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Next month the concluding volume in the five-volume series of books resulting from the American Bar Foundation's Survey of the Administration of Criminal Justice will be published. Now that the shortcomings of our criminal justice system have been delineated once again, what are we prepared to do about them?

The American Bar Foundation’s Survey of the Administration of Criminal Justice will be completed next month with the publication of Professor Frank Miller’s Prosecution: The Decision To Charge a Suspect with a Crime, to be published by Little, Brown & Company. This volume and its four companions report and analyze information gathered in a field study of criminal law administration in three major cities. Although the primary data are ten years old, continued monitoring and more recent studies show that the basic problems remain mostly unchanged.

No study of such a complex subject can be “definitive” in the sense of exhausting the subject. The main findings of the survey, nevertheless, are quite clear. These include:

- The wide discretion officials have in enforcing the criminal law, raising questions about the premises and objectives involved in their exercise of discretion.
- The ambitious goals of our criminal law (including public security and private civil liberty, uniformity and individualization, bodily safety and purity of morals), raising questions about community purpose.
- The autonomy of law enforcement agencies, raising questions about the identity and responsibility of law enforcement “authority” itself.
- The fact that achieving a high conviction rate is not necessarily the central aim of criminal law administration, raising questions as to its other purposes.

These findings generally correspond to those made thirty-five years ago by the Wickersham Commission and two years ago by the President’s Commission on Law Enforcement and Administration of Justice, which says how difficult it is to bring about fundamental improvement in so important a legal institution. The Foundation survey, however, made a special contribution in describing the administration of criminal justice as an interrelated system. However disjointed, the various institutions that were the subject of the survey have systemlike attributes. Common to all of them is the offender—the man and his file that move through the maze. Common also is a recognition by the official participants that their activities are interrelated. Every operative in the system—policeman, prosecutor, judge, correction officer—one way or another takes into account the probable response of others in the system to whatever action or decision he undertakes.

A System Composed of Balkanized Agencies

Recognizing that the agencies of criminal law are a system is one thing; putting the lesson into practice is another. The agencies of criminal justice are still balkanized, sealed off from each other by boundaries of legal jurisdiction, political allegiance and budgetary responsibility. There is an almost complete lack of over-all management or co-ordination. At the same time, performance specifications are

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2. In a few localities, specifically Los Angeles, some real advances have been made toward remedying this situation, but such efforts are exceptional.
pursued or imposed in one part of the system without reference to their impact on other parts. The due process explosion emanating from the Supreme Court is a much-debated illustration—the police are required to increase the procedural quality of their performance without being provided the resources to do so. But the police insistence that the "clearance rate" is the relevant measure of their performance reflects a similarly incomplete analysis. The public is not served by a high solution rate simply on crimes that the police know about.

In broader perspective, the efforts to deal with the problem of crime are hampered by the tendency of each agency to pursue its own ends oblivious of the interests of other agencies and of the aggregate effect on criminal law administration. Now that Congress at last has interested itself seriously in the problem of criminal law administration, we see it making the same kind of mistake. The Omnibus Crime Control and Safe Streets Act of 1968 contemplates massive augmentation of police resources without corresponding increases in the capacity of prosecution offices, criminal courts and corrections agencies to handle the new "business" increased police forces presumably will generate. These kinks sooner or later may be ironed out, but there will be a good deal of distress and confusion before that goal is realized.

The survey also permits us to see that the administration of criminal justice is a "system" from the point of view of its "customers"—the criminal offender, the potential criminal offender and the public-at-large. The aim of the criminal law is to protect society from serious domestic evils. This goal is achieved in part by the moral condemnation implicit in criminal prohibitions and in part by punishing those who violate the prohibitions. But beyond these measures there is an educational and demonstrative function of the criminal law system. Law enforcement officials are models—and in this sense teachers—of what proper behavior ought to be. This is the simple, but profoundly important basis for responsible concern about "police brutality". Each unnecessary use of the bill-club, each racial slur, each instance of officiousness is a lesson of some kind to someone. The lesson to be learned from this official miscreancy is surely not one that we want taught.

At the time the survey data were collected, there seemed to be little overt official brutality in the communities studied, testimony to the efforts of the agencies to do a professional job. That probably was true in most parts of the country at the time and, again with some important qualifications, appears to be substantially true today. However, the incidence of what might be called "psychic" brutality is widespread. A good deal of this is attributable to the personal and educational characteristics of people who are drawn into law enforcement work, and some of the callousness is no doubt the consequence of the abrasions they suffer while performing tough and exasperating jobs. But the survey indicated something else for which society has to take responsibility. At dozens of points, with a repetitiveness that settled into monotony, the system was ignorant, indifferent or abrupt with the people with whom it was dealing simply because there were too many cases, involving too many people, being handled by too few officials with too little time to do a decent job.

It is not merely that the police, the prosecutors and the magistrates have to make rapid decisions on the basis of inadequate information and insufficient reflection. Even when the objective circumstances would have permitted some kind of pause, the resources were not available to make use of it. It is now notorious that the policeman's arrest decision is a complicated choice made on the spur of the moment. But the same problem exists in the prosecutor's office, where the files whiz by the hasty perusal of a junior deputy and go past a senior deputy at an even faster rate. It repeats itself again in court, where the cases are served up to an overworked magistrate for drumhead treatment. What kind of a system of justice is it in which the aggregate professional involvement in the aggregate case, including police, prosecutor, magistrate and probation officer, is probably less than five hours and the final judgment that society makes—the hearing in court—takes less than five minutes? And what shall we say of antiriot procedures that pit police against crowds too large for them to handle with low-key techniques?

In light of these facts, the "breakdown of law and order" is not so much an anarchistic conspiracy as an accumulation of public neglect. As soon as we can abandon the search for a scapegoat—whether the police, the Supreme Court, youth unrest or the black man—we may get down to the serious business of organizing a system for the prevention of violence that will work over the long pull.

The Foundation survey has helped the legal profession become more aware of the weaknesses in criminal justice—the law's central institution. The criminal law is the pillar of the administration of justice, representing the most serious of society's legal concerns and the most sensitive of its legal processes. The legal profession has always claimed a special responsibility for it. What the survey has told the legal profession is what Justice Jackson, who inspired the study, had suspected it would: that the real significance of the criminal law is not so much its doctrinal refinement but its "delivered value"—its practical reality, day-on-day, year-on-year, at the level of enforcement.3

In this perspective, the processes of statutory reform and judicial law making appear as guidelines for social action rather than action itself. Having propounded a criminal law to which we say we are committed, are we prepared to take the public action that will make it a reality? It pleases us to moralize through the medium of the criminal law. It may be more appropriate, however, for us to ask what kind of social protection is worth having. Let us hope the legal profession can help our society confront that question.


EDITOR'S NOTE: Geoffrey C. Hazard, Jr., is Executive Director of the American Bar Foundation and a member of the faculty at the University of Chicago Law School.

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