense of the poor is to compare expenditures made by counties of similar population located in different States. This was done in the Bar Foundation study, where financial data were collected for counties of various sizes using assigned counsel or defender systems. This study found wide variations for the same kind of system within the counties in each of five population groups. In the smaller counties the median cost per defendant for defender systems was higher, if only because assigned counsel were poorly compensated. In medium-size counties the median cost of the two systems was about the same. In large counties the median cost per defendant was lower for defender systems. The report suggested "that the larger defender offices afford opportunities for lower unit cost because of the volume of cases." SILVERSTEIN, DEFENSE OF THE POOR 68 (1965).

2. *Federal System.* According to information furnished by the Department of Justice, the operating budget for next fiscal year for the Department's Criminal Division is $3.6 million. The 92 U.S. Attorneys' offices throughout the country employ a total of 667 Assistant U.S. Attorneys. The budget for these offices is about $19.6 million per year. Estimates vary on the percentage of time spent by U.S. Attorneys' offices on criminal matters, but it may reasonably be assumed that it is between 40 and 50 percent. Thus, the total expenditures for prosecution in the Federal system are between $11.4 and $13.4 million per year.

The Criminal Justice Act of 1964 is being financed by an appropriation of $3 million. The Judicial Conference of the United States has a Committee to Implement the Criminal Justice Act, headed by Chief Judge John S. Hastings of the Seventh Circuit. At a recent meeting in the third circuit, Judge Hastings said:

> About the appropriations, as I indicated, we had no guideline to furnish any assistance. The Justice Department in its testimony before the committee when it was considering this legislation made an uneducated guess, I would say, of about $3½ million a year. Our committee recommended $7½ million for the first year, and we thought that would quickly prove to be inadequate.
>
> The House Subcommittee held extended hearings on this budget presentation and was quite sympathetic to the views of the committee. As a matter of fact, it took very little issue with what the committee presented but felt that since we had nothing to go by in the way of experience, the recommendation should be cut, and they cut it to $3½ million.
>
> Then it got to the Senate, and the Senate for some unknown reason—I suppose stimulated by the desire for economy—cut it to $3 million. So that is the way it is in the present appropriations bill.
>
> In fairness to the Congressional committees, however, I must say that Congressman Rooney, chairman of the House subcommittee, and Senator McClellan of the Senate subcommittee have indicated they realize this might be entirely inadequate, and they stand ready, when the need is shown, when the money runs out, to sponsor supplemental appropriations to enable us to go ahead with the program.
>
> One thing that was taken out of our budget request, which would be of interest to the judges and the lawyers as well, is that there is no appropriation for administrative expense. Most of us think this is unfortunate, but it arose because it was not clear just what form this administration of the Act should take. We have again, I think, the indicated understanding that once it becomes clear what the most effective way of administering the act may prove to be, I think we can reasonably look forward to adequate appropriations for that purpose. 39 F.R.D. 401–02 (1966).[3]

III. UNMET NEEDS UNDER PRESENT STATE SYSTEMS

It is obvious that neither the prosecution nor the defense side is adequately financed under many, if not most, of the State systems. In many localities prosecution salaries are too low, professional and secretarial staffs are inadequate, and insufficient funds are available for investigation.

Lawyers who serve the poor may be divided into two groups, defenders and assigned counsel. See generally SILVERSTEIN, *op. cit. supra*, chs. 2, 3; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED (1959). As of December 20, 1966, the National Legal Aid and Defender Association listed 253 defender organizations, including 178 public, 20 private, 24 private-public, and 31 assigned counsel programs. During 1965, 144 of these offices reported handling 244,845 cases. The entire States of Massachusetts, Rhode Island, Connecticut, Delaware, and Florida are covered by defender offices, also the District of Columbia and Puerto Rico. Defender offices are also located in 22 other States, chiefly in the larger cities (Arizona, California, Colorado, Illinois, Indiana, Kansas, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Maryland, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington). Three additional States have law school programs (Georgia, Mississippi, Wyoming). Four States have appellate or postconviction defender offices (Indiana [postconviction only], Wisconsin, Minnesota, Oregon). Two States have local-option defender legislation that has not yet been utilized (Iowa and Hawaii, but plans are under way in Hawaii). In all States combined, defender offices are probably handling about 35 percent of the indigent felony prosecutions, the remainder being handled by individual assigned counsel.

In the Bar Foundation study each defender who was interviewed was asked, "Do you have adequate funds to run your office?" Of 46 defenders who replied, 22 (48 percent) said they did not. On the basis of these answers

[3] Judge Hastings later reported: "It now appears that the appropriation of $3,000,000 made for fiscal year 1966 . . . will be adequate for that year." 57 J. CRIM. L., C. & P.S. 426, 428 (1966).

and related answers from defenders and judges, the study concluded that half or more of the defender offices lacked adequate financing or needed additional staff members, and that a public defender office is more likely to be adequately financed than one that depends solely on private donations. SILVERSTEIN, *op. cit. supra*, at 43.

Despite the growing number and importance of defender offices, some form of assigned counsel system is still in use in about 2,900 of the 3,100 counties of the United States. A number of large cities have assigned counsel systems, notably Baltimore, Detroit, Milwaukee, Dallas, Houston, San Diego, and Seattle. Also some cities that have defender offices rely heavily on assigned counsel to supplement the defender service, *e.g.*, Buffalo, Cleveland, Cincinnati, New Orleans.

Table 1, *supra*, indicates that either nothing or very little is being spent for assigned counsel systems in a few of the States. In South Carolina, Kentucky, Louisiana, and Missouri no funds are available for assigned counsel, even for reimbursement of expenses, and the same is true in most counties of Arkansas. Utah in 1965 enacted a local-option law permitting each county to provide compensation, but it is not known whether any counties have done so. (Defender offices in Columbia, S.C., New Orleans, Salt Lake City, St. Louis City and County, and a few smaller places in Missouri provide some relief from this situation.) In two States, Georgia and New Jersey, assigned counsel are compensated only in capital cases. In New Jersey this will change on January 1, 1967, as the result of the decision in *State* v. *Rush*, 46 N.J. 399, 217 A.2d 441 (1966), which holds that the county or State must provide compensation in noncapital as well as capital cases; otherwise the lawyers' services, which are a form of property, would be conscripted without adequate compensation.[4]

In another group of States, some compensation is provided for assigned counsel, but the statutory maximum amounts are so low that they are grossly inadequate, *e.g.*, West Virginia and South Dakota. The same is true in many individual counties in other States where the court determines the amount of compensation. Since the *Gideon* decision, 16 States have amended their laws to do one or more of the following: provide compensation for the first time, increase the maximum amount, remove the maximum entirely, or provide compensation for the first time in noncapital felonies or in misdemeanors.[5]

Despite all this legislative activity, however—and the movement has by no means spent itself—there remains a large number of relatively poor States and individual counties that cannot be expected to provide adequate compensation for counsel, or defender systems, no matter how hard they try. These States and counties have such limited financial resources and so many other demands for public expenditures that it is practically impossible for them to provide adequate financial support for defense of indigents either now or in the foreseeable future.[6] The same is true for the prosecution in many of these places.

It is difficult to say how much additional money would be needed to provide adequate financing for the State systems of prosecution and defense. For the prosecution, present budgets total approximately $100 million. It is probably safe to say that no more than another $100 million, and perhaps no more than $50 million, would meet the present needs of prosecutors' offices, at least for their criminal duties.

It is even more difficult to estimate the need on the defense side, because the State systems keep changing as counsel is provided in additional kinds of cases or at earlier stages of the process. The following paragraph from DEFENSE OF THE POOR (p. 68), provides at least a clue to the amount that may be needed:

> This brings us to a direct confrontation with the financial problem generated by *Gideon* v. *Wainwright*, the cost of providing counsel for every indigent felony defendant in the state courts. How much would it cost a year to do this by an assigned counsel system? Table 15 provides at least a rough guide to the answer. As shown in Chapter 1, Table 1, the number of felony defendants is about 300,000 a year, and about half of them have free counsel provided because of their indigency. According to Table 15, median cost per defendant for counties of various sizes ranges from $50 to $149. If these figures are multiplied by 150,000 defendants, they yield a product of $7,500,000 to $22,350,000 a year. If the *highest* figures from Table 15 are used instead of the median figures, the product is $32,100,000 to $92,550,000. Comparable figures are not available for defender counties, but, on the basis of closely related data on costs, as shown in Table 18, it seems reasonable to conclude that the minimum amount would be higher and the maximum would be lower than the corresponding figures for assigned counsel systems.

It should be noted that these figures do not allow for felony appeals, misdemeanors, postconviction remedies, or miscellaneous other cases. Since the present expenditures in the State systems are roughly $17 million for felony representation in the trial courts, it is evident that much larger amounts will be needed. In the Federal courts $3 million has been appropriated for representation of approximately 15,000 to 20,000 defendants, including appeals and misdemeanors. This is $150 to $200 per defendant. At this rate, payment of counsel for the 150,000 defendants in the State courts would require $22.5 to $30 million (a conservative figure). Of the $17 million now being spent in the States, about half is spent in just three States—New York, Florida, and California. (See table 1 *supra*.) Together they contain 21 percent of the population of the United States and 20 percent of the felony defendants. Thus if the current rate of spending in these three States is projected for the other States, a total of about $45 million would be required, or $28 million more than the present level.[7] The New York and California figures include representation for misdemeanors; the Florida figure does not. All three include representation for appeals and for postconviction reme-

[4] On this point four decisions are *contra*: *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Warner* v. *Commonwealth*, 400 S.W.2d 209 (Ky. 1966); *State* v. *Clifton*, 247 La. 485, 172 So. 2d 657, 667 (1963); *Weiner* v. *Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958 (1966).

[5] The States are Alabama, Illinois, Kansas, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington.

[6] In some States where the per capita income of the State as a whole is fairly high but the income in some counties is low, a possible solution is a State system of financing. This is the present system in Massachusetts, Rhode Island, Delaware, Virginia, North Carolina, Tennessee, and Alaska. In West Virginia the State pays for representation in felonies, the counties in misdemeanors. In Alabama the counties pay for counsel in capital cases, the State in noncapital cases. In Florida the State pays about half the total cost, chiefly in salaries of public defenders and their assistants, while the counties pay other expenses of the defender offices and also, in most counties, the fees of assigned counsel in capital cases. In California the State recently appropriated $500,000 to defray approximately 10 percent of the total cost of assigned counsel and defender systems, the remainder of the expense to be borne by the counties as previously. Several State legislatures have made appropriations for transcripts for indigent appellants.

[7] On the basis of the figure for California alone, the 50-State total would be about $60 million.

dies to the extent that representation is required by State law. One should bear in mind that the figures for these States, high as they seem, may still not be high enough, if measured by a standard such as that of the Criminal Justice Act or the formula set forth in *State* v. *Rush, supra,* the recent New Jersey decision:

> The rate should reimburse assigned counsel for his overhead and yield something toward his own support. In approximate terms, the overhead of the average law office runs about 40 percent of gross income. To meet that expense and yield something to assigned counsel, this court suggests compensation at 60 percent of the fee a client of ordinary means would pay an attorney of modest financial success. 46 N.J. 399, 413, 217 A.2d 441, 448 (1966).

A similar formula has been developed in Wisconsin, where the Supreme Court has specifically approved an assigned counsel fee of two-thirds the minimum bar association fee. *Schwartz* v. *Rock County,* 24 Wis. 2d 172, 128 N.W.2d 450, 455 (1964). Nevertheless, it is probably safe to say that the total present needs of the State systems of defense, including appeals and misdemeanors, are somewhere between $40 million and $100 million. This does not allow for such costs as investigation, appellate transcripts, and representation in other proceedings, particularly in juvenile court.

For a theoretical discussion, see Hazard, *Rationing Justice,* 8 J. LAW & ECON. 1 (1965).

IV. PROJECTION OF NEEDS

A. EXPANDING AND SHIFTING POPULATION

The population of the United States has passed 190 million and it will soon pass 200 million. Demographers have predicted that it will reach 300 million by the year 2000. Moreover, the pronounced trend toward urbanization is expected to continue. An ever smaller proportion of Americans is able to produce all the food needed by the total population. Most cities have ceased to grow in population within their political boundaries, since all the buildable land has been used up, but the suburbs are growing rapidly. The FBI Crime Reports indicate that the per capita incidence of crime is highest in large cities, moderate in other cities, and lowest in rural areas. Moreover, the FBI Reports show that the per capita incidence of crime is increasing from year to year, although some of this probably results from better systems of reporting crime and from the increasing proportion of young people in the total population. From 1963 to 1964, the FBI found that the sharpest increase in crime occurred in suburbs, where the increase was 17 percent compared with 11 percent for the country as a whole.

The natural effect of the continued growth and urbanization of the population, all other things remaining the same, will be to increase the volume of crime and the number of persons who must be prosecuted and defended. Probably a population of 300 million, as against the present population of about 200 million, would result in more than 1½ times the present volume of prosecutions. The number would be more like double. If we add the factor of increasing rates of crime, assuming that the trend reported by the FBI will continue, the increase would be more than double.

B. CHANGING LEGAL NORMS

1. Extension of the Gideon *Rule.* It seems likely that the *Gideon* rule will be extended to additional kinds of cases, including but not limited to postconviction remedies, juvenile deliquency proceedings, and misdemeanors.[8] There is also the possibility that the *Gideon* rule will be extended to civil cases generally. See Comment, *Right to Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322 (1966). Undoubtedly, expansion of the *Gideon* rule will increase the requirements for counsel on both the prosecution and defense sides, but mainly on the defense side.

2. Bail Reforms. As against these factors suggesting increases in the requirements for counsel, recent and probable future changes in bail practices should result in a reduction of the needs for defense counsel. Some of the defendants who effect their release through recognizance, 10 percent cash deposit, or lower amounts of bail will be able to employ their own counsel or at least contribute a part payment toward the cost of their defense.

C. SOCIAL AND PENOLOGICAL REFORMS

It is difficult to predict the effect of the present programs of the Office of Economic Opportunity and other programs designed to eliminate poverty. To the extent that economic deprivation is a cause of crime, the raising of minimum levels of income should reduce the volume of crime or at least cause a redistribution of the kinds of crime.

Expansion of police forces, improved police training, and introduction of modern communications and scientific equipment should aid the police in apprehending and prosecuting criminals. This might have the effect of increasing the need for legal services, since the volume of cases would increase. At the same time, the greater likelihood of apprehension might reduce the volume of crime.

Reforms in penology should also affect the volume of crime by reducing the amount of recidivism. Improved probation and parole services, establishment of halfway houses, reform of prison administration, and improved juvenile treatment facilities should all have a tendency to reduce the volume of criminal prosecutions.

D. COST OF PROJECTED NEEDS

It is most difficult to predict the cost of the projected needs, since so many variable factors must be considered.

[8] The decision in *Case* v. *Nebraska,* 381 U.S. 336 (1965), involving a postconviction remedy, was referred to above. The State of Pennsylvania has applied the *Gideon* rule to a hearing on revocation of probation. *Commonwealth* ex rel. *Remeriez* v. *Maroney,* 415 Pa. 534, 204 A. 2d 451 (1964).

One possible approach is to assume the highest need as to all relevant factors. This assumption would have the advantage of setting an upper limit for prediction purposes. The upward factors are population increase and urbanization, increasing incidence of crime, extension of the *Gideon* rule, and improved police efficiency. In 10 years there would be a national population of 220 million persons, of whom at least 150 million would be living in or near cities, including 55 million in or near the 10 largest cities. The rate of reported crimes, arrests, and prosecutions would be perhaps 30 percent higher than at present. There would be approximately 400,000 felony defendants and 7 million misdemeanor defendants prosecuted each year in the State courts. The Federal courts would have 50,000 criminal cases a year. At least 200,000 of the State felony defendants would require free counsel, and another 50,000 to 100,000 would require partial subsidy. Between .1 and 2 million misdemeanor appointments would also be required. The Federal courts would require about 25,000 appointments.

If the State systems are adequately financed and if the present purchasing power of the dollar is maintained, approximately $200 million would be required for the prosecution and $75 to $100 million for the defense. The Federal system would probably require about $19 million for the prosecution and $6 million for the defense. Additional amounts for the State systems would be needed for costs of investigation, expert witnesses, and appellate transcripts. There is also the matter of representation for appeals, postconviction remedies, juvenile delinquency hearings, etc. One can only speculate about the costs of representation and related expenses in all these kinds of cases, since little or no information is available on present costs. Possibly the total would be no more than $100 million.

If we change these rather conservative and pessimistic assumptions about the future, the total costs would of course be lower. At best, however, it is certain that they will be more than the present costs would be if the State systems were adequately financed. The population increase alone would require a 15 percent rise in cost.

E. CAPACITY OF EXISTING INSTITUTIONS TO MEET FUTURE NEEDS

Without adequate financial support the existing institutions can barely meet current needs, let alone future needs. With sufficient support, however, the institutions will probably be adequate. Prosecutors' offices can simply add more deputies, more investigators, and more secretaries. The same is true of defender offices. Assigned counsel systems, however, will have more difficulty in keeping pace with the need, especially in more populous counties. If a county with a population of half a million or more attempts to assign counsel for misdemeanors and felonies, from a stage soon after arrest to final appeal, and for juvenile court and other proceedings, it will need an administrator, probably working full time, to keep track of the assignment rosters, payments, and other matters. Such a system, if adequately financed, costs more to operate than a defender system would cost. Even in smaller communities a defender system offers many advantages. We may expect a continued growth in the size and number of defender offices in the next decade, although they are not usually needed in small rural counties.

Appendix E

MODERNIZED COURT ADMINISTRATION

by Norbert A. Halloran

Efficient clerical and administrative management is important to the proper functioning of the criminal courts. Most courts could benefit substantially from the introduction of more modern methods and machinery into their court clerk's offices. Many tasks of the courts can be helpfully mechanized and even computerized. Computers and improved manual and mechanical techniques can schedule proceedings to obtain better use of judge and courtroom time and to prevent attorney conflicts and fruitless appearances. They can prepare court docket records, indexes, notices, and reports. They can be used to monitor criminal prosecutions, check on procedural delay, review pretrial detention, and to assign counsel. They can monitor arrest warrant status to ensure that when persons come to police or court attention, it is known whether other warrants are outstanding against them, and if so, whether these warrants are currently in force. Computers can help with the selection, time accounting, and compensation of jurors.

The techniques appropriate for particular courts will vary with the workload of that court, the kinds of cases it deals with, and the methods used to handle them. Although the precise procedures must reflect local rules and practices, certain basic functions are common to most court clerk's offices. This paper considers clerical and administrative techniques appropriate for courts with varying needs. For smaller courts with few cases manual and punched card methods are suggested. Computer methods are appropriate for busier courts. Manual, mechanical, and computer techniques will be discussed for each of the following basic court functions:

maintaining case histories and statistical reporting,
case monitoring and scheduling,
document preparation, and
case indexing.

The cost of automating government work can be a sensitive point for public officials, especially at the city or county level, where changes of this kind receive local publicity. Decisions to use computers for given work may rest on many grounds and sometimes other advantages overshadow cost considerations: the ability to make fast and critically accurate changes in payroll accounting, for example, or to swallow a climbing workload that manpower increases alone cannot keep pace with. In addition, there may be byproducts of better management controls, better service, and better morale, but these factors are hard to quantify.

For those who must approve computer expenditures, it is a great help if taxpayer savings—or at least the avoidance of any net increase in the cost of government—can be demonstrated. This demonstration would be hard to make were it necessary to advocate computers for criminal courts alone, since the task that can be mechanized is not large enough. At best, the criminal caseload in a few of our largest cities would support a punched card system. But merging the information handling chores of criminal courts with other organizations in local government may provide an economically sound way to put computers to work for criminal justice. And byproduct benefits should be obtained. Merging records administration of prosecutors, sheriffs, and the major courts would eliminate duplicate files and greatly assist the work of coordinating resources that usually must be shared across departmental lines.

Norbert A. Halloran holds a B.A. in political science from the University of Minnesota and an LL.B. from Georgetown University Law School. He is a member of the District of Columbia Bar. For 15 years he has worked in the field of systems management for government and private industry. He is now an advanced systems planner for the International Business Machines Corporation.

SYSTEM SIZE COMPARED TO COURT CASELOAD

The chart below shows the costs that could be expected if court information were automated. The chart's five columns represent counties of varying population to be served. For example, an urban county of one million people would fall in the range of the second column. A computer center for such a county, dedicated mainly to justice functions, can be estimated to cost between $150,000 and $225,000 per year. Please note the following items concerning the chart:

1. It assumes a fully integrated county justice information system, serving all civil and criminal courts and the prosecutor's office.
2. The cost range includes the cost of electronic data processing personnel and equipment. This would be offset by clerical savings that might very substantially reduce the cost.
3. If operations in all 310 urban counties (all above the "manual" column on the right) were mechanized, it would affect about two-thirds of the U.S. population.
4. The kind-of-case proportions in each column, for example the number of small civil claims as compared with the number of general civil cases or felonies, are estimates derived from court administrators' reports of 10 States.
5. One column's high range will overlap the low range of its neighbor because the computer system sizes overlap.
6. For the purpose of this analysis the character storage allocations (the number of letters or numbers) per case were as follows: misdemeanors—200, felonies—300, regular civil—500, and all other—300.

System Size and Court Caseload Range

			COMPUTERS				
			medium		small	PUNCHED CARD	MANUAL
		ANNUAL $ COST⟶	(above 225,000)	(225,000–150,000)	(130,000–75,000)	(50,000–20,000)	
CASES PER YEAR	CRIMINAL	FELONIES	above 5,000	6,000–2,000	4,000–1,500	2,000–400	under 400
		MINOR CRIMES	above 30,000	32,000–11,000	21,000–6,000	10,000–2,000	under 2,000
	CIVIL	GENERAL CIVIL	above 7,000	7,500–2,500	5,000–1,500	2,000–500	under 500
		DIVORCE, NONSUPPORT, AND PROBATE	above 30,000	30,000–10,000	20,000–6,000	10,000–2,000	uuder 2,000
		SMALL CIVIL ACTIONS	above 75,000	75,000–25,000	50,000–15,000	20,000–5,000	under 5,000
CITY-COUNTY POPULATION			above 1,500,000	500,000 to 1,500,000	300,000 to 1,000,000	100,000 to 300,000	under 100,000
NO. OF CITY-COUNTIES IN EACH SIZE GROUP			10	(55)⟵Overlap⟶(85) 300		(200)	2,700

CASE HISTORIES, CASE MONITORING, AND STATISTICAL REPORTING

The administration of criminal justice is a process in which mass efforts must move masses of cases through a varying cycle of events. Existing court records systems are not geared to do this effectively. What is needed is an accounting system for criminal prosecutions and case monitoring, a daily watch on all cases before the court designed to point out those being processed too slowly or otherwise needing special attention. This system should serve as both an operational control and a source for

status reports and statistics from which standards of court performance can be derived.

The court's historic record of its cases consists of: (1) docket books in which entries about case events are made, usually by hand as they occur, (2) original casefile documents which are filed in a numbered case jacket, and (3) a variety of schedules, work lists, calendar lists, etc. relating to cases pending in the court.

The docket book may be either bound or loose leaf; normally it contains a page for each case filed in the court. On this page an entry is made for each event, and this becomes the case history. Sometimes case history entries are made on the case jacket cover as papers are inserted, or two histories are maintained, one on the jacket cover, one in the docket book.

The case history found in the docket book is the prime public record, even though it is not an original record but is a paraphrased transcription from the original documents. Court clerks sometimes view themselves more as court archivists than court administrators, and case history sheets frequently are designed to do little more than accommodate historical purposes. Little thought has been given, it seems, to improving the format of this record to increase its utility for court administration.

There is no apparent standard design for the docket page. In some jurisdictions parts of the page will be dedicated, through preprinted captions, to specific pieces of information about a case. But the more common tendency seems to be to keep caption printing and a fixed format to a minimum. The docketing clerks simply make entries down the page, the lowest posting being the latest one. As a result the docket histories are very difficult to work with efficiently for purposes requiring fast visual extraction of key facts from many pending or terminated cases, as in calendaring or statistical reporting. Thus they are seldom relied upon for everyday needs. Supplementary duplicate records will usually be necessary for the case-oriented clerical jobs that keep the court running: calendaring, bail bond accounts, statistical tabulations, attorney assignment accounts, etc.

OPTIMUM MANUAL

Most courts need a good manual system; a suggested format for manual criminal case accounting is attached (exhibit A). Basically it is a refurbished form of the present docket book history record with some additions to permit case progress accounting.

The form combines information needed both for public record and court administrative purposes. At the same time, the new format would discourage anything but the shortest possible notation regarding case events on the theory that docket books should not contain elaborate statements of information that appears in, and can well be checked in, case document files.

More important, exhibit A shows how present docket sheets could be redesigned to permit easy hand-posting and visual taking of information.

The format, which could be varied to meet the needs of each jurisdiction, groups case information into these categories:

(1) The defendant—name, address, pedigree, bail status, name of bail bondsman and bond amount, and name and address of defense counsel (or indication of waiver of counsel).
(2) The prosecution—description of the charges, date of preliminary hearing, grand jury action, pleading, motions, and trial.
(3) The disposition—trial outcome, kind and severity of sentence imposed, and whether probation report was submitted.

In the final design it is probable that several cases, separated by heavy horizontal rulings, could be included on one side of a single page. Within the individual case section lighter horizontal rules would separate prosecution events by charge. Vertical columns highlight prosecution event dates. Shaded columns are used to enter the number of days that elapse between one prosecutive event and the next. Numbers to be shown in these "days elapsed" columns could be quickly determined from preprinted tables (similar to intercity mileage charts on road maps) on which date intervals are computed.

Although the new form is designed as a docket book page, it could also be printed on heavy stock suitable for loose vertical filing in open tubs during the period the cases on it are active.

All entries could be hand-posted as a normal part of docketing procedure, adding little to what is already being done in most courts. The format is tailored to felony courts, but a simplified version would be as useful for misdemeanor courts.

To find data a court clerk could sight down the key columns and note the number of each case in which he sees an abnormal situation which might warrant the presiding judge's attention. By similar scanning, clerks could transcribe data for monthly statistical reports. Or alternatively, the statistics gathering job could be accomplished by periodically copying docket book pages on a photographic copier and sending the copies to the State court administrative office.

PUNCHED CARDS

When reports are required from a punched card system, the scanning and transcribing tasks described above would be accomplished by machine. A deck of active cards would be maintained, no more than a few cards per case, in which case events in shortened or coded form would be keypunched. Basically, this is the procedure now used by courts in Pittsburgh, Los Angeles, and San Diego, which have mechanized calendaring.

There is room enough for only 80 or 90 letters or digits on a punched card, enough space to store about 15 dates, transaction numbers, or short words. Data per case can be increased by adding more cards, but this complicates the mechanics of cross-referencing cards belonging to the same case and may make the file too unwieldy. In a card system the fewer cards per case, the better.

To do even the simplest daily accounting and monitoring jobs for a docket carrying more than one to two thousand open cases would require a punched card system. Although machine searches of this size docket could be completed in several minutes, the nature of the file interrogation would have to be fairly simple because of the limited information in the cards. A typical search question might be, "How many and which civil cases have been continued more than once?" or "How many indigent criminal defendants have waived counsel?" For this size docket these questions could not be answered readily, if at all, from manual records.

Finally, punched card equipment introduces a big psychological advantage over manual systems for a data analysis job such as docket monitoring, which has an auditing objective. The task becomes depersonalized, its results printed out in a routine way.

COMPUTER

Much more data about active cases could be stored and kept current economically in a computer file than on cards. In fact the fully automated criminal docket could contain skeletal histories of all active prosecutions including at least as much detail as is now entered in the docket history sheet, and perhaps more information than is now available about areas that are sensitive or of frequent administrative concern, such as counsel assignments, bail bonds, or jail status.

With an electronic data processing system, case histories would be built up as a docket file in tape or disk storage from complaints, indictments, informations, and similar original records. From this automated docket file the computer would print monthly and daily cumulative docket history summaries, mechanizing the task of posting entries in docket books.

As these case summaries were being printed, they would be alphabetically arranged, thus eliminating need for a party name index. After each case name there would appear a resume of the events up to the date of the summary. Cases closed during a given year would be alphabetically merged by the computer into a permanent annual docket summary of closed cases.

This greater depth of information and the computer's ability to make subtle data comparisons and retrievals mean that more sophisticated analysis of docket conditions would be possible. Not only the status of cases, but the situation of defendants could be evaluated: their detention and whether counsel has been requested or waived. Workload analyses could be tailored to the needs of the judge, the prosecutor, and the chief of probation. Intensive statistical correlations might be made of such items as charges versus pleadings; pleadings versus sentencing; prison or probation sentences versus repeated offenses; pretrial jail or bail versus conviction rates; uniformity of sentencings by offense, by judge, and in relation to factors in the defendant's background. Over the course of time sentencing patterns and the case outcomes could be compared in terms of successful reintegration of the offender in the community and recidivism.

SCHEDULING

Of all the court's administrative tasks the one most difficult is to schedule its proceedings. Schedules setting specific trials for a fixed day are next to impossible to achieve on either the criminal or the civil side. Schedules must nearly always be tentative. This may be the most trying weakness of judicial administration and is caused by a combination of the workload problems, administrative methods, and the lengths to which courts are willing to go to accommodate the convenience of attorneys and parties.

The scheduling problem frequently is not as complex in the criminal as in the civil calendar. There are usually fewer participants in a criminal case, attorney conflicts are less frequent, and the court holds a tighter rein on the essential party, the defendant. Nevertheless, the court clerk's burden of keeping track of where the defendants are—waiting in jail, on bail, at large, or serving time—complicates criminal proceedings in ways not applicable to the civil branch, where lawyers are responsible for keeping tabs on the essential parties.

Because civil scheduling has more problems and its efficiency affects the judicial resources available for both criminal and civil work, it merits brief discussion. The multijudge, metropolitan civil court has to manage a congested docket of thousands of cases; it must shepherd each action through pleading skirmishes, discovery, pretrial, and settlement conference to a settlement or to eventual trial. At least three-fourths of all lawsuits are settled eventually, but many are settled on the eve of trial, so the court is saddled with almost the same amount of pretrial records and calendaring as if all cases had gone to trial. The scheduling tasks for pretrial, settlement conference, and finally trial do not begin until after the parties indicate that they are "ready" for trial. Any time after being placed in the "ready" condition, cases can go on the court calendar. This is the point at which civil litigants in our more seriously backlogged courts begin a long wait for trial.

The term "calendar" seems to be used in a number of different senses, sometimes to mean all cases ready for trial, but more often in the narrower sense of only those which clerks have tentatively earmarked for trial during the court's current calendar year or session. The calendar may be viewed as those cases that have been put into waiting order for trial. Practices vary widely; what follows is a general description to give a sense of how most calendaring systems operate.

The scheduler, or calendar clerk, transfers the oldest ready cases from the total backlog to the calendar, keeping them in queue both as to age and readiness date. For this procedure he may do no more than physically move case jackets to a special place in the file. He may set up control cards, or punched cards if calendaring is mechanized, or he may transcribe the names of these cases into a calendar book in which specific pages are al-

located to specific trial months. Whatever the method, there will be many changes and juggling of names before the moment of trial.

For trial scheduling, calendared cases are given tentative trial dates and are transferred in batches to weekly and daily calendar call lists. From these lists the trial workload can be distributed as judges become available. The number of cases listed for each call is determined by how fast those currently being called are tried or settled.

At a weekly call the case attorneys appear before the calendar or assignment judge and confirm both their readiness for trial and their ability to appear with parties and witnesses at trial on a given day. There may be daily calendar calls at which the procedure is repeated, and assignments of specific cases to specific courtrooms may be made.

It is by no means certain that every case on the daily call will get to trial that day or, conversely, that there will not suddenly be empty courtrooms, perhaps late in the forenoon after the day's list has been exhausted and it is too late to call in other cases.

Courts cannot firmly schedule trials because: last-minute settlements free courtrooms and judges unexpectedly (parties may settle even as late as during selection of the jury or during trial); last-minute postponements are caused by attorneys having conflicting engagements at another trial (this happens frequently in many cities because trial practice tends to be concentrated in a relatively small group of attorneys) or by parties or witnesses not appearing at trial; trials may take more or less time to try than expected; and courts cannot predict with complete accuracy when today's trial will end and therefore do not know for certain how many courtrooms will be available for new cases tomorrow.

The call list itself is a daily dilemma. If the list is too long, in effect padded, there are sure to be enough cases to fill all courtroom vacancies, but some parties will be sent home, causing inconvenience and added expense. Conversely, if the "call in" list is not padded, or if a particular morning call produces more than the average settlements and postponements, the assignment judge will run out of cases before he has filled the open courtrooms.

In one major city the trial call for one day showed 76 cases called with only 12 able to go to trial. Most of the others had attorney conflicts. Ironically, there were 14 court vacancies that day, so 2 courtrooms stayed empty even though thousands of aging civil cases were backed up awaiting trial.

MANUAL

Where the calendar is large enough to present coordination problems yet not to warrant a mechanized system, simple 3 x 5″ vertically filed card systems as well as horizontally filed visible-edge cards should be considered. Horizontal card file equipment consists of thin drawers each containing 30 to 60 5 x 8″ cards, filed flat, and held in place in pockets or holders. Cards are overlapped so that one line of print at the bottom of each card is all that is exposed. This line would contain the case name. The unexposed portion of the card carries details of the record.

Colored or printed celluloid tabs can be clipped to the exposed edge of the card to signal special conditions in the record. These tabs could include attorney numbers and such things as the detention status of the defendant.

Cards can be kept in calendar order and rearranged easily when cases are terminated or new cases calendared. Clerks preparing calendar lists and schedules, instead of typing them, would place one of these drawers on copying equipment, and with the press of a button create a list of the names in the drawer. If reproducible paper is used, the picture of the drawer can be a paper master from which a large number of additional copies could be produced.

The tabs showing attorney numbers would be visible on copies made of the drawer lists and would help calendar clerks prevent attorney conflicts when the cards are put into final order for trial assignment.

PUNCHED CARDS

At least three cities are using punched card systems for civil trial calendaring, Los Angeles, Pittsburgh, and San Diego. These operations have come a long way toward setting trial dates that will stick. Case identities, event dates, and, most important, attorney names are carried on the cards. Because the card interlocks the case and its attorney, machine processes for preparing trial schedules can be geared to spread lawyer commitments far enough apart to minimize the risk of conflict. This ability of these systems to attack the attorney conflict problem is one reason for their success in improving calendar management. But there have been other benefits, such as helping firms in their trial planning by identifying all of their pending cases; identifying total actual backlog for the court; and automatically printing schedule lists, attorney notices, and notice labels.

COMPUTER

Denver is using a computer for preliminary scheduling of civil and criminal cases. For this purpose three master computer tapes are maintained. One contains all active civil cases, one contains the records of all attorneys and their commitments, and one contains all the pending criminal cases.

To prepare the civil calendar, the computer compares ready cases from the civil case tape against attorney commitments. This produces a tentative trial schedule from which the calendar clerk manually sets up final daily schedules for the calendar call. Criminal proceedings are similarly scheduled from the criminal case tape. This tape contains a good deal more information on each defendant than is currently being used: amount of bond, prior convictions, days in jail prior to trial, the statutory range of sentence applicable to the crime charged, and other items. There are plans to monitor the criminal docket more intensively, making specific judicial management uses of most of the items on the criminal tape file.

One of the busiest trial courts, the Supreme Court for New York County, is planning to computerize trial scheduling, probably on a computer that will also perform statistical tabulations for the State Judicial Conference administrator. Computer advantages over punched card equipment for scheduling include a tighter and more current control of information about attorney commitments, case settlements, and courtroom availability.

One computer system approach is to maintain two separate tape or disk files, a primary file of all case histories in case number order (discussed above) and a smaller, more frequently processed file for the calendar containing needed data about ready cases and the attorneys appearing in them. Courtroom proceedings would be scheduled from this calendar file.

At the end of each day the trial judges' clerks would provide the computer center with cards showing status of current trials, courtroom openings, and settlements. The computer would be programmed to coordinate these facts with information about attorney commitments and status of cases in both the case history and calendar files.

Utilizing these data the computer center could prepare courtroom assignment lists for trials coming up on the next day. These could be released in time for posting in the courthouse and for publication by legal newspapers on the following morning.

The facts of a criminal defendant's physical status could be better accounted for and dealt with by a computer system. Jailed defendants' cases would be scheduled ahead of bail cases for example, and repeat offender ahead of first offender arraignments.

Having close command of more up-to-the-minute facts on status of both civil and criminal cases means that courts could also more precisely define the hour when witnesses need appear. This would increase the value of finding or developing faster methods of communicating with needed witnesses, such as a vest pocket radio receiver of the kind used by commercial message paging services.

PREPARATION OF DOCUMENTS AND RECORDS

Courts must also be papermills. Simple actions like summoning witnesses, which in the business world might be done by telephone or some other less formal means, must be formalized in legal documents. The routine nature and extremely high volume of some of these papers make them fertile ground for work-saving tools, from rubber stamps to office machines to computers.

Notices to parties and attorneys of scheduled courtroom events, and summonses, and notices of summonses served, are examples of the documents that can mount up in large numbers. In Essex County, N.J. (a population of one million), criminal and civil courts mail out almost one-half million notices per year. In addition to the mail-outs there are the numerous repetitive pieces of paper that must be produced for internal needs. (In three main Essex courts more than 20 clerks prepare just the notices and case folder labels.)

MANUAL

Techniques that will save repetitive writing or typing range from simple ideas that cost practically nothing—like rubber stamps and window envelopes—to machines costing up to many hundreds of dollars per month that will do high-speed selective addressing or selectively repetitive automatic typing. The spectrum should even include computers, because in certain operations a computer would print what is essentially canned text after it has made a decision that conditions require such a printing.

In the smaller courts where one might expect to find manual shortcuts eagerly applied, they seem to be used halfheartedly or not at all. Conservative attitudes of county clerks, the feeling that window envelopes are fine for telephone bills but inappropriate for court matters, and similar intangibles may play some part in this.

A high percentage of court mailings goes to attorneys, to the trial bar of that court. The forms and notices contain mostly preprinted text, so the big clerical job is to address these forms and the envelopes. The very least every urban court ought to do is equip itself with a mechanical means of addressing those attorneys with whom it continually does business. Some of the many devices and ways of doing this job, in ascending cost order, are rubber stamps, sheets of gummed labels inexpensively printed on ditto or mimeograph machines, addressing stencils, metal or plastic addressing plates with imprinters, and EAM machine or computer printed addresses on labels or envelopes in continuous forms.

The larger addressing machines are not useful for these purposes because they are designed for mass mailings in which every plate or label device is used for each mailing. Court addressing tasks, although large, are essentially a pick-and-choose effort. The kind of addressing device of course must not engage more clerical time finding and putting back the address plate than would have been expended writing the address by hand. Perhaps one of the best manual devices for court addressing chores and certain other brief and pro forma recurrent writing would be plastic cards resembling credit cards. They are versatile, inexpensive, and fast. Because these cards have raised type and the imprinters apply considerable pressure, they can be used on multiple-ply carbon forms. The cards are obtainable in various sizes. One company makes them up to 3 x 7″, which provides enough room for 500 characters of information. Embossing the letters onto a card costs from 10 cents to 25 cents per card.

In most medium-sized urban courts some handy addressing system, covering no more than several dozen of the largest trial firms, would probably accommodate 50 percent of all attorney mailings with gains in efficiency.

239-114 O—67——12

PUNCHED CARDS

In a judicial punched card system, case identifying data should be punched into the cards as early as practicable in the case's life in order to reap every possible advantage from the investment in machine readable data. For example, the cards can be used to prehead notices, forms, and docket sheets. They can print party name indexes and adhesive backed labels for envelopes and file folders. They can prepare juror compensation checks and court fee billing statements. The Chicago Municipal Court preheads civil case docket sheets from cards, and the Atlanta court has a punched card fee billing system.

A way to strengthen the economics of printing documents and records from punched cards is to print new case records in large batches on continuous, multiple-ply forms that incorporate more than one kind of record in the form construction. For example, in a court handling upwards of many thousand cases per year, case jackets, docket sheets, and any other records routinely created for every case—notices to parties or attorneys that the complaint or summons had been served, for example—could be combined in one form set for simultaneous printing of case identifying data in a single machine run. In small punched card systems processing less than a few thousand cases per year, this approach might not be as efficient as good manual techniques in view of the extra cost of expensive specialty forms.

Several kinds of robot typewriters are available to type canned messages taken from (1) an internal storage unit, (2) punched cards, (3) reels of magnetic tape, or (4) punched paper tape. Their advantages are that a document can combine unique entries by an operator at the keyboard with canned material from storage.

Some of these machines will simultaneously type the document and produce tapes or cards which contain the same message in machine readable form. The tape or cards can then be fed back into the robot typer to print other documents. The Denver court prints adhesive backed folder labels and proceedings notices using a paper tape that is created by a single typing effort.

The byproduct tape or card also can be sent on to a computer to be read into the machine for a larger systems purpose. Los Angeles is reportedly planning a large central justice and law enforcement system that would profitably use this method of feed-in of information to the central computer.

This kind of equipment is well suited to preparing key documents such as criminal complaints at heavy-volume source locations. The Police Department and the Criminal Court of the City of New York are experimenting with a central arraignment bureau where all misdemeanor offenders will be promptly taken for arraignment and where all complaints will be drawn. If the court automates its functions, the plan might include installation of automatic typewriters at this arraignment center for preparing the complaint documents and card or tape byproducts for automatic generation of other court records.

COMPUTER

Document writing by computer, although easy to do, would normally not be economical unless volume is huge. Even large courts do not produce this volume in documents alone. However, in an integrated court and justice information processing center, where computer costs are justified on the sum of many court tasks, court documents such as summonses, affidavits of service, notices to appear for proceedings, court orders, bench warrants, writs to execute judgments, garnishment orders, etc., could be partially or wholly prepared from case information in the computer file. A computer prints execution writs for small civil case default judgments in Atlanta, Ga.

If document writing by computer is to be an economically sound procedure, all documents would be printed on continuous, unlined paper containing either no design or simply a preprinted court letterhead spaced at document size intervals. The format of the document contents would be governed by the print programs. A document bursting and trimming device could be attached to the printer to simplify separation and handling.

All of the records printings suggested under "Punched Cards" above could be done by computer where the volume was great enough. Even the heading of case folders, though a simple printing job, can be done economically on a computer printer when volume is large. A surprising amount of clerical time can be saved by mechanizing this chore. In the Essex County District Court, a court of limited civil jurisdiction handling 50,000 cases per year, 12 clerks are committed to typing case jacket covers, a clerical cost of $72,000 per year.

COURT FORMS

The most serious deficiency in court documents, particularly complaints, warrants, informations, indictments, and summonses, is that they frequently are not standardized within the jurisdiction and vary in format from county to county, sometimes even from court to court within the same county. Secondly, these forms are seldom designed for clerical efficiency.

Finally, criminal justice documents more often than not are one-ply forms. Carbon paper seems to be viewed with suspicion for judicial transactions, perhaps as something alien to recordkeeping concepts rooted in colonial traditions. As a consequence, court and county clerks' offices are bogged down in repetitive writing of the same information. The need to rewrite and to copy invites transcription error, costs more, and throttles the movement of information.

Generally, documents covering every aspect of a criminal or civil process must be recorded in the clerk's docket books before they are put in the official case folders. Until these recordings are made, the information in the documents is not readily known or available—except to the lawyer, party, or judge immediately affected. Consequently, piles of orders and other papers waiting to be posted may stay out of circulation for long periods of time. Lawyers often complain of docket posting delays that can run into days, even weeks, causing delay in service of papers on an opponent or other problems.

STANDARDIZED AND EFFICIENT FORMAT

Perhaps the place to start is with model designs for primary documents, keyed to the requirements of a uniform criminal justice statistics system and to criteria on form efficiency, both of which are absent in today's court documents. Little design attention has been given to such considerations as convenience of data arrangements, machine entry spacing, or consistency of data sequence from one kind of document to another.

MULTIPLE-PLY FORMS

In addition to format improvement, certain key court documents should be on multiple-part, carbon-interleaved sets to save repetitive writing and to make their contents immediately available to several users. Multiple-part copies could go simultaneously to the case file, the docket registry clerk, a calendaring section, the prosecutor, and defense counsel.

The American Bar Association sponsored a uniform traffic ticket study that has designed a four-part model ticket which has been adopted in a number of places. The form's main objectives are to standardize traffic violation nomenclature, provide a one-write system for multiple copies, and incorporate a conditional arrest warrant in the ticket itself. This kind of a prototype design might be undertaken for other documents common to the judicial systems of most States, such as indictments and warrants.

A good portion of the initial docketing of a criminal case could be accomplished without extra writing by printing the criminal complaint or indictment form so that all information needed for docketing falls into the top third of the page. Ply two of the form could be adhesive-backed and perforated so that the top third section could be removed and pasted in the docket book. The paste-in technique is familiar to some court clerks; a court records supply service produces paste-in strips for the index. These present paste-ins are not a byproduct of another document's creation, however, simply a means of entering typed names into a bound ledger.

OTHER TECHNIQUES

Other time-saving techniques in judicial forms design might include preprinting complaint or indictment numbers on the form, thus establishing this number for the case without special registers for this purpose, or preprinting the charges and the criminal code citations for common crimes on the same form with instructions to encircle or check the ones appropriate.

With a punched card system it would be desirable to save keypunch effort and perhaps reduce risks of case numbering errors, by incorporating partially prepunched cards in the multiple-ply complaint or indictment form. Possibly the case number and the charge number (corresponding to the prenumbering done by the printer) are the only items that could be prepunched in the manufacture and assembly of the form. In some secondary documents prescored knock-out holes might be included in the card design to save keypunching small items such as case numbers and criminal charge codes. These same form techniques described for the punched card system would be applicable to computer systems.

INDEXING

The public and the practicing bar would find it more convenient if court records were in alphabetical sequence by party name. However, clerical efficiency and the need for control require cases to be numbered and filed by number.

A case number is a more positive identifier than a party name, there being so many similarities in names. A number is easier to say, to write, to find, or put away in a file. And finally, a case or docket number automatically fixes a case's queue position and is a way of knowing its age. Sometimes, numbering methods are designed to classify cases for statistical tabulations. For these reasons hard copy files and records in both criminal and civil courts are normally arranged and retained in a docket-number or case-number sequence for as long as the records are kept. Since case number is the only way one gets into court files, there must be an index that cross-references the number to the parties' names.

The ideal criminal index would contain, in perfect alphabetical order, the name of every defendant brought before the court from the beginning of its history until the close of business yesterday. Because of the high clerical cost of maintaining such an index, a wide variety of indexing approaches will be found—all less perfect than the ideal. Most are handwritten. Manual indexes cannot, as a practical matter, achieve perfect alphabetical sequencing; cases are simply grouped by the first few letters of the last name. It is impossible to predict how future names, coming into the docket in chronological order, will be spelled. Keeping perfect order would require leaving large and wasteful amounts of blank space between names and then continually recopying the whole list to redistribute the blank spaces. Consequently, pages of the index are allocated to last names beginning with a specific first and second letter, BE for example, and names starting with these letters will be entered on the page in whatever order they are brought into court files. The names Benton, Beason, Belafonte, and Beene may be put on the index in that order. A docket book supply firm preprints index book pages according to an alphabetization formula (based upon probability analysis of name spellings) that minimizes the disadvantage of not having a pure alphabetical order.

Sometimes the party index is kept on vertically filed 3 x 5″ cards, which means that perfect alphabetization can be had, but such an index is much harder to use than

a list of names. Sometimes the handwritten indexes are confined to 5- or 10-year periods, or they may be limited to the cases in a specific docket book.

Indexing is one of the clerical tasks that most court clerks agree ought to be mechanized. Probably from 10 to 20 courts in the country have adopted a punched card indexing system. A docket book supply firm offers a keypunch and index printing service. Courts send them the handwritten, partially alphabetized index pages. This service then key punches the list and sends back a fully alphabetized printed index.

OPTIMUM MANUAL

For the small- and medium-volume courts which use purely manual clerical systems, the partially alphabetized handwritten index book is quite satisfactory for its purpose and could not be greatly improved upon without unwarranted cost. However, trying to encompass in one series all cases processed in the court's life becomes unwieldy in the larger cities. The index should be broken into several series, each covering a limited span of years.

PUNCHED CARDS

New names continually flow into the court docket stream. The influx volume is so great in our largest courts that written indexes are of little value. When equipment is available, punched cards are a good method of keeping the index in order. However, it is a problem deciding how often to print the cards, for machine printings are up to date only on the day they are done. The tendency with keypunched index cards is to merge new cards manually into the deck between listing operations and thereby have an up-to-date card file for constant direct reference as well as for periodic printing.

COMPUTER

A completely automated docket file would be self-indexing and thus would eliminate the indexing problem. As described above, the computer printed docket would arrange case summaries in alphabetical order. Thus the two big, historically separate docket records—index books and case history books—would become one. It would no longer be necessary when looking up a case to find its number first. Knowing its name would be enough.

RECORDS RETENTION AND MICROFILM

In many States neither the legislatures nor the courts have definite retention limits for the various court dockets, files, and documents. Statutes governing the work of the county clerks are frequently interpreted to mean that court records are permanent. Both criminal and civil proceedings records, if not kept permanently, tend to be retained an excessively long time, long after lingering rights have become barred by statutes of limitations, sentences are over, appeal rights have expired, and legitimate reference needs have passed.

Where record retention schedules do not exist, they should be established; where present schedules are unrealistically long (*i.e.*, 30 years for small claims litigation, found in one court), they should be substantially shortened. The National Association of Court Administrators has examined the possibility of uniform retention guidelines but has not yet reconciled State differences. Retention standards are needed for complaints and warrants, indictments, criminal court clerk's trial notes, criminal trial transcripts, and criminal docket books.

Microfilming is reportedly being used to preserve records in several courts. Some Federal courts, the Los Angeles Superior Court, and other California courts microfilm all court orders at the time they are entered. Using microfilm for closed files can be expensive, particularly the cost of culling less valuable material out of large files, and it might be preferable simply to retain the entire file for a considerably longer time.

Technical advances in microfilm, however, make it desirable not only as a device for reducing storage bulk but as a way to cut drastically the labor costs of filing a record in the first place. The future county clerk may not file new papers in a case folder but may simply microfilm them and immediately throw away the originals. A machine feature might provide immediate verification that a good image was made. The equipment would then automatically store the image with other film documents for that case. That document or the entire case file could be retrieved by keying the case number. Document images could be reproduced on a copier attachment or displayed on a screen.

While this precise equipment is not now marketed, similar hardware is available, indicating that a machine of this description could be produced within the next several years for a cost permitting its use in court case document filing.

JUROR MANAGEMENT AND COUNSEL ASSIGNMENT

The paperwork dealing with juries breaks down mainly into:

a) selection of veniremen from a file of citizen names, frequently voter registration records;
b) preparation of juror notices (or summonses) for mailing to or direct service upon the persons called;
c) accounting for the time served by each juror, both for purposes of paying him and of knowing when his obligation is discharged; and
d) preparation of compensation checks.

Jury tasks permit fairly straightforward mechanization, using either punched cards or a computer. With computer systems juror notice printing and check preparation can become completely automated.

Recent decisions enlarging the right to counsel have created new administrative obligations on State criminal courts. There are three major clerical jobs in the counsel assignment programs:

(1) maintaining a roster of local attorneys, from which assignments to indigent cases are made;
(2) preparing and mailing notices to assigned counsel; and
(3) accounting for the compensation earned by counsel on the assigned cases.

Either punched card or computer systems could make fairly simple work of these tasks, especially the time-accounting and notice printing. For the addressing of notices, even the courts using manual systems can find time-saving shortcuts such as plastic cards. Courts with computer systems could develop more complex services. For example, the Houston Legal Foundation, a legal aid organization, rents time on a commercial service bureau computer to keep basic identity and experience information on 3,600 lawyers practicing in the Houston area in both State and Federal courts. This file is used to select counsel for assignment to indigent defendants in all types of criminal cases. The machine is programmed to match an attorney's experience to characteristics of the case so that attorneys are assigned cases within their competence and unusual cases are assigned to attorneys with special experience.

MONITORING ARREST WARRANTS

Arrest and bench warrants present administrative control problems. Communication lines between issuing and enforcing authority stretch fairly thin and often break. The original warrant generally will remain in the hands of the police or sheriff in the jurisdiction of its issue, but notice of the warrant, at least for more serious offenders, is often posted with neighboring and out-of-State police and with State criminal identification bureaus. Because a high percentage of warrants is never served, they pile up, and the bottom of the pile receives less and less attention.

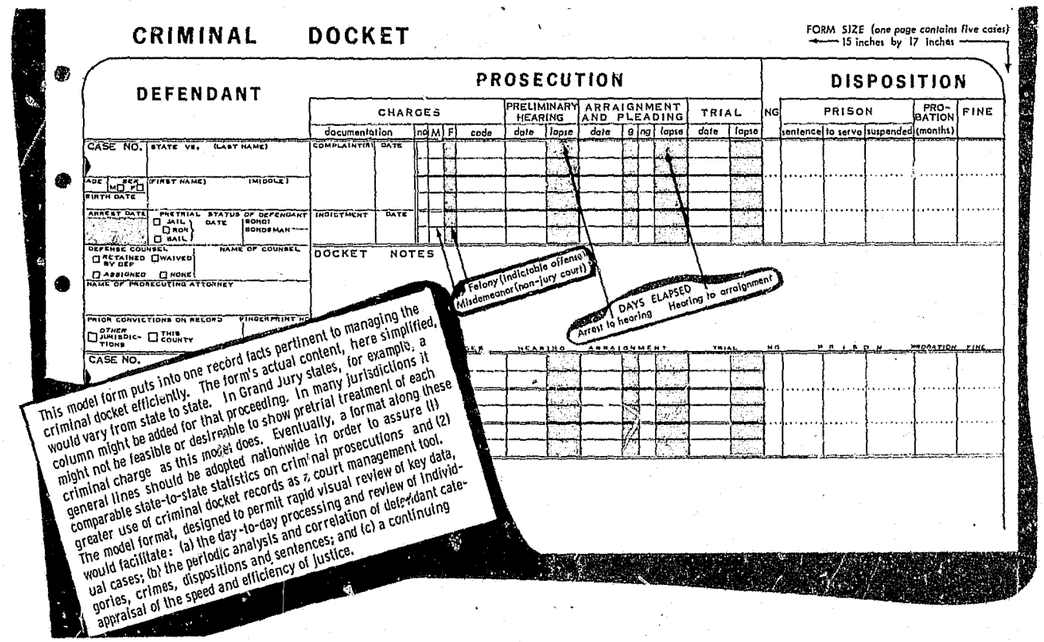
A warrant, although technically still valid, can become useless and the officer holding it does not know it or has not been notified of any change in circumstances pertaining to it. For example, the suspect may be dead, may have been tried and sentenced, or may have voluntarily appeared in court. Although it is the responsibility of an officer posting a warrant in foreign jurisdictions to notify them when it is withdrawn, served, or dead, this procedure is apparently neglected.

Some of the oldest warrants in the sheriff's file in Essex County, N.J., were 20 years old. The sheriff unwittingly makes several arrests per year on stale warrants, the most common being on old nonsupport cases, causing embarrassment and inconvenience both to his office and the persons arrested.

The solution is a centrally supervised system for monitoring warrants by which new information is regularly matched against the warrant file so those no longer needed can be withdrawn. Some cities, St. Louis for one, reportedly are developing such systems, and in some States, particularly New York, criminal intelligence files have partially mechanized warrant monitoring.

Warrant housekeeping would be greatly simplified if legal expiration dates could be assigned to warrants at the time they were issued, except on those relating to serious felony offenders. On its expiration date, which in most cases might reasonably be one year after issue, a warrant would become "stale," legally dead but carrying a presumption of renewability. This would force the police to verify and renew old warrants before acting on them. This procedure should be particularly beneficial to police file maintenance.

If warrants had expiration dates, police filing sections could use a colored card marking the expiration year. The warrants could then be pulled routinely by their color once or twice a year. The onus would be on the jurisdiction that issues a warrant to "repost" an expired warrant with other jurisdictions when it is renewed.



This model form puts into one record facts pertinent to managing the criminal docket efficiently. The form's actual content, here simplified, would vary from state to state. In Grand Jury states, for example, a column might be added for that proceeding. In many jurisdictions it might not be feasible or desirable to show pretrial treatment of each criminal charge as this model does. Eventually, a format along these general lines should be adopted nationwide in order to assure (1) comparable state-to-state statistics on criminal prosecutions and (2) greater use of criminal docket records as a court management tool. The model format, designed to permit rapid visual review of key data, would facilitate: (a) the day-to-day processing and review of individual cases; (b) the periodic analysis and correlation of defendant categories, crimes, dispositions and sentences; and (c) a continuing appraisal of the speed and efficiency of justice.

Index

E

F

G

H

I

J

L

M

U.S. GOVERNMENT PRINTING OFFICE: 1967 O—239–114

END