THE CRISIS OF OVERCRIMINALIZATION*

By

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ABSTRACT: Excessive reliance upon the criminal law to perform tasks for which it is ill-suited has created acute problems for the administration of criminal justice. The use of criminal law to enforce morals, to provide social services, and to avoid legal restraints on law enforcement, to take just three examples, has tended both to be inefficient and to produce grave handicaps for enforcement of the criminal law against genuinely threatening conduct. In the case of morals offenses, it has served to reduce the criminal law's essential claim to legitimacy by inducing offensive and degrading police conduct, particularly against the poor and the subcultural, and by generating cynicism and indifference to the criminal law. It has also fostered organized criminality and has produced, possibly, more crime than it has suppressed. Used as an alternative to social services, it has diverted enormous law-enforcement resources from protecting the public against serious crime. Finally, its use to circumvent restrictions on police conduct has undermined the principle of legality and exposed the law to plausible charges of hypocrisy. Pressures to criminalize persistently block practical assessments of what the criminal law is good for and what it is not. Studies of the sociology of overcriminalization offer a means of understanding, and perhaps, to some degree, of controlling, this unfortunate phenomenon.

Since the last war there have been striking achievements in reform of the substantive criminal law. Largely under the impetus of the American Law Institute's Model Penal Code, a number of states have completed revisions of their criminal codes, and still more are in the process. The importance of this reform for criminal justice cannot be overstated.

But there is a significant feature of substantive law-revision which these reforms have succeeded in reaching only in part. By and large, these efforts have dealt with offenses entailing substantial harm to persons, property, and the state, against which the criminal law is generally accepted as the last and necessary resort. But American criminal law typically has extended the criminal sanction well beyond these fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all. The existence of these

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crimes and attempts at their eradication raise problems of inestimable importance for the criminal law. Indeed, it is fair to say that until these problems of over-criminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue.

Chapter VIII of *Task Force Report: The Courts*, of the President's Commission on Law Enforcement and Administration of Justice, is an attempt to deal with some of these problems.¹ The Executive Director has chosen to reveal my own hand in its preparation,² and I could hardly come now either to praise it or to bury it. Still, it may be said that the controversial character of these issues, and the need to achieve consensus among nineteen Commissioners of highly differing backgrounds and orientation, quite understandably required some reduction in scope and muting in tone and conclusion of my original draft. I note this not in complaint. Indeed, that these distinguished citizens, who, as a group, can scarcely be charged with being immoderate or visionary, were prepared to raise substantial reservations concerning the overextension of the criminal law is itself an event of significance. Still, this special issue of THE ANNALS provides an opportunity to present, free of the restraints of the need for consensus, a number of observations and conclusions which appeared to me compelling in thinking about these matters for the Commission. I do this not to disown Chapter VIII, but to add to it. Indeed, I have not hesitated to make use of its substance, and occasionally its phrasing, where desirable, in the interest of making this statement self-contained. In short, whereas Chapter VIII is a version of my original draft, this article is my own version of Chapter VIII, though compressed as far as possible in keeping with the admirable ANNALS policy of brevity.

The subjects raising the central issue of overcriminalization cut a wide swathe through the laws of most jurisdictions. In the process of revising the California criminal law, we encountered a mass of crimes outside the Penal Code, matching the Penal Code itself in volume, and authorizing criminal convictions for such offenses as failure by a school principal to use required textbooks,³ failure of a teacher to carry first-aid kits on field trips,⁴ gambling on the result of an election,⁵ giving private commercial

1. U.S. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 97-107 (1967). This commission will be referred to herein as the National Crime Commission.

2. *Idem* at 2.

3. Calif. Education Code §9255.

4. *Idem* at §11955.

5. Calif. Elections Code §29003.

performances by a state-supported band,⁶ and allowing waste of an artesian well by the landowner.⁷ Then there are the criminal laws, enforced by the state police forces, which have been the primary means used to deal with the death and injury toll of the automobile. Indications are that this response may ultimately do more harm than good by blocking off politically harder, but more likely, remedial alternatives.⁸ Problematic also has been the use of criminal sanctions to enforce economic regulatory measures, a matter which I have dealt with elsewhere.⁹ And there are other instances as well. In this piece I want to comment on the problems of overcriminalization in just three kinds of situations, in each of which the costs paid primarily affect the day-to-day business of law enforcement. These are the situations in which the criminal law is used: (1) to declare or enforce public standards of private morality, (2) as a means of providing social services in default of other public agencies, and (3) as a disingenuous means of permitting police to do indirectly what the law forbids them to do directly.

ENFORCEMENT OF MORALS

The use of the criminal law to prohibit moral deviancy among consenting adults has been a recurring subject of jurisprudential debate. Stephens in the last century¹⁰ and Lord Devlin in this century have urged the legitimacy of criminal intervention on the ground that "society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies."¹¹ The contrary view, vigorously espoused by John Stuart Mill in the nineteenth century,¹² and by H. L. A. Hart¹³ and many others in recent years, is, in the words of the Wolfenden Report:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.¹⁴

6. Calif. Government Code §6650.

7. Calif. Water Code §307.

8. See the telling account of Moynihan, *The War Against the Automobile*, The Public Interest, No. 3 (Spring 1966), especially at 21 *et seq.*

9. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963).

10. J. F. Stephens, *Liberty, Fraternity and Equality* (1873).

11. Devlin, *The Enforcement of Morals* 23 (1959).

12. J. S. Mill, *On Liberty* (1859).

13. H. L. A. Hart, *Law, Liberty and Morality* (1963).

14. Great Britain Committee on Homosexual Offenses and Prostitution, Report, Command No. 247 (1957) (Wolfenden Report), Paras. 61 and 62.

It is not my purpose here to mediate or resolve that dispute. My objective is to call attention to matters of the hardest concreteness and practicality, which should be of as much concern in reaching final judgment to a Devlin as to the staunchest libertarian; namely, the adverse consequences to effective law enforcement of attempting to achieve conformity with private moral standards through use of the criminal law.

Sex offenses

The classic instance of the use of the criminal law purely to enforce a moral code is the laws prohibiting extra-marital and abnormal sexual intercourse between a man and a woman. Whether or not Kinsey's judgment is accurate that 95 per cent of the population are made potential criminals by these laws,¹⁵ no one doubts that their standard of sexual conduct is not adhered to by vast numbers in the community, including the otherwise most respectable (and, most especially, the police themselves);¹⁶ nor is it disputed that there is no effort to enforce these laws. The traditional function of the criminal law, therefore—to curtail socially threatening behavior through the threat of punishment and the incapacitation and rehabilitation of offenders—is quite beside the point. Thurman Arnold surely had it right when he observed that these laws "are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."¹⁷

But law enforcement pays a price for using the criminal law in this way. First, the moral message communicated by the law is contradicted by the total absence of enforcement; for while the public sees the conduct condemned in words, it also sees in the dramatic absence of prosecutions that it is not condemned in deed. Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere. Second, the spectacle of nullification of the legislature's solemn commands is an unhealthy influence on law enforcement generally. It tends to breed a cynicism and an indifference to the criminal-law processes which augment tendencies toward disrespect for those who make and enforce the law, a disrespect which is already widely in evidence. In addition:

Dead letter laws, far from promoting a sense of security, which is the main function of the penal law, actually impair that security by holding the threat of prosecution over the heads of people whom we have no intention to punish.¹⁸

15. Kinsey, Pomeroy, and Martin, *Sexual Behavior in the Human Male* 392 (1948).

16. See Skolnick, *Justice without Trial* (1966), chap. iii.

17. Thurman Arnold, *Symbols of Government* 160 (1936).

18. Model Penal Code §207.11, comments at 111 (Tent. Draft No. 9, 1959).

Finally, these laws invite discriminatory enforcement against persons selected for prosecution on grounds unrelated to the evil against which these laws are purportedly addressed, whether those grounds be "the prodding of some reform group, a newspaper-generated hysteria over some local sex crime, a vice drive which is put on by the local authorities to distract attention from defects in their administration of the city government."¹⁹

The criminalization of consensual adult homosexuality represents another attempt to legislate private morality. It raises somewhat different problems from heterosexual offenses, in that there are some attempts at enforcement. The central questions are whether the criminal law is an effective way of discouraging this conduct and how wasteful or costly it is.

Despite the fact that homosexual practices are condemned as criminal in virtually all states, usually as a felony with substantial punishment, and despite sporadic efforts at enforcement in certain situations, there is little evidence that the criminal law has discouraged the practice to any substantial degree. The Kinsey Report as well as other studies suggest a wide incidence of homosexuality throughout the country. One major reason for the ineffectiveness of these laws is that the private and consensual nature of the conduct precludes the attainment of any substantial deterrent efficacy through law enforcement. There are no complainants, and only the indiscreet have reasons for fear. Another reason is the irrelevance of the threat of punishment. Homosexuality involves not so much a choice to act wickedly as the seeking of normal sexual fulfillment in abnormal ways (though not abnormal to the individual) preferred by the individual for reasons deeply rooted in his development as a personality. Moreover, in view of the character of prison environments, putting the homosexual defendant into the prison system is, as observed recently by a United States District Court Judge, "a little like throwing Bre'r Rabbit into the briarpatch."²⁰

On the other hand, the use of the criminal law has been attended by grave consequences. A commonly noted consequence is the enhanced opportunities created for extortionary threats of exposure and prosecution. Certainly, incidents of this kind have been reported often enough to raise genuine concern.²¹ But, of more significance for the administra-

19. Kinsey, Martin, and Gebhard, *Sexual Behavior in the Human Female* 392 (1953).

20. Chief Judge Craven in *Perkins v. North Carolina*, 234 F. Supp. 333, 339 (W.D.N.C. 1964).

21. As recently as August 1966 a nationwide extortion ring was uncovered which used blackmail of homosexuals to extort millions of dollars from thousands of victims, many of whom were prominent personalities in entertainment, business, education, and government. *Time*, August 26, 1966, p. 14.

tion of justice, enforcement efforts by police have created problems both for them and for the community. Opportunities for enforcement are limited by the private and consensual character of the behavior. Only a small and insignificant manifestation of homosexuality is amenable to enforcement. This is that which takes place, either in the solicitation or the act, in public places. Even in these circumstances, it is not usual for persons to act openly. To obtain evidence, police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution.²² However one may deplore homosexual conduct, no one can lightly accept a criminal law which requires for its enforcement that officers of the law sit concealed in ceilings, their eyes fixed to "peephholes," searching for criminal sexuality in the lavatories below;²³ or that they loiter suggestively around public toilets or in corridors hopefully awaiting a sexual advance.²⁴ Such conduct corrupts both citizenry and police and reduces the moral authority of the criminal law, especially among those portions of the citizenry—the poor and subcultural—who are particularly liable to be treated in an arbitrary fashion. The complaint of the critical that the police have more important things to do with their time is amply attested by the several volumes of the National Crime Commission's reports.

The offense of prostitution creates similar problems. Although there are social harms beyond private immorality in commercialized sex—spread of venereal disease, exploitation of the young, and the affront of public solicitation, for example—the blunt use of the criminal prohibition has proven ineffective and costly. Prostitution has perdured in all civilizations; indeed, few institutions have proven as hardy. The inevitable conditions of social life unfailingly produce the supply to meet the ever-present demand. As the Wolfenden Report observed: "There are limits to the

22. See Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County*, 13 U.C.L.A. Law Rev. 643 (1966).

23. See *Bielicki v. Superior Court*, 57 Cal.2d 600, 371 P.2d 288 (1962); *Britt v. Superior Court*, 58 Cal.2d 469, 374 P.2d 817 (1962); *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965).

24. See Project, *supra*, note 22, at 690–691: "The decoy method is utilized by undercover officers who 'operate' by intentionally providing homosexuals with the opportunity to make a proscribed solicitation. . . . The decoy's modus operandi at a public restroom may be to loiter inside engaging a suspect in friendly conversation, using handwashing or urinal facilities, or even occupying a commode for long periods of time. If the suspect makes a lewd solicitation or touching, the decoy will usually suggest going elsewhere to consummate the act and the arrest will be made outside of the restroom. When a street area is a known rendezvous location for homosexuals and male prostitutes, the decoy will operate by loitering on the street or by using a car to approach the suspect. In bars frequented by homosexuals, the decoy will order a drink and engage in friendly conversation with a suspect. Enforcement in bathhouses may necessitate operation by nude and semi-nude decoys."

degree of discouragement which the criminal law can properly exercise towards a woman who has deliberately decided to live her life in this way, or a man who has deliberately chosen to use her services."²⁵ The more so, one may add, in a country where it has been estimated that over two-thirds of white males alone will have experience with prostitutes during their lives.²⁶ The costs, on the other hand, of making the effort are similar to those entailed in enforcing the homosexual laws—diversion of police resources; encouragement of use of illegal means of police control (which, in the case of prostitution, take the form of knowingly unlawful harassment arrests to remove suspected prostitutes from the streets;²⁷ and various entrapment devices, usually the only means of obtaining convictions);²⁸ degradation of the image of law enforcement; discriminatory enforcement against the poor; and official corruption.

To the extent that spread of venereal disease, corruption of the young, and public affront are the objects of prostitution controls, it would require little ingenuity to devise modes of social control short of the blanket criminalization of prostitution which would at the same time prove more effective and less costly for law enforcement. Apparently, the driving force behind prostitution laws is principally the conviction that prostitution is immoral. Only the judgment that the use of the criminal law for verbal vindication of our morals is more important than its use to protect life and property can support the preservation of these laws as they are.

Abortion

The criminal prohibition of abortions is occasionally defended on the ground that it is necessary to protect the mother against the adverse physical and psychological effects of such operations. There seems little doubt, however, that these laws serve to augment rather than to reduce the danger. The criminal penalty has given rise to a black market of illegal abortionists who stand ready to run the risk of imprisonment in order to earn the high fees produced by the law's discouragement of legitimate physicians. As a consequence, abortions are performed in kitchens and private rooms instead of in properly equipped hospitals, and often by unqualified amateurs rather than by licensed physicians. A relatively simple and nondangerous operation on patients strongly desirous of avoiding parenthood is therefore converted into a surrepti-

25. *Supra*, note 14 at 247.

26. Kinsey, *supra*, note 15 at 597.

27. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 450 (1965).

28. Skolnick, *supra*, note 16 at 100.

tious, degrading, and traumatic experience in which the risk to the mental and physical well-being of the woman is many times increased. Indeed, the evidence is irresistible that thousands of lives are needlessly lost yearly at the hands of illegal abortionists.²⁹

It is plain, therefore, that the primary force behind retention of the abortion laws is belief that it is immoral. One of the serious moral objections is based on the view that the unborn foetus, even in its early stages of development, has an independent claim to life equivalent to that of a developed human being. Even those holding this judgment, however, can scarcely ignore the hard fact that abortion laws do not work to stop abortion, except for those too poor and ignorant to avail themselves of blackmarket alternatives, and that the consequence of their retention is probably to sacrifice more lives of mothers than the total number of foetuses saved by the abortion laws.

While there are no reliable figures on the number of illegal abortions, estimates have ranged from a hundred thousand to a million and a half yearly.³⁰ Among the factors responsible for this widespread nullification, two appear to predominate. The first is that there is no general consensus on the legitimacy of the moral claim on behalf of the foetus. While it is vigorously asserted by some portions of the community, it is as vigorously denied by others of equal honesty and respectability. In democratic societies, fortunately, the coercive sanctions of the criminal law prove unacceptable and unworkable as a means of settling clashes of sharply divided moralities. Second, the demand for abortions, by both married and unmarried women, is urgent and widespread, arising out of natural and understandable motives manifesting no threat to other persons or property. As with most morals offenses, therefore, sympathy for the offender combines with an unsettled moral climate to preclude any real possibility of enforcement.

Gambling and narcotics

Laws against gambling and narcotics present serious problems for law enforcement. Despite arrests, prosecutions and convictions, and increasingly severe penalties, the conduct seems only to flourish. The irrepressible demand for gambling and drugs, like the demand for alcohol during

29. See the sobering testimony of the Assistant Chief of the Division of Preventive Medical Services of the State Department of Public Health, before the California Assembly Interim Committee on Criminal Procedure, July 20, 1964, quoted in Task Force Report: The Courts, *supra*, note 1 at 5.

30. See the sources in Model Penal Code, §207.11, Comments at 147 (Tent. Draft No. 9, 1959).

Prohibition days, survives the condemnation of the criminal law. Whether or not the criminal restriction operates paradoxically, as some have thought, to make the conduct more attractive, it is clear that the prohibitions have not substantially eliminated the demand.

Nor have the laws and enforcement efforts suppressed sources of supply. No one with an urge to gamble in any fair-sized city of this country has far to go to place an illegal bet. And in the case of narcotics, illicit suppliers enter the market to seek the profits made available by the persistence of the demand and the criminal law's reduction of legitimate sources of supply, while "pusher"-addicts distribute narcotics as a means of fulfilling their own needs. Risk of conviction, even of long terms of imprisonment, appears to have little effect. Partly, this is because the immediate and compelling need of the "pusher"-addict for narcotics precludes any real attention to the distant prospect of conviction and imprisonment. For large-scale suppliers, who may not be addicts, the very process of criminalization and punishment serves to raise the stakes—while the risk becomes greater, so do the prospects of reward.³¹ In addition, experience has demonstrated that convictions are difficult to obtain against large, nonaddict, organized dealers.

Our indiscriminate policy of using the criminal law against selling what people insist on buying has spawned large-scale, organized systems, often of national scope, comprising an integration of the stages of production and distribution of the illicit product on a continuous and thoroughly business-like basis. Not only are these organizations especially difficult for law enforcement to deal with; they have the unpleasant quality of producing other crimes as well because, after the fashion of legitimate business, they tend to extend and diversify their operations. After repeal of Prohibition, racketeering organizations moved into the illegal drug market. Organizations which purvey drugs and supply gambling find it profitable to move into loan-sharking and labor racketeering. To enhance their effectiveness, these organized systems engage in satellite forms of crime, of which bribery and corruption of local government are the most far-reaching in their consequences.³² Hence the irony that, in some measure, crime is encouraged and successful modes of criminality are produced by the criminal law itself.

Another significant cost of our policy is that the intractable difficulties of enforcement, produced by the consensual character of the illegal

31. Packer, *The Crime Tariff*, 33 *American Scholar* 551 (1964).

32. For a detailed description, see U.S. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967).

conduct and the typically organized methods of operation, have driven enforcement agencies to excesses in pursuit of evidence. These are not only undesirable in themselves, but have evoked a counterreaction in the courts in the form of restrictions upon the use of evidence designed to discourage these police practices. One need look no farther than the decisions of the United States Supreme Court. The two leading decisions on entrapment were produced by overreaching undercover agents in gambling³³ and narcotics prosecutions,³⁴ respectively. Decisions involving the admissibility of evidence arising out of illegal arrests have, for the most part, been rendered in gambling, alcohol, and narcotics prosecutions.³⁵ Legal restraints upon unlawful search and seizure have largely grown out of litigation over the last five decades concerning a variety of forms of physical intrusion by police in the course of obtaining evidence of violations of these same laws.³⁶ The same is true with respect to the developing law of wire-tapping, bugging, and other forms of electronic interception.³⁷ Indeed, no single phenomenon is more responsible for the whole pattern of judicial restraints upon methods of law enforcement than the unfortunate experience with enforcing these laws against vice.

There is, finally, a cost of inestimable importance, one which tends to be a product of virtually all the misuses of the criminal law discussed in this paper. That is the substantial diversion of police, prosecutorial, and judicial time, personnel, and resources. At a time when the volume of crime is steadily increasing, the burden on law-enforcement agencies is becoming more and more onerous, and massive efforts are being considered to deal more effectively with threats to the public of dangerous and threatening conduct, releasing enforcement resources from the obligation to enforce the vice laws must be taken seriously. Indeed, in view of the minimal effectiveness of enforcement measures in dealing with vice crimes and the tangible costs and disadvantages of that effort, the case

33. *Sorrels v. U.S.*, 287 U.S. 435 (1932).

34. *Sherman v. U.S.*, 356 U.S. 370 (1958).

35. E.g., *Johnson v. U.S.* 333 U.S. 10 (1948) (narcotics); *Draper v. U.S.* 358 U.S. 307 (1959) (narcotics); *Beck v. Ohio*, 379 U.S. 89 (1964) (gambling).

36. E.g., *Carroll v. U.S.*, 267 U.S. 132 (1925) (prohibition); *Agnello v. U.S.*, 269 U.S. 20 (1925) (narcotics); *Marron v. U.S.*, 275 U.S. 192 (1927) (prohibition); *Go-Bart Co. v. U.S.*, 282 U.S. 344 (1931) (narcotics); *Lefkowitz v. U.S.*, 285 U.S. 452 (1932) (prohibition); *Johnson v. U.S.*, 333 U.S. 10 (1948) (narcotics); *Rochin v. California*, 342 U.S. 165 (1952) (narcotics); *Jones v. U.S.*, 362 U.S. 267 (1960) (narcotics); *Wong Sun v. U.S.*, 371 U.S. 471 (1963) (narcotics); *Ker v. California*, 374 U.S. 23 (1963) (narcotics).

37. E.g., *Olmstead v. U.S.*, 277 U.S. 438 (1928) (prohibition); *Nardome v. U.S.*, 302 U.S. 379 (1938), 308 U.S. 338 (1939) (smuggled alcohol); *On Lee v. U.S.*, 343 U.S. 747 (1952) (narcotics); *Irvine v. California*, 347 U.S. 128 (1954) (gambling); *Benanti v. U.S.* 355 U.S. 96 (1957) (illicit alcohol); *Silverman v. U.S.*, 365 U.S. 505 (1961) (gambling).

for this redirection of resources to more profitable purposes becomes commanding. It seems fair to say that in few areas of the criminal law have we paid so much for so little.

One might, even so, quite reasonably take the position that gambling and narcotics are formidable social evils and that it would be dogmatic to insist that the criminal law should in no circumstances be used as one way, among others, of dealing with them. The exploitation of the weakness of vulnerable people, in the case of gambling, often results in economic loss and personal dislocations of substantial proportions. And the major physical and emotional hardships imposed by narcotics addiction raise even more serious evils. Still, such a view would scarcely excuse perpetuating the pattern of indiscriminate criminalization. There are obvious ways at least to mitigate the problems described; for example, by narrowing the scope of criminality. In the case of gambling, there is an overwhelming case for abandoning the traditional approach of sweeping all forms of gambling within the scope of the prohibition, while relying on the discretion of police and prosecutor to exempt private gambling and charitable and religious fund-raising enterprises.³⁸ At least, the evil of delegating discretion in such magnitude as to abandon law can be remedied by a more careful legislative definition of precisely the form of gambling conduct which the legislature means to bring within the criminal sanction. In the case of narcotics, our legislatures have tended indiscriminately to treat all narcotics as creative of the same dangers despite the strong evidence that some drugs, particularly marijuana, present evils of such limited character that elimination of the criminal prohibition is plainly indicated.³⁹ In short, there is much of value that could be done even if the whole dose of repeal were too much to swallow.

PROVISION OF SOCIAL SERVICES

In a number of instances which, taken together, consume a significant portion of law-enforcement resources, the criminal law is used neither to protect against serious misbehavior through the medium of crime and punishment nor to confirm standards of private morality, but rather to

38. The Model Anti-Gambling Act deliberately overgeneralizes the prohibition in this way even though recognizing "that it is unrealistic to promulgate a law literally aimed at making a criminal offense of the friendly election bet, the private, social card game among friends, etc.," on the ground that "it is imperative to confront the professional gambler with a statutory facade that is wholly devoid of loopholes." 2 ABA Comm'n on Organized Crime, *Organized Crime and Law Enforcement* 74-78 (1953).

39. See the review of the evidence in the papers of Messrs. Blum and Rosenthal in U.S. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967), especially at pp. 24-26, 126-131.

provide social services to needy segments of the community. The drunk, the deserted mother, and the creditor have been the chief beneficiaries. In each instance, the gains have been dubious in view of the toll exacted on effective law enforcement.

The drunk

Using the criminal law to protect against offensive public behavior, whether by drunken or sober persons, is not the issue here. The trouble arises out of the use of laws against public drunkenness to deal with the inert, stuporous drunk in the public streets and alleyways, who constitutes a danger to himself and an ugly inconvenience to others. Staggering numbers of these drunks are fed daily into the criminal machinery. Indeed, more arrests are made for this offense than for any other—35 to 40 per cent of all reported arrests. Not only does the use of the criminal law, therefore, divert substantial law-enforcement resources away from genuinely threatening conduct, but the whole criminal-justice system is denigrated by the need to process massive numbers of pathetic and impoverished people through clumsy and inappropriate procedures. Hearings and trials degenerate into a mockery of the forms of due process, with mass appearances, guilt assumed, and defendants unrepresented. Even if the social and personal problems of drunkenness were, in some measure, helped by this effort, these costs would make the investment doubtful. In fact, however, apart from a very temporary cleaning of the streets by the police, the effort is notoriously unsuccessful. Poverty, rootlessness, and personal inadequacy, which are at the bottom of alcoholism, are scarcely deterrable by the threat of criminal conviction. And rehabilitation in the human warehouses of our city jails is unthinkable.

In view of the detailed accounting of the experience with using the criminal law to deal with the public drunk and the suggestions of alternative civil remedies in the article in this issue by Mr. Stern⁴⁰ and in the report of the Crime Commission,⁴¹ the matter need not be further pursued here. But it should be said that no single experience so drastically exemplifies the misuse of the criminal law.

The creditor and the deserted mother

The bad-check laws and the family-nonsupport laws are two other instances in which the criminal law is used in practice to provide social

40. See the article by Gerald Stern in the Nov., 1967 issue of *The Annals*, 147–156.

41. See U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness (1967).

services; in these cases, to assist a merchant in obtaining payment and to assist needy families in obtaining support from a deserting spouse. The issue for legislative choice is straightforward: Is it ultimately worthwhile to employ the resources of police, prosecutors, and the criminal process generally in order to supplement civil remedies, even though such use entails a diversion of law-enforcement energies from more threatening criminal conduct?

Checks, of course, can be instruments of serious fraud for which it is proper to employ the sanctions of the criminal law. However, the typical bad-check laws provide for serious punishment as well for the person who draws a check on his account knowing that at the time it has insufficient funds to cover the check. Usually, the intent to defraud is presumed in these cases. Merchants, of course, are aware of the risk of accepting payment in checks, but expectedly prefer not to discourage sales. The effect of the insufficient-fund bad-check laws, therefore, is to enable them to make use of the resources of the criminal law to reduce what, in a sense, are voluntarily assumed business risks. When complaints are filed, the police, or sometimes the prosecutor, investigate to determine if there was a genuine intent to defraud or if the accused is an habitual bad-check writer. If not, the usual practice is to discourage prosecution and instead to assume the role of free collection agencies for the merchants.⁴²

The cost to law enforcement is, again, the diversion of resources from genuine threatening criminality. It is not clear that it is anything but habit which keeps states from narrowing their bad-check laws to exclude the occasional bad-check writer where there is no proof of intent to defraud. This would make it more difficult for merchants to obtain payment, but it is hard to see why it would not be preferable to conserve precious law-enforcement resources at the far lesser cost of requiring the merchant to choose between being more conservative in accepting checks and assuming the risk as a business loss.

Nonsupport complaints by wives against deserting husbands are handled similarly. The objective of law-enforcement personnel—the probation officer, a deputy in the prosecutor's office, a welfare agency—is not to invoke the criminal process to punish or rehabilitate a wrongdoer, but to obtain needed support for the family.⁴³ Instead, jailing the father is the least likely means of obtaining it. As in the bad-check cases, the chief effect on law-enforcement officers is that this duty amounts to still

42. American Bar Foundation, *Pilot Project Report on the Administration of Criminal Justice in the United States*, Vol. III, 570 (1959); LaFave, *supra*, note 27 at 118; Frank Miller and Frank Remington, *Procedures Before Trial*, 335 *The Annals*, 111, 114 (1962).

43. *Ibid.*

another diversion from their main business: Unlike the bad-check cases, however, here the criminal process is being used to provide a service which, indisputably, the state has an obligation to provide. It is apparent from the economic status of those usually involved that the service amounts to the equivalent of legal aid for needy families. Still, although the service is a useful one, it makes little sense to provide it through the already overburdened criminal processes. Although the obligation is performed by police and prosecutors with some success, it is done reluctantly and usually less effectively than by a civil agency especially designed to handle the service. In addition, it is performed at a sacrifice to those primary functions of protecting the public against dangerous and threatening conduct which only the criminal law can perform.

AVOIDING RESTRAINTS ON LAW ENFORCEMENTS

Another costly misuse of the substantive criminal law is exemplified in the disorderly conduct and vagrancy laws. These laws are not crimes which define serious misconduct which the law seeks to prevent through conviction and punishment. Instead, they function as delegations of discretion to the police to act in ways which formally we decline to extend to them because it would be inconsistent with certain fundamental principles with respect to the administration of criminal justice. The disorderly-conduct laws constitute, in effect, a grant of authority to the police to intervene in a great range of minor conduct, difficult or impossible legally to specify in advance, in which the police find it desirable to act. The vagrancy laws similarly delegate an authority to hold a suspect, whom police could not hold under the law of arrest, for purposes of investigation and interrogation.

Disorderly-conduct statutes vary widely. They usually proscribe such conduct as riot, breach of the peace, unlawful assembly, disturbing the peace, and similar conduct in terms so general and imprecise as to offer the police a broad freedom to decide what conduct to treat as criminal. A New York Court of Appeals Judge observed of that state's disorderly-conduct statute: "It is obviously one of those dragnet laws designed to cover newly invented crimes, or existing crimes that cannot be readily classified or defined."⁴⁴ In examining disorderly-conduct convictions, the Model Penal Code found that the statutes have been used to proscribe obscenity in a sermon, swearing in a public park, illicit sexual activity, picketing the home of a nonstriking employee, picketing the United Nations, obstructing law enforcement, shouting by a preacher whose "Amen"

44. *People v. Tylkoff*, 212 N.Y. 187, 201, 105 N.E. 2d 835, 836 (1914).

and "Glory Hallelujah" could be heard six blocks away, and talking back and otherwise using loud and offensive language to a policeman.⁴⁵ But the reported decisions give only a remote hint of the use of these laws since convictions are appealed only in a minute percentage of the cases.⁴⁶ In fact, arrests for disorderly conduct exceed those of arrests for any other crime except drunkenness—in 1965, a half-million arrests out of a total of five million were made for disorderly conduct.⁴⁷

Vagrancy-type laws define criminality in terms of a person's status or a set of circumstances. Often, no disorderly conduct need be committed at all. The usual components of the offense include living in idleness without employment and having no visible means of support; roaming, wandering or loitering; begging; being a common prostitute, drunkard, or gambler; and sleeping outdoors or in a residential building without permission. Beginning in feudal days, when these laws had their beginning, they have been pressed into a great variety of services. Today, they are widely and regularly used by police as a basis for arresting, searching, questioning, or detaining persons (who otherwise could not legally be subjected to such interventions) because of suspicion that they have committed or may commit a crime or for other police purposes, including cleaning the streets of undesirables, harassing persons believed to be engaged in crime, and investigating uncleared offenses. The story has been told in a number of descriptive studies in recent years.⁴⁸

Both the disorderly-conduct and vagrancy laws, therefore, constitute a powerful weapon in the hands of police in the day-to-day policing of urban communities. Since "penalties involved are generally minor, and defendants are usually from the lowest economic and social levels,"⁴⁹ they have proved largely immune from the restraints of appellate surveillance and public criticism. A weighing of the long-term costs of use of these laws against their immediate benefit to law enforcement suggests the wisdom of either scrapping them or at least substantially narrowing their scope.

45. Model Penal Code, §250.1, Comments at 2 *et seq.* (Tent. Draft No. 13, 1961).

46. See Adlerberg and Chetow, *Disorderly Conduct in New York Penal Law Section 222*, 25 Brooklyn L. Rev. 46 (1958).

47. U.S. FBI, Uniform Crime Reports 108 (1965).

48. Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L. J. 1351 (1950); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956); Justice Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L. J. 1 (1960); LaFave, *supra*, note 27 at 87–88, 151–152, 343–363. See N.Y. Law Revision Commission Report 591 (1935): "The underlying purpose [of vagrancy laws] is to relieve the police of the necessity of proving that criminals have committed or are planning to commit specific crimes."

49. Model Penal Code, *supra*, note 44 at 2.

The chief vice of these laws is that they constitute wholesale abandonment of the basic principle of legality upon which law enforcement in a democratic community must rest—close control over the exercise of the delegated authority to employ official force through the medium of carefully defined laws and judicial and administrative accountability. If I may, in the circumstances, take the liberty of quoting the language of Chapter VIII:

The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. It is unjust to structure law enforcement in such a way that poverty itself becomes a crime. And it is costly for society when the law arouses the feelings associated with these laws in the ghetto—a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate.⁵⁰

I would only add that police conduct undertaken under color of these laws produces the typical resentment associated with what is perceived as double-dealing. There is, after all, what can reasonably be taken for hypocrisy in formally adhering to the constitutional, statutory, and judicial restrictions upon the power of the police to arrest, search, and otherwise intervene in the affairs of citizens on the streets, while actually authorizing disregard of those limitations, principally against the poor and disadvantaged, through the subterfuge of disorderly-conduct and vagrancy laws.

The proper legislative task is to identify precisely the powers which we want the police to have and to provide by law that they shall have these powers in the circumstances defined. Amending the law of attempt to make criminality commence earlier in the stages of preparation than now generally is the case would help to some degree. More substantial moves in this direction are exemplified in the attempts to authorize stopping and questioning short of arrest such as those of the New York "Stop and Frisk" law and the proposals of the American Law Institute's Model Pre-Arrest Code. Unfortunately, however, the future is not bright. Increasingly, in recent years, the Supreme Court has been imposing constitutional restraints upon powers which the police and most legislatures strongly believe the police should have. If anything, therefore, the temptation to invent subterfuge devices has increased. This is

50. Task Force Report: Courts, *supra*, note 1 at 103–104.

another of the unfortunate consequences of the tension between the police and the courts. But until law enforcement comes to yield less grudgingly to the law's restraints in the process of imposing its restraints upon others, the problem will long be with us.

CONCLUDING REMARKS

The plain sense that the criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good; that the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses—this obvious injunction of rationality has been noted widely for over 250 years, from Jeremy Bentham,⁵¹ to the National Crime Commission,⁵² and by the moralistic philosophers⁵³ as well as the utilitarian ones.⁵⁴ And those whose daily business is the administration of the criminal law have, on occasion, exhibited acute awareness of the folly of departing from it.⁵⁵ The need for restraint seems to be recognized by those who deal with the criminal laws, but not by those who make them or by the general public which lives under them. One hopes that attempts to set out the facts and to particularize the perils of overcriminalization may ultimately affect the decisions of the legislatures. But past experience gives little cause for optimism.

Perhaps part of the explanation of the lack of success is the inherent limitation of any rational appeal against a course of conduct which is moved by powerful irrational drives. Explaining to legislatures why it does more harm than good to criminalize drunkenness or homosexuality, for example, has as little effect (and for the same reasons) as explaining to alcoholics or homosexuals that their behavior does them more harm than good. It may be that the best hope for the future lies in efforts to understand more subtly and comprehensively than we do now the dynamics of the legislative (and, it must be added, popular) drive to criminalize. The sociologists, the social psychologists, the political scientists, the survey research people, and, no doubt, others will have to be

51. Bentham, *Principles of Morals and Legislation* 281–288 (Harrison ed., 1948).

52. See *supra*, note 1.

53. Devlin, *The Enforcement of Morals* 17 (1959). It is noteworthy that, as a practical matter, Lord Devlin became convinced of the undesirability of continuing to consider consenting homosexuality a crime. See Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *Yale L. J.* 986, 987 n.4 (1966).

54. E.g., H. L. A. Hart, *The Morality of the Criminal Law*, chap. ii (1964).

55. See the quotation from the statement of a representative of the FBI before the National Crime Commission, *supra*, note 1 at 107.

conscripted for any effort of this kind. A number of studies have already appeared which have revealed illuminating insights into the process of conversion of popular indignation into legislative designation of deviancy,⁵⁶ the nature of the competitive struggles among rival moralities, and the use of the criminal law to solidify and manifest victory.⁵⁷ We also have a degree of understanding of the effect of representative political processes on the choice of sanctions and the dynamics of law enforcement by the police.⁵⁸ Perhaps by further substantial research along these lines—research which would put the process of over-criminalization by popularly elected legislators itself under the microscope—we will understand better the societal forces which have unfailingly produced it.⁵⁹ Understanding, of course, is not control, and control may prove as hopeless with it as without it. But scientific progress over the past one hundred years has dramatized the control over the physical environment which comes from knowledge of its forces. It may prove possible to exert in like manner at least some measure of control over the social environment. It is an alternative worth pursuing.

56. H. S. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963); Kai Erikson, *Sociology of Deviance*, in *Social Problems* 457 (J. Simpson ed., 1965).

57. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (1963); Joseph Gusfield, *The Symbolic Process in Deviance Designation* (Ms. 1967).

58. Westley, *Violence and the Police*, 59 *Amer. J. Sociology* 34 (1953); Skolnick, *supra*, note 12.

59. Under a Ford Foundation grant for a Program of Criminal Law and Social Policy, the Earl Warren Legal Center and the Center for the Study of Law and Society of the University of California (Berkeley) are attempting to undertake studies of this kind.