

Court-Related Processes and the Courts

Task Force Report: *The Courts*. Report of the President's Commission on Law Enforcement and Administration of Justice. U. S. Government Printing Office, 1967. Price \$1.00. x + 178 pp.

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A commission of inquiry in England or Scandinavia has traditionally been accorded greater public prestige and has usually had more consequences in legislation and executive action than in the United States. From a functional viewpoint one might have expected quite the reverse, for many social problems necessarily transcend the accepted legal bounds accorded in any area to the national government in the American federal system. Extra-legislative findings of a mixed group of technical experts and representatives of major interests would seem to have special utility in coping with the legalism of our constitutional order, since analysis, at least, can go beyond recommendations for congressional action. The Crime Commission *Reports* emphasize these neglected opportunities by directing their explicit appeals to the general public in their capacities as citizens, and as members of specialized interest groups more than to official agencies or officeholders.

The costs of choosing such a diffuse audience are also evident. The effect of appealing to so brooding an omnipresence as the developing conscience of an emerging, more civilized society is to lose, to some extent at least, a core of immediacy and introduce a rather large component of rhetoric into the picture. Certainly more diffuseness is evident in this volume, nominally entitled *The Courts*. The major topics are more properly conceived of as court-related; plea-bargaining, sentencing, availability of legal counsel, selection of legal personnel, and reforms in substantive law, supplement and outweigh three chapters on court structure and court procedure. This volume also evidences little creativity in re-

search approach, so that the appendices are largely observer reports or think pieces. The former give no indication of why the particular unit—both in time and space—was chosen for observation, and it is difficult to glean how typical the events described are, or even how typical the observer feels they are. The recounted incidents in the lower courts are gruesome enough in their small way; a judge taking umbrage because an accused is deaf, and tolling out a somewhat more severe sentence than normal without allowing the defendant to speak, seems straight out of Dickens:

“Well, he’ll hear this! Seventy days in the house of correction.” The defendant never uttered a word in the nature of a plea and discovered his fate only through a slip of paper handed to him by a police officer.

Apologetic haste and dutiful lip service to empiricism seem to have characterized these efforts. How thoroughgoing a study was possible or, to use McNamara’s favorite term, cost-efficient is difficult to say from this distance. But this feint at field research adds up to a lost opportunity to do something as interesting as the Commission’s community survey of actual incidence on crime. Studies by teams of observers of actual proceedings in terms of pre-set categories could have been supplemented by these free-wheeling impressions; reactions of the “clientele” to different types of judicial conduct come quickly to mind as another possibility.

As to plea bargaining, both the *Task Force Report* and the appended discussion by Professor Enker are interesting and cogent as to possible patterns without much advance as to actuality. (This will not turn out to be a further plea for empirical research because I suspect the difficulties are truly enormous.) As Professor Enker observes, “Indeed, this may be the very vice of the current system. . . . We do not really know whether there is cause for concern or not.” Given this problem, the Task Force’s suggestions are forthright: it wishes to normalize and make public the whole process. Judges should be informed of what has taken place and should actively supervise to protect both the public and the accused, yet not so actively as to preclude objectivity.

The most rigorous treatment is reserved for an operations research examination of the trial process. Some of this is tediously detailed and sometimes even unconvincing. (It is doubtful if every court must have a charge-a-plate address card for lawyers normally practicing before it in order to achieve efficiency.) Nonetheless, viewing the court process as a system emphasizes the extent to which bad record-keeping inconven-

iences jurors, witnesses, judges, defendants, and lawyers, alike. Our system of bringing charges, too, clearly emerges as one anachronistically preoccupied with the problem of apprehension and asserting custody over individuals.

Discussion of substitutes for arrest, bail and preliminary fact-finding are among the more creative pages in the volume. Clearly this is the work of fair-minded and forward-looking individuals.

Most impressive is the effort to think through the total societal effort at law enforcement. The Task Force suggests that the principal effort for rehabilitation should take place prior to the occurrence of habitual criminal behavior. This suggests at least a relative reversal of the present pattern of meticulous proceedings in felony matters and cursory trials in lesser matters. Substitutes for imprisonment are needed to avoid the societal and self-label of "criminal," with consequent difficulties in career and personal affairs. Judges should be given greater leeway in setting punishment and greater effort should be made to secure uniformity of sentencing and treatment of comparable individuals. Further, we have assumed the automatic availability of judges and criminal counsel; yet experience shows this is not going to just happen. Planning for manpower needs will be necessary if we are to implement allowed goals on legal representation. So even law school curricula are a subject for the Task Force's attention.

This broad perspective is what is curiously lacking in our entire system of government. Like common sense—aphoristically said to be a rare gift of God—vision is characteristically out of place in so complex a bureaucratically-structured polity as ours. Criminal law—necessarily a product of all levels of governance—grows by fits and starts. Particularly, since social attitudes have visibly changed in the lifetime of anyone likely to read these lines, anachronisms and injustices are likely to remain. Older statutes are likely to involve penalties which would now be considered savage. Even revisions of the criminal code usually involve only one level of government, and seldom take up questions that go beyond substantive law for that unit alone. The President's Commission offers the possibility of a functional equivalent of planning; it may provide the opportunity for comprehensive analysis and the setting of a societal agenda. On net, this is an impressive effort to accomplish these purposes in the field of law enforcement.