LAW ENFORCEMENT IN THE UNITED STATES OF AMERICA

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ON reflection, it seemed to me that instead of the subject on which I was originally committed to address the Society, "Modern Criminological Theories", it would be of more immediate interest if I were to tell you of the impressions I formed, during a five and a half months' sojourn in U.S.A., of law-enforcement methods in that intensely interesting country. The material I shall present to you is taken from the report which I have made to the Board of Studies in Criminology of the University of Melbourne. It should be remembered that my critical observations do not proceed from any unfriendliness to the American people, to whom I am warmly disposed, and that every criticism can be supported by pronouncements of responsible American authorities.

It should be realized, too, that as what I shall say concerns the morbid anatomy and the pathological manifestations of the American social process, I shall not attempt to put before you a balanced presentation of the total social organization, and that, because of the matters on which I concentrate, my description and comments do not show that organization in complete perspective.

The nature, extent and gravity of criminological problems in U.S.A., and the variety of theories and methods which have been propounded and used in attempts to deal with them, constitute a vast and fascinating field of investigation. Throughout the world the foundations of communal organization have been significantly and permanently affected by the enormous increase in mechanical energy and productive techniques now available for the use of mankind. Side by side with this happening the concepts by which the exercise of authority has customarily been justified have been under constant challenge, and there has been a lessening of the effectiveness of the traditional mechanisms of social control. In

U.S.A., these developments have proceeded further, and in a more receptive medium, than in countries which have still a more stratified social structure. American communities are, and have been for many years, characterized by fluidity and restless energy. Both the events and the influences attending the emergence of the American people as a nation produced social manifestations which, though not peculiar to American society, are nevertheless much more evident there than elsewhere.

The late Harold J. Laski has pointed out that, although in the American tradition there is a high veneration for law, that veneration is at least equalled by the widespread habit of a violence which disregards the habits of law. (*The American Democracy,* p. 31.) He connected this attitude with "the fact that it was so easy, if the law was put aside, to make one's way to wealth on so immense a scale" and he commented, "Once men seek to by-pass the law, they are bound to call into being not merely those who will evade it if they can, but (also) those who will break it with savage indifference if they know no other road to power and fortune". Laski mentioned two other factors which are relevant from a criminological view-point. "There is a real sense in which American respect for law has it itself begotten lawlessness," he observed. "The effort to control every field of human conduct by statute—an obvious deposit of the Puritan heritage—with the result that the sale of tobacco and liquor can be prohibited, meant that a group of men would arise to supply these wants to which the law refused satisfaction. The more widespread the want, the greater would be the profit in supplying it, and the more earnest would be the zeal of those responsible to see that it was enforced. Out of this there developed quite naturally a sense of satisfaction in outwitting the lawmakers. And once there is that kind of tension in the social environment . . . the stage is set for the breeding of violence by the attempt to compel obedience to the law." The second factor is that "the central ideal in the perspective of which all values are set is . . . of vast and sudden wealth". (*Ibid.,* pp. 32-3.)

The American way of life is avowedly dedicated to the pursuit of happiness, and happiness seems to be interpreted as a state capable of achievement by the satisfaction of human desires. Man's essential wants are few, but his desires are limitless and unsaleable. The economy being predominantly one of production, the media of mass communication are used to enlarge the range of those desires so that the production machines may be geared

to meeting them. That the American people, with the extraordinary variety of goods and amenities available to them upon instalment buying, are not noticeably happier than people above the level of want elsewhere, and that the incidence of mental ill-health is high, are facts which suggest that there may be more than a little substance in the doctrine that true happiness is not to be found merely in the possession of things, but lies in the limitation of desires, but such an idea has no place in American business philosophy. There is thus a constant appeal to the acquisitive propensity. That propensity, if unchecked, is a potent factor for social disintegration, for a group's existence depends upon proper control and adjustment of the self-regarding instincts of its members. Greed and cupidity lie at the root of a great deal of anti-social conduct, and their expression in disregard of the criminal law furnishes the bulk of the offenders who attract the operation of the coercive and punitive apparatus of society. A community which accepts in its public philosophy the exploitation of the acquisitive instinct not only as justifiable, but as an approved way to wealth, is therefore creating in its midst very grave potentialities for mischief. The conflict between the courses which the moral sense of the community approves and the activities which are in fact pursued and condoned exists in every country, of course, but it is strikingly obvious in the American society.

Despite the assertions sometimes found in American writings, there seems no justification for the theory that the average American citizen is any less law abiding by natural inclination than his counterpart elsewhere. There is no question, though, that the law enforcement machinery leaves a great deal to be desired, and that there is room for very great improvement. Constantly efforts are made to bring about this improvement, and the voluntary activities of citizens in this regard are an admirable aspect of American society. But the task of organizing the effective nation-wide criminal law and efficient law enforcement agencies which are at present lacking will be long and arduous, and there is abundant evidence that vested interests in the preservation of the worst features of the existing complex pattern of systems are both powerful and pertinacious in their resistance to desirable and necessary changes.

Assessment of the extent and gravity of social evils in U.S.A. is difficult because criminal statistics are notoriously unsatisfactory, and also because there is a marked tendency to present various aspects of these manifestations in a sensational fashion.

But where a governmental department is struggling for a greater share from the legislative budget, it is perhaps inevitable that its claims will be buttressed by eye-catching statistics designed to excite public perturbation, and it is impossible for a stranger to determine how valid these alarming assertions are.

There seems no doubt, however, that crime is big and profitable business. Senator Estes Kefauver, in a forward to Virgil W. Peterson's invaluable history of Chicago crime and politics, *Barbarians in Our Midst* (1952), wrote:

> "Law abiding Americans must devote some of their time and energy to a struggle against a ruthless internal enemy. He is often difficult to deal with. For, as Mr. Virgil W. Peterson shows, he is ingenious, untiring, rich, and gifted with the evil genius of corrupting law officers on many levels. His weapons are bribery, beatings, murder, banishment of rivals from the local scene, attempted intimidation of all those who would stand in his way, from the honest citizen at the ballot box to the juror in the jurors' box.
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> "Nor is this all. Long tolerated in some of our great communities, he has acquired by toleration what is seemingly a prescriptive right to crime. The stranger coming into such a community rubs his eyes in amazement at the sights he sees, and is more bewildered when he notes that citizens accept organized crime as a commonplace of their daily life."

Narcotics

The narcotic problem is one which has peculiarly American characteristics, and it is so surrounded by emotionalism, and I suspect, exaggeration, that it is very difficult to get a true picture of its real gravity. For example, marijuana is classed as a narcotic, but informed persons told me that its dangers, both to society and individuals, were grossly exaggerated. If this be so, the sensational statistics published on drug addiction and traffic in illicit drugs must be taken subject to many reservations. Often drug taking is offered falsely as an excuse for crime, in an endeavour to furnish a reason which the ordinary citizen may accept for otherwise incomprehensibly vicious conduct. Drugs are firmly linked with violent crimes and sexual orgies in the public mind, and it is highly probable that this is but another of the many misconceptions which exist in respect of conduct that departs from the normal. The latest Senate report asserts that approximately 50 per cent of all crime in U.S. cities, and 25 per cent of all crime in the nation, are attributable to drug addiction. I should take a lot of

convincing that this is so. According to the same report, U.S.A. has 60,000 drug addicts, more than all other Western nations combined, and the list of known addicts, now 30,000, is growing at a rate of 1,000 a month; there is one addict for every 3,000 U.S. citizens; 13 per cent of all addicts are under 21, and the dope traffic has tripled since World War II. Perhaps these assertions are well founded, but I am disposed to think they should be largely discounted or at least subjected to careful scrutiny. The Committee recommends, amongst other things, that the smuggling and sale of heroin should be punishable by penalties ranging from five years in prison to death. Senator Daniels, who presented the report, explained this proposal by saying:

> "Heroin smugglers and peddlers are selling murder, robbery, and rape, and should be dealt with accordingly. Their offence is human destruction as surely as that of the murderer. In truth and fact, it is murder on the instalment plan."

This is an excellent example of the kind of emotional presentation, by the use of false analogy, that has led to hasty and, in practice, unworkable legislation aimed at forms of anti-social conduct which excite public indignation. No responsible person can have anything but condemnation for dope-peddlers, but legislation of the kind foreshadowed is certain to be self-defeating, and the approach it indicates is likely to prevent any really useful measures from being considered.

This danger is, of course, always present in popularly elected assemblies, where to oppose draconic penalties is to invite the criticism that one is siding with the miscreant. By reason of the inescapable unfairness of sensational presentation in a press whose power often exceeds its standards of responsibility, the danger is significantly heightened in U.S.A.

In U.S.A. the dominant approach to the narcotic problem seems to consist in reliance on prohibitions and harsh penalties. If there are an effective and honest detecting agencies, severe laws against trafficking in drugs for profit may be effective, but addiction presents a different problem. If, as is claimed, addicts commit crimes and engage in the peddling of narcotics in order to get money to buy the means of satisfying their cravings, the high "black market" prices for the drugs are an important factor. Registration of addicts, and the issuing of drugs under proper supervision would seem to be a more sensible way of dealing with this aspect of this social mischief.

The first impression by one accustomed to the centralized and reasonably simple machinery for the administration of criminal justice in British communities is of the extraordinary complexity of the American system. Some notion of that complexity may be gained by contrasting characteristic features of the Australian and U.S. systems. Although Australia is a federation of six states, with a written constitution which owes a great deal to the constitution of the U.S.A., there is in Australia no federal penal system similar to the U.S. Bureau of Prisons, nor, except in federal territories, has there been any development of Federal criminal law, such as has occurred in U.S.A., for the reason that the peculiar needs that brought these mechanisms into existence in U.S.A. do not exist in Australia. Moreover, in each Australian state adult penal and correctional institutions are under the control of a single state authority, and the bewildering American pattern of local, county and city gaols and state-controlled penitentiaries is unknown. In each Australian state there is only one police force, under the control of a chief commissioner of police, operating throughout the state. In U.S.A. there are more than forty thousand separate and independent police forces, ranging from village constables to the F.B.I. Extradition poses no practical problem in Australia; flight from the state where the offence is committed to another state presents no obstacle to apprehension, for a warrant for the arrest of an alleged offender, issued in one state, can be executed in another, once there has been compliance with the comparatively simple requirements of the Commonwealth Service and Execution of Process Acts, but in U.S.A., given the aid of a lawyer skilled in technicalities, extradition can be made a highly dilatory proceeding. Here there is no practical problem of overlapping jurisdiction in the courts; the curial structure provides for the Supreme Court as the highest court, both trial and appellate, of the state; a court known as the Court of General Sessions (or some similar name) as an intermediate court; and Courts of Petty Sessions, which are magistrates' courts, at the lowest level. The Federal system in U.S.A. tends towards this simplicity, but in many American states the variety of courts and their jurisdictions is extraordinary. For example, the recent report (June, 1955) of the Temporary Commission on the Courts of the State of New York, recommends the replacement, by a five-court state system, of the 18 existing courts and types of courts which include more than 1,500 separate and semi-independent judicial entities. In Australia, all persons employed in connection with the administration of justice have

security of tenure which is unaffected by change of government, but that obviously desirable state of affairs is still the exception rather than the rule in U.S.A. (Cf. Herbert Agar, *The Price of Union* (Boston, 1950), p. 537.) The Grand Jury system, an important feature in American legal organization, survives here vestigially only, and is of no practical significance in the administration of the law, as preliminary enquiries and committals for trial are undertaken by magistrates.

The Federal System

I mention the Federal system of law enforcement separately because it is more readily comprehensible by an Australian lawyer than most of the state patterns, but even there the separate police forces attached to various executive agencies (five on one department, the Treasury), present a curiously unco-ordinated and complex pattern. Most of these police forces have specialized activities, and the best known of them is the Federal Bureau of Investigation. This body has a reputation for efficiency, and its personnel are said to be very well-trained. Its activities fell outside my field of inquiry, but so far as I could gather, the F.B.I. is not within the Civil Service system. (See Max Lowenthal, *The Federal Bureau of Investigation,* 1950.) Usually Federal professional and clerical employees are within the civil service, and probation officers, who are attached to the administrative division of the Federal courts, and parole officers, and personnel employed in the Bureau of Prisons, are within the Department of Justice and hold civil service tenure. The curial system is not dissimilar from ours; the country is divided into 85 judicial districts, each with a district court, and these are grouped around ten circuits, each of which has a Court of Appeals. The District of Columbia has a similarly organized court system. At the apex of the Federal system is the Supreme Court of the United States. Judges do not have to stand for election, but are appointed and hold office during good behaviour.

The federal penal system is part of the Department of Justice and is under the control of the Federal Attorney-General. It consists of the Bureau of Prisons, the Board of Parole and the Federal Prisons Industries. It is very well organized and has exercised a valuable influence for good upon penal practices throughout the United States. The Director, Mr. James V. Bennett, and his immediate assistants are humane and highly competent administrators, whose methods and philosophy are

studied with great interest not only within U.S.A., but throughout the world. They are well aware of the contradictions that are inherent in a modern penal system and this awareness, coupled with their professional competence, makes their contributions to penal science of great use and significance.

The agencies traditionally concerned with the maintenance of order and the enforcement of the law are the police, the prosecuting agencies, the courts and the officials who execute the sentences of the courts, or, under legislation, have the disposition of convicted persons after their guilt has been established judicially. I shall present my observations by reference to this traditional division of functions.

The Police and Prosecutors

It seems unhappily true that in U.S.A. police, in Walter Reckless's words (*The Crime Problem* (2nd ed. 1955), p. 655), "have been unusually susceptible to corrupt politicians, to underworld interests and to organized crime". Charles Reith (*The Blind Eye of History,* Faber, London, 1952, Ch. VI) considers the weakness of law-enforcement machinery in U.S. is due to the fact that, as the people's choice, the police were allowed to become, corruptly, the instruments and servants not of law, but of policy, and of local and corrupt controllers of policy. (Cf. also, Barnes, *Society in Transition,* 2nd ed. 1952, p. 426.) It is recognized by American writers on criminology that the extent of corruption and abuse of power among police forces in U.S.A. constitutes a grave social problem, and the descriptions to be found, for example, in Barnes and Teeters' *New Horizons in Criminology* (2nd ed. 1951, Ch. XII) and Ruth Cavan's *Criminology* (2nd ed. 1955, p. 38, pp. 320-24) of grossly illegal conduct by police officers are certainly sufficiently startling. It may be that there is, in very truth, a war between the police and the not inconsiderable lawless elements in American society, with a consequent disregard of the rules of fairness, and in such a state of affairs it is inevitable that innocent citizens will sometimes get hurt. But the record of misuse of police powers is perturbing in its detail and extent, and it is difficult to resist the impression that police officers do exercise power arbitrarily and irresponsibly on far too many occasions.

There are efficient police organizations in U.S.A., but the number of those which are not, and the complexities and technicalities that clog the exercise of their functions, result in the failure to punish a great deal of criminal activity. Van Vechten

found in a study published in 1942 that of 610,000 reported crimes, there were arrests for 25 per cent, convictions for 5·5 per cent and prison sentences for 3·5 per cent. According to Chief Judge John Biggs, Jr., out of 700 gang killings in Chicago during the past 25 years, there were fewer than 10 convictions. (*The Guilty Mind,* 1955, p. 177.)

The common law distinction between felony and misdemeanour has been retained as basis of classification of crimes, and this has procedural consequences of importance. From the standpoint of penalty, however, a felony is a capital offence or an offence which in the absence of probation entails imprisonment for more than twelve months, and such a sentence is served in a state prison. A misdemeanour is an offence which may involve a sentence of not more than 12 months, which when imposed is served in a county or municipal gaol.

Apart from almost a million misdemeanants who passed through the county, city or local "jails" on holding charges or serving sentences of under one year, there were at the end of 1953 over 172,000 adult prisoners in Federal and State prisons or correctional institutions (Federal, 19,363; State, 153,366), serving sentences for felony. One cannot, from Van Vechten's findings and these figures, arrive at a reliable conclusion concerning the extent of unpunished crime, but when they are set side by side they do give a rough idea of the extent of criminal behaviour, especially if it be true, as Reckless states (*The Crime Problem,* p. 12), that "many, perhaps most, violations of the criminal code are not known, particularly not known officially". According to the F.B.I. report for 1950 "the number of serious and undetected crimes committed during that year exceeded 1,700,000". Unreported crime is, of course, a significant problem in every country, but there is good reason to believe that its magnitude is greater in U.S.A. than in British communities.

This state of affairs leads to an attitude on the part of the public which is quite different from that dominant in British communities served by much more efficient and lay-respecting police forces. There is a tendency in U.S.A. to regard the means as justified by the end, and unconscious identification with the victim of the crime leads to condonation of police misbehaviour. But because of police inefficiency, whether it arises from bad organization, poorly trained personnel, or corruption, the chances of escaping apprehension are sufficiently great to satisfy far too many that crime *does* pay. It is only fair to add that these weak-

nesses have been the subject of vigorous action by able men, and there is ground for believing that the efficiency of police forces is on the increase.

The District Attorney's office is a peculiarly American institution. He has, according to Sheldon Glueck (*Crime and Justice* (1936), p. 144), "more power with less accountability than any other officer". Bargaining, whereby the prosecutor accepts a plea of guilty to a lesser offence, and does not proceed with the graver charge, is common, and may even aim at fixing the penalty. The average District Attorney's conception of his role as prosecuting counsel differs very greatly from ours; once a case reaches trial, he is concerned, not with justice, but with obtaining a conviction. This approach inevitably gives rise to abuses. Innumerable suggestions have been made for the eradication of the worst features surrounding the preparation and prosecution of criminal charges; Dr. Sheldon Glueck's admirable work, *Crime and Justice,* is devoted to a survey of the problem in all its aspects. If one is to judge from recent works on criminology, the situation generally is now much as it was when Glueck wrote in 1936. Reform comes very slowly; in most human societies what is everyone's affair is usually nobody's business.

The Courts and the Legal Profession

The observations which follow do not represent my personal assessment of the members of the judiciary, Federal and State, it was my good fortune to meet. My personal contacts with them were very pleasant and, generally, I was impressed not only by the legal attainments of those I met, but also by their interest in and knowledge of the social sciences other than the law. This interest was to be expected, I suppose, for usually the reason for the meeting was a common interest in the subjects I was investigating.

In a discussion of judicial power in America, Alexis de Tocqueville wrote, "Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and it will be found out at some future period that, by thus lessening the independence of the judiciary, they have attacked not only the judicial power, but the democratic republic itself". (*Democracy in America,* Vintage Books, Vol. 1, p. 289.) These observations in the early

part of the last century of a developing system showed considerable foresight.

In only six states, according to Blaustein and Porter (*The American Lawyer,* 1954, at p. 265), are judges appointed. In all the other states some form of popular election or popular confirmation is required. Under the system which is recommended by the American Bar Association as "the most acceptable substitute available for the direct election of judges", the position broadly is that a judge is appointed initially by the governor of the state from a list submitted by a special committee; the judge so appointed must submit himself for election at the next general election, but no other candidate is allowed to stand against him. The electors are asked, "Should Judge X be retained in office?" This is called "running against his record". Should he be rejected by the people, the governor appoints another qualified person from the list to the position, and that person in due course must submit himself for popular confirmation.

It seems generally agreed by responsible citizens that it is necessary to take the judiciary out of politics. According to the *Survey of Criminal Justice in Cleveland,* in 1922, the judges of the municipal courts were generally above suspicion of taking direct bribes, but found it difficult to forget the coming election, and I suspect this state of affairs has not altered. It seems established that in the large cities a substantial factor in lowered standards in the administration of criminal justice has been the elective system.

I imagine that a curious custom in some states, whereby judges of some jurisdictions also engage in the practice of the law as practitioners (see *The American Lawyer,* at pp. 266–7), is a consequence of insecurity of tenure.

Reference has already been made to the complexity of the curial structure. As with the creation of all courts, the reasons are historical, but a factor in the creation of some of these courts has been the American fondness for the *ad hoc* solution. For over 50 years there have been persistent endeavours to streamline the curial systems in various states (see Hearst, *The Growth of American Law,* at p. 93 ff), and at the present time Chief Justice Vanderbilt of New Jersey is in the forefront of the movement. There is no lack of awareness of the defects, and the professional associations are avowedly desirous of correcting them. Established abuses are hard to eradicate, however, and public inertia and indifference, as well as a fear (perhaps well founded) entertained

by some lawyers that justice may not be found to reside in assembly-line efficiency, constitute serious obstacles to change.

It is plain, though, that complexity tends to delay, and delay is likely to work injustice, by afflicting the innocent and favouring the guilty. There seems more than a little foundation for the conclusion that, as a general rule, administration of criminal justice in U.S.A. lacks both speed and efficiency in the trial and conviction of offenders. This is in part ascribable to the calibre of the judiciary and in part to the unnecessary technicality of the procedural law, but if the professional competence of trial judges were higher, trials would be shorter and a good many of the appellate protections could be dispensed with.

Having regard to the American veneration for law, I was surprised at the cynical attitude of many responsible American citizens with whom I discussed the matter towards courts and lawyers. The law's delays excite derision, and its technicalities impatience. Incidentally, I cannot believe that it is other than a grave defect in a legal system that a person, sentenced to death, can in some instances, by legal manoeuvring, delay execution of the sentence for as long as six or seven years, nor do I consider that it is other than socially harmful to carry out a death sentence after the lapse of so long a time. That such things can happen seems to me to indicate a curious harshness of outlook and an indifference to human suffering. Certainty in the detection and apprehension of, and swiftness of punishment, or at any rate disposition, of offenders must always be the basic requirements of a rational criminal system.

From my limited opportunities of observation, fortified by fairly wide reading of American publications, I am left with an uneasy feeling that there is a tendency on the part of the American courts to punish too severely, and that these unduly harsh penalties are sometimes resorted to, perhaps unconsciously, for the purpose of diverting attention from the defects of the system. Certainly some of the sentences of imprisonment are excessively long by Australian or English standards. A sentence of 99 years, coupled with a sentence of life imprisonment, may have a meaning to those familiar with the requirements in some states that a prisoner must serve one-third of his sentence before he is eligible for parole, and that "lifers" may only be released by executive clemency, but it sounds fantastic to the ordinary person. In Stateville, Illinois, there is a prisoner serving ten sentences of 199 years operating cumulatively, or 1990 years in all.

It may be mentioned, as some guide to comparison, that 21 per cent of the 3,653 prisoners sent to prison during 1949–53 in the State of New Jersey were sentenced to minimum terms of five years and over, whilst during 1951 and 1952 in England and Wales the percentage of prisoners sentenced to five years or over was 1·2.

In a series of articles published during September, 1955, in a responsible newspaper, the *Baltimore Evening Sun,* Edward J. Mowery asserted, "The Administration of criminal justice in this country is faltering. It is jeopardizing rights of the innocent through careless, indifferent or venal court procedure. It has created an atmosphere of presumed guilt that aborts our precious constitutional safeguards.

"No one, of course, knows the tragic toll of bungling justice. We do know that many who were guilty have escaped punishment and many who were innocent have died for crimes they didn't commit.

"Two of the nation's leading criminal lawyers flatly state that between ten and twenty per cent of the 153,000 in American prisons today were either falsely convicted or were the victims of sentences that were too harsh."

According to Mowery, the late Justice Robert Jackson, of the U.S. Supreme Court, told him, "I'm not sure that innocent persons are entirely safe or that innocence is a sufficient shield. The real problem in criminal law isn't the criminal at all. It's the citizenry —the good people—who sway between sentimentalism and savagery. When excited about crime waves, they demand tough sentences and shortcuts to convictions."

To a question, "What about breakdowns within the courts?" Mr. Justice Jackson replied, "Certainly there are breakdowns; the innocent are too often convicted and the guilty too often escape punishment".

The unsatisfactory state of criminal justice has recently been highlighted by the creation, in 1955, of a special committee by the American Bar Association. That committee, consisting of seven lawyers, is headed by an eminent lawyer, Major-General William J. Donovan, and the Chief Justice of the Supreme Court of U.S.A., Mr. Earl Warren, will serve as a special consultant. The Chief Justice described the project as "a pioneering effort, the first complete study of criminal justice administration ever undertaken". Fundamentally the committee will undertake research into the four principal divisions of the system—the police function, the prosecution and defence of criminal trials, the

working of the criminal courts, and of the methods of probation, sentence and parole.

The committee has said that the American law enforcement process is "sadly deficient", and that criminal procedure "is not creditable to our people or our profession".

The legal profession and the law schools must, I feel, carry a good deal of responsibility for the present unsatisfactory state of affairs. With a few exceptions, the law schools do not seem to recognize the obligation to teach criminal law as a basically important part of a student's legal education, and the legal profession seems to have been apathetic in the presence of abuses, both by the prosecution and the defence.

Practice in the criminal courts seems to be regarded not only as bringing no prestige, but as involving a positive loss of that attribute, which is greatly sought after in an egalitarian society. If this attitude is well founded, it indicates the existence of an unhealthy state of affairs, both communal and professional. The remedy is largely in the hands of the profession and the courts, which have expert knowledge of the matters involved, but an awakened and properly informed public opinion would strengthen immensely the hands of those who wish to bring about improvement. Despite signal contributions by some newspapers in occasional campaigns to correct a particular miscarriage of justice or unmask corruption and abuse, it is impossible to resist the feeling that a considerable portion of the American press often prefers sensational presentation to adherence to responsible standards. "Trial by newspaper", as it takes place unchecked in U.S.A., is a procedure which is startling to the Australian observer. Australian courts have taken and enforced the view that it is the business of the police, and not of journalists, to detect crimes; and of the courts, and not of the newspapers, to try alleged offenders; that fair trial is just as important, and as socially necessary, as freedom of expression, and that the maintenance of the one in a sensibly administered legal system is in no way incompatible with the robust existence of the other, but there is no similar judicial control in U.S.A. Apparently the American legal profession must bear a substantial amount of the blame for the existence of this grave impediment to the proper administration of justice. (See *The American Lawyer,* p. 270 ff). The publication of unproved allegations against the defendant before trial is recognized as a grave obstacle to the fair administration of justice. Mr. Justice Jackson said, "There is no worse enemy of our American system

than the person who would bring outside forces—sympathy or hate—to influence a verdict. There is a feeling that it's good to bring to the public prematurely every bit of information that can be dug up to discredit the accused." (*Baltimore Evening Sun,* Sept. 16, 1955.) Special Sessions Justice Mathew J. Gray, of New York, after 18 years' judicial experience, stated, "Many law enforcement agencies have been consistently guilty of making extravagant claims immediately after a sensational crime. The stories they feed to the press are not only exaggerated. In many cases, they are pure fiction. Subsequent trials repeatedly have shown that headline-hunting rather than a desire for justice prompts this departure from ethical practice. Those who purchase these headlines at the expense of human liberty—and they may include judges—constitute a more serious threat to our form of government than the most rabid communist in our midst." (*Ibidem.*)

Mr. Justice Frankfurter has written on the same subject. "Too often cases are tried in newspapers before they are tried in court," he observed, "and thereby the assurance of a fair trial is enormously decreased. The characters, as presented in the newspaper trial, often differ from the real persons who appear later in the court trial, and the latter usually suffer from this unfair distortion." (*St. Louis Post-Despatch,* December 13, 1953.)

I feel strongly that the courts have failed signally in this matter. The purveyors of this damaging material could not accomplish their ends if the newspapers were restrained by the courts within their proper limits. The time for action was when significant elements of the American press abandoned the simple moral verities which expressed themselves in decent standards of taste and responsibility. Now the task is immensely more difficult; indeed, having regard to the extraordinary dominance of the American scene by the media of mass communication, it may be an impossible one. But even responsible lawyers who were keenly alive to the evil told me that unless the quality of the judiciary was substantially improved, they would not be prepared to entrust the courts with the contempt powers which are exercised by the superior courts of British communities.

Broadly speaking, not a great deal can be done with the lawyer once he is immersed in practice; the persons upon whom the importance of the criminal law must be impressed are the students. For my own part, I regard a proper understanding of the criminal law as essential to the making of a sound lawyer. "No

department of law can claim great moral importance," wrote Sir James Fitzjames Stephens in the preface to his monumental *History of the Criminal Law of England* (1883), vol. 1, p. ix, "than that which, with the detail and precision necessary for legal purposes, stigmatizes certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property or personal liberty. . . . The political and constitutional interest of the subject is not inferior to its moral interest. Every great constitutional question has had its effect both on criminal procedure and on the definition of crimes." The protections against injustice which have been adopted only over the last 150 years, after centuries of struggle, can easily be lost, and it is the lawyers upon whom rests the duty to preserve them, as well as to see that the criminal law is administered efficiently so that wrongdoers shall not go unpunished. The special knowledge of teachers of law imposes on them the obligation to bring these matters vividly before students. It was once true, and should still be so, that to be a lawyer is to be a member of a learned profession, and not merely a person licensed to earn a living in a protected occupation. Membership of a learned profession involves the duty, without thought of pecuniary advantage, of guarding and preserving essential social concepts, foremost amongst which, for lawyers, is the idea crystallized by Madison in the words, "Justice is the end of government. It is the end of civil society." (*Federalist,* No. 51.)

These observations are not remote from the developing branch of learning known as criminology, as is shown by Dr. Paul Tappan in his article "Who is a Criminal", reprinted in *Criminology, a Book of Readings* (1953, p. 39 ff). Most criminologists are social scientists without training in the law. But law reform, even by legislation, must be affected ultimately through lawyers, and although it can be achieved against the opposition of the legal profession, obviously the easier and more satisfactory way is with the profession's co-operation. Absence of legal training often leads criminologists to underestimate the complexity of the task, and to give insufficient weight to considerations of which experienced lawyers are aware.

The criminal law is a part of the mechanism for maintaining in society the form of order which the elements controlling the instruments of political power require. It is, in the ultimate analysis, the regulated brute force of the community. It has a long and bloody history, but at the present stage of human de-

velopment devices exist in certain human societies, amongst which are U.S.A. and the peoples comprising the British Commonwealth, which will, if honestly and intelligently employed, go far towards realizing the ideal of fair trial, which has been traditionally regarded as the ultimate expression of justice according to law. But no generally acceptable theory of punishment has yet been formulated, and once retribution, which most lawyers unconsciously accept as sufficient justification, is thrust into the background, we are left floundering in a morass of uncertainties and unproved, and perhaps unprovable, assumptions. The theory of "social defence" as a justification for indefinite detention at the discretion of an administrative agency, which is accepted in one form or another by many criminologists, is plausible, particularly when analogically presented, but it may prove highly dangerous to the legitimate liberty of the individual, and I am disposed to think that a great deal of avoidable human misery may have already resulted from its too enthusiastic adoption. The laws regarding sexual offenders enacted in some American states (Cf. Paul Tappan, *Some Myths About the Sex Offender,* Federal Probation, June 1955, Isabel Drummond; *The Sex Paradox, An Analytical Survey of Sex and Law in the U.S. Today,* N.Y. Putman, 1953, and the remarkable provisions for registration of sexual offenders contained in section 290 of the Penal Code of California) afford instances of the irrationalities, and worse, that have attended the application of this concept under the influence of ignorant emotionalism. If lawyers show no great enthusiasm for handing over wrongdoers indefinitely to administrative agencies, it is because those who have thought about it realize that, in Pound's words (*Justice According to Law,* Yale University Press, 1951, p. 79), "what differentiates administrative adjudication from judicial justice is the lack of checks upon arbitrary, biased, or extralegal, if not unlawful (in the sense of lack of accord with the legal rights of individuals) action in the other".

The laxity of professional discipline in most American States takes a good deal of meaning from the admirable Canons of Ethics which have been adapted by Bar Associations. Even where a Bar Association does make a recommendation courts seem disposed to take a more lenient course. (Cf. Blaustein and Porter, *The American Lawyer,* Ch. VIII.) The legal profession in any country is exposed to the conflict between precept and practice; its proclaimed ethical obligations are not always easy to apply in the daily practice of the law. Correction of flagrant violations, such

as the use of unfair or dishonest methods by an advocate, whether for the prosecution or the defence, should present no difficulty to a good judge, however, and here again the ultimate responsibility for the observance of proper standards of fairness must rest upon the court.

Indeed, the first requirement in the solution of the worst features of the administration of the criminal law in the U.S.A. would seem to be good judges. There are, of course, many good judges and many strong and able courts, but given throughout the nation, strong and capable trial judges, with security of tenure, and adequate salaries, and supported by appellate courts characterized by robustness rather than by subtlety, a great deal could be done to eliminate the defects that everyone deplores, but a good many seem disposed to tolerate.

Methods of Dealing with the Wrongdoer

One of the reasons why U.S.A. is of great interest to an observer interested in the social processes is that there are always in progress highly significant sociological enquiries and experiments. American contributions to penal science have long attracted the attention of other countries. The purpose of the visit of de Tocqueville and de Beaumont in 1831 was to examine the penitentiary system, and their report *On the Penitentiary System in the United States,* published in translation in 1833 at Philadelphia, with an introduction, notes and additions by Francis Lieber, contains much material that is still of criminological relevance. It has always been true of American society that there is no reluctance to give a trial to at least some new ideas; indeed, one of the burdens it carries, as do other societies, is that often a social mechanism survives long after the idea which gave rise to it has become obsolete and the original impetus has been exhausted.

At the present time thought on penal matters in U.S.A. is in a state of flux, but there is a marked tendency to embrace the notion of individualized punishment, by way of probation and indeterminate sentence and parole, although the application of this conception occasionally has strange results, as in *Williams v. New York,* 337 U.S. 241; 93 Law Ed. 1337. During 200 years many devices have been tried, from the Separate System of Pennsylvania and the Silent System of Auburn, to the open institutions of Chino, California, and Seagoville, Texas.

There seems to be a general acceptance of the idea that, from the standpoint of accountability, it is proper to treat wrongdoers under 21 differently from those over 21. Indeed, in California, the Youth Authority may admit to its institutions young offenders up to 23 years of age. Juvenile Courts, not dissimilar from what are here known as Children's Courts, institutions for juvenile offenders, training schools, diagnostic clinics, vocational guidance centres, and psychotherapy institutions have been widely established.

A. Probation

There is an increasing tendency upon the part of courts to use probation as a method of dealing with adult offenders.

Under the Federal system the probation service is attached to the Federal courts. It provides pre-sentence reports for the information of the sentencing judge. The defence has no right to see the report, but as a matter of grace is often permitted to do so.

There is substantial evidence that probation is working successfully. In the Federal courts for the year ending 30th June, 1954, 44 per cent of the 38,141 persons convicted were placed on probation. During that year probation was ended in 10,246 cases, in 1,643 of which, or 16 per cent, it was ended by violations of the terms of probation. In Los Angeles county the probation rate is about 40 to 50 per cent of adults convicted in the higher courts and it is claimed that the success percentage is 90 per cent. The figures in the juvenile courts are said to be even better. I think these claims require careful scrutiny.

According to Mr. Will C. Turnbladh, the executive secretary of the National Probation and Parole Association, throughout U.S.A. the courts are using probation in about 35 per cent of felony cases, and in less than 10 per cent of misdemeanour cases, but where efficient services are available the percentage of cases disposed of by recourse to probation is 65, and in these instances the success rate is higher.

The same authority states that there are in U.S.A. approximately 3,000 probation officers for 665,000 adult and youthful offenders placed on probation. This, he points out, involves an impossible case load, for whilst 25 is the desirable number it is clear that 50 is the greatest number of probationers that can be supervised in any sense by an officer at any given time. Moreover, there is difficulty in obtaining satisfactory probation officers. There

is, as yet, no great prestige attaching to the position. Salaries are not high, by American standards, and only persons who regard the work as a vocation rather than a job are likely to be successful in what is often a very discouraging field of activity.

There are many arguments for probation, which are as applicable here as in U.S.A. Professor Austin McCormick, who has had the great advantage of many years' experience in the actual running of the Federal and New York City and military correctional services, sets them out in an article, "The Potential Value of Probation" (*Federal Probation,* March 1955, p. 3 ff), and there is a mass of literature on the subject. At a time when the public purse is strained by the demands of defence preparation and social welfare services the one most likely to appeal to governments is that the cost of effective probation supervision is very much less than the expense of holding a prisoner in gaol. As population increases, existing penal establishments will be insufficient—indeed already are—to house offenders if traditional punitive practices persist, but it is more expensive to build a maximum security prison of the traditional kind than it is to build a hospital or a school, two services which communities with increasing numbers are very much in need of. It is possible, therefore, that in time incarceration in maximum security prisons will be used only as a last resort.

B. Sentences

I have already drawn attention to the fact that sentences in America tend to be longer than in Great Britain and Australia. On comparison, American sentences are longer also than those imposed in Canada, New Zealand, Switzerland and the Scandinavian countries. I formed the firm impression that in U.S.A. there is a tendency for legislatures to stigmatize as criminal conduct that may be socially unconventional, or unacceptable, but which is not necessarily socially injurious. Mr. Turnbladh states (*Annals of American Academy,* May 1954, p. 114) that in the opinion of a number of heads of prisons between 25 and 40 per cent of the inmates of their institutions could have been dealt with on probation. My impression was the same as that of Dr. Hermann Mannheim, of the London School of Economics, that there are too many people in American prisons (*Group Problems in Crime and Punishment, etc.,* London, 1955, at p. 186) but I would add that too many of them are in prisons for too long.

C. Fines

It is said that nearly half the persons in gaols (as opposed to prisons) at any one time are there for non-payment of fines. (Barnes and Teeters, *New Horizons in Criminology*, p. 474.)

D. Prisons

Some penal systems in U.S.A. are excellent, but I gathered that generally prison systems do not function satisfactorily, and are capable of great improvement. Mr. Sanford Bates, who was Director of the Federal Bureau of Prisons, and whose knowledge and experience are unsurpassed, asserts without hesitation that the introduction of obvious reforms and the efficient running of penal establishments will not be achieved so long as prison administration and personnel appointments are under the control of local political bosses.

I inspected a number of prisons, and I stayed at two correctional institutions—the California Institution for Men at Chino, and the Federal Correctional Institution at Seagoville, Texas.

The most remarkable penal and correctional system is that of California, which deserves the closest study. I was greatly impressed by the ability of the controllers of the system, and they are obviously dedicated to their work. The extent of the activities of the system and the range of its institutions are amazing to one accustomed to a cheese-paring and conservative approach to the problems of child welfare, juvenile delinquency and penal institutions. Since 1944, California has spent over sixty million dollars on its prison system; the new medical facilities institution at Vacaville, opened in 1955, is said to have cost twenty million dollars.

There is much that is controversial about what is there being done in the field of crime prevention and punishment, however, and that circumstance, and the manysidedness of the system, preclude me from offering any confident opinion about it. The penal administration is anxious to increase the number of medium-security institutions and to get away from the old idea of close confinement in the bastille-type of prison, and as classification methods improve, and money becomes available, effect will doubtless be given to this policy. Even in California, however, the administration is burdened with the heritage of maximum security institutions constructed in former times, and San Quentin and Folsom are still the basis of the California penal system, although

the methods of running them have changed very considerably, so I understand, since Richard A. McGee became Director of the Department of Corrections in May 1944. Admirable though its purposes are, there is always the danger that such an administration may take on inhuman qualities of perfectionism in the course of making men better despite themselves, and that it may require more of its human material than they are capable of giving.

The function of the Adult Authority and the principles on which it operates are set out in the following extract from the Biennial Report 1950, of the Department of Corrections, California, at p. 8:

> "Under California laws, the courts sentence felons to prison but do not, as they do in most states, fix the term of duration of punishment. This responsibility falls upon the Adult Authority, which conceives as its first and foremost responsibility the protection of society; its second inseparable from the first, is the moral regeneration and rehabilitation of each inmate. In discharge of these fundamental obligations, the most complex of its functions are those related to the fixing of terms and the granting of paroles. The following are the principal factors weighed by the authority in exercising its responsibilities related thereto: (1) legal limitations; (2) the type of crime; (3) the social history; (4) findings of psychological tests; (5) findings of medical and psychiatric reports; (6) record in prison; (7) pertinent correspondence; and (8) inmate's future plans.
>
> "In fixing the term and granting or denying parole in each case, a sincere and honest effort is made to determine within legal limitations, how much time will be required to properly condition the inmate so that he can make an adequate social adjustment in a free society. This includes the amount of time that seems necessary for the individual inmate to prove himself under supervision. While a serious and conscientious effort is made in reaching such an estimate in each case, it is fortunate that the law is flexible in permitting the redetermination in all cases, since no one knows exactly what problems will beset the man once released from prison."

Of the three Californian prisons, Folsom, San Quentin, and Soledad, the first made the most favourable impression. San Quentin is a complex multi-purpose prison, and the architecture of Soledad, with its wide, seemingly endless corridors, appears likely to foster inmate troubles.

The Federal prison at Alcatraz provides journalists with a never failing subject for sensational and usually misleading articles. It is a "tough" prison, and as it must be shockingly expensive to maintain, the justification which may be offered for it is its presumed value as a demonstration of the dreadful fate society can impose on wrongdoers. It is completely opposed to all modern concepts, and even if it be regarded as the ultimate in maximum security institutions for those who are so dangerous to society that no risk of escape can be taken, its lack of amenities and rehabilitative programmes still condemns it. I doubt, though, if all its inmates come within the class which Mr. Justice Holmes designated as rattlesnakes, too dangerous to be at large. Alcatraz is so obviously opposed to the philosophy of the men who control the Bureau of Prisons that I suspect its continued existence is due to no wish of theirs, and that the responsibility must lie elsewhere.

I visited Cook County gaol, and Stateville and Joliet prisons, in Illinois, and the State prison at Columbus, Ohio, and the London prison farm, and the Federal reformatory at Chillicothe in that State. The two latter institutions are progressive and well equipped, and represent sensible and intelligent applications of the reformatory concept. In Pennsylvania I was shown the Eastern penitentiary, the very large prison at Graterford and the Federal penitentiary at Lewisburg; the Tombs in New York City, and Sing Sing and Auburn prisons in New York State; and the new Norfolk prison which had just been completed; the Norfolk "Community" prison, which had just been the subject of a highly critical report by an investigating commission, and the ancient Charlestown prison, soon to be demolished, after having been condemned on many occasions during the last 100 years as unfit for use. I do not think any useful purpose would be served by discussing these institutions, but I do confess that both the Tombs and Cook County gaol appalled me; they are far less defensible, even as "holding" (or remand) institutions in this age than were the English prisons of John Howard's day.

The California Institution for Women, Corona, and the Massachusetts Reformatory for Women, Framingham, are two interesting institutions. The former is of most modern construction and the latter quite outmoded. Yet both institutions impressed by their obvious excellence. In each instances, the dominant reason was the superintendent, Miss Alma Holschuh at Corona, and Dr. Miriam Van Waters at Framingham. Each of these women is a remarkable personality devoted to the work

upon which she concentrates her wisdom, her firmness and her unflagging energies. It has been acutely said that every penal institution is the reflection of its warden (or governor), and these two institutions for women supply confirmation of the truth of the observation.

Generally, the penal establishments appear far too large, and most seemed overcrowded, some badly so. The administrators are hard put to keep the prisoners occupied, and idleness, the most corroding factor in prison life, is a constant threat both to discipline and rehabilitative activities. Usually, legislation restricts the areas of commercial production which prison industries may undertake, and there, as here, the great bulk of manufacturing activity involves work whose rehabilitative value is not high. But even when an inmate is taught a skilled occupation during incarceration, it is not uncommon for him to prefer to follow some other occupation when released.

Reception and classification methods are theoretically well-devised and sometimes highly ingenious. California uses psychologists and psychiatrists more than the other systems, so far as I could see. But the limited number of qualified persons gives rise to difficulties and their use is by no means as widespread as is commonly thought. In youth reception centres, it is often a question whether all should have some psychotherapy, which means that the available facilities are spread too thin for anyone really to benefit, or the facilities should be concentrated on those who are plainly in need of it. Common sense would seem to require the adoption of the second course. Group therapy is employed, and it is claimed, with considerable success. I sat in on some group therapy sessions, however, and I would be inclined to treat the more optimistic claims with some reserve.

In some penal institutions, usually where custodial security is not the primary aim, inmate councils, a form of substitute for Thomas Mott Osborne's plan of inmate self-government, have been established, and from observations made at a meeting I attended, I should say it has value at Chino. Warden Heinze told me that this method functioned well at Folsom, California, a maximum security institution with some minimum security activities, but Warden Ragen, of Joliet-Stateville, Ill., expressed himself as unalterably opposed to it.

Devices to ameliorate the abnormal and frustrating environment of prisons are far less successful than in theory they should be. Indeed, the wonder is not that so many fail, but that any

succeed. Within a large maximum security type of prison the possibility of getting a genuine response from any substantial number of the inmates is slender. It would be surprising if it were otherwise, for by definition the inmates consist of the least hopeful human material, and they are confined under conditions that foster resentment and hostility to authority and the value which enable outside society to cohere.

Generally my impression of the penal institutions was that they were run without avoidable brutality, which of course does not mean there is an absence of harshness. Francis Lieber observed in his preface to the work of de Beaumont and de Tocqueville, mentioned earlier, that "society has the right to punish but not to brutalize; to deprive of liberty, but not to expose to filth and corruption". This sentiment is now expressed in the aphorism men are sent to prison, not to be punished, but as a punishment. All kinds of strange things go on behind prison walls, and the casual visitor is not likely to learn of them. But so far as I could observe, a prisoner in the better institutions who is reasonably tractable is unlikely to suffer any greater detriment than is inevitably involved by penal detention. Something has been done to prevent character deterioration, and if, as some think (Cf. Sheldon and Eleanor Blueck, *After Conduct of Discharged Offenders,* p. 84), the abandonment of criminal conduct is related to the attainment of maturity it may be that these prisons, which are well managed, without obvious brutality, will enable some men to attain, and so enable parole authorities, if they should recognize that condition, to release them from detention. Such prisoners have not been rehabilitated or reformed, though, by prison programmes; they have "grown up" during their period of incarceration, and for that reason are unlikely to return. I doubt whether any more than this is achieved in these large prisons with their extraordinary assemblage of maladjusted human beings. Their purpose is primarily punitive; their classification and segregation problems are virtually insoluble, and it is unlikely that much of significance in the way of rehabilitation is ever achieved.

Three problems of prison life are food, tobacco, and sexual outlets. I could see no indication that the third is likely to be solved in American prisons, where homosexuality presents constant and serious difficulties to the administrators, and often exercises a baneful influence over inmates, but the first and second have been. Food is good and adequate, although there is a difference of opinion whether a prisoner should have to eat all

that he puts on his plate. Tobacco, long a source of trouble in prisons as a forbidden or limited indulgence, and as prison currency, has ceased to be so. The solution was found to reside in putting racks of the "makings"—a small sack of tobacco and cigarette papers—around institutions where prisoners may help themselves.

According to the 1954 Report of the Federal Bureau of Prisons, diagnosis of the sexual offender has been shown to be uncertain, and treatment results have been discouraging. The Bureau welcomes the enactment of a "Prisoner's Home Leave" bill as "forward looking". Under it the granting of "home leave" to attend funerals, visiting seriously ill parents or wives, or for an interview with a prospective employer on release, may be authorized.

The best American opinion is against the erection of the traditional type of maximum security prison for general use. Quite apart from its unsuitability, the cost of erecting these structures is now prohibitive. Attempts to modernize or "patch up" ancient buildings are also deprecated. Mr. James V. Bennett has written, "one of the reasons why prisons have moved forward at so sluggish a pace, and cramped antiquated institutions continue to struggle along in crowded cities with cold water cells, walk-around for recreation yards, and dilapidated shops is the failure of the administration to recognize that these ancient bastilles reach a point where no more money should be spent on them. To attempt to modernize a century-old institution by patching up long outmoded cell blocks or crowding modern kitchen facilities or a hospital amidst a jumble of cell blocks, shops, or stoverooms is wasteful in the extreme. And where this is done it is a faithful index of the sort of leadership a prison system boasts." (*Annals of American Academy,* May 1954, p. 14.)

E. Parole

The parole system has been introduced in U.S.A. as a consequence of the wide adoption of the indeterminate, or more correctly the indefinite sentence. An indeterminate sentence may be for a completely indefinite term, or for an indefinite term not less than a minimum term fixed by statute or by the sentencing court, and not more than the maximum fixed by the court or by statute. Broadly, the first method is used where the offender is under 21, and in connection with some sexual offenders, and the second, maximum-minimum, in about 36 States, and two Federal territories, the District of Columbia and the Territory of Hawaii.

The indefinite sentence, particularly when presented under the guise of "social defence", possesses great attractiveness to legislatures, although it is relatively unusual for those bodies to provide adequately the financial means which are, in common justice, an essential condition of its adoption. It is said in the U.N. publication that it can only succeed if there are present "freedom from all political influence, suitable institutions, trained personnel and an organized system of supervision. The two factors which count most are the human factor and the money factor—both difficult to control". (p. 58.)

If it be the fact that it is highly probable that a person because of his criminal propensities will inflict grave injury upon other members of society, it may be justifiable to segregate him. When this is done, it is done not as a punishment, but as a preventive measure. But the segregation which occurs under an indefinite sentence is for a crime, and it is imposed as a punishment, and is regarded by the prisoner as such. In the practical application of the system, the sentencing tribunal is likely to determine, as the minimum, a period of incarceration which it regards as a proper period of punishment. But unless there are graded institutions, the prisoner will probably remain in the same penal establishment after the minimum period has expired, and it is improbable that he will notice any difference in his condition, except that he then has acquired the chance that an administrative agency, not subject to the traditional protections against judicial caprice, such as public hearings, prescribed procedure and provisions for appeal, may elect to release him on conditional liberty when it thinks fit.

Juvenile Delinquency

This social problem occasions great concern in U.S.A. In 1953, the U.S. Attorney-General, Mr. Herbert Brownell, at the annual convention of the National Education Association, predicted that within the year 1954 one million boys and girls in U.S.A. would get into trouble serious enough to be taken into custody by the police. According to the Education Editor of the *N.Y. Times*, Mr. Benjamin Fine, Mr. Brownell did not go far enough, for during 1955 there would be more than 1,000,000 of such delinquents, and by 1960 the figure would be 2,000,000 (*1,000,000 Delinquents*, N.Y., 1955, Forward).

Juvenile delinquency is a blanket label used to cover anti-social conduct by young human beings which would be punish-

able as a criminal if done by a person over 16 or 17 or 21, or some other legally specified number of years. Crime consists in the voluntary violation of a legal provision which society upholds by threat of punishment; it is an act which is capable of being followed by criminal proceedings having a criminal outcome. (Cf. Glanville Williams, *The Definition of Crime,* Current Legal Problems, 1955, p. 107 ff.) Except by statutory provision, however, the law does not recognize juvenile delinquency as a legal conception. Were it not for statutory exclusions, the common law rule, which is usually found also in criminal codes, would apply, by which full criminal responsibility attaches at 14 years of age. Juvenile delinquency is thus a sociologist's concept, rather than a lawyer's.

"It is the general conclusion of most modern studies that most anti-social individuals are manufactured in childhood. If any society finds itself manufacturing them in unusually large numbers, the increase is likely to be traceable to factors in the pattern of community life which act adversely on the family or on the customs of upbringing which parents adopt." (Alex Comfort, *Authority and Delinquency in the Modern State,* London, 1950, p. 8.) There seems a good deal to support the view that the two ages which are most important in the young are those between three and four for psychological development, and the early "teens" for ethical development.

All investigators agree that juvenile delinquency is a complex problem; that it comprises diverse manifestations which stem from diverse causes. Human beings are constantly demanding to be told the "cause" of upsetting phenomena, and to be supplied with a simple and all embracing solution that will save them from continued exposure to these annoyances. Hence, when any complex problem arises, the number of "causes" diagnosed is usually exceeded only by the number of "remedies" suggested. But Dr. Comfort's observation seems to have the merit of directing attention to what is a causation factor in a great deal of the anti-social behaviour by growing human beings at the present time, namely, the eclipse of the family. It may be conceded that causation factors are many and various, but any significant increase in juvenile delinquency points very cogently to some serious defect in the social organization.

The traditional training ground in human behaviour is the home. But under the modern production system, great numbers of married women with young children are able to leave their

homes without social disapproval, and to work in factories. Often they are compelled to do so by economic necessity; this is particularly true of the deserted wife. At the end of 1955 the U.S. Census Bureau reported that the number of working wives in U.S.A. was 11,800,000, an increase of 600,000 over the previous year. The Melbourne *Age* of 31st December, 1955, which carried this item, announced also that in Japan, another highly industrialized country with a large labour force of women, one-third of all serious crimes in 1955 had been committed by juveniles, and that 48 per cent of the offences against women had been committed by youths under 18. Russia, also far advanced in industrialization, is greatly perturbed, too, about the increase of anti-social conduct by young persons.

The "production at all costs" philosophy necessarily involves a "consumption at all costs" outlook, for production cannot be an end in itself; it can function only if consumers can be found. This has led to a suspension or disregard of social values, once called virtues, which, whatever their drawbacks may have been, at least tended to produce social stability. The need to find methods of disposing of the articles produced has led to commercial exploitation of the acquisitive, aggressive and sexual impulses.

A consequence is that the home as a physical place, characterized by the physical presence of the mother, where children can learn the social disciplines, is ceasing to exist in significant sections of society. Further, the growing human being is in this way deprived of the opportunity of learning the standards by which he can test his conduct to determine its social acceptabality. These appear to me to be basic factors in the present grave American problem, which is, of course, not confined to U.S.A., but presents itself spectacularly there.

It must be said that once convinced of the urgency of a problem, particularly if it can be presented sentimentally, the American people exhibit great energy in attacking it. They have done so on various levels with juvenile delinquency. The best minds recognize that we have added very little to ancient knowledge of the mainsprings of human conduct, and that research, and still more research, is required in this most difficult of all fields of enquiry. Valuable work has been done for many years in U.S.A., where researchers have been prominent in the development of prediction studies. The history of these studies is to be found conveniently in volume 1 of the *English Studies in the Causes of Delinquency and the Treatment of Offenders,* entitled,

Prediction Methods in relation to Borstal Training, by Dr. Hermann Mannheim and Leslie T. Wilkins (H.M. Stationery Office, 1955). First examined by Warner in 1923, this method of enquiry has attracted many investigators and it is claimed that it can now supply valuable guides for the intelligent use of mechanisms and social control. The invaluable work of Dr. Sheldon and Dr. Eleanor Glueck is well known, and their forthcoming book, embodying the latest results of their investigations, should reveal important further advances in this field.

The strong American tradition of communal effort has been invoked to grapple with the juvenile delinquency programme, and the usual range of preventive and palliative measures are being employed. It is recognized that a first requirement is to ascertain the facts and enquiries have been conducted by a variety of bodies. In 1953, a sub-committee of the U.S. Senate Judiciary Committee undertook a full investigation. Two interim reports have been returned so far, and the final report is awaited. In the first interim report it is accepted that juvenile delinquency does not result from a single cause; "neither the illegal behaviour of an individual nor the total problem of juvenile delinquency in society can be attributed to any one cause" (p. 8). It follows, of course, that there is no single remedy, and the keeping of the problem within controllable limits can only be achieved by a variety of measures, foremost amongst which should be those which aim at the improvement of family and communal life. The report recognizes (p. 9) that "the materialism of our age, with its emphasis upon getting ahead and financial success, subjects children to great strain and oftentimes frustration. Modern advertising, coupled with easy pay-as-you-go plans, which tend to divert a disproportionate share of family income to keeping up with the neighbours, may throw added strains on family life."

I inspected a variety of institutions in which delinquents and "dependent" (or neglected) children were housed or detained. The hopeful institutions are of the prison farm and forest camp type; the larger barred buildings in the cities as in Chicago are thoroughly depressing, and despite the devoted efforts of often very good personnel, contribute very little to the solution of the problem. The disparities between what theory recommends and what administration achieves are never so obvious as in institutions for juveniles. Children need protection not only by the State, but also on occasions from the consequences of the State's intrusiveness, indifference and neglect.

Sexual Offenders

In about 17 states special statutes have been enacted in connection with sexual offenders. Most of these legislative provisions have been vigorously criticised. Dr. Paul Tappan, of New York University, observes (*Federal Probation,* June 1955, p. 12):

> "Certainly experience with these laws reveals the futility of ineffectual legislation. In general the statutes appear to have served only the purpose of satisfying the public that 'something is being done'. In fact, fortunately, very little is being done under the sex psychopath laws in most states, but that little is worse in effect than leaving the offender to the operation of the traditional criminal law would have been." (See also Reckless, *The Crime Problem,* 1955, p. 292 ff.)

Dr. Alfred Kinsey and his associates have sought to correct the misconceptions that surround this subject and his conclusions are supported by psychiatrists of eminence. In Kinsey's estimate, not more than 5 per cent of convicted sex offenders in U.S.A. are of a dangerous kind, in the sense that they used violence.

So far as I could gather, reliable experts in U.S.A. are agreed:

1. That there is no evidence to support the popular belief that persons who commit minor sexual offences (e.g. frotteurs, exhibitionists, peeping Toms) are prone to commit grave sexual crimes (e.g. rape, violent sexual assault), and progress from minor to major crimes. The acceptable evidence points to the contrary conclusion.
2. That it is practically impossible to predict by any valid process what individuals will commit serious sexual offences.
3. That the majority of sexual offenders (excluding adolescent offenders who are involved in rapes) are not oversexed, as is popularly believed but tend to be under-sexed. In Dr. Manfred S. Guttmacher's words, "Sex offenders do not appear to be due primarily to the heightened sexual thrust of adolescence, but rather to a failure to obtain normally a satisfying sexual adjustment as the years have passed".

There is no general agreement among experts upon what is called a "sex psychopath", and there are no generally accepted criteria which will enable such an individual to be recognized and identified clinically.

In the field of treatment, the knowledge is also imprecise and uncertain. A California legislative committee found that except for individual psychotherapy, there was no form of treatment which could be justly claimed to be effective, and the experience of the Federal Bureau of Prisons points in the same direction. Expense and lack of sufficient numbers of trained personnel preclude the general adoption of individual psychotherapy.

There is great need for a dispassionate approach to the problem which sexual offenders present, but the subject is so productive of emotional reactions that such an approach by a community is unlikely to be established, although there has been some advance in the Scandinavian countries. The minor sexual offenders are nuisances rather than menaces, and the violent sexual crimes are often committed by individuals who, except at the time of the commission of the offences, are not classifiable as abnormal. Violent assaults are committed for a variety of satisfactions, and sexual satisfaction is but one of them. Often the significant feature is not the sexual element, but the use of violence. The conduct should be punished, and the prisoner dealt with by the penal authorities, on the basis of an aggravated assault, and his recourse to violence may indicate that the protection of society requires that he be segregated for a lengthy period. This is as true of the person who uses actual violence in the course of a robbery as it is of the person guilty of a violent rape.

On the present state of knowledge, the most that can fairly be expected is that persons convicted of sexual offences which are marked by peculiar features of violence or are committed upon human beings who, by reason of immaturity or advanced age, are usually regarded as outside the range of sexual approach, should be held in confinement until competent authorities consider it is safe, from the community's standpoint, to release them. If this is done by way of prevention, then there is an obligation on society to provide such means of treatment as are reasonable. The late Sir Norward East considered that "the medical treatment of these offenders in a special penal institution administered on colony lines with psychiatric treatment when required would enable much needed research to be carried out". (*Eugenics Review*, October 1955, p. 192.) The Danish institution, Herstedvester, directed by Dr. George Sturup is such an institution. At Herstedvester, under a strictly selective system, and with the inmate's consent, castration is used as a medical measure upon sexual

psychopaths. The claims made for this procedure are interesting and impressive, but able American psychiatrists with whom I discussed the subject were not prepared to accept them. I was told that castration does occur in at least one state in U.S.A., but I was not able to obtain any satisfactory information concerning the circumstances. Acceptance or rejection of the propriety of such measures depends very largely upon the philosophical outlook of the advocates or opponents of them, and this makes it difficult to evaluate both the claims and criticisms. My own feeling is that such measures certainly should not be employed, in the present uncertain state of knowledge, and that even if it were scientifically established that they did remove anti-social propensities, society still should not revert to the use of mutilation. The distinction between punishment and remedial treatment of this kind may be clear enough to the expert, but it is less clear to the ordinary man, and often not clear at all to the subject. In the choice of evils, the lesser should be chosen, and the harm that may result from society's adopting such measures appears to me to be greater than any likely gain.

No expert with whom I discussed this matter subscribed to the belief that corporal punishment was a proper method for use in such cases.

Capital Punishment

Judgment of death may be imposed and carried out in all but four states. In two states, Rhode Island and North Dakota, this penalty is available only for murder of a prison guard by a prisoner serving a life sentence. Capital punishment was abolished in some states, but later restored.

From 1930 to 1953, 3,281 were executed upon judicial sentence. Of that number, 1,479 were whites (including 15 women), 1,763 were negroes (including 10 women), and 39 (including 2 women) were classified as "others". Of the persons executed, 87 per cent suffered the penalty for murder, 11·4 per cent for rape, and 1·6 per cent for other offences, including espionage. The highest number executed in any one year was 199 in 1935; in 1953 the number was 62.

Methods of execution comprise electrocution (23 states), lethal gas (8 states) hanging (10 states). In Utah the condemned man is offered the choice between death by hanging and death from a firing squad. In some prisons, the death cell is equipped with a

large window of "one way" glass through which the official witnesses may observe the condemned man as death overtakes him, but which does not permit him to see them, but in Sing Sing the witnesses occupy seats in the room where the electric chair stands. On at least one occasion (in Jackson, Miss., in 1950, see *Time,* 6th February, 1950) the relatives of the victim of a murder were allowed to witness an execution by electrocution. The condemned prisoner was a negro aged 28 years, whose offence had been committed when he was 16 years old.

The English Royal Commission on Capital Punishment 1949–53 examined the electrocution and lethal gas methods, and reported, "We cannot recommend that either electrocution or the gas chamber should replace hanging as a method of judicial execution in this country. In the attributes we have called 'humanity' and 'certainty' the advantage was, on balance with hanging; and though in one aspect of what we have called 'decency' the other methods are preferable we cannot regard that as turning the scale". By "decency" the Royal Commissioners mean freedom from bodily mutilation.

In England the time between the entry of the executioner and execution is said to be 9 to 25 seconds. The figures quoted by the Royal Commissioners showed the time from entry into gas chamber to unconsciousness to vary from 40 seconds (California) to 5 minutes (Nevada), and with electrocution from 2 to 3 minutes.

Discretion is sometimes committed to the trial judge to decide whether a person convicted of a capital offence should suffer death or imprisonment. In the case of the Rosenburgs, the trial judge exercised this discretion adversely to the prisoners. In a remarkable case (*Williams v. N.Y.* 327, U.S. 241), the prisoner was found guilty of first degree murder. The jury added a recommendation that he be sentenced to life imprisonment as they were entitled to do under the New York Penal Law, Section 1045. The trial judge disregarded this recommendation and sentenced the prisoner to death. He did this on material contained in a pre-sentence investigation report which apparently was not revealed to the prisoner or his lawyers until the judge narrated it in the course of his reasons for sentence, and which concededly would not have been admissible against the prisoner according to the law of evidence. The U.S. Supreme Court, with two dissentients, affirmed this judgment of death.

Assuming that the punishment of death is justified by the welfare of society, it appears to me to be absolutely against the

social interest that the decision that a man must die by the machinery of the state should be confided to any individual, whatever his position. Such a decision should be a collective one, either by a jury, or an executive body such as a cabinet. A judge's position in such a case is not comparable with that of the Home Secretary in England. The Home Secretary does not decide that the prisoner must be executed; execution is the consequence of the jury's verdict of guilty and the judgment of the court based on that verdict, unless the Home Secretary advises the sovereign that the prerogative of mercy be exercised and the prescribed legal consequences should be arrested. In this State, and I think in the other Australian States which retain the death penalty, an execution may not be carried out until the Executive has fixed the date, and this results in practice in Cabinets taking the decision whether or not the legal sentence shall be carried out, although in form a commutation is an exercise of the prerogative of mercy.

The United States seem to me—and this plainly can be no more than an impression—to be in greater danger of regimentation than is commonly realized. Egalitarianism always carries with it that danger, as de Tocqueville foresaw over a century ago. (See *Democracy in America,* Vintage Books, Vol. 2, p. 334 ff, Ch. VI.) The pressures to conformity are immense, and the fate of a person or group that does not conform may be highly unpleasant. It is a deplorable fact that American history supplies many instances of the misuse of the coercive machinery of society against individuals or groups against which public opinion has been inflamed.

As far back as 1920 the late H. L. Mencken wrote, in his essay *The National Letters,* "The whole drift of our law is toward the absolute prohibition of all ideas that diverge in the slightest from the accepted platitudes, and behind the drift of that law is the far more potent force of growing custom, and under that custom there is a national philosophy which erects conformity into the noblest virtues and the free functioning of personality into a capital crime against society". This is, of course, an obvious and intentional exaggeration, but there is enough truth in it to make us pause, if we are wise, before accepting American methods which are on their face restrictive of individual liberties. If there were a full survey made of all the agencies in U.S.A. which can exercise power of one kind or another, at discretion, over the individual and the extent of those powers were viewed in the light of the

conduct which attracts their operation, I fancy that the resulting picture would be a startling one.

There seems to be more than a little basis for the criticism that the criminal law in some States is being used to stigmatize as criminal conduct which may be socially unconventional or unacceptable, but which is not socially injurious to such an extent that it should be forbidden under threat of criminal penalties. Further, laws framed with a different purpose, but expressed broadly, are sometimes invoked to punish behaviour which is unpopular but which on any reasonable view should not be branded as criminal. A whimsical instance of legislative restriction which may have more to recommend it than appears at first sight is a law in North Dakota which prohibits a person convicted three times of felony from marrying a woman under forty-five.

What is needed in penal matters is, it seems to me, a complete reversal of the present approach. Criminal conduct is regarded as necessarily attracting punishment unless the offender can point to circumstances which are regarded by the sentencing tribunal as making its imposition of it unfair. The punishment except where the offence is capital, and often even then, is imprisonment. Prima facie, imprisonment involves detention in a maximum security prison although, where they exist, the prisoner may be moved in course of time to a medium or minimum institution.

It is commonplace of penal experience that not all persons who are in maximum security institutions need that form of detention to prevent them from escaping. A high proportion of inmates in maximum and medium security institutions are not escape risks at all. It should be possible to devise techniques of determining who among convicted persons are the "non-deterrables", really requiring detention in the so-called "tough" prison; indeed, it is claimed that these techniques already exist. (Cf. *American Law Institute's Model Penal Code,* Tentative Draft No. 4, p. 176, Dr. Manfred S. Guttmacher's memorandum.) The maximum security institution would then be needed for reception and classification purposes, and for the incarceration of the percentage of convicted persons (which I suspect would not be more than 20 per cent and may well be less) who need strict confinement. The reason for the retention of maximum security institutions in general use as prisons is really the persistence of the vindictive or retributive idea of punishment, coupled with the need for economic reasons, to make use of the existing buildings. While this attitude persists, prisons will be run as places of strict con-

finement and whilst it is proper that a prison should have some aspects of unpleasantness, the deprivation of liberty being the worst, it makes nonsense of public utterances to the effect that men are sent to prison not to be punished but as a punishment, and that the object of penal science is rehabilitation and reformation, for convicts who do not need maximum security treatment to be subjected to it merely because the system has not oriented itself to what are now accepted and acknowledged as proper penal measures.

As I have indicated, I am disposed to think that a satisfactory penal system could be achieved by altering the present emphasis, but that alteration should go beyond a mere custodial approach. A parole authority should be established with power to release a prisoner under supervision before the expiration of his fixed term, but with the additional power to apply to the sentencing judge to order, for good cause shown to the judge, that a particular prisoner be detained after the expiration of his fixed term because it is unsafe in the interests of society to release him. Such a procedure would have the advantage of providing for the protection of the rights both of the prisoner and the community by traditionally tested methods.

Discussion

MR. P. BRETT said that from a study of written materials, unsupported by personal observation, it appeared to him that there were four main defects in the American system. There was, first, an excessive localization in the administration of justice; secondly, a combination of the elective system and the local system for district attorneys and the judiciary; thirdly, the tendency to entrust the task of dealing with sentenced criminals to administrators; and, fourthly, trial by newspaper. Each one of these faults sprang from a sound basic idea which had not worked out successfully in practice.

The basic idea in most cases was to kerb tyranny by decentralizing power and in the case of the newspapers to allow freedom of speech. These theoretical ideas had been allowed to grow into unchangeable institutions. The development of these ideas into institutions in America contrasted with the empirical method of development which had been followed in England.

A striking feature of the American scene was the active study of criminal law and administration among the legal profession. There was, however, a solid body of opposition to improvement

coming from people of no high reputation who preferred to maintain the existing faults.

DR. H. J. FORD said that in the course of a recent stay in the United States he had been horrified by what he had observed of trail by newspaper and he had seen indications that to this was to be added trial by television. He instanced a case in which two white brothers were charged with the murder of a negro boy. The newspapers went to great lengths in the publication both of pictures and of written material designed to arouse sympathy for the accused men. Finally, a television interview was broadcast in which pressmen interview a negro and endeavoured to get him to say that the arrangements of the trail were such as to ensure a fair trial.

MR. R. M. EGGLESTON said that one difficulty which the United States faced was the lack of a violent public opinion which would condemn notorious wrong doing. There was a great acceptance of things which were known to be unmoral or immoral. A second difficulty which the United States faced was the tremendous thoroughness of its people in carrying to its logical conclusion an accepted theory. Their thoroughness in carrying democracy into effect had led to its extinction and the practice of electing members of the judiciary provided an instance of this. Our own lack of thoroughness would stand us in good stead in this context.

MR. P. D. PHILLIPS said that His Honour appeared to have lost the buoyant optimism which was characteristic of him when he was secretary of the Society several years ago. He agreed that some of the defects of the American system arose from carrying good intentions too far. Trial by newspaper was in effect protected by the constitutional freedom of speech, and the Supreme Court of the United States itself had interpreted the constitutional guarantee as preventing a control of newspaper material in the interests of a fair trial.

A comparison of American development with English development showed the value of traditional practice as against theory. In his view accumulated and traditional experience played a more important part in the administration of criminal law than a vast body of newly elaborated practice or finely spun theory.

MR. JUSTICE BARRY, in reply, said that Mr. Phillips had mistaken for buoyant optimism what was really an irrepressible

oppositionism. He did not share Mr. Phillips's satisfaction with the judicial process in England or elsewhere. He held the view, which had been propounded by some of the speakers, that in America good ideas had been carried much too far, strongly supported by corrupt and ill-advised elements in the community. Nothing could be said in favour of the behaviour of the American press in relation to criminal matters, which he characterized as fraudulent and dishonest and calculated to prevent the community from developing any decent standards at all.

In the absurd decision of the Supreme Court, on freedom of speech, to which Mr. Phillips had referred, there was an inarticulate major premise, namely, that the calibre of the elected portion of the judiciary was so poor that even responsible people in the community would not be prepared to allow the superior courts to exercise the contempt powers which are exercised in this country.

If it were true that we were faced with choosing whether or not to follow American developments, he thought that the indications were that we would make the wrong choice. Already the so-called American way of life had spread through the western democracies and many of its manifestations were to be seen in the Australian community.

He had been asked a question concerning the apparent increase in the use of narcotics in America. In published figures it was difficult to say what was the truth and what was fiction, because if the government department concerned was directed with energy there was a marked tendency to produce spectacular information. There had, for instance, been a great campaign against the use of marihuana, which was a drug in fact less harmful than alcohol. Many Mexicans smoke marihuana as part of their ordinary behaviour, and now a lot of them were in gaols and penitentiaries in California. The Federal Bureau of Investigation is sometimes associated with such policy campaigns. It was a body extraordinarily highly regarded in the United States. His personal view was that it represented a grave danger to human liberties.

The State of California in particular possessed a large volume of repressive penal legislation under which a convicted sexual offender had to register his residence and was virtually prohibited from obtaining employment. The late Dr. Kinsey had observed to him that he considered that California had succeeded in establishing a police force better than anything since Hitler.

He had perhaps been highly critical of some American institutions. The picture would not, however, be complete if he failed to say that many American bodies were greatly concerned about developments in that country and were directing a great deal of thought and energy towards the correction of matters which they considered to be wrong.