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## Crime, the Public, and the Crime Commission: A Critical Review of the Challenge of Crime in a Free Society

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# CRIME, THE PUBLIC, AND THE CRIME COMMISSION: A CRITICAL REVIEW OF THE CHALLENGE OF CRIME IN A FREE SOCIETY

Warren Lehman\*

Robert Warshaw noted that "So much of official American culture has been cheaply optimistic that we are likely almost by reflex to take pessimism as a measure of seriousness." It is just this unthinking encouragement of bloated expectation that leads young persons to compare forecast with outcome and to conclude that hypocrisy and duplicity are at work. What is asked of us is honesty; and what that requires is a great deal more rigor in matching our performance to our standards. It is now the only way to maintain the credibility of those standards.

Daniel P. Moynihan\*\*

## I. GOVERNMENT BY COMMISSION

WHAT is the appropriate set for the mind when it mulls the report of the President's Commission on Law Enforcement and the Administration of Justice?<sup>1</sup> Should it be fine grind, as is the professor's when he asks a student in his first class in law school to state the case of *Regina v. Dudley & Stephens*?<sup>2</sup> Or should the running wheel be raised from the bedstone, as is so often the case when the professor turns to review the work of a colleague? While the latter may have the appeal of habit, there are, I think, three important reasons why one should not extend to this report the courtesies academe usually offers an individual author.

First there is the office that any commission report has to fulfill. Such a report is intended to influence the policy decisions of governments, and it is supposed to do so directly, without the mediation of critics. It is not an entry in the intellectual market place, where presumably error will be discovered by failure to sell. Rather, it is implied that error has been eliminated from the report by pretesting among the commissioners and their staff, and that further discussion is therefore unnecessary.

Just how direct this impact on policy is supposed to be is evi-

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\*\* *Nirvana Now*, 36 THE AM. SCHOLAR 539, 548 (1967).

1. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter REPORT].

2. 14 Q.B.D. 273 (1884).

denced by the President's treatment of his Crime Commission report. Some of the recommendations were embodied as legislative proposals in a presidential message to Congress before the report was made public.<sup>3</sup> Moreover, the intent to protect the work from critical examination—which would reduce its political effectiveness—is demonstrated by the report's own advertising. The panegyric with which the Commission introduces itself and its work to the public would embarrass the publisher of memory-improvement books. I quote at length despite a strong predisposition not to interrupt myself with the words of others:

The report is the work of 19 commissioners, 63 staff members, 175 consultants, and hundreds of advisers. The commissioners, staff, consultants, and advisers come from every part of America and represent a broad range of opinion and profession.

In the process of developing the findings and recommendations of the report the Commission called three national conferences, conducted five national surveys, held hundreds of meetings, and interviewed tens of thousands of persons.

The report makes more than 200 specific recommendations—concrete steps the Commission believes can lead to a safer and more just society.<sup>4</sup>

The reviewer by tempering his judgments—by pointing up the good and ignoring the bad or by admiring the effort as he might for the individual work of a colleague—unwittingly furthers the impression that the work is beyond question, and thereby does a disservice to the community. Obviously, no matter what the credentials of its author, a writing by which the sovereign is guided deserves much closer scrutiny than the one in which an individual seeks to persuade the mind of the public. To overlook, out of misplaced kindness or for unstated political reasons, the erroneous, even the merely arguable, in authoritative proposals for government activity is an intellectual sin.

A second reason for a less than charitable approach is the possibility that the President's Commission on Crime and the Administration of Justice just might be a typical presidential commission. It has been suggested that "government by commission" may represent a late and promising development in the governance of democratic societies.<sup>5</sup> The argument is that in most western countries the power

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3. *Crime in America: The President's Message to Congress Recommending Crime Control and Law Enforcement Legislation for the Control of Narcotics, Firearms, and Wiretapping* (delivered Feb. 6, 1967), 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 182 (Feb. 13, 1967), 113 CONG. REC. 985 (daily ed. Feb. 6, 1967).

4. REPORT at v.

5. Bell, *Government by Commission*, THE PUB. INTEREST, Spring 1966, at 3, 6-9.

to initiate legislation has slipped from the grasp of legislators and been taken up by national executives. The threat of such a development has been given many names—Boulanism, Gaullism, the cult of personality. The question posed when political power is centered in the executive is how, other than by removal of the executive,<sup>6</sup> shall public opinion influence policy. Without at least some opportunity for initiative from the citizenry one can hardly call one's government a democracy. Daniel Bell (following de Jouvenal) has suggested that the commission may solve this problem by bringing to the executive the views of the people.<sup>7</sup>

The report of the Crime Commission calls into question Bell's optimism, for that report reflects not the mind of the community but that of the Administration. A Presidential commission (one is tempted to generalize) is a pride of domesticated intellectuals and leading citizens willing to sacrifice their disagreements in hope of drinking at the springs of power. This hope is a snare and a delusion: the commissarial lions jump to the whip of the politician. And it is the lion-tamer whose reputation is enhanced by the lions, not vice versa.

A commission does more to enhance executive power than to subject it to neodemocratic restraint. A commission report lends to a President's legislative proposals whatever authority the commissioners have. Moreover, a commission as a source of legislative initiative has a tactical advantage over a legislature. The commission can provide a complete legislative package. The legislature, by contrast, has too much on its mind to devote eighteen months to a wide-ranging examination of large topics; it lacks the staff that can be provided a presidential commission; and, because its members' positions on many issues will have to be part of the public record, a legislature's program is likely to be limited to those items upon which individual legislators dare publicly agree. (The Commission members did their work behind closed doors to avoid exactly that problem.)<sup>8</sup> The completeness of a commission package enhances the attractiveness of each of its components, and the whole is, there-

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6. This route is open in any society, though its accomplishment may be more or less difficult. Where deposing the sovereign is the only route open, the public cannot talk but only scream. Insofar as only the most gross improprieties are reachable through deposition, that process bears some similarity to the constitutional limitations on the legislature exercised by courts under the rubric of substantive due process. See E. FREUND, *STANDARDS AMERICAN LEGISLATION* 274 (Phoenix ed. 1965).

7. See Bell, *supra* note 5, at 9.

8. "[S]ecrecy has served . . . a . . . need . . . for consensus among individuals each of whom represents a constituency in American public life." MacKenzie, *The Commission Report on Crime*, *NEW REPUBLIC*, Feb. 4, 1967, at 15.

fore, greater than the sum of its parts. Finally, a legislator cannot afford to ignore the support that the President builds for himself, through the publicity that attends his commission's reports, among the legislator's own constituents.

The additional legislative influence that a commission report gives to the President might be tolerable if the report were either an independent and comprehensive intellectual effort or a reflection of the concerns of the community. In fact the Crime Commission report was at least as much a report of the President to the people as it was a report of the commissioners to the President. And even so far as it was the report of the commissioners, it gave voice not to the opinions of the people but rather to political compromises between the criminal justice establishment and what Daniel Moynihan might call doctrinaire liberalism.<sup>9</sup> (James Q. Wilson began his review of the Commission report by pointing out that it was not organized to answer the questions an intelligent layman would want to discuss; rather, it was organized "around the existing institutional machinery for handling criminals.")<sup>10</sup> If the President can significantly influence the content of a commission report, and if the report is also the result of closed-door political compromises, it is doubtful that the commission format provides an acceptable solution to the perceived problem of bringing public opinion to bear upon government.

If our first reason for refusing the report's claim of special respect is because of what it is intended to accomplish (we may well have to live by its suggestions), our third reason for denying it that respect is because of what the report is. If the report is a narrowly political document, it is an inappropriate device for determining long-range policy issues. It is hard to imagine anything more inappropriate than allowing such policy decisions to be made, without criticism, by those closely bound to the politics of the present. The future ought not be defined by what is politically possible now. It is equally hard to imagine that policy proposals made by those restricted by the politics of the present are not peculiarly susceptible to error—error in description of the problems of both the present and future, and hence in the solutions suggested. At the very least we should not

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9. Moynihan, *Nirvana Now*, 36 THE AM. SCHOLAR 539 (1967).

10. Wilson, *A Reader's Guide to the Crime Commission Reports*, THE PUB. INTEREST, Fall 1967, at 64, 64-65. Wilson in this and an earlier article (published before the *Commission Report*), *Crime in the Streets*, THE PUB. INTEREST, Fall 1966, at 26, has contributed much to my understanding. I owe him especially profuse thanks for this gift as I am guilty of having, on the basis of an incorrect quotation, made some nasty cracks about him in *Thinking Small About Urban Renewal*, 1965 WASHINGTON U.L.Q. 396-97. He was kind enough to point out my error with humor rather than rancor.

allow the authors of a report so suspect in origin to rush us into action, and yet that is exactly what they would do.

The rush is betrayed by the framework of the report. In the most general terms, the argument of the report is that the problem of crime in America has reached crisis proportions<sup>11</sup> but that we can be optimistic about solving that problem if only we carry out the Commission's specific recommendations.<sup>12</sup> Both of these propositions, at least as they will be understood by most readers, are false. Neither are we so badly off as the Commission implies, nor are we justified in any optimism that things will get measurably better in the next twenty years. The dramatics are peddled to us so that we may eagerly and unquestioningly support the Commission's conclusions and its recommendations.

Yet, a presidential commission could indeed provide a most useful service, especially when its subject matter is one about which the public is both anxious and ill-informed. In such circumstances the commission has the chance to replace phantasms with information, to replace worry with thought, and to give direction to an inchoate desire to act. The opportunity is a precious one, for a commission is in a unique position to reach not only those specialists for whom its subject matter is of daily concern but also the whole of the literate public. No individual scholar can hope to attract a hundredth part of the circulation, a hundredth part of the press coverage, but such attention is the commission's by right. The opportunity is precious not only because the whole of the public will be reached, but because the same subject will not in a generation be considered under the same circumstances again. If the subject has not been exhausted, potential authors will have been, and so will the patience and purse of the community.

The duty of a commission is commensurate with the uniqueness of its opportunity and with its unparalleled power to affect legislatures and the mind of the public. Measured by its duty, the Crime Commission was a failure.

It was not a failure because of its inability to find the answers to admittedly hard questions. If anything, it failed because it pretended to have answers. It failed because to a public seeking guidance it dissimulated, equivocated, and avoided. It failed because, withal, it posited as a revolutionary committee. Likely, it seems, the failure was inevitable for a modern political commission. I provide something

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11. "The criminal justice system is faced with too urgent a need for action to stand back for a generation and engage in research." REPORT 13.

12. REPORT at vi.

of a history that others may judge whether this failure was an accident or an inevitability.

## II. THE TRANSMUTATION OF GOLDWATERISM

A single startling event appears to have begun the process by which a formless public concern about crime was played upon, molded, and remolded to suit the needs of politicians. The authors of the report were only the most recent to get on the bandwagon—to take advantage of crime having become a national issue.

In New York City early in the morning of March 13, 1964, Winston Mosley murdered Kitty Genovese. To accomplish the murder, Mosely made three separate attacks with a knife over a period of half an hour. Thirty-eight people were wakened by the victim's screaming. A light flickered on, a shout from a window served to interrupt the killer, but no one seriously raised a hand to stop the mayhem or even to call the police, until, after the third attack, Miss Genovese was dead.<sup>13</sup> The event received only the most routine attention from the press<sup>14</sup> until the police discovered how many people had seen the crime committed but done nothing. A comment from the dismayed police commissioner to the city editor of the *New York Times* led to a page-one story on March 27, two weeks after the event.<sup>15</sup>

The story of the thirty-eight frightened or apathetic witnesses made headlines across the country and occasioned a spate of editorial self-examination of which the *Times'* *What Kind of People Are We?*<sup>16</sup> was probably typical. Religious leaders, psychologists, and sociologists were asked to analyze the problem.<sup>17</sup> We were concerned because the thirty-eight people were ourselves, able to look passively on while a woman was murdered. So discomfited were some that they rose to attack the police or to call for penal legislation for silent witnesses.<sup>18</sup> But the basic theme was self-examination.

That examination continued into July, until the eve of the Republican National Convention. The weekend before the convention, publication of a book on the Genovese murder was announced in

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13. See Gansberg, 37 *Who Saw Murder Didn't Call Police*, N.Y. Times, March 27, 1964, at 1, col. 4. The article is reprinted, with additional matter, in A. ROSENTHAL, THIRTY-EIGHT WITNESSES 29-45 (1964).

14. See, e.g., N.Y. Times, March 14, 1964, at 26, col. 4.

15. See A. ROSENTHAL, *supra* note 13, at 19-25.

16. N.Y. Times, March 28, 1964, at 18, col. 2.

17. E.g., Mohr, *Apathy Is Puzzle in Queens Killing*, N.Y. Times, March 28, 1964, at 21, col. 1.

18. See A. ROSENTHAL, *supra* note 13, at 53-57, 68-70.

the *Times*.<sup>19</sup> A few weeks before, the murderer had been condemned to death before cheering spectators.<sup>20</sup>

One cannot but believe that the Genovese murder had affected Dwight Eisenhower as much as it had the rest of us. And when it came time for him to address the convention, he chose to divert but once from his purpose of party peace-making—to discuss individual moral responsibility for solving, among other things, the problem of crime on the streets: “[I]n the home, in the school and the church is a great field where the aggregate influence of dedicated concerns among the local citizenry can be applied with revolutionary impact on all these evils.”<sup>21</sup> This response was appropriate to the view that the thirty-eight witnesses evidenced a moral decay that could be cured only by a reassertion of individual virtue. Moments later, however, Eisenhower betrayed a sympathy with those New Yorkers who had sought to shift the blame from themselves. The convention was aroused by the unbecoming statement that we should not be “guilty of maudlin sympathy for the [apprehended] criminal, who [had been] roaming the streets with switchblade knife . . . seeking helpless prey . . . .”<sup>22</sup> It was that latter remark, not the former, which was to set the tone when it came time for Barry Goldwater to offer leadership in defining the crime problem for an unhappy public. That, perhaps, is not surprising; it was those who cheered the Eisenhower remark—the radical conservatives who had gained control of the convention—who were to be responsible for Goldwater’s nomination.

If Eisenhower’s individual responsibility theme had been occasioned by the Genovese murder, his crime repression theme, symbolized by the switchblade knife, may well be attributable to the experience of another New York City girl. Shortly before the convention opened, Miss Arlene Del Fava had drawn a switchblade knife from her purse and used it to fend off a would-be rapist. The attacker was apprehended, but so was Miss Del Fava—for carrying the knife. She said that she had done so because she did not “want to be another Kitty Genovese.”<sup>23</sup> Miss Del Fava was finally discharged by a grand jury, but not until the day after Eisenhower’s address. The Del Fava case provided an unfortunate counterpoint to the Genovese case. The disgruntled observer, anxious to rid himself of any blame for

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19. The book was A. ROSENTHAL, *supra* note 13. N.Y. Times, July 8, 1964, at 33, col. 3; Nichols, Book Review, *id.* July 12, 1964, pt. VII, at 10.

20. See N.Y. Times, June 16, 1964, at 1, col. 6.

21. *Id.*, July 15, 1964, at 20, col. 8.

22. *Id.*; Rovere, *Letter From San Francisco*, THE NEW YORKER, July 25, 1964, at 77.

23. N.Y. Times, July 16, 1964, at 33, col. 6.



Kitty Genovese's death, could easily convince himself either that the assumption of individual responsibility was useless or that analyzing the crime problem in those terms was irrelevant. It was a convenient psychological release, a phony double-blind that restored the sense of righteousness.

Before Eisenhower's address there was no evidence that either Goldwater or Republicans in general had any intention of emphasizing the problem of crime in the national campaign. Goldwater had not attended to the subject previously and it was not being seriously considered by the Republican platform committee.<sup>24</sup> But in a press conference before his acceptance speech, Goldwater, asked what he foresaw to be the issues of the campaign, said, "I think . . . the abuse of law and order in this country is going to be [an] issue—at least I'm going to make it one because I think the responsibility has to start some place." He did not suggest that it should begin with the extirpation of the silent witness in ourselves. Instead, he asserted, to the surprise of many, that "responsibility should start at the federal level with Federal courts enforcing the law."<sup>25</sup> Then he cited as an example of the sorry pass to which we had come the fact that a New York girl was being held for carrying the knife with which she had defended herself; while, he said, the attacker is probably going to get a medal.<sup>26</sup> Even after so clear a statement no one seriously believed that Goldwater would make crime a campaign issue.<sup>27</sup> But, of course, he did.

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24. See Rovere, *supra* note 22, at 77:

The origin of this commendable but somewhat novel resolve [to solve the problem of crime in the streets] is not clear. Goldwater exegetes say that it never has been a theme in his earlier writings and speeches. There were intimations of it in the platform—talk of "moral decline and drift" and an indictment of the Johnson administration for "encouraging disorderly and lawless elements"—but a national remedy for crime is not among the many good things the platform promises.

Rovere, *A Reporter at Large*, THE NEW YORKER, Oct. 3, 1964, at 201, 202:

For two or three years now, a number of reasonably intelligent people have been studying Goldwater and Goldwaterism as intently—and in some cases almost as morbidly—as Cotton Mather ever studied the doings of Satan and the manifestations of witchcraft. But not even the most assiduous and imaginative of Goldwaterologists was prepared for the Senator's emergence in San Francisco as a candidate for High Sheriff as well as for President.

25. Rovere, *supra* note 22, at 77. The quotation is repeated by Rovere in *A Reporter at Large*, THE NEW YORKER, Oct. 3, 1964, at 201, 202-03, but the concluding phrase, "with federal courts enforcing the law," is dropped.

26. See N.Y. Times, July 17, 1964, at 11, col. 8.

27. See Rovere, *A Reporter at Large*, THE NEW YORKER, Oct. 3, 1964, at 201, 202-03:

Goldwaterologists in the Cow Palace and across the country were stunned [by Goldwater's reference to crime in his acceptance]—and stunned again . . . in a press conference the following morning [when he made the statement quoted in the text] . . . [Goldwater was vague when asked for detail, and] Goldwaterologists assumed that this was about the size of it—the Republican candidate would continue to take a stand against "bullies and marauders" but would not undermine his whole position as a strict Constitutionalist by proposing any specific strategy of intervention.

It seems both more appealing and more reasonable to believe that Eisenhower's statements reflected the honest feeling of a concerned official rather than that they were a trial balloon the Goldwater forces induced him to set free. It is difficult to base a political campaign upon the moral rearmament of the electorate; to be a really useful political issue, a public concern must be appropriate for governmental action. The mutation in the Eisenhower position implied in his switchblade knife remark, Goldwater's assumption of federal responsibility—these were the grounds for a political campaign. Yet the conjunction was probably an accident—an irresponsible seizing upon issues that seemed attractive because they had been so lately in the public eye. The day after the convention Goldwater could suggest—as a federal function in crime fighting—only his own prospective moral leadership as President.<sup>28</sup> His later expansion of the possibilities for federal responsibility had the earmarks not of dissimulation and controlled exposure but of discovery. If the choice of campaign issues was this kind of accident, Goldwater was blessed with the luck of the Princes of Serendip.

The moral turpitude and apathy themes had been used by the platform committee, developed by the press in analyzing the Genovese case, and would appeal to the righteous and simple whom Goldwater counted among his supporters. More important, the "big city crime problem" meant "the Negro problem" to many. There was already supposed to be a backlash among moderate whites against excesses in the civil rights movement. Goldwater could say, "as the President, I am going to do all I can to see that women can go out in the streets of this country without being scared stiff";<sup>29</sup> his audience, racist and backlash, could be expected to read "white" before "women" and to picture as the threatening aggressor the Negro male in all his animal virility. In addition, there was the United States Supreme Court which had added coddling criminals to the list of sins for which the John Birch Society was anxious to condemn it. The crime problem as a political platform provided a simple means of courting just those groups whose support Barry Goldwater needed, without Goldwater having to wear his—or Robert Welch's—heart on his sleeve. The advantages of this approach were missed by neither the political commentators<sup>30</sup> nor Barry Goldwater's own advi-

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28. *See id.* 203.

29. Quoted in Rovere, *supra* note 22, at 77.

30. *See id.* at 78:

Before the Convention, [Republican delegates] seemed at a loss for a way to court the racist vote in the North without making racism an article of the new Republican credo. But a way it seems has now been found, and the candidate who says he has moral scruples about the principle of segregation seems positively exhib-

sors. As election neared, a Republican policy team recommended that the campaign issues be narrowed to a few. First on the list was moral decay; second was the crime that decay produced. Foreign policy issues followed.<sup>31</sup>

There was one problem with the crime issue: how could a constitutional fundamentalist square his call for federal leadership in crime control with his support of states' rights? How, in fact, could anyone transform the need for law and order in the streets into a federal problem? Goldwater was vague when he was asked for an explanation the day after the convention. "He said a few words about creating an improved 'moral climate' by force of presidential example, and some about bettering the quality of the federal judiciary."<sup>32</sup> A few days later he was more specific: his plan included replacing present law enforcement officers with persons who understood that the important thing about law enforcement is to put criminals behind bars; getting Congress to overrule the *Mallory* rule by statute;<sup>33</sup> filling the court with appointees who would "redress Constitutional interpretation in favor of the public";<sup>34</sup> and supporting a constitutional amendment that would "give back to the states those powers absolutely needed for fair and efficient administration of criminal law."<sup>35</sup>

The moral decay, the decay of which the Republican policy committee had spoken, was not attributed to Goldwater's intended constituency, but to some undefined others—Northerners, city-folk, Negroes, teenagers, criminals; the blank could be filled in according to the listener's predispositions. And these undefined others were to be dealt with by invigorated local and federal law enforcement. The concerns aroused by the Genovese murder and reflected in Eisenhower's speech had been perverted. It was not now the good who had grown weak so much as it was the bad who had grown strong.

Though it was obvious that Goldwater had struck a responsive chord—the public was worried about crime and at least a significant segment of it apparently welcomed the opportunity to put the blame on others—Lyndon Johnson reacted as the incumbent presidential

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arated by the thought of a campaign against mugging, stabbing, rape, house-breaking, and other well known interracial activities. By this extraordinary means, he can seek the backlash vote without for one moment agreeing—or even, perhaps acknowledging to himself—that that is what he is doing.

31. See N.Y. Times, Oct. 14, 1964, at 28, col. 1.

32. Rovere, *supra* note 27, at 203.

33. See *id.* 204.

34. *Id.*

35. Quoted in *id.* 206.

candidate in a happy and prosperous nation.<sup>36</sup> It was politically inexpedient for him to dispute Goldwater's analysis of the crime problem during the campaign; hence, Goldwater's was the only voice attempting to define for the public the way in which the crime problem should be viewed. Johnson's only response was to scoff at the notion that crime was a problem for the federal government's concern. When he was asked about the crime issue after the Republican convention, Johnson said, "Well, I think I should remind all of you that the United States is one of the few nations which does not have a national police force. The Constitution provides that responsibility for law and order should be vested in the states . . . ."<sup>37</sup> By late September, however, it was obvious that the crime issue was disturbing him, for he described federal antipoverty and education programs as evidence of the Administration's concern with crime.<sup>38</sup> By implication, activities such as those, which might affect the causes of crime, defined the proper limits of federal activity in crime control.

Goldwater's promise to do something about the problem of crime in the streets was the most successful of his campaign appeals. Within four months of Goldwater's crushing defeat at the polls, Johnson, now a President elected on his own, sent a message to Congress in which he called crime "a malignant enemy in America's midst" and proposed to deal with it as a national problem.<sup>39</sup> That Johnson adopted the Goldwater theme to his own ends was no accident. His doing so undercut a Republican monopoly of the crime question,<sup>40</sup> moved toward a reconciliation with at least the moderate among those who voted for Goldwater, and directed his own considerable energies to what many believed was a problem of crisis proportions. However, grabbing the Goldwater banner was not an easy thing for

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36. *Id.* at 217, and especially 225-26.

37. N.Y. Times, July 19, 1964, at 56, col. 5.

38. *See id.*, Sept. 25, 1964, at 81, col. 5.

39. President Johnson's March 8 Message on Crime, 21 CONGRESSIONAL Q. ALMANAC 1394 (1965).

40. Johnson's political acumen and foresight have proved no less sensitive than one has been led to expect. Governor Ronald Reagan of California is already attempting to resurrect for the next presidential campaign the problem of crime in the streets. Hill, *Reagan Says War Is Election Issue*, N.Y. Times, Sept. 29, 1967, at 25, col. 2. The Ballad of George Romney begins:

The wind atop Mt. Washington is singing Romney's right George Romney's right  
—the spread of crime and violence must cease George Romney's right . . . .

St. Louis Post-Dispatch, Jan. 21, 1968, at 1-D, col. 2.

This Article was written last winter. Today, after the Republican Convention, one need hardly cite anything for the proposition that crime remains a national political issue. It is overshadowed in the debates of the presidential year by more immediately pressing international problems, but it remains an issue of obviously intense feelings, and which is still viewed as an appropriate and major subject of national political concern.

a Democratic President to do. He could not concede any of Goldwater's explanations for the crime problem. He had to support the Supreme Court. He could not place the blame for crime on Negroes. He could not admit to moral decay either in his Administration or in the city dwellers of the Great Society. And he had to invent a federal role in criminal justice administration that satisfied the Constitution, the ideology of his liberal supporters, and the need to appear actually to be doing something.

The presidential message in which Johnson announced his intent to create a crime commission must be about the dullest political masterpiece on record. It bears the mark of Johnsonian prose, but it deals in one way or another with each of the problems Johnson faced in trying to convert Goldwaterism to his own use. The statement begins with the *non sequitur*, almost obscured by verbal legerdemain, that because crime is a nationwide problem it is therefore a problem that should be dealt with by the federal government.<sup>41</sup> The idea of federal responsibility for local law enforcement, a notion developed by chance and embraced in desperation by Barry Goldwater, ridiculed but a few months before by Johnson, had become a major theme of the Great Society. There remained two problems: dissociating Johnson from Goldwaterism and deciding just what the federal government might do.

Johnson began his attack on Goldwaterism with the statement that "It is not enough to reflect our concern . . . by seeking out single answers or simple answers. They do not exist."<sup>42</sup> Then he dealt with the conservative's simple answers. With respect to Negro responsibility, Johnson pointed out both that the disadvantaged are less likely to respect the law and that not all crime is committed by "those denied equal opportunity."<sup>43</sup> The charge of moral decay was met with examples of youthful concern and activity in social welfare areas.<sup>44</sup>

The problem of the Supreme Court was a little more difficult to handle. The President admitted that misunderstanding had existed between law enforcement officers "and some courts," then added, "We need to think less about taking sides in such controversies and more about our common objective: law enforcement which is both *fair* and *effective*."<sup>45</sup> That the balance was to be struck by ignoring

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41. President Johnson's March 8 Message on Crime, *supra* note 39.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (emphasis in original).

the controversy became clear only when, later in the message, Johnson directed the Crime Commission (whose creation he was announcing) to discover "[W]hat steps can be taken to create greater understanding by those involved in the administration of justice at the state and local level of the efforts of federal courts to ensure protection of individual rights."<sup>46</sup> In other words, the Commission's role was less to consider the merits of the balance toward which the Court appeared to be moving than it was to convince the community that it could live with the Court's decisions.

There were, however, two of Goldwater's positions from which Johnson did not retreat. He did not challenge the notion that a crime crisis existed. Perhaps more important, he did not return to the introspective approach to crime, the approach that had gained temporary ascendancy following the Genovese murder. Crime, one may infer from the report that the Commission produced for Johnson, was to be viewed in the more comfortable way—as the business of an anti-society from whom the good can and should be protected by governmental activity.<sup>47</sup> "Almost every recommendation in [the Crime Commission report] is a recommendation to State or local government . . . ,"<sup>48</sup> and those that are not are recommendations to the federal government. But one commissioner, Miss Genevieve Blatt, was disturbed. In her "additional views" Miss Blatt said that the report was deficient in neglecting the fact that "godlessness [is] a basic cause of crime," and, she added, "religion . . . a basic cure."<sup>49</sup> We need not share her religious faith to be surprised that the Commission makes so little point of the notion that a citizen ought not "shop syndicate."

### III. THE VIRTUE OF UNANIMITY

Having put Goldwater down, Johnson—if he was to insist there was a crime crisis—had now to produce his own program. Considering his penchant for creating commissions,<sup>50</sup> it is not surprising

46. *Id.* at 1396 (emphasis in original).

47. There are expressions to the contrary in the report, but they usually take the form of pious afterthoughts.

48. REPORT at 279.

49. REPORT at 302.

50. "[I]n recent years, the number and variety of Government commissions have expanded enormously, and these commissions seem to be developing into a new and unanticipated mechanism of government." Bell, *supra* note 5, at 6. We may infer that the tendency is not unique to President Johnson.

Perhaps the most dramatic evidence of the proliferation of government commissions lies in the government's difficulty in categorically denying responsibility for the parody *Iron Mountain Report* [L. LEWIN, REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE (1967)]. The editors of TRANS-ACTION said:

that he chose the commission format for his fact-finding and advisory machinery. The Commission he created to "inquire into the causes of crime . . . and make recommendations for actions which can be taken by Federal, State, and local governments, and by private citizens and organizations . . ." <sup>51</sup> consisted of nineteen members <sup>52</sup> who were given a budget of one million dollars <sup>53</sup> and told to report in eighteen months. <sup>54</sup>

It was not because Johnson was without ideas, or without agents able to generate them, that he needed a commission; many proposals for federal action were already available. When Johnson announced his intent to create the Commission, he demonstrated independence by also announcing that he would shortly send to Congress several items of new crime-control legislation: tightened firearms control, federal civil commitment for narcotic addicts, control of "psycho-toxic" drugs not then covered by federal legislation, and a raft of other proposals, said to be forthcoming from the Attorney General, to deal with organized crime. <sup>55</sup> These were all items which, though already incorporated in the President's program at the time the Commission was created, the Commission was later to consider as if they were new ideas. One of these, the civil commitment proposal, was enacted while the Commission still had it under advisement.

If Johnson had no great need for the suggestions that the Commission was to produce, he did need the assurance that he was doing everything that a safe opinion would say the federal administration should do. He needed a specification of the limits of federal responsibility, and he needed one supported by people who would carry weight not only with his liberal democratic supporters, but as importantly with Goldwater supporters who might be converted. <sup>56</sup>

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*Trans-action* has found that those readers who take [the *Iron Mountain Report*] seriously tend to be Government officials. Upon inquiry, sources very close to the White House were authorized to say that the files and libraries of the Executive Office of the President have been reviewed, and although some reports in the general subject area covered by the Report were found, there was no record of this particular report. These sources believed, therefore, that no comment was appropriate at this time. Informally, they observed that their statement does not rule out the possibility that the *Report* was sponsored either in White House, by some Congressional committee, or by some other agency of the Federal Establishment.

Comment, *Social Science Fiction*, TRANS-ACTION, Jan.-Feb. 1968, at 7-8.

51. Exec. Order No. 11,236, 1 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 8 (1965).

52. Twenty members were authorized. *Id.*

53. S. REP. NO. 602, 89th Cong., 1st Sess. 1 (1965).

54. Exec. Order No. 11,236, *supra* note 51.

55. President Johnson's March 8 Message on Crime, *supra* note 39, at 1395.

56. The commissioners "were chosen cross-sectionally the way the Warren Commission was chosen and partly for the same purpose: to calm the country down."

From the President's point of view, the political limitations on the kind of report to be produced were, though quite specific, fairly wide. The report should not transgress programs and ideals to which Johnson was already committed; it ought to give the federal government something to do; and it ought to be authoritative.

Unanimity among an appropriately diverse group of commissioners is the key to authority, and the selection of an appropriately diverse group of commissioners is an art. The modern Executive chooses his commissioners first for whom they represent.<sup>57</sup> In this respect the art has advanced considerably over the last thirty-five years. The members of the Wickersham Commission were apparently representative only insofar as they came from different sections of the country.<sup>58</sup> Geographic representation, while a consideration in the selection of the latest crime commission's members, was a relatively minor one. The key factor today, it has been said, is the representation of functional constituencies—groupings defined not by geography but by common interests or purposes.<sup>59</sup> The goal is to include on a commission persons recognized as responsible leaders by each of the groupings that might be concerned with the subject matter being studied. In the case of the Crime Commission, the constituencies that needed to be represented are easy enough to discern—for example, prosecutors, judges, police, Negroes, the organized bar. It was also necessary that representation come from national, state, and local levels of government. One man such as James B. Parsons, a Negro federal judge from the Midwest, could be used to kill several birds with one stone.<sup>60</sup>

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Another purpose, and a major one, was to summon prestige behind the crime war when LBJ was ready to take the offensive with a program of his own." MacKenzie, *The Compromise Report on Crime*, NEW REPUBLIC, Feb. 4, 1967, at 15.

57. See Bell, *Government by Commission*, THE PUB. INTEREST, Spring 1966, at 3, 6-7. Leonard C. Lewin describes the selection of the members of the fictional commission that produced the *Iron Mountain Report*, L. LEWIN, *supra* note 50, at xviii, xxii-xxiv. One would hope the mutual examination by the commissioners of each other's medical dossiers is a bit of an exaggeration. Otherwise the author creates a considerable air of verisimilitude.

58. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS, H.R. DOC. NO. 722, 71st Cong., 3d Sess., iii (1931) [hereinafter WICKERSHAM REPORT].

59. Bell, *supra* note 57, at 6.

60. The Commission consisted of Nicholas Katzenbach (chairman), who was Attorney General at the time of his appointment, Genevieve Blatt (representing state prosecutors and women), Charles D. Breitel (representing the state judiciary), Kingman Brewster, Jr. (representing education), Garrett Byrne (representing local prosecutors), Thomas J. Cahill (representing the police), Otis Chandler (representing the press), Leon Jaworski (representing the bar), Thomas Lynch (representing state prosecutors), Ross L. Malone, Jr. (representing federal prosecutors), William P. Rogers (representing federal prosecutors), James B. Parsons (representing the federal judiciary and Negroes),



Looked at in one way, it would appear that this kind of diversification serves the useful purpose of bringing to a commission the characteristic positions of all those who are likely to have an active interest in a subject. Perhaps more important from the President's point of view, however, is the fact that the signators guarantee to their own constituents the acceptability of the compromise embodied in the report.<sup>61</sup> Representation is a two-way street.

The President's problem was to pick a diversified group that could yet be brought into agreement. The selection of the constituencies to be represented, fortunately for the President, does not determine who shall serve as their representatives on a commission. Few groups are so constituted that the President does not have a number of choices. The type of people required are those one would characterize as responsible and sound—those who want to get the job done, who are dedicated to public service, those who are not fanatics but are willing to compromise when necessary to achieve a more important goal—in short, people whose very virtues can be used against them.<sup>62</sup>

The Crime Commission's report illustrates how successful the President can be in achieving unanimity, even among nineteen people of diverse backgrounds and interests. Little over six pages was required to set out the "additional views"<sup>63</sup> of individual members respecting a report 300 pages in length and containing over 200 recommendations affecting every aspect of criminal justice administration. As one who has recently attempted to collaborate with a joint author in producing a book on but one small aspect of the problems under view by the Crime Commission,<sup>64</sup> it is incredible to me that essential agreement could have been reached in a mere

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Lewis F. Powell (representing the organized bar), Robert G. Storey (representing the bar), Mrs. Robert J. Stuart (representing women and the League of Women Voters), Robert F. Wagner (representing mayors), Herbert Wechsler (representing law professors), Whitney M. Young, Jr. (representing Negroes), and Luther Youngdahl (representing the federal judiciary). *Presidential Commission*, 21 CONGRESSIONAL Q. ALMANAC 630 (1965).

61. See note 56 *supra*.

62. See Silver, *Crime American Style: The President's Commission*, COMMONWEAL, April 21, 1967, at 141: "The composition of the commission itself, a carefully balanced body consisting of policemen and laymen of varying sociological complexion, insured that certain areas would not be analyzed." MacKenzie, *The Compromise Report on Crime*, NEW REPUBLIC, Feb. 4, 1967, at 15, 16:

Byrne, the tough prosecutor, and Luther Youngdahl, the liberal federal judge, are natural foes on civil liberties matters, but they agreed that the commission should not seriously consider the question of taking out from under the criminal law homosexuality involving consenting adults, effectively vetoing the idea.

63. REPORT 302-08.

64. D. OAKS AND W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* (1968).

eighteen months among nineteen people on 200 recommendations. I find some consolation in the difficulties in reaching agreement experienced by the Wickersham Commission in its report for President Hoover on the enforcement of Prohibition laws. That report included separate statements by all eleven commissioners which in aggregate equalled in length the report itself.<sup>65</sup> Of this disagreement Chairman Wickersham said, "as is probably inevitable when eleven people of different antecedents and temperaments endeavor to agree on a contentious subject [this report] is more or less a compromise of varying opinions."<sup>66</sup> That such conflict, or at least its manifestation, has proven less than inevitable is probably a tribute to Nicholas Katzenbach, chairman of the current Commission, who as *Life* put it, "worked hard for unanimity . . . because the report [was] meant not only to inform the public but also to support Administration crime bills . . . ."<sup>67</sup>

Even though it must be presumed that the commissioners, having agreed to serve, wanted to produce a useful report in the time available, one may wonder what magic the Administration used to induce virtually complete unanimity. The report would have been, if anything, more useful had there been more disagreement, had the public been made privy to the disputation that went on behind the Commission's closed doors.

Obviously the Administration may choose whether to play up a commission's findings, or to ignore them. A commission's report is made to the President. He can publish it or not, and, if he does, he can choose the time and place to assure maximum or minimum public attention. The President's power to make an unsatisfactory report disappear is not without limits. The commissioners may have enough independent standing to attract the press, regardless of the President; or his own advance publicity may make discreet burial impossible. Still there is something of a usable veto power, and it has been exercised.<sup>68</sup>

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65. Report and statements each ran about eighty pages.

66. WICKERSHAM REPORT 161.

67. Stolley, *A Crisis Worse Than Anyone Imagined*, LIFE, Feb. 24, 1967, at 24, 25.

68. The report of the National Commission on Technology, Automation, and Economic Progress was ignored by the administration, apparently because it was too controversial. Its publication was announced in an off-hand manner and under circumstances that would tend to restrict press coverage. Bell, *supra* note 57, at 4-5. A report to a presidential task force, chaired by Joseph Pechman of the Brookings Institution, which was said to approve the Heller plan for the return to the states of a portion of federal income tax revenue, was not even published, perhaps because the suggestion had been taken up enthusiastically by Republicans. M. Ostrow, *Federal Tax Sharing with the States*, Dec. 1967 (unpublished student work at Washington University). The U.S. Office of Education recently rejected a contract research report

For the threat of burial to have the effect of producing a favorable consensus, the commissioners had to have reasons to want the report published and supported by the President. They had the very best reasons—idealism and money. The liberals wanted their theories of the cause and cure of criminal behavior and their ideals of judicial administration embodied in a presidential program. The representatives of the criminal justice establishment wanted federal support, financial and moral.<sup>69</sup>

While I am sure that many of the Commission's recommendations are of value, I would have more confidence in them had they been recommended by some person or agency other than this Commission. We may infer from the Commission's organization and the short time it had to work that each commissioner had every reason to avoid looking closely at those recommendations of his fellows that

at least in part for making unfavorable mention by name of educators and politicians. Wyant, *U.S. Rejects City School Critique*, St. Louis Post-Dispatch, Nov. 16, 1967, at 1-C, col. 3. More recently, Mayor Lindsay of New York has repeatedly urged action on the recommendations of the Kerner Commission, whose report the President seems to be trying to forget.

By way of contrast, SOCIAL AND ECONOMIC CONDITIONS OF NEGROES IN THE UNITED STATES, a recent joint report of the Departments of Commerce and Labor was issued by the White House with considerable fanfare, including a personal send-off by the President . . . . Not only was the President on hand to kick it off, but staff members of the President's Commission on Racial Disorders were tipped to the report as the latest word on the matter. Not only was the press specially alerted for the report, but a copy was rushed up to one prominent academic figure who was supposed to use it to impress business men assembled in a conference on welfare called by Gov. Rockefeller.

Kraft, *The Administration and the Negro*, St. Louis Post-Dispatch, Nov. 3, 1967, at 3-B, col. 1. The report, says Kraft, tells "us almost nothing new about the Negro," comparing it very unfavorably with the Moynihan report. "No doubt there is nothing very startling, or even important, about one more mediocre federal study. What is startling and important is that the White House thought it was putting out a first-class piece of work." *Id.* Kraft concludes that the contrast between the fanfare for and merit of the report evidences the Administration's inability to appreciate or make use of sophisticated information.

Leonard C. Lewin, describing the presumably fictional debate over publication of the presumably fictional *Iron Mountain Report*, said:

Those who argued the case for keeping the Report secret were admittedly motivated by fear of the explosive political effects that could be expected from publicity. For evidence, they pointed to the suppression of the far less controversial report of then-Senator Hubert Humphrey's sub-committee on disarmament in 1962. (Subcommittee members had reportedly feared that it might be used by Communist propagandists, as Senator Stuart Symington put it, to "back up the Marxian theory that war production was the reason for the success of capitalism.") Similar political precautions had been taken with the better known Gaither Report in 1967, and even with the so-called Moynihan Report in 1965.

Furthermore, they insisted, a distinction must be made between serious studies, which are normally classified unless and until policy makers decide to release them, and conventional "showcase" projects, organized to demonstrate a political leadership's concern about an issue and to deflect the energy of those pressing for action on it.

REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE xiii (1967).

69. "No matter how the crime problem is sliced in Washington, it must come out pork . . . ." MacKenzie, *supra* note 56, at 16.

were not obviously objectionable, and to expect the same consideration in return. There were enough problems in dealing with disputed issues. To maintain the front, it was necessary that everyone have a thoroughly unjustified optimism in the usefulness of everyone else's projects; hence the optimistic glow of the Commission report. To paraphrase Robert Warshaw,<sup>70</sup> unfortunately today we are likely, almost by reflex, to take pessimism as a measure of honesty. When James Q. Wilson, who was one of the Commission's advisors, says that there is little we can do to reduce crime short of locking up all juveniles,<sup>71</sup> he is inherently more believable than is the Commission when it introduces its concluding chapter with the statement, "America can control crime."<sup>72</sup>

The intellectual costs of consensus can be measured in areas where we know that there was conflict. By seeing how the Commission treated issues on which the President was known to have strong views with which at least some commissioners disagreed we can get an idea how limited is the intellectual contribution of the Commission report.

President Johnson is known to be a strong opponent of legalized wiretapping and bugging. Apparently he feared that the Commission would not agree with him, for he attempted to keep the Commission from considering the subject.<sup>73</sup> But the Commission took its own head and after discussion recommended that "Congress should enact legislation dealing specifically with wire-tapping and bugging"<sup>74</sup>—a position hardly likely to trouble the President. This does not mean that the President misjudged his commissioners' biases. To the reader who is attentive, this neutral recommendation comes as a surprise. A page earlier the Commission clearly implied its support

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70. See the opening quotation of this Article.

71. Wilson, *Crime in the Streets*, THE PUB. INTEREST, Fall 1966, at 26, 34.

72. REPORT 279.

73. See MacKenzie, *supra* note 56, at 15:

Ramsey Clark, the acting attorney general, told the commission in November that bugging is one of those "red flag items" that gets people mad and diverts attention from root solutions to the crime problem. Clark and Chairman Katzenbach knew that there was very little the commission could tell LBJ about wire tapping and bugging; he hates it and he wants Congress to make most of it even more illegal than it is now. They knew then, but most of the commissioners did not know, that the Justice Department was tracking through its criminal docket to purge it of prosecutions tainted through eavesdropping-by-trespass. But bugging is an issue hard to dispose of cleanly once it reaches the floor. How Katzenbach and Vorenberg [James Vorenberg, the Commission's executive director], another anti-eavesdrop man, managed to let the issue reach showdown proportions [this was written before the report was published] in the commission is still an untold story. Very likely part of the explanation is Katzenbach's view that the wiretap laws could use some "clarification" [clarification is all the report finally recommended] and Vorenberg's refusal to leash the gung-ho section of his staff.

74. REPORT 203.

for the use of electronic eavesdropping devices in crime fighting.<sup>75</sup> The less attentive reader is likely to be taken in by the topological device of separating the forthright opinion from the insipid recommendation. Between the two is a very long page of text discussing bugging as a threat to privacy and the ambiguity of present law;<sup>76</sup> the latter provides a seemingly logical bridge to a recommendation which, if it calls for anything, calls for clarification.

The Commission's views on recent Supreme Court decisions restricting police activity were similarly muted; one is tempted to say encoded. Johnson in setting up the Commission had called upon it to defend the Court.<sup>77</sup> This it apparently could not be brought to do, at least not beyond the most minimal and reluctant obeisance.<sup>78</sup> The solution was to make no recommendations referring directly to the wisdom of Supreme Court decisions; a conservative minority was left to raise the issues politely in an additional statement. That statement<sup>79</sup> forms no part of the Commission's official report but is described by its authors—surprisingly in view of the original presidential mandate<sup>80</sup>—as a venture beyond the bounds of the Commission's responsibilities.<sup>81</sup>

That is the end of the matter as far as the Commission's official position is concerned; nothing which can clearly be taken as the voice of the Commission says anything to the contrary. A commission report, however, operates on several levels. The highest is that of the black-letter recommendations, which may be compared to the legislative text, and to which it may be assumed the commissioners, after close attention, for one reason or another agreed. The next

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75 The Commission quoted with obvious approval the testimony of a New York district attorney to the effect that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime." It followed this quote with its own statement that "[o]nly in New York have law enforcement officials achieved some level of continuous success in bringing prosecutions against organized crime." REPORT 201.

76. REPORT 202-03.

77. See text accompanying note 45 *supra*.

78. It conceded the propriety of restricting, after its exposure by the Wickersham Commission, the use of the third degree, but explicitly approved no other restrictions (REPORT 93), refused to take a position on *Miranda* (REPORT 94), and conceded that the problem was one of striking a balance and that the police must be controlled, but centered its discussion of these issues around a paragraph that dilated at surprising length how police practice over the last thirty years had been circumscribed (REPORT 93). The result may have satisfied all the competing interests on the Commission, but it can hardly satisfy the reader, unless he can be satisfied by reading a statement in which he can find expressed his own opinion along with its opposite.

79. REPORT 303-08.

80. See text accompanying note 51 *supra*.

81. REPORT 308.

level is the text of the report, in which the recommendations are set. The text, which can be compared to congressional committee reports, may or may not be useful in explicating the recommendations, for it is not entirely clear whether it speaks with the voice of the commissioners or the staff. Certainly the commissioners' responsibility for the text is less complete than it is for the recommendations. Finally there are supplemental reports;<sup>82</sup> these appear most often to be the work of advisors—and can be compared with the transcripts of legislative hearings—for which the commissioners have little or no responsibility.

It is in the chapter on the police<sup>83</sup> that one would expect to find the Commission making recommendations relating to the Supreme Court's decisions on police procedure, but there is none. The text of that chapter, like that of the discussion of wiretapping, is not entirely consistent with the lack of any official recommendation. Rather, the chapter is replete with secret messages from somewhere inside the political cookie factory. Apparently a great deal of aggravation was sublimated in the suggestion that the states, by legislation and formal administrative procedure, anticipate the Court's expected review of the stop-and-frisk problem.<sup>84</sup> (The Court has now handed down a decision on the stop-and-frisk issue.<sup>85</sup>) By taking such action states could establish something of a record of necessity and fair administration so that court review would proceed "under more enlightening circumstances."<sup>86</sup> That speed was being urged to avoid what somebody obviously considered the threat of yet more ill-considered Supreme Court decisions is a point that can be gathered only by reading between the lines.<sup>87</sup> In the same vein is the sug-

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82. In addition to the principal report there are nine supplemental reports, giving additional material on the major subjects considered by the Commission.

83. REPORT 91-123.

84. The need for legislative action to pre-empt the courts is discussed at REPORT 93-95; particular reference to stop-and-frisk laws is made at REPORT 94-95. The need for administrative guidelines for police action is discussed at REPORT 103-06. None of this discussion explicitly criticizes the Court. Rather, the responsibility is put upon state legislators and local police administrators for their failure to communicate their needs to the Court. The police are put in the position of excusing themselves for having slipped their toes under the foot of the Supreme Court. The official recommendations that administrative police guidelines be formulated is justified on a whole raft of grounds, of which aid to the Court is but one. Most of the others are silly, *e.g.*, the hopeful suggestion that the guideline-producing police administrator and his staff would act like a corporate board of directors. Individual policemen would have removed from their shoulders the burden of making ad hoc decisions. Policemen would be forced "to ponder the nature of deterrence." REPORT 106.

85. *Terry v. Ohio*, 36 U.S.L.W. 4578 (June 11, 1968); *Sibron v. New York*, 36 U.S.L.W. 4589 (June 11, 1968).

86. REPORT 95.

87. The tactic calls to mind the unsuccessful attempt of James Vorenberg, the Commission's director, to formulate standards extrajudicially through the A.L.I.

gestion that there may be loopholes in *Miranda* that police and state legislatures could begin exploring.<sup>88</sup>

But whose messages are these? They may come from disaffected staff members who are wont to see what they can put over on their superiors, garnering whatever solace for intellectual prostitution can be had from whispering, "I am Lazarus, come from the dead, come back to tell you all, I shall tell all." Or maybe it is the commissioners who "have bitten off the matter with a smile . . . squeezed the universe into a ball [and rolled] it toward some overwhelming question. . . ."<sup>89</sup>

To put the question of authorship demonstrates the absurdity of the game. In doing so we concede that the significance of the report lies not in what is said but rather in who said it, and that the question to be asked of a commission report is not the wisdom of its proposals but the intent of its authors.

On one issue in which the President was interested the Commission made it quite clear that there was disagreement. Johnson had publicly supported civil commitment of narcotic addicts in the same message in which he announced that a Crime Commission was to be appointed.<sup>90</sup> Despite Johnson's having gone out on a limb, the Commission took the position on civil commitment that "results are still too fragmentary, and experience still too limited, to permit anything more than tentative judgments."<sup>91</sup> It followed that remark with a full page describing the arguments pro and con.<sup>92</sup> By the time of publication the issue was moot, for the bill had been passed.<sup>93</sup>

The frank admission of disagreement and inadequate information on this issue betrays the defeat of intellect by politics, and of virtue by advantage, to which a presidential commission is susceptible. Lack of consensus is permissible where the issue involved is politically unimportant; on issues where feelings run high, no matter how reasonable the dispute that engenders those feelings, disagreement must be submerged for the benefit of the program, for unanimity.

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Model Pre-Arraignment Code. See MacKenzie, *supra* note 56, and Justice Harlan's dissent in *Miranda* in which he called attention to efforts underway outside the Court to solve the constitutional problems posed during the pre-arraignment period. *Miranda v. Arizona*, 384 U.S. 436, 523-24 (1966).

88. REPORT 94.

89. T. S. ELIOT, *The Love Song of J. Alfred Prufrock*, in COLLECTED POEMS 11, 15 (1930).

90. President Johnson's March 8 Message on Crime, 21 CONGRESSIONAL Q. ALMANAC 1394, 1395 (1965).

91. REPORT 228.

92. REPORT 229.

93. 28 U.S.C. §§ 2901-06 (Supp. 1966).

## IV. WILL THE REAL CRIMINALS PLEASE STAND UP

Though President Johnson dissociated himself from the Goldwater explanations for the crime problem, he never questioned Goldwater's assumption that the problem had suddenly reached such dramatic proportions as would justify declaring an informal national emergency. He did not list among the duties assigned to the Commission—in either his congressional message<sup>94</sup> or the executive order by which he created the Commission<sup>95</sup>—the task of measuring the volume of crime. He was satisfied, apparently, with his own statement that the crime rate had doubled since 1940 and since 1958 has been increasing five to six times as fast as the population growth.<sup>96</sup>

It was, of course, desirable that there be a crime crisis. If it is hard to prove that it exists, it is at least as hard to prove it does not.<sup>97</sup> Johnson could not easily stand up to the nation and say, "Folks, you've all been mistaken. Them newspaper writers been misleadin' you again." It would be hard, even if he was right. And the easier (if not the correct) road for Johnson was also the more attractive for his commissioners. There would have been no medals to be handed around without a war to wage.

The fact that all participants stood a step closer to realizing many personal goals, albeit idealistic ones, if the crime problem had reached crisis proportions does not prove that there has been no crime increase. Yet surely it gives us reason to look closely at what the Commission has to say on the subject, for the Commission, though not directed to do so, felt compelled to ask how much crime there is and whether there is more now than there used to be.

What constitutes a crime crisis should be an objective question. A crime crisis would consist in an increasing crime rate, caused by factors not likely to disappear in time, where it is likely that the increase will be of sufficient magnitude to destroy or significantly modify the social order and where it appears that these changes will occur unless prompt action is taken. A crisis does not exist because people have had called to their attention a problem that has existed unnoticed for a long time. Nor does a crisis exist simply because a transitory cause intensifies for a time some recognized evil. But while the question is theoretically objective, in practice it is not.

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94. See note 90 *supra*.

95. See note 51 *supra*.

96. Message, *supra* note 90, at 1394.

97. On the inadequacy of statistics on such matters, see D. OAKS & W. LEHMAN, *supra* note 64, at 18-27 (1968).



We cannot know with certainty, in the present state of the social sciences or of statistical recording, whether the tests of a genuine crisis have been met. We must each make our own judgment from what limited information is available.

Whatever standards we apply to define crime crises, we must begin with a seemingly simple calculation: the total amount of crime today compared with the amount extant at some base point in the past. To obtain the figures we must depend upon police reports, and these reports show, indeed, a steady increase in the number of crimes committed since the Second World War. But that does not answer the question. For one thing, we know that police reports are inaccurate. Unfortunately, we don't know how inaccurate, but there are a variety of reasons for supposing that police reports tend to exaggerate the crime increase.

The Commission considered in some detail the distortions in our perception of the crime problem that are produced by fuller crime reporting.<sup>98</sup> But, having discussed the problem, the Commission continued to behave as if the only possible interpretation of the data was that the needed crime crisis exists. We shall explore for the balance of this section, in the light of what is known of crime statistics, the ambiguity of that "crisis."

The Commission tells us that there is everywhere a great reservoir of criminal acts that are never reported to the police.<sup>99</sup> It is possible, however, and even likely, that as the public has become more sensitive to crime its members have reported to the police a higher percentage of the crimes of which they are aware. This is thought to be particularly true among minority group members, who have long experienced high crime rates, but who in the past have been unable or unwilling to complain.<sup>100</sup> It is also possible that the automobile has brought some of those, who in earlier days would have confined their criminal activities to the ghetto, into residential areas where the likelihood of a report to the police is quite high. Besides both poor and rich feeling more reason to complain, it may be that today more people of all classes feel the police can and will do something about crimes; it seems reasonably clear that police are on the whole more professional and less corrupt today than

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98. REPORT 25-27. A further and more pointed presentation is provided in Wilson, *supra* note 71.

99. REPORT 20-22.

100. See REPORT 20-22. See also Rainwater, *Open Letter on White Justice and the Riots*, TRANS-ACTION, Sept. 1967, at 22, 26-27; Kraft, *Ghetto Hoodlums and Police*, St. Louis Post-Dispatch, Aug. 17, 1967, at 3-E, col. 1.

they have been for a very long time.<sup>101</sup> Finally, widespread insuring of personal property encourages people to report theft and property damage to the police<sup>102</sup> (and inspires at least some people to support phony insurance claims with equally phony police reports).

It is also possible that the police are reporting more of the criminal acts they know about. A change in police reporting practices may come about for a number of reasons: a police department, having under-reported for years in order to protect a city administration's reputation, may begin to look foolish when the crime rate it reports falls far below that reported by cities of comparable size.<sup>103</sup> Eventually, someone demands "accurate" statistics and a large and abrupt jump in the crime rate appears almost overnight. Moreover, as policemen become more professional they are much more likely to make written reports of all incidents coming to their attention; such reports provide the basis for fuller tabulation.<sup>104</sup> Finally, it may be that the police report more crime because as community standards have changed so have those of the police. Things may look serious to the policeman of today that would not have concerned him ten, twenty, or thirty years ago. The Federal Bureau of Investigation (FBI) in tabulating crime tries to make compensation in its reported national totals when a city's police force suddenly begins fuller reporting—a not very satisfactory

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101. The reason most frequently given by respondents in the Commission's study of unreported crime for the victim's failure to report is his belief that the police cannot or will not do anything about it. REPORT 22. The Commission did not consider whether there was any trend in this belief, any more than it considered whether there was a trend in failure to report generally. See note 116 *infra*.

Claude Brown, in *MANCHILD IN THE PROMISED LAND* 405, had been looking for Skippy, a man who had knifed Claude's mother: "I never found Skippy either. The police found him. That was surprising, that the police would really find somebody—that they'd really look for somebody for two weeks—for having hurt somebody else in Harlem. I guess Harlem was changing."

102. See REPORT 27. In discussing insurance, the Commission fails to note the possibility of an increase in phony crime reports entered with a view to collecting insurance. The point is made by Wilson, *supra* note 71, at 27. The Commission suggests that the high proportion of all auto thefts that are reported to the police is evidence of the importance of insurance in getting people to report. There seem other sufficient explanations for the unusual rate at which auto theft is reported: the value of automobiles (it is low value thefts that go unreported); the high rate of recovery, if not conviction (it is pessimism that discourages complaints); and the utility and importance of the auto in most people's lives.

103. See the Commission's comparison of New York and Chicago crime rates, REPORT 26.

104. This does not necessarily mean more accurate. A policeman has a great deal of discretion as to what he will report as crime. In many of these instances there is no correct answer, but a consistent definition can markedly affect the impression created either of the success of the police in solving crime, or of the crime rate. D. OAKS & W. LEHMAN, *supra* note 64, at 20-22 (1968).

process<sup>105</sup>—but even this procedure cannot compensate at all for the changes that take place gradually, either in the pattern of citizen reporting to the police or of police reporting to the FBI.<sup>106</sup>

Despite all doubt about the accuracy of police statistics, no one questions that there has been a significant increase in the absolute number of crimes committed in America over the last twenty-five years—if only because there are more people in America. And though the problem of exaggeration becomes more difficult in assessing percentages, few would seriously doubt that the number of crimes committed has increased at a faster rate than the increase in the number of people. Few would doubt that there are now more crimes committed per 100,000 population than there were in 1940. That, in a nutshell, is the crisis. That, however, is not the end but rather the real beginning of the inquiry.

There is very good reason for believing that there has been an increase in the rate of crime. If there were not such an increase it would mean that our society had grown surprisingly more moral in the last twenty-five years. Crime, we know, is committed in disproportionate amounts by certain groups in our society, most notably by young persons. Because of the post-war baby boom, the proportion of young people in the population has been increasing dramatically—fast enough to change the whole tenor of our society. Thus, if the rate at which young people commit crime remained exactly the same over the last twenty-five years, the crime rate for the society as a whole would have to rise. If the crime rate did not go up, it would mean that young people today are committing crimes much less frequently than ever before. This conclusion seems so implausible as to justify our belief that police statistics are accurate in evidencing at least some fairly large increase in the crime rate.<sup>107</sup>

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105. The discounting method is described in REPORT 26 and in more detail in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 211 (1967).

106. An additional factor influencing the interpretation of crime statistics (though not necessarily the total volume of crime) is inflation. The point at which the value of a stolen article will support a felony rather than a misdemeanor charge has remained unchanged, while the value of articles has gone up (or the value of money down). The FBI's figures on theft of articles valued in excess of \$50 are subject not only to reporting but to monetary inflation. See S. ELKIN, A BAD MAN 161 (1967):

And I'll tell you something else. Science in its development of transistorized equipment has made our problem tougher. A thief's armload today is worth more than a thief's armload was yesterday, and a thief's armload tomorrow will be worth even more. I foresee a time when the thief's armload will be approximate in value to the thief's truckload of yesteryear. *That's* what science has done with its vaunted miniaturization.

107. The recent migrant to the city slum raises exactly the same sort of problem as does the juvenile. The inner city poor constitute another demographic subgroup—a subgroup with a high overlap with the subgroup of the young—that is responsible

At this point, the problem of the inflation of the absolute number of crimes becomes crucial. If the crime rate has increased only as rapidly as we would expect, considering the increase in the number of juveniles, our situation looks rather different than if the crime rate is increasing significantly more rapidly than expected. There is disagreement on this issue. The Commission is prepared to allow that about half of the crime increase can be explained by demographic changes.<sup>108</sup> That means that the other half of the increase is due to our becoming somehow worse as a society. Others believe that almost all the increase in the crime rate can be attributed to demographic changes.<sup>109</sup> If that is true, we are no worse a society than twenty-five years ago. The crime crisis boils down, not to our

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for a disproportionate amount of crime. Like the subgroup of the young, that of the inner city poor may be in process of transit to another status. As early as the Wickersham Report it was clear that the ethnic groups that had graduated from the ghetto into the upper world lost with that movement a propensity to commit crime that some had thought genetic. That fact was determined through a commission financed study conducted by Clifford Shaw and John McKay. 2 WICKERSHAM REPORT 338-39 (1931). The absorption of Negroes by the upper world may well be slower than that of other groups (as it certainly has been so far), for there is no group pushing in to replace Negroes at the bottom.

108. REPORT 28. The Commission's figure takes into consideration total population growth and the growth in the proportion of young people. While the Commission says these changes could account for 40-50% of the change, the figures on which the Commission bases its conclusion attribute 49% of the change to these two factors. PRESIDENT'S COMMISSION ON CRIME AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 209 (1967). In the same appendix, *The Prediction of Crime From Demographic Variables: A Methodological Note*, *id.* 207-10, the unidentified author attempts to determine the impact of other demographic variables—place (urban-rural), sex, and race—in various combinations. Some combinations, because of inadequate data, could not be computed. It was impossible, for instance, to compute the total effect of race, sex, and age. *Id.* at 208. A combination of changes in population, race, and place could account for a 46% increase in crime, *id.* at 209. The combined effects of changes in population and age account for the 49% increase mentioned. Obviously, the combination of race and age would account for more. The unidentified author concludes that "much of the change in the volume of crime appears to be accounted for by these demographic changes. If it were also possible to get arrest information for each sex and age group within each race and place category, the proportion accounted for would undoubtedly be increased considerably." *Id.* at 209. In implying that this study supports a conclusion that as little as 40% of the increase can be attributed to demographic changes, the Commission acted dishonestly. The anonymous author's calculations incidentally do not include any discount in crime figures for inflation attributable to reporting changes, except such as the FBI makes in its Uniform Crime Reports. See text accompanying note 105 *supra*.

109. Wilson, *supra* note 71, at 31-32 reports a study, SPACE GENERAL CORPORATION, PREVENTION AND CONTROL OF CRIME AND DELINQUENCY (1965), made for the California Youth and Adult Correction Agency. By calculating crime by age group "there is hardly any increase in the rate at all over the period 1960-1965. And if we consider violent crimes (murder, rape, robbery, and aggravated assault) instead of all 'serious' crimes, the increase all but disappears." Wilson, *supra* note 71, at 31. Wilson concludes, "For the present, the only sure way we know of fighting crime is birth control." *Id.* at 32.

having gotten worse, but to our not having gotten better fast enough—to our failure to improve rapidly the moral attitudes of our young people. We could determine which of these conclusions is correct only if we had accurate figures on the absolute number of crimes. Without accurate figures, our judgment on the question of whether we have gotten worse depends upon how much we choose to discount police reports in light of the known but immeasurable forces inflating them.

All the rhetoric of the Great Society aside, it is a rather different thing to assert that as a society we have fallen away from standards that had been earlier attained than to assert that we must become suddenly, say, twenty-five per cent better than we ever have been before to solve the crime problem. The possibility of return to a previous height is a little less problematical than that of achieving a height not before attained. Moreover, if improvement of the society, rather than staving off a rout, is our goal, revolutionizing the criminal justice system seems to be one of the least direct paths toward achieving it. A revolution in street sweeping would be arguably almost as helpful.<sup>110</sup> If, on the other hand, it is true that we are getting worse, that in prosperous middle age our national morality has come unhinged, we could conceivably decide that we want to be saved from ourselves regardless of the cost in otherwise unpalatably efficient and professional policing, distasteful invasion of privacy,<sup>111</sup> and inhuman remorselessness in prosecution. These are

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110. The question of the usefulness of changes in the criminal justice system is considered at greater length below. See text accompanying notes 128-37 *infra*. The first proposal concerning the system that one would consider would be to increase its capacity in the light of its seemingly inevitable increase in business. We might decide, however, that because the demand will peak out and presumably decrease eventually, we don't want to overbuild, *i.e.*, build a system that will exceed demand in more normal times. The problem is of the same type as trying to decide how many subway cars to buy. The decision as a practical matter can be neither so few that all seats will be filled at mid-day, nor so many that no one will stand at rush hour.

111. With all the modern gadgets, "The state of the art [of scientific crime detection] today is such that we can provide a fantastic amount of security to people if they are willing to put up with it." A statement of Arnold Sagalyn, "the Treasury Department's director of law enforcement," quoted in Anderson, *Why Crime Pays*, *PARADE*, Aug. 27, 1967, at 6, 7. The article describes closed circuit television monitoring of buildings against burglary, odor sensors that might allow detection from the outside of buildings of marijuana or people on the inside, and an auto surveillance system that could detect not only theft but speeding violations. The author concludes, "Clearly, the public must make some sacrifices if crime is not to rage completely out of control." *Id.* at 7. A report, drafted by Professor Louis Sohn for submission to the United Nations by the Commission To Study the Organization of Peace calls for the creation of an agency to "study the implications of scientific and technological development for human rights and fundamental freedoms . . ." Among other items, the report was concerned with electronic surveillance and the proposed national data bank. *St. Louis Post-Dispatch*, Sept. 5, 1967, at 10A, col. 1.

the kinds of policy issues that depend on the vital but unresolved statistical questions.

Our factual situation in respect to crime may then correspond, as far as the Commission or anyone else knows, to either of these models, to a combination of them, or perhaps to some others.<sup>112</sup> If, in the face of these analytical difficulties, the Commission had made clear at least some of the choices open to society and the ambiguity of the evidence on which those choices must be made, it would have done a conscientious and commendable job, opening for reasonable discussion the choices that face us.

Unfortunately, the Commission did no such thing. It confessed its inability to decide whether Americans are more criminal somewhere in the middle of the chapter on criminal statistics.<sup>113</sup> Throughout the rest of the text, however, the Commission acted as if it had discovered that Americans are today more criminal than ever before. A crisis mentality pervades the work, exemplified by the introductory statement that "[t]he criminal justice system is faced with too urgent a need for action to stand back for a generation and engage in research."<sup>114</sup> The Commission's commitment to one side of an argument it admitted it could not settle is evidenced in a variety of ways:

—The summary preceding the report, which is all that many will read, fails to mention the statistical reservation but emphasizes one study showing that almost everyone has committed serious crimes

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112. The two models so far constructed are by no means the only possible ones. Let me briefly suggest two others. One is that many people have become convinced there is more crime and have changed their life patterns accordingly. This, it will be seen immediately, may in part be a self-fulfilling prophecy, for to the extent that the streets are abandoned by the decent and law-abiding they are available for *anschluss* by the criminal imperialists of the slum. I consider it a very plausible argument that if there has been any increase in crime it is due, via this mechanism, to more "accurate" crime reporting. If the problem is that people believe there to be more crime, we have yet another possible policy choice: the appearance of doing something to fight the supposed crime increase. A doctor would call such medication a placebo. Even if a real increase in crime followed an imagined increase, the placebo would still solve the problem by returning the streets and parks to the law-abiding.

Another model would assume that people in our society have become increasingly intolerant of crime, or that urban society has become too delicate and refined a mechanism to withstand the levels of crime accepted in the past as normal, though not desirable. These two statements may simply be different ways of saying the same thing—that as people get closer together they must place more reliance on the absence of criminality in their fellows, else, else—well, else they will have to expend too high a proportion of their time and energy worrying about the safety of themselves and their property. Not wanting to spend so much time, they worry and urge upon the institutions of the state that these institutions become more zealous and effective in fighting crime.

113. The critical reservations are expressed in point 3 of the Commission's conclusions on the amount and trend of crime. REPORT 31.

114. REPORT 13.

and another showing that there is a great volume of crime no one ever reports.<sup>115</sup>

—The detailed description, in the text, of the study of unreported crime leaves the clear implication that failure to report is a new phenomenon, and hence that the crisis is even greater than reported crime would make it appear.<sup>116</sup>

—Finally, if the crime increase is generational, no explanation is needed for it beyond population statistics. The Commission explains the increase in crime as a symptom of moral and social decay, thereby clearly evidencing its psychological dissatisfaction with the demographic analysis that it was unable to reject intellectually.<sup>117</sup>

That my concern with the Commission's approach to the volume of crime is not petty is evidenced by *Life* magazine's article on the report, which was headed "A Crisis Worse Than Anyone Imagined."<sup>118</sup> In support of that assertion *Life* offered the evidence of the Commission's study on unreported crime.<sup>119</sup> It is probably upon this article that most reading Americans depended for their knowledge of the Crime Commission report. It was the horror stories that

115. See REPORT at v.

116. See REPORT 20-22. "Although the police statistics indicate a lot of crime *today*, they do not begin to indicate the full amount." *Id.* at 20 (emphasis added). "These surveys show that the actual amount of crime in the United States *today* is several times that reported in the U[niform] C[rime] R[eport]." *Id.* at 21 (emphasis added). Neither of the *today's* are necessary and there is nowhere a suggestion that the failure to report may have been common in the past, perhaps, as far as the Commission knows, even more common than it is now. It may have come as a shock to the commissioners that so many people fail to report crime. (The Commission was easily surprised by the ordinary behavior of ordinary people. "Surprisingly, 23 percent [of neighborhood business owners] were unable to give any estimate at all of the amount of their losses due to shoplifting." REPORT at 43. Personally, I was dismayed that 77% of small merchants would keep inventory records adequate to betray how badly they'd been done. It's like the wife putting a notch in her bed-post every time her husband's been unfaithful—a sort of response that would be considered unhealthy by every lovelorn columnist I've read. The Commission may have been surprised but its misrepresentation of the significance of the unreported crime survey was unforgivable.)

117. An outline of the Commission's causal analysis will be found in REPORT 5-6. It includes such notions as the following:

An abundance of material goods provides an abundance of motives and opportunities for stealing . . . .

. . . .

. . . [P]arental, and especially paternal, authority over young people is becoming weaker. . . . The community's social institutions have so far not found ways to give young people the motivation to lead moral lives; *some of them have not even recognized their duty to seek for such ways.* . . . [There is an] enormous gap between American ideals and American achievements . . . .

. . . .

A city man is often . . . socially isolated from his neighborhood and therefore incapable [sic] of being controlled by it.

. . . .

[N]o system . . . will rid a society of crime if there is not a widespread ethical motivation . . . . [Emphasis added.]

118. LIFE, Feb. 24, 1967, at 24.

119. *Id.*

were ultimately conveyed to the public, not the more subtle statistical reservations that raise the question of whether the horror stories were justified. The horror stories have had their effect. The organized bar, for instance, has swallowed the Commission report hook, line, and sinker.<sup>120</sup>

#### V. WHAT'S THE PROGRAM?

In a way, it is unfair to respond to the Commission that there may well be no crisis. After all, it is desirable to reduce crime no matter what its present level. And some activities may be worth undertaking, though they have no measurable effect on the crime rate, simply in the name of justice, humanity, knowledge, or economy. But if there is no crime crisis we can consider proposals a little more carefully before acting upon them. If the world has ever been as we find it now, it will not disintegrate while we mull a little longer the question of its improvement. Whatever the force of the argument that we must move against present evil, though we move in ignorance,<sup>121</sup> that force is adequately met by examples such as the sanitation system that spreads disease,<sup>122</sup> the housing program that removes the roof from over the poor man's head, the minimum-wage law that puts him out of work, and the consumer credit law that drives him to bankruptcy.<sup>123</sup> It is not better in the fire than in the frying pan.

If the reader will concede that, absent a crisis, engaging in thought is an appropriate precursor to taking action, he ought to concede the same even if he thinks that there *may* be a crisis. The argument is the same unless we are reasonably sure that our society is about to collapse in a whimper of decay and fearfulness. (In that event, we may be excused even for turning to witch doctors.) But the Commission makes no such case. The strongest statement that can be made with certainty is that we have some time to spend with Mercury for nights spent long ago with Venus.

It is equally true that we need not hurry if the palliatives under consideration bear no relation to the crime rate. Whether they are

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120. See, e.g., Welliver, *The President's Page*, 23 MO. BAR J. 391 (Sept. 1967).

121. The Commission poses the problem in these terms: "Crime is a continuing and urgent reality with which we must deal as effectively as we can. We cannot await final answers. The alternatives are not whether to act or not, but whether to act wisely or unwisely." REPORT 273. That statement follows by half a page the statement that, "what [the Commission] has found to be the greatest need is the need to know." *Id.*

122. See H. SPENCER, *THE MAN VERSUS THE STATE* 351 (1914 ed. combined with and published under title of *SOCIAL STATICS*).

123. See Satter, *Consumer Credit Remedies—An Evaluation*, 13 DECALOGUE J. 7 (1962).



useful and come without unacceptable costs can be considered at relative leisure—not because we scorn improvement, but because we want reasonable assurance that we are improving. But whether or not the activities commended to us may justly be undertaken for reasons other than their tendency to reduce crime, we are bound to consider the Commission's program in the terms in which it was elicited and offered: as a program for reducing crime. As a first approach to that question, we ask whether the criminal justice system is a mechanism to which we can resort with optimism in the effort to achieve that goal. It is, after all, to the criminal justice system that most of the Commission's recommendations are directed.

#### A. *An Expected Optimism*

While the Commission presented a pessimistic view of our present situation, it presented an optimistic one of the likelihood of success in controlling,<sup>124</sup> nay reducing, the incidence of crime.<sup>125</sup> (I decline to debate whether these promises can properly be attributed to the commissioners;<sup>126</sup> they will be so interpreted by the public, and the commissioners are inevitably parties to them.) This optimism was necessary if the Commission's suggestions were to be acted upon with enthusiasm and alacrity. And it goes without saying that had his commissioners equivocated on many of the recommendations they were to make, as they did on the federal civil commitment issue, President Johnson would not have been happy. After all, he wanted a program, not a confession of ignorance, even though the latter might have been more appropriate.

When the promise of improvement is first presented to the reader, it is accompanied by an "if"—"[i]f the following [seven] objectives are rigorously pursued."<sup>127</sup> The objectives include more money for the criminal justice system, more research about it, more and better people working in it, the elimination from it of injustice, more imaginative treatment of those captured in its toils, and, finally, a better society. The seventh recommendation is for citizens rigorously to pursue the other six, especially the five related to the system. The imbalance between recommendations for societal improvement and those for improvement of the system sufficiently

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124. REPORT 279.

125. REPORT at vi.

126. See text following note 81 *supra*. There is, however, internal evidence that this view is that of the Commission: "[T]he Commission is sure that the Nation can control crime if it will." REPORT at xi.

127. REPORT at vi.

reflects the attention given each in the rest of the report. The imbalance may be explained by the relative ease of fiddling with the criminal justice system; it may be explained by the interests of the commissioners and their staff; and it may be explained by the political attractiveness of dealing with crime as an institutional problem for which the citizenry is not really responsible. It certainly cannot be explained by the effectiveness of the criminal justice system as a means of reducing crime. The criminal justice system is not much of a lever with which to move the society.<sup>128</sup> To paraphrase Learned Hand: righteousness lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.<sup>129</sup> That this is more than an appealing aphorism can, I think, be demonstrated if we consider why it is that most people do not commit crime.

It cannot be true that those of us who usually behave acceptably do so out of fear of punishment; a moment's introspection should make that clear. When we avoid evil in the normal case there is no conflict at all—no desire to do evil deflects our course. If the contrary were true, ulcers, mental breakdowns, and alcoholism would be not merely endemic in our society but universal. And even when a crevice in the subconscious betrays a dark, unseemly desire, the conscious is more likely to dispose of it in terms of right and wrong (really a sensed abhorrence) than in the terms of the likelihood of criminal punishment. If the most important factor in keeping crime down is our shared feeling of propriety, we ought ask what the criminal justice system can do by way of defining and strengthening the conscience of the community.

It is clear that the criminal justice system can affect particular judgments. By defining behavior as right or wrong, the law probably influences the judgments of many, if not most, of those who are generally predisposed to obey the law. But influencing the judg-

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128. Leverage can be taken here in a mechanical sense as it is when we speak of the leverage obtained through borrowed money. The notion is related to those of dampening and amplification discussed in D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 187 (1968). Leverage is appropriate when looking at the problem from the actor's point of view. Amplification and dampening describe the problem from the point of view of the system being acted upon.

129. L. HAND, *THE SPIRIT OF LIBERTY* 190 (3d ed. 1960). Francis Allen reached a similar conclusion in *THE BORDERLANDS OF CRIMINAL JUSTICE* 59 (1964): "[I]t seems likely that the [juvenile] court's contributions to the eradication of the delinquency will be limited and peripheral." He adds, "[I]t may be true that the tendency to attribute capabilities to the court that it does not possess represents to some degree a largely unpremeditated effort to evade the necessity of accepting more fundamental and less comfortable alternatives." *Id.* at 60.

ment of the law-abiding respecting particular behavior is not the issue here.<sup>130</sup> The problem with which the Commission was concerned was that of encouraging general willingness to obey laws demanding respect for our property and persons, laws that have already been defined and accepted by the majority as right.

Can the criminal justice system do anything in this direction? Let us consider three mechanisms by which it might be supposed that the system could encourage in the society's members the notion that the law ought to be obeyed: through procedural fairness and decency, through severity and certainty of punishment, and through the treatment of those whom the system convicts.

Presumably some amount of criminal activity is occasioned by a perceived unfairness in the social order, an unfairness either to the individual criminal or to a group of which he considers himself a member. It may be that the fairness of the legal system affects the potential criminal's view of the society as a whole—that the system is the society's surrogate. However, for most people the criminal justice system is merely a relatively small element of their experience of society.<sup>131</sup> Under these circumstances the fairness of the system can affect the perception of the society as a whole only when the system creates impressions radically more or less favorable than those created by the rest of the society. This does not mean that the police, for instance, cannot come to symbolize oppression. It means, however, that improvement of police practices would not much influence the oppressed group's view of the society as a whole, or even of the police. If occasions of police misbehavior are being sought as justification for expressing discontent, they will be found.<sup>132</sup> The weight of social inequity cannot be placed upon the shoulders of the police with any reasonable optimism that they can successfully bear it.

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130. On the circumstances for success in that venture, see D. OAKS & W. LEHMAN, *supra* note 128, at 188-90 (1968).

131. Admittedly the police play a larger role in the life of the ghetto dweller than in the life of the white middle class. Still the law is a relatively small part of life.

132. See REPORT 37; Parmetter, *Breakdown of Law and Order*, TRANS-ACTION, Sept. 1967, at 13 ("The Detroit riots started in a police raid on what is known locally with self-conscious quaintness as a blind pig, an after-hours tavern."); L. Rainwater, *Open Letter on White Justice and the Riots*, TRANS-ACTION, Sept. 1967, at 22, 26-27 (emphasis added):

There is always deep conflict and ambivalence in the ghetto over the issue of police protection versus police harassment. The ghetto is a dangerous place for its inhabitants, and they would like to have firm and competent police surveillance. On the other hand, that very surveillance carries with it the danger of unjust and unseemly behavior by the police. Police rationality dictates that anyone in the ghetto is more suspect of crime than anyone in a white middle class neighborhood. From the police point of view, then, ghetto residents should be more willing to cooperate by answering questions and accepting arrest. The conflict

Improvement in the fairness of the criminal justice system, therefore, can have only marginal effect on the moral judgments of the potential criminal and hence on the crime rate unless the system is so radically improved that every police, magisterial, and judicial decision is made with the wisdom of Solomon. This result would follow if, in determining the perceived fairness of the society, the judicial system were as significant as the economic system; it is the more true since quite obviously the latter is far more influential in determining our over-all view of the social order. It follows that a relatively minor redistribution of wealth in the society or rearrangement in the opportunity structure could be expected to have a more radical effect than transfusing all the wisdom of the Supreme Court into the mind of every policeman on the streets.

Perhaps the system, through the punishment it metes out, gains the leverage with the potential criminal that it lacks in its role as surrogate for the society. But the threat of the law is a very inadequate means of preventing crime, because it depends upon the efficiency of a notoriously ineffectual system. The cost of an efficiency that would frighten people into acceptable behavior is not compatible with the conditions of a free society.<sup>133</sup> If but twenty per cent of all crimes are followed by conviction, which is probably an optimistic estimate,<sup>134</sup> a fifty per cent increase in the success of the criminal justice system would increase the conviction rate to but thirty per cent—changing the odds of being penalized from one in five to three in ten. Such a change seems unlikely to frighten a potential criminal very much, yet it would require a revolution in the criminal justice system of almost unimaginable proportions.

The threat of the law is most likely to be effective with those who, though they may be tempted to violate a specific law—evade income taxes, for instance, or drink at prohibited times or places—already respect the system generally and are inclined to obey its laws. Such people, I say on the basis of introspection, fear not so much the punishment the system on its own can mete out (they

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built into this kind of situation can perhaps be somewhat ameliorated by more integrated police forces, and by vigorous supervision of the police to see they are not impolite or overly aggressive. *But that is no real solution to the problem.*

133. See, e.g., note 111 *supra*.

134. A Commission field study indicated that 25% of a sample of 1,905 crimes reported in Los Angeles were cleared by apprehension or arrest. REPORT 247-48. If Los Angeles' experience is anything like Chicago's, half of the persons arrested never get to court. D. OAKS & W. LEHMAN, *supra* note 128, at 31-35 (1968). Further, the Commission's study of unreported crime indicates that at the very least half of all crimes are unreported. REPORT 20-22. It is at least possible that as few as 5% of all crimes result in punishment for the offender.

may even wonder how they would bear up under prison conditions), but the punishments that accrue in addition to the prison sentence because of their very participation in and acceptance of the society. They do not want to be thought of as bad; they do not want to be separated from the sort of society they have become accustomed to and value; they do not want to lose contact with their possessions. The effectiveness of a penalty imposed by a court therefore depends upon an already existing attachment to society. Thus, the more disaffected a person, the less leverage the system has on him, even through fear.<sup>135</sup>

But the question we ask is not whether the system can enforce a grudging conformity through fear, but whether the spectacle of other people being punished can induce the feeling that laws in general ought to be obeyed. Certainly one would expect that punishment too uncertain or too mild would encourage the disaffection of those otherwise disposed to obey the law. Nobody wants to be taken for a sucker. The belief that others are getting away with things may lead the law abiding to question their obligation to the system. But is the opposite true within any useful limits?

The actual spectacle of criminals suffering is a pleasure today denied most of us. At best, we may imagine the pain when, now with decreasing frequency, a capital sentence is carried out and publicized. We do not ordinarily spend much of our time empathizing in horror with the life of a prison inmate. That is not to say that there is no gratification or reinforcement in seeing someone punished. But I do not think we really need much of that kind of reinforcement.<sup>136</sup> Occasionally seeing someone getting a traffic ticket

135. This is hardly an original observation. Dickens, describing the England of 1775, said:

Daring burglaries by armed men, and highway robberies, took place in the capital itself every night; families were publicly cautioned not to go out of town without removing their furniture to upholsterers' warehouses . . . the mail was waylaid by seven robbers, and the guard shot three dead, and then got shot dead himself by the four . . . after which the mail was robbed in peace; that magnificent potentate, the Lord Mayor of London, was made to stand and deliver on Turnham Green, by one highwayman, who despoiled the illustrious creature in sight of all his retinue . . . *In the midst of them, the hangman, ever busy and even worse than useless*, was in constant requisition; now, stringing up long rows of miscellaneous criminals; now, hanging a housebreaker on Saturday who had been taken on Tuesday; now, burning people in the hand at Newgate by the dozen, and now burning pamphlets at the door of Westminster Hall; today taking the life of an atrocious murderer, and tomorrow of a wretched pilferer who had robbed a farmer's boy of sixpence.

C. DICKENS, *A TALE OF TWO CITIES* 3 (Cleartype Ed., n.d.) (emphasis added).

136. The Genovese case, text accompanying notes 13-20 *supra*, is an unusual instance of a widespread and intense desire to see a specific crime expiated through punishment. The psychology of such a phenomenon is an intriguing subject for speculation. In the usual case, however, there is no such widespread concern that punishment be meted out.

or a sentence for income tax violation seems to do the job; at least there is no evidence that people were "better" when hanging was more frequent.<sup>137</sup>

The allegiance of the bulk of the society is retained with a conviction rate that probably accounts for much less than twenty per cent of all crimes committed. Allegiance is no more retained by abstract evidence of the efficiency of the system than it is by actual awareness of the guilty suffering. People may respond to evidence of consistent corruption and venality,<sup>138</sup> or to what they interpret as an intolerable rate of crime, but in neither case is the response really occasioned by awareness of a low conviction rate or by having been made aware too infrequently of the guilty being punished. Venality exposed may shake the faith of some in their duty to obey the law. Experiencing or knowing of crime does not even do that; rather, it elicits demands for stricter enforcement. This is to be expected, at least within a fairly wide range, because the technical failure of the system does not call into question, as would the moral failure, the legitimacy of the system. More efficient enforcement and more frequent and publicized punishment probably affects the crime rate only through engendering fear.

Finally, the criminal justice system may increase the predisposition to obey the law among those whom it convicts. In this case, of course, we are indirectly improving society not by creating fewer criminals, but through the cure of those who have committed crime and been convicted. Penology is, therefore, a science with an inherently limited leverage. It can reach, except insofar as a criminal culture is self-propagating, only the relatively few who have already committed crime and been caught at it. But even at that we are speaking with excessive optimism, as if, in fact, penologists know how to prevent convicts from committing yet more crimes after their release. There is little if any evidence that we have such knowledge.

There is then little reason for the optimistic belief that any manipulation of the criminal justice system will have any measurable effect upon the belief that the law ought to be obeyed, upon our judgments of right and wrong, or upon our tendency to commit

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137. See note 133 *supra*.

138. See Gardiner, *Public Attitudes Toward Gambling and Corruption*, 374 ANNALS AM. ACAD. POL. SCI. 123, 128-34. Gardiner's study of "Wincanton," "an eastern industrial city with a 1960 population between 75,000 and 200,000," *id.* at 124-25, indicates that the public, while complacent toward the crime of gambling, can become sufficiently concerned when corruption is brought blatantly to its attention. But when corruption is quiet, no one worries about it.

crime. And surely this has to be the case. A society cannot be so sensitive to the quality of its criminal justice system that its collapse or its continuance would depend upon who was elected sheriff. For its preservation a society must develop a wide tolerance for variation in the quality and efficiency of enforcement. If this is true, it follows that changes in the system will have to be very dramatic to affect the basis of social organization—the shared belief in the rightness of those prohibitions that make common life possible.

These arguments have particular force if the crime problem is, as it appears in large part to be, the normal criminal activity of an abnormally large group of young people. Juvenile crime does not usually grow into adult crime, and the juvenile's criminal phase is unlikely to last more than five to ten years. For any institutional device to influence juvenile crime, it must somehow reach the youth during this period of his life or before it. One would surmise that the opportunities are very slight for the criminal justice system to impress upon the young its fairness, its efficiency, or its vengeance. For better or for worse, the moral education of the young is largely in other hands, even in the slums. And those who reach teenage ill-disposed toward the law are likely to get through their criminal period without ever having been caught on a charge serious enough to expect these results; yet the Commission fails to tell us so.

I cannot but believe that the commissioners know all this. The source of their optimism really has little to do with the systemic manipulation to which they devote so much of their attention.<sup>140</sup> Their optimism could reasonably be predicated only upon improvement of the society that the criminal justice system serves. But that is trickery. Granted that improvement in the society was one of the seven contingencies upon which their optimism was founded; the truth is that reasoned hope for a significant reduction in crime could be based upon this contingency alone, and, absent this, it could be based on the realization of no other.

When it came time to deal with the social order rather than the criminal justice system, the Commission was understandably short on detailed advice. What it did, in effect, was use the Crime Commission report as another platform to plump for the usual range of liberal and Great Society nostrums for social ills. The Commission's advice in this area cannot be taken as a serious, independent contri-

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139. See note 134 *supra* on the likelihood of anyone being caught and punished for crime.

140. On the general problems of systematic or constitutional manipulation, see D. OAKS & W. LEHMAN, *supra* note 128, at 175-96 (1968).

bution. Its recommendations are but thinly disguised descriptions of presumably desirable end-states.<sup>141</sup> How one reaches those ends the Commission cannot suggest.

While it is true that no one else knows how to improve the society either, it is also true that others positing the same goals at least give some recognition to the difficulties of reaching them. The Commission can recommend housing improvement without the least acknowledgement of sixty years of frustrated effort toward this goal. In recommending integration, the Commission ignores the fact that the most vociferous voices in the Negro community now favor segregation and that many whites have been converted to the belief that separate development ought to be the immediate goal.<sup>142</sup> More and better teachers are demanded<sup>143</sup> in a report that also asks for more and better police,<sup>144</sup> and more and better social workers,<sup>145</sup> and, of necessity, more and better lawyers.<sup>146</sup> How we are to find all of these better people, no one says, nor even who should get first choice among them.

In a word, with respect to what is most necessary the Commission offers the least help. Its optimism, if it is founded upon anything, is built upon the insecure sands of received liberal welfare doctrine, and the problems that stand between our society and that brave new world are ignored as if they were but minor nuisances. It is not fair to respond that detailed consideration of these issues was beyond the scope or competence of the Commission. The Commission nowhere in its report suggests that its social recommendations are any less well-founded than its recommendations for the criminal justice system. No more is it an excuse to say that the Commission

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141. E.g., "Expand efforts to improve housing and recreation," "Develop methods to provide minimum income," "Develop activities that involve the whole family together," "Reduce racial and economic segregation." REPORT 293-94. (On the doubtful value of economic integration, see Lehman, *Thinking Small About Urban Renewal*, 1965 WASH. U.L.Q. 396, 403, 408-10).

142. See Roberts, *More Whites Dropping Theory of Integration, Supporting Black Power*, St. Louis Post-Dispatch, Dec. 22, 1967, at 1B, col. 1.

143. REPORT 73.

144. REPORT 106-13.

145. "Social workers" stands here as surrogate for a variety of welfare workers, gang workers, family counsellors, psychiatric social workers, employment counsellors, settlement house workers, probation officers and so on. The need for these is implicit in any number of the recommendations of the juvenile crime chapter, REPORT 55-89, the corrections chapter, REPORT 159-85, and in the program suggested for the handling of drunkenness offenses. REPORT 233-37.

146. REPORT 150, 151-53. See also PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURT 152-61 for Lee Silverstein's background paper *Manpower Requirements in the Administration of Criminal Justice*.



was, after all, dealing with very hard problems.<sup>147</sup> Its optimistic stance is exactly the source of the objection. Had it made clear the difficulty of the problems it would have fulfilled its duty to the public. That is exactly what it did not do.

Perhaps worse than oversimplification is a disquieting omission. The recommendations for improvement of the social order, which we would like to believe may ultimately reduce crime, are certain in the meanwhile to increase it—at least in the form of demonstration and riot, and probably in juvenile and property crimes as well. All our knowledge of revolutionary psychology indicates that the propensity to revolt increases with relative improvement in status.<sup>148</sup> There is also evidence that the propensity of juveniles to commit property crimes responds to affluence in the same way.<sup>149</sup> We have to expect these results; yet the Commission fails to tell us so.

### B. *When Is a Crime Not a Crime?*

"[T]he criminal law is the formal cause of crime, since a crime is merely an instance of behaviour which is prohibited by the criminal law . . . ."<sup>150</sup> Obviously, in any state of society the longer the list of prohibited behavior the greater will the society's crime problem appear to be. The make-up of the list, however, will be relevant in determining what a given volume of crime means for the health of the society. Insofar as crime statistics during Prohibition included instances of people drinking illegally, one would question the admissibility of such statistics as evidence of moral decay. On the contrary, one might conclude that classifying drink-

147. This explanation was offered by James Q. Wilson in *The Crime Commission Reports*, THE PUB. INTEREST, Fall 1967, at 66-67.

148. If I recall my history correctly, such an explanation was offered for the French Revolution. More apposite, however, is a recent study of Negro riots in America. From the income, quality of education, intensity of contact with whites of Negro college students who participated in sit-ins, John M. Orbell has concluded that "the cause of the [Negro] revolution is the increasing proximity of Negroes to the dominant white culture—the closer Negroes come, the more strongly they demand their share." *Roundup of Current Research*, TRANS-ACTION, Oct. 1967, at 4. William Styron puts the following words into the mouth of Nat Turner, the leader of an 1831 slave revolt: "Does it seem a hopeless paradox that the less toilsome became the circumstances of my life the more I hoped to escape it? That the more tolerable and human white people became in their dealings with me, the keener was my passion to destroy them?" (Quoted in Platt, Review, PSYCHOLOGY TODAY, Jan. 1968, at 14, 15). Orbell did not find, however, that increasing contact with whites produced increased animosity.

149. See Toby, *Affluence and Adolescent Crime*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 134 (1968).

150. J. MICHAEL & M. ADLER, CRIME, LAW AND SOCIAL SCIENCE 20 (1932).

ing as a crime had exaggerated the crime problem. But I do not intend primarily to consider whether "overcriminalization"<sup>151</sup>—the use of criminal sanctions in inappropriate situations—results in exaggeration. Rather, I intend to look at some social problems raised by unquestioning enforcement of the substance of today's criminal law.

What behavior can appropriately be called criminal has recently generated a fair amount of discussion. Unfortunately, most of the discussion, at least in this country, has been directed to academic audiences.<sup>152</sup> The Commission had the opportunity to increase participation in the debate, but instead, it approached the topic so gingerly that a reader who was not already familiar with the terms of the debate could not understand what the Commission was saying. At the level of the final report, the Commission considered decriminalization as a possibility only in relation to marijuana-smoking and public drunkenness.<sup>153</sup> Professor Sanford Kadish, serving as a Commission consultant, tried to get the Commission to consider whether we should legalize gambling, abortion, narcotics, and deviant and extra-marital sexual relations. The substance of his paper is now available in the *Annals of the American Academy of Political Science*.<sup>154</sup> It is a strong and forthright piece that could have been readily adapted to bring to a wide audience the issues involved. A chapter in *Task Force Report: The Courts* was based upon Professor Kadish's paper.<sup>155</sup> Of this chapter, Professor Kadish says, "[T]he controversial character of [the] issues, and the need to achieve consensus . . . quite understandably required some reduc-

151. The term, as handy as it is barbaric, is apparently accepted in the trade, Kadish, *The Crisis of Overcriminalization*, 374 ANNALS OF AM. ACAD. OF POL. SCI. 157 (1967).

152. E.g., DEVLIN, *THE ENFORCEMENT OF MORALS* (1959); GREAT BRITAIN COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, COMMAND NO. 247 (1957) (The Wolfenden Report); H. HART, *LAW, LIBERTY AND MORALITY* (1963); Kadish, *supra* note 151; Schelling, *Economics and Criminal Enterprise*, THE PUB. INTEREST, Spring 1967, at 61. The Wolfenden Report demonstrates that government commissions need not avoid touchy subjects, at least in England. Such a report must also have resulted in bringing to a wider audience in England the question of reducing restrictions on private sexual activities.

153. In respect of marijuana it recommended only study of the issue. REPORT 224-25. Presumably by way of compensation for this daring suggestion, the Commission in respect to all other drugs generally followed the hard line of the Federal Narcotics Bureau. REPORT 219-21. In respect of drunkenness it expressly recommended "decriminalization." REPORT 236. There is a brief but not at all pointed discussion of the enforcement of morality at REPORT 126-27.

154. See note 151 *supra*.

155. *Substantive Law Reform and the Limits of Effective Law Enforcement*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 97-107 (1967).

tion in scope and muting in tone . . . ."<sup>156</sup> But even the muted task force report is not the Commission report. When the subject was strained once again by the Commission, it was reduced to a single page in which the issues are not only muted but virtually invisible.<sup>157</sup> Of course, the Commission makes no recommendation. For all practical purposes, the Commission worked on the assumption that the criminal law ought to be taken and enforced as found.

### 1. *Classifying Crimes*

In questioning whether or not behavior should be classified as criminal, "[t]hinking of 'crime' as a whole is futile,"<sup>158</sup> unless one is content to deal on an ad hoc basis. The Commission, however, provides no general guides for thinking about crime in useful categories: "The causes of crime, then, are numerous and mysterious and intertwined. . . . No one way of describing crime describes it well enough."<sup>159</sup> Doubtless true. It is, however, equally true that without at least some categories, imprecise though they may be, it is impossible to look at crime except as a whole.

I venture, therefore, some rough and overlapping categories to aid in thinking about the subject. The criterion chosen is the manner in which the individual who violates the law views his own behavior—whether he thinks it is appropriate behavior for all members of society. I intentionally avoid asking whether the law ought to enforce morality, because the terms of that debate can be misleading. While it is true that the law is not co-extensive with morality, it is equally true that the core of that which is called criminal must be felt to be immoral. The question as a practical matter is which moral judgments the law ought to enforce and which ones it ought to leave alone. One possible answer is that proscription is, in terms of the legitimacy of the law, safe in proportion as those who commit the proscribed behavior concede its impropriety and, but for special justification, avoid it.<sup>160</sup> It is obvious that the views of the delinquents toward various proscribed behavior would form something

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156. Kadish, *supra* note 151, at 158. Though Professor Kadish was quite polite about it, it seems reasonable to believe that he was rather piqued at having that chapter attributed to him [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 2 (1967)] when it reflected only a muted version of his paper. It would appear that his article, *supra* note 151, provided him an occasion for setting the record straight.

157. REPORT 126-27.

158. REPORT 3.

159. REPORT 18.

160. This answer, it must be noted, does not tell what should be proscribed, but only what can be without a range of deleterious consequences.

like a continuum. For purposes of analysis, however, we can construct models at each end and at the middle of that continuum.

There are, first of all, acts like rape, murder, and robbery which almost everyone outside of the criminal community views as improper. Even the criminal, if he has otherwise rationalized his behavior, may view such acts as improper in most circumstances. These are acts, in other words, which virtually no one would assert should form the basis of a categorical imperative. As long as these acts are committed for what the actor sees as idiosyncratic reasons, we are dealing with what might be called "ordinary" or recognized crime.<sup>161</sup> The legitimacy of the law is not likely to be called into question by even the most stringent enforcement of laws prohibiting ordinary crime.

A second class of criminal behavior includes a range of activities about which the society as a whole is, and its members as individuals are likely to be, ambivalent—behavior that the society hopes to minimize and keep out of sight, but which no one expects to eliminate completely. Prostitution is the classic example, but probably most consensual crimes—crimes without victims—have fallen at one time or another into this category. In respect to each of these crimes one must ask whether the costs of suppression exceed the advantages of prohibition. Abortion is an obvious case. Making abortion criminal probably results in many needless deaths among the customers of shady medical practitioners—deaths that would be avoided were it possible to obtain an abortion in a hospital. It was costs such as this that Sanford Kadish wanted the Commission to bring to the public's attention.

In the third class of crime there is a denial by the perpetrator of any impropriety. Actually two subclasses are recognizable. The first involves acts which are considered by some not to be inherently immoral; the perpetrators consider their behavior consistent with a categorical imperative. The rule can be stated either in negative or positive terms: in respect to no one should this act carry opprobrium or criminal sanction, or, everyone should engage in similar actions. We can call these moral crimes.<sup>162</sup> Obvious contemporary examples

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161. The term "ordinary criminal acts" is used by Dean Francis Allen in *Civil Disobedience and the Legal Order*, 36 U. CIN. L. REV. 1, 5 (1967).

162. For most homosexuals, homosexuality is probably closer to a moral crime than to an ordinary consensual crime. Those who engage prostitutes (and perhaps prostitutes themselves) probably view their behaviour more often as ordinary (consensual) crime. Drug use is probably in process of change from ordinary to moral crime, at least with respect to "soft" narcotics and hallucinogens. The difference is important for the legitimacy of the specific prohibition involved and can be significant for the legitimacy of the whole system.

include homosexual behavior and the use of narcotic drugs. In both instances guilt feelings have been suppressed, the behavior is engaged in, and assertions are commonly made that it should not be illegal.

The second subclass includes a miscellany of usually minor crimes engaged in as a means of expressing discontent with the social order. We can call these acts protest crimes. The specific forms of criminal behavior engaged in are probably not thought by the perpetrators to be consistent with a categorical imperative. Persons who, for instance, make private property unusable by "sitting-in" probably would not want a society in which it was impossible to protect generally against invasions of private property.<sup>163</sup> But they may believe that people who are confronted with a perceived evil are bound by a categorical imperative to express their concern through violation of laws they would normally respect.

## 2. *Moral and Protest Crime*

The impression that there is a crime crisis is doubtless heightened by the publicity given to moral crimes and crimes of protest.<sup>164</sup> These crimes attract attention and induce abhorrence. They do so because their commission either questions the most basic values that guide the lives of the majority or threatens a comfortable, convenient, and familiar social order.<sup>165</sup> The observer's abhorrence is readily translated into a perceived moral decay in the observed. Moral decay, un-Americanism, and like terms are convenient dumping grounds for

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163. While this position may be adopted formally by demonstrators, there is evidence that lawbreaking is contagious. See Allen, *supra* note 161, at 30-37 (1967).

164. Despite the relative insignificance of the harm they cause. See *id.* at 19: The harms to persons and threats to public order than can in any fair way be traced directly to the activities of modern protest groups shrink into insignificance when compared with those associated with murders, rapes, robberies, assaults, burglaries, and larcenies that for generations have disfigured life in our cities. This statement may seem too strong after the Newark and Detroit riots but probably is not.

Because my purpose is different from Dean Allen's, I lump together here civil disobedience (which is of its nature public, see *id.* at 9) and, for instance, deviant sexual behavior when engaged in by those who believe it should not be illegal (such behavior is likely to be engaged in in private). Secret law violations considered morally justified may not cause such obvious disruption as has been attributed to civil disobedience, *supra* note 163, but the difference is of degree, not kind.

165. Dean Allen, *id.* at 21-24, discusses the difference in public reaction to ordinary and sociopolitical crime. Recognizing the latter to be considerably more disturbing to the public, he attributes the stronger reaction at least in part to the fact that sociopolitical crime constitutes "a fundamental challenge to the sovereignty of law." *Id.* at 24. It strikes me as unlikely that the disturbed among the public see the problem in such abstract terms. It is possible to draw this inference insofar as the law embodies an acceptable moral code and supports a familiar social organization. But I think it not the threat to law but the threat to what the law embodies that gives rise to the concern.

all that we perceive and do not like. Only with the guidance of informed discussion will the public learn to distinguish between rape and the use of marijuana, or between mugging and protesting. But making such distinction is necessary not only properly to inform the public, but also to provide a sound basis for policy.

In a sense, it is improper to describe moral and protest crimes as crime at all. Those engaging in the proscribed behavior, and often many observers as well, will deny the presence of immorality that is the basis of ordinary crime. When organized or self-conscious groups take this position on many issues or with any frequency the community is faced, no matter how it chooses to view the situation, with something different from an ordinary crime problem. On a purely pragmatic level, it is quickly discovered that suppression of moral and protest crime is peculiarly ineffective. Instead of inducing fright, suppression raises martyrs. Instead of discouraging repetition, it encourages it. The observer may choose to defend his shaky moral superiority, to continue to insist on the decadence of the revolutionaries, but if he is to fight with any hope of success, he must take a careful and objective measure of the enemy.

It is not self-evident that the legal order ought to enforce the criminal law in dealing with moral and protest crime.<sup>166</sup> The legal order might better look to its own self-preservation. The criminal law can be called upon to perform at least two intellectually distinguishable functions, which we can call social and political. In contrasting these functions, the issues will become clear.

On the one hand, the legal system can enforce, and thereby reinforce, the basic norms shared by all members of the society. It can, in a word, enforce the ordinary criminal law. In doing so, the legal system acts as an integral element of the social structure; probably, because common to all societies, it is an element necessary to hold societies together. When the substantive criminal law is limited to prohibitions against ordinary crime, the legal system is performing a purely social function.

The substantive criminal law probably never corresponds completely to the moral sense of the community. Through discretionary enforcement, legal fictions, and so on, disparities can be tolerated.

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166. I depart again from Dean Allen on this point. *See id.* at 14. I imagine I depart from many others, as well. However, it should be emphasized to make clear the limits of the disagreement that I am addressing myself to law enforcement agencies rather than to those engaged in or considering civil disobedience. That I might offer to enforcing agencies this year the advice that follows does not mean I would not offer to Dean Allen's audience much the same advice he so articulately and persuasively offers.

But when a majority and minority coagulate into recognizable groups, so that the criminal law is seen by the victims as a device for imposing the will of one upon the other, then the criminal law becomes a political tool. At least three consequences follow: the law as a general organizing institution is discredited in the eyes of the suppressed; the law becomes tied to the political fortunes of the majority, whose tool it has become; and enforcement, because normal levels of effort are inadequate, must be stepped up dramatically to produce a tolerable conformity to law.

In performing its social function, law enforcement, without seriously affecting the amount of crime in the community, can be extremely inefficient in putting criminals behind bars.<sup>167</sup> Consensus on proper social behavior performs the basic job of protecting the society from disruption. When consensus collapses or a majority attempts to use the criminal law to enforce its policy judgments, however, consensus cannot come to the aid of the criminal justice system, and it is on its own in the fight against the minority. Consequently, it must try to achieve a much higher rate of success in apprehension and conviction. Of necessity, it must turn to techniques appropriate in a totalitarian state. When the criminal law does so, its claim to provide the ordering basis of the society is yet further weakened: not only is it called upon to enforce unacceptable laws, but it is compelled to use unacceptable techniques in doing so.

Enforcing the will of the majority is exactly the position that the criminal law should avoid. When the legal order is put in that position it may justly question, in the interest of self-preservation, its duty to enforce the law. The continued vitality of the system may then depend upon its not attempting the degree of enforcement attempted in respect of crimes proper; it must know when to give in and when to overlook. (When enforcing laws against ordinary crimes, it need never do so, though for reasons unrelated to the legitimacy of the system it may choose to do so.)

As a practical matter, such discretion is not likely to be encountered once issues become polarized. The police are unlikely to respond with tolerance to an implied threat. (The Detroit riot of 1967 was triggered by a police raid on an after-hours tavern—a blind pig. One may ask whether the police would have overlooked the violation had they been explicitly threatened, as a response, with the possibility of a riot. It seems unlikely. Yet it is perfectly conceivable

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167. See note 134 and text accompanying notes 134-37.

that many policemen—even those not paid off—would have chosen to wink at a liquor law violation.) Even were the police inclined to temporize, if their decisions were visible the possibility of criticism would probably discourage them. Differential enforcement cannot easily be indulged as a public or even a conscious policy, and no verbal justification for such a decision is likely to be found satisfactory. The only thing that makes discretionary negative charging decisions possible is their invisibility.

Nonetheless, discretionary enforcement is not to be condemned out of hand in cases of moral or political crime; there is no corresponding universal disapproval of discretion in enforcement with respect to other minor crimes. There is no reason why discretion should not be indulged in appropriate circumstances to avoid greater evils, as long as it is done quietly. But except for such occasional exercise of political judgment in essentially political matters, there is little that the criminal justice system can do that is not simply defensive. The problem of accommodating to changing morality and of minimizing the destruction, disorganization, and injury that may result from political crime does not rest comfortably in the hands of the criminal justice administration. The real problems are political and social and must ultimately be resolved by other means. The criminal justice system can only do its best at holding down the fort until assistance arrives from the legislature or until a new consensus develops.

In neglecting to point out these problems, the Commission again failed to help the community think about crime. At the same time, it garnered for its crisis theory whatever support was to be found in public concern with moral and protest crime. In taking advantage of this public concern as an occasion to increase the effectiveness of law enforcement, it may be that the Commission will have speeded revolution rather than stayed it.

### 3. *Is Gambling a Sin?*

It is the consensual crimes that have raised the question whether the law ought to be used to enforce morality.<sup>168</sup> Because the wisdom of the laws against a whole range of consensual crimes has been canvassed in two recent and excellent articles,<sup>169</sup> I shall not attempt another survey. I want to emphasize only one particularly glaring

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168. See the sources cited in note 152 *supra*.

169. Kadish, *supra* note 151; Schelling, *supra* note 152.



example of the Commission's refusal to question the substantive definitions of the criminal law: its refusal seriously to ask whether gambling ought to be legalized.

Faced with a similar issue, the Wickersham Commission, though it could not bring itself to recommend repeal of the eighteenth amendment, at least asked honestly whether Prohibition was a good thing. In doing so, it doubtless aided public understanding of the issue. Had the current President's Commission asked the same questions with respect to gambling—even concluding that gambling should still be prohibited—it would have performed a corresponding service to the America of this decade. That it failed to do so, in the face of two facts, is a woeful comment on the Commission.

The first fact is made clear by the Commission's own assertion: gambling is, as alcohol was forty years ago, the rock upon which organized crime is built. The Commission had before it—indeed, it gives us—the salient facts.<sup>170</sup> The take from gambling each year is seven billion dollars. Second to gambling, the two most lucrative black market activities are loan sharking and the sale of narcotics, and the income from gambling is twenty times that of either of the runners-up. Gambling accounts for eighty per cent of all income from supplying illegal goods and services. Perhaps more striking is the fact that if you add up all of the costs of crime—including not only criminal income but the costs of the police and the court system, of insurance and legal fees, of earnings lost by the victims of violent crime, of private protection services—gambling accounts for a third of the cost of crime in the United States. The income from gambling each year is two and one-half times the total cost of running all of the nation's police forces. By defining this industry as criminal we take its vast income from the hands of government and legitimate business and deposit it in the hands of the syndicate. There it will be put out at profit by loan sharks, used to finance the infiltration of criminals into legitimate business, and invested in the corruption of the police. What are the social gains to counterbalance such costs?

It is hard to believe the Commission missed the implications that were so plain in its own statistics. (On the bar graph illustrating the cost of crime, the bar representing gambling was too long to fit on the page.)<sup>171</sup> One might forgive, if not condone, this lapse if the Commission had any reason to fear that the public would disapprove the mere mention of the possibility. But the second disturbing fact

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170. The figures that follow are read or interpolated from the chart in REPORT 33. Statements in the text, REPORT 32, cannot be directly correlated with the chart.

171. See REPORT 33.

is that in this time of affluence it seems unlikely that any strong voice would have assailed the White House had the Commission asked the question. Gambling, unlike homosexuality or the sale or use of narcotics, is not considered a sign of depravity by any significant element of the population.<sup>172</sup> One could have hoped that a sympathetic understanding of the plight of the homosexual and the addict would have stiffened the Commission's backbone and led it to face those problems, regardless of the possible hue and cry. No such moral support would have been needed to ask, with respect to gambling, whether we should continue its prohibition.

Why, then, did the Commission not do so? The kindest explanation is that commissions, like regulatory agencies and legislatures, share with courts the problem of detecting or being moved to respond to diffuse public interests.<sup>173</sup> With gambling there are no squeaky wheels, no obviously localized public costs, no touching victims. No one has any serious difficulty placing a bet, hence there is no strong movement by frustrated consumers. The syndicate has, through organization, internalized external costs, with the result that there is little bloodshed.<sup>174</sup> There are, as far as one can tell by the paper, fewer people led to financial ruin by gambling than are led there by the hire-purchase plan. Who is to complain that gambling is illegal? Surely not the syndicate.

Less charitably, it has been suggested that the Commission failed to ask the question because of its dependence on enforcement agencies, which have "(to put it mildly) a vested Parkinsonian interest in perpetuating criminal definitions of the conduct they are called upon to regulate."<sup>175</sup> It has been argued that the Commission wanted the agencies of criminal justice to participate wholeheartedly in their own Commission-recommended reform; and that to win cooperation the Commission, besides accepting existing definitions of crime, hid its eyes from police corruption,<sup>176</sup> included in its recommendations a great deal of money for enforcement agencies,<sup>177</sup> and

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172. John A. Gardiner in his study of Wincanton found that 88% of those interviewed thought bingo should be permitted, 59% favored a state lottery, and 55% favored legalizing all gambling. Gardner, *supra* note 138, at 126.

173. On the courts, *see, e.g.*, Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908). On regulatory agencies, *see, e.g.*, Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U.L.Q. 416.

174. *See* Schelling, *supra* note 152, at 65-66.

175. Silver, *Crime, American Style: The President's Commission*, COMMONWEAL, April 21, 1967, at 141.

176. *Id.* at 142. The reference following the index entry "Police corruption" reads "see police misconduct." REPORT 336.

177. MacKenzie, *The Compromise Report on Crime*, NEW REPUBLIC, Feb. 4, 1967, at 15, 16.

larded its report "with encomiums to such agencies as the FBI and the Narcotics Bureau."<sup>178</sup>

Whatever the reason, the Commission missed an opportunity to call attention to a question the public ought to be asked to consider in an informed way. With its vast prestige, the Commission could have prepared the way for a genuine revolution, one which would have significantly reduced crime and given law enforcement agencies a fighting chance against an enemy that can now buy and sell them. The idea is simple enough: legitimate competition will in time replace criminal organization in supplying such services as gambling if and when the supplying of such services becomes a legitimate business in which others can enter. I know this thesis to be questioned. There is, however, ample evidence of its truth. I cite three examples. The most obvious, perhaps therefore the most likely to be overlooked, is that traffic in liquor, once the mainstay of organized crime, is now a trivial part of criminal business—illicit liquor costs about seventy-five cents per person per year in the United States while gambling costs thirty-five dollars per person.<sup>179</sup> In another field, the syndicate in New York is selling out its interest in homosexual bars because legitimate businessmen are, as a result of reduced police pressure, entering the market in competition with organized crime.<sup>180</sup> Perhaps more apposite, gambling in Nevada, thought to have been run by the syndicate even though legalized, is even now being taken over by legitimate business. The erratic Howard Hughes has been buying about everything in sight in Nevada, including a number of casinos. More important, since passage of a law permitting corporations to own casinos,<sup>181</sup> other legitimate corporations have been going into the gambling business.<sup>182</sup> Certainly this will mean a dramatic reduction in organized "skimming," with the result that the govern-

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178. Silver, *supra* note 175, at 141.

179. Figures extrapolated from the table in REPORT 33.

180. See St. Louis Post-Dispatch, Dec. 3, 1967, at 10-I, col. 1:

A more tolerant attitude by police and the liquor authority towards bars that cater to homosexuals—plus an increasing social tolerance of deviates—has induced legitimate businessmen to invest in such places. This has broken the near monopoly enjoyed for years by Mafia.

181. 5 AUTOMATED STAT. REP. 98, Nev. Stat. 470-77 (1967), amending NEV. REV. STAT. 463.170 (1967).

182. See Starr, *Why Is Howard Hughes Buying Up Las Vegas?*, LOOK, Jan. 23, 1968, 69, 73:

Governor Laxalt is a number one fan of Hughes: "His coming here did things for our state image that a multimillion-dollar public relations campaign couldn't have achieved," says the Governor. He has given Nevada gambling instant respectability. The Governor wants out-of-staters to take notice that Nevada has for several years been making a shift from the old methods of financing gambling casinos through an assemblage of partners to the corporate way, with open bookkeeping and open methods. The Del E. Webb Corp., a Phoenix construction company, has moved into Nevada gaming, and so have several other corporations. Last spring, the Nevada legislature made it possible for the

ment will get more taxes. Almost certainly it will mean that gambling income will not be used for criminal purposes or be shipped outside the United States; rather, it will be reinvested in legitimate business.

"Decriminalization" is, unlike other methods previously mentioned, a crime-fighting technique with very considerable leverage. The result is not simply that gambling is no longer a crime, so no longer included in criminal statistics. Eliminating the need for police protection will eliminate the need to corrupt the police. Petty gamblers and small-time bookmakers will no longer be so readily subject to extortion. And the time of the criminal justice system previously devoted to dealing with gaming offenses can be devoted to fighting other more serious criminal activity. The salutary influences of legalization multiply rather than dwindle.

The trouble with the Crime Commission's program is not that it was unable to answer hard problems. Reducing crime is not easy. The trouble with the Crime Commission is that it directed our attention to the less fruitful among the possibilities for action open to us, that it dug over familiar ground rather than put its prestige on the line.

#### IV. CONCLUSION

I mentioned to a friend in law teaching that I had in progress a criticism of the Crime Commission report. He said I must be taking it far too seriously. I assume his position was that of the authors of the *Iron Mountain Report*: that there are, as distinct from serious studies, "conventional 'showcase' projects organized to demonstrate a political leadership's concern about an issue,"<sup>183</sup> and that the Crime Commission report was one of the latter.

I cannot believe that it was not intended, at least by the majority of those involved, to be taken seriously. I know or know of and respect too many of those who participated in preparing the Commission report. If I ask whether those several hundred people would readily give up as much as eighteen months of their lives to partici-

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first time for a corporation, and not just individuals, to get a license to run a casino.

Federal authorities concerned over crime-syndicate influence in Nevada gambling, cautiously share Laxalt's optimism. "We can see a change already," says a top U.S. enforcement official. "A number of old-timers are still around, but increasingly, untainted investment money is being attracted here." It is noteworthy that after Hughes took over the casinos, employees had to fill out personnel questionnaires, while thorough investigations were made of key people.

183. L. LEWIN, REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE xiii (1967).

pate in a public relations gimmick, the answer has to be no. It would be an insult not to take these people seriously.<sup>184</sup>

The consultants, the advisors, and the staff, as far as I know, could have been consultants, advisors, and staff to a group producing a thoroughly creditable report. Perhaps even the commissioners, or people of the same sort, but in different mix or under different auspices, could have produced a creditable report. But it could not be done in the turgid, perfumed air of the capital. Everything conspires against good results—the pressure of time, the influence of the Administration, and not only the human failings of the participants but their virtues as well.

The President wanted not so much to deal with crime as to deal with public concern about crime. The commissioners came to Washington expecting to deal with the former; they left having dealt with the latter. In the process of transformation, the commissioners became parties to the most insulting of political views toward the public: that the public, like a woman, is to be coddled and courted but not taken seriously. They exuded optimism, rode roughshod over legitimate controversy, and hid from the public the ideas they thought unpalatable.

The reasons are many for being disturbed about the Crime Commission report. I have limited myself to the more general ones because these are the easier to overlook. One's sympathy with specific recommendations can easily distract attention from the radical failure of the report. And it was a radical failure, almost certain to do more harm than good. When everything we know presages increases in crime, the Commission's unrealistic optimism, its groundless promises of success in the war against crime, are just more mud on the face of a distrusted liberalism. The Johnson Administration probably will not suffer; as long as the Viet Nam war lasts, no significant effort will be made to follow up the Commission's recommendations; and only when the time and money have been invested will the futility of the effort be recognized. The problem of dealing with a public that discovers it has been duped will be left to a future President. But the reckoning will come for today's politicians or their heirs, just as, unfortunately, it will for the cause of liberalism. The young will no longer accept well-intended busy-work as a substitute for success or honest pessimism.

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184. And certainly the report has been taken seriously. The American Academy of Political Science devoted its November 1967 issue of the *Annals* to the Commission report. It is being reviewed by everybody. The American Bar Association has committed itself to realization of the Commission's program.

But the Commission's program, if Daniel Moynihan is to be believed,<sup>185</sup> is just one more nail in the coffin being prepared for liberalism by the New Left. The Commission's more unique contribution must lie in what it has done for or to the crime problem. It directs us with a free hand to undertake hundreds of activities with which to while away our time and whittle at our energies and resources. Since the Commission provided no basis for judging which activities should be undertaken first, one must predict which recommendations are most likely to lead to action on the basis of importance or logical priority. There will be widespread support for police getting college degrees—a key proposal of the police section,<sup>186</sup> which James Q. Wilson aptly characterized as nonsense.<sup>187</sup> The court system will get rid of drunk and disorderly cases before other institutions adequate to handle them are developed.<sup>188</sup> Despite our best intentions, people will be held for drunkenness (perhaps through some form of commitment) for indefinite periods of drying out without actually being cured. And in due time we will have our analog to *Gault*.<sup>189</sup> Because the Commission feared to ask whether morals should be legislated, we will have wiretapping and bugging as the only means of fighting the monster created by Prohibition and nurtured by the monopoly of gaming. Police commissioners will spend their time on, or trying to establish their right to be on, city planning commissions.<sup>190</sup> Police lobbyists will haunt the halls of Congress seeking expanded federal aid. Magistrates and police court judges will be sitting on criminal court benches; and the reputé of the judiciary, if not the status of those composing it, will sink to unheard of lows.<sup>191</sup> The business of the misdemeanor courts will be brought to felony courts and will bring with it all the evils of overwork from which felony courts are now largely protected. In a word, the Com-

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185. *Nirvana Now*, 36 THE AM. SCHOLAR 539 (1967).

186. REPORT 109.

187. *The Crime Commission Reports*, THE PUB. INTEREST, Fall 1967, at 64, 81.

188. The recommendations are made in REPORT 233-37.

189. *In re Gault*, 387 U.S. 1 (1967). Some form of holding will almost certainly be demanded and likely permitted. The Commission itself recommends detention while under the influence. REPORT 235. Experience with mental institutions indicates many professionals are unhappy with voluntary commitment because at crisis periods in treatment the patient can choose to walk away, wasting all the investment of treatment resources in him. The commitment approach has also been adopted, despite the Commission's neutral stand in dealing with federal narcotics cases. See note 92 *supra*.

190. See REPORT 99.

191. Both these results may be expected as the most likely consequences of unification of misdemeanor and felony courts, recommended by the Commission in REPORT 129.

mission's recommendations will be carried out in exact proportion as there are those who have something to gain from their achievement. The rest will languish for want of interested proponents. And the pursuit of self-interest has the Commission's implied approval. Indeed, its tactic was to appeal to self-interest—a little bit for everybody—in the predictably vain hope that the things nobody is interested in will be carried along in the tide.

Worst of all, the Commission has probably pre-empted for many years the field of major reassessment of the crime problem. The Commission was called into being because people were concerned about crime. It was to substitute for Goldwater's simple answers some real ones. It was to tell the people of America how to think about crime and what to do about it. To this task it brought the prestige of the White House and of its own members. That it frittered away the corpus of its trust means not only an opportunity missed but an opportunity foreclosed for others. Where are the authors to be found? Where the interest and enthusiasm? Having pre-empted the field, this inadequate report must be our guide through the years of increasing crime. I think it better we had none. The vacuum might have raised up a better one.