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CRIMINAL JUSTICE RESEARCH

FRANK J. REMINGTON

Mr. Remington is Professor of Law in the University of Wisconsin. From 1950 to 1956, he served as a member of the technical staff and Advisory Committee for the new Wisconsin Criminal Code. Professor Remington is also a Special Consultant and member of the Advisory Committee for the American Law Institute's Model Penal Code as well as Project Director of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States.

Professor Remington here reviews the three principal categories of legal research in the field of criminal justice—those pertaining to (1) appellate court decisions defining criminal conduct, (2) legislation pertaining to the definition of criminal conduct and (3) administrative processes applying substantive criminal law to individual cases. Assessing the accomplishments of legal research in these areas, Professor Remington finds significant inadequacies, particularly in the lack of attention paid to problem areas which seldom, if ever, reach appellate courts, and in the lack of research concerning the administrative aspects of criminal law. With respect to the research efforts which have been made in the area of administration, he notes that they have usually concerned problems which could be as ably handled by other specialties, and have not reflected the special competence or frame of reference of the lawyer. He urges that future legal research in this field should examine the question of what role the rule of law should play at the various levels of criminal law administration.

The author prepared this article at the special request of the Board of Editors in commemoration of the *Journal's* fifty years of publication.—EDITOR.

INTRODUCTION

The task of research in the field of criminal justice is not unlike the task of research generally. In the main it is necessary to decide what the major problems are, to orient existing knowledge to those problems in a way that makes their dimensions as clear as possible, and to devise methods of acquiring such additional knowledge as is required to form an adequate basis for their solution.¹

Sometimes the existence of a major problem is apparent enough, and efforts can be directed toward the discovery of its cause and its remedy. This, for example, is the current situation in regard to cancer. No one seriously doubts that it is proper to spend a great deal of money and effort upon its study. In other instances, however, the most important existing problems are not entirely clear, and therefore the first task of research is to decide where available resources can

best be directed. This situation confronts those who study criminal justice administration.

It would be an obvious oversimplification to represent that there are a certain number of inherently important problems in criminal justice administration which warrant research attention to the exclusion of others. The field is too complex for that. Indeed it would not be possible, in a single article, to describe adequately the kinds of important problems which exist, ranging as they do from problems of police efficiency on the one hand to those relating to the effectiveness of psychiatric therapy on the other hand. The objective here is a more limited one. This being the fiftieth anniversary of this *Journal*, an appreciable segment of which has been devoted the research products of lawyers, it seems appropriate to ask what problems have preoccupied lawyers' research in the past, and what new directions their research might take in the future.² The kind of research which is emphasized in legal scholarship ought to be a matter of general interest, because the lawyer has a unique opportunity to focus effectively the contributions of more spe-

¹ See Wechsler, *The Legal Scholar and the Criminal Law*, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH (University of Michigan Law School, 1955) 126-136 for a very helpful treatment of this same general problem. He defines research as "... no more than systematic inquiry designed to gain ideas, insights, or information relevant to the solution of important problems in the field."

² *Id.* at p. 127: "I think we should rather ask ourselves, what are the attributes or qualities of legal scholarship that are most needed in this field, what are the attitudes of mind, perspectives, points of view or special competence that legal scholarship should seek to bring to bear?"

cialized social sciences upon some of the basic issues of current criminal justice administration. To explain why this is so and to suggest how it can be more effectively done is the purpose of this article.

Research by lawyers can, for convenience, be divided into three categories which have some chronological significance: (1) the study of the function of the appellate court in the definition of what conduct is criminal; (2) the study of the function of the legislature in the definition of criminal conduct; and (3) the study of the process of administration by which the substantive criminal law is applied to cases which arise. Somewhat oversimplified, these can be described as the judicial, the legislative and the administrative processes in the field of criminal law.

Research on the appellate judicial process is traditional and has been relatively adequate, but it has not had substantial impact upon the content of appellate decisions themselves. Research on the legislative function has become more common in recent years, and major contributions to the improvement of substantive criminal legislation are now being made. Research on the administrative process in the criminal law has been sporadic, varying from enthusiastic efforts during the early crime surveys of the 1920's to an almost complete absence of interest during other decades. In general, research on the administrative process has lacked a consistent sense of direction.

RESEARCH ON APPELLATE OPINIONS DEFINING WHAT CONDUCT IS CRIMINAL

Without doubt the chief concern of legal scholarship over the past fifty years has been with the problems which have caused appellate courts the greatest conceptual difficulty. This is reflected in the fact that textbooks continue to rely upon appellate opinions to generalize on the definition of crimes, typically pointing out that local legislation may affect the validity of the generalizations as applied to any particular state. The same emphasis has characterized much of the material prepared for use in legal education. This situation is likely to continue because the appellate opinion is the most suitable material for the Socratic method of law teaching, and the desire to produce a casebook which will have national appeal tends to cause emphasis upon judicially approved generalizations rather than

upon local legislative variations or innovations. Concentration upon the appellate process is understandable, and its importance warrants continuing study; but preoccupation with the appellate process is justified only if it adequately reflects the important problems now confronting the legal system in criminal law administration. This is not the situation today; probably it never was.

Without unduly depreciating the great amount of study which has been given appellate opinions, it may fairly be said that the studies have had comparatively little impact upon the content of appellate decisions themselves. One striking example will illustrate this. The subject of criminal homicide has received a tremendous amount of study. Areas of confusion, inconsistency and duplication in appellate case law have been identified and thoroughly discussed. Few problems in law have been dealt with so extensively.³ In 1953, the Court of Military Appeals was called upon to interpret a new, if not a novel, punitive article defining murder.⁴ The court was not bound by precedent and thus, within the limits imposed by the words of the punitive article, it was in a position to utilize the great amount of prior analysis of the problem. Despite this, the opinion of the court was one which differed in no significant way from the opinions of courts in states such as New York which had been called upon to interpret similar statutory language over 100 years ago.

This is difficult to explain. In part the reason may be that the study of the homicide problem has failed to produce much new information about the consequences of one kind of judicial inter-

³ Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 701, 1261 (1937); Moreland, *HOMICIDE* (1952), and other works cited therein.

⁴ In, *United States v. Davis*, 10 C.M.R. 3 (1953), the court interpreted U.C.M.J. 118 (3) "... an act which is inherently dangerous to others..." to require a risk to more than one potential victim relying on prior decisions in New York and rejecting contrary interpretations in states like Wisconsin. In so doing the court of Military Appeals was apparently unaware of the fact that the New York interpretation was undoubtedly caused by the fact that gross recklessness carried a death sentence while an intentional killing was punishable only by life imprisonment. In a subsequent case, the Court of Military Appeals was called upon to decide the meaning of UCMJ 118 (2) "... intends to kill..." and concluded that this did not require a specific intent because if it did certain cases of extremely gross recklessness as to a single potential victim would be reduced to manslaughter. *United States v. Craig*, 10 C.M.R. 148 (1953). The distortion of the plain language of 118 (2) resulted because the court found itself trapped by the prior decision, a situation which would have been avoided by even a casual knowledge of the literature on homicide.

pretation as opposed to another, and studies typically have failed to take any substantially different perspective of the problem than that taken by the appellate courts themselves. In other words, research has, for the most part, consisted of an analysis of the logic of appellate opinions, assuming substantially the same information available to the appellate court. It is, of course, important to be concerned with the logic of appellate decisions, for a principal function of the legal system is to achieve consistency and rationality in the formal norms designed to control individual behavior. Conceding this, it seems nonetheless a fact that research on appellate case law will not have a substantial effect upon case law development unless research produces information of a kind significantly different from that typically available, though perhaps less thoroughly analyzed, in briefs of the parties.

Research on the appellate process has, however, had an effect upon substantive criminal law legislation designed to supplement or supplant prior case law. Such legislative revisions as have been accomplished typically deal more adequately with those issues which have been of concern to appellate courts than they have with other issues, no less important, which have seldom reached the level of appellate litigation. The crime of vagrancy is of great importance both in terms of day-to-day administration, and also in terms of the potential harm which a loosely drawn statute can cause to those who ought not be subjected to the criminal process. Because of the nature of the crime, vagrancy seldom reaches the appellate court and, for this reason, has been given little attention in legal research. As a consequence, vagrancy has been inadequately dealt with in legislative revisions.

RESEARCH ON LEGISLATION DEFINING CRIMINAL CONDUCT

For at least the past twenty years there has been a constantly increasing interest in the legislative function relating to the definition of criminal conduct. This has paralleled the great interest in legislation in other fields of law, prompted in part no doubt by the substantial increase in congressional activity, particularly in the field of economic regulation, during the 1930's. For whatever reason, much more attention is now being given to legislation, both in research and in teaching. And this increased interest is reflected in major efforts to make legislation meet more

adequately the perplexing problems of the substantive criminal law.

Two states, Louisiana and Wisconsin, have adopted complete revisions of their substantive criminal codes.⁵ A number of states are now working in the same direction.⁶ Neither the Louisiana nor the Wisconsin revision produced any very fundamental change in the criminal law of those states. The achievement of both is limited primarily to clarification of existing legislation and codification of important aspects of prior case law. This limited objective does, however, constitute a major improvement. The criminal law, above all, can be effective only if so drafted as to be capable of administration by persons who, for the most part, do not have the time or the training to understand highly complex substantive law formulations. It is probably true that it is more desirable to have a statutory formulation which can be easily applied in 99% of the cases, even though it leaves unresolved 1% of the cases, than it is to have a highly complex formulation which deals adequately with 100% of the cases but cannot be readily understood by most of the persons who will be called upon to administer it. Clarity is an objective which can be achieved in legislation more easily than in law making which is left by default to appellate courts, because appellate courts are likely to see problems primarily in terms of the difficult cases which come before them. Legal scholarship itself has been more interested in the unusually complicated situation than in clarification of the typically recurring situation.

Many of the problems of current criminal law administration result not so much from the fact that we know little about individual and group behavior, but rather from the fact that legislatures have not bothered to deal with important issues at all or have dealt with them ambiguously. Thus the almost habitual failure to define accurately the mental state or the overt conduct required for a given crime creates serious problems

⁵ For a discussion of the Louisiana revision see Bennett, *Louisiana's Criminal Code of 1942*, 20 KAN. CITY L. REV. 208 (1952); Smith, *How Louisiana Prepared and Adopted a Criminal Code*, 41 J. CRIM. L., C. & P.S. 125 (1950). For a discussion of the Wisconsin revision see Remington, *A Proposed Criminal Code for Wisconsin*, 20 KAN. CITY L. REV. 221 (1952); Remington, *Criminal Law Revision, Codification vs. Piece Meal Amendment*, 33 NEB. L. REV. 396 (1954); Platz, *The Criminal Code*, 1956 WIS. L. REV. 350.

⁶ Major efforts are in progress in Illinois, Minnesota and New Mexico.

for administration, and serious risk that conduct will be subject to severe criminal penalty without anyone having given adequate consideration to whether it is wise to so treat it.⁷ Inadequate utilization of knowledge is as important a problem for research as is the fact of inadequate knowledge itself. The difficulty resulting from a failure to utilize effectively existing knowledge by means of careful draftsmanship is compounded by the lack of even minimal effort to repeal criminal statutes which have long outlived their usefulness.

One example will illustrate how much harm can be caused by inadequate definition of the conduct which the legislature wants to proscribe. The problem of prostitution is one which will not be solved, if it is ever solved at all, until we know more about the causes of and the treatment for deviant behavior. But we have institutionalized a method, the process of legislation, for deciding whether prostitution should be criminal and for determining the precise circumstances in which criminal liability ought to be incurred. There is no reason why the crime cannot be defined with precision and clarity. Despite this, one state, not untypical, has proscribed the conduct by a statute which provides:

"Any person who shall accost, solicit or invite another in any public place, or in or from any building or vehicle, by word, gesture or any other means, to commit prostitution or to do any other lewd or immoral act, shall be guilty of a misdemeanor."

It is not entirely clear what meaning this language had historically. It is clear that it has been differently interpreted by police, on the one hand, and some trial judges, on the other hand, for a considerable number of years. Police take the position that a willingness to have intercourse for money is criminal, while some trial judges require proof of aggressive solicitation by the woman involved. The result is confusion in relation to the most simple, frequently occurring situation. If a bar becomes known as a place which prostitutes frequent, one common method of enforcement is for an undercover officer to go to the bar and engage in the customary activity, which may include buying the girl a drink and giving the usual expression of interest. If the response is an acceptance for a stated amount of money, an

arrest is made. It may be perfectly clear what happened—perfectly clear that the woman offered to have intercourse for money—and yet not at all clear whether such conduct is criminal. This is the kind of issue that is unlikely ever to get to an appellate court. It remains, therefore, as a constant source of misunderstanding between police and trial judges who differently construe language which is not as clear as it could be. The cost in wasted time and effort is tremendous.

It is of course true that continuing improvement in legislation defining criminal conduct requires more than clarification. It requires greater knowledge of individual and group behavior than we now possess. Research, like that underlying the Kinsey Report, increases understanding of the community's reaction to behavior now criminally proscribed. But to grant this is not to depreciate the importance of major legislative revision now. The process of careful revision itself tends to define, more adequately than would otherwise occur, those issues upon which social science data is needed.

The American Law Institute has substantially completed a Model Penal Code which identifies many of the major issues in the substantive criminal law, defines the alternative ways of dealing with those issues, and proposes a method of solution which the Institute believes to be most desirable.⁸ Much of the material upon which the Model Code is built consists of existing legislation and case law, but the analysis of that material is much better than that achieved in connection with the Louisiana and Wisconsin revisions. Moreover, the Model Code deals much more adequately with important issues like insanity, double jeopardy, entrapment and vagrancy, which have either been ignored or dealt with superficially in prior efforts at revision.

There has never been serious doubt that the substantive criminal law is a proper subject for legal research. Such doubt as existed related rather to the proper emphasis of such research. The trend in the direction of increased attention to legislative revision and codification will undoubtedly continue. Careful statutory formulation is not only an objective in itself, but also it will, in the process, indicate more precisely than before the questions about which we are in great need of more knowledge. The immediate task is

⁷ See Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952); Remington and Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

⁸ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

to do a more adequate job with the areas of the substantive law which have not been a matter of appellate judicial concern and thus which have not heretofore received careful attention in legal research. The long run objective must of course be a continuing re-examination of the substantive criminal law in the light of increasing knowledge about human behavior.

RESEARCH ON THE PROCESS BY WHICH THE CRIMINAL LAW IS ADMINISTERED

The major task for the future is to give increased attention to a third aspect of the criminal law, the process by which legislative policy is implemented administratively. This is the area where there is the greatest need for significant contribution. But it is difficult to know where to start. Whereas the substantive criminal law is of obvious importance to legal research, it is not apparent to what extent the same thing is also true of administration.

Despite such ambitious undertakings as the early crime surveys such as *Criminal Justice in Cleveland*,⁹ the *Missouri Crime Survey*,¹⁰ the *Illinois Crime Survey*,¹¹ and the *Wickersham Study*,¹² there has not been sustained interest, in legal scholarship, in the administrative aspects of the criminal law. This is reflected in the fact that there is not a single adequate text dealing with criminal law administration. Moreover, materials prepared for legal education have, for the most part, de-emphasized administration in favor of emphasis upon the substantive criminal law. Such attention as has been given to problems of administration has been confined to those issues which have traditionally reached appellate courts. These are issues like arrest, especially the issue of tort liability for false arrest, problems of search and seizure, entrapment, double jeopardy and fair trial. These are obviously problems of great importance; but to concede this is not to justify the conclusion that all major issues of importance to legal scholarship will reach appellate courts, or that it is adequate to view those issues which are the subject of appeal in the same context

in which they reach appellate courts. The fact that the whole field of sentence and correction is now largely outside the scope of appellate review conclusively demonstrates this.

The easy conclusion is that legal research ought to be interested in all aspects of administration. Taken literally, this would require the intensive study of scientific crime detection, pathology, social work, psychiatry, personnel management and the many other specialized fields which are integral parts of the total process by which criminal justice is administered. It is important that these problems receive continuing study, but it is not at all apparent what legal research can add to the research efforts of the specialists most directly involved. This seems obvious enough, and yet it is readily assumed that traditional issues such as the choice between the coroner and the medical examiner are proper subjects for legal research. They are, in the sense that the legislature must, through law, make the choice. But if the principal problem involves the relative adequacy of the pathological examinations which will be conducted, it seems apparent that the question, once accurately defined, can be most helpfully dealt with by medical, rather than legal, research. One other example will illustrate this point. An increasingly popular subject for legal scholarship is the problem of psychiatric therapy for those convicted of crime. It is obviously desirable for lawyers to understand both the current contributions and limitations of psychiatry. But understanding psychiatry is not enough. It is necessary to ask what relevance this knowledge has for legal research, because the study of psychiatry by lawyers will not achieve a research objective in itself unless the lawyer is able to utilize the knowledge in a way significantly different from the way in which it is utilized by the psychiatrist.

The need therefore is for an adequate conceptual framework for legal research in criminal justice administration which will serve as a basis for identifying the problems of major importance, and which will insure that legal research supplements rather than duplicates research by other social or physical scientists.

The unique and important contribution which legal research can make is to ask what role, if any, the rule of law ought to play at various stages in criminal justice administration. Interest in legal rules has been traditional in relation to the formal

⁹ *CRIMINAL JUSTICE IN CLEVELAND* (The Cleveland Foundation, 1922).

¹⁰ *THE MISSOURI CRIME SURVEY* (The Macmillan Company, 1933).

¹¹ *THE ILLINOIS CRIME SURVEY* (Blakely Printing Company, 1929).

¹² *REPORTS OF THE NATIONAL COMMISSION ON LAW AND ENFORCEMENT*, (United States Government Printing Office 1931).

process of adjudication and as to some aspects of police enforcement. But the fact that the selection of problems for research has been based largely upon whether they reach the stage of appellate litigation has meant that important aspects of administration are typically ignored. For example, there has been relatively little critical examination of the function of the rule of law in relation to the exercise of the prosecutor's discretion, the dominant practice of bargaining for pleas of guilty, and the entire process of sentencing and correctional treatment. And yet, it is precisely at these points that it is most important to know the extent to which legal rules and procedures can properly be dispensed with.¹³

Valuable though their contributions were in other respects, the early crime surveys did not produce any clear conception of the kinds of administrative problems which ought to be of greatest concern to legal research. The major surveys were staffed for the most part by lawyers, and were, in that sense, legal research. Yet typical of the problems selected for study were matters of personnel recruitment and management, organizational structure, techniques of crime detection, and methods of rehabilitative therapy. Apart from the treatment of some traditional aspects of prosecution and litigation, it is apparent that the surveys would have been no different if lawyers had not participated at all. If this were a matter solely of professional pride, it would be of little importance. But if, as is true in fact, the failure of legal scholarship to develop a clear conception of its function means that major issues are left without study, then this is a matter of genuine concern.

The consequences of lack of an adequate conception of the function of legal research in criminal

law administration can be seen in the results of the major crime surveys. In general those surveys concentrated upon four kinds of problems: (a) the problem of organized crime; and (b) the day to day inefficiencies in criminal justice administration; (c) instances of gross unfairness in law enforcement; and (d) failures to stress adequately rehabilitative therapy. All of these are of obvious importance; but no one of them is an adequate objective for legal research. The law performs its most useful function at precisely those points where there is conflict among the objectives of efficient conviction of the guilty, successful rehabilitative treatment of deviant behavior, and fairness of procedure in dealing with suspected and convicted offenders.¹⁴ If the rule of law has meaning at all, it requires that important contributions to the balancing of these objectives be made by legal norms and by procedures for assuring compliance with those norms. This problem has been largely ignored in the major studies of criminal justice administration. This can be seen by a brief review of the points of emphasis of prior survey research.

(a) *Concentration Upon Spectacular Break Downs in Law Enforcement.* A system for the administration of criminal justice can be examined in terms of its major failures. The most spectacular way of doing this is by concentrating on the problem of organized crime when it is rampant, as it was in Chicago in the 1920's. This is a point of concentration in the Illinois Crime Survey, in portions of the Wickersham Report and, to a somewhat lesser extent, in the Cleveland and Missouri Crime Surveys. The more recent Kefauver investigations were obviously directed to the problem of organized crime.

Viewing the administration of criminal justice in terms of its obvious, major defects makes it easy to reach general agreement on the fundamental objectives of administration. At least, no one would seriously claim that a continuation of organized crime is a proper objective. Attention therefore turns immediately to the proposal of remedies to cure an obvious defect. Although weakness in the legal framework may contribute

¹³ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1101 (1952): "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."

¹⁴ See the opinion of Chief Justice Warren in *Spano v. New York*, 360 U. S. 315 (1959): "As in all such cases [14th Amendment cases], we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."

to breakdowns in law enforcement, typically the major factors relate to community attitude, political structure, and matters of personnel recruitment and tenure. Most would agree that strenuous effort at law enforcement within the existing legal structure would achieve the objective of suppressing widespread organized crime. The problem is essentially one of local government. This is properly of concern to legal research, but the achievement of good government is a problem which exists generally and is not at all unique to criminal justice administration. Concern with organized crime is important but not adequate to expose the basic problems of day-to-day criminal law administration.

(b) *Concentration Upon Day-to-Day Inefficiencies in Law Enforcement.* A second way of studying the administration of criminal justice is to concentrate upon defects less obvious than organized crime. This was the major objective of all of the early surveys. Whereas the continued existence of widespread organized crime is a defect which no one would deny, other less obvious inefficiencies are more difficult to identify and more difficult to define in a way that will be widely agreed upon. This posed a serious problem for the early crime surveys. It was solved by the "mortality tables."

To determine efficiency it was assumed, for statistical purposes, that the completely efficient system would convict and impose maximum punishment upon all persons arrested. To determine how efficient a system was, "mortality tables" were prepared which indicated points of maximum drop-out. The research statisticians recognized that this was a quantitative determination and that a large "mortality rate" at any point in the system was not necessarily undesirable.¹⁵ This limitation of the method was not kept sufficiently in mind, however, and the attention of the surveys immediately turned to explaining the defects and proposing methods of solution. Explanations were typically made in terms of the influence of politics or weakness of personnel or in organizational structure. The inadequacy of this oversimplified approach was pointed out by Alfred Bettman, a participant in, and the most perceptive commentator on, the early surveys:

"There is a reason for everything; but the whys

¹⁵ THE ILLINOIS CRIME SURVEY 33 (Blakely Printing Company, 1929).

and wherefores of this development cannot be thoroughly explored by the simple process of locating the agency which does most of the disposing of cases and then attributing full and exclusive responsibility to that agency. Some agency has to perform the function of sifting out the cases which justify trial upon the offense charged, and if the methods applied in police, preliminary examination, and other stages of the cases preceding the prosecutor's jurisdiction dump into his arms more cases than are warranted by or numerous charges in excess of the provable facts, then, when the prosecutor nolle many cases or accepts many pleas of lesser offense, he may be stepping into a breach into which somebody must step and for which he may be better fitted than any other existing functioning agency. Nor should we leave out of account the subtle and profound reflex effects of the theories or principles upon which the dispositions or punishments of offenders are to be based. The kind or the methods of the agency through which cases are to receive prompt and accurate labeling as a preliminary to disposition of the offender (guilty or not guilty, guilty of burglary or of larceny) might, on analysis, be quite different according to whether the disposition is to be based mainly on the facts of the crime or on knowledge concerning the offender. For instance, if the disposition of the offender is to take into account his whole history and personality, a plea of guilty of larceny might quite adequately place him within the jurisdiction of the disposing tribunal; whereas, if the penalty is to be more or less mathematically based on the exact legal definition of the act committed by the accused, the careful jury trial might well be deemed a preferable mode for selecting the persons who are to be subjected to punishment or treatment."¹⁶

The "mortality table" approach to the study of criminal justice administration had a number of unfortunate consequences:

(1) Any organizational characteristic or any procedural or administrative rule that tended to make conviction more difficult was viewed as an obstacle to proper enforcement, without thorough consideration of its purpose or total effect upon criminal law administration.

(2) Because of the emphasis upon defects, administration of criminal justice tended to be viewed exclusively in terms of its defects, and

¹⁶ NATIONAL COMMISSION ON LAW ENFORCEMENT AND OBSERVANCE, (United States Government Printing Office 1931), Report No. 4 at p. 146.

consequently no effort was made to understand why some systems or some procedures worked well.

(3) Since the objective was efficiency in the conviction of the guilty, major emphasis was given to matters of organization detail and techniques of investigation which had a direct effect upon efficiency. Thus the study of police enforcement emphasized personnel recruitment and assignment, communication systems, equipment, record keeping and other aspects of administrative housekeeping. These are important matters, but they are not adequate as major objectives of legal research.

(c) *Concentration Upon Gross Unfairness in Law Enforcement.* A third way of studying the administration of criminal justice is to concentrate upon unfairness in the treatment of offenders and suspected offenders. This might have been an aspect of the study of the efficiency of law enforcement, but it was not. The surveys saw efficiency of enforcement and fairness of procedure as sufficiently divisible to make possible entirely separate analyses. The chief effort to locate unfair practices in criminal justice administration was made in the Wickersham Report on "Lawlessness in Law Enforcement."¹⁷

An indication of the preoccupation with abuses is seen in the fact that it was assumed that the most "trustworthy accounts of individual instances of unfairness were furnished in reported judicial decisions."¹⁸ Even if appellate decisions may reliably indicate the kinds of abuses which have taken place, it does not follow that they are also a reliable indication of the extent of the practice or that they afford an adequate basis for determining the factors which explain abuses in systems where they are found to exist. If the objective is to demonstrate that there are abuses and to arouse the public in the hope that this will force change, then appellate decisions, or indeed newspaper accounts, may be an adequate basis for study. If, however, the objective is to understand thoroughly the cause of the abuses and thus to produce a sound basis for remedial measures, mere indication of the presence of abuses is clearly not sufficient.

Concentration upon appellate decisions as

evidence of unfairness also gives undue emphasis to certain stages in criminal justice administration, while others, equally important, are largely ignored. For example the Wickersham Report on "Unfairness in Prosecution" was devoted almost entirely to examples of unfairness occurring at the trial, and no attention was given to possible unfairness in the decision as to whom to charge with a criminal offense. This is not surprising when one considers the relative ease of raising the issue of unfairness at the trial and the relative impossibility of successfully asserting an abuse of the prosecutor's discretion. An appeal to racial prejudice during trial, a matter emphasized in the Wickersham Report, is likely to be raised on appeal. A consistent policy of racial differentiation in selection of charge by the prosecutor is difficult, perhaps impossible, to raise through the appellate process. And yet the latter may be far more important than the former.

In addition to the usual recommendations for improvement in personnel and organization, the report on "Lawlessness in Law Enforcement" made a recommendation for a major change in law. The most effective way of minimizing third degree tactics was said to be to require persons arrested to be brought immediately before a committing magistrate. This recommendation has had an important impact upon current criminal justice administration. Unfortunately the study of appellate cases upon which the recommendation was based could not give an adequate basis for knowing whether a requirement of immediate appearance before a magistrate was consistent with the minimal needs of effective law enforcement. And this issue is as yet unresolved.¹⁹

(d) *Concentration Upon Rehabilitative Therapy for Persons Who Have Committed Crime.* A fourth way of studying the administration of criminal justice is to try to determine the extent to which administration serves the function of rehabilitating persons who have committed crime. The primary effort of the early surveys was upon efficiency, which was measured, not in relation to the objective of rehabilitation, but rather in terms of the likelihood of a guilty person being convicted and receiving the maximum punishment prescribed. Although this was the general situation, those chapters devoted to a study of

¹⁷ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (United States Government Printing Office, 1931), Report No. 11, "Lawlessness in Law Enforcement."

¹⁸ *Id.* at p. 3

¹⁹ *Mallory v. United States* 354 U. S. 449 (1957); *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong. 2d. sess., July 17 and 30, 1958.

parole did typically concentrate upon the relationship between parole practices and the likelihood of successful adjustment under supervision in the community. For example, the Illinois Crime Survey contained one of the early efforts to identify those factors which determine or explain success or failure on parole. This kind of study has been continued, with a great deal of the work being done by Professor Sheldon Glueck of the Harvard Law School. It in no way depreciates the importance of this problem, or of the truly significant contribution of Glueck and of the Illinois Crime Survey, to assert that the predictability of recidivism is not a problem to which legal scholarship brings any special competence.

Although this seems obvious enough, it is not uncommonly thought that a study of treatment processes solely in terms of their effectiveness is an adequate objective for legal research. One consequence of this is that lawyers, and thus to some extent the law, have been willing to assume uncritically that behavioral sciences like psychiatry, psychology and social work contain within themselves sufficient safeguards against unwarranted interferences with individual freedom in the exercise of official power in the process of criminal justice administration.²⁰ Legal norms or procedures are seen as either unimportant or as positive obstacles to successful treatment.²¹ This may in fact be true, but an assumption that it is ought to be made only after critical examination

²⁰ This in part explains the "sex psychopath" legislation. See Allen, *The Borderland of the Criminal Law, Problems of Socializing Criminal Justice*, 32 SOCIAL SERVICE REV. 107, 113-115 (1958): "One of the most alarming aspects of the current agitation for reform of criminal justice and related areas is the apparent willingness of some proponents of reform to substitute action for knowledge, action of the sort that often results in the most serious consequences to the affected individuals. Unfortunately, this is a tendency found too frequently among lawyers of the more 'progressive' variety."

²¹ The study of efficiency or effectiveness of method by the professional most directly concerned almost inevitably causes him to see the law as an obstacle, because a function of law in this field is to balance, against professional goals, the interest in being free from official interference no matter how professionally competent or highly motivated. And this must be the concern of law as long as the criminal law involves punitive consequences for the individual involved. See for example, Kooiken, *Postwar Influence Upon Criminal Investigations*, 35 J. CRIM. L., C. & P.S. 426, 428 (1945): "They (police administrators) are inclined to look upon the constitutional provisions not as measures protecting the liberties of the citizen, but more as obstacles to confound and obstruct the law enforcement officer in his daily tasks."

of current administrative experience. It is here that the need for careful research is greatest and the tradition for legal research most lacking.

THE DIRECTION OF LEGAL RESEARCH IN THE FUTURE

Five year ago, Herbert Wechsler, Reporter for the American Law Institute's Model Penal Code, described the task of legal scholarship in the following way:

"Legal scholarship can make its largest contribution to the law by systematically focusing on legislative questions, marshaling analysis and research to the legislative problems of its field: it has important special competence that should be brought to bear on formulating legislative policies entitled on the merits to prevail. The thesis would be relevant at any time. It has special relevance today, for we are living in the greatest legislative age in the entire history of man."²²

It is not inconsistent with this to assert that we are now at the beginning of an era in which there will be greater interest than ever before in the relationship between legislative policy making and day-to-day administrative implementation of policy. A most casual look at current criminal justice administration discloses a situation of legislative default in regard to aspects of administration which involve a most difficult balancing of the objectives of efficiency of conviction, effectiveness of rehabilitative therapy, and appropriate regard for the interest of the individual in fair and consistent treatment. The consequence of this legislative default is a delegation of immense responsibility to front line administrative agencies whether by choice; by neglect; because of inherent inadequacies in even the most careful verbal formulations; or, because judgments about human behavior can seldom be expressed in very specific terms with our limited knowledge as to what the relevant aspects of behavior are.

This broad delegation of responsibility to front line administrative agencies is not new, although the rapid development of the field of correction has resulted in the creation of new problems requiring the exercise of administrative discretion. What is new is the increasing willingness to re-examine critically the wisdom of delegating broad

²² Wechsler, *The Legal Scholar and the Criminal Law*, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 136 (University of Michigan Law School, 1955).

and in many instances uncontrolled discretion. This is a trend not unique to the criminal law. In the field of economic regulation there is evidence of an increasing skepticism as to whether economic problems can best be dealt with by administrative agencies staffed by experts and given broad discretion free from interference by legal norms and procedures designed to compel adherence to those norms.²³ Certainly this concern is evident in relation to administrative decisions in the fields of loyalty, federal employment and deportation.²⁴ Closer to the field of criminal law, there is now less than complete satisfaction with the view, once popular, that problems of juvenile delinquency can best be dealt with by a complete elimination of legal formalities and procedures in juvenile court proceedings.²⁵ And in relation to adult criminality, the current proposals of the American Law Institute to subject decisions like parole to formulated legislative criteria have evoked spirited debate.²⁶ These are symptoms.

²³ See for example, Carrow, *Separation of Powers*, 9 VA. L. WEEKLY DIGEST COMP. 1-7 (1957-1958).

²⁴ GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956).

²⁵ See Allen, *The Borderland of the Criminal Law: Problems of Socializing Criminal Justice*, 32 SOCIAL SERVICE REV. 107, 115-119 (1958).

²⁶ The relevant sections are: Model Penal Code, Tentative Draft No. 2, Sec. 7-01 Criteria for Withholding Sentence of Imprisonment and Placing Defendant on Probation; 7.02 Criteria for Imposing Fines; 7.03 Criteria for Sentence of Extended Term of Imprisonment; Felonies; 7.04 Criteria for Sentence of Extended Term of Imprisonment; Misdemeanors and Petty Misdemeanors. Tentative Draft No. 5, Sec. 305.13 Criteria for Determining Date of Release on Parole.

The typical opposition to legislative criteria is, "some of these criteria may be good, but they are not good in a statute." See proceedings, American Law Institute, 33rd Annual Meeting (1956) at p. 271. The reply of the Reporter for the Model Penal Code states the other side of the issue: "I certainly cannot agree or cannot have the slightest respect for decisions by anybody for which no reason can be given, and I would submit myself that utterly undisciplined parole adjudications—that is, adjudications without reference to a norm—do not represent sound parole practice ought not be encouraged, and there is nothing in the nature of a parole system that should exempt it from the general effort of the legal system to prescribe the norms or standards in terms of which public power is exercised." Proceedings at p. 276.

The extent to which it is possible or wise to have formal criteria is not a problem confined to the criminal law. See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 206 (1927).

When we read of commercial cases in Lord Hardwicke's time that "All the evidence was thrown together and left to the jury" with instructions to take certain matters into account in reaching a verdict, we observe a significant resemblance to the present state of the

The basic problem for the criminal law is to know the extent to which decisions involving important individual and governmental interests ought to be controlled by legal norms and procedures on the one hand, or left to other controls such as professional standards or accountability through frequent election on the other hand. The task for legal research is to identify the important problems of this kind which exist in current criminal justice administration with sufficient precision and clarity to make it possible for social science research to produce knowledge relevant to the solution of those problems which exist. Basic understanding of the nature and extent of current legal norms and of procedures for their enforcement is essential. More particularly, it is important to know:

(1) What are the important constitutional limitations upon legislative, judicial and administrative decision making?

(2) What is the formal allocation among the legislature, the court and the administrative agency of responsibility for making important decisions?

(3) What are the relative roles of legal and professional norms of decision? As expertness increases there is a corresponding desire on the part of the experts to minimize the role of legal norms as methods of controlling important decisions. The relationship between legal norms and professional norms as means of insuring the responsible exercise of official power is therefore of basic concern.

(4) What methods are there for contesting the validity of a norm or for contesting its applicability in the particular case? For example, where there is as broad discretion as the prosecutor has in deciding to charge, it is important to know whether an individual can challenge the prosecutor's policy of selecting for prosecution only certain kinds of offenders or certain kinds of offenses. Even assuming the validity of the criteria of decision, it is important to know whether the

law of utility regulation. The utility cases are full of such expressions as that "these questions must be left for the most part to the good judgment of the tribunal which passes upon each particular case." So indeed many of them must be; but so to a considerable extent must still be many of the questions which arise in the field of commercial law. The question is not whether we can arrive at a complete set of formulae which will enable us to write off at one stroke the correct solution of every utility case, but whether it is possible for the courts to develop a number of more or less settled rules or principles to govern in cases of the same general character.

individual is given an opportunity to challenge its applicability to his particular case. This issue is often stated in terms of a right to a hearing. It has important implications for such issues as whether pre-sentence information is to be made available to the convicted offender. To contest the validity of a decision in an individual case typically requires knowledge of the facts which provide the basis for the decision.²⁷

(5) What sanctions are available for compelling adherence to such norms as exist? This is a subject of great controversy in relation to important law enforcement problems. Current discussion relates almost entirely to the desirability of the exclusionary rule of evidence as a sanction to compel adherence to the legal norms designed to control law enforcement officers.

(6) To what extent does protection against arbitrary official action require a system of "checks and balances" as well as the promulgation of legal norms? Is it desirable, for example, that a trial judge view his role as including supervisory control over law enforcement policy and practice in his community?²⁸

These kinds of basic questions must be asked. But, there are also important, and less frequently defined, questions which relate more directly to the administrative implementation of basic policy decisions.

Decisions, whether to prosecute, to convict or to sentence, are of concern to all criminal justice agencies which share, in varying degrees, common responsibility for the total process by which offenders and suspected offenders are handled. Because each major decision is part of a single total process for handling offenders, the agency responsible for a particular decision must act, to

²⁷ Fair procedure, designed to prevent erroneous imposition of punishment is, of course, a minimal objective. But, it is important also that the procedure have an appearance of fairness if criminal justice administration is to have any possibility of doing the individual good. It is easy for an offender to see individualized justice as being capricious even though made on sound professional grounds if those grounds are not made known or are not intelligible to the offender. This is a basic problem for correctional therapy.

²⁸ See Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 CHI. LAW SCHOOL RECORD 318 (1958), where it is pointed out that the United States Supreme Court's decisions relating to "due process" requirements for in court procedures have been more readily accepted than "due process" requirements for local police practices. It is said that this reflects a divergence between local conceptions of propriety and the court's standards. It may reflect, even more, the disagreement on the issue of the desirability of judicial checks upon enforcement policy.

some extent at least, on the basis of expectations as to what actions other decision-makers will take. The importance of understanding patterns of communication within the loose federation of criminal justice agencies is obvious. Certainly the task of the total system of criminal justice administration is to achieve sufficient stability of expectation to produce an integrated method of dealing with offenders.²⁹

Maintaining a stable over-all administration is particularly difficult where there is difference, in degree at least, of objective on the part of agencies engaged in criminal justice administration. The problem is further complicated when no one agency is given clear authority to resolve conflicts when they occur.³⁰

A further complication results from the fact that each criminal justice agency must perform its function in a manner consistent with the maintenance of an over-all system of criminal justice administration operating within limited time, money and personnel resources. Thus a judge may give a lesser sentence to an offender who pleads guilty primarily because a relatively high percentage of pleas of guilty is essential to the maintenance of the current system.³¹

These are problems which present a challenge for legal research. A major contribution is now being made in the preparation of the American

²⁹ For an analysis of the sometimes-called "rules of anticipated reaction" see FRIEDRICH, *PUBLIC POLICY* 16 (1940), and SIMON, *ADMINISTRATIVE BEHAVIOR* 130 (1957).

See also GLUECK, *PREDICTING DELINQUENCY AND CRIME* 143 (1959): "It is an illustration of what, we venture to assert, is probably a major weakness in the process of administering criminal justice; namely, that each official stationed at one point on the offender's via dolorosa from arrest to his return to society, regards his particular post as the all-important one, and his part in the process as a specific and isolated end in itself. He is all too prone to overlook the fact that his function is intimately related to those which proceed and succeed his and that, whatever may be stressed as the major aim of the criminal law, it cannot be denied that the ultimate objective of it all is to prevent further deprivations on social values protected by law."

³⁰ See, SIMON, *ADMINISTRATIVE BEHAVIOR* (1957).

³¹ See Hart, *The Aims of the Criminal Law*, 23 LAW AND CONTEMP. PROB. 401, 402 (1958): "This means that each agency of decision must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole. A complex of institutional ends must be served, in other words, as well as a complex of substantive social ends."

See also Ohlin and Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW AND CONTEMP. PROB. 495 (1958).

Law Institute's Model Penal Code, which deals explicitly with the problem of the relationship among legislative, judicial and administrative responsibility in the field of sentencing and correction. There is, however, no similar attention given to the equally important decisions which take place at the police³² and prosecution level. And, the objective being model legislation, there is too little opportunity to consider the important administrative problems which relate to the implementation of a legislative policy.³³

The American Bar Foundation has in progress a major study of the administration of criminal justice in selected areas of the United States.³⁴ This study is concentrating upon the critical decisions which are made in the process of administering criminal justice. These relate to important stages in the process such as the decision to arrest, to charge, to convict, to sentence or to revoke probation or parole. Each involves the necessity of balancing the desire for expert and efficient enforcement and treatment with the desire for freedom from unwarranted official interference—an objective which is often assured only at the cost of some inefficiency in enforcement and

treatment programs. It is expected that the results of the first phase of the American Bar Foundation study will be published within two years. Preliminary compilations of the data are being made available to persons who are interested in using the material for research and professional education in fields related to criminal justice administration.³⁵

The degree of success which the American Law Institute's Model Penal Code, The American Bar Foundation's survey, and other important research efforts will have will depend in no small part upon the degree of interest which they generate in the basic problems of the criminal law and its administration. Making the results of important research widely known is thus an objective worthy of the best efforts of this Journal during its second half century of publication.

³⁵ A pamphlet describing the status of the project and the availability of preliminary reports is available upon request by writing John C. Leary, Acting Administrator, American Bar Foundation, 1155 East 60th Street, Chicago 37, Illinois.

For a brief description of a research study stimulated by the Bar Foundation Survey, see *ANNUAL REPORT, RUSSELL SAGE FOUNDATION* 34-36 (1957-1958). The Social Science Research Council has announced an institute on the administration of criminal justice to be held at the University of Wisconsin from June 27-August 12, 1960. This institute will be based in large part upon the preliminary reports of the Bar Foundation Survey. 13 *ITEMS* 32-33 (1959).

For an able analysis of some of the data gathered by the survey, see Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 68 *YALE L. J.* 543 (1960).

³² For a helpful statement of the current status of research in the police field, see *ANNUAL REPORT, RUSSELL SAGE FOUNDATION*, 34-36 (1957-1958).

³³ Such few sociological studies of criminal justice administration as there are, are described in Glaser, *The Sociological Approach to Crime and Correction*, 23 *LAW AND CONTEMP. PROB.* 683 (1958).

³⁴ The entire cost of the project has been covered by a grant from the Ford Foundation in the amount of \$445,000.