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## CENTRAL PROBLEMS OF AMERICAN CRIMINAL JUSTICE

*Francis A. Allen\*†*

At periodic intervals during the present century the American "crime problem" has aroused agitated public discussion. At these times both publicists and ordinary citizens are likely to assume that the disturbing conditions have suddenly arisen and are wholly unlike anything experienced before. In considering the crime problem, the beginning of wisdom may lie in the discovery that this is a problem with a history. Crime and its control did not suddenly become significant in the late 1960s, at the end of World War II, or even with the launching of the prohibition experiment at the conclusion of the first great war. On the contrary, issues of law and politics engendered by crime and efforts to contain it have characterized our public life since the beginning of the Republic. In the nineteenth century, the restlessness, unruliness, and propensities to violence of American society impressed a succession of distinguished British visitors to our shores, among them Charles Dickens<sup>1</sup> and Mrs. Frances Trollope.<sup>2</sup> At the turn of the century Joseph Conrad pictured us in even darker tones. In his novel, *The Secret Agent*, he has the nihilistic and half-mad manufacturer of explosives say of us: "[T]heir character is essentially anarchistic. Fertile ground for us, the States, very good ground. The great Republic has the root of the destructive matter in her. The collective temperament is the lawless. Excellent."<sup>3</sup>

It is not necessary, of course, to accept quite so somber a view of our national character and history in order to perceive that the roots of what Americans call the crime problem lie deep in American society, and that fundamental improvements are not likely to be achieved cheaply or quickly. Moreover, there is abundant evidence that the high levels of crime we are now experiencing are likely to be with us well into the 1980s. Demographic projections strongly sup-

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1. See C. DICKENS, *AMERICAN NOTES* (1842).
2. See F. TROLLOPE, *DOMESTIC MANNER OF THE AMERICANS* (1832).
3. J. CONRAD, *THE SECRET AGENT* 70 (Thos. Nelson & Sons, Ltd. 1960).

port this prediction. Increasing crime rates in recent years appear to be closely associated with increases in the number of young persons in our population of an age at which crimes are most frequently committed. For example, the number of males fifteen to seventeen years old doubled in the quarter-century following 1950. A projected decline in the number of persons in this age category has led some to anticipate an imminent reduction in crime, but closer scrutiny of these data suggest that the decline likely will occur most slowly in urban areas and among socioeconomic groups in which crime rates are highest.<sup>4</sup> For the next decade and a half, therefore, there is little reason to expect material relief in our situation by reason of changes in the age characteristics of our population.

These hard and unwelcome facts need to be remembered, for in this area of public policy we have proved vulnerable to panaceas and promises of speedy cures. This propensity has led us to accept such simplistic models of our problems as a war between "the peace forces" and "the criminal forces." Hopes raised by these and similar representations are doomed to disappointment, with consequent weakening of our self-confidence. At the same time, we are diverted from inquiry and measures that might lead to those modest gains that lie within our capacities.

Other attitudes have hampered thought and action concerning the administration of criminal justice. Discussion of these matters in the United States is characterized by a partisanship that frequently trivializes the issues presented and denies depth and balance to our consideration. The problems of criminal justice touch upon some of the most important of our social concerns. Through the agencies of criminal justice, the most rigorous sanctions at the command of government are visited upon individuals. The problem of reconciling the exercise of law enforcement powers with the values of a democratic society demands a constant vigilance. The rise of the European dictatorships in the first half of this century clearly revealed that the institutions of criminal justice may be perverted into instruments for the systematic destruction of basic political values.<sup>5</sup> More recent disclosures stimulated by the Watergate affair demonstrate again that the wise containment of governmental powers devoted to criminal law enforcement is an essential part of the strategy of freedom. One of our most pressing current needs is for more effective means of

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4. Zimring, *Dealing with Youth Crime: National Needs and Federal Priorities* (1975) (unpublished paper).

5. See F. ALLEN, *THE CRIME OF POLITICS* 4 (1974).

scrutinizing the activities of our police agencies, both state and national, and of ensuring that their operations advance rather than subvert our basic interests and values.<sup>6</sup>

These legitimate libertarian concerns, however, have caused some Americans to overlook the fact that the criminal law must, nevertheless, be enforced. In the last decade, crime and the fear of crime have become serious and deleterious factors in our national life. They have diminished our confidence and sense of security, caused economic loss and human anguish, debased the quality of our lives, and deformed our politics. It is remarkable how few among lawyers, academicians, or the public at large are able to display equal concern for the wise containment of the public force in the criminal process and for the achievement of more effective law enforcement. Partly as a consequence of this inability to see the whole problem we have failed to achieve either goal adequately. The profound and pragmatic men who framed the Constitution and drafted the Bill of Rights appear to have understood these necessities better than we. They aspired both to the "blessings of liberty" and to "domestic tranquility." They also understood that the one cannot be fully realized without the other.

Fundamental to a system of criminal justice is the body of law that designates the conduct subject to criminal sanctions and defines the applicable penalties. One curious feature of American criminal justice is the insouciance with which we have treated the fundamental problems of crime definition. Even today, despite the significant revival of interest in criminal law revision inspired largely by the American Law Institute's Model Penal Code,<sup>7</sup> we are much more likely to be absorbed in debating issues of process and procedure than in determining who is or ought to be deemed a criminal. This neglect of fundamental issues has in no way stemmed the flood of new criminal statutes or weakened the apparent faith of legislatures in criminal penalties as the solution to social problems that range from the most trivial to the most profound. The quality of the legislative product, however, is often deplorable. Each year a spate of penal provisions is enacted containing the same easily avoidable ambiguities of language that have caused difficulties of interpretation for at least a century, and which leave in doubt such elementary matters as the sorts of knowledge or purpose the defendant must be found to have possessed before he becomes eligible for the penalties of the law.

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6. *See id.* at 21-22, 68-71.

7. (Proposed Official Draft, 1962).

Reams of regulatory enactments can be scrutinized without discovering evidence of any consideration of the appropriateness of criminal penalties to the legislative purpose or the relative efficacy of such penalties when compared to the wide range of noncriminal sanctions available to the law.<sup>8</sup> Nor, in all candor, can it be said that American courts have done much better. American judicial opinions dealing with the substantive criminal law do not, in general, constitute a distinguished judicial literature, or one that can be compared favorably with that of courts in several other nations whose law is also derived from English sources.<sup>9</sup> No doubt, responsibility for this situation resides to some degree in the law schools. The time has long passed since the basic criminal law course was routinely assigned to the youngest and most vulnerable member of the faculty or to that colleague suspected of mild brain damage and hence incompetent to deal with courses that really matter. Nevertheless, it is true that there are faculties of some distinguished American law schools that only grudgingly tolerate courses in the substantive criminal law and that remain to be convinced of the subject's real importance.

The question of who should be deemed criminal in our society is too insistent, however, to be wholly suppressed. Perhaps one of the incidental gains that may be derived from the acrimonious controversy surrounding the proposals for the recodification of the federal criminal law, contained in the bill known as S.1, is the demonstration that important interests and values may be strongly affected by the contents of a criminal code.<sup>10</sup>

One of the principal issues of legal policy in our time is that of decriminalization, a program more frequently discussed than achieved.<sup>11</sup> For at least a generation it has been clear that the system of criminal justice is seriously overburdened with responsibilities that would be better performed by agencies other than the criminal law, or perhaps not performed at all. In many instances, attempts to enforce such criminal prohibitions, especially sumptuary regulations concern-

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8. Allen, Book Review, 66 *YALE L.J.* 1120, 1121-22 (1957).

9. For a discussion of these problems in so far as they involve the Supreme Court of the United States, see Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958); Packer, *Mens Rea and the Supreme Court*, 1962 *SUP. CT. REV.* 107.

10. S.1, 94th Cong., 1st Sess. (1975).

11. There is a substantial literature on this issue. See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Junker, *Criminalization and Criminogenesis*, 19 *U.C.L.A. L. REV.* 697 (1972); Kadish, *The Crisis of Overcriminalization*, 7 *AM. CRIM. L.Q.* 17 (1968); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 *S. CAL. L. REV.* 588 (1968).

ing gambling, adult sexual behavior, and the consumption of alcohol and certain other drugs, are clearly not worth the candle. The consequences of such efforts are to encourage police practices that impinge upon constitutionally protected areas of privacy, that divert the limited resources of law enforcement from the tasks it can uniquely perform, and that exacerbate the alienation of significantly large groups in the population from the law and the institutions of justice. Continuation of our efforts to impose an official version of propriety in these areas will probably fail, and at great cost. But the costs of success would likely be higher, for success would entail the use of governmental coercion on a scale threatening to our basic political values. We face a period in which the only kind of free society likely to be attainable is one in which the law must show a broader tolerance than ever before for diversity in interpersonal relations, ethical preferences, and private conduct.<sup>12</sup> This is a more serious prospect than advocates of decriminalization have sometimes perceived, for the consequence in some cases is to broaden the gap between private moral convictions and the policy of the law.<sup>13</sup> But if it is a serious matter to deny the coercive sanctions of the law to enforce the sincerely held moral sentiments of certain groups, it is even more serious to impose coercive sanctions on persons for conduct sincerely held by them to be morally required or within the protected ambit of individual choice. The abortion controversy illustrates the dilemmas that must be encountered and resolved by the law in an increasingly pluralistic society.

The year 1968 marked the end of the Warren Court, and with it the end of an extraordinary experiment in the uses of judicial power to alter significantly the nature of American criminal justice in the interest of a more complete realization of the constitutional commands. How the achievement of the Warren Court is to be evaluated remains very much a matter of contention even nine years later. Whatever the ultimate judgments may be, it seems clear that because of the Warren Court we see many problems today in ways not perceived before, and that however far other courts may depart from that Court's precedents, we shall not return to the status quo ante. It is likely that the lasting contribution of the Warren Court will prove to be less its solutions to the problems addressed, and more its identification of the problems requiring solution and its ethical impulse. The very failures of the Warren Court to modify certain

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12. See F. ALLEN, *supra* note 5, at 72-74.

13. Cf. Levi, *The Collective Morality of a Maturing Society*, 30 WASH. & LEE L. REV. 399 (1973).

obdurate features of our system through the application of judicial power may be of value in underscoring the point that fundamental reform cannot be achieved by the Supreme Court alone, but requires the full and intelligent cooperation of the legislative branch.<sup>14</sup> It also requires the impetus given by such contributions as the *Standards for Criminal Justice* of the American Bar Association,<sup>15</sup> and the work of the American Law Institute<sup>16</sup> and the National Commissioners on Uniform State Laws.<sup>17</sup>

Important as the Warren Court's concerns were, however, they encompassed only a small segment of the critical problems confronting the administration of criminal justice in the modern era. Indeed, in fashioning procedures that necessarily require greater expenditures of time and personnel, the Warren Court in some degree exacerbated the systemic malfunctions of criminal justice administration. This is not to argue that the Warren Court could conscientiously have ignored the great issues of decency and equity that it addressed. Yet criminal justice reform that fails to concern itself with the totality of the system's operation is likely to produce results that are partial and unsatisfactory. Most reform efforts in this century have been of this character, and there continues to be an insufficient awareness within the legal profession or the public at large that we face a crisis in the administration of criminal justice that threatens the imminent breakdown of the system.

In the report of the American Bar Association's Special Committee on the Administration of Justice issued almost a quarter century ago, Justice Robert H. Jackson observed: "There is widespread doubt that existing criminal procedures can be relied upon either adequately to protect society or to protect the individual accused."<sup>18</sup> In the intervening years, the doubt that Justice Jackson expressed in 1953 has deepened into near certainty. The causes of the present crisis are many and imperfectly understood, but the essence of the matter is clear enough. The American system of criminal justice is confronted by quantitative demands that exceed the capacities of its resources and procedures. The administration of criminal justice groans under a stifling and increasing weight of numbers—numbers of offenses, of

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14. I have dealt more fully with these matters in Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases* 1975 U. ILL. L.F. 518.

15. ABA STANDARDS FOR CRIMINAL JUSTICE (1973).

16. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

17. NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE (1974).

18. *Criminal Justice: The Vital Problem of the Future*, 39 A.B.A.J. 743 (1953), quoted in L.R. KATZ, *JUSTICE IS THE CRIME* 1 (1972).

accused persons, and of convicted offenders. Accommodations made by the system to the exigent quantitative demands put upon it have resulted in practices directed principally to the processing of increasing numbers of persons as an end in itself—practices that bear only incidental relation to justice for the individual caught up in the system or to the adequate protection of the community.

The American system of criminal justice is not a system of trial by jury but one directed to the obtaining of guilty pleas. In many jurisdictions guilty pleas are obtained in as many as ninety per cent of the cases. Because a significant decrease in the percentages would create demands for resources and personnel to which the existing system could not possibly respond, every effort is made to maintain the number of guilty pleas at high levels, and this objective prevails over every other competing goal.<sup>19</sup> The result in most urban jurisdictions is a system of compromise, barter, and bargain that, although susceptible to manipulation in some instances by the government and in others by the defendant, fails in general to advance the legitimate interests of either the community or the defense.

The havoc wreaked on important social interests by such malfunctioning of the criminal justice system is not susceptible to accurate estimate. Perhaps the most serious losses are to the integrity and credibility of the law and its institutions. The operation of the system diverges seriously from its intended purposes; it pursues objectives rarely acknowledged and relegates to secondary importance the objectives it is supposed to fulfill. The result is a process permeated by pretense and camouflage, and the influence of these tendencies is discernible even in the opinions of the Supreme Court of the United States.<sup>20</sup>

These pathologies are no secret to the many capable persons who participate in the administration of American criminal justice or who have systematically observed its operations. As a result of the dedicated efforts of these persons, progress, however halting, is being made to alleviate some of the serious malfunctions. Yet efforts at reform produce their own perils, and here, as in other attempts to modify the operation of human institutions, we must face the specter of unintended consequences. One of the fatal errors often committed

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19. There is an extensive literature on this subject. See Alschuler, *The Prosecutor's Rule in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968). See also D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966).

20. See *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742 (1970). See generally Alschuler, *The Supreme Court, The Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

in reform movements is the failure to perceive the interrelatedness of the entire criminal process and therefore to overlook the effect that changes in one stage of the process produce in the operation of others. Thus, in recent months proposals have been advanced for a sweeping program of mandatory minimum sentences, often apparently without calculation of, on the one hand, how such a program may be frustrated by plea bargaining in the pretrial stages of the process, or, on the other, how the already intolerable conditions of overcrowding in our correctional institutions may be aggravated by substantial increases in the prison population.

Another error that sometimes diminishes the effectiveness of reform is a tendency to rely on improved managerial principles when the basic problem is an absolute deficiency in the resources of personnel and money available to the system. Programs limited to readjustments of procedures may make it easier for legislatures to evade the hard but necessary decisions to increase the allocation of resources to the criminal justice system. It is possible that experience with the new federal speedy-trial legislation may illustrate this point.<sup>21</sup> To recount these problems, of course, is not to question the importance of improved managerial principles, the increased utilization of computer and other electronic technology, or the modification of historical procedures that were created to meet requirements wholly different from those of the twentieth-century world. What is urged is that the indispensable movement to reform must be more broadly based and carefully calculated than ever before, and that it must be accompanied by a resolve to bear the costs that a proper performance of the justice function entails.

Accompanying the crisis in the administration of criminal justice are other issues of at least equal importance. Occasionally, fundamental theoretical questions long mooted in academic circles suddenly became of the most pressing practical concern. This is now occurring in the area of criminal justice. Serious consideration is being given to the purposes of the criminal law and the ways in which these purposes may best be realized. A time when fundamental issues are raised is one of great opportunities, yet it is also one of great peril.

For the larger part of the present century, the attitudes of most professionals in the fields of theoretical and applied criminology were dominated by what on an earlier occasion I described as the "rehabilitative ideal." The concept of deserved punishment was rejected as unscientific and inhumane. The possibilities of deterring dangerous behavior were greeted with profound skepticism and denied serious

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21. See Speedy Trial Act of 1974, 18 U.S.C.A. §§ 3161-3174 (Supp. 1976).

consideration. The sanctions of the criminal law were seen as providing opportunities for modifying the behavior of offenders in the interests of both social defense and the happiness, health, and satisfactions of the individual offender. Most of the reforms undertaken in the present century were expressions of the rehabilitative ideal, such as systems of parole and probation, the juvenile court, and psychiatric counseling.<sup>22</sup> Although public attitudes were less strongly and consistently committed to the rehabilitative ideal than those of the professionals, the notions of rehabilitation and reform of criminals often found sympathetic response in the general public.

The case against the rehabilitative ideal was first seriously undertaken in the years immediately following World War II. The indictment contained many counts. It was observed, first, that talk about rehabilitation frequently served as a cosmetic to disguise ugly realities in penal institutions that aggravate rather than cure criminality. It was noted, also, that the application of the rehabilitative ideal resulted in the exercise of broad discretion by judges and correctional personnel, a discretion affecting basic human concerns, but largely free of meaningful legal standards and therefore frequently abused.<sup>23</sup> But more important than any of these concerns was the growing perception that rehabilitative measures do not work, that after decades of experimentation there exists no validated scientific evidence of the capacity of rehabilitative programs to reduce criminal recidivism.<sup>24</sup>

The case against the rehabilitative ideal has achieved spectacular success. Rarely has there been so precipitous and complete a reversal of professional opinion. Today the talk is of deterrence and incapacitation: the law's promises to inflict punishment on those who violate it must be kept. Sentences should be fixed and not subject to the discretion of parole boards; in many cases minimum sentences of imprisonment are to be mandatory. Persons who demonstrate dangerous propensities to violence should be subjected to long terms of incarceration. The concept of deserved punishment is to be refurbished and pressed into service.<sup>25</sup>

Many of the measures associated with the new mood deserve a trial, and, in any event, their widespread adoption appears inevitable. But every posture taken toward social problems contains its own

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22. These matters are discussed in greater detail in F. ALLEN, *supra* note 11, at 25-41.

23. *Id.* at 32-35.

24. Perhaps the most influential modern statement of this point is Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *THE PUBLIC INTEREST* 22 (Spring 1974).

25. Among the most responsible modern discussions of many of these themes is

distinctive forms of pathology. One suspects that we shall need to be strongly on our guard to prevent the new emphasis on deterrence and incapacitation from degenerating into a regime of harsh and insensitive repression. However imperfectly the rehabilitative idea was expressed in practice, it at least focused attention on the individual offender as a human being entitled to the concern and compassion of the community. Wars on crime breed war psychoses, and social action taken in the heat of such excitement has a way of proving self-defeating.

Moreover, if we turn away from the rehabilitative ideal because it does not work, what shall our stance be toward other measures that may succeed in modifying aggressive human behavior into more placid and malleable forms? To what ends shall we use aversion therapy, psychosurgery, behavior-modifying drugs? Our response cannot be a Luddite rejection of all new knowledge in these fields. But we are in urgent need of principles delineating areas of human personality and autonomy inviolate from the scalpel and the syringe.<sup>26</sup>

Recently I received a letter from a brilliant and perceptive investigator who place in juxtaposition two sets of facts derived from his ongoing inquiry. The first is that one-half of all felony arrests for robbery and burglary in New York City are of teen-agers, and the probability of a New York teen-ager being arrested for a felony in any one year is seven per cent. The other set of facts is that the daily attendance rate in the New York public schools is sixty-five per cent, and in the ghetto schools it is around fifty per cent.<sup>27</sup> What is to be done about this relentless production of young criminals? What is there in our culture and institutions that permits this to occur? In candor, we are no closer to secure answers to these questions than we were at the turn of the century when the study of crime causation was first placed on a systematic basis. Yet in our preoccupation with legislation, administration, and crime repression, we need to keep alive our concern about a society that breeds such massive expressions of aggression and violence. In short, in the field of criminal justice we need to respond to our consciences and compassion, as well as to our fears. It seems not too much to say that the quality of our response is important, not only to the administration of justice, but also to the realization of our most basic values.

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N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974). See J. WILSON, *THINKING ABOUT CRIME* (1975).

26. See Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).

27. Letter from Professor Hans Zeisel to Francis A. Allen (Feb. 25, 1976).