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CRIMINAL LAW REFORM AND THE LAW REVIEWS

RUSSELL M. COOMBS*

*This article is adapted from remarks delivered by the author, as a member of a panel on legal reform, to the 17th National Conference of Law Reviews, held in Williamsburg, Virginia. While the editors recognize that its content is not in keeping with traditional concepts of law review articles, we feel that the ideas expressed are sufficiently important to be brought to the attention of the legal community in general and other reviews in particular [Eds.]***

It is universally recognized that reform of our present system of criminal law and procedure is necessary. This article surveys a few of the areas in which such reform can be facilitated by the efforts of law reviews, and discusses various types of projects, studies, and proposals that might be undertaken in conjunction with this effort.

Reform can properly be directed toward making criminal law enforcement more effective in achieving the primary goal of crime prevention while at the same time safeguarding individual liberty, societal freedom, and other valued social goals. Reform by safeguards designed to minimize unjust and inconsistent application of criminal laws and to prevent undue harm to individual interests in the process of enforcement of these laws has in recent years reached a relatively high degree of development.¹ The extraordinarily swift adoption and implementation of reforms to protect individuals from oppression by criminal law enforcement clearly demonstrates the rapidity with which law reform can take place when the need is patent and the motivation is strong.²

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** The views expressed in those remarks and this article are those of the author and are not offered as necessarily representing the views of any other person or any agency. Gratitude is expressed for the helpful advice of G. Robert Blakey, Chief Counsel, U. S. Senate Criminal Laws and Procedures Subcommittee, in the preparation of this article.

1. D. Reznick, *The Rights of Criminal Defendants*, in *THE RIGHTS OF AMERICANS* 433 (N. Dorsen ed. 1970). See also Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785 (1970).

2. Although rapid adoption of any major step in law reform is exceptional, swift implementation is particularly noteworthy in the criminal field, where use of a new prohibition, penalty, or procedure is often possible only where there is the concurrence of several of the agencies through whose hands cases pass: police, prosecutors,

Much remains to be done, of course, in reducing abuses of important social and individual interests committed in the name of law and order. Many of the problem areas—from widespread investigative arrests³ to frequent abuse of prisoners by prison officials⁴—have been identified. The law reviews must continue to conduct studies of the incidence of abuses and propose legal and administrative techniques which might reduce them.⁵ The study, thought, and passionate motivation which produced a decade of revolutionary expansion of procedural protections for criminal suspects must now be turned to the development of dynamic reforms in criminal law enforcement with a goal of more effective crime prevention.

When measured against the social problem it seeks to control, the criminal justice system is generally seen to be functioning poorly. The

grand juries, trial courts, and correctional agencies. The "liberal" reforms of criminal procedure of the past decade were implemented rapidly, if not with perfectly broad coverage, since many of them involved suppression of evidence and reversal of convictions by the courts, often exercising final power over the cases.

Reforms to tighten law enforcement may not, on the other hand, prove equally capable of prompt and effective implementation, since disinterest or disapproval of a specific reform at a single level of the criminal justice system can in many cases bar its employment. A case in point is judicially-supervised electronic surveillance, which can be considered a reform to improve the process of gathering accurate evidence. For example, a disinclination on the part of one United States Attorney General to use the statutory authority for such surveillance prevented all federal investigative agencies and courts from obtaining its benefits for a seven-month period during 1968 and 1969, and a similar disinclination led the Massachusetts Attorney General to refrain from using his similar authority at any time during 1968 or 1969. *See* REPORTS ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS, [Admin. Ofc. of the U. S. Courts] for calendar years 1970 and 1969 and for the period June 20 through December 31, 1968. In view of experiences such as these, anyone proposing reforms designed to strengthen criminal law enforcement must give consideration not only to the substance of the reform and the techniques for obtaining its enactment, but also to methods to facilitate its implementation, such as focusing responsibility for such implementation on only one or two levels of the criminal justice system and facilitating the exposure of failure to implement the reform. For an example of the facilitating of such exposure, *see* 18 U.S.C. §§ 3575, 3576 (1970) (requirement that courts state reasons for failure to impose enhanced prison sentences on recidivists, professional criminals, and organized crime offenders).

3. *See generally* *Davis v. Mississippi*, 394 U.S. 721, 726 (1969).

4. Prison administrators and guards need not be singled out for criticism, since prisoners probably are more abused by the general failure to devote funds and attention to entire corrections systems than by acts of individual cruelty or negligence. *Compare* *Holt v. Sarver*, 9 CRIM. L. REP. 2171 (8th Cir. 1971) (federal district court findings that entire Arkansas prison system violates eighth amendment upheld), *with* K. MENNINGER, *THE CRIME OF PUNISHMENT* 71-81, 219-48 (1968).

5. A recent example of such a study is Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647 (1971).

public has so little confidence in the system, and finds its processes so burdensome for victims and witnesses, that only a small minority of serious crimes are reported.⁶ Too few of the reported crimes are solved, and too few of those solved are taken to court. Busy courts and over-worked prosecutors find time to obtain convictions for the serious charges in a minority of cases, while guilty pleas to lesser charges are far more common, and only a small number of cases result in the imposition of substantial sanctions.⁷ Even in those few cases, the so-called "correction" imposed more often than not compounds rather than corrects the exposed criminal behavior.⁸ The process from crime to appeal has become so slow, cumbersome, and technical that the relationship between crime and punishment is often obscured.⁹

A justifiable lack of confidence in this creaking system appears to have had a tendency in recent years to encourage the adoption of extreme and one-sided measures to prevent abuses by the government of

6. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter cited as *CHALLENGE OF CRIME*]; a survey indicated that

the actual amount of crime in the United States today is several times that reported in the UCR [the F.B.I.'s Uniform Crime Reports compiling statistics on crime reported to local police] [T]he amount of personal injury crime reported to [the research center which conducted the Commission survey] is almost twice the UCR rate and the amount of property crime more than twice as much as the UCR rate for individuals

Even these rates probably understate the actual amounts of crime

In the national survey of households those victims saying they had not notified the police of their victimization were asked why. The reason most frequently given for all offenses was that the police could not do anything

CHALLENGE OF CRIME at 21-22.

7. According to estimates by the President's Commission on Law Enforcement and the Administration of Justice, 2,780,140 UCR "Index" crimes (willful homicide, forcible rape, aggravated assault, robbery, burglary, larceny of \$50 and over, and motor vehicle theft) were committed in 1965; but only 727,000 of the offenders were apprehended; only 177,000 were formally accused for prosecution as adults and detained; 160,000 were convicted; and only 63,000 were sentenced to prison terms. *CHALLENGE OF CRIME* at 262-63, fig. 5.

8. For a great many offenders . . . corrections do not correct. Indeed, experts are increasingly coming to feel that the conditions under which many offenders are handled, particularly in institutions, are often a positive detriment to rehabilitation.

. . . .

[T]he ineffectiveness of the present system is not really a subject of controversy

CHALLENGE OF CRIME at 159, 185.

9. *Id.* at 154.

the interests of suspects.¹⁰ When the competing interests of society and the individual are balanced in formulating a new rule of procedure, little weight is given to the protection of a criminal justice system which appears to do little good for society. Further, this lack of confidence can tend, in an equally devastating fashion, to nourish support for extreme measures to strengthen criminal law enforcement at the undue expense of individual interests.¹¹

The present need, therefore, is for the development of radical reforms which can make the criminal justice system much more operationally effective. Nevertheless, they must be reforms which take due account of our fundamental beliefs in individual liberty, security, privacy, and other related social values.

It is possible, without attempting either a comprehensive outline of areas where reform is necessary or a list of specific proposals, to suggest four general areas for major reform.

10. See, e.g., *Alderman v. United States*, 394 U.S. 165 (1969) (federal defendant who shows unconstitutional electronic surveillance which he has standing to complain of must be given transcript of surveillance without judicial screening for relevancy or danger to public interest). But see 18 U.S.C. §§ 2518(10)(a), 3504 (1970). For the arguments for and against the *Alderman* rule, see, e.g., McClellan, *The Organized Crime Control Act (S30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 108-33 (1970); THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S30) 26-34 (1970), as well as the *Alderman* case itself. A summary of arguments to the effect that recent interpretations of the privilege against self-incrimination and the right to counsel are examples of excessive concern for the interests of defendants and insufficient concern for those of society appears in CHALLENGE OF CRIME at 303-08 (additional views of messrs. Jaworski, Malone, Powell, and Storey, concurred in by Mr. Byrne, Chief Cahill, and Mr. Lynch).

11. No civilized society can long permit within its domain an ever-rising tide of lawlessness. Such a tide is now lashing out against our society, and there are few who do not agree that it must be stopped and turned back. Nevertheless, I am concerned that there is a danger that if this difficult task cannot be accomplished now with the enactment of prudent reforms in the administration of our system of criminal justice, other less prudent steps will be taken at a later time—to the detriment of us all. Edmund Burke aptly remarked to the House of Commons in 1780 on the question of electoral reform:

“Consider the wisdom of a timely reform. Early reformatations are amicable arrangements with a friend in power; late reformatations are terms imposed upon a conquered enemy; early reformatations are made in cool blood; late reformatations are made under a state of inflammation. In that state of things the people behold in government nothing that is respectable. They see the abuse, and they will see nothing else. They fall into the temper of a furious populace provoked at the disorder of a house of ill fame; they never attempt to correct or regulate;

Sanctions

In assessing needs for improvement of criminal justice, the search must begin at the end. No part of the criminal process is fully justified unless the sanctions imposed at the end of the process leave society in a better position than it would have been had the process been omitted. In many cases, it is doubtful whether these processes achieve the ends for which they were designed.¹² The law reviews should address themselves to the expansive topic of what sanctions society should have available for lawbreakers. These studies could explore such areas as types of sanctions, offenses, and offenders and might serve to redevelop completely the subject of punishment and crime.

Since the stinginess of the public is one major reason for the inadequacy of present correctional facilities and techniques,¹³ an important aspect of these studies should be an effort to document fully the relative economic and social costs of every kind of correctional program, and to attempt to develop rehabilitative programs which are relatively inexpensive. In addition, the increasing injection of federal funds into state correctional systems¹⁴ warrants an intensified study of more expensive proposed programs of rehabilitation and a search for methods of measuring their effectiveness.¹⁵

they go to work by the shortest way; they abate the nuisance,
they pull down the house."

I deeply believe that the framework of civil liberty embodied in our Bill of Rights need not be condemned or demolished to achieve needed reforms in the operation of our system of criminal justice. I am concerned, however, lest our people come to believe that effective crime control requires us to set aside the Bill of Rights.

McClellan, *supra* note 10, at 56 (footnotes omitted).

12. See generally CHALLENGE OF CRIME at 159-85.

13. *Id.* at 12-15.

14. See Omnibus Crime Control and Safe Streets Act, 1970, Pub. L. No. 91-644 §§ 6, 7, 84 Stat. 1880, 1885, 1888, amending 42 U.S.C.A. § 3741 *et. seq.* (1970) by adding to the Act authorizing Law Enforcement Assistance Administration grants to states and localities a new Part E for "Grants for Correctional Institutions and Facilities," and providing percentage floors under correctional grants for fiscal year 1971 and thereafter.

15. Such measurements in the past have often been inadequate.

Those in the field [of corrections work] have sometimes lacked the inclination, and have almost always lacked the resources, to evaluate their new programs carefully. There has been a tendency for the correctional field to adopt new or seemingly new programs in an impulsive, sometimes faddish manner, only to replace them later with some more recent innovation.

Much supposed progress really has been only circular movement.

CHALLENGE OF CRIME at 164.

Another aspect of correctional reform can be the development of sanctions which impinge upon a defendant's liberty or property in ways more varied, and potentially more appropriate and effective in particular cases, than the traditional fine or imprisonment. Newly refined limitations on liberty could grow out of those used before trial under the Federal Bail Reform Act,¹⁶ and draw from such traditional statutory sanctions as disqualification for public offices or private licenses.¹⁷ Limited deprivations of property such as those authorized in title IX of the Organized Crime Control Act of 1970¹⁸—forfeiture or forced divestiture of property related to but not used in the commission of a crime,¹⁹ for example—could be tailored to specific offenses and added as sanctions available for various crimes against property, such as fraud or extortion. Using these materials as starting points, studies might set forth comprehensive and integrated sets of alternative and cumulative sanctions. Standards for the imposition of these sanctions must be developed and applied to various crimes in ways more likely to control crime than the present, more narrow alternatives.

Prohibitions

A second major area in which reforms are desirable is the body of substantive law defining what conduct is criminal. This has been a tra-

16. 18 U.S.C. §§ 3143-48 (1970).

17. *E.g.*, PA. CONST. art. 2, § 7. "No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth." PA. STAT. ANN. tit. 63, § 616 (1968):

The board (State Board of Chiropractic Examiners) . . . may refuse to grant and may suspend or revoke a license or a registration to any applicant for the following reasons:

. . . .

(2) Violation of the health laws of this Commonwealth.

(3) Pleading guilty or nolo contendere to, or being found guilty by a court of competent jurisdiction of, a crime involving moral turpitude

Among the issues which would be raised by an attempt to refine the basic approach reflected in such disqualifications and apply that approach so that it furthers a greater number of the varied social values underlying criminal prohibitions are: (1) whether disqualifications should be extended to private business and other activities not generally covered by licensing and regulatory legislation; (2) whether the imposition of disqualifications following conviction should result from judicial or administrative action, or a combination; and (3) how and on what grounds disqualifications could be subsequently mitigated or lifted.

18. 18 U.S.C. §§ 1961-68 (1970). While that act treats some sanctions as civil and some as criminal, there ordinarily is no bar to adding sanctions sometimes treated as civil to the other consequences of criminal conviction.

19. 18 U.S.C. §§ 1963(a), 1964(a) (1970).

ditional subject for law reform spurred by bodies such as the American Law Institute,²⁰ the American Bar Association,²¹ the law reviews,²² and other organizations. The proposals have ranged from redefinitions of individual crimes, such as perjury and usury, to massive undertakings, such as the drafting of the Model Penal Code.

Further work in this area is necessary, and law reviews should be alert to identify instances in which the law of a particular jurisdiction fails to prohibit conduct which should be criminal,²³ imposes unnecessarily strict requirements of proof,²⁴ or attempts unduly to punish minor misbehavior. Federal and state criminal statutes can, for example, be surveyed for crimes—tax evasion, usury, and fraud may be examples—where the shifting to the defendant of the burdens of producing evidence and persuasion on particular issues would enhance the accuracy of fact-finding.²⁵ It is particularly important that the law reviews devote

20. E.g., ALI MODEL PENAL CODE (1962).

21. E.g., "Organized Crime Control," *Hearings on S. 30 Before Subcomm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 693-95 (1970); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 403-09 (1952); ABA COMM. ON ORGANIZED CRIME, REPORT 50-52 (1951). These sources deal with efforts of the ABA to obtain reform of statutes defining the crime of perjury.

22. E.g., Note, *Loan-Sharking: The Untouched Domain of Organized Crime*, 5 COLUM. J. L. & SOC. PROB. 91 (1969) (discussion of organized loansharking and presentation, with commentary, of a model loansharking act).

23. The Pennsylvania penal code, for example, fails to include a prohibition, such as the one found in the federal criminal laws, against bribery of a person who has been selected for but has not yet assumed a public office. Compare PA. STAT. ANN. tit. 18, §§ 4303, 4304, 4305 (1969) with 18 U.S.C. § 201 (1970).

24. Compare *Williams v. Commonwealth*, 91 Pa. 493 (1880) (proof of perjury requires two witnesses to falsity or one witness and corroboration), with 18 U.S.C. § 1623(e) (1970) (two witness rule abrogated).

25. A recently-published model loan-sharking act includes provisions of this type, including the following:

2. Making extortionate extensions of credit

....

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is a presumption that the extension of credit was extortionate

(1) The extension of credit was made at a rate of interest in excess of that established for criminal usury (twenty-five percentum per annum).

(2) At the time credit was extended, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the non-repayment thereof had been punished by extortionate means or

(B) the creditor had a reputation for the use of extortionate means to

much time to the study of the proposed new title 18 of the United States Code,²⁶ not only for its obvious impact on federal law but also because state legislators will consult it. There will never be another time so well suited to an unusually thorough evaluation of the work of the commissioners.²⁷

collect extensions of credit or to punish the nonrepayment thereof.

(3) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded \$100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of the factor specified in subsection (b) (1), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

(d) The presumption created in subsection (b) has the following consequences:

(1) in the absence of evidence tending to show the innocence of the transaction, the offense shall be treated as established by the proof beyond a reasonable doubt of the three factors which give rise to the presumption (subsections 2(b), (1), (2), (3)); and

(2) when there is evidence tending to show the innocence of the transaction, the issue of whether the extension of credit was extortionate must be submitted to the jury unless, giving weight to the three factors which give rise to the presumption and to the legislative finding that such facts, standing alone, are in general strong evidence of the presumed offense, the court is satisfied that the evidence as a whole clearly negatives the presumed offense; and

(3) when the issue of whether the extension of credit was extortionate is submitted to the jury, the court shall charge that while the presumed offense must on all the evidence be proved beyond a reasonable doubt, the law declares that the three factors giving rise to the presumption standing alone, are in general strong evidence of the presumed offense.

Note, *Loan-Sharking: The Untouched Domain of Organized Crime*, 5 COLUM. J. L. & SOC. PROB. 91, 130-31 (1969). That model act has, with some modifications, been introduced in the Pennsylvania General Assembly, H.R. 918, 1971 Sess. (1971).

26. See FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971). Information on how to obtain copies of that report and the supporting Working Papers, as well as a helpful guide to the broad issues raised by the report, can be found in McClellan, *The Challenge of a Modern Federal Criminal Code*, 57 A.B.A.J. 585 (1971).

27. There is reasonable time, on the other hand, for careful evaluation of the proposed new code. Senator John L. McClellan of Arkansas, in whose subcommittee the proposal is pending, has begun hearings on it but has stated that they "in all likelihood will not conclude until sometime toward the close of the current session of Congress." *Id.* at 585. Even the Justice Department, at this writing, has not yet completed the expression of its views on the code, so that considerable further delay may be expected.

In addition to this traditional approach to reform of substantive criminal law, law reviews might also encourage a different approach. It has been said that in recent decades American law has shown increasing concern for individual rights as compared with property rights and for equality as compared to liberty. These propositions seem to be borne out by recent changes in procedural standards in criminal cases.²⁸ Where substantive criminal law is concerned, however, it is questionable whether the pace of reform has been equally swift. Therefore, an efficacious approach might be to examine both the definitions of substantive crimes and the penalties for their commission, and determine whether they reflect outmoded economic, social, religious, or moral values and require substantial reform. A study of that question might be of further service and considerable interest, given a nation whose ideas of social justice are changing rapidly, if it included a formulation of an entire penal code reflective of the highest shared values and realistic aspirations of modern and educated men. Such a code, for example, might greatly mitigate the offense of simple larceny as applicable to impoverished defendants with minor dependents,²⁹ while creating a new crime for employers who exploit underpaid employees while making large profits.³⁰

28. *E.g.*, *United States v. Katz*, 389 U.S. 347, 353 (1967) (shift in rationale for constitutional limitation of electronic surveillance from physical intrusion into constitutionally protected area, to aural invasion of privacy.).

29. Such an offender can receive, for example, a prison sentence of up to five years of solitary confinement at labor and a \$2000 fine for a first offense of larceny under present Pennsylvania law. PA. STAT. ANN. tit. 18, § 4807 (1969). An example of a sophisticated attempt to scale the gravity of theft offenses depending upon the circumstances and results of their commission is § 1735 of the proposed new federal criminal code, *supra* note 26. It must be noted, however, that the imposition of appropriate sentences can best be required, and the requirement enforced, through use of a combination of techniques, including: (1) some degree of proliferation of offenses with various elements, as in proposed § 1735; (2) the provision of standards (it might be here that the factors of poverty and dependency mentioned above would appear), and perhaps procedures, for selecting sentences within the authorized range for each offense, *compare* § 3202 of the proposed new federal code *with* 18 U.S.C. §§ 3575-76 (1970); and (3) a system of appellate review of sentences. The task of properly combining these techniques should be common to every attempt at codification. The special task suggested for the law reviews, on the other hand, is the preparation of a criminal code, or part of one, designed especially to reflect changed economic, social, religious, and moral values.

30. Among the new crimes to be created in such a proposed code would certainly be some involving business conduct violative of the drafters' conception of humane and enlightened economic and social policies. Such crimes have been and are staples of criminal law. Not until 1967, for example, did the Pennsylvania General Assembly repeal its provision for up to six months imprisonment for anyone who, "being a . . . railroad employee, for the purpose of furthering the object of or lending aid to

In a conversation with the author, two former convicts recently indicated what they felt were the principal faults in the criminal justice system which cause defendants to feel they are treated unfairly. A basic fault was that existing criminal codes proscribe certain conduct as criminal and arbitrarily exclude other, equally culpable, conduct, often as a means of protecting those with social power from those without it. Careful evaluation of that proposition would be a large project. It would very likely, however, lead to the proposing of specific reforms which, in time, might be adopted and tested by one or more states. Such a study would lay important groundwork for reform, so that substantive criminal law could respond less sluggishly to changes in American values and standards. In any event, sincere attention to complaints, such as those of the two convicts, should make some contribution to furthering respect for law among those prone to suspect leaders and lawyers of using the law as a lever against the poor and powerless.

Investigation

A third major area for development of reforms is the law governing techniques for obtaining and securing access to evidence. Since any adjudicative process depends wholly upon the ability of the finder of fact to examine the relevant evidence, the law reviews should survey all the techniques which are or could be used by the government or the defendant to collect and preserve evidence and develop proposals to improve those techniques. Expeditious means for compelling witnesses to cooperate, under judicial supervision, in furnishing information to the government or a suspect during the investigatory phase of a case could, for example, be explored.³¹ Proposals to give broad investigative powers

any strike or strikes, organized or attempted to be maintained on any other railroad, refuses or neglects, in the course of his employment, to aid in the movement over and upon the tracks of the company employing him, of the cars of such other railroad company, received therefrom in the course of transit" PA. STAT. ANN. tit. 18, § 4663 (1969); repealed, Act of Nov. 30, 1967, Pub. L. No. 641, § 1. Of course, one considering proposing new economic crimes must contemplate the creation of civil causes of action and regulatory authority as a supplement or substitute for criminal prohibitions.

31. It seems indisputable that both before and after a charge is brought, there are occasions when authority to compel the attendance of witnesses for interviews or testimony and the production of documents, at the behest of the prosecution or the suspect, would contribute to substantial justice. Some such authority exists, as in the prosecution's access to grand jury subpoenas, e.g., 18 U.S.C. § 3332 (1970) and in rare instances authority for use by the suspect, after charge but before trial, of compulsory process. See FLA. R. CRIM. P. 1.220(f) (rule for "discovery deposition," adopted in October, 1968). However, few such provisions exist for the benefit of suspects or de-

to grand juries in those states where they now lack such power should be prepared and examined.³² States lacking general witness immunity statutes similar to the new federal law,³³ which prohibits use against a witness of his immunized testimony and its fruits but does not bar his conviction on independently obtained evidence, should be offered draft legislation and urged to adopt it.³⁴

Many of these studies should be based in part upon the collection and evaluation of empirical data concerning the consequences of employing or rejecting specific techniques of investigation. Empirical studies, of course, have been and are being conducted in this general area. One contribution which can be made by the law reviews is to encourage and conduct such studies. Perhaps members of the reviews could be appointed to assist in the collection and evaluation of data and to scrutinize empirical studies with a more exacting legal analysis than they might be subjected to by the criminologists, sociologists, or others who may plan and conduct them.

One obvious area for such research is the application of the federal and state electronic surveillance laws enacted since 1968. The statistical reports published annually by the Administrative Office of the United

fendants. Prosecutors in some jurisdictions are not permitted to use grand jury subpoenas to seek evidence solely to perfect a case which already is the subject of an indictment. Investigative subpoenas which can be used independently of grand juries are not available to some investigative and prosecutive agencies, *see, e.g.*, Commonwealth *ex rel.* Margiotti v. Orsini, 368 Pa. 259, 81 A.2d 891 (1951) (Pennsylvania Attorney General lacks subpoena power), and in other respects the availability of compulsory process to the two sides of a pending or imminent criminal case is quite limited. Some limitations and controls to prevent abuses are of course appropriate, but it should be possible to devise standards and procedures for their application and judicial review so that neither the suspect nor the prosecution is denied compulsory process at any stage of an investigation or prosecution. Such limitations and controls should be minimized as to the power of an investigative or prosecutive agency to investigate before indictment and maximized as to the power of a suspect to attempt through compulsory process to clear himself of a charge not yet brought. Even in the latter case, however, some provision for subpoena power can be made. *Cf.* 18 U.S.C. § 3333 (1970) (requiring that an appointed public official on whom a critical grand jury report is about to be published be given the opportunity to designate witnesses who must be heard by the grand jury).

32. The deficiencies of investigative grand jury powers in one state are described in PA. CRIME COMMISSION REPORT ON ORGANIZED CRIME 102-05 (1970), and an effort is being made to correct the deficiencies by a bill now pending in the Pennsylvania General Assembly, H.R. 917, 1971 Sess. (1971).

33. 18 U.S.C. §§ 6001-05 (1970).

34. An exemplary state witness immunity bill is Pennsylvania H.R. 919, 1971 Sess. (1971). As to the validity of such legislation, *see* Zicarelli v. New Jersey State Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted*, 91 S. Ct. 916 (1971).

States Courts³⁵ are only starting points, but as such can be very useful and should suggest many areas in which empirical research is well suited to test the assumptions made by opponents as well as proponents of court-ordered wiretapping and electronic surveillance.

Procedure, Evidence, and Review

The fourth and final major area for reform rivals or even surpasses correctional reform in importance and urgency, and concerns the manner in which the courts handle a criminal case after indictment, including rules of procedure, evidence, and appellate review. It is primarily the complex and technical way in which existing law treats these interrelated subjects that has made the criminal justice system virtually unworkable.³⁶

The most intensive and creative study should be devoted to developing a new basic approach, implemented by detailed proposals, radically different from that now employed. The theme of a new approach should be to make criminal proceedings much more swift, less technical, and more fully subject to review. Such new procedures would be more likely to lead to a disposition of each case on the basis of the defendant's guilt or innocence rather than, for example, the fact that the defendant's privacy was invaded or that the prosecution witnesses died before a second trial after reversal was possible.

Simplifying and rationalizing the rules of evidence would be one aspect of such a proposal, and could begin with a thorough comparison of the rules of evidence in each jurisdiction with the better academic views concerning them. For example, there is substantial academic support³⁷ for revising the co-conspirators declaration exception to the hearsay rule, so that its application would depend not on whether the extrajudicial declaration was supposed to have been made in furtherance of the conspiracy but on whether the circumstances of its making were such as to make it trustworthy. There are, as another example, excellent

35. REPORTS ON APPLICATIONS, *supra* note 2.

36. Very strong language has been reported in newspapers as used to describe our criminal justice system by American and British experts participating in the American Bar Association's recent London meetings. A number of those experts blamed the shortcomings of American criminal justice upon excessive complexity and technicality in rules of procedure, evidence, and appellate review. *E.g.*, Washington Post, July 17, 1971, at A1, col. 1 (quoting U.S. Attorney General Mitchell as saying in a speech on July 16, 1971, that the U.S. system of criminal justice has become a "caricature of justice," and that "the discovery of guilt or innocence as a function of the courts is in danger of drowning in a sea of legalisms.").

37. *See, e.g.*, C. MCCORMICK, MCCORMICK ON EVIDENCE § 244 (1954); MODEL CODE OF EVIDENCE rule 508(b) (1942); UNIFORM RULE OF EVIDENCE 63(9).

reasons for creation of a broad exception to the hearsay rule for prior statements of a witness available for cross-examination.³⁸ It would be most desirable to explore the extent to which changes in the rules of evidence and expanded authority for cautionary instructions by judges concerning credibility could reduce bench conferences, points of appeal, and retrials, and improve the quality and quantity of the information available to triers of fact.

Included in studies of the rules of evidence must be further evaluation of those rules excluding reliable evidence as a means of promoting values other than accurate fact-finding. These studies should be supplemented by empirical research concerning such matters as the impact of exclusionary rules upon court cases in which they are applied, the degree of deterrence of improper conduct caused by the various exclusionary rules, and many other issues,³⁹ some of which are discussed in an article by Professor Dallin H. Oaks published last year.⁴⁰ The importance of the exclusionary rules requires that thorough empirical and legal study of it have a secure place in any examination of possible criminal law reforms.

Areas in which procedural reform is possible are suggested by the Standards for Criminal Justice adopted by the American Bar Association.⁴¹ The law reviews should, however, examine these and other proposals with a critical eye and inject fresh thinking by shaping their own proposals for reform. Another need is for the development of explicit legislative or judicial standards limiting and guiding the selection of sentences in individual cases. Thus, an interesting proposition for analysis would be the imposition of requirements that defendants and prosecutors have opportunities to be heard on sentencing, and that sentences be supported by stated findings and reasons.⁴²

38. Cf. *California v. Green*, 399 U.S. 149 (1970). Compare *United States v. DeSisto*, 329 F.2d 929, 933 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1965), with *Goings v. United States*, 377 F.2d 753, 762 n.12 (8th Cir. 1967). See also MODEL CODE OF EVIDENCE rule 503, comment at 234 (1942).

39. For a discussion of policy considerations relevant to the exclusionary rule and the need for empirical studies to inform evaluation of those considerations, see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 9 CRIM. L. REP. 3195, 3202-07 (June 21, 1971) (Burger, C.J., dissenting).

40. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

41. E.g., ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft 1970). A number of volumes of standards relating to various aspects of criminal justice have been drafted or approved, and can be obtained from the ABA.

42. Two recent and careful attempts to draft such standards and requirements are

Another area in which procedural reform can be considered concerns the scope of appellate review and the powers of appellate courts. The Congress, in last year's Organized Crime Control Act,⁴³ adopted, for a limited class of cases, a scheme for appellate review of sentences⁴⁴ which permits sentence increases on review taken by the government without violating, according to its proponents,⁴⁵ the due process and double jeopardy clauses. To the extent that it succeeds in doing so, it promises at long last a system of sentence review which is not one-sided in favor of defendants, thus avoiding many of the objections made to previous calls for sentence review while more fully accomplishing the basic objectives of such review.⁴⁶ The operation of that portion of the new federal act should be studied and the feasibility of extending its principles to state⁴⁷ and other federal cases assessed, so that the anomaly and injustice of unreviewable sentencing decision can be eliminated.

Other studies should explore the possibility of broadening the scope of review of convictions, thereby making more flexible the powers of appellate courts when they find trial court errors. One conclusion might be that expanded appellate power and scope of review would substantially reduce the number of cases in which retrials occur. These retrials often cause expense and delay and sometimes cannot take place, thereby causing the release of guilty persons. It may be possible to devise criteria by which error, though not entirely "harmless," could be disregarded as, for example, where commission of the error does not appear to have been willful, where grounds for reasonable doubt of the defendant's guilt do not appear from the record or in a new offer of proof permitted by the appellate court, and where only affirmance would work substantial justice.⁴⁸ Intermediate criteria might be found by which

§ 3575 and § 3202 of the proposed new federal criminal code, *supra* note 26. *See also* note 29 *supra*.

43. Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 922.

44. 18 U.S.C. § 3576 (1970).

45. *See, e.g.,* McClellan, *supra* note 10, at 174-88; S. REP. NO. 91-617, 91st Cong., 1st Sess. 92-99 (1969); "Organized Crime Control," *supra* note 21, at 537-40, 544-48, 568-79, 695-701. *But see, e.g.,* THE PROPOSED ORGANIZED CRIME CONTROL ACT, *supra* note 10, at 43-52.

46. For a discussion of these objectives and of some of the drawbacks of one-sided sentence review, *see* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1968), especially at 1-6, 20-31, 55-63.

47. Legislation similar to 18 U.S.C. § 3576 (1970) has been proposed for at least one state. *See* PA. CRIME COMMISSION REPORT ON ORGANIZED CRIME 97-102 (1970).

48. *See generally* Mause, *Harmless Constitutional Error: The Implication of Chapman v. California*, 53 MINN. L. REV. 519 (1969); Note, *Application of the Harmless*

certain errors in some circumstances would result in the entry of a verdict of guilty on reduced charges or a reduction of the sentence on the original charge.

Affirmance of a conviction after trial court error not considered "harmless" may be a relatively drastic departure. Judge Friendly recently has suggested that collateral attacks on criminal judgments should succeed only where the defendant asserts a "colorable claim of innocence," but he made it clear that his proposal was limited to collateral rather than direct review.⁴⁹ It appears certain, however, that appellate courts have considered, on direct review, cases in which error was not "harmless," even though the trial court proceeding left no substantial question of the defendant's guilt and further indicated that there was no reasonable likelihood that substantial justice could be done by a reversal. If that is so, it is reason enough to devote time and effort to an attempt to articulate criteria for identifying and realistically disposing of such cases in a more just and effective manner.

The greatest misgiving about the specific possible reforms is not, however, that they are too extreme, but that they are too tame. While no attempt has been made to provide an outline of necessary procedural reforms, these few illustrations may fail to convey the true sense of need for revolutionary proposals. That need might be better conveyed by this suggestion: It would be well worthwhile for a team of students or lawyers to undertake a project which uses Professor John Griffiths' recent article *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*⁵⁰ as a base and attempts to move toward a practical, comprehensive proposal for reform of criminal procedure. Another team might consider in detail the effect of replacing criminal juries with judges or small panels of judges, and whether this would result in a sufficient reduction of evidentiary and procedural problems and an improvement of appellate review so as to justify such a technique for controlling not only procedure but fact-finding as well. The net result could be more protection of individual defendants than they now enjoy under our cumbersome system of jury trials. In any event, protection would be so nearly the same that the reform would be warranted as a means of improving crime prevention.

Error Doctrine to Violations of Miranda: The California Experience, 69 MICH. L. REV. 941 (1971).

49. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

50. 79 YALE L.J. 359 (1970).

CONCLUSION

Whatever may be the merits or demerits of any particular proposal for changes in the American criminal justice system, the essential point is that reform must be radical and rapid. It is up to members of the law reviews and others interested in law reform to develop programs which are sufficiently drastic to correct a deteriorating situation. Nevertheless, the reforms must preserve what are considered to be the essential elements of fair and enlightened criminal law and procedure.

Existing constitutions should of course receive respect in law reform efforts, but constitutional amendments must be proposed whenever desirable. Recently, there have been rapid changes not only in the social conditions with which the criminal justice system must deal but also in the constitutional law governing that system. While almost all of these changes have been judicial, no reformer should shrink from the possibility that further changes in the constitutions themselves may be made.

Neither should the law reviews turn away from participation in the key aspects of criminal law reform which depend much less on legal analysis than on assessment of various policies and values. Those aspects, as much as any others, are the business of the law reviews, not only because of the need to coordinate reforms with related provisions of existing law and other technical legal problems, but because in the law reviews reside skills and resources vital to effective reform efforts. Any far-reaching proposal will receive, before it has any chance of adoption, the most thorough and mature analysis and criticism of established scholars and groups. Even then, progress will most likely result from experimentation by individual states with specific reforms, until their value is demonstrated in such a way as to win wide acceptance. Often the only immediate value of a proposal will be to begin laying a foundation of thought, discussion, and further study, so that society's reaction time will be reduced and its reaction made more valid. The danger now is not that an impromptu radical proposal will be enacted, but that the initial proposals thrown into the crucible of criticism, to be ground down and refined, will not have the creativity and boldness demanded by a crumbling criminal justice system. The law reviews, with resources of youth, creativity, and scholarship, are well-equipped to serve, at every stage of the process, in the efforts to achieve meaningful criminal law reform.