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COMMENTARY

THE COURTS STAND INDICTED IN NEW YORK CITY

A. SMITH* AND H. POLLACK**†

In the past few years the New York City courts, traditionally among the most venerated and respected institutions of local government, have increasingly been subjected to severe criticism.¹ These criticisms reflect the bitterness, anger and even contempt of the public for what is perceived as the inefficiency, laziness or callous stupidity of judges, who are considered responsible for putting dangerous offenders back on the streets. Public criticism has come from all parts of the political spectrum, but the criticism is remarkably consistent. In

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† *A Note on Sources:*

The data for this article were drawn primarily from three sources: contemporary newspaper accounts; official reports and budgets of the City of New York and its relevant criminal justice agencies; and extensive personal interviews with the leading criminal justice practitioners in the city. Our research was centered on New York, Bronx and Kings Counties in New York City, since these counties have the heaviest criminal case loads. Among those interviewed were the district attorneys of these three counties, the supervising judges and a dozen of the sitting judges of the criminal parts of the supreme courts of these counties (*Note:* In New York, the supreme court is the lowest state-wide trial court.—Ed.), the Chief Executive Officer of the Courts of the City of New York, the Attorney-in-Charge of the Legal Aid Society of New York City, several senior officials of the New York City Police Department, the Deputy Commissioner of the New York State Department of Correctional Services and a number of other officials in miscellaneous categories. These interviews were remarkable in two respects: first for the candor with which those interviewed spoke (each interviewee was promised that nothing he said would be attributed to him by name); and second for the degree of consensus which emerged, both as to the state of the criminal justice system and the immediate steps which should be taken to alleviate the existing problems.

¹ New York Times, Oct. 31, 1974, at 14.

the eyes of the public, the New York courts stand accused:

1. Judges permit plea bargaining to such an extent that serious felonies are reduced to relatively minor charges and trivial punishment is meted out to dangerous offenders. The result is that criminals are freed within a short period of time to return to the community and repeat their violent acts.

2. Judges indulge in excessive plea bargaining because they are lazy and uncaring, or because they are so insulated from the realities of street life that they do not realize what they are doing, or because as "liberal" political ideologists they consistently elevate the rights of the defendant over the rights of the community.

3. Sentences are wildly disparate, without rhyme or reason. This is largely due to the personal failings of the judges.

4. Judges spend too little time on the bench. They are frequently late or absent, and thus permit large backlogs of cases to build up in their courts.

How true are these charges? Are dangerous persons released into the community by unthinking courts? Are judges as inferior a lot of public servants as recent criticisms make them appear to be?

I

Unhappily, some of the charges are true. Dangerous persons *are* released into the community largely through plea-bargaining,² but

² "Plea Bargains Resolve 8 of 10 Homicide Cases," New York Times, Jan. 27, 1975, at 1; "Lower Courts Are Settling 80% of City Felony Cases," New York Times, Feb. 14, 1975, at 1. The thrust of these articles is that the courts are releasing dangerous offenders into the community by accepting guilty pleas to lesser offenses and then imposing minimal sentences for these offenses. The effect is to put the criminal back on the street almost immediately.

the *competence, honesty and integrity of the judges on the bench have very little to do with the situation.* Were every judge in the criminal courts a Solomon who worked 60 hours a week, many of the abuses which the public rightly deprecates would still continue to flourish. The disastrous state of the New York City courts is caused not by the personal failings of the judges, but by numbers: the number of cases compared to the number of courts and related facilities which are available to handle them,

The arithmetic is simple. From 1952 to 1974 the total number of regular, housing and transit policemen in New York City increased from 19,450 to 36,574, or approximately 88%. During the same period of time the number of judges sitting in the misdemeanor and felony courts rose from 91 to 190,³ or approximately 108%. While the number of police and the number of judges increased in roughly similar proportion, the number of felony arrests rose from 16,957 to 101,748: a 500% increase. Another way of saying this is to note that in 1952 every policeman statistically made .89 felony arrests; in 1974, each officer was responsible for 2.8 felony arrests. The felony workload of the criminal courts thus increased six-fold at the same time that the number of judges available to cope with the workload barely doubled.⁴

³ In New York City there are two courts of criminal jurisdiction: the Criminal Court, which handles misdemeanors, and the Supreme Court, which handles felonies. In 1974, 92 judges were assigned to the Criminal Court, and 66 were assigned to the Supreme Court. However, since the Supreme Court felony load was so great, 16 judges from the Criminal Court were transferred to temporary duty in the Supreme Court, as were three judges from the Civil Court and 29 judges from the Court of Claims. Altogether, there were 190 judges to handle all the criminal cases in New York City, but only 66 were permanently assigned to felony work. This contrasts with 23 so assigned in 1952.

⁴ All figures relating to the number of police are taken from the ANNUAL REPORTS OF THE NEW YORK CITY POLICE DEPARTMENT, and the ANNUAL EXPENSE BUDGETS OF THE CITY OF NEW YORK. The figures relating to the number of judges come from the NEW YORK CITY EXPENSE BUDGET and the annual NEW YORK CITY OFFICIAL DIRECTORY (popularly known as the "Green Book"). The figures on felony arrests come from the ANNUAL REPORTS OF THE NEW YORK CITY POLICE DEPARTMENT; those on the felony workload of the courts came from the Office of the Chief Administrative Judge of the Supreme Courts of New York City.

This disparity between the number of judges and the number of potential cases would by itself be sufficient to seriously overload the courts. The situation is, unfortunately, further compounded by the fact that a felony trial in 1974 is a far different procedure from the felony trial of 1952. Due in large part to a series of Supreme Court rulings which extended rights to indigent defendants which had previously been exercised only by the well-to-do, felony trial procedure has become substantially more complex and time-consuming. Even in 1952, all felony defendants in New York State were represented by counsel, but the role of the defense attorney has changed markedly since then. Pursuant to the Supreme Court's decisions in *Miranda v. Arizona*,⁵ *United States v. Wade*,⁶ and *Terry v. Ohio*,⁷ defense attorneys can and do challenge the admissibility of confessions, eye witness identifications, the legality of arrests and attendant searches, and the propriety of many types of police procedures.⁸ In previous years, neither assigned

⁵ 384 U.S. 436 (1966).

⁶ 388 U.S. 218 (1967).

⁷ 392 U.S. 1 (1968).

⁸ In *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Supreme Court held that illegally seized evidence could not be used to obtain a criminal conviction in a state court. Since *Mapp*, the Court has attempted to define the scope of this exclusionary rule.

Under Chief Justice Earl Warren, the Court extended the rule to cover not only physical evidence as in *Mapp*, but also confessions obtained during custodial interrogation without the presence of counsel, *Miranda v. Arizona*, 384 U.S. 436 (1966); identifications made at an improperly conducted line-up, *United States v. Wade*, 388 U.S. 318 (1967); and evidence obtained through illegal eavesdropping and wire-tapping, *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). At the same time, however, the Warren Court lowered the standards for on-the-street police stops and searches from the traditional "probable cause" to "reasonable suspicion," *Terry v. Ohio*, 392 U.S. 1 (1968), and also suggested in *Davis v. Mississippi*, 394 U.S. 721 (1969), that mass fingerprinting aimed at finding a criminal suspect might be permissible with prior judicial sanction. The Warren Court substantially expanded the protection afforded defendants in state cases, but balanced this protection by making it somewhat easier for police to obtain and use reliable non-testimonial evidence.

Contrary to the expectations of some, the Court under Chief Justice Warren Burger has not moved immediately to undo the work of the Warren Court. *Mapp* has not been overruled and the exclusionary

counsel nor Legal Aid attorneys had the resources or the appellate court encouragement to undertake such activities. Today they have both. The result is that felony court judges in 1974 sat an average of seven working days longer than in 1952, but they handled only 14.8 trials each as compared to 23.3 trials in 1952, a decrease of 33%.⁹

These statistics lead to only one conclusion: the number of cases to be handled has increased faster than the resources available to handle them. In the last twenty years, there has been ever-increasing pressure on every criminal court judge in New York City to clear his calendar and keep his caseload current. This pressure has been increased by public awareness of the civil liberties problems of lengthy pre-trial detentions and by the overcrowding of remand facilities such as Riker's Island and the Tombs. Given this pressure, it is understandable that plea bargaining, as a short-cut to the disposition of cases, has been and continues to be used to excess.

The elimination of plea bargaining, even if it were possible, is not the answer. Not all plea

bargaining is bad,¹⁰ and the courts cannot and should not attempt to bring every case to trial on the original charges. In many instances plea bargaining is an expeditious way of achieving justice for all parties. This is especially true in cases where the arresting officer has overcharged the defendant, or where a legitimate complaint is supported by evidence which is too weak legally to prove the state's case. While it is true that some defendants through plea bargaining may get less punishment than they deserve, it is by no means a certainty that such defendants would get any punishment at all were they brought to trial. In a very large proportion of arrests there are elements of overcharging and insufficient evidence, either of which might lead to acquittal.¹¹ Plea bargaining in such cases may be a desirable alternative.

On the other hand, it cannot be denied that plea bargaining is frequently abused, and when it is abused, dangerous criminals may be released with minimal or no punishment. Such abuse is usually the result of calendar pressure and is heaviest at two points in the criminal justice process: first, at the initial arraignment, and second, after the case has been awaiting trial for more than one year. At the initial arraignment the state, in an effort to dispose of the case with minimal use of court resources, will offer the defendant the best bargain he is likely to receive without suffering a lengthy pre-trial confinement.¹² In New York City,

rule still applies to illegally seized physical evidence, illegally extracted confessions, and illegally obtained identifications. What the Burger Court has done, however, is to continue the tendency of the Warren Court to *lower* the standards for legal police procedures. In *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court approved a warrantless search which was not incident to arrest, although the police may have had probable cause. A warrantless search not incident to arrest was deemed based on consent absent a showing that the defendant knew he had a right to refuse consent in *Schneckloth v. Bustamonte*, 412 U.S. 318 (1973). See also *United States v. Watson*, 423 U.S. 411 (1976). An arrest for a traffic violation was held to constitute grounds for a complete search of the defendant which yielded illegal drugs, *United States v. Robinson*, 414 U.S. 218 (1973). For a full discussion of these issues see Weintraub & Pollack, *The New Supreme Court and the Police: The Illusion of Change*, in *THE AMBIVALENT FORCE* (A. Niederhoffer & A. Blumberg eds. 2d ed. 1976).

The net effect of these decisions has been to upgrade the legality of police performance at the state and local level. The erosion of *Mapp* by the Burger Court has not as yet permitted a return to the time when all police conduct and the fruits thereof went unchallenged in the courts. The result of this upgrading, however, has been that a considerable amount of court time is spent in pre-trial motions dealing with the suppression of evidence.

⁹ STATE OF NEW YORK JUDICIAL CONFERENCE REPORTS, 1952, 1974.

¹⁰ The United States Supreme Court has recognized and upheld the need for plea bargaining in our criminal justice system:

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

¹¹ Interview with Mario Merola, District Attorney, Bronx County, New York, (Jan. 9, 1975); interview with New York City Police Department administrative official, (Feb. 5, 1975).

¹² Interviews with Supreme Court justices, New York, Bronx and Kings Counties, New York, (January and February 1975).

court administrators select their most flexible, experienced and secure judges to handle arraignments with the aim of doing justice without "giving away the court," *i.e.*, imposing an inappropriately minimal sentence. Despite the good intentions and overall creditable performance of the arraignment judges, however, dangerous persons do get through and return to the community to do terrible things. One problem at arraignment is that suspects frequently have long arrest records with few or no convictions. How much weight *should* a judge give to a record reflecting multiple arrests without accompanying convictions when so many arrests are of poor quality or of dubious validity? In addition, judges have commented to the authors that adequate data on the defendant's history is not always available to them, either because the computerized state criminal justice records are incomplete or because of a lack of court staff to check on representations made by the defendant.

Should the defendant refuse the bargain offered him at arraignment and be considered dangerous enough to be denied bail, he may spend up to a year or more in jail awaiting trial, due to the shortage of court facilities. The right to a speedy trial, however, is guaranteed by the United States Constitution, and after a year the appellate courts will exert increasing pressure on the prosecutor to either try the case or dismiss it.¹³ At that point, the prosecutor will frequently offer the defendant an extremely good bargain in the hope of getting some kind of conviction, rather than being forced to dismiss the case altogether. So frequently does this happen that defendants who are experienced in the byzantine intricacies of the criminal justice system will deliberately try to delay going to trial. Officials of the Legal Aid Society admitted to interviewers that for the guilty defendant with considerable evidence against him, there is no better strategy than delay. The defendant risks very little because the time he has served in jail will be credited against his ultimate sentence.

The courts and prosecutors are acutely aware of the dangers of the abuse of plea bargaining.

In all the New York City boroughs except Staten Island, the district attorneys have concluded that their best strategy in response to the problem of numbers is to concentrate their resources on handling the most serious crimes, and to pay only formal attention to lesser crimes. To that end, in each borough except Richmond, Major Offense Bureaus (MOB) have been established to handle serious, violent crimes. Rating systems have been established to determine suitability of cases for MOB treatment, taking into consideration such factors as the amount of violence used, the degree of injury to victims, the past record of the defendant, and the strength of the state's case. MOB cases are usually not plea bargained. At the very least, pleas of guilty will be accepted only to felony offenses which are quite close to the offense charged in the indictment. Moreover, such cases are brought to trial with reasonable dispatch, and the sentences handed down are quite severe, normally amounting to lengthy prison terms.

The results of MOB operations are noteworthy. In the Bronx, for example, from July 1, 1973, to July 1, 1974, 97% of all cases prosecuted by the Major Offense Bureau resulted in convictions. Of equal importance, the median time from arrest to final disposition was 74 days. Ninety-five percent of the defendants prosecuted received prison terms. These impressive results were made possible by the special handling which MOB cases receive. The police alert the district attorney's office when a potential MOB arrest is made. A special assistant district attorney handles these cases at arraignment and shepherds them through the entire court process. Special courtrooms and judges are reserved exclusively for MOB cases.¹⁴

Prosecutorial and court resources are insufficient, however, to extend MOB treatment to cases which, though not qualifying for MOB treatment, may nevertheless be seriously disruptive to the community. These cases become the step-children of the criminal justice system, in part, at least, because of the diversion of scarce resources to MOB. Even homicide cases which are not handled by MOB, but rather by separate divisions within the district attorney's

¹³ The Appellate Divisions actually send letters to the administrative justices of the supreme courts involved, indicating that they will entertain defendants' motions to dismiss if overripe cases are not immediately set for trial.

¹⁴ NATIONAL CENTER FOR PROSECUTION MANAGEMENT, REPORT TO THE BRONX COUNTY DISTRICT ATTORNEY ON THE CASE EVALUATION SYSTEM (1974).

office and by specially assigned judges, suffer from an acute lack of resources.

II

Another charge frequently levelled at New York City judges is that the sentences they impose are wildly disparate. For very similar offenses it is alleged that one offender may receive probation or very little prison time, while another receives a substantial prison sentence. Again, these problems have been ascribed to the personal incompetence of the incumbents on the bench.

Sentences *are* very disparate in many cases, but then, cases are very different also. No two homicides, robberies, assaults, or burglaries are really identical. Even if the offense is the same, the offender is different. The judge must ask a number of relevant questions: Was the offender known to his victim? How old is the offender? Does he have a previous record? Did the victim play any part in the crime? Is the offender an addict, or an alcoholic? Does the community or the family have the resources to help the offender if he is placed on probation? What is the prognosis for the offender's future conduct? What was his motive in committing the crime? These are but some of the variables which a judge must consider, and which make for marked differences in the sentences imposed.

An unreported case recently adjudicated in Manhattan illustrates some of the problems in this area. A black gypsy cab driver who, for self-protection, carried a gun for which he had no permit, returned to his cab from the cafeteria in which he had stopped for coffee. He was accosted by two men and ordered to take them to Harlem. The cab driver was frightened by the appearance of the two men and he refused to take them. The men moved threateningly toward him and in a panic, the cab driver pulled out his gun and fired, killing one of the men. At that moment, an off-duty policeman passing on the other side of the street heard the shooting. He pulled out his own gun, fired a warning shot in the air and ordered the cabbie to stop shooting. The driver in his panic did not hear the policeman identify himself, and heard only the shot which he thought was directed against him. He whirled and shot at the policeman, hitting him in the hand. The cab driver was subsequently arrested and in-

dicted for the murder of the would-be passenger (who, it turned out, had a long record of cab driver holdups), and for attempted murder of the policeman.

What is the proper disposition for a case like this? Does the judge do justice by concentrating on the offense and ignoring the totality of the circumstances? Should the judge, for example, take into consideration the fact that the defendant had no criminal record, was a responsible family man and a respected member of his community? Possession of an unlicensed weapon is illegal, but is it also relevant that holdups of cab drivers, especially in ghetto areas, are fairly frequent, and that cabbies are sometimes killed during such holdups? Would either justice or the community be served by an automatic sentence formula decreeing prison terms for all killings committed with illegally possessed weapons? After spending fifteen months in jail awaiting trial, the cabbie was permitted to plead guilty to manslaughter and was released on probation. Those who consider the sentence fair should realize that when police statistics are compiled, this will be a case of murder and attempted murder of a policeman where the defendant was released on probation.

The sentences imposed by trial judges may be disparate, but whether disparity is a problem depends on one's point of view. To the prison administrator, such disparity is irritating and poses problems because of its adverse impact on inmate morale.¹⁵ If Jones is doing five to ten years for robbery and Smith is doing one to three, Jones will be aggrieved. But each may deserve his sentence from the point of view of the sitting judge, who attempts to reflect the needs of the community in his dispositions. The statutory discretion allowed to judges is permitted precisely because the courts are expected to take variables into consideration.

III

Judges are frequently accused of contributing to the congestion of the courts by working too few hours. They are said to come in late, leave early, take excessively long summer vacations, and utilize every excuse not to hold court. Such charges are reinforced every time policemen, complaining witnesses and others

¹⁵ Interview with Benjamin Malcolm, Commissioner of Correction, New York City, (June 17, 1976).

who were ordered to appear at 9:30 A.M. are forced to sit waiting for an hour until the judge finally appears. Professor Abraham S. Blumberg pointed out that a 1955-1965 survey of judges sitting in a major criminal court in New York City revealed that the workload of the judges was unevenly distributed.¹⁶ If this survey were to be replicated today, the results might not be very different. Many judges admitted to the authors that some of their colleagues take advantage of a system where firing is not easy and where there are relatively few direct controls over judicial conduct. Nevertheless, the shirkers are atypical. When a judge fails to show up in court, he may have slept late or he may have been playing golf. But he may also have been hearing motions in chambers, doing legal research, writing opinions, getting additional background on a case, negotiating a plea, arranging for the court appearance of lawyers, witnesses and others needed in trying a case or doing a dozen other legitimate chores which cannot be performed in open court. Furthermore, the judge who handles disproportionately few cases may be one who tries lengthy cases and gets involved for weeks or months in the disposition of a single case. The "productive" judge, on the other hand, may be one who clears his calendar by giving away the court.

Abuses in the past were more flagrant, but since the institution of the Administrative Judge's Office there is tremendous pressure on all judges to put in an honest day's work.¹⁷ Absences and latenesses are reported promptly, and the offending judge is called to account, frequently in ways which are embarrassing to one who has come to expect nothing but deference from those around him. Those judges who don't conform may not be fired, but they can be harassed in other ways—either by trans-

fer to outlying districts or by being given uncongenial assignments. The number of long vacationers, race track habitués and golfers has markedly declined.¹⁸ While it is admittedly difficult to measure judicial productivity, judges in New York City now sit one and one-half weeks longer than they did twenty years ago, and the quality of their performance necessary to meet appellate court standards has increased substantially. With some individual exceptions, New York City's judges, as a group, are in all likelihood performing at least as well as the public has a right to expect under the circumstances.

IV

If the judges are thus not to blame for the inadequacies of our criminal courts, what then are the problems and what should be done to remedy them? The first most obvious answer is money. The courts need more money. The ridiculous disparity between the amounts spent for the police and other parts of the criminal justice system must be modified. In New York City the *entire criminal justice system* (courts, corrections, probations) outside of the police department receives only one-and-a-half per cent of the city budget. We need more judges, more courtrooms, more court attendants, and probably more remand facilities for the short-term detention of defendants awaiting trial. We need more probation officers so that pre-sentence reports can be completed expeditiously without becoming superficial.

To advocate more money for the courts, however, is like advocating motherhood. No one will disagree, but no one—not the city, the state or the federal government—will come forth with the money. New York City is now faced with its most critical budget squeeze in forty years. But even in affluent times, the courts were shortchanged; few voters, despite their fear of street crimes, care as much for the courts as for the state of the subways, the schools, or even the garbage pickups in their neighborhoods. The courts simply have no political clout in budgetary terms.

Why the courts have been so ineffectual in obtaining a reasonable share of the tax dollar is not clear, but several answers suggest them-

¹⁶ A. BLUMBERG, *CRIMINAL JUSTICE* (1974).

¹⁷ The Office of Court Administration in New York City supervises the day-to-day functioning of the courts. The office compiles statistics on the attendance, workload and productivity of each judge; the number of cases awaiting trial; and the length of time required for disposition of cases at various stages of proceedings. It is also involved in determining and allocating the court's budget and conducts ongoing studies to determine the need for changes in procedure. This office was established in 1974. Prior to that time similar functions had been performed by the Administrative Judge of the Criminal Courts, Supreme and Criminal, of the City of New York, a position which had been established in 1955.

¹⁸ Interview with Lester Goodchild, Chief Executive Officer of the Courts of the City of New York, (Jan. 31, 1975).

selves. In the first place, an agency's annual appropriation is normally based on its previous year's budget allocation; increased or decreased in proportion to the increase or decrease in the total budget and to the amounts given to other agencies. To put it another way, if an agency wishes more than the share of the budget previously allocated to it, it must show substantial justification. The courts in New York City have, in fact, kept pace with the police department in terms of the increase in numbers of personnel.¹⁹ The disproportionate increase in felony arrests, however, has created the urgent need for an increase in court personnel, an increase which the courts have simply been unable to obtain. Their failure to persuade the budget makers may be due partly to the fact that a judge is a very expensive commodity. Each additional supreme court judge in New York City, including the costs of his courtroom, attendants, stenographer, and other services, costs \$600,000,²⁰ or the equivalent of approximately 300 policemen. The need for an additional judge would have to be very well substantiated—and in political terms this is almost impossible—to outweigh the appeal of 300 policemen on the streets. It is also much more difficult to add judgeships, which must be created by an act of the state legislature. Intense interparty negotiations are involved, since judgeships are most cherished pieces of political patronage. In contrast, the number of police can be expanded simply at the discretion of the city administration.

The police themselves, moreover, are numerically a much larger group than are the judges. Given the alliance of the Police Benevolent Association with other municipal unions in New York City, police now constitute a pressure group to be reckoned with. The judges have no similar constituency, even though many of them come out of the political clubhouses and have close political ties to the city administration. The police thus have a substantial advantage when the decision is made as to where tax dollars should be added

in order to strengthen the criminal justice system.

Finally, the public simply does not understand the relationship of the courts to the police. Since most citizen-court contacts are at best unpleasant, the courts themselves do nothing to endear themselves to the average citizen. Even if the citizen is not a defendant, his view of the courts is jaundiced. If he comes as a complaining witness, he suffers endless delays and sharp frustration. As a juror he endures hours of aimless waiting. As an observer he experiences unexplained mumbling at the bench and even more inexplicable, lengthy pauses in the proceedings while the judge mysteriously disappears. To many citizens it appears that all that is necessary is for the judges to buckle down and go about their business more efficiently.

Unless the public is educated to understand the relationship between street crime and the shortage of court facilities, money simply will not be forthcoming. Even recent sharp criticism of the courts in the press, though misleading, has been helpful in drawing attention to problems of which the taxpayer is normally unaware. Until political leaders have the courage to take money away from those parts of the system which have the support of well-organized and vocal interest groups, such as the civil service unions and the highway lobby, and give it to the courts, the effectiveness of the courts will not improve.

However, money alone is not the complete answer. There are other measures which can be taken to reduce the overcrowded condition of our courts. To begin with, for many defendants plea bargaining is both a legitimate and just way of disposing of cases. There is no need to attempt jury trials for every indictment or information. What should be avoided is the pressure to accept pleas and to inordinately reduced charges simply for the purpose of clearing the calendar.

Second, efforts should be made to introduce into the criminal courts an intake procedure that will divert away from the formal criminal justice system a host of relatively minor cases where in all likelihood the punishment for the defendant would be less than imprisonment. Consider, for example, the adolescent who is caught siphoning gas from someone's tank, the housewife who is arrested for shoplifting, the

¹⁹ The courts, however, have fallen behind in dollar allocations. Since 1953 the budget for the police has increased 900%, while the court budget has increased only 508%.

²⁰ Office of Court Administration of the City of New York.

motorist who punched the man who took his parking space, or other cases of this type. It should be possible to give such defendants a prompt hearing before a magistrate, or a lawyer-referee, at which the defendant, the complaining witness and the arresting officer can be heard. The formal procedural rules that normally protect the defendant would not be observed, but the defendant would enjoy the benefit of a prompt disposition of his case, the guarantee of no more than minimal punishment, and recourse to the regular courts should he feel aggrieved. The hearing officer in such a case would be entitled to order restitution, fines, supervision by probation, placement in a job training program, referral to a rehabilitation program, or whatever similar disposition might be found appropriate. Enormous amounts of court time could be saved by such a diversionary process. There would be no loss to the community since, in the end, the more formal criminal adjudicatory process would achieve no better results. The defendant and the complaining witness may actually receive more time and attention in such relatively informal procedures than in a court which is so harried that it has no time for petty offenses.

An experimental program along these lines is currently being mounted in Harlem under the auspices of the Institute for Mediation and Conflict Resolution.²¹ The purpose of the program is to handle cases of family disputes and lesser crimes between friends, relatives and neighbors which might otherwise have gone to criminal court. These cases are referred to the Institute by police officers, either directly from the scene or from the station house, and are heard by a panel of three community residents specially trained for arbitration work. At least theoretically, this program is an excellent first step towards removing minor offenses from court calendars. It is somewhat limited, however, in that it deals only with disputes among

individuals who are known to each other. There are many other criminal offenses occurring between strangers which also could be diverted out of the regular court process into less formal administrative handling.

A third way of relieving congestion in the courts is to remove many morals offenses from the penal code. It is absurd, when the Off Track Betting Corporation²² is legally operating on 125th Street, for the police to be arresting and processing numbers runners doing business on the same block. The number of homosexual arrests is declining, and obscenity prosecutions are a rarity, but there are still dozens of prostitutes picked up daily to no end other than harassment and perhaps the payment of fines. The women involved consider these fines to be a business tax, and the fines probably do not even pay the city for the costs of processing such cases through the courts. Too much has been written on the need to decriminalize marijuana and heroin to recapitulate here, but drug possession cases (as opposed to cases of drug-induced crime) are also exercises in futility. The social price of prosecuting morals offenders often is the inability to prosecute those who commit violent crimes.

A fourth way of uncluttering the courts would be to make strenuous efforts to improve the quality of arrests and reduce the degree of overcharging of arrested persons. One reason for the excessive number of poor arrests may be the fact that a good proportion of the time spent by policemen in processing an arrest and arraignment is paid for at overtime rates. It may be very tempting for a policeman who finds himself particularly squeezed for money to make an arrest knowing that it will add approximately \$100 to his pay check. In such cases defendants are usually overcharged so that they will be arraigned in court rather than given a desk summons. Arrests of this type are not normally made for felonies, but are more likely to result from morals offenses, street brawls or other incidents which the policeman might otherwise ignore or handle unofficially.²³

²¹ This is a community agency funded by the New York Criminal Justice Coordinating Council, employing mainly people from the Harlem community who are trained as referees and taught the principles and techniques of mediating and arbitrating conflicts. See Weisbrod, *The Need for Diversion of Interpersonal Criminal Complaints: The IMCR Center, (1977)* (unpublished master's essay, John Jay College). This is a pilot project using federal funds which is attempting to demonstrate the utility and cost effectiveness of a limited diversionary program.

²² The Off Track Betting Corporation is a New York State instrumentality that accepts bets on horseracing.

²³ It is impossible to document the relationship between overcharging and the paying of police at overtime rates during the arraignment process. No studies have been made and no statistics exist, partly

To avoid this kind of "bounty hunting," prearrestment procedures have been developed which enable the policeman and the complaining witness to accompany the defendant to a central facility where the information necessary for arraignment is gathered and the complaint attested. The defendant is then arraigned without requiring the presence of the officer or the complaining witness. This procedure not only reduces inconvenience to the complaining witness (the victim) but also cuts down the officer's overtime pay about 80% to 90%.

Such programs have been instituted experimentally in some boroughs. Efforts are currently underway to make them citywide, despite misgivings on the part of the Legal Aid Society and some court officials. Legal Aid feels that the officer's presence is required in relation to the bail hearing at arraignment and also to facilitate possible disposition through plea bargaining at that time. These objections are valid but could probably be overcome by carefully designed complaint forms which would elicit the necessary information. As matters stand now, even without such gathering of information, the policeman stands mute in two-thirds of the cases processed. Even if an occasional case needed to be held over for further processing, such a practice would be a vast improvement over the present system.

A fifth way of streamlining the operations of the courts would be to remove the judge from the jury selection process and to re-examine the process by which pre-trial motions are handled. A Manhattan supreme court judge estimates that one-third of his time is spent in jury selection, one-third in hearing pre-trial motions, and only one-third in actually trying cases. Jury selection frequently is a long and tortuous process, but it is an essential one. While there may be no need to change the method of selection, it is not essential for the judge personally to supervise the picking of

the jury. The *voir dire* examination and the assignment and exercise of challenges by the prosecutor and defense attorneys can proceed equally well under the direction of a lawyer-referee, while the judge himself can be occupied with other matters.

The problem presented by pre-trial motions is more complex. As a consequence of recent United States Supreme Court criminal procedure decisions,²⁴ it is possible for attorneys to challenge the prosecution's case in many ways. Motions may be made to suppress illegally seized evidence, improperly obtained confessions, and unduly prejudicial evidence, such as mention of the defendant's past record. Just as in the case of jury selection, the ultimate outcome of the trial may depend on the decisions made in these pre-trial motion hearings. Probably very few attorneys would be willing to have such motions heard by anyone other than the trial judge, so that the substitution of a lawyer-referee would be impossible. Nevertheless, some time could be saved by scheduling the hearings of such motions so as to minimize delay. For example, attorneys could be required to furnish the court with a complete list of all motions to be argued. The lawyers and evidence needed for these pleadings could then be gathered together and handled expeditiously, and jurors, witnesses and others not needed could be excused. Discovery rules could be expanded so that the prosecution would be required to make full disclosure to the defense of all evidence in its possession. This would enable the defense attorneys to carefully plan and organize their motions.²⁵ The current system frequently is quite disorganized, with lawyers making motions at the last moment and thereby throwing the trial schedule into disarray.

Finally, it is time for knowledgeable officials to examine the impact of those laws which

²⁴ See note 8 *supra*.

²⁵ There is no constitutional compulsion on prosecutors to make such complete disclosure. *United States v. Agurs*, 427 U.S. 97 (1976). Such a practice can, however, be instituted as a *procedural rule of the court* with the consent of the parties involved. It can be argued that some prosecutors would resist giving the defense more information than is legally required. We have found, however, that many harried prosecutors in the overcrowded urban courts, are open to any reasonable suggestion that would expedite the flow of cases and relieve them from the intense pressure of an impossible agenda.

because this is an extremely sensitive issue within the police department. Since almost all arraignments are on overtime, there is no way of determining a cause and effect relationship between overtime and a particular group of charges. The hypothesis set forth by the authors is based on interviews, conducted on a not-for-attribution basis, with police administrators who are convinced that the easy availability of overtime pay leads to a tendency to overcharge criminal offenders.

impose prison sentences without possibility of plea bargaining for particular offenses. For example, under the Rockefeller Drug Laws²⁶ as initially passed, a conviction for drug possession meant that a judge was required to impose a *prison* sentence with a substantial minimum and a maximum of life. Such defendants were not permitted to plead guilty before trial to anything less than an A-3 drug felony, which provided for a mandatory prison sentence of a minimum of one year to a maximum of life. In theory, these drug laws were designed to prevent permissive judges from "coddling" defendants. In practice, they introduced elements of rigidity into the sentencing process which created injustices to defendants and great administrative problems for prosecutors and the courts. The New York state legislature recently modified some provisions of the Rockefeller Drug Laws, largely at the behest of the police and district attorneys. Now it is possible for possessors of small amounts of narcotics to plead guilty to lesser offenses and escape parole supervision for life.²⁷ Police and prosecutors had requested the change because in the past three years court calendars became increasingly clogged with cases involving petty drug offenders.

There are, however, provisions of the Rockefeller Laws which still mandate compulsory sentences for serious drug offenders and habitual felons. Superficially, it seems appropriate for the legislature to insist that such defendants, as a matter of public policy, go to prison. In practice, however, on a case-by-case basis, there is frequently sufficient ambiguity or mitigation that it is desirable that more discretion remain in the hands of the judge. The important point is that whenever the legislature mandates prison sentences it must *concurrently* make provision for increased numbers of prosecutors and judges. If it does not, the result will be

that those cases for which prison sentences are mandated will monopolize the resources of the system and squeeze out all other cases.

It is also essential that the legislature concern itself immediately with the problem of correctional facilities. If court reform is to be effectuated, that is, if the courts are to deal more effectively with dangerous felons, then there must be some place to send such defendants after conviction. (Whatever the shortcomings of commitment may be, there is consensus that the commitment of some individuals is necessary for the protection of the community.) For some years, the population of New York State's prisons declined sharply. Recently, however, the number of inmates increased: from 11,250 in 1972 to 15,450 in 1975.²⁸ New York's correctional institutions will soon be operating at capacity, and if the legislature and the public hope to make court reform a reality, planning for correctional facilities must start immediately, since there is a considerable lead time for the construction of such facilities.

Many of these suggestions for court reform can be effectuated with very little extra money, although substantial relief for the system probably depends on budget reallocations. Before anything constructive can be done, however, the search for a scapegoat, the all too human desire to point the finger at somebody else, must stop. No part of the criminal justice system functions perfectly, no part is totally responsible for the failings of the system, and no part functions in a vacuum. The courts may stand indicted by the public, but the verdict on the judges, at least on the whole, has to be "not guilty." The public protest over the shortcomings of the system can, however, be put to positive and constructive use if political leaders have the honesty and integrity to do what serious observers of the criminal justice system know needs to be done.

²⁶ N.Y. PENAL LAW § 220 (Consol. 1975).

²⁷ *Id.*

²⁸ New York State Division of Correctional Services, personal communication to the authors.