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Reflections on "The Challenge of Crime in a Free Society"

Crime begins adversely and seriously to influence the quality of life in the United States of America. Happily, so far as I can judge from the literature and the statistics, this cannot be said of New Zealand. Yet a spirit of patronizing lack of concern for the problems across the Pacific may not be the best guide to New Zealand's policy; there may possibly be lessons to be learned from the United States. That possibility is, I assume, the justification for inviting an emigre like myself to make a tour d'horizon of those aspects of the criminal justice systems of the United States that he regards as likely to be of interest to lawyers in New Zealand.

I write from the somewhat insecure base of three years of reasonably close observation of these matters in the United States after two earlier one-year soundings. My knowledge of the criminological scene in New Zealand is limited to the first six weeks of my life, which I spent in your country, and thereafter is drawn from your law reviews and commentaries which provide perhaps equal insight to that gained in my formative weeks. The title of this paper contains, in McLuhan's phrase, the whole message: "The Challenge of Crime in a Free Society" is the report of the President's Commission on Law Enforcement and Administration of Justice. It was published in 1967. Together with the ten Task Force Reports which have been subsequently published and other research papers on which the report was based, it makes up the most significant collection of information on the problems of crime and juvenile delinquency, their prevention and treatment, to be found in any document or report of a study anywhere. It has precursors in the Wickersham Commission Report and similar documents of the late 1920's and early 1930's, but none attained its quality or catholicity. The report makes more than two hundred recommendations for action at various levels of government. It seems to me to combine the best features of a report of a royal commission and an academic study. And it is literate, having the advantage of close editing by some grammarians from the New Yorker. (The Advisory Committee of the American Law Institute's Model Penal Code project at first included a Professor of English, but he early resigned in dismay.)

In this paper I shall select a few of the themes in the Report for brief commentary after having discussed some of the changes in the role of the lawyer in this field which the Report reveals.

Law, Lawyers and Criminology

Lawyers at last begin to play both a more active and a more modest role in the criminal justice system. I first came to the United States in 1955 to teach at the Harvard Law School. It was there well understood that the teacher of criminal law was, by definition, the least intellectually equipped member of the faculty. If perchance he demonstrated a capacity beyond that expectation he might be allowed, as the years passed, to move onwards and upwards to those advanced forms of money-grubbing which receive the higher kudos of the Law School. This attitude was well understood by the faculty, by the students, and, miserably, by the teacher of criminal law. The students were determinedly headed towards Wall Street, in New York, or LaSalle Street, in Chicago, and no animadversions to criminals, to the victims of crime or to the plight of the poor would deflect them. There was a general feeling among the students that involvement in criminal law matters, as well as being unremunerative, would be bad for their reputations and for their morality; like others, they well understood that dirt rubs off.

All this has changed dramatically in the ensuing decade. Courses in criminal law and allied studies, far from being confined to a brief period in the first year, now run through all three years of the graduate (post-college) law courses of the leading law schools.
of the United States. At my Law School, the University of Chicago, a criminal law course is compulsory in the first year; a course in criminal procedure is available in the second; courses in constitutional law are preoccupied with problems of due process in the criminal justice system; the course in evidence also concerns itself extensively with criminal law matters; and there are seminars in Law and Psychiatry, Law and Criminology and Comparative Criminal Law and Procedure available to second and third year students. We are not atypical of the leading law schools in the United States in respect of this range of offerings.

Likewise, and more importantly, the profession is vastly more concerned. Under the leadership of the Federal Supreme Court regular Sentencing Institutes are to be found running throughout the federal judicial system. I have participated in several of these and discovered that the more senior and prestigious the judge, the greater his willingness modestly and energetically to play a role, sometimes qua-student, in these two-day institutes where outside "experts" join with judges in the close and detailed discussion of the judicial sentencing function in relation to general theory in the behavioral sciences as well as to the detailed problems of particular cases.

Similarly, the profession has been stirred by its sense of obligation to the poor, and prodded by Federal Supreme Court decisions, to the provision of extensive aid in criminal cases to indigent accused persons. The "dock brief" is seen for the monstrosity that it is, and from the time of arrest through appeal the resources of the profession begin to be turned to the adequate, timely and effective representation of the indigent accused. It is perceived that these things must be done, not in any spirit of charity for the poor and criminous, but because, if we are to begin to live up to the abundant rhetoric of our system, it is essential to provide the reality of effective legal assistance, with a sufficiency of funds for investigative and consultative processes. An adversary system lacking adequate representation is plainly inferior to the continental inquisitorial system.

Lawyers are more involved and they are more modest in their involvement. It has been appreciated that legal training and legal insights functioning alone are inadequate to the tasks that face the criminal justice system. It has been seen that we must become more closely allied with other disciplines in the behavioral sciences. This movement is apparent in the law schools. Let me give some examples. Harvard has recently appointed Lloyd Ohlin, a sociologist, to the faculty of the Law School. He, with James Vorenberg, a Professor of Law, was one of the main architects of "The Challenge of Crime in a Free Society". He comes from that seat of criminological expertise - Chicago - to bring sociological insights to the lawyers of the East. His academic training in sociology is buttressed by extensive experience in correctional work. At the University of Pennsylvania, in Philadelphia, Marvin Wolfgang, another distinguished sociologist, is to be found in close association with their excellent law school carrying on the relationships between legal and sociological efforts in the prevention and treatment of crime which was started with such distinction by Thorsten Sellin. And at my law school in Chicago I have two colleagues who are sociologists - Hans W. Mattick, working in the Center for Studies in Criminal Justice after a rich experience in correctional work and in the prevention of juvenile delinquency in the depressed areas of the city, and Hans W. Zeisel, a leading research methodologist who has, over the past decade, with Professor Harry Kalven also of my Law School, conducted the most detailed empirical study of the operation of the jury that has ever been made.

Academically the point is clear, and operationally the judges and lawyers are learning it: we operate within a criminal justice system in which decisions at the police level are of first importance to the operation of the courts and corrections; in which practices and decisions in the courts are of immediate significance to the police and to correctional work; and in which the work of probation departments and prison departments is of important feed-back significance to the police and to the courts. Lawyers must cease to see themselves as dominant in this whole field, occasionally and graciously using those skilled in other disciplines to help them in their work. We are just one of the important contributing disciplines, and we will do better if we recognize that though we have some great inherited values to protect, they are certainly not the sole relevant values in the whole system.

If my assessment of these changing attitudes is correct, and I am confident of the broad truth in it, the next inquiry is, why have these tendencies developed? Why have the problems of crime attracted both local and national political importance? Why is it likely, as it is, that together with the problem of Viet Nam, the problem of crime in the streets and in particular of crime in the ghettos of the United States may become of central political importance in a presidential election year? One might benevolently answer: a developing social conscience. And to a degree this would be true, certainly amongst the young. But I doubt it as a global reply. Only a few states in the United States have followed New Zealand's excellent lead in providing compensation to victims of crimes of violence. Generally speaking, prisons are inefficient and understaffed; probation and parole services are overloaded; courts squalid and in arrears with their work; and the list is easy to lengthen. Great capacity to tolerate excessive suffering by others has been coolly demonstrated. No; in a rather debased way I think the prime motive is fear. The mass media of the United States constantly assail one's ears with the threat of crime. It is true that crimes of violence to the person in Chicago would run, so far as one can judge from the statistics, something between six and seven times as frequently per thousand of population as in Auckland. That is bad enough, agreed, but it does not explain a change of attitudes and the sudden political prominence of the issue-unless a change in the rates is also to be found. Well, what is the truth here? Have the rates of crimes of violence per thousand of population been increasing? The first chapter of "Crime and the Challenge of Crime in a Free Society" asks this question with great responsibility. It merits your close attention; but let me summarize my own views on this matter drawn from that chapter and from other studies.

Between 1960 and 1970 the numbers of youth aged 15-19 will increase by some 45%. In the same decade the number of males aged between 20 and 24 will increase by some 56%. These are the crime-prone years, particularly in respect of crimes of violence to the person. If human behaviour remained exactly constant, one would therefore expect a substantial increase in the rate of crimes of violence per thousand of total population. And these population explosions are to be found primarily in the cities, and particularly in the depressed inner cities, which have traditionally and disproportionately contributed to criminality. The crime-at-risk age group and the crime-at-risk ecological distribution have both grossly increased. Within these criminous ecological groups, as well as within other residential groups in the community, the general pattern would seem to be that adult criminality remains substantially the same per thousand and that the crimes of children and youths show a measurable tendency to increase. The result is that without any measurable changes in human behaviour one does get gross changes in the size of the crime problem as it faces the individual citizen in the streets - and that is what matters. When to this is added the turmoil of the problems of inadequate housing, unemployment,
unsatisfactory education, and turbulent police relations facing the Negro in the criminous cities of America, and taking into account the potentiality for violence in many aspects of the movement towards racial equality, there is no doubt that the United States faces problems of crime that seriously threaten its social fabric.

Let me turn from these depressing realities to a description of the background of the National Crime Commission, to some discussion of its political follow-up, and then to a consideration of two problems that percolate the report - the problem of decriminalization, or the "over-reach" of the criminal law, and the problem of research.

The National Crime Commission

In the summary to "The Challenge of Crime in a Free Society", the Commission describes its own report and the work that lay behind it:

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.

Many Americans take comfort in the view that crime is the vice of a handful of people. This view is inaccurate. In the United States today, one boy in six is referred to the juvenile court. A Commission survey shows that in 1965 more than two million Americans were received in prisons or juvenile training schools, or placed on probation. Another Commission study suggests that about 40 percent of all male children now living in the United States will be arrested for a non-traffic offense during their lives. An independent survey of 1,700 persons found that 91 percent of the sample admitted they had committed acts for which they might have received jail or prison sentences.

Many Americans also think of crime as a very narrow range of behavior. It is not. An enormous variety of acts make up the "crime problem". Crime is not just a tough teenager snatching a lady's purse. It is a professional thief stealing cars "on order". It is a well-heeled loan shark taking over a previously legitimate business for organized crime. It is a polite young man who suddenly and inexplicably murders his family. It is a corporation executive conspiring with competitors to keep prices high. No single formula, no single theory, no single generalization can explain the vast range of behavior called crime.

The existence of crime, the talk about crime, the reports of crime, and the fear of crime have eroded the basic quality of life of many Americans.

The nineteen commissioners themselves were prestigious and politically influential citizens - three judges, five leaders of the bar, four law enforcement officials (police or prosecutors), two politicians out of office, an academic lawyer, a University president, a newspaper publisher, the president of a women's organization, and the head of an important civil rights organization. No sociologist, no economist, no scientist, no one skilled in prison or parole work. These gaps were, however, largely remedied by the vocational range and dedication of the substantial staff that James Vorenberg, the Executive Director of the Commission, gathered together for the eighteen-months' effort to assay what was known of the problems of crime and delinquency in the United States, and to suggest what should be done about them.

The report, the task force documents, and the research papers
provide a balanced plan; they do not read like a doctoral thesis, nor should they. Sensible, politically acceptable steps are suggested - not cures which do not exist.

An apparently sound mechanism was designed to expedite these plans; but I must regretfully report its failure so far. Through the Juvenile Delinquency Prevention Act and the Safe Streets and Crime Control Act, the federal government would begin to provide leadership and, in particular, funds for those of the two hundred recommendations in "The Challenge of Crime in a Free Society" that local communities, states, cities, might care to adopt on an experimental basis. Thus, funds and the limited expertise in this whole system could be channeled to what was creative and developmental in the system. We could all learn from the critically-evaluated, federally-supported, local testing of the Commission's recommendations. Funds of the order of $500,000,000 per year would, as from the second year, be available from the federal coffers to prime the pumps of state, city and local endeavors. I was ingenuous enough to believe in such a plan; but I have been cured of my simplicity.

With twenty or so other academic types as discussion leaders, well-read in "The Challenge of Crime in a Free Society" and acquainted with the Administration versions of the Juvenile Delinquency Prevention Bill and the Safe Streets and Crime Control Bill, I was called to a meeting in Washington with some 700 people from the states, cities, local communities, and rotten boroughs of this vast country. We academics were briefed the night before in the Department of Justice. The plan was, in essence, that outlined in the previous paragraph. Speaking for myself, the next day I was as a child; the "politicians" were gentle and kind, but they brushed me aside with a firm politeness. I learned the truth over my second drink in the bar after the first day's debacle. I had been ingenuous to believe that the backwoodsmen would accept such a role for the federal government. Federal funds, if they came, would be used, my local political advisers assured me, to reduce pressure on state, city and local budgets. They would be divided not at all unequally - as the testing of new plans clearly requires - but equally, in accordance with a complex relationship between populousness and political influence. Any developments would not come from a bunch of federally-recruited intellectuals, but from such local initiative as might emerge. Now, be quiet, drink up, and let us talk about something amusing like women or crime.

This federal legislation lies scattered in the wreckage of the past congressional session - I come to doubt the politicians' (federal and state) seriousness of purpose in this problem. They are excellent at the orotund bewailing of the falling standards of others, but not at planful action. Still, there are some promising signs: We are likely soon to see a National Research and Training Institute of the type suggested by Congressman Scheuer and Senator Edward Kennedy; some funds for research and development along lines recommended in "The Challenge of Crime in a Free Society" (not as much, of course, as for riot control training, but some); a Federal Judicial Center under parallel legislation; some federal funds for police training free of the grim clutch of J. Edgar Hoover - and so on. A few of the high hopes of yesteryear - modified, reduced, made more acceptable to the politicians in an election year.

The report may have failed as yet to win acceptance as a plan of action; but the fault lies not in what is recommended but in the political quagmires, the balkanized police forces, and the jealousies and anxieties of the complex and discordant governmental structures that make up this exciting and frequently infuriating country. The lessons of the report remain clear, however, whether politically accepted or not. And to two of these I now turn - the role of the criminal sanction and the role of research.
University of Chicago, offered this wise advice: "We may start with the obvious observation that not every standard of conduct that is fit to be observed is also fit to be enforced." 2

The United States suffers grievously from an overly moralistic criminal law. It becomes essential for us more narrowly to define the proper role of the criminal law. That law must cast off its moralizing superstructure and concentrate on the protection of the citizen from violence and the threat of violence, and on the protection of his property from certain serious depredations. We must do less and do it better. We must be cautious about using the criminal law as an instrument to achieve the good life for others. The consequences of our present exaggerated role for the criminal law, if its moralistic over-reach, can be seen is so vividly to any local jail, to any nearby court of first instance, or they can be found set out in "The Challenge of Crime in a Free Society". The system is bedevilled - police time, court time, correctional time, and the energies of all wasted - by a criminal law that sweeps up alike the inadequate nuisance and the dangerous thug.

In three areas of the criminal law the report speaks authoritatively to that issue.

First, it carries forward a movement begun in the courts 3 to hold that being drunk in a public place, drunk and disorderly, drunk and resisting arrest, and similar otherwise non-criminal expressions of drunkenness or alcoholism should fall outside the scope of the criminal law. The drunks clutter the jails and shuffle as a stage army through the minor courts. One of every three arrests in America is for the offense of public drunkenness. Little is achieved for the arrestee or for us - it is demeaning and it is expensive. The Commission strikes to the heart of the matter: "Drunkenness should not in itself be a criminal offense. Disorderly and other criminal conduct accompanied by drunkenness should remain punishable as separate crimes" (235/236). Other means than the police, the jails and the courts must be applied to this social problem. A variety of experiments to this end. There is surely no doubt of the wisdom of this recommended reduction of the reach of the criminal law.

Secondly, the Commission recommends another reduction of the grasp of the criminal law, a reduction of the jurisdiction of the juvenile court. Many Americans have been disturbed by a growing realization that the rhetorical benevolence of juvenile court processes, designed for the benefit of the child, could in no wise be matched to the reality of the crowded dockets and the curt processes of the juvenile courts of America, and to the exiguous rehabilitative facilities available to those courts to achieve their proclaimed rehabilitative purposes. In Mr Justice Fortas' words in the Supreme Court 4: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." And since the Commission's report, the Supreme Court In re Gault 5 has carried this theme into constitutional mandate and has extended many of the protections of constitutional due process to the child who is charged with being a juvenile delinquent.

The Commission makes a strong recommendation here. It urges the establishment of Youth Service Bureaus, located in neighborhood community centers to handle those problems of the child and the child

5. 387 U.S. 1 (1967).
in his family, community and school which now find their way to the juvenile court but which would not be crimes if the child had been an adult. The juvenile court's jurisdiction would then be reduced to those acts which had they been committed by an adult, would have been crimes. The "welfare jurisdiction" of the juvenile court — and it is a wide jurisdiction — should go; here the model of the Scandinavian local administrative boards is to be preferred. There is much of detail to discuss here, but the thrust is, in my view, compelling.

Thirdly, the Commission was divided on the issue of a similar decriminalization in the field of narcotics. The majority asked for research and, pending knowledge, more of the same punitive enforcement. Fifty years of failure had not convinced them. A minority of four, however, wrote as follows (302/303):

Many persons concerned with the problem have for years been questioning whether the criminalization of narcotics and marihuana distribution has not served to defeat the objective of controlling and perhaps eliminating drug abuse and the crime associated with it. The gnawing question to which there has never been a satisfactory answer is whether this policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain the funds to acquire his own drugs. There is also the unusually difficult question of whether the compulsion of the addict to obtain drugs and the money to purchase them causes him to commit collateral crime that otherwise he might not commit.

In this important area the Commission has been unable to face the fundamental questions. Instead, for reasons that are quite understandable but in our view not justifiable, it assumes that the laws and the traditional methods of enforcement which have obtained for over 50 years, are the only proper ways in which to meet the problem. It makes this assumption at a time when the use of narcotics and other drugs may have become intensified, and all of the moral, economic, and criminal law problems associated with these vices may be greater than ever....

We recognize that there were practical limitations, apart from the short time the Commission was given to do its work. It is not easy to question the views of the many National and State law enforcement agencies of high quality and experience, which have been struggling heroically with the problem along traditional lines for over a half century.... It is particularly difficult to remove from one's own mind and from the minds of others the idea that, because there is correlation of events, one must be the cause of the other. But the fact — the obvious fact — that so many criminals are also users of narcotics or marihuana, and that there has been an escalation in the use and the amount and kind of drugs, does not necessarily mean that drug abuse is a cause of crime. It is difficult to persuade people that they should at least consider whether both are simply the effects of common causes — that delinquents resort both to drugs and to crime for more deep-seated reasons than that the one causes the other.

We feel impelled to make these remarks because, while we do not know the answers or have the data to disprove what we believe to be the unproven presuppositions of the traditional approach, we are convinced that the time must come when this Nation will have to consider from entirely new and unbiased viewpoints the associated but distinguishable problems involving narcotics, marihuana, hallucinogens, and other dangerous drugs. The time will come when we will have to determine causal relations and

6. Dr Brewster, Judge Breitel, Mrs Stuart, Mr Young.

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consider the possibility that traditional methods of law enforcement produce more rather than less crime, particularly of a collateral character.

The Commission thus, overall, tended towards a wise reduction of the applicable role of the criminal law. It failed, however, to meet the views of many scholars in this field, which I share, that a similar reduced criminal jurisdiction is desirable in relation to certain sexual crimes, vagrancy, gambling - indeed, to all victimless crimes. By victimless crimes I mean all situations now called crimes where (apart from homicide) no one identifies himself as a victim of crime.

"Victimless crimes" should not be thought of as a small part of the phenomenon of crimes. Of the over five million arrests reported in 1965 in the Uniform Crime Reports, almost half were for crimes that have no real victims (prostitution, gambling, narcotics use, vagrancy, juvenile curfew violations and the like) or for breaches of the public peace (drunkenness, disorderly conduct).

Let me turn from such contentious issues to a theme with which all will agree - though I doubt that anything much will be done: the need for research evaluative of the processes of the criminal justice system.

Research

In 1927, Felix Frankfurter wrote for the Boston Crime Survey that the subject was "overlaid with shibboleths and clichés" and that it was essential to "separate the known from the unknown, to divorce fact from assumption, to strip biases of every sort of authority." It remains a true statement. The need for research and knowledge in this field is great and urgent. In the United States less than one percent of the expenditure on the criminal justice system is devoted to research and the accumulation of data concerning that system. By contrast, even with the hugely expensive involvement in Viet Nam, the Defense Department allocates fifteen percent of its total budget to research.

The Commission makes four recommendations:

1) Criminal justice agencies such as State court and correctional systems and large police departments should develop their own research units, staffed by specialists and drawing on the advice and assistance of leading scholars and experts in relevant fields.

2) Substantial public and private funds should be provided for a number of criminal research institutes in various parts of the country.

3) Universities, foundations, and other private groups should expand their efforts in the field of criminal research. Federal, State, and local governments should make increased funds available for the benefit of individuals or groups with promising research programs and the ability to execute them.

4) A National Foundation for Criminal Research should be established as an independent agency.

These recommendations speak for themselves and are, I believe, relevant to the criminal justice system of every country. I shall confine my comment to stressing the particular need for one type of research, that is, research evaluative of our prevention and treatment methods.

Police, court, sentencing, and correctional practices must cease to rest on prejudice, surmise and good intentions. We are under a moral obligation to use our best intelligence to discover whether and to what extent those practices serve our community protective purposes.

Criminological research has been too long concentrated on the search for that will o' the wisp, the causes of crime, and much too little attention has been given to research evaluative of our prevention and treatment methods. The methodology of such research is well within our competence; it is not expensive. It is a sin
against the light to introduce any new practice or programme into the criminal justice system without at the same time providing for its critical evaluation. And the same need exists for all existing programmes and practices. It seems an obvious plea - to count the cost, assess the efficiency, analyze the system - yet were it accepted it would work a revolution in our systems of criminal justice.

A New Zealand - Australia Institute

Let me conclude this paper with a recommendation which flows to a degree from this felt need for research and knowledge in this field. There should be a New Zealand - Australian Research and Training Institute, pursuing research studies and bringing together for seminars those concerned with the prevention and treatment of crime and delinquency in Australia and New Zealand. This is not a new idea. It has, to my knowledge, been discussed at a senior government level in both countries for at least ten years; but nothing has been extruded from those discussions. The broad similarity of problems faced in New Zealand and the Australian states, the similarity and yet the differences of approach to them, make the region an ideal laboratory for such an Institute and provide superb data on which it could base training programs for senior, near policy-level, officers of the police, courts, correctional agencies, and other departments officially concerned with the broad range of problems attendant on the prevention and treatment of crime. Such an Institute would make it possible for us to provide levels of training and skill at a senior-executive stage of careers in these fields which is totally lacking at present. The days of the good mind and common sense are not numbered; they will long remain the central desiderata of policy planning; but the need of those minds for support, information and stimulation by the rapidly burgeoning knowledge in this field is now inescapable.

New Zealand and each state of Australia have it well within their financial resources and levels of skill to provide in-service and basic training for the sub-systems of the criminal justice system (police - lawyers - courts - corrections); what New Zealand and each state of Australia lack is the capacity to provide sufficient training and in-service development for those who proceed beyond the middle management level in these sub-systems and have to relate their decisions to the overall system. Nothing very drastic will happen, I suppose, if no such Institute is established; man has a huge capacity to tolerate inefficiency and suffering; but if it be desirable to minimize these adversities, then such an Institute would be an economical and effective way of doing so. I am in a peculiarly good position as an Australian citizen, born in New Zealand and working in the Chicago heart of criminology, to urge the need for such an Institute and further to urge that New Zealand should play a forceful and initiative role in its establishment as she has in so many other worthwhile developments in the social welfare field.

Norval Morris