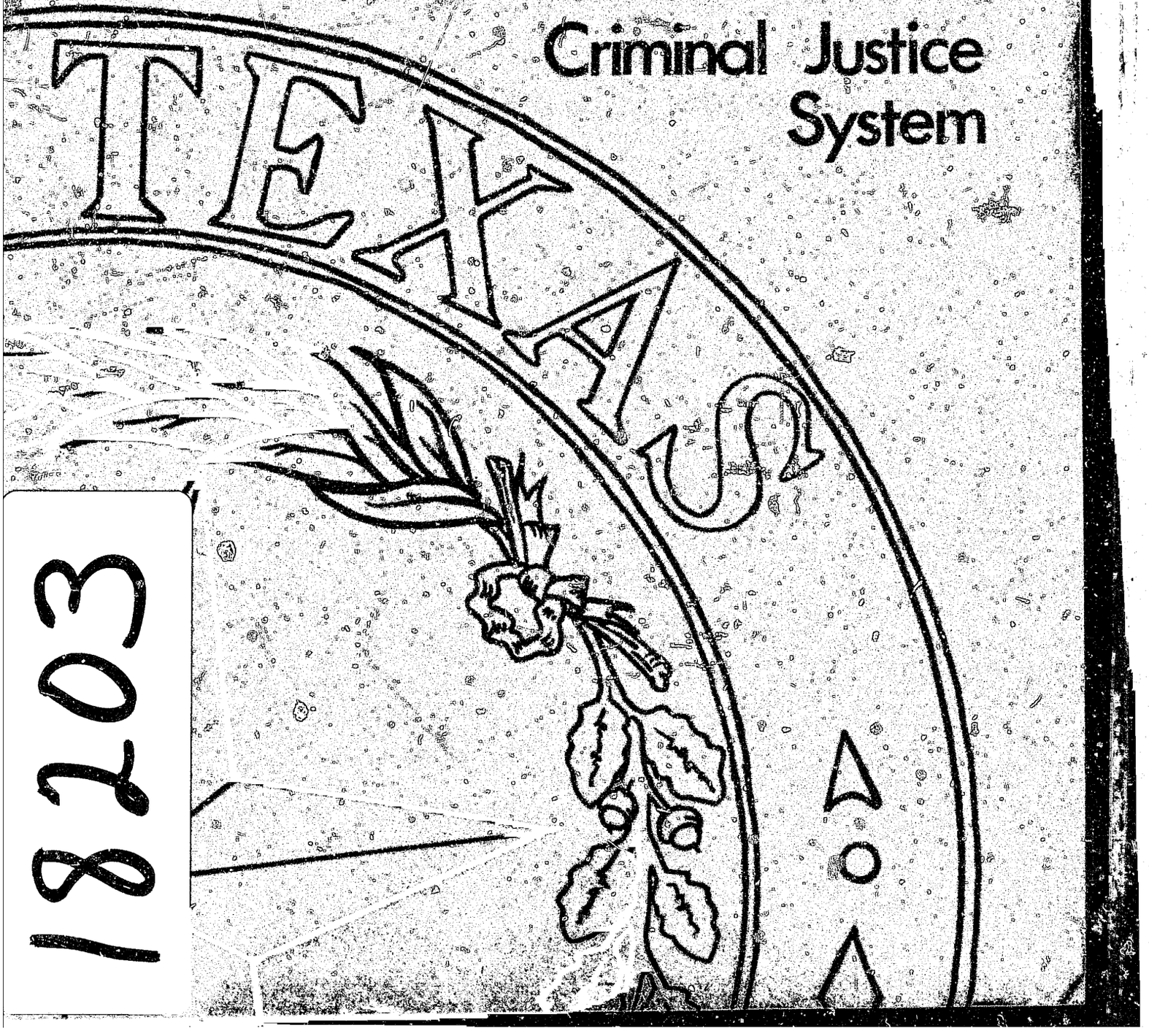
The Texas Constitution

Its Impact on:



Criminal Justice System

THE IMPACT OF THE TEXAS CONSTITUTION ON THE CRIMINAL JUSTICE SYSTEM

Allan K. Butcher
Associate Professor
Institute of Urban Studies
The University of Texas at Arlington

James W. Stevens
Director of Academic Programs
Institute of Urban Studies
The University of Texas at Arlington

Gloria W. Eyres
Research Associate
Institute of Urban Studies
The University of Texas at Arlington

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FOREWORD

This paper is one of a series of papers commissioned by the Institute for Urban Studies of the University of Houston to explore the impact of the Texas Constitution on the people of Texas. It is the goal of this series to stimulate a more enlightened dialogue concerning the central issues involved in the revision process and to render that process as responsive as possible to the needs of the state.

The Impact Series was financed in part under the Provisions of Title I, Higher Education Act of 1965, "Community Service and Continuing Education Program," administered by the Coordinating Board, Texas Colleges and University System. Colonel Wilbur W. Hurt is Director of the Community Services Program. Additional funding for this paper was provided by the Hogg Foundation.

Institutions cooperating in this series include the Institute for Urban Studies, University of Houston; the Institute of Urban Studies, University of Texas at Arlington; and the Lyndon Baines Johnson School of Public Affairs, at the University of Texas at Austin. Also cooperating in the project is the Texas Advisory Commission on Intergovernmental Relations.

Coordinating of the Impact series was undertaken by Thomas C. N. Evans and Ruth Whiteside of the Institute staff. Special appreciation is extended to Mr. Glen Provost for his work in the initial stages of the project. The Institute for Urban Studies and the cooperating institutions express appreciation to the many persons responsible for the creation of the papers.

John E. Bebout
Program Director
Institute for Urban Studies
University of Houston

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Special thanks also go to our contributors who spent numerous hours on original drafts and who suffered through editing and redrafts. These include Dr. John Kennedy, Dr. Mary Almore, Mr. John Reifenberg, Mr. Robert Bogomolny and Dr. Charles Friel. We would also like to express our appreciation to Mrs. Elva Barger for her diligent typing and to Miss Barbara Yablonsky for editorial and proofreading support.

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Allan K. Butcher
James W. Stevens
Gloria W. Eyres

CONTRIBUTORS

JAMES W. STEVENS is the Director of Academic Programs for the Institute of Urban Studies, the University of Texas at Arlington. Previously he was the Director of Criminal Justice Programs (1972-73) and Assistant Director for Information Systems (1969-72), also at the Institute of Urban Studies. Dr. Stevens received his B.A., M.A. and Ph.D. in political science degrees from Florida State University. Immediately following completion of his academic program, Dr. Stevens taught at the University of Maryland for three years. During the past several years, Dr. Stevens has directed a number of major research and development projects in the area of information systems and criminal justice in particular. These included the Texas special project under the national Project SEARCH. Dr. Stevens has presented numerous professional papers to organizations such as the Urban and Regional Information Systems Association and the Southwestern Social Science Association, and has authored and co-authored several articles, book reviews and other publications.

ALLAN K. BUTCHER is an associate professor and graduate advisor for criminal justice programs in the Institute of Urban Studies, The University of Texas at Arlington. From 1969 to 1973 Dr. Butcher held the Armstrong H. Chair of Government at Texas Wesleyan College in Fort Worth. He had been associated with the Institute in a number of research projects prior to joining the faculty full time in June 1973. Dr. Butcher received his M.A. in political science from the New School for Social Research in New York City, and, in 1970, his Ph.D. in Government from the University of Texas at Austin. He was elected a Danforth Foundation Associate in 1969. From 1963 until 1969 Dr. Butcher was on the faculty of the Department of Government, Southwest Texas State University, San Marcos, Texas. He has authored and co-authored a variety of papers, articles, and reports and served as a consultant to such organizations as the North Central Texas Council of Governments. Dr. Butcher has attended law school at Southern Methodist University in Dallas.

JOHN W. REIFENBERG is a member of the research field staff of the Police Foundation. In this capacity he is involved in the evaluation of several innovative programs being carried out by the Dallas Police Department. Mr. Reifenberg has his Juris Doctor degree from the University of Denver and is a candidate for his Master of Arts in psychology from that university. He has participated in several research projects related to the administration of justice and has taught legal seminars while at the University of Denver. Mr. Reifenberg is an adjunct assistant professor in the criminal justice program at the University of Texas at Arlington.

ROBERT L. BOGOMOLNY is an associate professor in the School of Law, Southern Methodist University. He has his law degree from Harvard University and was a member of the Special Projects and Legislation Section of the Criminal Division of the Department of Justice in Washington, D.C. for two and a half years. He has also been a staff member of the VERA Institute in New York City where, at the request of the mayor, he established the city's first methadone treatment program. Mr. Bogomolny has been associated with the Bureau of Narcotics and Dangerous Drugs and has been engaged in the private practice of law for several years. At SMU Mr. Bogomolny is the Director of the Center for Police Development.

JOHN E. KENNEDY is a professor of Law at Southern Methodist University. Mr. Kennedy's law degree is from Notre Dame, and, in addition; he has a Master of Laws and a Doctor of Juristic Science degree from Yale University. He is a member of the Minnesota bar and is admitted to practice before the United States Courts of Appeal for the Fifth and Sixth Circuits. Following his graduation from law school at Notre Dame, Mr. Kennedy served as a lieutenant in the United States Coast Guard. After leaving the service he was clerk to Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota, engaged in private practice, and has taught for a number of years. Among the law schools at which he has taught are the University of Kentucky, the University of Illinois, George Washington University and Florida State University. Mr. Kennedy has a particular interest in civil procedure and judicial administration. He has published a number of articles and book reviews in these areas and was co-revisor of a number of chapters in Moore's Federal Practice.

CHARLES M. FRIEL is a member of the faculty of the Institute of Contemporary Corrections and Behavioral Science at Sam Houston State University in Huntsville, Texas. Dr. Friel received his B.A., M.A. and Ph.D. in psychology from The Catholic University of America in Washington, D.C. Dr. Friel has published extensively in the fields of psychology and criminal justice and is well-known for his work in the National Project SEARCH.

MARY G. ALMORE has been an adjunct professor in the Institute of Urban Studies, The University of Texas at Arlington, for the past year, and will join the criminal justice faculty full time in September. Dr. Almore received Master of Science degrees in criminology and in psychology from Florida State University in Tallahassee and her Ph.D. in psychology from Texas Christian University. Since 1965 she has taught in the Department of Psychology at Texas Wesleyan College in Fort Worth; she previously served as a school social worker and a juvenile probation officer. She is a member of the American Psychological Association and the American Society of Criminology and has been a consultant to the Fort Worth Human Relations Commission.

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INTRODUCTION

Crime and the fear of crime have become topics of widespread discussion and concern among American during recent years. The Federal Bureau of Investigation (FBI) has noted that during the five-year period ending in 1971, reported crimes in the United States increased a total of 83 percent while the population increased only 5 percent.[1] During that same five-year period violent crimes, as defined by the FBI, increased 90 percent.[2] The Uniform Crime Reports for 1971 shows that the reported crimes in Texas during the year 1971 increased in every category except theft.[3] During that year, for example, murder in Texas increased 15.3 percent, robbery 20.1 percent, aggravated assault 14.3 percent.[4]

A disquieting feature of considering crime and its impact on Americans is the realization that life need not be this way. The omnipresent nature of crime throughout the world is a "fact of life" accepted by most people, although perhaps grudgingly and reluctantly. There are, nevertheless, areas of the world and even sections of this country where the crime problem is dramatically less than in others. Citing again the 1971 Uniform Crime Reports, the murder rate for the United States as a whole was 8.5 per 100,000 population.[5] In Houston, however, the reported murder rate was 18.1; in Corpus Christi it was 16.1; in Dallas, 15.5.[6] In Honolulu, during the same year, the murder rate was 4.8 or about one fourth that of the several

Texas cities cited.[7]

Even more persuasive is the recognition that many of the western European countries have murder rates less than one hundredth those of many American cities. Murder rates such as 0.08 per 100,000 population for Norway, 0.40 for Denmark, and 0.36 for England and Wales are fairly typical.[8] During 1971, the FBI estimated that there were 339 murders in the Greater Houston area which has a population of over two million.[9] England and Wales, with a total population of over fifty-six million persons, typically has about 150 murders each year. A recent reported murder rate for Canada of 1.81 shows that this is not a phenomenon peculiar only to the other side of the Atlantic Ocean.[10]

Perhaps crime cannot be eliminated, but obviously it can be reduced. The question everyone is interested in is how can it be reduced. What are the elements of a society in general and a system of justice in particular which can lead to such a reduction? What changes in the organizations or operations of law enforcement agencies, prosecution and the courts, and corrections would result in a safer society? How can we increase the level of the "domestic peace and tranquility" promised by the United States Constitution?

This report was prompted by a recognition of these problem areas, coupled with the impending revision of the Texas Constitution. The writing of a new constitution for the State of Texas offers an unusual, if not unique opportunity to critically examine the instruments of government and to make those modifications necessary to reflect the latest and best methods of ensuring that government is responsive and responsible to the demands and needs of the people. Thus, this report has been prepared to provide the members of the Constitutional Revision Commission with the information and understanding of the criminal justice system in Texas needed for their task of making recommendations to the Constitutional Convention meeting in 1974.

As important as individual facts or pieces of information contained herein is the report's general overview of the criminal justice system in Texas. This system overview will be emphasized to provide the commission members with a general framework within which to make considerations and evaluations regarding the criminal justice system and constitutional revision. The report will provide an appreciation and understanding of the multiplicity of actors and decision points and of the interrelationships which characterize the criminal justice system in Texas. This approach is based on the belief that in order to comprehend the organization and operations of any one particular part of the criminal justice system, it is vital that the role and place of that part within the larger whole be understood and appreciated.

For members of the commission, this report will provide the most current resource materials available. It is aimed at establishing an appropriate background and an awareness of recent research and theories being discussed by scholars and practioners in the criminal justice system. For the purposes of this report, the criminal justice system has been divided into five functional areas: law enforcement, prosecution and defense, the judicial process, institutional corrections, and probation and parole. Specialists in each of these areas

have written separate chapters in which they have discussed the present status of each of these functional areas in Texas; they have identified and analyzed the perceived weaknesses in the current situation; in most cases they have outlined how other states have responded to similar problems or weaknesses; and finally they have sketched out the alternatives available to the commission members or others in responding to these issues. An appropriate bibliography has been provided for each subject area to facilitate gathering additional information or researching particular points by the members of the commission or its staff.

The first chapter of the report is an introduction to the criminal justice system which discusses the place of the system within the general governmental organization and then concentrates on the "systems" approach to the consideration and understanding of the criminal justice activities in the state. The step-by-step path taken by an exemplary criminal case is detailed to provide an illustration of the system as it now operates in Texas. Chapters two through six deal with law enforcement, the prosecution and defense roles, the judicial function, institutional corrections, and probation and parole, respectively. The final chapter contains brief concluding remarks and pulls together the recommendations from the other chapters.

Footnotes

[1]Federal Bureau of Investigation, U.S. Department of Justice, Uniform Crime Reports for the United States, (Washington, D.C.: U. S. Government Printing Office, 1971), p. 2.

[2]Ibid., p. 3.

[3]The Texas Criminal Justice Council, 1973 Criminal Justice Plan for Texas (Austin, Texas: Office of the Governor, 1973), p. 4.

[4]Ibid.

[5]Uniform Crime Reports, p. 62

[6]Ibid., p. 81.

[7]Ibid., p. 84.

[8]"International Murder Rates," The New York Times Encyclopedic Almanac, 1971, p. 276.

[9]Uniform Crime Reports, p. 84.

[10]"International Murder Rates," p. 276.

CHAPTER I

THE CRIMINAL JUSTICE SYSTEM

Allan K. Butcher
James W. Stevens
The University of Texas at Arlington

The criminal justice system is a part of the larger political organization of the society. Although not often thought of in such a context, it is as much a political organization as is the legislature, the school board or other political institutions. While politics can be defined in various ways, such as the authoritative allocation of scarce resources, more simply put, it is the process for deciding who gets what, when, how, and at what cost to whom. The decisions made by the personnel of the criminal justice system deal essentially with these issues. Questions such as the distribution of police resources, whom to arrest, what charges are to be filed, and what sentence is to be imposed are all examples of political decisions. They represent decisions that allocate benefits to some people in the community and impose costs to others.

The overriding purpose of the criminal justice system is usually stated as enforcing or carrying into effect the legal norms of the community. The norms most closely identified with the criminal justice system are those of order maintenance and the protection of the individual from harm by others. To accomplish these ends, the criminal justice system acts upon those persons who are in violation of community norms. In order to protect the community, the criminal justice system removes, either temporarily or permanently, those members of the community who present a threat to the safety of themselves, others, or property in the community.

The system provides machinery for the inculcation of legal norms in an effort to "reform" or "rehabilitate" those who have not sufficiently internalized those norms and who have violated the standards provided by the community. By acting on these transgressors the criminal justice system also exacts a measure of punishment or revenge for those who have been harmed by the transgression. Besides the purpose of revenge, this also provides an example to others in the community of the penalties that accrue to those who violate the norms of behavior. Thus the system allegedly acts as a deterrent to those who might at some later date violate or consider violating the standards of the community.

The domestic peace and tranquility, or "law and order," are not the only values in any society. The promotion of one set of values often entails the limiting of others and herein lies a dilemma. A system that places an exceedingly high value on one particular norm to the virtual exclusion of others normally faces few problems in that area. A totalitarian system of government, for example, places great importance on stability and order and is usually willing to pay the necessary price for such security in the coin of individual freedom. It is not difficult to design a system that will provide a maximum of safety, security and orderliness.

Democracy is a difficult form of government within which to work because it places great importance on values that are often in conflict. On the one hand democracy emphasizes the freedom of the individual. On the other hand, basic democratic theory recognizes that freedom and even democracy itself can only exist where there is stability and order. Too much security, too much government interference in the lives of the people stifles freedom; insufficient security and order is chaos, if not anarchy, in which little freedom can survive. Achieving the fine balance between security and order on the one hand and individual freedom and rights on the other, is the difficult task faced by designers of the criminal justice system in a democracy.

Criminal Justice Systems and Processes

The criminal justice system, as generally referred to, constitutes a conglomeration of agencies and officials at all levels of government. Richard A. Myren provides the following definition:

> For the purpose of this essay, a criminal justice system is defined as the aggregate of agencies (police, prosecution, courts with jurisdiction over violations of the criminal law, probation, parole, correctional agencies, and specialized agencies...) that have responsibility for enforcement of the criminal law.[1]

This definition includes any agency that is legally mandated a range of responsibility for criminal law enforcement. As such, it constitutes a <u>legal</u> or formal definition of the criminal justice system which is based on legislative mandates.

A different type of definition of the criminal justice "system" is provided by Feild, Manson, and Bell. Their definition is based on

the activities of criminal justice agencies and is stated as follows:

> The system is--in an ideal sense--a series of sequential, interrelated activities which includes apprehension, prosecution, conviction, sentencing incarceration, and rehabilitation of offenders.[2]

However, they further state that "the three main institutions of the criminal justice system are the police, the courts, and the correctional agencies."

These definitions represent the two main types of definitions now in use by both practioners and students of the criminal justice process. The first emphasizes and is based on the components of the process or the agencies that handle criminal law enforcement activities; it is essentially a legal or formal definition stemming from legislative mandates and organizational procedures and structures. The second type of definition is based on activities that are carried out by these agencies and would not be limited by strict organizational boundaries.

Current criticisms aimed at the use of the term "system" to refer to the total set of enforcement, judicial, and custodial activities contend that no integrated, coordinated, and interactive set of processes exist and that the term "system" is a misnomer. These analyses contend that a "non-system" exists and that the term "process" would be more appropriate to refer to the activities under evaluation. "Non-system" in this sense is intended to refer to the fact that a cohesive and strong structure does not exist to provide coordination of activities.

Some difficulty also exists with the application of the term

"system" to individual components or agencies in the criminal justice process. Often law enforcement, judicial, or corrections agencies refer to their own function as a "system" rather than as a "subsystem". The "judicial system" is used by judges and lawyers; the "law enforcement or police system" is frequently found in discussions of these functions; and "correctional systems" is a term used when referring to the set of institutions concerned with incarcerating convicted persons.

Normally, the criticisms of the criminal justice system are framed in terms of lack of coordination. The inefficient processes that seem to characterize the total workings of the system lead to claims that no central direction exists and that no interaction among agencies can be achieved to provide satisfactory processing of individuals through the system. The autonomy of the various agencies contributes to this image since each agency can formulate its own procedures and processes without complete communication and consideration of other agencies' activities.

In this regard, Feild, Manson, and Bell note that:

> However crucial this lack of adequate resources may be, other weaknesses are no less apparent and no less vital: efficiency often suffers because responsibility is widely dispersed among different levels of government; few effective planning and coordinating structures exist; badly needed and positive changes at times come all-too-slowly; perspectives are frequently ill-defined or misallocated.[3]

In a second work, they state:

> We like to think of the criminal justice system--in an ideal sense--as an orderly and sequential progression of events... . However, in its day to day operation, the criminal justice system falls far short of this ideal. The three primary institutions of the system--

> the police, the courts, and the correctional agencies--find their tasks complicated not only by a lack of communication and coordination, but also by the legal and administrative separation of their powers and responsibilities.[4]

The literature on criminal justice organizations and activities is filled with similar comments. Throughout the materials dealing with the "system" as it now exists, there appear numerous comments critical of the level of cooperation and coordination existent.

For these reasons, "system" as a term to denote the full range of activities involved in processing accused and convicted persons is considered to be inaccurate. However, it is apparent that those individuals most critical of the current organizational arrangements continue to use the term in spite of the inadequacies of the process. There appears to be an assumption that "system" can be used to denote a wide range of agencies that are loosely grouped according to similarity of responsibilities and because the agencies deal with the same subjects.

A related problem is that of dealing with individual agencies as "closed systems" with impermeable boundaries. Because of the apparent or claimed autonomy of agencies as noted above, they are often conceptualized as individual units isolated from other agencies and from the rest of the society. As such they do not have to deal continually with their environment, but make their procedures and policies without constant and thorough consideration of other agencies dealing with the same subjects.

Similarly, some authorities on criminal justice processes presuppose a closed system concept when analyzing criminal justice activi-

ties. This tendency leads very quickly to the conclusion that the total set of functions that are loosely grouped for purposes of analysis do not constitute a "system." When utilizing the closed system perspective, one must assume a tight and autonomous organizational unit which works in isolation from the environment. It is obvious from even a cursory examination of the total process that criminal justice agencies do not constitute a closed system.

Katz and Kahn point out several difficulties encountered in using the closed system perspective. They note:

> The major misconception is the failure to recognize fully that the organization is continually dependent upon inputs from the environment and that the inflow of materials and human energy is not a constant....
>
> A second error lies in the notion that irregularities in the functioning of a system due to environmental influences are error variances and should be treated accordingly....
>
> Thinking of the organization as a closed system, moreover, results in a failure to develop the intelligence or feedback function of obtaining adequate information about the changes in environmental forces....[5]

All of these problems are evident in the literature dealing with criminal justice processes.

Katz and Kahn argue for the use of an "open systems" concept which will, to a great degree, eliminate many of the problems incurred in the use of the closed systems perspective. A number of comments made in regard to utilization of the systems approach should be repeated here. First, they point out that social systems, as we consider the criminal justice system, are "contrived systems." As they

state "they are made by men and are imperfect systems. They can come apart at the seams overnight, but they can also outlast by centuries the biological organisms which originally created them."[6]

System in their approach "is a structuring of events or happenings rather than of physical parts and it therefore has no structure apart from its functioning."[7] Thus while we may think of an automobile as a set of interrelated parts or of a biological organism as a set of subsystems integrated to provide mutually supportive outputs, it is impossible to consider the "criminal justice system" likewise. The criminal justice system is not a physical entity bound by the laws of physics producing firmly expected results under constant conditions. It is a set of contrived behaviors originated and reproduced over time to deal with constantly changing environments and subjects.

In the everyday use of the term system, most individuals are utilizing a concept based on the assumptions of physical laws. It becomes apparent that this definition will not suffice since it departs significantly from reality and fails to explain the interworkings of criminal justice processes. Katz and Kahn commented that "there has been no more pervasive, persistent, and futile fallacy handicapping the social sciences than the use of the physical model for the understanding of social structures."[8] It is thus necessary to depart from closed, physical system models for purposes of analyzing social systems and criminal justice systems. A redefinition in terms of events or patterns of behavior is essential with the elimination of a basic concept based on parts, components or, in the case of the criminal justice system, agencies. While the previous definitions are valuable in everyday

discussions, they do not provide a workable concept in the social systems sense.

A more appropriate definition may be formulated in terms of the processes, procedures, and behaviors developed to provide for criminal law enforcement. The Advisory Commission on Intergovernmental Relations offered several comments which are valuable along these lines. Their report on state-local relations notes:

> In a constitutional democracy, a criminal justice system involves a process whereby society seeks to enforce the standards of conduct necessary to protect individuals and the community.
>
> It operates by apprehending, prosecuting, convicting, and sentencing those members of the community who violate the basic rules of group existence as determined by duly sanctioned constitutional and statutory processes.[9]

These statements provide an initial emphasis on the activities and functions of criminal justice agencies and direct attention to the behaviors of individuals and how these agree with societal norms as promulgated in constitutional and statutory documents.

It is possible and even desirable for some purposes to eventually group the identified behaviors into larger categories. For instance, when writing basic organizational documents such as state constitutions, the behaviors functional for law enforcement may be aggregated into components that can be treated in a similar manner. Eventually the concept of organization can be introduced and "agencies" or "departments" created to cover all officials or all behaviors considered to be appropriately grouped.

This is a point at which the "parts" become visible in a physical sense, but also a point at which it is necessary to guard against moving back to a closed system-physical system perspective. It must be continually kept in mind that the aggregations of behaviors into "agencies" is a convenient way to group and organize human beings for carrying out work activities and not a formulation of a physical system that obeys the laws of chemistry and physics. The agencies or organizations created are not parts of the system, but simply groupings of people with behaviors functional for similar system objectives.

It was with these thoughts in mind that this report on the criminal justice process was initiated. Three basic functions were delineated to encompass the research desired. These are:

FUNCTION	ACTIVITY	AGENCY
Enforcement	Patrol Apprehend Arrest	Police Sheriff State agencies
Adjudication	Charge Prosecute Judge Defend	Courts Prosecution Defense council
Custodial	Incarcerate Counsel Advise Train Observe	Prisons Jails Parole Probation

For convenience, this report is divided into agency-related components which reflect organizational patterns at this time. A concern in using this approach is that the reader not lose sight of the system as a whole. In order to ensure an awareness and appreciation of the total criminal justice system, the next section traces a typical felony case

through the various agencies and operations.

A Typical Felony Case

Any attempt to sketch the path taken by a "typical" violation of the criminal laws, even though restricted to the State of Texas, has very real limitations. Within the State there is a great variety of ways in which criminal cases are handled. This is primarily because there are so many separate decision points in the process and so many different decision-makers, most of whom operate within relatively broad ranges of discretion. Thus, trying to generalize sufficiently to cover these possible alternatives without at the same time becoming too vague is a difficult task. Regardless of these limitations, however, such a description can be of definite value as a device to show the inter-relations among the various agencies and to show the likely sequence of events in the processing of a criminal case.

The Arrest Stage

For the purposes of this illustration, we will assume that an adult male has been arrested as a result of a felony which has occurred within the sight of the arresting officer. If the offense had not occurred within the presence of the officer, or within the presence of another person who related this to the officer, it would have been necessary to obtain a warrant from a magistrate before the arrest could be lawfully made. Once the man has been arrested he is immediately advised of his constitutionally guaranteed rights by means of what is commonly called the "Miranda warning." The person is advised that he has the right to remain silent and that anything he says can be used

against him in court; that he has the right to the presence of legal counsel and that if he cannot afford such counsel, the state will appoint an attorney for him and that he need not say anything without the attorney present. Any information obtained from the arrestee after the arrest and prior to the Miranda warning is inadmissable in court, so there is considerable incentive for giving the warning as soon as possible following the actual arrest. Should the individual elect to waive his rights and talk to the officers without the presence of legal counsel, there is a "heavy burden" on the state to show that the waiver was made knowingly, intelligently, and willingly.

Following the arrest, the man is taken to the city jail (assuming he was arrested by city police) and held there while the arrest report, offense report and other documentation are prepared. Once this material is completed, it is taken to the prosecuting attorney's office where an assistant district attorney goes over the documentation to determine whether to file charges and, if so, what charges are to be filed. If there is going to be a delay in the decision, perhaps because of a week-end or other reason, the prisoner is taken before a magistrate where he again is given a Miranda type warning. Here it is common to have the prisoner sign a statement stating that he has been given the warning and that he does understand the nature of the warning.

Once the decision to file the charges has been made, the complaint is written and filed in justice of the peace court. The complaint is often accompanied by a notation made by the prosecutor of a recommended amount of bail to be set by the justice of the peace. With the filing of the charges, the prisoner is transferred to the county jail where

he remains until he raises the amount of bail set by the justice of the peace or until action on his case results in its going forward or exiting from the system. At the county jail he is fingerprinted and photographed, and copies of the fingerprints are sent to the Federal Bureau of Investigation in Washington and to the Department of Public Safety in Austin. This is done to get the fingerprints classified and to obtain an up-to-date criminal history of the individual. These criminal histories are commonly called "rap sheets." Soon after being transferred to the county jail, the prisoner is taken before a magistrate for a preliminary hearing. Here a Miranda warning is given again, even if it has already been given by the city police. Great care is usually taken to ensure a record of the prisoner having been exposed to these constitutionally required warnings.

The Texas Code of Criminal Procedure allows for an examining trial to be held before a justice of the peace after the filing of the charges. This is to determine whether there are sufficient grounds to warrant holding the subject and, importantly, it serves to provide the defendant with some information regarding the case against him. In some counties however, this examining trial is used very infrequently.

The Prosecution

Once the decision to file the charges is made, the case is assigned to an assistant district attorney in the felony section of the office. The evidence is gathered and presented to a grand jury usually as soon as possible after the filing of the charges. Once the grand jury considers the matter there normally is no examining trial since both of these procedures serve basically the same function: the determination of the sufficiency of the evidence to warrant the holding of a trial. The grand jury usually has more members than a regular trial jury, and it is their responsibility to consider the evidence presented by the prosecuting attorney.

Normally the defendant is neither present nor represented at the grand jury hearing. If the grand jury votes that a trial is warranted by the evidence presented, it returns an indictment or what is known as a "true bill." If the grand jury decides that the evidence does not support a decision to hold a trial, this is known as a "no bill" and results in the matter being dropped, the prisoner released and the proceedings ended.

Following the return of the indictment by the grand jury, the individual is required to be present before a district judge for the indictment to be read to him and to be asked how he pleads to the charge. At this arraignment, reconsideration of the amount of bond is possible, and the amount may be raised or lowered according to the situation. If the individual pleads guilty to the charges, he is bound over for sentencing. In the interim between the pleading and the sentencing, some judges ask that the probation officer make a presentence investigation of the defendant's background and look into such areas of the defendant's life as needed to gather information required to make an appropriate sentencing decision. Some judges decline to use presentence investigations however, even when these are available. Other judges do not have access to such reports because there is no probation office in that county or district and no other machinery is available for gathering this

information.

In the absence of a plea of guilty at the arraignment, the case is set for trial. During the period between the return of the indictment (or even earlier) and the trial, there are negotiations between the prosecuting attorney and the defense counsel regarding the case. It is during these conversations that an agreement is often worked out between the two. This is commonly known as "plea bargaining", "trading out", "copping a plea" or any of several other terms. In essence it is a bargain between the two attorneys, approved by the defendant and the prosecuting attorney's superiors, that the prosecution will make some agreed-upon concession in return for a plea of guilty. This concession is frequently a reduction of the charge, such as from aggravated assault to a simple assault or from armed robbery to robbery. Other considerations might be made, such as a promise to drop other charges in return for a guilty plea on one particular charge or a promise that the prosecution will recommend a lesser or perhaps probated sentence. Plea bargaining is involved in a very large number of the cases. If no bargain is reached or if the defendant or some other actor refuses to go along with the deal reached by the attorneys, the case is set for trial.

A short time before the trial, often about ten days or so, a pretrial conference may be held. At this conference the case is discussed by the two attorneys and the judge. Issues are identified and agreements on basic proceedings are made. While pretrial conferences are not uniformly used, they often are functional in that they provide a means of narrowing the scope of the trial by allowing the identification of

those issues upon which there is no controversey and the exchange of names of the witnesses to be called, evidence to be submitted, and the procedures to be followed. These prior agreements can facilitate an efficient trial.

The Trial

At the trial the defendant has the choice of having the case heard before the judge, that is a "bench trial," or before a jury of twelve persons selected from the voting lists of the district. Similarly, if the defendant chooses to have a jury trial he may also elect to have the jury determine the sentence to be imposed should he be found guilty or he may have the judge decide on the sentence. If the trial is to be before a jury, the first matter of business is the selection of the jury members. The panel is called and individuals questioned regarding their knowledge of the case, possible bias or interest in the outcome of the case, and other matters that would indicate good cause why that person should not be impaneled. Any number of prospective jurors may be eliminated from the panel for good reason. In addition to these "challenged for cause," each attorney is allowed a limited number of "preemptory challenges" or challenges he wishes to make for other than demonstrably good cause. If an attorney exhausts his preemptory challenges before the panel is completed, the judge has discretionary power to allow him additional challenges.

The trial begins with opening statements by the attorneys, and then the prosecuting attorney presents the case for the state. Witnesses are called, and evidence is introduced to establish the case against the

defendant. Each crime is defined by statute and requires that certain elements of the crime, such as the use of force or intent, etc., be proven by the state. If the state cannot establish the existence of each element of the crime, the case for the state fails. The defense counsel is allowed to cross examine each witness for the prosecution.

Following the state's presentation, the defense presents its side of the case. Naturally the prosecution is allowed to cross examine each person testifying for the defense. Closing arguments are then made by the two attorneys, and the judge gives the charge to the jury. In this charge, the judge does not comment on the evidence submitted by either side but instead instructs the jury on the law to be applied and the limits within which the jury must make its decision. The jury then retires for deliberation.

When the jury reaches an agreement, court is reconvened. Texas requires a unanimous agreement on the part of the twelve jurors that they are individually convinced beyond a reasonable doubt as to the guilt of the defendant. In the absence of unanimous agreement, the jury must continue its deliberations until agreement is reached or until it is clear that it cannot reach such an agreement. If no agreement can be reached, the jury is dismissed and a new trial can be ordered. If the jury returns a verdict of innocent, the defendant is released and the case exited from the system. If the jury returns a verdict of guilty, the defendant is bound over for sentencing.

At this time a presentence investigation may be ordered by the judge or he, himself, may inquire into the background of the defendant for information with which to make an appropriate sentencing decision. At a

formal sentencing hearing, the two attorneys may argue their positions regarding the proper sentence to be imposed and the defendant himself may make a statement regarding punishment. At the conclusion of this hearing, the judge or jury makes a decision regarding the penalty to be assessed. If the defendant is to be probated, he is assigned to a probation officer. If he is to be incarcerated in the Texas Department of Corrections, he is held in the county jail until he is transferred to the reception unit of the Texas Department of Corrections at Huntsville.

The defendant may appeal his conviction to the Texas Court of Criminal Appeals in Austin, but as a result of a statute passed in the 1973 legislative session, the defendant is transferred to the state penitentiary pending the outcome of the appeal. Prior to this 1973 statute, persons appealing their decisions were held in the county jails until the final judgment was made on their appeals. This sometimes resulted in prisoners staying as much as several years in county jails while their appeals wound through the appellate machinery.

It should be kept in mind that the case may be dismissed at any time should it become apparent that there is no justification for going forward. The case may be exited from the system before the indictment by either the police or the prosecuting attorney if there is insufficient evidence to warrant proceeding any further. If the judge recognizes at the preliminary hearing or at the arraignment that the case is defective, he can dismiss. Likewise even after the verdict, the defendant may make an appeal or an attack on the decision if he is able to show that a

fatal error was made which resulted in prejudicing his proceedings.

Post Conviction

Texas statutes provide probation as an alternative to incarceration for many crimes. The maximum probation is ten years. During that time the probationer is free to live in his community, work, support his family and live a reasonably normal existence. He is required, however, to fulfill certain requirements set forth at the time of his probation. These normally include such things as not leaving the county without the permission of his probation officer, remaining employed, supporting his family, making restitution, and not drinking or using narcotics. In addition he is required to file a report periodically, often once a month, with the probation office and to pay a probation fee to the county supervising his probation. Should he violate his probation or be convicted of another crime, the probation officer can move to have the court rescind the probation, and the person is arrested and transferred to the Texas Department of Corrections. Should the probationer fulfill the terms of his probation, at its conclusion or even up to several years before the expiration date if the probationer has shown himself to warrant such treatment, the probation officer moves to have the court conclude the probation and the person is released from supervision and the case exited from the system.

If the person is to be incarcerated, he is transferred to the reception unit of the Texas Department of Corrections at Huntsville. For the first several weeks he undergoes physical and psychological testing to determine the prison unit and work he will be assigned to.

He is then transferred to one of the system's units to serve his sentence. During the sentence, a wide variety of rehabilitative programs can be utilized to assist the individual in making a successful return to the community.

After the expiration of one third of the sentence or twenty years whichever comes first, the person is eligible for consideration for parole by the Board of Pardons and Paroles. Since "good time" can accrue at the rate of as much as one and one-half or two days for every day actually served with good behavior, it is not necessary for any person to serve as much as twenty years before parole is possible. If paroled, the person is assigned a parole officer in his home area. This parole officer is part of the state system (as opposed to the probation officer who is a county officer), and he supervises the parolee and insures that the conditions of his parole are met. If, before the expiration of the parole, the person commits another crime or violates the conditions of the parole, a hearing may be held and the individual returned to prison to serve the rest of his sentence. If, however, the individual fulfills the conditions of his parole, at the expiration of the required time he is released from supervision and the case exited from the system.

It should again be stated that this description is a simplification of a complex operation having literally thousands of possible variations. It does, nevertheless, provide an overview of the operations of the entire criminal justice system and as such should be of value.

Footnotes

[1]Richard A. Myren, "Decentralization and Citizen Participation in Criminal Justice Systems", Public Administration Review, Special Issue, Vol. 32, (October, 1972) p. 718.

[2]John Feild, Donald B. Manson, and Chauncey Bell, Cities and Criminal Justice, (Washington, D.C.: National League of Cities and U.S. Conference of Mayors, 1971), p. 1.

[3]Feild, Manson, and Bell, Cities and Criminal Justice, p. 3

[4]Feild, Manson, and Bell, Criminal Justice Coordinating Councils, (Washington, D.C.: National League of Cities and U.S. Conference of Mayors, 1972), p. 1.

[5]Daniel Katz and Robert L. Kahn, The Social Psychology of Organizations, (New York: John Wiley and Sons, Inc., 1966), pp. 26-27.

[6]Ibid., p. 33.

[7]Ibid., p. 31.

[8]Ibid., p. 31.

[9]Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, (Washington, D.C.: U.S. Government Printing Office, 1971), p. 66.

CHAPTER II

LAW ENFORCEMENT

John Wm. Reifenberg, Jr.
Police Foundation

The Organization of the Police

The police function in the United States is performed by a variety of agencies. Corresponding to the three levels of government, law enforcement agencies exist on federal, state and local levels. On the local level, policing may be done by sheriffs, constables, small municipal departments or large urban departments. Within any one state the geographical jurisdictions of these agencies overlap, and, at times, so do the subject-matter jurisdictions.

Federal Police Agencies

Although a national police force with general investigative and law enforcement powers has never existed in the United States, the federal government does perform a national police role with respect to military offenses and federal criminal offenses. The police power of federal agencies does not extend to enforcing criminal law or maintaining civil order unless a specific federal crime is involved.

Military offenses

The Military Police and the Criminal Investigation Divisions of

the various armed services are the only military law enforcement personnel who commonly function in local jurisdictions. Even so, their authority is limited to policing military personnel and conducting general criminal investigations on military bases. When such assignments carry over to the public sector, they are carried out with the agreement and cooperation of local police officials and within limits set by the laws of military justice.

Federal criminal offenses

There are many federal agencies with specialized law enforcement functions, but most of these agencies do not assist state and local agencies in law enforcement on a regular basis and thus do not perform a police function.

The Federal Bureau of Investigation (F.B.I.) has the broadest law enforcement concerns among the federal agencies. It functions primarily as an investigative unit in cases of federal statute violations, internal security questions and interstate violations. In addition to its investigative duties in Texas, the F.B.I. also assists local police through criminal laboratory examinations, a uniform crime reporting system, a national crime information service and specialized training for local law enforcement personnel.

Other federal units which work closely with local agencies investigate violations of federal drug, tax, immigration, currency, postal and customs laws. The U. S. Secret Service cooperates with state and local agencies in protecting the President, Vice President, and other persons designated by Congress. Personnel of the U. S. Marshall's Office and the

U. S. Probation Office enforce the orders of the federal courts in Texas and maintain supervision of federal offenders on probation and parole. National Park Rangers act as peace officers in federal reserves within the state.

State Police Agencies

The American reluctance to centralize general police powers also applies to the organization and duties of state police departments. Only 23 state police departments possess general criminal investigation and law enforcement powers; those of the other states have as their primary responsibilities the enforcement of state traffic laws and the patrol of state highways.[1] Only eight state police departments devote over 20 percent of their time to criminal investigation.[2] The Texas Department of Public Safety is one of these. Although it has criminal investigation powers as well as traffic law enforcement duties, the Department's primary responsibility, like that of most other state police agencies, is policing traffic on rural highways. Of its total law enforcement personnel in 1973, 1,614 are traffic enforcement officers, while 234 men are assigned to criminal law enforcement.[3]

State criminal enforcement is carried out by members of the Intelligence Service, the Narcotics Service and the Texas Rangers. These units focus their attention on crime problems in rural areas and in small towns. This situation results in better policing in rural areas. In their role as peace officers, the state police are an excellent solution to the problems that exist in rural police patrol. By substituting full time, well trained and well equipped police for part-time and minimally trained

sheriffs and constables, the state police make rural policing more effective.

Most state police departments assist local police agencies by maintaining state criminal records systems, by conducting police training programs and by providing statewide communication systems. The Texas Department of Public Safety performs all these services in addition to providing crime laboratory examinations and educating citizens in public safety.[4] The Department also assists local agencies by assuming the responsibility for motor vehicle inspections, drivers license examinations, safety education, and licensing and weight service.[5] In view of the many responsibilities of the Department, it is not surprising that this agency cannot devote more resources to statewide police patrol.

County Police Agencies

Sheriff

The sheriff is the primary law enforcement officer at the county level, and, in rural areas, he is usually the only law enforcement officer. The pre-eminence of the sheriff in the American system of local government is a result of several factors. Prior to the development of urban police departments, the sheriff was the chief police functionary in the American governmental system. As an independent elected official, the sheriff has traditionally held a key position in the local political system. Lastly, sheriffs are vested with the power of posse comitatus. This legal concept entitles a sheriff to deputize any law enforcement officer or citizen in the county to aid him in his duties. Although this power is rarely used now because of the existence of local and state police

agencies, it does give him legal superiority over local police. Although several counties have entrusted police activities to professional county police departments, there remain 3,000 elected sheriffs in the United States. In 33 states this office is provided for in the state constitution, with most sheriffs serving a four-year term.[6]

The sheriff in Texas is an elected constitutional law enforcement officer, serving a four-year term,[7] subject only to the control of county commissioners and this only by means of their control of county finances. There are 254 sheriffs' offices in Texas, ranging from one-man departments in rural areas to departments of several hundred in large metropolitan counties.[8] As a law officer the sheriff's duty is to keep the peace and to patrol the county in an effort to control and prevent crime. The sheriff's law enforcement role is usually a minor one although it may be somewhat more important in rural counties than in urban counties. His other duties include serving civil and criminal process of the county court, operating the county jail, preserving order in county courts and enforcing county court orders. He also serves as tax collector in Texas counties with populations under 10,000.[9]

Since the sheriff maintains an independent political status, he selects his deputies on a discretionary basis. Very often, deputies are hired as a result of the support they have given the sheriff in his election bid. Without the protection of civil service regulations for sheriff's deputies in Texas, favoritism prevails and professionalism suffers.

Constables

A constable is an elected precinct officer who serves as an officer

of the justice of the peace court. He also serves as the counterpart of a sheriff in townships and other minor subdivisions of a county. There were about 25,000 constables in office in the United States in 1967.[10] In most states the office has been created by statute and, therefore, can be easily modified if the need arises. Texas is one of the 12 states in which the office is constitutionally created.[11] The Texas Constitution provides for one constable for every Justice of the Peace Court, and thus it is possible for there to be from four to eight constables in each county.[12]

In Texas, the constable is an independently elected officer, serving a four-year term.[13] The county commissioners court determines the amount of his compensation, and, unlike the sheriff, the constable has his deputies appointed by the commissioners court. He is supervised in his duties by the justice of the peace but works with the commissioners court on budget and personnel matters.

The constable is primarily a civil process server, but in some locales he has broad police powers. In his role as a peace officer he acts to preserve order in his precinct. Even in locales where the constable serves a police function, he still spends the greatest portion of his time on process servings. The fact that so little of the constable's time is devoted to policing his precinct has resulted in the abolishment of the office in several states.

Perhaps the main reason that the constable does not spend more time on police work is the lack of monetary incentive to do so. In most states where the office exists, the constable is compensated on the basis of the amount of legal process served, not on the amount of

police work he does. In Texas, constables are paid both on a fee basis and on a salary basis, but this varies with the county. Constables often work only part time, and working on this basis it is difficult for them to achieve the expertise needed for professional policing. Consequently, the organization of their police services is often very poor and the records incomplete.

The many defects in the office make it unattractive to those seeking professional police positions and often results in the office not being filled. A survey of nine states in 1967 revealed a 71 percent vacancy rate in available constable offices.[14] The 1971 figures for Texas show about a 30 percent vacancy rate.[15] Although the vacancy rate in Texas is not as high as that in some other states, it is still substantial enough to cause some doubt as to the usefulness of the office.

In summary, the police function of the constable is a minimal one. As a result, the value of the office is based upon the service the constable performs for the justice of the peace court.

Municipal Police Agencies

In Texas, as in the rest of the nation, crime is an urban problem. Texas cities with populations of over 50,000, while containing 50 percent of the state's population, report 74 percent of the index crimes.[16] The police are concentrated in the urban areas of our nation to meet the challenge of crime. Almost one-third of the nation's police personnel are stationed in the 55 largest urban areas.[17] In Texas this concentration is even more pronounced. Over one-half of the full time

local police are stationed in the state's largest urban areas.[18] Law enforcement, then, is predominantly the job of metropolitan police departments. It is because of this fact that the focus of much of the remaining discussion will be on metropolitan police problems.

Almost all but the smallest municipalities in the United States have the legal authority to create police departments. In Texas, all home rule cities and general law cities, if they so choose, may establish police departments. Several of the 669 municipal departments in Texas rely on city marshalls to patrol their streets,[19] but most maintain a formal police department, headed by an appointed chief of police answerable to the city executive. Generally the appointment is made from within the ranks of the department although in situations of unusually qualified persons, outside police professionals are appointed.

There is an immense variety in police departments in the United States--in size, in training, in personnel policies, in organization, and in equipment--but their responsibilities are essentially the same. They all strive to protect life and property within the cities, by enforcing laws, preventing crime and maintaining order. Police departments vary from one-man departments to departments with several thousand officers. The major municipal departments in Texas vary in size from about 20 officers to about 2,000 officers.

Most Texas departments require probationary periods for recruits, but only 40 percent require pre-duty training. Only the largest departments maintain their own training academies. Police officers in metropolitan departments are usually civil service employees. Most departments are members of state civil service systems, but the largest cities

in the United States often maintain their own systems. This is true of Texas; however, many of the smaller departments have no civil service provisions. This is unfortunate because lack of a civil service system can add to political favoritism within a department.

As cities vary in size, so do they vary in the types of specialist employees and in complexity of organization. In larger cities there are greater numbers of ranks and a greater number of special assignments. The activities of most departments fall into three categories--field operations, support services and staff services. Again, the number of specialties within each of these categories varies with departmental size. Smaller departments do not have enough personnel to specialize. In these departments the same man may act as patrolman, investigator and traffic officer.

In larger departments field operations include patrol, traffic supervision, criminal investigation and perhaps juvenile work. Support services include communications, record-keeping, jail supervision and crime laboratory examinations. Staff services include recruiting, training, internal inspections, planning and research and community relations. As the need for these specialized services grows so does the need for civilians to relieve trained officers from secondary functions like clerical work, switchboard operation and laboratory services. The only sworn personnel assigned to many of the support and staff services act in a supervisory capacity. In spite of the diversity of their tasks, there is one underlying purpose in their work--to support the patrolman in the field. It is his role that will be considered next.

The Patrol Function

The Police Mission

Police do not work in a vacuum. Their encounters with citizens are substance of policing. It is citizens who commit illegal acts, not merely "criminals." Because patrolmen observe the widest range of citizen behavior, they have the widest range of police duties. The nature of policing can be discovered by observing the actions of police officers on patrol duty.

Patrol work entails a wide variety of duties, from rescuing treed cats to apprehending murderers. A listing of these duties would require pages of text. Most of these duties, however, can be classified into three general functions. These are law enforcement, order maintenance, and provision of service to the public.[20] In addition, three styles of policing have been identified[21] which, in their interaction with these general functions, determine the unique way in which police perform the functions in a particular locale.

These styles of policing are a result of prevailing community attitudes on what is the nature of the police function. When police act as if maintaining order were their primary function this style is identified as a watchman's style. This style is most often observed in communities with homogeneous populations whose citizens want as little interference as possible in their daily routine. The same communities are usually older ones, with little history of major crime problems.

In communities where the police act as law enforcers, that is, they evaluate citizen behavior strictly within the letter of the law, the style is identified as a legalistic style. This style is very

prevalent in communities with heterogeneous populations, with significant crime problems, and those which pride themselves on having "professional" police departments. This style derives from the fact that a common community attitude on what constitutes proper behavior is lacking. A police department in this setting must rely on legalistic norms to fulfill its role.

The last style, the service style, is characterized by frequent informal police intervention. In such a department all calls for service, no matter how insignificant, are seriously attended. The citizens in the community are usually homogeneous and of a higher economic status. They require service for their money, and that is precisely what they get. In such communities, major crime is usually not a problem, and consequently, the police can respond more seriously to basically non-criminal matters.

Police Patrol

The majority of personnel in any police department is assigned to patrol the city. Each patrolman is assigned to a certain section of the city, which he patrols during his shift. All cities maintain 24-hour patrol, in three shifts. Some of the better organized police departments maintain a fourth shift which patrols during high crime periods of the day. Each patrol section, or "beat" is created on the basis of population, traffic flow, physical boundaries and, in cities with sophisticated planning departments, equalized for workload. Uniformed patrolmen cruise their beats in marked cars which are in contact with the rest of the department by means of a police radio

network. Motorized patrol can cover more territory and respond to calls for service much more rapidly than can foot patrolmen. Some cities, however, do maintain a few foot patrols in densely populated, high crime areas.

In their role as law enforcers, members of the patrol division have primary responsibility for crime prevention. They are present on the streets with the dual purposes of deterring crime and apprehending those in the act of committing crimes. They are also sources of intelligence regarding criminal activity, but investigative units seldom take advantage of this fact. Their constant presence in the area allows them to respond quickly to disturbances which threaten peace and order on the beat. In their service function, they are readily available to those needing aid.

Patrol, then, is a means by which police departments distribute their uniformed personnel so as to be as readily available as possible to the needs of the public, while acting as a deterrent to observable criminal activity.

The Patrolman as Law Enforcer

The partolman is the case finder of the criminal justice system. Of the crimes reported to the police, almost all are either reported to or witnessed by patrolmen. As a law enforcer, the patrolman's duty is to apprehend criminals and to investigate crime. Apprehension consists of a sequence of actions in response to the criminal event, the sequence beginning with detection of the crime. Crimes are detected by police on patrol, by the victim, by a witness, or by virtue of some

sort of alarm apparatus. Although one of the purposes of police patrol is the detection of crimes in action, most crimes are reported by phone calls from citizens.

Upon the report of a crime a dispatcher puts out a call over the local police radio to the appropriate patrol unit. The assigned unit then proceeds to the scene in answer to the call. Depending upon the sophistication of the communications equipment and the manpower available, the time elapsing between the call for help and the arrival of the patrolman can be anywhere from a few minutes to almost an hour. Response time is an important factor in apprehension because the chances of apprehending an offender with several minutes start on the responding officers are minimal.

When the officer arrives at the scene he may be lucky enough to catch the criminal in the act, but more than likely the criminal already will have fled. If a description is available from either the victim or a witness, there will still be a chance of apprehending the offender. In these situations the officer will initiate his own search, while requesting aid from other units over the police radio. Arrests are often made on the basis of data broadcast in this manner. In modern society, however, with its densely populated cities and its highly mobile populace, a few minutes is usually all the time needed for an offender to make good his escape. Apprehension in such situations, then, is a contest of time rather than of wits.

If the criminal successfully flees the scene, it is then the patrolman's duty to record any pertinent information about the crime or, in cases in which the scene itself might provide some evidence, to

maintain security until crime scene specialists have an opportunity to gather evidence. At this point, his knowledge of the beat is most important. The rapport he has established with the inhabitants of his beat will enable him to gather information about the crime which an investigator, unfamiliar with the beat, cannot. Rapid, efficient questioning of victims and witnesses is crucial because persons suffering the emotional trauma of a crime will quickly forget details.

Investigative personnel take over the investigation at this point. They re-question witnesses and attempt to identify suspects. If witnesses can give no clue to the offender's identity, the chances of apprehension are not good. Contrary to common conceptions about police work, fingerprints and the like are almost useless in identifying the perpetrator, unless suspects exist. Without there being a suspect to whom fingerprints can be matched, there is almost no way to identify the perpetrator. Pieces of hair or thread from clothing, which television detectives use to track down offenders, are useless to real detectives. They do not have the time to check everyone in a city with a certain color hair, or to check all those who own clothing made of a certain fabric. Modern criminal identification techniques can only yield results when a suspect is available.

When a suspect can be found, the investigator works in concert with personnel from the district attorney's office to develop evidence satisfactory for the issuance of an arrest warrant by the courts. At this point the investigator may arrest the suspect himself or the task may be assigned to other personnel.

Order Maintenance and the Patrolman

Most police officers think of themselves as law enforcers whose job consists of catching and arresting criminals. Citizens also generally subscribe to this myth. The myth has gained such credence that the LEAA has devoted millions of dollars to programs designed to combat stranger-to-stranger crimes. In fact the major portion of an officer's time is spent not on crime fighting, but on order maintenance. Only a small percentage of police calls actually result in an arrest[22] and those who are arrested are predominantly citizens who have committed minor criminal violations such as drunkenness, disorderly conduct or gambling.[23] In order maintenance situations the policeman can be required to resolve family quarrels, handle street brawls among juveniles, help drunks, or maintain order at civil gatherings. Rather than enforce the law, he ensures that the law is not violated by virtue of the situational potential for lawlessness.

Keeping the peace does not necessarily involve using the arrest power. In minor criminal situations the officer can trade non-arrest for orderly behavior on the part of citizens. In situations which have no criminal aspects, but in which citizens require help, he can be required to act as counselor, arbitrator or authority figure. In order to execute these roles with success, he must know how to deal intimately with highly emotional people. He must also have knowledge of the locale and the customs of those living there. Such knowledge is important if the patrolman is to maintain order across a variety of personal problem situations.

Police discretion

The police officer himself determines whether he will act as a law enforcer or a peace keeper by discretionary use of his power to arrest. Discretion exists for several reasons. First, there are so many laws for which an officer could arrest someone that he could not remember them all. Even if he could, he does not have enough time to arrest every lawbreaker he sees. Lastly, if an officer did arrest every violator he observed he would soon be out of a job. This is true because Americans pass laws which they do not expect to be enforced, and, thus, citizens of a community would not tolerate the enforcement of every law.

Aside from being a working solution to the overcriminalization of behavior, discretion is a tool for keeping the peace in a community. The power to withhold arrest is used by the police officer to reward peaceful behavior. If an officer can maintain peace without resorting to arresting everyone who commits minor violations, then he is free to devote his time to preventing serious crime.

Since arrest or non-arrest is the result of this descretion, it is extremely important to be able to identify the criteria that affect the exercise of this power. Discretion is employed mainly in situations in which the offense is not serious. In cases of serious offenses such as murder or rape, there is general agreement among police officers and the public that the full criminal sanctions should be applied. In less serious offenses, such as disturbing the peace or intoxication in a public place, while one must admit that the act is illegal, there is disagreement as to whether the act is deserving of such a serious

consequence as arrest. Because of this ambiguity the officer will be prone not to invoke criminal sanctions. In addition to the seriousness of the offense, a police officer will also look to the demeanor of the offender. A recalcitrant or aloof offender can force an arrest because the offender's actions are read by an officer either as a challenge to his authority or as indifference to the law.

Discretion is a necessary part of police work. But, it is power that can be easily violated because of its informal aspects, and therefore it is one which should be well understood by the public.

The Service Aspects of Patrol

Along with his peace-keeping and law enforcement functions, the patrolman provides other services to the public. Included in these service duties are such actions as giving emergency medical aid, finding lost children and pets, monitoring parking meters, checking vacationers' homes and giving directions. These duties are different from order maintenance in that they involve services for a particular client and no one else. In helping a drunk for instance, a patrolman is performing a service for that client as well as for the public in general. It is the drunk's capacity to disturb the public order which makes this action an order maintenance one. The service functions provided by the police could, in fact, be provided by someone else. In some locales this is the situation. Private patrol agencies provide home security services, and in many cities "meter maids" monitor parking meters.

It is because of the round-the-clock presence of patrolmen that these service duties have devolved to the police. The community sees

the patrolman as a service agent because of his obvious presence. And, it is true that, to many in our society, the patrolman is the only governmental authority that they know how to contact for necessary services.

Current Issues in Policing

The role of police in the United States has recently come under close scrutiny. This is the result of several factors. Since the early 1960's police have become the subject of intensive study by social scientists. Government studies of the nation's crime problem, that culminated in the publication of the President's Commission on Law Enforcement and Administration of Justice in 1967, resulted in an organized approach to the study of police problems. The creation of the Law Enforcement Assistance Administration (LEAA) in 1968 provided a funding agency for police innovation. Riots in some major cities and civil disturbances on university campuses reinforced the concern with how police operate. The problems are many, but solutions are being formulated. The following section will consider some of the major problem areas and innovations being made, in Texas and elsewhere, in answer to these problems.

Training

One area of police innovation that has received major attention is training. It is generally conceded that an upgrading of police personnel is needed. Improved training is the most practical way of accomplishing this goal. Training efforts have taken two major directions. The first is concerned with providing better police training; the second with providing education in an academic setting.

In an urban setting, improved academic training is probably more important than improved police training. Police in the United States are predominantly from a white, middle class background and share the biases and prejudices of their background. At the same time, they are required to deal uniformly with citizens from every cultural background. Education is the means by which an officer can gain a broader cultural perspective. An effort to achieve this goal has been made on the national level through the Law Enforcement Education Program of the LEAA which makes grants and loans to present or future criminal justice personnel for academic education. Texas has responded to this program by creating criminal justice programs at such institutions as Sam Houston State University and the University of Texas at Arlington. In addition, Texas has created a standardized core curriculum in criminal justice that enables students to transfer easily from junior colleges to universities in pursuing their studies.

Improved police training has also received attention. In Ohio, the Highway Patrol Academy has been expanded to provide more local police training. A district planning agency in the same state has developed a mobile in-service training center to carry training to rural areas. The Illinois State Police and several universities have implemented new training in criminalistics for local police. New York has developed programs for training police administrators. In Texas twenty-four police academies were funded by the LEAA in 1971.[24] In Dallas, Fort Worth, and San Antonio new approaches to police personnel training have been implemented.[25]

Community Relations

Community relations programs have received nationwide attention recently. The fact that the police serve the community plus the need for community support in law enforcement has made better relations between the community and the police imperative. This is especially true in minority areas where the crime problems are the most severe and where hostility to the police is the greatest. Major community relations programs have been initiated in Illinois, Ohio, Pennsylvania and New York.[26] In Texas, the cities of Fort Worth, Dallas and San Antonio have programs.[27] Community relations store-front offices have been opened in Amarillo, Austin, Fort Worth and Texarkana.[28] San Antonio has initiated crime prevention programs in its school system.

Many cities have attempted to better community relations by hiring more minority personnel. Dallas has developed a minority recruiting program at many black junior colleges in the region, in addition to a special minority cadet program. The police departments of Miami, Cincinnati, St. Louis, and Washington, D. C. have also developed significant minority recruiting programs. New York City has increased minority membership in the department by hiring minority members as community service officers.

Controlling Police Conduct

The police have many powers which by virtue of discretionary application can be abused. In their role as peace officers they can arrest persons, conduct field interrogations, search persons or places and use deadly force. There are legal limitations on all these powers,

but in reality, legal sanctions against abuse of these powers are only applied to those who are charged and found guilty of such abuses. The legal system controls behavior by punishing transgressors. To better control police conduct a more immediate control system is needed.

In spite of the fact that procedural manuals exist in some departments, there is a tendency to keep departmental policies ambiguous. This serves to maintain independence from outside control. When abuses exist however, some control becomes necessary. This is why several police departments have cooperated on studies of police policy-making. The Dallas Police Department is conducting such a study, with the assistance of the Arizona State University, College of Law. The Dayton Police Department is also working on the problem and is developing new police guidelines in cooperation with police-citizen task forces.

Civilian review boards are another proposed remedy for abuses of police power. There are, however, many inherent difficulties in such a solution. As the two recent efforts at review boards in Philadelphia and New York City show, trust in the impartiality of such a mechanism is a necessary ingredient for its successful functioning.[29] In these instances the police felt that the review boards were illegitimate attempts at control and, as such, they refused to cooperate with the boards. Although the existence of review boards does not necessarily result in political control of the police, these two attempts show that their effectiveness is limited. At present, then, the best solution to abuses of police power is the development of meaningful internal control policies.

Police Efficiency

In an attempt to increase their efficiency, police departments have begun to adopt new patrol strategies and to apply technology to their law enforcement operations.

New patrol strategies

Among the most interesting innovations in patrol are the efforts of several cities to decentralize their patrol personnel and to create neighborhood police teams. Dallas and Cincinnati both are undertaking major decentralization programs. Other attempts at decentralization are also being carried out in Los Angeles, New York City, Detroit and Syracuse, N.Y. The decentralization concept envisions delegating responsibility for law enforcement to neighborhood stations. By these programs departments hope to create better community relations and achieve better crime prevention. In conjunction with decentralization of patrol responsibility, these cities are creating teams of police containing patrolmen as well as investigators. Moving police operations down to the neighborhood should decrease response time and result in greater apprehension of offenders.

Another strategy many departments are using is saturation policing. This consists of placing extra personnel in high crime areas as well as fielding personnel whose specific purpose it is to combat certain crimes. This technique is being employed in New York City and Kansas City, Missouri with great success. Dallas has expanded the operations of its tactical units in a saturation policing effort with funds from the LEAA. San Antonio has seen a sharp decrease in burglaries and thefts as a

result of a specialized burglary task force.[30]

Perhaps the most revolutionary strategy of all is presently underway in Kansas City, Missouri. Experimental areas have been created in which this department is testing the basic assumption that patrol is a crime deterrent. In certain areas police are patrolling as usual, but in others police only enter the area on calls for assistance. Preliminary results of this experiment indicate that the crime rate is the same in areas that are patrolled and in areas without patrol. Since approximately eighty percent of a patrolman's time is devoted to cruising his beat in an effort to deter crime, these results imply that eighty percent of patrol time might be wasted on deterrence.

Technology

Other efforts at increasing the effectiveness of patrol have incorporated some of the products of modern technology. Dallas, Fort Worth and San Antonio have instituted helicopter patrols to supplement automobile patrol[31] The use of helicopters has made the apprehension of fleeing suspects considerably more successful. At night, searchlight-equipped helicopters can search wide areas with almost as much success as daylight searches. Computers have also made police work more efficient. Dallas has recently installed a computer assisted dispatch system which records calls for service and automatically identifies the nearest available units for the dispatcher. Kansas City, Missouri is presently attempting to predict crime incidents by virtue of computer analysis of crime trends.

Some Thoughts on Texas Law Enforcement

There is a great variation in the law enforcement services provided in Texas. Large cities usually have more efficient police departments than do smaller cities and rural areas. They also generally have greater crime problems than do smaller cities and rural areas. Rural law enforcement does not have to be the same as metropolitan law enforcement. All law enforcement officers, however, should be equally trained. Standardized training and standardized testing on the state level would ensure all Texans professional law enforcement. State legislation could accomplish professionalism in law enforcement. Regional law enforcement planning, under the direction of the Department of Public Safety would achieve more efficient law enforcement throughout the state. Better law enforcement in Texas is basically a question of organization, not of centralization of police agencies. It is necessary for police agencies to be independent so that they may be responsive to community wishes. The state should aid local law enforcement with funding and with centralized information and communication services, while allowing independent local control.

In spite of the local nature of law enforcement, constitutional revision can aid in making Texas law enforcement more efficient. The fact that the offices of sheriff and constable are provided for in the Constitution makes it impossible to modify these offices to suit the needs of their respective counties. In large metropolitan counties, the sheriff is not needed as a law enforcement officer. The same is true of constables. In rural areas, the law enforcement powers of the

sheriff are needed. Constables, however, serve little law enforcement even in rural areas. The offices of sheriff and constable should be made statutory, rather than constitutional, so that they can be abolished or not as suits the law enforcement needs of their respective counties.

Footnotes

[1]Admisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System (Washington, D. C.: Government Printing Office, 1971), p. 170. Cited hereafter as Advisory Commission.

[2]Ibid., Table 12, p. 84.

[3]Criminal Justice Council, 1973 Criminal Justice Plan for Texas (Austin, Texas: Office of the Governor, 1973), Table 2, p. 12. Cited hereafter as 1973 Criminal Justice Plan.

[4]Vernon's Annotated Civil Statutes, art. 4413, sec. 14, c. 2, art. 4413, sec. 14, c. 4.

[5]1973 Criminal Justice Plan, p. 12.

[6]Advisory Commission, pp. 76, 82.

[7]Texas, Constitution, art. 5, sec. 23.

[8]Criminal Justice Council, 1971 Criminal Justice Plan for Texas (Austin, Texas: Office of the Governor, 1971), p. II-46. Cited hereafter as 1971 Criminal Justice Plan.

[9]Texas, Constitution, art. 8, secs. 16, 16a.

[10]Advisory Commission, p. 76.

[11]Ibid., Table A-3, p. 275.

[12]Texas, Constitution, art. 5, sec. 18.

[13]Ibid.

[14]Advisory Commission, p. 160

[15]1971 Criminal Justice Plan, pp. I-30, II-46.

[16]1973 Criminal Justice Plan, Fig. 5, p. 7.

[17]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, (Washington, D. C.: Government Printing Office, 1967), p. 9.

[18]1971 Criminal Justice Plan, Table 2, pp. I-52, A-2.

[19]1973 Criminal Justice Plan, p. 17.

[20]These distinctions are made in the works of Michael Benton, Egon Bittner and James Q. Wilson. Michael Benton, The Policeman in the Community, (New York: Basic Books, 1964); Egon Bittner, "The Police on Skidrow: A Study of Peace-Keeping," American Sociological Review, 32 (1967), pp. 699-715; James Q. Wilson, Varieties of Police Behavior, (Cambridge: Harvard University Press, 1968).

[21]Wilson, pp. 140-226

[22]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology, (Washington D. C.: Government Printing Office, 1967), p. 93.

[23]The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, (Washington, D. C.: Government Printing Office, 1967), p. 20.

[24]U. S., Department of Justice, Third Annual Report of the Law Enforcement Assistance Administration, Fiscal Year 1971, (Washington, D. C.: Government Printing Office, 1972), pp. 148, 206, 213-215, 239.

[25]1971 Criminal Justice Plan, pp. I-53 - I-54.

[26]Department of Justice, Third Annual Report of the Law Enforcement Assistance Administration, pp. 148, 206, 215, 225.

[27]1971 Criminal Justice Plan, pp. I-53 - I-54.

[28]Department of Justice, Third Annual Report of the Law Enforcement Assistance Administration, p. 241.

[29]James R. Hutson, "Police Review Boards and Police Accountability," Law and Contemporary Problems, 36 (1971), pp. 515-538.

[30]Department of Justice, Third Annual Report of the Law Enforcement Assistance Administration, p. 241.

[31]Ibid.

CHAPTER III

CRIMINAL PROSECUTION AND DEFENSE

Robert L. Bogomolny
Southern Methodist University School of Law

A fundamental premise of the criminal justice system in the United States is that involved parties shall have a right to present the issues before a neutral and detached fact-finder in order to determine the truth of the allegations and to settle the issues for all times. Central to this form of presentation is the assumption that both parties will be represented by skillful experts who will vigorously present their points of view. Through the conflict of these points of view as presented by the experts, it is assumed that truth will become apparent and the fact-finder will have the ability to decide the issues.

In this country, the representatives of the state are paid professionals who owe their allegiance to the state. The representatives of the person drawn before the court by the state are, of course, private attorneys or public attorneys in a quasi-public agency such as a public defender's office who are paid to represent the interests of the defendant. Both representatives are trained in the law and are held to standards of professional conduct to protect and pursue the rights of the party they represent. It is fundamental that these representations be vigorous, searching, and aggressive so that the truth can be fer-

reted out and the integrity of the system of justice preserved.

Although there are no specific references in the Texas Constitution to the functions of the prosecution and the defense in a criminal case, it is clear that the absence of an adequate system of representation of the accused would violate the constitutional provisions of Texas[1] and of the United States.[2] The Texas Constitution does not specifically provide duties or standards of performance for the prosecuting attorney, nor does it make reference to defense attorneys, other than a defendant's right to counsel.[3] In fact, the Texas Constitution refers explicitly only to representation of the state in the various criminal trials. In this area it provides:

> The Judges of all Courts of county-wide jurisdiction heretofore or hereafter created by the Legislature of this State, and all Criminal District Attorneys now or hereafter authorized by the laws of this State, shall be elected for a term of four years and shall serve until their successors have qualified.[4]

The Texas Constitution further provides:

> A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected to the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary, and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold of-

> fice for a term of four years, and until their successors have qualified. (As amended Nov. 2, 1954.)[5]

It would probably be an error to attempt to specifically describe the prosecution and defense function in the constitution of any given government. Rather, general parameters such as the right to counsel, adequate representation, fundamental fairness and due process of law give adequate leeway for the development and evolution of a representational system in which both parties, the state and the accused, stand adequately represented. Insofar as constitutional problems are addressed, they are discussed in terms of right to counsel, adequate representation and fundamental fairness, as embodied in the Bill of Rights.

The rest of the material in this chapter describes the functions and importance of the prosecuting attorney and the defense attorney in the criminal justice system. As will be seen, the major failings of the criminal justice system do not relate to constitutional deficiencies but rather to legislative failings whereby inadequate assistance of counsel, basic unfairness in the system, inequality of conditions, and lack of resources combine to thwart the concept of liberty and justice inherent in the constitutional protections of Texas and the United States. It will be necessary to discuss in some detail the specific functions that are central to the prosecution and the defense roles, highlighting, where possible, problems, conflicts, and weaknesses in the prosecution and defense functions and, by implication, the resulting weakness in the criminal justice system. In the short space allocated, it is not possible to give a comprehensive review of all prosecution and defense functions. Rather, the most significant functions (plea-

bargaining and sentencing) have been selected for in-depth review. These in-depth studies will show (1) the relationship between the prosecution and defense as seen in the state of Texas; (2) the ambiguity of the prosecutor's role which leads to conflicting functions; and (3) how inadequacies in the system prevent the implementations of the constitutional mandates of right to counsel and fair trial.

Role of Defense and Prosecuting Attorneys

Since the decision of Gideon v. Wainwright[6] in 1963, there has been growing recognition of the importance of defense counsel to the trial of a criminal case.[7] The courts have emphasized the importance of counsel to translate legal proceedings to the defendant and to assure that he has an adequate opportunity within the legal system to advocate his position. In the absence of counsel, it is believed that the defendant is basically incapable of asserting his rights in our highly technical legal system.

Recent court cases specifically recognize the right to counsel, and it is a matter of common sense that without representation a defendant cannot be essentially equal to the government and its trained prosecutors before the court. The need, now, is to ensure that the rights has meaning. Representation by inadequate counsel, too long after arrest, and without resources to investigate, is not a meaningful right to counsel. A most perplexing problem for the criminal justice system is to ensure that an early stage counsel with adequate resources is available to all defendants.

For years, it has been assumed by many people that all of the

advantages in a criminal trial rest with the defendant.[8] The presumption of innocence, the burden of proof beyond a reasonable doubt, the accusatorial rather than inquisitorial system, all have been said to place the advantages with the defendant. As a technical matter, the state does have a higher burden of proof since it must prove beyond a reasonable doubt the guilt of the defendant. As a practical matter, however, it is no longer adequate to say that the defendant has all the advantages in a criminal case since experience has shown that the government is far more able, by and large, to prosecute than the defense is to defend.

One has only to look at the statistics governing disposition of criminal cases to buttress this conclusion. The Texas Civil Judicial Council has published the following statistics for the year 1971. A total of 31,091 defendants pled guilty; 667 defendants were found guilty upon a nonjury trial; 1,702 defendants were found guilty upon a jury verdict; and 6 upon a guilty plea with a jury verdict. Only 199 defendants were found not guilty at a nonjury trial; 478 found not guilty at a jury trial; and 46 upon directed verdict. One can see that well over 97 percent of the criminal cases in the district courts for the State of Texas end up in a verdict of guilty.[9] Obviously, the state has a very credible record in developing guilty verdicts in criminal cases.

Aside from the statistical proof of the state's general competence in convicting people, there is the fact that the state witnesses and fact-finders--the police and sheriff's departments of the State of Texas--are professional witnesses who are ready, paid, and interested in testifying in court and in convicting the defendant. The defendant

is dependent mostly upon non-professional witnesses to be recruited and cajoled into testifying by his often underpaid and overworked counsel. The absence of adequate resources, and the generally low pay to defense counsel appointed to represent clients in Texas, mean that even the most diligent private attorney is severely hampered in adequately developing a criminal case.

The Texas Code of Criminal Procedure provides:

> A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment, or to represent an indigent in a habeas corpus hearing, shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held, according to the following schedule:
>
> (a) For each day or a fractional part thereof in court representing the accused, a reasonable fee to be set by the court but in no event to be less than $50;
>
> (b) For each day in court representing the accused when the State has made known that it will seek the death penalty, a reasonable fee to be set by the court but in no event to be less than $250;
>
> (c) For each day or a fractional part thereof in court representing the indigent in a habeas corpus hearing, a reasonable fee to be set by the court but in no event to be less than $50;
>
> (d) For expenses incurred for purposes of investigation and expert testimony, a reasonable fee to be set by the court but in no event to exceed $500;
>
> (e) For the prosecution to a final conclusion of a bona fide appeal to the Court of Criminal Appeals, a reasonable fee to be set by the court but in no event to be less than $350;
>
> (f) For the prosecution to a final conclusion of a bona fide appeal to the Court of Criminal Appeals in a case where the death penalty has been assessed, a reasonable fee to be set by the court but in no event to be less than $500. Sec. 1 amended by Acts 1969, 61st Leg., p. 1054, ch. 347, §1, eff. May 27, 1969; Acts. 1971, 62nd Leg., p. 1777, ch. 520, §1, eff. Aug. 30, 1971.[10]

Although these amounts seem reasonable, they are rarely adequate for necessary costs incurred in a trial.[11] In addition, local practice may further reduce these fees by requiring free services on one appointed case in exchange for pay on another. The state, on the other hand, has virtually unlimited amounts of money, time, and manpower to devote to the prosecution of a particular defendant.

All of this leads to the conclusion that the advantage in a criminal trial lies with the state. In the absence of a vigorous, active defense, this advantage not only cannot be overcome, but even semblances of equality cannot be maintained. Certainly the requirements of due process and right to counsel can be met superficially by the physical presence of an attorney at critical stages, but the substantive quality needed to adequately prepare a case simply is not met in most cases.

The Role of the Prosecutor

The primary duty of a lawyer engaged in public prosecution is not to convict, but to ensure that justice is done.[12] Ordinarily when we speak of the duties of the prosecutor, we tend to think of an official whose sole task is to make certain that guilty parties pay their debt to society. A canon of ethics points out however, that the primary duty of the prosecutor is to engage in the pursuit of justice.

There is tension between the need in prosecutorial decision-making for certainty, consistency, and fairness on the one hand, and flexibility, sensitivity, and adaptability on the other. The prosecutor is both an administrator and an advocate. He is an administrator whose range of responsibilities includes seeking justice, setting the court

schedule of cases, selecting cases to be tried, and directing the prosecuting attorney's office. He is an advocate as a "protector of the public interest" in bringing the guilty to justice. The prosecutor uses his discretion in selecting the varying weights to give these sometimes conflicting roles.

Discretion occurs at virtually each decision point in the prosecutorial process. The initial decision is to prosecute or not to prosecute.[13] The second is to choose the charge and bargain for the sentence to be offered.[14] The third is at trial,[15] and the fourth is in the sentencing.[16] The problem of broad discretion is not that discretion *per se* is undesirable, but rather that the arbitrary use of discretion can lead to discriminatory, oppressive and unequal treatment. Such abuse also offers a fertile bed for corruption and is conducive to the development, at worst, of a police state and, at best, one that is police-minded.

The initial discretionary decision, to prosecute or not to prosecute, consists of three choices: (1) the choice not to prosecute where there is violation of law; (2) the choice to prosecute cases that normally would be dismissed; (3) the choice of which potential charge to prosecute. Statutory language is often broad and covers a multitude of behaviors. Full enforcement of all also would lead to injustice or a public outcry. Further, legislative framing of statutes does not always reflect legislative consciousness of the limited manpower of police and prosecutors' offices. The prosecuting attorney therefore must choose which cases will be pursued.

In the exercise of the discretion to prosecute, there is a set of

variables that determines the parameters of the prosecutor's decisions:

(1) caseload

(2) seriousness of the violation

(3) court's conception of the seriousness of the offense

(4) special characteristics of the defendant

(5) availability of alternative sanctions

(6) adequacy of the case

(7) equality of treatment or enforcement

(8) special interests or influences.

The most important factors that influence the district attorney's discretion are reviewed below.

The present solution of the caseload problem of the prosecutor is basically a weighing process between the seriousness of the case and the amount of time it will take to successfully prosecute, plus additional weights given to the above listed factors. This is essentially a process of balancing the magnitude of the violation with the potential volume of litigation, such that the greater the potential caseload, the greater the need to exercise discretion and dismiss cases.

The seriousness with which the court perceives the mode of criminal behavior being prosecuted is another important consideration. The judiciary may consider that prosecution for minor infractions wastes court time. Jury sympathies are also taken into account. For example, unregistered gun violations are not vigorously prosecuted in communities where there is a large military or ex-military population; or communities which depend on hunting may be more strict in poaching violations.

The character of the defendant is often important in decisions of

whether to prosecute. Unconventional lifestyles, group memberships, or poor criminal records might persuade the prosecutor to file charges in situations in which he otherwise might not. Conversely, prosecutors are reluctant to prosecute the elderly and the respectable for less serious crimes. These categories are carved out because of the prosecutor's own notions of optimum selective enforcement. The decision to prosecute or not may rest with the availability of alternative sanctions. For example, employees accused of minor embezzlement can be fired, or shoplifted items can be returned.[17]

Decisions to prosecute are often based on the adequacy of the proof. For some crimes, the evidence is easily obtained. Other offenses involve difficult problems of proof, especially offenses involving elements of mental state or other problems with vague legal standards. The prosecutor's choice to enforce these statutes tends to carve out a distinct enforcement policy.

The prosecuting attorney for the various counties has the authority to determine who shall be charged with a criminal offense. If the prosecutor decides not to handle a particular criminal matter, there is no appeal from his decision. Citizens who disagree with a particular prosecutor's decision are left to the next election to replace him. This however, does not create a remedy for a specific situation in which the prosecutor's activity may offend the citizenry.

The prosecutor's discretion to take a criminal case, however, does have advantages; if he truly represents the public interest, both with respect to justice and conviction, he can exercise judgment about whether to subject a particular individual to the rigors of the criminal

process. Such judgments protect certain citizens from prosecution where there may be technical violations of the law but where the prosecuting attorney determines that the activity is not significant. In addition, the prosecuting attorney determines, by and large, which cases will be presented to the grand jury and as a practical matter, his activities will direct and often control the grand jury's conduct.[18]

It is possible to limit the prosecutor's discretion by several means. First, a more definite statement of the role of the prosecutor by the legislature would be useful. Second, more precision in legislative definition of crimes would limit the prosecutor's de facto enforcement policy. Such precision limits the discretion in prosecution due to the more exacting requirements of proof. Third, by decriminalizing many nonharmful activities, often known as victimless crimes, discretion can be limited. Other remedies include:

(1) publication of standards by the prosecutor indicating how he exercises his discretion;

(2) litigation by aggrieved parties for court restraint of prosecutor's action;[19]

(3) exercise of administrative controls through county funding sources or the courts;

(4) concentration of public opinion on the district attorney's activities;

(5) a statutory scheme allowing the appointment by the court of a special prosecutor to prosecute cases the regular prosecuting attorney will not prosecute.

The problem is that most of the activities of the prosecutor are low-visibility actions and often are unreviewable.[20] However, if citizens understand the practical functions of the prosecutor, abuses can be limited and prosecution practice improved.

The Expanded Right to Appointed Counsel

The Sixth Amendment to the United States Constitution provides: "(I)n all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense." The right of the accused to utilize the assistance of privately retained counsel is so clearly established by the language and history of the sixth amendment that it is rarely litigated. By contrast, the nature and scope of the state's duty to provide counsel to assist indigent defendants has been the source of considerable controversy. Once the constitutional right to court-appointed counsel is recognized, the issues are: (1) When does the right to counsel being, and (2) What events does it cover?

The right to counsel, originally limited to "special circumstances,"[21] was expanded by Gideon v. Wainwright[22] to give the right to counsel to indigent defendants in all felony cases. This meant that if a defendant could not afford a lawyer,the state would have to provide one for him. The right to counsel in Texas case law generally parallels the federal doctrines in Gideon.[23]

Currently, counsel is required at all critical stages: at trial, on appeal,[24] at pre-trial stages--preliminary hearings and arraignment,[25] line-ups[26] and at plea-bargaining.[27] Arrest has not been held to require the assistance of counsel because of its investigatory nature. Counsel is required, however, when the investigatory nature of arrest changes to custodial interrogation.[28]

In Argersinger v. Hamlin,[29]the Supreme Court of the United States declared that where one is likely to be deprived of his liberty, due process requires appointment of counsel for indigent defendants.[30] It

is now clear that whenever a defendant may be sent to jail, he is entitled to counsel. The logical extension of Argersinger may require counsel even in petty offenses where no jail sentences are available.[31]

The constitutions of Texas and the United States as interpreted by the courts have not said how the states should implement the rights to counsel for the indigent. Problems relating to the resources and efforts that must be expended to implement these rulings are still not settled. A central issue for the legislature is the implementation of programs for delivery of legal services to indigent defendants. Three major methods have been used: (1) assigned counsel; (2) public defenders; or (3) a combination of assigned counsel and public defenders.

The basic method in Texas is the assigned counsel system.[32] The system is based on two assumptions; (1) all attorneys have the skill to defend clients in criminal proceedings; and (2) the constant influx of new attorneys into the criminal justice system will improve the quality of practice--this means either (a) the assigned counsel scheme provides a training ground for novice attorneys thus improving the overall quality of the bar, or (b) the presence of new attorneys in the system will provide a constant stream of criticism. Both of these assumptions can be challenged.

The economic burden of the assigned counsel scheme falls on the private bar. Experienced attorneys will not handle these criminal cases if they can avoid them because the cases are financially unrewarding and time consuming.[33] Civil attorneys, who are not used to or skilled in the techniques of the criminal law, are sometimes appointed to represent defendants and may not provide adequate representation

while the state has full time, well-trained specialists to represent its side of the matter.

Without the presence of effective counsel, the judicial system becomes oppressive rather than equitable. The large number of appeals based on the inadequacy of representation points out the importance and weakness of assigned counsel in Texas. Furthermore, even though allegations of attorney incompetence may not be sufficient for reversal, the charges may have bearings on appeals concerning other constitutional rights which were not adequately protected at trial.

On the other hand, the scheme for a public defender or a mixed system which may include private attorneys may offer several advantages over the assigned counsel used in Texas at present. First, it creates an administrative framework to guide public defense. The competency of attorneys can be reviewed as part of an administrative evaluation, thus providing a device to remove appeals from the courts and to improve the quality of representation. Second, the public defender can provide experienced and competent attorneys. The public defenders office can use its more experienced staff to train young and inexperienced attorneys. The defendant will be better served in that he will feel that he has been dealt with fairly and will receive competent representation. Third, the public defender assures the continuous representation since attorneys can be appointed to cases much earlier. Fourth, the public defender can aid in the development of meaningful criticism of the criminal justice system through policy statements based on his experience.

The economics of the public defender system are important since

resources are always at a premium. The cost per case is less than in an appointive system, since less time is used to prepare individual cases because of the experience of the attorneys and the possibility of paralegal help.[34] Further, social costs are less, e.g., the defendants are more satisfied with the system and there is a real possibility of savings of court time through fewer appeals.

The major argument against the public defender is the "two wrestler syndrome" where it is assumed that the defender will be prejudiced by having to cooperate with the same prosecutors and judges on a day-to-day basis. The argument is that this will lead to cooperative practices. The concept of cooperative practices assumes that because of continuous contact between the attorney for the government, the judge, and the defense counsel, a defendant will not receive vigorous representation when conflicts between the attorneys and judges occur. Due to lack of discovery, competence and resources, private attorneys are encouraged to participate in cooperative practices with the district attorney which may be disadvantageous for their clients.[35] Thus, the assigned counsel system has not avoided cooperative practices and this system has cooperative practices that are implicit and not subject to administrative and judicial review.[36]

In the last analysis, the absence of a comprehensive, strong defense system in Texas creates an imbalance of representation and greatly compromises the quality of equal justice in the criminal courts.[37] There is no simple answer to this problem since either private or public representation of defendants can be inadequate. From the arguments presented, however, it appears that the creation of a statewide public

defense system could provide more adequate defense.

In order to better understand the prosecution and defense functions, two major activities in a criminal prosecution have been selected for specific review. These are plea-bargaining and sentencing.

Plea-Bargaining

As can be seen from the Civil Judicial Council's report for 1971, the vast majority of criminal convictions are a result of pleas of guilty.[38] In 1971, 31,091 cases in the district courts were disposed of by plea. In order to understand the criminal justice system we must know what is a plea of guilty, what are the implications of such a plea, and who controls the plea system.

A defendant, who's guilty plea is a confession of responsibility or a confession of willingness to be sentenced, waives his right to contest the charges against him waives, his right to a jury trial, waives his right to confront the witnesses against him and accepts a finding of criminal responsibility by the court. Because of the waiver of constitutional rights involved and the willingness to accept judgment, a plea of guilty is necessarily a significant and serious activity within the criminal justice system.

It is impossible from the statistical breakdown of cases to be certain how many of these pleas evolve from negotiations between the government's representatives, prosecuting attorneys, and defendants and their counsel, with respect to the outcome of the case. Defendants are generally willing to plead guilty in exchange for consideration of various aspects of their criminal charge: dropping certain

parts of the charges, making arrangements as to the length of sentences, or offering probation. Without the plea of guilty, the present criminal justice system would not be able to function. If guilty pleas were eleminated from the system, we would have to find resources to try tens of thousands of additional cases in Texas. It is doubtful that such resources are available.

There are certain important implications to the plea system. When a prosecutor agrees to accept a plea of guilty to a lesser offense or to ask for a specific sentence disposition in exchange for a plea, he is, in fact, removing from the judge or jury the right to sentence the defendant for the offense committed. Since the legislature has set a particular range of punishments, the prosecutor, by offering a reduced charge, eliminates the opportunity for the range of punishments to apply. In effect, the citizens' judgment with respect to the range of punishments as expressed through the legislative process is superceded by the prosecutor's dealings.

In addition, insofar as he does determine a sentence through the plea process, the prosecutor removes flexibility from the corrections system and from the judge in determining what is the best corrective or rehabilitative alternative with respect to sentencing. It can be argued that the prosecutor, in fact, does not control sentencing, but that the judge or jury controls it. It is no secret, however, that plea negotiations are basically honored by the courts of the State of Texas as they are throughout the United States. If the judges began not to honor plea negotiations and to set independent or separate sentences, the inducement to plead guilty to a particular charge would be

removed and defendants would pursue their rights to trial by jury. If these rights were pursued, the additional thousands of jury trials would force the system to grind to a halt.

An inducement to plead guilty is the fact that prosecutors generally offer and strive for less punishment in a case involving a plea than in a case involving a trial. For example, if a prosecutor offers a ten-year probated sentence to a defendant to plead to a robbery charge and the defendant pursues his right to trial, the prosecutor will very often request that the judge or jury sentence the defendant to ten years in prison, rather than probation. Quite often, if he is found guilty the defendant will serve a significantly longer time in prison than he would have, had he accepted the plea negotiation. The defendant's awareness of this situation produces a great deal of pressure to plead guilty to a particular criminal charge rather than pursue his right to trial.

It is in this regard that the skillful defense attorney becomes so important. In the absence of adequate defense protection, the pressures of the state to produce an agreement become awesome and the defendant's ability to freely and objectively weigh the opportunities for a not guilty verdict at trial are diminished. Even if no opportunity exists for acquittal at trial, the negotiating ability of the defense counsel will determine to some degree what sentence the defendant receives. This negotiated sentence might be quite different from the sentence defined by the legislature or from what the defendant may need and deserve. Negotiated sentences are primarily based on a bargaining process rather than on a theory of corrections or punishment.

As often happens in criminal cases, the defendant is pressured to plead before the appointment of counsel. Representatives of the prosecutor will confront him with an offer giving him immediate inducements to deal with the state in the absence of counsel. The inequality and disadvantages to the defendant in this kind of system are clear. As can be seen, none of this has particular constitutional ramifications since the Supreme Court[39] has in essence validated the plea system. What it does say is that in legislatively defining the powers of the prosecution, firmer statutory guidelines are needed to control the system to ensure fairness and to ensure that the interests of the public and the defendant are served by the plea negotiation system.

Sentencing

In most cases, the prosecuting attorney will make a recommendation to the judge or jury concerning the sentence to be assessed. Often, a prosecuting attorney in his adversary role will vigorously argue for a specific sentence to be assessed, citing the nature and severity of the crime and the background of the defendant in support of his position. Often, the effectiveness of the prosecuting attorney will be judged by the length of sentence he procures, it tacitly being assumed that a sentence of 3,000 years indicates a better job by the prosecutor than a sentence of thirty years. The fundamental difficulty with this role is that the direct participation of an advocate in sentencing tends to break down objective judgment and substitute partisan involvement, which may be inconsistent with doing justice. The American Bar Association Project on Standards for Criminal Justice suggests:

> Too little attention has been given to the role of the prosecutor in sentencing. What study there has been suggests that too often the participation of the prosecutor has been in a sense both too broad and too narrow. The excess breadth consists of the tendency of prosecutors to make unsolicited sentence recommendations to sentencing judges and to seek to make a reputation or gain political advantage by news accounts of the severity of the sentences he demands. The undue narrowness pertains to the refusal of some prosecutors to play any part in supplying available information helpful to informed sentencing and the correction of the inaccuracies of pre-sentence reports. To improve the process of sentencing in the administration of criminal justice, a critical stage in the eyes of both the defendant and the public, the prosecutor must reappraise his role and function in both these respects and recognize that as an administrator of justice his function reaches beyond the verdict and covers the whole spectrum of criminal justice, even though his role may be secondary to other participants in some phases.

The standards further provide:

> Role in sentencing.
>
> (a) The prosecutor should not make the severity of sentences the index of his effectiveness. To the extent that he becomes involved in the sentencing process, he should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
>
> (b) Where sentence is fixed by the judge without jury participation, the prosecutor ordinarily should not make any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or he has agreed to make a recommendation as the result of plea discussions.
>
> (c) Where sentence is fixed by jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but he should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

The importance of a prosecutor reappraising his role and following the

above standards cannot be overemphasized. A recent study of the Harris County District Attorney's Office concluded:

> (t)he Harris County system of criminal justice is dominated by the District Attorney's office . . . Except in one area (investigations preliminary to the bringing of charges), the Harris County office exercises almost complete control over a case. Interviews with the assistant district attorneys assigned to the criminal district courts, with former assistant district attorneys, and with criminal defense attorneys have affirmed this statement in the realm of criminal sentencing. As one former assistant district attorney, who wished not to be identified, put it: "A district attorney is not limited a great deal by the judge".[40]

It appears that justice is best served when the district attorney is not involved in sentencing but rather serves the public interest by ensuring a fair outcome.[41]

The defense function at sentencing requires that the defense attorney continue his active involvement in the case. All too often, defense counsel assumes that his job ends at the jury verdict. A good defense attorney can aid the sentencing process by seeing that the judge has all the relevant facts at sentencing and by suggesting sentencing alternatives. As an officer of the court, he can also see that accurate representations concerning the defendant are presented to the judge or jury.

Recommendations

Although the existing Texas Constitution does not present major problems concerning the prosecution and defense functions in the criminal justice system, there are substantial non-constitutional weaknesses in both roles. Lack of adequate support for defense attorneys and the lack of a public defender system in Texas weaken and perhaps

totally undermine the defendant's right to representation at trial. At the same time, inadequate understanding of the prosecuting attorney's role and too broad discretion could lead to serious problems in the administration of justice in Texas. The key to solving these problems is legislative action supported by informed public opinion.

On the basis of the above, the following are recommended:

(1) that the prosecuting offices be required to follow the American Bar Association's standards with regard to sentencing practices;

(2) that the measure of effectiveness of the prosecuting offices be divorced from the conviction rate;

(3) that a statutory scheme be enacted for the appointment by the courts of special prosecutors for the prosecution of cases which the prosecution attorney will not prosecute;

(4) the formation of some administrative technique to guide the publication of standards for prosecutorial discretion;

(5) the creation of a public defender system to protect the constitutional rights of indigents in criminal cases.

Footnotes

[1]Vernon's Annotated Constitution of the State of Texas, art. 1 sec. 10. Cited hereafter as Texas Constitution.

[2]U.S. Constitution, amend. IV.

[3]See, note 1 and 2 supra, see also U.S. Constitution amend. XIV.

[4]Texas Constitution, art. 5, sec. 30.

[5]Texas Constitution, art. 5, sec. 21.

[6]Gideon v. Wainwright, 372 U.S. 335 (1963)

[7]See, text and materials cited, note 21-31, infra.

[8]Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," Yale Law Journal, 69 (1960), p. 1149.

[9]Forty-third Annual Report, (Austin, Texas: Texas Civil Judicial Council, 1971), pp. 186-7, 126-49.

[10]Vernon's Annotated Code of Criminal Procedure, art. 26.05 (Supp. 1972).

[11]Criminal Justice Council, 1972, Criminal Justice Plan for Texas (Austin, Texas: Office of the Governor, 1972), pp. II-89.

[12]Canon 5; Canons of Professional Ethics of the American Bar Association, see also, Standards Relating to the Prosecution Function and the Defense Function (Chicago, Illinois: American Bar Association, 1971), p. 25, std. 1.1(c).

[13]Standards, supra, stds. 3.4-3.9, pp. 32-4

[14]Ibid, stds. 4.1-4.4, p. 35-6.

[15]Ibid, stds. 5.1-5.10, p. 36-40.

[16]Ibid, stds. 6.1-6.2, p. 40-1.

[17]See, Powell v. Texas, 392 U.S. 514 (1968) (where part of the decision to place the suspect in jail was based on the nonexistence of alternative methods for control of drunks).

[18]Cf. generally, "Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence," University of Chicago Law Review, 39 (1972), p. 761.

[19]Cf. generally; F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (Boston, Massachusetts: Little, Brown and Company, 1969), pp. 297-334. "Prosecutorial Discretion--A Reevaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse," De Paul Law Review, 21 (1971), p. 485. (The courts are generally loath to interfere with the prosecutor on the theory that the prosecutor is an agent of the executive branch of the government and therefore to interfere would be to violate the separation of powers doctrine). See also, note 24, infra.

[20]See e.g., Hutcherson v. United States, 345 F.2d 964 (D.C. Cir. 1965), cert. denied, 382 U.S. 894 (1965) (Denied court's power to force the prosecutor to choose the lesser of two statutory offenses), Deutsch v. Aderhold, 80 F.2d 667 (5th Cir. 1935) (same); see e.g., Neilson v. State, 437 S.W.2d 866 (Tex. Crim. App. 1968). (Court states that the prosecutor's discretion in charging is not reviewable by a court and is not subject to reversal for failure to charge the greater crime). Martinez v. State, 165 Tex. Crim. 244, 306 S.W.2d 131 (1957) (same) see also, United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935 (1965) (Citizen could not file mandamus to force prosecutor to prosecute) cf., note 23, supra.

[21]Powell v. Alabama, 287 U.S. 45 (1932).

[22]Gideon v. Wainwright, 372 U.S. 335 (1963).

[23]Ibid. See, Ex parte Austin, 410 S.W.2d 439 (Tex. Crim. App. 1967), see also, Texas Constitution, art. 1, sec. 10.

[24]Compare Douglas v. California, 372 U.S. 353 (1963), with Anders v. California, 386 U.S. 378 (1967). accord. Ex parte Gudel, 368 S.W.2d 775 (Tex. Crim. App. 1963); but see, Bishop, "Guilty Pleas in Texas," 24 Baylor Law Review 301, 306 (1972).

[25]See, Gideon v. Wainwright, 372 U.S. 335 (1963); accord, White v. Maryland, 373 U.S. 59 (1963); see also, Pointer v. Texas, 390 U.S. 400 (1965). The right to counsel at pre-trial stages, preliminary hearings and arraignment, depends on the nuances of the theory of "critical stages." Although the theory has still not been fully explicated, the critical nature of any given stage in the criminal justice continuum may vary significantly.

[26]Compare, White v. Maryland, 373 U.S. 59 (1963) with, Kirby v. Illinois, 406 U.S. 682 (1972); Compare, Pointer v. State, 375 S.W.2d 293 (Tex. Crim. App. 1964) with, Ellsworth v. State, 477 S.W.2d 170 (Tex. Crim. App. 1969).

[27]See, Gideon v. Wainwright, 372 U.S. 335 (1963); see also, Brady v. United States, 397 U.S. 742 (1970), Boykin v. Alabama 395 U.S. 238 (1969), McCarthy v. United States, 394 U.S. 459 (1969).

[28]See, United States v. Wade, 388 U.S. 218 (1967), Miranda v. Arizona, 384 U.S. 436 (1966), Escabedo v. United States, 378 U.S. 478 (1964).

[29]Argersinger v. Hamlin, 407 U.S. 25 (1972) (Reasoning that any threat of incarceration required counsel because constitutional issues could arise in the smallest of cases, e.g., vagrancy.

[30]Ibid. 28.

[31]See, "The Indigent's Expanding Right to Appointed Counsel: Argersinger v. Hamlin," Albany Law Review, 37 (1973), p. 383.

[32]1972 Criminal Justice Plan for Texas, p. II-89. With the exception of Tarrant County which provides public defenders to be appointed by the court.

[33]Ibid.

[34]See, Goldberg and Hartman, "Help for the Indigent Accused: The Effect of Argersinger," NLADA Briefcase, 30 (1972), p. 203; Goodell, "Effective Assistance of Counsel in Criminal Cases: Public Defender or Assigned Counsel," Kansas State Bar Journal, (1970) p. 339; Singer "LEAA and the Public Defender Movement," NLADA Briefcase 31 (1972), p. 256; see also, J. Taylor et al., A Comparison of Counsel for Felony Defendants, (Arlington, Virginia: Institute for Defense Analysis, 1972). (2 vols.)

[35]See, Johnson, "Sentencing in the Criminal District Courts," Houston Law Review 9 (1972), p. 944; Comment, "In Search of the Adversary System - The Cooperative Practices of Private Criminal Defense Attorneys," Texas Law Review 50 (1971), p. 60.

[36]Ibid.

[37]1973 Criminal Justice Plan for Texas, pp. 195, 198, 200 (1973) (Comparison of the proposed amounts to be spent on court, prosecution and defense aides).

[38]See, note 9, supra.

[39]See, Brady v. United States, 397 U.S. 742, (1970), Boykin v. Alabama, 395 U.S. 238 (1969), McCarthy v. United States, 394 U.S. 459 (1969).

[40]Johnson, "Sentencing in the Criminal District Courts," Houston Law Review, 9 (1972), p. 984.

[41]See, Johnson supra; cf. generally, Teitelbaum, "The Prosecutor's Role in the Sentencing Process: A National Survey," American Journal of Criminal Law, 1 (1972), p. 75.

CHAPTER IV

THE JUDICIARY

John E. Kennedy
Southern Methodist University
School of Law

The Present Court System in Texas

General Court Structure

The Texas Constitution of 1876, as amended in 1891, provides in pertinent part:

> Sec. 1. JUDICIAL POWER: COURTS IN WHICH VESTED. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.[1]

Thus certain courts named above are declared to exist by the express language of the constitution while other courts are allowed to be created by the legislature. This distinction has led to a dichotomy between "constitutional courts" and "legislative courts." At the outset, it should be noted that the implementing legislation for the trial court level is not uniform on a statewide basis, but varies from county to county, so that it is very difficult to describe "a court structure" at the trial level in Texas. Instead, there are multiple structures unique to each county.[2]

Constitutional courts

Supreme court

Texas, unlike most other states, has two courts of final jurisdiction: The Supreme Court of Texas, which hears only civil cases (including decisions under the juvenile statutes) and the Court of Criminal Appeals, which hears only criminal cases. The Texas Supreme Court is composed of a chief justice and eight associate justices who are elected for six-year overlapping terms.[3] Under the constitution the Supreme Court is given power to exercise both appellate and original jurisdiction.[4] The appellate jurisdiction of the Supreme Court is limited, except in cases of direct appeal from the trial court, to questions of law arising from cases in which the court of civil appeals has appellate jurisdiction.[5] The Supreme Court may not, unless authorized, exercise appellate jurisdiction over original actions in the court of civil appeals.[6]

Court of criminal appeals

The Texas Court of Criminal Appeals was established in 1891 by article V, section 4 of the constitution, superseding a court of appeals which had both civil and criminal jurisdiction from 1876 to 1891. In 1966, a revision increased the number of judges from three to five, one of whom must be presiding judge. Their qualifications are the same as those of associate justices of the Supreme Court of Texas, and they are elected for six-year overlapping terms.[7] The Court of Criminal Appeals has appellate jurisdiction co-extensive with the limits of the state in all criminal cases, and the court and its judges have the

power to issue writs of habeas corpus and such other writs as may be necessary to enforce its own jurisdiction.[8] The jurisdiction of the court is appellate, except in the matters of writs of habeas corpus, and it is the court of exclusive, final jurisdiction in criminal cases.

Courts of civil appeals

The Courts of Civil Appeals were established by article V, section 6 in the 1891 amendments to the constitution of 1876. There are fourteen such courts, each of which has a chief justice and two associate justices.[9] These courts are numbered according to their respective geographical districts. Each court has jurisdiction to hear appeals from civil cases in the trial courts within its district. Qualifications for the justices are the same as those for members of the Supreme Court of Texas.[10]

The constitution provides that courts of civil appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, extending to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law.[11] Under this power the legislature has provided for appellate jurisdiction over final judgments rendered in the district courts and county courts where the matter in controversy exceeds $100.[12]

It is important to note that the jurisdiction of a court of civil appeals extends to civil cases only. Thus case law has had to define its relationship of the Texas Courts of Civil Appeals to the Court of Criminal Appeals. For example, suits in behalf of the state to recover

penalties and forfeitures are not criminal cases, but civil cases over which a court of civil appeals has appellate jurisdiction. Thus, although the Court of Criminal Appeals does have authority to determine the validity of motor vehicle muffler laws as criminal statutes,[13] a court of civil appeals may determine the validity of such laws where the rights of a party are affected by their operation.[14] Although the Court of Criminal Appeals is not bound by holdings of a civil court, such determinations are persuasive when the validity of those laws is before the Court of Criminal Appeals.[15]

The justices of the courts of civil appeals theoretically may not exchange benches or sit for each other. An element of flexibility however was added by article 1738[16] which authorizes the Supreme Court to equalize the dockets of the courts of civil appeals by transferring cases from one court to another and permits the justices to hear transferred cases in the courtrooms of the courts from which they were transferred.[17] Because section 6 of article V states that each court of civil appeals "shall consist of a Chief Justice and two Associate Justices," a constitutional amendment would be required to add more justices to existing courts of civil appeals.

District courts

The constitutional trial court of general civil jurisdiction is the district court. It also has criminal jurisdiction over felonies and a narrow range of misdemeanors. As will be noted later, other courts have initial jurisdiction over most misdemeanors and civil commitment. Article V, section 8, of the constitution provides in

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pertinent part:

> JURISDICTION OF DISTRICT COURT. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections and said court and judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari , and all writs necessary to enforce their jurisdiction.[18]

Each district judge is elected and must have been a practicing lawyer or judge of a court for four years and a resident of the district in which he was elected for two years, both immediately preceding his election. Each judge is elected for a term of four years and receives an annual salary from the state of $20,000, which in many instances is supplemented by funds from the counties in his judicial district.[19]

There is a restriction in the constitution which technically prohibits the creation of multi-judge district courts and thus embalms the 19th century concept of "one judge-one court." The constitution provides that the state shall be divided into judicial districts, and from each district "there shall be elected...a Judge."[20] This constitutional anomaly providing for "single judge district courts" has

presented a problem in the metropolitan centers which need many judges and where the natural solution would be to appoint multiple judges to the same district. If the requirement were literally applied, the large cities would be faced with great administrative difficulties in having many district courts, each geographically exclusive. The expedient solution, devised by the legislature with the approval of the Supreme Court,[21] has been to create multi-geographically concurrent district courts and to allow the judges of the multi-district courts to sit within only one district. However, straightforward constitutional authority would provide a better solution.

County courts

The county courts were established in 1876 by article V, section 15 of the constitution. Each county in Texas has a county court and a judge who is elected for a four-year term. The legislature determines the salary or salary range, which is paid by the county and which generally is determined in relation to the population of the county. The "constitutional" county courts are to be distinguished from "county courts at law" which are established by the constitutional provision allowing the legislature to establish "other courts."[22] There are 254 counties and therefore 254 constitutional county courts in Texas.

The constitution provides that the jurisdiction of the county courts shall extend to:

> Original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to

> the Justices Courts as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and that shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value $200, and not exceed $500, ... and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500 and not exceed $1,000, ... but shall not have jurisdiction of suits for the recovery of land.
>
> They shall have appellate jurisdiction in cases civil and criminal of which Justice Courts have original jurisdiction, ... In all appeals from Justices Courts there shall be a trial de novo in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.
>
> "The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills . . . . appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards . . . .[23]

One does not have to be a lawyer to recognize that this provision generates two major problems: (1) conflicts of jurisdiction between the county and district courts; and (2) conflicts of jurisdiction between the county and justice of the peace courts. For example, while it is clearly established that county courts have exclusive original jurisdiction in matters of probate, only the district court has jurisdiction to construe a will,[24] or to determine the title to real or personal property claimed by the estate,[25] or to decide a claim against an estate after it has been denied by the executor, administra-

tor or guardian,[26] unless such claim is within the county court's civil jurisdiction. Whenever such issues arise, independent suits must be prosecuted in the district court and the judgment must be certified to the county court for observance.[27]

However, some element of flexibility is provided by another inconsistent and ambiguous provision. Section 22 of article V of the constitution provides:

> The Legislature shall have power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of County Courts, and in cases of any such change or jurisdiction, the Legislature shall also conform the jurisdiction of the other courts to such change.[28]

This section has been held to authorize the legislature to increase the jurisdiction of the county court by giving it jurisdiction concurrent with the justices of the peace,[29] and also to take away civil and criminal jurisdiction of the county courts and transfer it to the district court.[30] This power to diminish or increase the jurisdiction of the county courts in particular counties has been exercised frequently by the legislature.[31] However, the power does not extend to probate matters, which have been held to be neither "civil" nor "criminal" within section 22; consequently, the probate jurisdiction of the county court is said to be exclusive.[32]

The constitutional county court, though it still technically has jurisdiction, apparently has ceased to exist as an operating judicial court in most urban counties and has functionally been supplanted by legislative county courts with concurrent jurisdiction.[33] In urban counties the one constitutional county judge is primarily and often

exclusively occupied with his administrative duties as presiding officer of the commissioners court, which is not a judicial court but rather the governing body of the county. However he does hear mental illness cases concurrently with other legislative county probate judges.[34]

Justices of the peace courts

The office of the justice of the peace was established by article V, section 18, of the constitution. The justice is elected for a four-year term and his salary is determined by the county commissioners court.[35] There are no specified qualifications to holding office. The constitution provides that each county be divided by the county commissioners court into not less than four, nor more than eight justice precincts. A justice of the peace is elected within each precinct except that in any precinct with 8,000 or more inhabitants, two justices are elected. There were at last count 892 justices of the peace in Texas.[36]

Under the constitution, justice courts have jurisdiction in criminal matters where the penalty is $200 or less; in civil matters where the amount in controversy is $200 or less, and where exclusive jurisdiction is not given to the district or county courts; and such other jurisdiction, criminal and civil, as may be provided by law.[37] It is further provided that "appeals to the county courts shall be allowed in all cases decided in justice courts . . . ; and in all criminal cases under such regulations as may be prescribed by law."[38]

It is now provided by statute that some statutory county courts have concurrent jurisdiction with that of the justice courts in those counties.[39]

Legislative or statutory "other courts"

As noted above, article V, section 1 of the constitution, provides that the "judicial power of this State shall be vested . . . in such other courts as may be provided by law."[40] It further provides that:

> The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.[41]

Legislative and judicial reconciliation of these provisions with the constitutional grants of jurisdiction to specific courts, has resulted in a compromise. Under this compromise the legislature has power to create "statutory" courts with powers concurrent with the "constitutional" courts, so long as the "statutory" courts do not deprive the "constitutional" courts of their constitutional jurisdiction.

Criminal district courts

The statutes creating criminal district courts typically limit their jurisdiction to criminal cases and provide that the regular district courts shall have no criminal jurisdiction.[42] There may be a difference of opinion between the Court of Criminal Appeals and the Supreme Court as to the constitutionality of such provisions. The Court of Criminal Appeals has stated that the constitutional power of the legislature to "conform the jurisdiction of the other district and other inferior courts" authorized the legislature to give "exclusive" jurisdiction to the criminal district courts.[43] The Supreme Court, however, has repeatedly held that the legislature cannot reduce the jurisdiction of a constitutional district court.[44] In Lord v. Clayton,[45] the Supreme Court held that although the

statute creating the 136th District Court of Jefferson County expressly limited its jurisdiction to civil cases, and other legislation purported to give exclusive jurisdiction of criminal cases to the Criminal District Court of Jefferson County, the 136th Court was nevertheless a constitutional district court with full power to impanel a grand jury, receive an indictment, and try the accused. But whatever difficulties may exist in creating district courts with civil jurisdiction only, it is settled that the constitutional power to establish "other courts" does authorize the legislature to establish district courts with criminal jurisdiction only.[46] Similarly, it appears that criminal district courts may also be granted limited jurisdiction over certain types of civil cases, such as those involving domestic relations and payment of taxes.[47]

Even though the legislative treatment of statutory district courts remains ad hoc, county by county, recently, there has been a welcome trend away from narrow jurisdictional restrictions on statutory district courts. For example, the 1963 statute creating one new civil and one new criminal district court for Dallas County provides:

> The said court shall have and exercise, in addition to the jurisdiction now conferred by law on said Courts, concurrent jurisdiction coextensive with the limits of Dallas County in all actions, proceedings, matters and causes, both civil and criminal, of which district courts of general jurisdiction are given jurisdiction by the constitution and laws of the State of Texas.[48]

Domestic relations courts

Courts of domestic relations are creations of statute and have resulted from the need for a specialized response to large volumes of cases in particular counties. The judges of these courts are paid

exclusively by the county while the salary is determined by the legislature in the statute creating the court. The result is that some of the judges have definite salaries set while others have a minimum or maximum salary scale; still others are paid the equivalent to the total (state basis plus local supplement) salary of a district or other judge.[49] There are twenty-eight such courts in Texas.[50] Their subject matter jurisdiction may include areas of juvenile law[51] as well as family law.

The justification given for these courts is that they permit more continuity in domestic relations matters than was possible when such cases were rotated among the district judges on a short-term basis.[52] These courts share the classic weakness of specialized courts with limited jurisdiction in being unable to give full relief. For example, there are numerous cases where these courts cannot give complete relief because title to real estate or the interests of third persons are involved.[53]

Conceptually, a domestic relations court should be thought of as a "statutory" district court exercising lesser but included concurrent jurisdiction with a constitutional district court.[54]

Juvenile courts

Statutes provide that district courts or county courts may be designated as juvenile courts of the counties in which they are located,[55] and in some instances the legislature has established a separate juvenile court for certain counties.[56] Separate juvenile courts have been upheld under the constitution.[57] It seems that a juvenile court may be either an existing constitutional district court, a county court, a criminal

district court, or a specially created court. Again, such a system creates the possibility of conflicts in jurisdiction.[58]

Probate courts

Although the constitutional county court has the general jurisdiction of a probate court,[59] the legislature has created, by special acts, courts for certain counties known as probate courts.[60] The judges of probate courts have the authority to hear and determine matters relating to these proceedings in the same manner and with the same powers as are vested in the constitutional county judges.[61]

While the constitutional probate jurisdiction of the county court is said to be exclusive,[62] other courts with concurrent probate jurisdiction may be established if no attempt is made to deprive the constitutional county court of its "constitutional" probate jurisdiction.[63]

County courts at law

The constitution provides for a county court with a single judge presiding. In providing additional judges to handle county court litigation, the legislature has not attempted to increase the number of judges of the constitutional county courts, perhaps because section 15 of article V of the constitution provides for the election in each county of "a" county judge who is also made presiding officer of the county commissioners court by section 18.[64] Consequently, separate courts have been created under the power granted in the first paragraph of section 1 to "establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof."[65]

A whole class of statutory county courts has been formed, upon each of which the legislature has conferred some portion of the jurisdiction of the constitutional county courts. These courts have various names and are granted a variety of subject-matter jurisdictions from county to county. It seems settled that these courts have a legitimate existence under the constitution as "other" courts established by the legislature under article V, section 1.[66]

As of 1971 there were 57 county courts-at-law.[67] The statutes establishing these courts generally authorize the judges of courts of like jurisdiction in the same county to transfer cases, exchange benches, and sit for each other.[68] Nevertheless these are distinct tribunals, as illustrated by cases holding that one county court-at-law cannot set aside an execution sale had in another, and that one court has no jurisdiction of a condemnation case upon filing of objections to the award of special commissioners appointed by the judge of another court.[69]

Municipal courts

Municipal courts were created "in each of the incorporated cities, towns, and villages" of the state by statute in 1899.[70] These courts, originally known as "corporation courts,"[71] are presided over by persons specifically elected or appointed to be judge of the court and in the absence of such a person, the mayor serves ex-officio as the judge of the court.[72] As a result, a court with a judge exists in every city, town and village in the state, regardless of the city's size or need, and indeed, regardless of whether the city officials even know of the court's existence.

The municipal courts have original and exclusive jurisdiction over cases arising under the ordinances of the city and concurrent jurisdiction with the justice of the peace courts over offenses arising under the criminal laws of the state, punishable by fines of $200 or less.[73] These courts are clearly "other courts" created under Section 1 of Article V of the constitution.[74]

Small claims courts

Additionally, the legislature has created a court of inferior jurisdiction, known as the small claims court, in which the justices of the peace sit as judges.[75] This court has concurrent jurisdiction with justice courts in actions for the recovery of money where the amount involved, exclusive of costs, does not exceed the sum of $150, and in some cases $200.[76] The court is not available to the voluntary assignee of a claim or to anyone engaged in the business of lending money at interest or to any collection agency or agent.[77] While the small claims courts were established with the intent to provide a suitable forum for minor civil litigation, they have not been completely successful. Indeed, a study of small claims courts has concluded that measured by its objectives, "(i)t is clear that the plan so boldly conceived in 1953 has been a failure."[78]

Distribution of Power to Impose Criminal Sanctions

Both the constitution and the code of criminal procedure provide that the Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the state in all criminal cases.[79] This jurisdiction is exclusive and all-encompassing.

District courts

In accord with the constitution[80] the legislature has provided that the district and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, as well as of all misdemeanors involving official misconduct.[81] In counties in which the county court does not have criminal jurisdiction, all criminal judgments from justice courts are to be appealed directly to the district criminal courts.[82]

County courts

The county court has original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice courts and when the fine to be imposed exceeds $200.[83] In all appeals from the justice courts there shall be a trial de novo in the county court, and if the fine imposed in the county court is more than $100, then appeal will lie from that court directly to the Court of Criminal Appeals.[84]

Justice of the peace courts

Justices of the peace have constitutional jurisdiction of criminal matters in cases where the penalty or fine to be imposed may not be more than $200, and such other criminal jurisdiction as may be provided by law.[85] The code of criminal procedure implements this constitutional grant of jurisdiction.[86]

Municipal courts

These courts are created by statute. Their jurisdiction extends

to the corporate limits of the city, town or village and to crimes arising under ordinances of the city, town or village. They also have jurisdiction concurrent with justices of the peace in any precinct in which the city is located but only in criminal cases in which maximum punishment is by fine alone, not exceeding $200.[87]

Power to impose civil commitment in Texas

The judicial power to impose civil commitment in Texas encompasses three types of incompetents: (1) the mentally ill; (2) alcoholics; and (3) narcotic addicts. The basic jurisdiction for commitment and disposition of estates is granted by the constitution to the constitutional county courts:

> The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law.[88]

Mentally ill

The legislature has provided that the county courts, and probate courts (county courts-at-law) shall have jurisdiction to commit mentally ill persons to community mental health centers, and to community mental health and mental retardation centers.[89]

At one time it was unclear whether the constitutional county court had exclusive or concurrent jurisdiction for mental commitment proceedings.

A later act of the 55th Legislature[90] clarified this question and gave concurrent jurisdiction to constitutional county courts and probate courts.[91]

Alcoholic commitment

For a person to be committed as an alcoholic under the Texas statute,[92] the fact of alcoholism must first be proved to the county court upon petition or application. Jurisdiction is vested in "the county judge of the county where an alleged alcoholic resides."[93] It is unclear whether this jurisdiction is also given to county courts-at-law, but there is some indication it may not be.[94] The legislature has provided, however, that any judge of any court may, upon finding a person guilty of violation of a misdemeanor, which act resulted from chronic alcoholism, remand such a person (if over eighteen years of age) to the Texas Commission on Alcoholism for ninety days in lieu of sentence.[95]

Commitment of narcotics addicts

The Texas Legislature has provided that the county judge may commit to a mental hospital upon petition any person who "is addicted to narcotic drugs and requires hospitalization in a mental hospital for his own welfare and protection or the protection of others."[96]

This statute apparently grants jurisdiction concurrently with constitutional county judges and county courts at law. In a recent case, Berney v. State,[97] the Texas Supreme Court affirmed a probate court's dismissal of an application for civil commitment under the statute. The affirmance was not based upon the county court's

exclusive jurisdiction (which would have excluded the probate court's concurrent jurisdiction) but rather upon the fact that an indictment had been returned, conviction had, and the alleged addict was already in custody of the Texas Department of Corrections. In other words, the jurisdiction of the criminal district court had vested prior to that of the probate court indicating by negative implication that if the jurisdiction of the criminal district court had not been invoked, the probate court would have valid jurisdiction to enter a commitment decree. Hence the constitutional county court and probate courts must have concurrent jurisdiction for narcotics commitment.

Criticisms of Present Texas Constitutional Structure

General Principles

The foregoing description of the constitutional structure, and of legislative implementation of the Texas court system, reveals a picture of multiple courts with specidalized jurisdiction, subject to no central authority. The problem is partly constitutional and partly legislative. The general criteria for criticism of such a system were enunciated by Roscoe Pound over fifty years ago[98] and have been carried forward by the American Judicature Society and the American Bar Association.[99] Pound took the view that courts of limited and specialized jurisdiction are an undeveloped society's ad hoc response to immediate needs. One drawback of such a system is the inability of a single court to render full relief because of lack of jurisdiction over the subject matter. For example, in Texas a suit concerning title to land involved in the administration of an estate

can only be heard in district court, but a suit to determine heirship or descent under a will may only be heard in county or probate court. Hence neither court, in such controversies, can render full and complete relief.

As a superior alternative, Pound urged that (1) such a court system should be replaced with one which is "unified" or "integrated," (i.e., "horizontally" all cases start in the same court, and "vertically" all cases are reviewed in the same court; thus what is known as "jurisdiction" becomes administrative convenience and all judges become interchangeable); (2) the system should be "flexible" (i.e., court jurisdiction and procedure are capable of change in order to meet diverse and evolving needs) and; (3) the system should be subject to "administrative control" (i.e., power should exist to manage all court business and personnel). These general criteria have been the starting point for criticisms of the Texas court system ever since Roscoe Pound addressed the Texas State Bar in 1919.[100]

Judge Clarence Guittard of the Dallas Court of Civil Appeals, writing in 1967, has acknowledged these fundamental criticisms.[101] Judge Guittard carefully demonstrated that by means of legislation and rules of procedure Texas has "evolved," through patchwork effort and in spite of constitutional restrictions, in the direction of Pound's ideal model. Judge Guittard acknowledged, however, that the evolution was far from complete and urged in 1967 many amendments to the existing judiciary article of the constitution, changes in legislation, and effective use of court rules and administrative authority to achieve more efficiently the same results. He advocated painstaking evolution

of details since, historically, Texans do not take kindly to "radical" revision of their constitution. Judge Guittard's approach is worth noting, because even if radical constitutional revision of the judiciary article were accomplished in the near future, the major functional job would still remain with the legislature and the courts to build a rational, efficient and just system, by developing a modern judicial code, rules of procedure and a management system.[102]

Another major criterion for a modern court system is a workable procedure for selection and retention of judges of the highest quality. The leading model for reform has been the so-called "Missouri Plan" for merit selection, under which judges are proposed by a commission, appointed by the governor, and run unopposed for reelection against only their record.[103] Theoretically the Texas system provides for direct popular election of judges, but as a practical matter it has to some extent evolved into a practice under which outgoing judges resign and new judges are appointed by the governor.[104] Thus the Texas system is subject to the dual criticism that in theory it interjects too much "politics" in the judiciary by providing for direct popular elections and that in practice the quality of the judiciary depends in great part upon the appointing discretion of the governor.[105]

Combining the major points of criticisms of the Texas judicial system, Justice Joe Greenhill of the Texas Supreme Court, writing in 1971, restated some of the goals for reform in Texas: (1) There is a need for a unified or integrated court system on horizontal levels so that judges and subject matter jurisdiction of courts will be interchangeable, and thus court business and manpower can be handled with maximum

efficiency. (2) There is a need for central authority for court management, horizontally and vertically, to probide for uniform statewide budgeting, and financing of the courts and assignment of judges. (3) There is a need for merit selection of the judiciary.[106]

Reform embodying these goals would produce a number of indirect benefits. Trials de novo on appeal from the municipal to the county courts and from county to district courts would be eliminated.[107] The end of limited jurisdiction would allow individual judges to give complete remedies rather than partial solutions.[108] Small claims and minor criminal matters would be given equal status and importance with the present types of cases within district court jurisdiction. Experiments for improvement of small claims and minor criminal matters[109] could be carried on more effectively through courts with sufficient logistical backing and trained judges.[110]

Some Examples of Bad Results Flowing From The Texas Constitutional Structure

Justice of the peace courts

The major question is what is the quality of justice in the justice of the peace courts? Since the justices of the peace are not required to be lawyers, and court administration is highly informal, many conclude that these courts do not really deliver justice and actually result in public disrespect for law.[111] The justices of the peace respond that they deliver "grass-roots" justice for the little man at lower cost than it takes to run a formal court system.[112] They further argue that in their absence there would be a void in the resolution of "small" civil claims and minor criminal matters and that the

justices of the peace perform an important task without any logistical support.[113] One rebuttal to these arguments is that under a unified court system, the low-cost "grass roots" function does not disappear but exists as a magistrate division of the unified court, and becomes subject to administrative control and logistical support.[114] The real question then is how to improve the quality of justice that the citizen receives in minor criminal and civil matters.[115] It is submitted that the best potential for realizing this goal lies in abolishing justice of the peace courts.[116]

Aside from general debate about the quality of justice in these courts, and whether abolishing them will in fact improve the quality of justice delivered, there are further arguments which point toward abolishing the justice of the peace courts. First, it is wasteful and inefficient to provide for trials de novo in the county courts for appeals from the justice of the peace courts.[117] Second, the municipal courts have concurrent jurisdiction with the justice courts in criminal cases arising within the territorial limits of the municipality.[118]

A third, more important ground for questioning the continuation of the constitutional justices of the peace is their relation to the criminal district courts in the criminal justice system. In addition to their substantive criminal jurisdiction, the justices of the peace perform important "in-take" functions for the district courts by issuing warrants, reviewing probable cause for arrest, and determining bail.[119] To the extent the justices of the peace do not perform these

judicial functions with independence but instead simply rubber-stamp the wishes of the police and prosecutors, there is no screening out of cases that go on to the district court. Thus the district court becomes glutted with more cases, further delays result,[120] and people charged with crimes become caught in the system without adjudication of their guilt or innocence. Since the justice of the peace is a constitutional officer and not subject to direct administrative control, the criminal district judges may have difficulty in getting the justices to coordinate their practices, paperwork, and speed in order to ensure an efficient, accountable case flow from the justice of the peace through the district courts.[121]

Municipal courts

Since the municipal courts are not constitutional courts but legislative courts, questions concerning their judges, proper jurisdiction, financing, and administration are not presently frozen by the Texas Constitution.[122] Thus plans for their improvement can be accomplished primarily by legislation and municipal ordinance. There are several constitutional aspects however. First, to the extent the present constitution expressly places jurisdiction in other constitutional courts, the most a municipal court can be given is concurrent jurisdiction. Second, if a new constitution were to follow Pound's model and provide for only one unified trial court, then presumably the legislature could not create "other" legislative courts,[123] and the municipal courts, their judges and functions, would presumably be transferred into the unified state trial courts.

County courts

A central problem with the county courts is that they act both as appellate trial de novo courts to the justice and municipal courts, and as courts of limited jurisdiction in relation to the district courts. From a judicial management viewpoint, the court manpower and resources are not interchangeable with the other courts, and jurisdictional disputes cause problems of inefficiency and confusion.

An example of jurisdictional conflict is shown in the power of the county court in civil commitment of narcotic addicts provided there are no pending criminal charges against them.[124] Patricia Berney was indicted for sale of narcotics on October 3, 1969. Prior to trial, on November 7, 1969, Miss Berney's mother filed a petition in probate court seeking civil commitment for Patricia based upon narcotics addiction. On hearing, the probate court dismissed because the indictment had already vested jurisdiction in the criminal district court. Mrs. Berney then, in the 134th District Court of Dallas County, brought a petition for mandamus, which was also dismissed for lack of jurisdiction. An appeal of the mandamus dismissal, the court of civil appeals affirmed. While this was going on, Miss Berney was convicted on January 30, 1970, in Dallas County Criminal District Court No. 5 and was placed in confinement until transferred to the Texas Department of Corrections on May 29, 1970.[125] The decision of the court of civil appeals was ultimately affirmed by the Texas Supreme Court and Miss Berney is apparently serving her seven-year term. The statement of law emerging from this case is that criminal court jurisdiction vesting prior to filing of a petition for civil commitment will take precedence over the civil pro-

ceeding. There seems to be no logical or policy reason why this should be so, other than that a criminal court cannot civilly commit, and in a felony situation a county court cannot convict, so that one court's jurisdiction must exclude the other. A decision as to precedence had to be made, and it was made in favor of whichever jurisdiction was invoked first. The constitutional system leaves the choice of civil or criminal confinement somewhere in the hands of the prosecutor, private attorney, county judge, and district judge.

A more important criticism of the county court system, however, is that the county judge is probably not the best trained person to be deciding questions of mental illness, alcoholism, and narcotic addiction in civil commitment proceedings. Since the judge has a paramount role in the quality of these proceedings in each case and has an important long-term community leadership role in developing modern responses to mental health problems, society should respond with the best possible judges and courts for this work. However, the county judge is not necessarily a lawyer[126] and the salary of the county court is variable,[127] with the result that civil commitment procedures on a statewide basis may be very uneven.

The process of involuntary commitment for alcoholism may serve as an example for showing similar problems in the process for mental illness and narcotics addiction commitments.[128] An alcoholic is defined by the statute as a person who does one of the following things: he chronically and habitually drinks alcoholic beverages to such an extent that he has "lost the power of self control with respect to the use of such beverages,"[129] or he endangers public morals, health, safety,

or welfare "while chronically and habitually under the influence of alcoholic beverages."[130]

In practice, it appears that the civil commitment process for alcoholics in Texas is highly informal, with the court and a physician deciding among themselves what is best for the subject of the proceeding.[131] This procedure has been highly criticized for lack of implementation of the statutory standards:

> (T)o state that there is little likelihood of error in the commitment process is meaningless in view of the absence in Texas of procedural safeguards to protect the alleged alcoholic from being 'railroaded' into commitment or an erroneous finding concerning his condition.[132]

Field studies of the actual commitment process in mental illness cases[133] and in narcotic commitment cases[134] reveal similar need for upgrading and reform. It is submitted that the highest status trial judge should be utilized in this process.

District courts

A central problem for the district courts is that they were conceived by the constitution as "one judge-one court" courts.[135] However, much practical unification of the district courts has been accomplished through complex use of legislation, court rules, and administration.[136] A current case illustrates some problems that remain. In the case of Johnson v. Avery,[137] Avery sued Johnson in a district court and shortly thereafter Johnson brought a suit against Avery in a different district court in the same county concerning the same subject matter. Avery then sought to abate the second suit because of the pendency of the first, but the second district court overruled his plea on the ground that

Avery had fraudulently induced Johnson to delay filing his suit. Avery then sought and obtained a temporary injunction from the first court to restrain Johnson from prosecuting the second suit, after a hearing in the first court lasting nine days. The court of civil appeals affirmed the injunction, but the Supreme Court reversed on the ground that the second court had the right to determine whether Avery was estopped by his fraud to assert the prior active jurisdiction of the first court.[138] While the case may be an extreme example, it reveals the basic defect in a system which allocates courts business by grants of jurisdiction of the subject matter, as opposed to a system which creates one court with total subject matter jurisdiction and provides for administrative assignment of cases to judges and divisions of the court.

Court of criminal appeals

It is arguable that maintaining separate, constitutional, final appellate courts for civil and criminal cases is more efficient and hence desirable. There are cogent reasons for abolishing such a system, however. First, allocating judicial business by jurisdiction of the subject matter, with ultimate authority split between two courts, leads to jurisdictional conflict over what is civil and what is criminal and who has the last say. Second, from an administrative viewpoint, flexibility is lost in the inability to interchange civil and criminal appellate judges.[139] Third, and most importantly, some critics feel there can be a loss of perspective in specialized judges, and an erosion of their ability to bring fresh insight and innovative solutions to old problems. On these grounds, Judge Irving Goldberg of the United States Court of

Appeals for the Fifth Circuit, an eminent Dallas lawyer before going on the federal appellate bench, argues against any attempt in the name of efficiency to convert the generalist federal judge into a specialist.[140] In any event, if there is merit in the specialization of judges, it can be accomplished by administrative division with substantially the same result, without the structure being permanently frozen into the constitution.

Trends in Other States

Unified Judiciary

As previsously noted, Roscoe Pound laid the theoretical groundwork for reform of state court systems,[141] and the American Judicature Society has been the lead force in advocating implementation of those reforms throughout the states.[142] Because each state system is unique, and is continually changing, it is difficult to categorize the systems, except by a few major characteristics. Writing in March 1973, Mr. R. Stanley Lowe, Associate Director of the American Judicature Society, made an attempt to categorize court systems in relation to their degree of unification.[143] First, however, he points out the difference between structural, versus administrative or de facto unification. Structural refers to constitutional and legislative definition of the system, whereas de facto or administrative refers to the way the system is working in fact, regardless of its structure.[144] Listed below are 12 jurisdictions Lowe describes as having achieved both structural and administrative unification of their court systems, along with paraphrases of some of Lowe's comments:

Alaska-model of simplicity
Colorado-three level plan demonstrates effective unification through strong administration
Florida-as of March 14, 1972
Hawaii-
Idaho-example of unifying a proliferated judicial system by statutes into a two-level system
Illinois-model system admired by most court experts
New Jersey-pioneer but outdated
North Carolina-
Oklahoma-
Pennsylvania-
District of Columbia-
Puerto Rico-most nearly meets philosophical ideal

Lowe lists 17 states as incorporating some key elements of court unification where most emphasis has been on horizontal as opposed to vertical unification,[145] 5 others as having made progress,[146] and 4 others as recently having approved new judicial articles in 1972 general elections providing for unified court systems.[147] He describes 8 states as being in the process of seeking legislative authorization for court unification,[148] 1 state as having rejected unification in a 1972 constitutional convention,[149] and 5 states as not having moved toward unification.[150] Although Lowe does not correlate his list, the apparent source of structural comparison is the Model State Judicial Article, approved by the American Bar Association in 1962.[151]

Merit Selection of Judges

Since 1937, the American Bar Association and American Judicature Society have advocated a non partisan court plan[152] for judicial selection which would "take the state judges out of politics as nearly as may be."[153] Missouri was the first to adopt the plan in 1940, thus the concept became known as the Missouri Plan.[154] Writing in 1966, Glenn

Winters categorized the states as follows:[155]

Partisan Election-19 states
Non-partisan Election-16 states mostly in the Northwest
Appointment by the Executive-federal system, Puerto Rico and 9 states, mostly in the East
Merit Plan-13 states

The Missouri Plan has been subjected to close criticism, even by its advocates.[156] A recent criticism of merit selection is voiced by Professor Maurice Rosenberg, specifically in relation to simultaneous trends toward unification of courts.[157] Professor Rosenberg says the hardest job under any system is to induce good lawyers to sit on "high-volume, high decibel, high-emotion" courts, i.e., lower criminal, domestic relations, small-claims courts. He fears that proposals to unify and integrate the court system, while having the goal of improving the quality of justice in the lower trial courts, may simply reduce the status and functioning of the existing "higher status" trial courts and drive the good judges out. For example, one might pose the question whether any Texas district judge would want to hear cases now heard by justices of the peace or municipal judges.[158] Nevertheless, Professor Rosenberg concludes, on balance, that court unification and merit selection are the only practical direction to take on problems of court reform.[159]

Justices of the Peace

Writing in 1967, Judge Guittard noted that the office of justice of the peace no longer exists in fourteen states, including Virginia, Ohio, Connecticut, North Carolina, Illinois, and Michigan. Justices of the peace have been deprived of constitutional status in Montana and

Idaho, having been replaced by other courts on a local basis in Tennessee, and in Kansas their civil jurisdiction has been reduced to $1.00.[160]

Civil Commitment

A 1971 tabulation of the various state courts which administer civil commitment procedures indicates that approximately half of the states retain jurisdiction for civil commitment proceedings in probate, or analagous types of courts, and that the other half place the jurisdiction in their state trial court of general jurisdiction.[161] The authors of this comprehensive study did not express a recommendation as to which courts should have jurisdiction over the process of judicial hospitalization. In light of their other nine recommendations for improving the protection of rights of people involuntarily commited,[162] however, it must follow that jurisdiction should be vested in the highest trial court of the jurisdiction.[163]

Judicial Administration

Ernest C. Friesen and his colleagues, writing in 1971, state: "Organization of court systems for management purposes is non-existent in most states."[164] However, since that time there has been a major movement toward utilization of court administrators on the horizontal level within multi-judge trial courts and appellate courts, and some movement on the vertical scale, i.e., state supreme court management of inferior court systems.[165] Exactly where the states are at this time in terms of de facto management is very difficult to categorize, other than by describing each state and each court. The trend is best indicated by the goal stated in the 1971 Consensus Statement of the

National Conference on the Judiciary:

> (State Courts) should be under the supervisory control of the Supreme Court of the state, whose Chief Justice should be the chief executive officer of the unified court system . . . .
>
> He should be assisted by a statewide court administrator, charged with responsibility for developing and operating a modern system of court management . . . .[166]

Proposals and Recommendations

Chief Justice Robert W. Calvert's Task Force for Court Improvement produced its "Proposed Judiciary Article for the Texas Constitution" in September, 1972, and a modified draft was presented in December, 1972. This proposal appears to be a unique composite of the existing Texas Constitution, the American Bar Association's Model State Constitution, the National Municipal League's Model State Constitution, and specific provisions of other state constitutions. Overall, the proposal represents a good draft, and considering the work that went into it and the political realities relating to the people who support the proposal, it is reasonable to assume that Calvert's proposal will be a starting point from which other changes will be recommended. Accordingly, a number of major features of the Calvert proposal should be evaluated from the perspective of this report.

The summary to Calvert's proposal characterizes one of its major changes as follows:

> The judicial system is unified under the supervision of the Supreme Court. Only two levels of appellate courts (Supreme Court and courts of appeals) and two levels of trial courts (district courts and county courts at law) are permitted.

The changes embodied in the above summary represent a welcome move in the direction of an integrated, unified court system. However, the proposal does not go far enough toward horizontal integration because, as described above, it mandates two levels of trial courts. As noted previously, such a structure inevitably causes confusing and inefficient disputes over jurisdiction of the subject matter in the system and does not allow exchange and management of judicial personnel between the two levels. More importantly, however, the continued constitutional status of the county courts-at-law will probably invite the legislature to continue their minor civil and criminal misdemeanor jurisdiction, and thus perpetuating the denial of a level of justice equal to that which is delivered in the district courts.

Another important example is the mental commitment process, now allocated to the probate court. While it is true that under the proposal, the legislature could place such jurisdiction in the district court, nevertheless the constitutional existence of the county courts-at-law could exert a powerful influence, based upon precedent, for them to retain the jurisdiction. Another criticism is that the county courts-at-law might absorb the magistrate's "in-take" function for the felony charges in district courts, and since the county court would not be subject to full administrative control by the district court, efficient management would be hard to accomplish.

Another major change in the Calvert proposal is summarized as follows:

> The Court of Criminal Appeals is merged with the Supreme Court . . . . The Legislature is empowered to give the courts of appeals criminal, as well as civil jurisdiction.

This would be a good change. It would allow greater flexibility in management of the caseloads and personnel of the two sets of existing courts. Also, it would eliminate disputes over jurisdiction of the subject matter and disputes as to which court has the final say in grey areas; e.g., the procedures for commitment and release of people acquitted of crimes by reason of insanity. Third, the judicial perspective of the appellate judges, in deciding both civil and criminal cases would be enlarged.

The remaining major changes summarized in the Calvert proposal appear generally to be good ones in relation to the subjects covered in this report, and neither the absence of additional changes nor the need for more extensive change in these areas, negate the conclusion that the overall approach of the Calvert proposal provides a sound basis for revising the Judiciary Article of the Texas Constitution.

Footnotes

[1]Vernon's Annotated Constitution of the State of Texas, art. 5, sec. 1. Cited hereafter as Texas Constitution.

[2]See Appendix A.

[3]Each must be a citizen of the United States and of Texas and at least thirty-five years of age, with at least ten years as a practicing lawyer, or a lawyer and judge of a court of record together. The chief justice receives an annual salary of $33,500 and each of the eight associate justices receives annual salaries of $33,000. Ibid, sec. 2; Vernon's Annotated Revised Civil Statutes of the State of Texas, art. 6819a-18 (1959). Cited hereafter as V.A.C.S.

[4]"Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe." Texas Constitution, art. 5, sec. 3. It is also provided that the legislature may allow the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor. Ibid.

[5]Hunt v. Wichita County Water Improvement District, 147 Tex. 47, 211 S.W.2d 743 (1948).

[6]Nash v. McCallum, 74 S.W.2d 1046 (Tex. Civ. App. - El Paso - 1934 - n.w.h.). Among its miscellaneous powers, the Supreme Court may impose punishment for contempt of court, V.A.C.S., art. 1911 (Supp. 1971, and has power, on affidavit or otherwise, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. Texas Constitution, art. 5, sec. 3; V.A.C.S., art. 1732 (1892). The supreme court has no advisory powers under the constitution, and the legislature may not confer such powers upon the court. Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933).

[7]Texas Constitution, art. 5, sec. 4. The presiding judge receives an annual salary of $33,500, and each of the four other judges receives a salary of $33,000. V.A.C.S., art. 6819a-18 (1957); The legislature in 1971 "provided for the designation and appointment of certain retired appellate judges, district judges, or active appellate or district judges, to sit as commissioners of the Court of Criminal Appeals. This legislation was amended during special session, immediately following the regular session, to provide for appointing a commission composed of two attorneys-at-law, having those qualifications for the judge of the Court of Criminal Appeals." Texas Criminal Justice Council, 1973 Criminal Justice Plan for Texas (Austin, Texas: Office of the Governor, 1973), p. 19. V.A.C.S., art. 1811e (1971). Such commissioners are to receive an annual salary of $33,000. There is no intermediate appellate court for criminal cases in Texas.

[8]Texas Constitution, art. 5, sec. 5; Vernon's Annotated Code of Criminal Procedure, arts. 4.03, 4.04. Cited hereafter as V.A.C.C.P.

[9]The courts of civil appeals were created in 1891 in order to relieve the congested docket of the Supreme Court. C. Guittard, "Court Reform: Texas Style," Southwestern Law Journal, 21 (1967), p. 469. Cited hereafter as Guittard. Though the increase in population and judicial business was definitely foreseen, the only remedy granted to deal with it was to create additional districts with a courts of civil appeals in each. This process has gone on until there are now fourteen courts of civil appeals. V.A.C.S., art. 1817 (Supp. 1967).

[10]They are elected to six-year overlapping terms and each receives an annual salary of $30,000.

[11]Texas Constitution, art. 5, sec. 6.

[12]"The appellate jurisdiction of the courts of civil appeals shall extend to all civil cases within the limits of their respective districts of which the district courts or county courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed $100 exclusive of interest and costs." V.A.C.S., art. 1819 (1957). There is further statutory provision that an appeal or writ of error may be taken to the court of civil appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases in which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds $100 exclusive of interests and costs. V.A.C.S., art. 2249 (1927). The courts and the judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of the court. V.A.C.S., art. 1823 (1923).

[13]In re Trafton, 160 Tex. Crim. 407, 271 S.W.2d 814 (1953).

[14]Department of Public Safety v. Buck, 256 S.W.2d 642 (Tex. Civ. App. - Austin, - 1953, err. ref.)

[15]In re Trafton, supra n.13.

[16]V.A.C.S., art. 1738 (Supp. 1963).

[17]See Appendix B.

[18]Texas Constitution, art. 5, sec. 8

[19]Texas Constitution, art. 5, sec. 7; art. 16, sec. 17; V.A.C.S., arts. 6819a-2 through 6819a-43 (Supp. 1971).

[20]Texas Constitution., art. 5, sec. 7.

[21]Wheeler v. Wheeler, 76 Tex. 489, 13 S.W. 305 (1890); see discussion in Guittard at 457, 467.

[22]Texas Constitution, art. 5, sec. 1.

[23]Texas Constitution, art. 5, sec. 16.

[24]Langehennig v. Hohmann, 139 Tex. 452, 163 S.W.2d 402 (1942); McCarty v. Duncan, 330 S.W.2d 899 (Tex. Civ. App. Waco - 1959 n.w.h.)

[25]Jones v. Sun Oil Co., 137 Tex. 353, 153 S.W.2d 571 (1941); Brown v. Flemings, 212 S.W.2d 483 (Tex. Comm'n. App. 1919); McMahan v. McMahan, 175 S.W. 157 (Tex. Civ. App. 1915. ref.); Berry v. Barnes, 26 S.W.2d 657 (Tex. Civ. App. - El Paso, 1930 n.w.h.)

[26]George v. Ryon, 94 Tex. 317, 60 S.W. 427 (1901); Marx v. Freeman, 21 Tex. Civ. App. 429, 52S.W. 647 (1899 n.w.h.).

[27]Gregory v. Ward, 118 S.W.2d 1049 (1929); Higginbotham v. Davis, 221 S.W.2d 290 (Tex. Civ. App. - Dallas, 1949 n.w.h.); Vernon's Annotated Texas Statutes: Texas Probate Code, sec. 313 (1956). Cited hereafter as Texas Probate Code).

[28]Texas Constitution, art. 5, sec. 22.

[29]Gulf, W. T. & P.Ry. v. Fromme, 98 Tex. 459, 84 S.W. 1054 (1905); White v. Barrow, 182 S.W. 1155 (Tex. Civ. App. 1916 n.w.h.).

[30]Muench v. Oppenheimer, 86 Tex. 568, 26 S.W. 496 (1894); Chappell v. State, 153 Tex. Crim. 237, 219 S.W.2d 88 (1949).

[31]V.A.C.S., art. 1970-141a (1951); V.A.C.S., art. 1970-310 (1964).

[32]State v. Gillette's Estate, 10 S.W.2d 984 (Tex. Comm'n App. 1928). However, other courts with concurrent probate jurisdiction may be established if no attempt is made to deprive the constitutional county court of its probate jurisdiction. State v. McClelland, 148 Tex. 372, 224 S.W. 2d 706 (1949).

[33]See infra, text accompanying notes 63-69.

[34]C. Guittard supra, note 9 at 477.

[35]The payment of justices of the peace on a fee basis was ended by Constitutional Amendment 3 approved by the voters on November 7, 1972. See, Dallas Morning News, November 8, 1972, p. 25A.

[36]1973 Criminal Justice Plan for Texas, p. 26

[37]Texas Constitution, art. 5, sec. 19.

[38]Ibid.

[39]V.A.C.S., arts. 1970-305, sec. 3 (1959) (Cameron County); 1970-311a, sec. 3 (1955) (Potter County); art. 1970-339, sec. 3 (1955) (Nueces County); 1970-34, sec. 3 (1925 (Tarrant County); 1970-340-1, sec. 3 (1957) (Lubbock County); 1970-347, sec. 3 (1959) (Nolan County).

[40]Texas Constitution, art. 5, sec. 1.

[41]Ibid.

[42]E.g., V.A.C.S., arts. 1926-1 to 1926-53 (supp. 1966).

[43]Cockrell v. State, 85 Tex. Crim. 326, 211 S.W. 939 (1919).

[44]Lord v. Clayton, 163 Tex. 62, 352 S.W.2d 718 (1961); Ex parte Richards, 137 Tex. 520, 155 S.W.2d 597 (1941); Reasonover v. Reasonover, 122 Tex. 512, 58 S.W.2d 817 (1933); St. Louis S.W. Ry. v. Hall, 98 Tex. 480, 85 S.W. 786 (1905); see Castro v. State, 124 Tex. Crim. 13, 60 S.W. 2d 211 (1933).

[45]163 Tex. 62, 352 S.W.2d 718 (1961).

[46]Hull v. State, 50 Tex. Crim. 607, 100 S.W. 403 (1907); Cunningham v. City of Corpus Christi, 260 S.W. 266, 269 (Tex. Civ. App. - San Antonio, 1924 n.w.h.).

[47]Ex parte Richards, 137 Tex. 520, 155 S.W. 2d 597 (1941).

[48]V.A.C.S., art. 1926-15 (Supp. 1965). Similarly, in Bexar County, the former criminal district courts have been converted into the 144th and 175th district courts, and all district courts have concurrent jurisdiction in both civil and criminal cases although it is provided that the 144th and 175th shall give preference to criminal cases, and all indictments shall be returned to them. The other seven district courts are directed to give preference to civil cases, and all civil cases are directed to be filed in such other courts. V.A.C.S., art 199(37)(Supp. 1966).

[49]1972 Texas Criminal Justice Plan at I-19.

[50]V.A.C.S., arts. 2338-2 to 2338-21 (Supp. 1971); see 37 Tex. Civ. Jud. Council Ann. Rep. 238-40 (1971).

[51]Ibid.

[52]See discussion in Guittard, supra, note 9 at 471.

[53]E.g., Rader v. Rader, 378 S.W.2d 373 (Tex. Civ. App. - Dallas, 1964, err. ref. n.r.e.) (domestic relations court has no jurisdiction of suit for alienation of affection).

[54]McHone v. Gibbs, 469 S.W. 2d 789, 790 (Tex. 1971).

[55]V.A.C.S., arts. 2338-1, sec. 4 (1967); 2338-2 (1959).

[56]E.g., V.A.C.S., 2338-9 (1967) (establishing a juvenile court for Dallas County, having concurrent jurisdiction with district court in certain cases).

[57]Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

[58]See Martin v. Texas Youth Council, 445 S.W.2d 553 (Tex. Civ. App. - Austin 1969, n.w.h.) (dissenting opinion, appendix at 564) (juvenile court may not hear motion to vacate final order; remedy is habeas corpus in district court); see also McAlpine v. State, 457 S.W.2d 426 (Tex. Civ. App. - Houston (1st Dist.), 1970 n.w.h.).

[59]Texas Constitution, art. 5, sec. 16.

[60]E.g. V.A.C.S. art. 1970-345 (1957) (creating probate court for Tarrant County).

[61]V.A.C.S., art. 1970a-1, sec. 1 (1957).

[62]State v. Gillette's Estate, 10 S.W.2d 984 (Tex. Comm'n App. 1928).

[63]State v. McClelland, 148 Tex. 372, 224 S.W.2d 706 (1949); cf. discussion accompanying notes 42-46 supra.

[64]See text accompanying notes 22-34 supra.

[65]Texas Constitution, art. 5, sec. 1.

[66]Allen v. State, 122 Tex. Crim. 186, 54 S.W.2d 810 (1932); Sterrett v. Morgan, 294 S.W.2d 201 (Tex. Civ. App. - Dallas, 1956, n.w.h.).

[67]Forty-third Annual Report (Austin: Texas Civil Judicial Council, 1971), p. 210.

[68]E.g. V.A.C.S., art. 1970-31.1, secs. 2, 8(1963).

[69]Henderson v. Texas Turnpike Authority, 308 S.W.2d 199 (Tex. Civ. App. - Dallas, 1957 ref).

[70]V.A.C.S., art. 1194 (1899).

[71]J. Cook, Texas Corporation Courts, (Austin, Texas: Institute of Public Affairs, University of Texas, 1961), p. 33.

[72]V.A.C.S., art. 1197, 1197a (1953).

[73]V.A.C.S., art. 1194, art. 1195 (1899).

[74]V.A.C.S., arts. 1194-1200a (1955); Harris County v. Stewart, 91 Tex. 133, 41 S.W. 650 (1897).

[75]V.A.C.S., art. 2460a (1963).

[76]B. Stoller, "Small Claims Courts in Texas, Paradise Lost" Texas Law Review, 47 (1969), p. 450.

[77]V.A.C.S., art. 2460a, sec. 2 (1963).

[78]Stoller, note 76, supra at 459.

[79]Texas Constitution, art. 5, sec. 5; V.A.C.C.P., art. 4.03.

[80]Texas Constitution, art. 5, sec. 8.

[81]V.A.C.C.P., art. 4.05.

[82]Texas Constitution, art. 5, sec. 16.

[83]Texas Constitution, art. 5, sec. 16; V.A.C.C.P., art. 4.07.

[84]Ibid; V.A.C.C.P., art. 4.08

[85]Texas Constitution, art. 5, sec. 19.

[86]V.A.C.C.P., art. 4.11.

[87]V.A.C.C.P., art. 4.16.

[88]Texas Constitution, art. 5, sec. 16.

[89]V.A.C.S., art. 5561e (Supp. 1967). For emergency commitment procedures, see also V.A.C.S., art. 5547-27 (1957). See discussion Jones, "Emergency Restraint Under the Texas Mental Health Code," Texas Bar Journal, 33 (1970), p. 31.

[90]Acts 1957, Fifty-fifth Legislature, C. 334, compiled as V.A.C.S., art. 1970a-1 (1957).

[91]See note following V.A.C.S., art. 5547-11 (1957).

[92]V.A.C.S., art. 5561c, sec. 9(B) (1958).

[93]Ibid., sec. 9(a)

[94]J. Bannerot, "Civil Commitment of Alcoholics in Texas," Texas Law Review, 48 (1969), p. 164.

[95]V.A.C.S., art. 5561c, sec. 12 (1957).

[96]V.A.C.S., art. 5561c-1, sec. 2(a)(4), (c) (supp. 1969).

[97]462 S.W.2d 949 (Tex. 1971).

[98]R. Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," Judicature, 46 (1952), p.55.

[99]R. Lowe, "Unified Courts in America: The Legacy of Roscoe Pound," Judicature 56 (1973), p. 316.

[100]Proceedings of the Texas Bar Association (Austin, Texas: Texas Bar Association, 1918), p. 69. See also, R. Slayton, "The Proposed Judicial Department - Its Twenty-Eight Principles," Texas Law Review, 35 (1957), p. 954.

[101]C. Guittard, "Court Reform, Texas Style," Southwestern Law Journal, 21 (1967), p. 451.

[102]C. Murray and W. Hooper, "A Proposal for Modern Courts," Texas Bar Journal, 33 (1970), p. 199, who without express suggestions for constitutional revision urge complete reorganization of Texas courts following a concept of regional courts, and only three state trial courts: district, county and magistrate. See also R. Calvert, "Proposed Revision Article V, Texas Constitution," Texas Bar Journal, 35 (1971), p. 1001.

[103]R. Schroeder and H. Hall, "Twenty-Five Years' Experience With Merit Judicial Selection in Missouri," Texas Law Review, 44 (1966), p. 1088.

[104]G. Braden, Citizens' Guide to the Texas Constitution (Houston, Texas: Institute of Urban Studies, University of Houston, 1972) p. 44. ("About two-thirds of the (full-time) judges originally went onto the bench through appointment"); see also Bancroft Henderson and T.C. Sinclair, The Selection of Judges in Texas: An Exploratory Study, (Houston, Texas: University of Houston, 1965).

[105]F. Jones, "Thoughts on Judicial Selection," Texas Bar Journal, 27 (1964), p. 757. But see W. Burnett, "Observations on the Direct-Election Method of Judicial Selection," Texas Law Review, 44 (1966), p. 1098, arguing that the Texas system is a good one, and that in any event the system of selection is not so important as improved salaries for the judges.

[106]J. Greenhill and J. Odam, "Judicial Reform of Our Texas Courts - A Re-Examination of Three Important Aspects," 23 Baylor Law Review (1971), p. 204.

[107]A similar result might be accomplished without constitutional amendment by legislation authorizing municipal courts of record, see Texas Urban Development Commission, Toward Urban Progress: A Report to The Governor and the 62nd Texas Legislature, (Arlington, Texas: Institute of Urban Studies, University of Texas at Arlington, 1970), and V.A.C.S., art. 1200aa creating a municipal court of record in Wichita Falls.

[108]County Judge Carl W. Friedlander, former Administrative Judge of the Dallas Municipal Court, takes this view in "Court Administration in the Municipal Court" (Unpublished Master of Laws Thesis, Southern Methodist University Law School, 1973).

[109]For example: (1) The case load of the municipal courts is composed mainly of traffic violations, and some advocate turning this function into one of administrative law. R. Berg and R. Samuels, "Improving the Administration of Justice in Traffic Court," De Paul Law Review, 19 (1970), p. 503; Note, "A Study of the Constitutionality of Limiting Administrative Adjudication of Traffic Offenses to a Portion of the State," Brooklyn Law Review, 33 (1967), p. 301; Note, "Traffic Court Reform, Columbia Journal of Law and Social Problems, 4 (1968), p. 255. (2) The municipal courts and justice court case load in other states may consist of petty-offenses arising from so-called victimless "crimes" of drunkeness, sex offenses, and drug offenses. Many reformers call for decriminalization of such offenses and treatment rather than punishment. M. Blinder and G. Korblum, "The Alcoholic Driver; A Proposal for Treatment as an Alternative to Punishment, Judicature, 56 (1972), p. 24. R. Kaplan (Presiding Judge, Gary, Indiana, City Court), "The Alcoholic Problem Facing Misdemeanor Courts," Judicature, 54 (1970), p. 122. Thus if Texas follows the developing trend, at least to the extent of reducing such offenses from felonies to misdemeanors, e.g. possession of marihuana, then the lower Texas courts will have jurisdiction to solve these modern social problems.

[110]Leonard Downie, Jr., Justice Denied: The Case for Reform of the Courts, (Baltimore, Maryland: Penguin Books, Inc., 1971), pp. 200-17.

[111]N. Randolph, "Local Option Abolition of Justice Courts," Texas Bar Journal, 25 (1962), p. 15, arguing that evils of the justice courts could be corrected by requiring the justices to be attorneys and providing state salaries.

[112]B. R. Sleeper, "Local Option Abolition of Justice Courts," Texas Bar Journal, 25 (1962), p. 14

[113]W. Crowe, "A Plea for the Trial Court of Limited Jurisdiction," Judicature, 53 (1969), p. 157. See also interview with Judge Tom King of County Court at Law No. Two, Dallas, County, a former justice of the peace and member of Judge Calvert's Taskforce on Judicial Reform, who believes justice of the peace courts should be retained for small claims adjudication which could not be performed by courts of record. Rae Ann Fichtner, "Suggested Reforms in the Dallas County Court System," (unpublished paper, Southern Methodist University Law School, 1972).

[114]E.g., Michigan successfully operates small claims divisions of the state district courts with simplified procedure, low costs, and without lawyers. Note, "Michigan Small Claims Courts Eliminate Attorneys, High Costs," Judicature, 53 (1969), p. 214.

[115]L. Downie, Jr., Justice Denied: The Case for Reform of the Courts, (1972), reviewed in 1971 Law Forum, p. 546.

[116]L. Truax, "Courts of Limited Jurisdiction are Passe," Judicature, 53 (1970), p. 326.

[117]C. Guittard, supra note 101 at 480.

[118]V.A.C.S., art. 1195 (1899).

[119]The justices of the peace are "magistrates" as the term is used in the Texas Code of Criminal Procedure, art. 2.09, and they act as examining courts for the purpose of inquiring into a criminal accusation against any person, art. 2.10. Arrested persons must be taken before a magistrate, art. 14.06, art. 15.17, and be given an examining trial, art. 16.01, and a determination of bail. The justice of the peace also has power to issue search warrants, art. 18.01.

[120]Opinions expressed by Harris County court administrators to the author, May 24, 1973.

[121]Opinion expressed by a Dallas County criminal district judge to author, January 1973.

[122]See text accompanying notes 64-69 supra.

[123]Task Force for Court Improvement (Chief Justice Calvert's Task Force), The Proposed Judiciary Article of the Texas Constitution. (St. Paul: West Publishing Company, September, 1972) provided in Section 1:

> "The judicial power of the state is vested in a unified judicial system composed of a Supreme Court, courts of appeals, district courts, county courts at law, and no others. All courts shall have jurisdiction as provided by law. (Emphasis added)

[124]Berney v. State, 457 S.W.2d 182 (Tex. Civ. App. - Dallas (1970), aff'd 462 S.W.2d 949 (Tex. 1971); Berney v. Sterrett, 452 S.W.2d 37 (Tex. Civ. App. - Dallas 1970), n.w.h.

[125]The Berney case is discussed in Note, "State Hospital Commitment Versus Criminal Prosecution of Narcotics Addicts," Texas Tech Law Review, 2 (1971), p. 346, wherein it is pointed out that the various opinions of the case, supra n. 22, indicate different time sequences in relation to the indictment, the filing of petition for civil commitment, and conviction for sale of narcotics. Factual inconsistencies aside, the case illustrates a serious confusion among the courts as to jurisdictional conflict between criminal and civil commitment for essentially the same series of acts, transactions, or occurrences.

[126]Texas Constitution, art. 5, sec. 15:

> ". . . there shall be elected in each county . . . a County Judge, who shall be well informed in the law of the State . . ."

[127]Forty-third Annual Report (Austin, Texas: Texas Civil Judicial Council, 1971), pp. 208-10.

[128]R. Jones, "Civil Commitment: A Socio-Legal Approach to the Mental Patient and the Drug Addict," (Unpublished paper, Southern Methodist University School of Law, 1973).

[129]V.A.C.S., art. 5561c (1957).

[130]Ibid. Second, it must be shown in the petition that the alleged alcoholic is a resident of the county over which the judge has jurisdiction, and is over the age of eighteen years. A third requirement is that the person be shown to be "in actual need of care and treatment" and that such treatment "would improve his health." In addition to the three foregoing requirements, the alleged alcoholic must be appropriately described by one of the following seven categories: (1) not capable of conducting himself properly; (2) unfit properly to conduct himself; (3) not capable of conducting and looking after his affairs; (4) unfit properly to conduct and look after his affairs; (5)dangerous to himself; (6) dangerous to others; (7) has lost the power of self control because of the use of alcohol. If the county judge finds upon proper proof that all four of the above requirements are fulfilled, he may involuntarily commit the person.

[131]J. Bannerot, "Civil Commitment of Alcoholics in Texas," Texas Law Review, 48 (1969), p. 159.

[132]Ibid. at p. 175.

[133]F. Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill," Texas Law Review, 44 (1966), p. 424, (describing commitment of 40 people in 75 minutes); Comment, "The Expanding Role of the Lawyer

and the Court in Securing Psychiatric Treatment for Patients Confined Pursuant to Civil Commitment Procedures." Houston Law Review, 6 (1969), p. 519.

[134]R. Jones, "Civil Commitment: A Socio-Legal Approach to the Mental Patient and the Drug Addict," (Unpublished paper, Southern Methodist University School of Law 1973).

[135]See text accompanying 15-17 notes, supra.

[136]C. Guittard, "Court Reform-Texas Style," Southwestern Law Journal, 21 (1967), p. 467. The one judge-one court problem has been partially solved by allowing district courts to be held in only one district. Another step toward a unified judiciary was giving judges the power to transfer cases from one court to another. For further development, see Special Practice Act of 1923 and in the Administrative Judicial District Act of 1927. V.A.C.S., arts. 2092 (1923), 200a (1959), respectively (now Texas Rules of Civil Procedure 390). The provisions of the Special Practice Act provided that any judge may transfer cases from one court to another and may try cases pending in any other court without formal transfer, either in his own courtroom or in the court where the case is pending.

Section 27 of article 2092 provided that a majority of the judges of the district courts could make rules for calling the docket, for setting and postponement of cases, for classifying and distributing cases, for having one calendar for all cases set in all courts, and could make such other rules as they deemed advisable to facilitate the dispatch of business. V.A.C.S., art. 2092, sec. 27 (1964). When the Rules of Civil Procedure were adopted in 1940, section 27 was among the provisions of the statutes that were listed as repealed. See editor's note following V.A.C.S., art. 2092 (1964). No comparable provisions were brought forward into the new rules. Rule 817 merely authorizes each district and county court to make rules not inconsistent with the Rules of Civil Procedure. The result is that local rules of practice cannot be uniformly effective in all the district courts of a county without unanimous action and consent of all the district judges, a difficult and discouraging task.

Transfer powers on the civil appeals level is found in V.A.C.S., art. 1738 (1962).

[137]414 S.W.2d 441 (Tex. 1966).

[138] Obviously, this controversy would have been much less complicated if there had been only one district court with several judges. Assignment of a judge to hear the case would then be purely an administrative matter. Actually, no reason is apparent why this particular problem could not have been handled administratively by transfer and consolidation or joint hearing under rules 330(i) and 174(a). The fact

that a hearing was held for nine days on the question of which of two district judges should hear a case on the merits, with an appeal on this question going all the way to the supreme court, demonstrates the difficulties which can still arise from the existence of separate and distinct courts in the same county. See Lord v. Clayton, 163 Tex. 62, 352 S.W.2d 718 (1961); Carlson v. Johnson, 327 S.W.2d 704 (Tex. Civ. App. 1959); Guittard, supra note 136 at 467-68.

[139]E.g., assuming the Court of Criminal Appeals develops a heavier case load than the Supreme Court, (see Appendix C) the load presumably cannot be equalized, unless some rationalizing constitutional device is employed. E.g., The State of Kentucky when faced with an overload on their Supreme Court avoided the creation of an intermediate court of appeals by creating a system of Commissioners of the Supreme Court, who decide cases subject to adoption by the Supreme Court. These commissioners can be and often are state trial judges from another part of the state than that from which the appeal is taken.

[140]Judge Goldberg expressed these opinions to a seminar on Federal Appellate Practice in the Southern Methodist University Law School, Spring 1972. It is also interesting to note the parallel in Judge Goldberg's views with those psychiatrists who advocate that modern executives need a complete job change at least every five years to keep their mental attitude from going stale. It is submitted that the best system achieving "specialist efficiency" with "generalist perspective" would be divisions of court business with rotation of judges. E.g., some multi-judge district courts, such as the United States District Court for the Northern District of Texas, rotate the assignment of the criminal docket for six month periods. See also parallel opinions of Judge Truman Roberts of the Texas Court of Criminal Appeals, Texas Bar Journal, 35 (1972), p. 1007, and those in opposition by Judge W. A. Morrison of the Texas Court of Criminal Appeals, Texas Bar Journal, 35 (1972), p. 1002.

[141]R. Pound, "The Cause of Popular Dissatisfaction with the Administration of Justice," Judicature, 48 (1962), p. 56.

[142]E.g., "Consensus Statement of the 1972 Conference on the Judiciary," Judicature, 55 (1972), p. 29.

> "State Courts should be organized into a unified judicial system financed by and acting under authority of the state government, not units of local government."

See A. Miller, Judicature, 55 (1972), p. 62.

[143]R. Lowe, "Unified Courts in America: The Legacy of Roscoe Pound," Judicature, 56 (1973), p. 316.

[144]Ibid. at 322. Judge Guittard's view is that Texas is structurally not unified but de facto or administratively is evolving toward unification; see text accompanying notes 101-102.

[145]Arizona, California, Connecticut, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Rhode Island, Vermont.

[146]Alabama, Delaware, Indiana, Louisiana, Wisconsin.

[147]Kansas, South Carolina, South Dakota, Wyoming.

[148]Georgia, Kentucky, New Hampshire, Oregon, Texas, Utah, Virginia, Washington.

[149]Montana

[150]Arkansas, Mississippi, Nevada, Tennessee, West Virginia.

[151]I. Holt, "The Model State Judicial Article in Perspective," Judicature, 47 (1963), p. 8.

[152]R. Watson, "Judging the Judges," Judicature, 53 (1970), p. 283.

[153]J. Greenhill and J. Odam, "Judicial Reform of Our Texas Courts - A Reexamination of Three Important Aspects," Baylor Law Review, 23 (1971), p. 221.

[154]R. Watson, note 152, supra at 285.

[155]G. Winters, "Selection of Judges - An Historical Introduction, Texas Law Review, 44 (1966), p. 1087.

[156]R. Watson and R. Downing, The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Non-Partisan Court Plan, (New York, New York: John Wiley and Sons, 1970).

[157]M. Rosenberg, "Improving Selection of Judges on Merit," Judicature, 56 (1973), p. 240.

[158]See Appendix D for description of present types of cases filed in district courts. The answer here appears to be the creation of magistrate divisions, and periodic rotation of judges to maximize specialization, generalization, and equitable assignment of types of workload to multiple judges of a unified court.

[159]See also, M. Rosenberg, "The Qualities of Justices - Are They Strainable?" Texas Law Review, 44 (1966), p. 1063. See Appendix E for current status of state judiciaries as to selected reform criteria.

[160]Institute Judicial Administration, Annual Survey of American Law, p. 607 (1965); Institute Judicial Administration, Annual Survey of American Law, p. 651 (1963); Institute Judicial Administration, Annual Survey of American Law, p. 714 (1962); R. Allard and F. Breen, "Court Reorganization Reform-1962," Judicature, 46 (1962) p. 110; Guittard at 483, n. 225.

[161]S. Brakel and R. Rock, The Mentally Disabled and the Law, (Chicago, Illinois: The American Bar Foundation, 1971), Table 3.2, pp. 72-76.

[162]Ibid at 61-63.

[163]It is conceded however that Section 9 of the Draft Act Governing Hospitalization of the Mentally Ill, refers to the court as a "(probate)" court. See also S. Brakel and R. Rock, supra note 161, App. A at 456, 459.

[164]E. Friesen, E. Gallas and N. Gallas, Managing the Courts (Indianapolis: Bobbs-Merrill, 1971), p. 31.

[165]This movement has been conditioned upon the funding of new job positions for "court administrators" or "court executives."

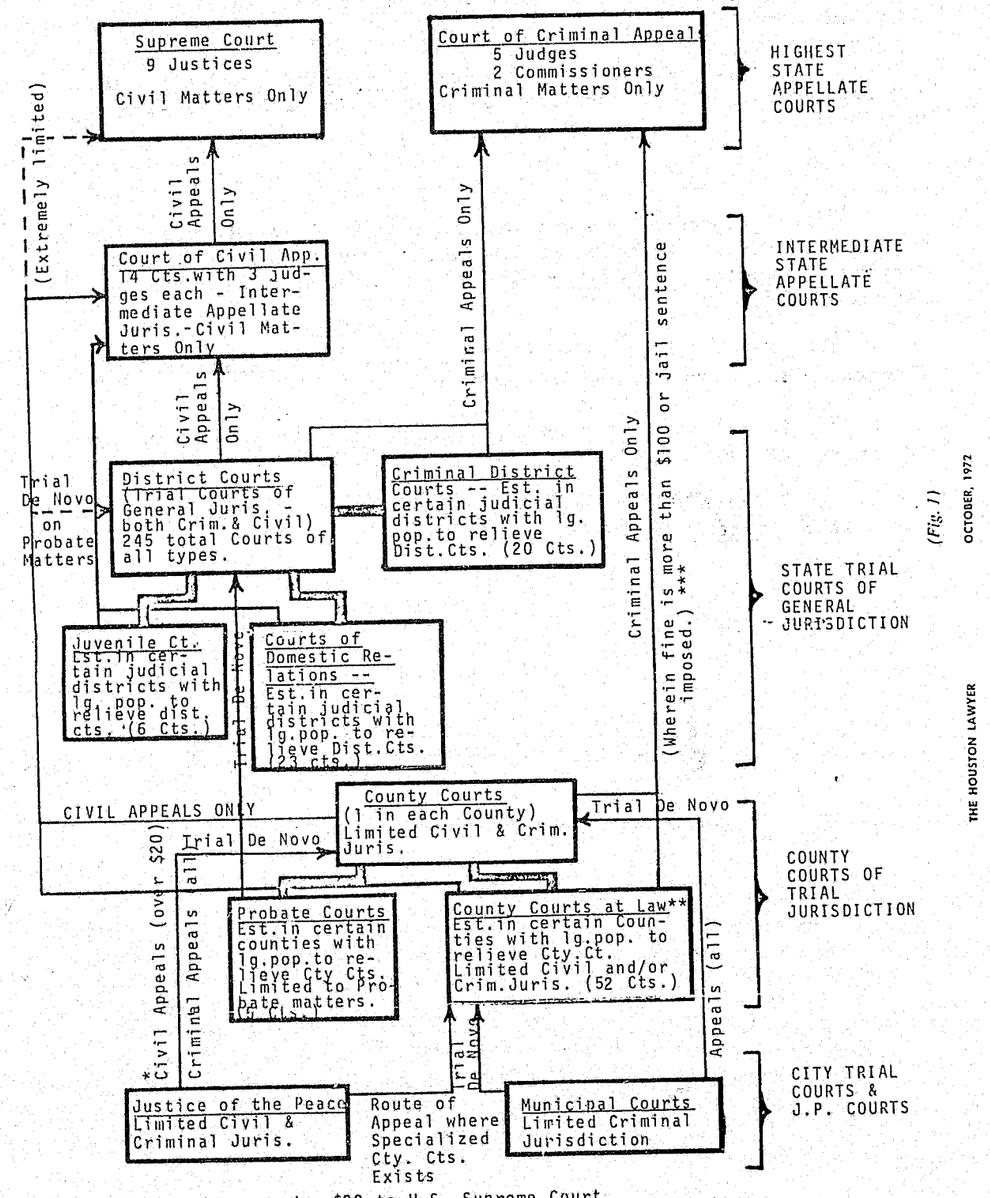
[166]"1971 Consensus Statement of the National Conference on the Judiciary," Judicature, 55 (1971), p. 29.

Appendix A.

The Judicial System of Texas.

Source: The Houston Lawyer 20, 21 (Oct. 1972).

THE JUDICIAL SYSTEM OF TEXAS



*Appeals on matters under $20 to U.S. Supreme Court
**Some Counties have separate civil & criminal County Courts at Law.
(35 County Courts at Law, 11 County Crim.Cts. at Law, 3 County Civil Cts. at Law, 5 County Probate Courts, 1 County Crim. Court of Appeal, 2 "County Court")
***Appeals on matters under $100 to U.S. Supreme Court

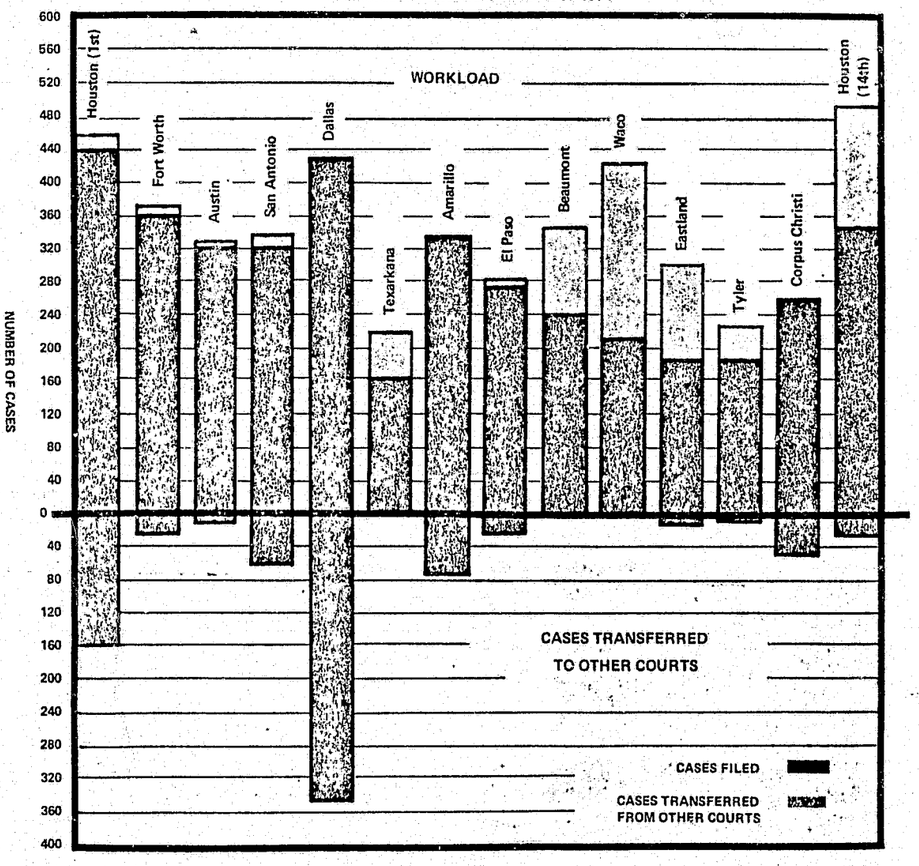
(Fig. 1) OCTOBER, 1972 THE HOUSTON LAWYER 20

Appendix B

Texas Courts of Civil Appeals, Workloads and Cases Transferred, 1968-71.

Source: 43rd Texas Civil Judicial Council Annual Report, p. v (1971)

Figure 5. COURTS OF CIVIL APPEALS
Workloads and cases transferred 1968-1971

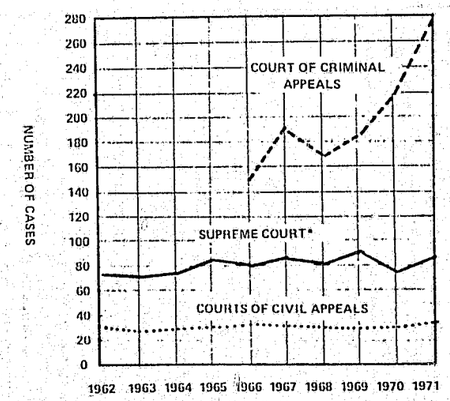


Appendix C

Texas Appellate Courts, Average number of cases filed per justice 1962-1971.

Source: 43rd Texas Civil Judicial Council Annual Report, p. iv (1971).

Figure 3. APPELLATE COURTS
Average number of cases filed per justice 1962-1971



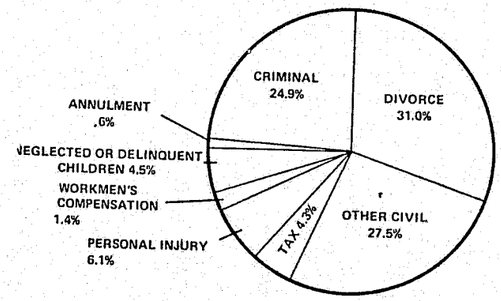
*"Regular Causes" and Applications for Writs of Error.

Appendix D

District Courts, Categories of cases filed 1971.

Source: 43rd Texas Civil Judical Council Annual Report, p. vi (1971).

Figure 7. DISTRICT COURTS
Categories of cases filed 1971



Appendix E

Status of State Judiciaries, 1972.

Source: 56 Judicature 423 (May 1973).

	Merit Plan	Mandatory Retirement Age	Service after Retirement	Unified Court System	Unified Bar	Judicial Compensation Commission	Judicial Qualification Commission	Office of State Court Administrator	1972 ABA Code of Judicial Conduct	Operate under Modern Rules of Criminal & Civil Procedure
Alabama	No	70	Yes	No	Yes	No	Yes	Yes	No	X & Y
Alaska	Yes	70	Yes	Yes	Yes	No	Yes	Yes	No	X & Y
Arizona	No	No	Yes	Yes	Yes	Yes	Yes	Yes	No	X & Y
Arkansas	No	No	Yes	No	No	No	No	Yes	No	X & Y
California	V	No	Yes	No	Yes	No	Yes	Yes	No	X & Y
Colorado	Yes	72	Yes	Yes	No	No	Yes	Yes	Yes	X & Y
Connecticut	No	70	Yes	Yes	No	Yes	No	Yes	No	X & Y
Delaware	No	No	No	Yes	Yes	No	No	Yes	No	X & Y
Florida	Yes	70	Yes	Yes	Yes	Yes	Yes	Yes	No	X & Y
Georgia	V	70	Yes	No	Yes	Yes	Yes	No	No	X
Hawaii	No	70	Yes	Yes	No	No	Yes	Yes	No	X & Y
Idaho	Yes	70	Yes	Yes	Yes	No	Yes	Yes	No	X & Y
Illinois	No	70	Yes	Yes	No	Yes	Yes	Yes	No	X & Y
Indiana	Yes	75	No	No	No	No	No	No	No	X
Iowa	Yes	Sup. Ct. 75 Dist. Ct. 72	Yes	Yes	No	Yes	Yes	Yes	No	X & Y
Kansas	Yes	70	Yes	Yes	No	No	No	Yes	No	X & Y
Kentucky	No	No	No	No	Yes	No	No	Yes	No	X & Y
Louisiana	No	75	Yes	No	Yes	No	Yes	Yes	No	X & Y
Maine	No	No	Yes	Yes	No	No	No	Yes	No	X & Y
Maryland	V	70	No	Yes	No	No	Yes	Yes	No	X & Y
Massachusetts	V	70	No	No	No	No	No	No	Yes	X & Y
Michigan	No	70	Yes	Yes	Yes	Yes	No	Yes	No	X & Y
Minnesota	No	Dist. Ct. 70	Yes	No	No	Yes	Yes	Yes	No	X
Mississippi	No	No	No	No	Yes	No	No	No	No	No
Missouri	Yes	70	Yes	Yes	Yes	No	Yes	Yes	No	X & Y
Montana	No	70	Yes	No	No	Yes	No	No	No	X & Y
Nebraska	Yes	70	No	No	Yes	No	Yes	Yes	No	X & Y
Nevada	No	No	No	No	Yes	No	No	Yes	No	X & Y
New Hampshire	V	70	Yes	Yes	Yes	No	No	No	Yes	X & Y
New Jersey	V	70	Yes	Yes	No	No	No	Yes	No	X & Y
New Mexico	V	No	No	No	Yes	No	Yes	Yes	No	X & Y
New York	V	70	Yes	No	No	Yes	No	Yes	Yes	
North Carolina	No	App. Ct. 72 Trial Ct. 70	Yes	Yes	Yes	No	Yes	Yes	No	X
North Dakota	No	No	Yes	No	Yes	No	No	Yes	No	X
Ohio	V	70	Yes	No	No	Yes	Yes	Yes	No	X
Oklahoma	Yes	No	Yes	Yes	Yes	No	Yes	Yes	No	No
Oregon	No	75	Yes	No	Yes	No	No	Yes	No	No
Pennsylvania	No	70	Yes	Yes	No	Yes	Yes	Yes	No	X & Y
Rhode Island	No	No	Yes	Yes	No	No	No	Yes	No	X & Y
South Carolina	No	72	Yes	No	Yes	No	No	No	No	X & Y
South Dakota	No	No	Yes	No	Yes	Yes	No	No	No	X & Y
Tennessee	Yes	No	Yes	No	No	No	No	Yes	No	X
Texas	No	75	Yes	No	Yes	No	Yes	No	No	X
Utah	Yes	Dist. Ct. 70 Sup. Ct. 72	Yes	No	Yes	Yes	Yes	Yes	No	X & Y
Vermont	Yes	No	No	No	No	No	No	Yes	No	X
Virginia	No	70	Yes	No	Yes	No	Yes	Yes	Yes	X & Y
Washington	No	75	Yes	No	Yes	Yes	Yes	Yes	No	X
West Virginia	No	No	Yes	No	Yes	No	No	No	Yes	X
Wisconsin	No	70	Yes	No	Yes	No	Yes	Yes	No	Y
Wyoming	V	No	No	Yes	Yes	No	No	No	No	X & Y
District of Columbia	No	No	No	Yes	Yes	No	Yes	No	Yes	X & Y
Federal Courts	No	No	Yes	—	—	Yes	No	—	No	Yes

Appendix E (continued)

Status of State Judiciaries, 1972.

Source: 56 Judicature 423 (May 1973).

CHAPTER V

THE TEXAS CORRECTIONAL SYSTEM

Charles M. Friel
Sam Houston State University

Within the Texas criminal justice system there are four types of correctional institutions: juvenile detention facilities, the Texas Youth Council's State Training Schools; city and county jails, and the Texas Department of Corrections. This chapter presents a resume of each type of institution providing a discussion of its legal bases, administrative and operational characteristics, and recommendations pertaining to the future development. For organizational purposes the chapter is divided into two sections; the first addresses juvenile institutions while the second addresses institutions for adults.

Juvenile Corrections

Juvenile Detention Facilities

Legal basis

The term "juvenile detention facility" is somewhat misleading since such facilities do not always house only juveniles, and the facilities themselves range from those designed specifically to hold juveniles, to county jails, police lock-ups, boarding houses, foster homes or any other place which the juvenile court specifies as a detention facility.[1]

The legal basis for detention facilities stems from the Texas Civil Statutes which authorize that a child may be taken into custody when his conditions or surroundings are deemed to be injurious to his welfare.[2] Similarly, any peace officer of probation officer is authorized to take into custody any child who is found violating the law or any ordinance, or who it is reasonably believed is a fugitive from justice or his parents.[3]

Once a child is taken into custody, he may be released to a parent, guardian or other interested person upon the receipt of a promise that the person will assume complete responsibility for the child and is willing to bring the child before the probation officer or the court at any time specified. If the child is not released in this manner, the officer must bring the child before the juvenile judge who will either authorize the child's release or mandate his detention.

In cases where the parent, guardian or interested person cannot or will not take responsibility for the child, the court can place the child under the custody of a probation officer and place him in a detention facility designated by the court.[4]

The juvenile court has wide latitude in designating a place as a juvenile detention facility. The law provides that the court can enter a general order designating any secure and safe place as a juvenile detention facility, including jails, boarding houses, foster homes, and other specialized locations.[5] The law does, however, place some restrictions on the detention of juveniles. Specifically, a child cannot be placed in any compartment or cell of a jail or police lock-up in which persons over the juvenile age are incarcerated. The law spe-

cifically requires that juveniles be placed in a room separate and apart from incarcerated adults.[6]

In some urbanized areas of the state, commissioners courts have built and maintain specialized juvenile detention facilities. Authority to maintain such facilities is based on the Texas Civil Statutes which designate the county commissioners court as responsible to maintain places of detention for juveniles. In lieu of a proper jail or juvenile detention home, the commissioners court may pay for the boarding of juveniles in foster homes or similar facilities. Such facilities may be in the same county or other counties which can provide such detention services.[7]

As in the case of adults, children may not be arbitrarily detained for an unspecified length of time. In the absence of a detention order issued by the juvenile court, a child may only be detained pending appearance before the court, to which he must be brought as soon as is reasonably possible.[8]

If a child is detained by court order, he may be held for as long as deemed necessary by the court. There is no provision in Texas law for release on bail or recognizance for a juvenile. However, a juvenile, like an adult, may be released under a writ of habeas corpus. In the case of a child held in a detention facility, the writ would be an order demanding that the child be brought before the court and reason shown why he is being detained. The writ may be sought by the child or any person for him and may be issued by any court or judge having jurisdiction, including the Court of Criminal Appeals, district courts, and county courts.[9] Any person disobeying the writ is civilly liable

and can be fined $50 for each day the child is illegally detained.[10]

Administration

Very little statistical information is available on the administration of juvenile detention facilities. As mentioned above, although the commissioners court is responsible for providing such facilities, there is no mandatory state statistical reporting law which would make such data available.

Two studies do provide some information on the administration of detention facilities. In 1970, the Law Enforcement Assistance Administration contracted with the United States Bureau of the Census to conduct a survey of all jails in the United States.[11] The results of this survey provide information on the number of jails which are designed to detain juveniles and the number of juveniles detained as of March 15, 1970.

On this date, Texas jails contained 10,720 inmates of which 169 were juveniles (1.58 percent).[12] Of this number, 98.2 percent were being held for other authorities or had not yet appeared before a juvenile judge, while 1.8 percent were classified in a post adjudicatory category.[13] The survey also revealed that of the 325 jails in Texas, 249 were designed to hold juveniles awaiting appearance before a judge.[14]

The only other available statistical information on juvenile detention facilities was collected by the Texas Criminal Justice Council in 1972. In a recent study the council attempted to survey all juvenile probation departments in the state.[15] Among the questions asked was whether the department maintained a juvenile detention facility. The

results of this study indicated that of the 161 counties that had full time juvenile probation services, 8 maintained a juvenile detention facility. It can be assumed that in the remaining counties, county jails, police lock-ups or foster homes are used for the detention of juveniles.

As mentioned previously, the commissioners court is responsible for providing funds for the detention of juveniles under the jurisdiction of their county. In this regard, it is of interest to note that of the total 1972 budget of $6.9 million expended by juvenile probation departments, $1.6 million (24.18 percent) was expended in the housing and care of juvenile detentioners.

Recommendations

The primary problem with the state's juvenile detention facilities stems from the lack of uniform standards for the designation and operation of such facilities. Although some urban counties maintain separate facilities specifically for the detention for juveniles, such an approach would not be cost effective in most Texas counties. At the present time there is wide variability in the types of institutions used to detain juveniles, relative custody provided, and available services.

Under current state law there are only two statutory guidelines affecting juvenile detention facilities. The first guideline requires that juveniles by kept in cells separate from adults although they may be kept in the same jail facility as adults. The second guideline allows the juvenile court to specify any secure place as a detention facility having no other restriction than the requirement to segregate ju-

veniles from adults.

The care of juveniles in Texas could be greatly enhanced through the development and enforcement of uniform standards for the maintenance and operation of juvenile detention facilities. Such a set of standards could be administered in two ways. The first approach would be to develop detailed operational standards and incorporate these into the state's statutes. Under this procedure the basic mechanism for enforcement would involve civil suits against any detention facility that did not meet minimum statutory requirements.

A more flexible approach would be to create a standards commission. Such a commission, with appropriate staff, could be given the authority to develop minimum guidelines and to close any detention facility which did not meet these guidelines. Under the commission approach the staff would be required to inspect all juvenile detention facilities within the state at least once a year to determine if these facilities met minimum standards. In the event that a facility did not meet minimum standards, the commission could so notify the juvenile court, requiring changes be made within a specified period of time.

The advantage of the commission approach is that the creation, administration, and updating of the standards is handled administratively rather than by statute. Such an approach would obviate the need to seek new legislation each time it was desirable to change the minimum standards.

Aside from the mechanics of definition and enforcement, there is little question that the expression of minimum standards for juvenile detention facilities would greatly upgrade the care of juveniles in

Texas. If the enforcement of these standards was through the creation of statutory minimum guidelines there would be no need for enforcement personnel since enforcement would be achieved through civil suits. The disadvantage of this approach however, is that such a mechanism would not provide for the yearly inspection of all detention facilities. If a standards commission was created, the provision for inspection would be ensured but the advantages might be offset by associated personnel costs.

The second problem associated with juvenile detention facilities is the lack of statistical information on their status and operation. It is strongly recommended that the juvenile court be required to provide annual statistical information on their use and status of juvenile detention facilities. If a standards commission was created, authority to collect such statistics could be made part of the commission's responsibility. In the absence of such a commission it is recommended that the Texas Youth Council be given authority to collect, analyze and disseminate such statistical information. Such information is significant for appraising the current status of juvenile detention facilities and for future planning on the local, regional, and state levels.

The Texas Youth Council
State Training Schools

Legal basis

With the establishment of the Republic of Texas little legal discrimination existed in the prosecution of juveniles and adults. Following the common law tradition, anyone over seven years of age was considered legally responsible for his actions, thus juveniles were pro-

secuted in the same manner as adults.[16]

By 1856 the Texas Legislature had increased the age of criminal responsibility to nine years old. However, provision was made to exempt children under thirteen years of age from criminal responsibility if it could be shown that they did not understand the criminality of their acts.[17] During the same year the legislature also enacted legislation exempting anyone under seventeen years of age from the death penalty.[18]

From the inception of the Republic through the early years of statehood there was no discrimination in the correctional treatment of juveniles and adults. All accused and convicted individuals were incarcerated either in county jails or in the state's prison, regardless of age. Recognizing the hazards and liabilities which stem from the common incarceration of juveniles and adults, the legislature created a separate reformatory for juveniles at Gatesville. This institution was designed to receive sentenced male juveniles and many of its initial residents were transferred from the state prison.[19]

In 1893 the legislature designated the Gatesville Reformatory as having exclusive custody of all males under the age of sixteen convicted of felonies and whose sentences did not exceed five years incarceration.[20] Peculiarly, the legislature made no similar provision for the custody of female juveniles under the age of sixteen nor for males whose sentences exceeded five years except for the state prison.

In 1899 the administrative authority of the Gatesville School was amended and placed under a Board of Commissioners. Its administration was again amended in 1920 and placed under the Board of Control which ad-

ministered the Gatesville School until 1949 when it became the responsibility of the Youth Development Council.[21]

Recognizing the need for adequate custodial care for female juveniles the 32nd Legislature made provision for the Gatesville State School for Girls in 1913. Other state training schools were created by the legislature including the State School for Negro Girls, authorized in 1927 and informally opened in 1947.

The administration of the state's training schools was again reorganized in 1957 with the creation of the Texas Youth Council. The Texas Youth Council Act represented a legislative milestone in the history of juvenile corrections in Texas. Under the act the council was charged with the responsibility of administering correctional facilities for delinquent youths and providing such training and education as deemed necessary for their rehabilitation.[22]

The act also extends to the council the authority to release on parole juveniles within the state's training schools and to supervise them within the community until such time as they are no longer within the council's custody.[23]

The Texas Youth Council Act specifies that the council consist of three members to be appointed by the governor with the consent of the senate. The concern of the legislature is expressed in the requirement that the members of the council be outstanding citizens who have manifested interest and concern for youth. The purpose of the council is to set policies for both the institutional care and community supervision of youth under the custody of the Council. The actual administration of the council is vested in an executive director who is hired

by the council.[24]

In enacting the Texas Youth Council Act the legislature placed broad responsibility on the council beyond simply providing for custodial care and community supervision of persons within its custody. It is charged with a variety of extended responsibilites including the ongoing study of the sources and problems of juvenile delinquency and the provision of assistance and cooperation with local and state agencies concerned with the development of programs directed toward the prevention of youth crime and delinquency.[25] The council is also required to report to the legislature and the governor as to its programs and accomplishments in the treatment of children committed by the courts, and to make specific recommendations as to how the state might best handle young offenders.[26]

One of the primary purposes of the act was to specify a single agency to supervise the institutional commitment of adjudicated delinquents. The act requires that any juvenile adjudicated a delinquent who is not released by the court unconditionally, nor placed on probation or other form of community supervision, shall be committed to the Texas Youth Council.[27]

The act is quite clear that the legislature did not intend the state training schools to be warehouses for adjudicated delinquents. The act requires that the council examine each child upon receipt and explore all pertinent aspects of his life and behavior pursuant to his subsequent rehabilitation. The council is required to re-examine each child at least once a year so as to assure a realistic appraisal of the child's needs and the need to hold him within institutional custody.

If the council does not re-examine the child at least yearly, the juvenile is entitled to petition the committing court for discharge, unless the council can present satisfactory evidence for the child's continued institutional care.[28]

The act also attempts to protect the security and privacy rights of delinquents within the care of the Texas Youth Council. All records concerning the youth are specifically defined as private records and can only be obtained upon order of a district court.[29]

The act provides the council broad custodial latitude in the treatment of youths committed by the courts.[30] The council can confine the youth within one of the state schools, release him under community supervision, and reconfine him as frequently as is deemed necessary both for the child's good and for the public's welfare. The council may require youth within its custody to participate in a broad variety of programs which are deemed useful for his social development. These programs may include any moral, academic, vocational, physical, or recreational programs which are specifically designed for the child's benefit and which are neither simply self-serving nor exploit the child's labors.

Unlike adult correctional institutions youth are not committed to the Youth Council for a predetermined period of time. The youth may be released from a state training school when it is considered that such a release is to the benefit of the child and the community.[31] Usually juveniles are released under parole supervision; however, the act specified that all custody by the council shall be terminated when the youth reaches his twenty-first birthday.[32]

Administration[33]

Organization

As mentioned previously, the Texas Youth Council is statutorily headed by a three man council, appointed by the governor with the consent of the senate and for six-year terms. The council members, who do not receive any pay for their service, are charged with the responsibility of establishing the broad policies of the agency. The day-to-day operation of the council is directed by the executive director. He is appointed by the council and is responsible to the council for the administration of the council's schools and parole supervision program.

The central office of the council is located in Austin, Texas. The office is composed of the executive director, a deputy executive director, seven directors and supportive staff. Directors are responsible for functional programs in the areas of child care and training, maintenance and construction, finance, research, mental health and psychiatric services, parole supervision, and religious training.[34]

At present the council maintains 13 facilities and administers 22 parole offices throughout the state.[35] Of these institutions, 9 are dedicated to the care of adjudicated delinquents, 3 are charged with care of dependent and neglected children, and 1 facility, The Parrie Haynes Ranch, has been developed as a campground and recreational facility.[36]

The council maintains four institutions for delinquent girls and five institutions for delinquent boys. These include both minimum and maximum security treatment facilities, as well as individual reception centers for both boys and girls. The Brownwood Reception Center for

Delinquent Girls is designed to perform the initial evaluation of each girl committed by the courts to determine the child's needs and to properly assign the child to the various programs within the Texas Youth Council. A similar function is performed by the Gatesville Reception Center for Delinquent Boys.[37] The council also maintains a halfway house for delinquent boys in Houston. This facility serves as a temporary community-based residential facility to assist boys in their transition from a state school to the community. A similar facility, Bridge House, is operated in Fort Worth for delinquent girls.[38]

Budget

It is somewhat difficult to present a simple analysis of the budget for the Texas Youth Council since the agency does receive funds from other than general appropriations. The general appropriations for the Council for 1973 is approximately $17.8 million in addition to subsidies received under the federal Title I program which include grants for $363,378. With income derived from other grant sources the total projected operating expenses for the council for 1973 are approximately $18.1 million.[39]

Since part of these expenses are involved in the administration of parole, to compute the cost of maintaining state schools it would be necessary to subtract from the total operating expense approximately $755,000.[40]

Possibly a better way to interpret the costs associated with the maintenance of the state schools would be to look at the average yearly cost associated with keeping a child in any one of the schools. These costs range from a low of $4210 per child per year in Gatesville School

for Boys to a high of $11,000 per child in the Giddings State School. The unit cost of the Giddings State School, however, is artificially high since this is a new facility which is fully staffed but is not yet up to its full occupancy level. Excluding the cost for operating the Giddings State School, the average unit cost among the remaining state schools was approximately $6,000 a child during 1972.[41]

Manpower

Because of the diversity of programs involved in the administration of the state's training schools, the council employs a wide variety of employees. These include medical doctors, psychiatrists, psychologists, social workers, house parents, professionals in the area of vocational training and education, custodial officers, maintenance personnel, and other supportive staff. Excluding those institutions for dependent and neglected children, the remaining state schools which have custody of adjudicated delinquents have a staff in excess of 1,400 people.

Calculation of an average salary for institutional workers is somewhat complicated because of the great diversity in types of employees retained; however, the starting salary for a Correctional Officer I is $5,256 per year.[42]

Admissions

During 1971 the Youth Council admitted 4,149 juveniles. Of this number, approximately 60 percent were adjudicated delinquents committed to the council by juvenile courts, 5 percent involved transfers between institutions, and 35 percent were juveniles already in the custody of the council and returned to the council's training schools after tem-

porary absences such as furloughs, hospital, escapes, and parole returns.[43]

All newly admitted juveniles are retained at the appropriate reception center for diagnosis and classification after which they are assigned to one of the council's residential facilities. During 1971 the average daily population of the council's facilities was 2,442, which is approximately the same as its average daily population five years previously.[44] During 1971 the council paroled 2,420 boys and girls. Of these, approximately 99 percent were paroled directly from the training schools while 1 percent were paroled while on temporary leave from a school.[45]

Services

The rehabilitative services provided by the council for school residents may be divided into nine areas, including: diagnosis and evaluation, child care, social service, education, recreation, religious training, pre-release, health care, and residential placement. Although each service area is significant in the child's ultimate rehabilitation, the council considers education to be one of the most important elements in its treatment program.[46]

The state schools provide regular academic and vocational education accredited by the Texas Educational Agency. Every effort is made to assure that the type and quality of education provided is comparable to that found in the public schools of the state. The council has established eight separate, fully accredited academic and vocational programs for boys and three for girls.[47]

Unlike the public school system, the council's schools operate

11 months a year and require the attendance of all residents. Each of the council's schools is an independent school district and the staffs of the schools meet the same standards for employment as teachers in any other accredited school district in the state.[48] The council makes every effort to synchronize a child's education so that when he leaves the state school he may re-enter the public school system without loss of time or credit.

Since the majority of children committed to the state schools have a history of poor academic performance, a variety of special educational programs are available. One example is the Educational Enrichment and Language Training Center at the Gatesville School for Boys, which treats such disorders as dyslexia.[49]

A pre-release program is designed to prepare the youth for a subsequent reintegration into the community. Activities incorporated in this program are designed to provide practical knowledge and experience for everyday living. This program emphasizes activities that promote social contact, individual responsibility, and good citizenship.[50]

Recommendations

Since the enactment of the Youth Council Act, the state has developed a number of facilities for the care and custody of adjudicated delinquents. These facilities provide a broad variety of programs to identify the child's needs and to assist him in returning to the community. However, the Youth Council has little control over the types of youngsters committed to its institutions since such commitments emanate from the state's juvenile courts. Because of the absence of

community-based treatment programs in many counties, the council receives youth who would be better treated in their own communities.

The absence of full time juvenile probation services in many of the state's counties leaves the juvenile courts little discretion in treating juveniles other than the commitment to state training schools. The extension of juvenile probation services to all 254 counties would greatly facilitate the operation of the state's schools. Although the Texas Criminal Justice Council, through grants under the Law Enforcement Assistance Administration program, has facilitated the development of juvenile probation services in many counties, there still remain broad areas of the state in which no such services exist.

Another problem area for the council involves the receipt of adjudicated delinquents who are also mentally retarded. A significant problem exists at the local level in the proper diagnosis and treatment of the mentally defected delinquent. In so far as such youngsters are mentally retarded they could be committed to one of the state's schools for the mentally retarded, were it not for the fact that the waiting period for admission to these schools is about three years. In the absence of immediately available facilities for the mentally retarded delinquent, the juvenile court in many cases has no alternative other than commitment to the Texas Youth Council. While the council is equipped to treat the delinquent, the mentally retarded delinquent does present particular treatment problems for the council.

It is recommended that studies be initiated to determine the incidence of mentally defective delinquents and that alternatives be developed for their treatment. Certainly the current program of the Department of Mental Health and Mental Retardation to establish community health centers is an initial step in this direction.

As mentioned previously, the Youth Council has developed halfway house programs in Houston and Fort Worth. The concept behind these programs is to provide the youth a gradual integration into the community. It is recommended that the council encourage the expansion of this program in the various urban centers of the state. There is every indication that such programs not only assist the youth in returning to the community but are effective in reducing recidivism.

Adult Corrections

City and County Jails

Legal basis

Under Texas law a jail is defined as any place of confinement used to detain a prisoner and administered by local units of governments.[51] A prison is a state administered facility used to incarcerate individuals convicted of felonious crimes and sentenced for a period of incarceration by a district court.

The basic differences between the two types of institutions stem from the unit of government responsible for their administration and from the status of the person detained. While a prison is responsible for the incarceration of convicted felons, a jail detains persons awaiting trial for the commission of a crime, either a felony or misdemeanor, those convicted of misdemeanor and individuals held for other authorities.

The Texas Civil Statutes empower the commissioners court to main-

tain a jail within the county. The law requires that such jails be maintained in a safe and suitable manner, with adequate provisions made for the security and sanitation of the facility and the safety and health of the inmates.[52] In order to maximize both the security of the institution and the safety of the inmates, provision is made for various types of segregation of inmates within the jail.[53] This requires the segregation of female inmates from males as well as segregation of inmates on the basis of type of offense, security risk, and other criteria germane to the proper administration of the facility.

While some counties have both city and county jails, rural counties frequently incorporate such operations into a single facility. Due to the large number of sparsely populated counties in the state, legal provision has been made for counties of less than 20,000 in population to contract with cities within the county to finance, construct, maintain and operate jails for joint city and county use.[54]

Under Texas law the sheriff is the keeper of the jail.[55] He is responsible to receive anyone committed by a warrant from a magistrate or to hold anyone in want of bail.[56] The sheriff is immediately responsible for assuring the security and sanitation of the facility and the safety and health of persons incarcerated. In addition to having custody of state prisoners, the sheriff is also required to receive any federal prisoners tendered by United States Marshalls.[57] The sheriff is entitled to receive a daily fee for the keeping of prisoners; however, the receipt of this fee is only for inmates held within the jail in his jurisdiction.[58] No fee is received for inmates charged within the sheriff's county and held in other county jails.[59]

Unlike other states, Texas has no provision for statewide uniform statistical reporting on the administration of county jails. The sheriff, however, is required to make an annual report to the commissioners court indicating the number of inmates incarcerated, the associated cost, and any profit secured from the retention of federal prisoners.[60]

To insure the proper custody and treatment of county prisoners, the law makes provision for the sheriff, with the approval of commissioners court, to hire guards and matrons to administer the jail facility. In emergency situations when the commissioners court is not readily accessible, the sheriff may hire additional custodial officers with the approval of the county judge.[61]

Unlike some states, Texas has no provision for parole from a county jail. However, there is legal provision for the commutation of the sentence of a county inmate. The sheriff may commute up to one-third of an inmate's original sentence based upon the inmate's adjustment and good behavior while in jail.[62] This is similar to the provision for the granting of "good time" within the state's prison system.

For inmates held in county jails because of refusal to pay fines, provision is made for "working off" the fine.[63] The Code of Criminal Procedure allows an inmate to reduce his fine by a set rate for each day's work performed within the jail facility. In those jails not having a county farm or adequate work programs, the prisoner is allowed to reduce his fine by a specified amount for each day he served within the jail facility.

Administration

In 1972 the Texas Criminal Justice Council published a detailed analysis of the 325 jails identified in Texas by the United States Bureau of the Census.[64] This total does not include police lock-ups that do not detain individuals for more than 48 hours. Of the 325 jails identified, 235 were county jails and 90 were city jails.[65] Among the city jails, 30 were in communities in excess of 25,000 in population and 60 were in cities less than 25,000 in population.[66] Texas has more jails than any other state, regardless of population. The large number of jails in Texas is a function of the fact that there are 254 counties in the state of which 235 operate jail facilities.

Distribution of inmates

As of March 15, 1970, the Bureau of the Census identified 10,720 inmates incarcerated in Texas jails.[67] In terms of total number of inmates, Texas ranks third in the nation, preceded by California (27,672) and New York (17,399).[68]

It is of interest to contrast those inmates awaiting trial with those who have been convicted. Of the 10,720 inmates identified, 7,353 (68.59 percent) were awaiting trial and 3,367 (31.41 percent) had been convicted.[69] This indicates that the preponderance of jail inmates in Texas are awaiting trial as opposed to a national pretrial average of 51 percent.[70]

As might be expected, the vast majority of jail inmates are adult males (93.2 percent). The remainder are adult females (4.8 percent) and juveniles (1.5 percent).[71]

Manpower

As of March 15, 1970, the 325 city and county jails in Texas employed 1,144 full time equivalent employees.[72] Texas ranks sixth in the nation in terms of total jail employees, preceded by California, Florida, Illinois, New Jersey, New York, and Pennsylvania.[73] Comparing total inmates to staff employees, the state average ratio of inmates to staff is 10:1.[74] Texas has fewer staff per inmates than all but two states in the nation (Idaho and Mississippi).[75]

In 1970, the total March payroll for jail employees in Texas was $533,155. The average salary for jail employees was $472 a month, which placed Texas 31st in the nation in terms of custodial officers' salaries.[76]

Facilities

The 325 Texas jails had a total designed capacity of 17,191 inmates.[77] Considering that there were 10,720 inmates incarcerated on March 15, 1970, this indicated that on the average Texas jails were 38 percent under capacity. However, this figure is somewhat deceptive since rural jails are usually under capacity while urban jails are often over capacity. The degree of crowding in the state's jails ranges from some jails having no inmates to others being as much as 88 percent over capacity.

Texas jails vary significantly in terms of the age of the facilities. Of the total 5,690 jail cells within the state, 55 percent were built within the last 25 years, while approximately 31 percent are between 25 and 50 years old. One out of 10 jail cells are between 51 and 75 years old while 4 percent are between 76 and 100 years old. While it might be thought that older jails would be found in rural communities,

the fact is that antiquated jail facilities can be found in both urban and rural counties throughout the state.[78]

Of the 325 jails in Texas, 249 are designed to hold pre-adjudicated juveniles. Similarly, 63 jails hold adjudicated juveniles awaiting further legal action.[79]

Financing

The reported operational costs for Texas' 325 jails during 1969 was $10,848,000. Planned construction costs for 1970 totaled $973,000 for renovation of existing jails and construction of new jails.[80]

Services

The Census Bureau survey also attempted to determine the types of inmate services offered within city and county jails. However, questions concerning types of services were only asked of county jails, and city jails in communities with populations in excess of 25,000. Of the 265 jails which fit this criterion, only 7 (2.6 percent) had recreational facilities, and only 8 (3 percent) had educational facilities. One hundred of the jails surveyed (37.7 percent) had medical facilities and 181 (68.3 percent) had visiting facilities including those used by the inmates' attorneys. Finally, the Bureau of the Census found that 7 Texas jails (2.6 percent) had no toilet facilities.[81]

Recommendations

As evidenced from the data presented above, there is wide variability in both the physical condition and administration of the state's jails. Although there are statutory minimums affecting the construction and operation of jails in Texas, enforcement is weak and many jails fall

far short of these standards.

One alternative for upgrading the status of the state's jails would be to create a jail inspection commission which would be charged with the responsibility of annually inspecting all jails in the state and would have authority to close any jail which did not meet minimum standards. It is also recommended that the minimum standards not be incorporated into law but be developed administratively by the commission allowing greater flexibility in updating standards as need requires.

In addition to this jail inspection responsibility, the commission could also publish a monthly newsletter making available to jail administrators pertinent information on a variety of problems in community-based corrections. This could include discussion of diversionary programs, officer training, dietary programs, recent appellate court cases affecting jail administrations, rehabilitation, and other areas. Such a research and development and feedback mechanism would be most helpful to the state's jail administrators in assisting them to meet minimum standards.

If the national jail statistics are accurate, Texas incarcerates more people per capita in its local detention facilities than does any other state. This is not cost effective or does it necessarily correlate with the greatest public safety. The absence of diversionary programs in many communities allows for no alternative other than incarceration. Local communities should be encouraged to explore the utility and cost effectiveness of diversionary programs as a means of offsetting the need for jail construction or expansion. The use of detox-

ification programs is probably one of the most significant diversionary programs to be considered. The use of recognizance programs, misdemeanant probation, and the use of summons and citations in lieu of arrest can greatly reduce jail populations.

It is strongly recommended that a mandatory reporting mechanism be created so that annual statistics be made available on the operation and physical condition of the state's jails. The collection of such statistics could be done by a state jail inspection commission or in the absence of such a commission, by the Texas Department of Corrections. Such information is vital to the proper programing of the criminal justice system in general and to the planning of community-based corrections in particular.

The Texas Department of Corrections

Legal basis

The state's prison system began with the establishment of the Republic of Texas. During the early days of the Republic, all criminal offenders were under the jurisdiction of the sheriff regardless of the type of offense or conviction status. By 1842 it was recognized that this county-based correctional system left much to be desired and in that year the Texas Congress set up a committee to find a location for a state prison. Based on the recommendations of this committee, the congress established a Texas Prison on a 10-acre site in Huntsville. The keeper of the prison was directly responsible to the President of the Republic and was authorized to hire guards to ensure the safekeeping of the convicts. In authorizing the prison the congress made no

provisions for the rehabilitation of the inmates who were employed at whatever activities were thought by the keeper of the prison to be the most profitable to the Republic.[82]

After Texas joined the Union, the first legislature enacted legislation for the establishment of a state prison in 1846. This act authorized the governor to appoint a three-man commission to purchase land for the prison and to supervise the construction of facilities.[83]

The Texas Prison received its first inmate in 1849 and grew in size and population until the advent of the Civil War. During the war, the prison was used as a prison camp for the incarceration of Union soldiers.[84]

The first major legal revision of the Texas prison system was initiated by the 40th Legislature in 1927. At this time the legislature authorized the creation of the Texas Prison Board to set policy for the prison system and created the position of general manager to supervise a day-to-day operation of the system.[85]

The second major legal revision was enacted by the 55th Legislature in 1957.[86] The legislature changed the name of the Texas Prison Board to the Texas Board of Corrections and the Texas Prison to the Texas Department of Corrections. The name of the general manager was changed to director of corrections and his responsibilities were greatly enhanced.[87]

Previously, the basic legal authority for the Texas Department of Corrections stemmed from the Texas Constitution which empowered the Texas Legislature to provide for the management and control of a state prison system.[88] Under its current legislative mandate, the Texas De-

partment of Corrections is to be a self-sustaining prison system which provides for the humane treatment of inmates. The law also requires the department to encourage the training of inmates and to provide opportunities for rehabilitation.[89]

Currently the Texas Department of Corrections is administered by the Texas Board of Corrections composed of nine members appointed by the governor. The day-to-day administration of the department is supervised by the director of corrections who is hired directly by the board.[90]

The director has broad statutory authority including the hiring and firing of personnel and the establishment of rules and regulations pursuant to the humane treatment of the inmates, their training, education and discipline, segregation and classification.[91]

In order to assist the director in maximizing these goals the legislature has enacted various provisions allowing for the establishment of a school within the department, hospital facilities, and other programs associated with the general health and rehabilitation of the inmates.[92]

The director of corrections can be removed by the board at any time for inefficiency or improper conduct.[93] The law provides, however, that the board must notify the director of its intentions and he must be given an opportunity to have a hearing before the board.[94]

In order to assure proper discipline and control, the legislature has authorized the director of corrections to grant the commutation of sentence. Under this provision, the director of corrections is empowered to grant "good time" to inmates who properly abide by the rules and regulations of the department. Under this system all inmates

are classfied into one of three classes.[95] Class I inmates may have 20 days of their sentence commuted for each month served while Class II inmates may have 10 days commuted from their sentence for each month served. Class III inmates receive no commutation of sentence. In addition to this classification system, approved trustees may have 30 days of their sentence commuted for each month that they serve.[96]

The director of corrections is authorized to take away an inmate's "good time" for failure to comply with the department's rules and regulations.[97] Through this system of commutation, the department attempts to control and regulate the behavior of the inmates and to encourage their participation in programs geared toward their eventual rehabilitation.

Aside from furloughs and other forms of temporary release, inmates depart from the Texas Department of Corrections in one of two ways. If an inmate has served his prescribed sentence with allowances for "good time", the director of corrections is required to discharge the inmate.[98] The director or his executive assistant is required by statute to prepare and deliver to the inmate a written discharge indicating the name of the inmate, the offenses of which he was convicted, the county of convictions, the time he served and any portion of that time which was commuted.

By law, the department is directed to provide the inmate with clothing and any money held in trust for the inmate. Inmates discharged by the prison are provided with funds by the state. The amount of money provided is determined by the amount of time the inmate served. The minimum amount is twenty-five dollars and the maximum is one hundred

given to those who served twenty years or more, not including commuted time.[99]

The other means of release from the Texas Department of Corrections is parole. Parolees, while under the supervision of the Texas Board of Pardons and Paroles are still within the legal custody of the Texas Department of Corrections for the duration of their parole. Individuals released under parole or conditional pardon are given five dollars and a railroad or bus ticket to the county of conviction.[100] If the conditions of parole require that the inmate report to a specific location, the inmate is issued a bus or railroad ticket to the specified location.

Administration[101]

Organization

As mentioned previously, the Texas Department of Corrections is statutorally composed of a nine member board appointed by the governor and the director of corrections. Under the director are six assistant directors concerned with various areas of administration. These include assistant directors for treatment, industry, new construction, agriculture, business and special services. Included within special services are data processing, employee training, records and classification.[102]

The department administers 14 separate prison units in east Texas distributed from southeast of Dallas to south of Houston. Among these units is the Diagnostic Center where all new inmates are held for 30 days prior to classification and assignment to one of the other units in the system. Other specialized units include the Goree Unit for women, the Ferguson Unit which is used primarily for youthful offenders and the Jester Unit which incorporates the pre-release program of the department.[103]

The 1957 legislative act mandated that the department by a self-maintaining system providing humane treatment and the opportunity for training and rehabilitation of the inmates. Pursuant to this objective, the department has developed a broad-based agricultural and industrial program providing many of the goods and services required to maintain this large institution. Every effort is made to provide work for all inmates, unlike other state prisons where the inmates have little or nothing to do. The department has also developed a variety of treatment and rehabilitation programs which range from vocational training to primary, secondary and college education programs.[104]

Population

Currently the department has within its custody in excess of 16,000 men and women. During 1972, the department received 6,734 new inmates as well as a number of readmissions including persons returning from bench warrants, escapees, parole violators, persons returning from a medical reprieve, and others. During the same year, the department released 3,828 inmates under parole supervision and discharged 3,285 at the expiration of their sentences.[105]

Approximately 20 percent of the inmates are sentenced to a period of from four to five years while about 25 percent have sentences between five and ten years. Of all new inmates admitted during 1972 approximately 16 percent were committed to sentences in excess of 20 years.[106]

The inmate population is normally composed of about 95 percent

males, of whom 41 percent are Caucasians, 43 percent Negro and most of the rest are of Mexican-American background. Approximately one in three has served prior commitments in the department, about two out of three have previously served jail sentences and approximately one in six has been previously incarcerated in other state prisons.[107]

The educational equivalency level of new inmates is usually between 5 and 6 years, while the average intelligence quotient (IQ) is in the 80's, including about 7 percent whose IQs fall below 70.[108] For comparison purposes, it might be noted that individuals with IQ's below 70 are usually considered mentally retarded.

Budget

Because of the development of broad agricultural and industrial programs, it is difficult to calculate the true cost of the operation of the Texas Department of Corrections. One method would be to define the income value of all services provided within the department, adding to it income received by general appropriations. Using this method of calculating cost, the total expenses for the operation of the Texas Department of Corrections in 1970 was $41.3 million. Of this total expense, $24.2 million were recouped through the prison's agricultural and industrial enterprises.[109]

Another way of looking at operating costs would be to total all cash expenditures and subtract from this amount the income produced by the prison's industrial and agricultural programs. Using this method of calculation, the department's operating cost in 1970 equaled $28.2 million. This was offset by income derived from prison programs equaling approximately $11 million for a net loss or cost of $17.2 million.[110]

Yet another way of calculating the cost of the prison system is the cost per day per inmate. Adjusted for income derived from prison industries and agriculture, this average was $3.31 in 1972. The total state appropriation for the department for 1972 was $26.8 million.[111]

One should bear in mind, however, that the indirect costs of incarceration are high. These costs include payments made by the state in the form of aid to dependent children of the families of men incarcerated in the department, and lost income and taxes that might have been paid had these men not been incarcerated.

Manpower

The Texas Department of Corrections employs a wide diversity of persons in various functional areas including custody, treatment, production, and supportive services. In addition to the Board of Corrections and the director there are six assistant directors, 14 wardens and 16 assistant wardens.

There are 1,800 correctional officers whose primary responsibility is the custody of the inmates and the security of the system. The starting salary for correctional officers is currently $500 a month. There are 114 employees in the area of treatment, and the system is supported by 105 clerical personnel.[112]

The manpower of the prison is augmented by contracts and working agreements with a variety of state and federal agencies. Currently the department has contracts with the State Department of Welfare, the Commision for the Blind, the Texas Employment Commission, the Texas Commission on Alcoholism, and the University of Texas Medical School at

Galveston. The Department has also developed working agreements with the Veterans' Administration, the Social Security Administration, the Baylor College of Medicine (which provides resident surgeons to the prison) and John Sealy Hospital in Galveston (which provides residents in ophthalmology).[113]

In addition to these agencies, the prison provides office space for the institutional parole officers of the Texas Board of Pardons and Paroles and for lawyers of the Attorney General's Office who assist inmates in writing writs and other legal matters.

Programs

Aside from its agricultural and industrial programs, the department has developed a variety of specialized programs specifically geared for the educational and vocational rehabilitation of the inmates. The Windham School District, created by the legislature in 1969, is a fully accredited educational program supported by the Minimum Foundation Program.[114] Essentially this is a public school providing primary and secondary education for the inmates. There are currently more than 8,000 inmates enrolled in academic classes provided by the Windham School and each year approximately 1,000 inmates receive GED certificates or high school diplomas.

The department has also established vocational training programs including one administered in cooperation with Texas A&M University involving training for heavy equipment operation and water and sewage plant operation.[115] The department has established a barber college under a grant from the Texas Criminal Justice Council with approval of the State Board of Barber Examiners.[116] Under the Manpower Development

and Training Act (MDTA), and in conjunction with the Texas Educational Agency and the Texas Employment Commission, the Department has developed seven occupational training programs which are capable of handling approximately 20 men in each class.[117]

Several area junior colleges including Alvin Junior College and Lee College of Baytown have developed college programs for qualifying inmates. In the fall semester in 1971, 60 inmates received Associate of Art degrees.[118]

Two essential parts of the department's treatment program include the proper diagnosis and classification of all incoming inmates so as to properly relate inmates needs and program resources, and the Pre-release Center located at the Jester Unit. The purpose of this latter program is to prepare inmates about to leave the department for their reintegration into the community. The pre-release program provides a variety of services including counseling and psychological services, vocational rehabilitation services, employment counseling and job placement services. The pre-release program was initiated in 1963 and is credited with reducing the recidivism rate in Texas from about 38 percent to a current rate of approximately 20 percent.[119]

Recommendations

In recent years the Texas Department of Corrections has experienced a significant increase in the number of men and women committed by the state. Currently the department is receiving over 6,000 commitments a year. It is recognized by the department and many concerned individuals throughout the state that some individuals committed to the

state's prison system could be more effectively handled by probation supervision. However, the absence of full time probation services in many Texas counties provides virtually no sentencing alternatives for felons other than commitment to the Department of Corrections.

Any concerted effort to extend probation services throughout the 254 counties in the state would greatly ease the administrative problems of the department as well as reduce its operational costs. A number of alternatives exist for the extension of probation services including state subsidy of probation services in rural areas; the administration of probation by a state agency, such as the Board of Pardons and Paroles; or a statutory requirement that all counties maintain full time probation services. Regardless of the mechanism employed to assure statewide coverage of probation services, the creation of such services would greatly benefit the Department of Correction.

As described in a previous section, inmates exit the Department of Corrections either at the termination of their sentence or by release under parole supervision. In contrast with other states, the use of parole in Texas is relatively low. It is recommended that Texas develop a mandatory release system comparable to that used by the Federal Bureau of Prisons. Under this federal system all inmates must be released to parole supervision, at least 120 days prior to the expiration of their sentences. Such a system of mandatory community supervision in Texas during the last few months of a man's sentence would facilitate his integration into the community and should have a positive effect on the department's recidivism rate.

The quality of correctional administration is in great measure a function of the quality of the staff, which in turn is related to salaries. At present correctional officers in the department receive a starting salary of $500 per month. Considering the authority and responsibility invested in these officers coupled with the rapidly increasing cost of living, every effort should be made to increase the salary structure for the Department's personnel. Prison units near urbanized areas, such as Houston, have experienced difficulty in recruitment because of the competing salaries in such areas. The low salary structure also impedes the recruitment of appropriately trained and educated personnel.

Unlike prisons in other states which are restricted by law from developing self-supporting industrial and agricultural programs, the Texas Department of Corrections is in great measure self-sustaining. From the vantage point of organized labor, the employment of inmates in the industrial, agricultural and construction activities of the prison system, infringes on the free labor market. In the past few years, various bills have been introduced in the legislature which would greatly curtail the department's self-sustaining programs.

It is recommended that the department be protected from the enactment of the legislation that would restrict the use of inmates in these programs. While the restriction of inmate labor may create some jobs for the free labor market, the disadvantages are significant. Such restriction would greatly increase the cost of operating the department. In addition such restrictions would eradicate the vocational benefits which accrue to inmates working in such activities and might create a

severe problem in finding sufficient work for the inmates within the system.

Footnotes

[1]Vernon's Annotated and Revised Civil Statutes of the State of Texas, art. 2338-1, sec. 11. Cited hereafter as V.A.C.S.

[2]Ibid., sec. 8.

[3]Ibid., sec. 11.

[4]Ibid.

[5]Ibid., sec. 11.

[6]Ibid., sec. 17.

[7]Ibid., art. 5138.

[8]Ibid., art. 2338-1, sec. 11 (c.f. Opinion, Texas Attorney General, No. 0-7227, Sept. 5, 1946).

[9]Vernon's Annotated Penal Code of the State of Texas, art. 117. Cited herafter as V.A.P.C.

[10]Ibid., art. 146 and 147.

[11]Law Enforcement Assistance Administration," The National Jail Census - 1970, (Washington D.C.: U.S. Government Printing Office, 1971).

[12]Friel, C. M. Texas Jails - 1970, (Austin, Texas: Texas Criminal Justice Council, 1972), p. 11

[13]Ibid., pp. 11-12.

[14]Ibid., pp. 22-23.

[15]Personal correspondence with Mr. Hugh McLeland, The Texas Criminal Justice Council, Austin, Texas, April, 1973. (Results of this survey should be published in September, 1973).

[16]Ordinances and Decrees of the Constitution, 1836-1838.

[17]General and Special Session Laws of Texas, 1859; V.A.P.C., sec. 36.

[18]Ibid., art. 37.

[19]General and Special Laws of Texas, 1887.

[20]Vernon's Annotated Code of Criminal Procedure of the State of Texas, (1893) art. 2951. Cited hereafter as V.A.C.C.P.

[21]V.A.C.S., art. 5143c, sec. 1.

[22]Acts of the 55th Legislature, 1957, V.A.C.S., art. 5143d, sec. 1.

[23]Ibid.

[24]Ibid., sec. 6.

[25]Ibid.

[26]Ibid.

[27]Ibid., sec. 12.

[28]Ibid., sec. 16.

[29]Ibid., sec. 33.

[30]Ibid., sec. 18.

[31]Ibid., sec. 27.

[32]Ibid., sec. 31.

[33]Information from reports of Texas Youth Council and personal correspondence.

[34]The Texas Youth Council - 1971, (Austin, Texas: The Texas Youth Council, 1971), p. 6.

[35]Ibid., pp. 15-20.

[36]Ibid.

[37]Ibid., p. 15.

[38]Ibid., p. 19.

[39]Figures made available in personal correspondence with the Texas Youth Council.

[40]Ibid.

[41]Ibid.

[42]Ibid.

[43]The Texas Youth Council - 1971, p. 21.

[44]Ibid., p. 22.

[45]Ibid.

[46]Ibid., p. 37

[47]Ibid.

[48]Ibid.

[49]Ibid., p. 38.

[50]Ibid., pp. 47-49.

[51]V.A.P.C., art. 345.

[52]V.A.C.S., art. 5115.

[53]Ibid., art. 6166a.

[54]Ibid., art. 5115a.

[55]Ibid., art. 5116.

[56]V.A.C.C.P., art. 42.

[57]V.A.C.S., art. 5117.

[58]V.A.C.C.P., art. 1040, sec. 1.

[59]Ibid., art. 1037.

[60]Ibid., art. 1040, sec. 2.

[61]V.A.C.S., art. 6871., V.A.C.C.P., art. 1041.

[62]V.A.C.S., art. 5118a.

[63]V.A.C.C.P., art. 793, V.A.C.S., art. 6812b, sec. 18.

[64]Friel, C. M. Texas Jails-1970, (Austin, Texas: Texas Criminal Justice Council, 1972).

[65]Ibid., p. 14.

[66]Ibid.

[67]Ibid., p. 19.

[68]The National Jail Census - 1970, p. 9.

[69]Friel, C. M., p. 11-12.

[70]Ibid

[71]Ibid.

[72]Ibid., p. 19. (In calculating full time equivalent employees, two part time employees are considered equivalent to one full time employee. c.f. p. 4 of same reference.)

[73]The National Jail Census - 1970, p. 9.

[74]Friel, C. M., p. 19.

[75]The National Jail Census - 1970, p. 9.

[76]Friel, C. M., p. 24.

[77]Ibid., p. 26.

[78]Ibid., p. 27.

[79]Ibid., pp. 22-23.

[80]Ibid., p. 19.

[81]Ibid., pp. 28-29.

[82]The History of the Texas Department of Corrections, (Huntsville, Texas: The Texas Department of Corrections, 1973). (Unpublished document made available by the Research Division of the Texas Department of Corrections.)

[83]Ibid.

[84]Ibid.

[85]Acts of the 40th Legislature, 1927.

[86]V.A.C.S., art. 6166a, et. seq.

[87]Ibid., art. 6166b.

[88]Vernon's Annotated Constitution of the State of Texas, art. 16, sec. 58 (was deleted by constitution amendment in election August 5, 1969).

[89]V.A.C.S., art. 6166a.

[90]Ibid., art. 6166j.

[91]Ibid.

[92]Ibid., art. 6203b and 6203c.

[93]Ibid., art. 6166p.

[94]Ibid., art. 6166k.

[95]Ibid., art. 61841.

[96]Ibid.

[97]Ibid.

[98]Ibid., art. 6166z(1).

[99]Ibid.

[100]Ibid.

[101]The material used in this section is taken from annual reports of the Texas Department of Corrections and other information made available by the department.

[102]Texas Department of Corrections - 1971. (Huntsville, Texas: Texas Department of Corrections, 1972), pp. 4-5.

[103]Ibid., pp. 8-14.

[104]Ibid., pp. 16-70.

[105]Statistical Information made available by Mr. Steve Pipkin, Research Division, Texas Department of Corrections in personal correspondence.

[106]Ibid.

[107]Friel, C. M., Texas Prisoner Statistics, (Austin, Texas: Texas Criminal Justice Council, 1971), pp. 16-24.

[108]Ibid.

[109]Frazier, R. L., "Incarceration and Adult Probation in Texas: A Cost Comparison," Unpublished Master's Thesis, Sam Houston State University, May, 1972.

[110]Ibid., p. 23.

[111]Personal Correspondence with Mr. Steve Pipkin, Research Division, Texas Department of Corrections.

[112]Ibid.

[113]Ibid.

[114]The Texas Department of Corrections - 1971, pp. 60-61.

[115]Ibid., p. 61.

[116]Ibid.

[117]Ibid.

[118]Ibid., p. 62.

[119]Ibid., p. 64.

CHAPTER VI

PROBATION AND PAROLE

Mary G. Almore
The University of Texas at Arlington

More or less informal probation and parole services have been available in the United States since the early nineteenth century. The first law providing for probation was enacted in Massachusetts in 1878 while the first law pertaining to formal parole was passed in New York in 1869.

The history of statutory provision for these extra-institutional means of dealing with offenders in Texas is somewhat shorter. Although an adult probation and parole law was passed in 1947, no provisions were made for funding. The 55th Legislature enacted the "Adult Probation and Parole Law of 1957." Probation and parole were separated, placing administration and funding of probation on a local basis and providing for a state system of paid parole officers. A second law was enacted in 1965. Basically the same as the 1957 law, it constitutes present statutory provisions. An amendment to the 1965 act was offered in this most recent 1973 Legislature. It would have established a Texas Adult Probation Office:

> . . . to make probation services available throughout the State, to improbe the effectiveness of probation services, and to provide financial aid to counties for the establishment and improvement of probation services.[1]

However, it was not enacted and, apparently, was never reported out of

committee. The state's present juvenile court act was passed in 1943 while the first state-funded juvenile parole program began in the fall of 1961.

Thus, in the areas of probation and parole, Texas is essentially playing "catch-up ball." In the context of that analogy, the state has made some runs and base hits. But, it has also made some errors and strike-outs and has left perhaps quite a few runners stranded on base. Unfortunately, it is, in fact, a bit difficult to know just how the game is going in light of the lack of sufficiently comprehensive and contemporary statistics. Still, some view of the current situation can be given.

Probation: Current Status[2]

Approximately 215 of the 254 counties of the state currently provide adult probation services. This includes an increase of about 100 counties in the past two years, due to increased awareness of need and, importantly, to the involvement of the Texas Criminal Justice Council. Especially in less populated areas, several counties have joined together to form single, multi-county departments.

Including supervisors, probation officers, employment counselors, etc., there are approximately 400 paid professionals engaged in adult probation. The estimated number of probationers (about equally divided between felons and misdemeanants) is 80,000. Thus, statewide, the average caseload per professional worker would be 200, or four times the number recommended by the American Correctional Association as a maximum.[3]

Information regarding the percentage of convicted offenders who are given probated terms shows a 1971 probation rate of approximately 51 per cent for felons and of about 44 per cent for misdemeanants. Of all those placed on adult probation, it is estimated that 85 per cent are successful, i.e., complete probation without its revocation.

Detailed information regarding the relative costs of probation vis-a-vis institutionalization is not available. Based on the experiences of other states a cost ratio of approximately 1:5 can be estimated. Furthermore, the cost of probation in Texas is significantly offset by the statutory provision that each adult probationer may be charged a service fee of up to ten dollars a month.

Educational standards for adult probation officers are set by state law.[4] For counties of 50,000 population or over, they must have completed four years at an accredited college or university and have two years full time paid employment in responsible related work. Additional experience can be substituted for college, year for year, up to two years. This approximates the minimum standards suggested by the American Correctional Association: graduation from an accredited college or university with a major in the social or behavioral sciences plus one year of related graduate study (a year of full time paid experience can be substituted but only for graduate, not undergraduate, study).

In counties of less than 50,000 population the only requirement is completion of two years of study in an accredited college or university, well below any accepted minimal standard. It might be noted that the previously mentioned amendment, offered but not acted upon by the 1973 Legislature, would have required a bachelor's degree plus a year

Aide Program sponsored by the American Bar Association's Young Lawyers Section and the Commission on Correctional Facilities and Services. Under this program, a volunteer (usually a lawyer) spends 6 to 8 hours a month with a single parolee during his first critical year out of the institution. Before beginning, each volunteer participates in training sessions and subsequently works in tandem with the parolee's regular officer. Variations on such a program are possible in both probation and parole, though working with the regular officer is an important element, as is some training (usually in quite short, though fairly intensive, sessions).

Such volunteerism has several potential advantages, advantages already demonstrated in several programs. For example, it permits someone's spending more time with each offender than his regular probation or parole officer characteristically could. It provides the offender with a model of someone who is interested in him even though he (the volunteer) "doesn't have to be." Certainly, many professional personnel are as equally and as sincerely interested. But, at the same time, many probationers and parolees do not perceive the professionals in this way, at least initially feeling that "it's just part of their job." Too, successful volunteer programs such as have been reported in various areas can increase community involvement even beyond the volunteers themselves. Similarly, they can increase community understanding of both the professional probation and parole officer and the offender.

This compendium has presented a number of rather major problem areas in probation and parole reflecting the current status of these

systems in Texas. An effort has been made to define particular needs rather explicitly and to discuss some of the ramifications of meeting or not meeting them.

The Texas Criminal Justice Council (and, doubtless, others) are aware of these problems. As mentioned several times, the Council has provided a variety of grants in an effort to explore some solutions. It is continuing to do so. The first necessary steps have been taken, but the journey remains a long one.

It was suggested earlier that the most qualified probation and parole officers could not work effectively separated from other facets of the criminal justice system. Similarly, no system of probation or parole can be expected to be effective outside the context of the larger society. It is suggested here that attitudinal and opinion aspects of that larger society may themselves constitute problems. Among orientations that may impede change are:

1. There is a tendency to adhere to a basically talion principle in dealing with the offender (sometimes under the guise of deterrence) in spite of years of experience militating against faith in the ultimate effectiveness of such an approach in itself.
2. Probably related to this, at least in part, is the prevalence of misconceptions about crime and delinquency. Such misconceptions again persist in the face of solid evidence to the contrary. Evidence has shown, for example, that offenses are more likely to be committed against property than against persons and that offenses

against persons are more likely to be committed by those whom the individual knows than by strangers.

3. There is a penchant for simplistic solutions to problems, solutions often based on "simple and sovereign" concepts of causation. Further, when such solutions are not successful, there is some tendency to lose patience and move on toward other equally simplistic answers or to conclude that the problem is insoluble. Yet crime and delinquency are not simple problems, simply caused. Neither are they amenable to simple solutions.
4. Finally, there is a predilection for focusing on immediate and more apparent costs, with a concomitant disregard of the costs of alternative courses and of future financial benefits. Were Texas to undertake meaningful solutions to the personnel and system problems previously delineated, it would admittedly require a fairly large expenditure of funds over the next few years. But such expenditures should be weighed against other costs. "Human" costs, such as poorly adjusted or lost lives, cannot meaningfully be translated into dollar terms. But the comparative costs of institutionalization and community-based treatment can be calculated, as can court costs and property loss or damage. With an appropriate data base, potential savings in reduced

recidivism can be estimated. Estimable, too, if less accurately, are the potential economic benefits of changing unproductive (if not anti-productive) citizens into productive ones.

If solutions to these problems (labeled as essentially attitudinal or orientational) are to be forthcoming, it will require extensive education of the public and, in some cases, of political leaders and of professionals within the criminal justice system. Yet such a program of education or awareness may well be prerequisite to solutions to the problems of the probation and parole system itself.

Current Trends in Probation and Parole

Perhaps the context of orientation is the most appropriate for considering current trends in probation and parole, for certainly orientational modifications have occurred. For years an essentially nonproductive debate raged over contentions that the offender had deliberately chosen to trangress society's laws and expectations, that he was the hapless victim of an adverse society, or that he was mentally ill. None of these positions, in itself, took adequate cognizance of the fact that an individual does have some responsibility for his decisions but that, also, some societal conditions are criminogenic and that the person who behaves in ways that are significantly deleterious to himself and/or society is less than maximally well-adjusted.

To the extent that mental health was an issue, it was generally in terms of what is characteristically called the "medical model." In effect, the individual was "healthy" if he was not demonstrably "sick."

That definition has changed in many quarters so that real mental health implies the presence within the individual of potential and forces for positive growth. In this context, the roles of both the individual and society can be recognized, whether it be the larger society, the community or neighborhood, or the societal microcosm we call the family.

More recently, increasing recognition has also been given to the fact that undesirable behavior (e.g., crime and delinquency) can be learned, just as desirable behavior can be. With this recognition an important, if not primary, function of the criminal justice system can appropriately be seen as one of education or re-education (some may find socialization or re-socialization preferable terms). To accomplish this function, institutionalization may be necessary in some cases. But probation, parole and their adjunctive services can play a vital role. Burdman, for example, estimates that only 15 per cent of offenders need long-term restraint and 15 per cent need short-term community-oriented confinement, while 70 per cent could be supervised in non-institutional community-based programs.[6]

In either event, a learning approach (coupled with the broader view of what constitutes mental health) carries with it important implications. For one thing, it is known that in the educational process different individuals respond differentially to diverse teaching approaches. While many students conform more or less successfully to monolithic methodology, a discouraging number do not. Among those who do respond essentially successfully, it has been found that actual learning levels are often somewhat less than maximal. Among those who do not, it has been found that successful learning is indeed often

possible when alternative approaches are available. Analogously, more success in probation and parole can be anticipated where diverse and multi-faceted programs are provided (as they are being to some extent).

A second implication comes from a rather extensive body of replicated research in learning. That is, it is known that undesirable responses can be extinguished (or at least suppressed) through punishment. But, it is also known that the use of punishment alone in no way guarantees that at least equally undesirable responses will not replace the initial ones. Behavior is most successfully influenced through reinforcement (i.e., the removal of a noxious stimulus or the presentation of a positive reward) or through punishment appropriately combined with reinforcement.

The most obvious applications of this established principle are in the institutional setting, but there are also applications in probation and parole. An individual will not learn to respond in socially (and personally) acceptable ways without being given an opportunity and some reinforcement for doing so. In many cases, this can be done most effectively in the community to which the individual is ultimately expected to adjust.

Orientational changes often operate in tandem with operational changes and this has been the case in the fields of probation and parole. In part at least, current trends in these systems are reflective of the modified viewpoints discussed.

Several of these trends have already been pointed out: increasing attention to family counseling; the construction of group homes,

halfway houses, and the like; cooperation of probation and parole systems with other community resources, and the utilization of volunteers. Other more or less inter-related trends can be noted.

In recent years a variety of supervision/treatment methods have been instituted, at least on an experimental basis. For example, some success has been found in the use of paraprofessionals i.e., paid personnel who have less than the minimum recommended educational or experiential preparation but who can provide defined adjunctive or supportive services.

In 1966, Ohio began a program called "shock probation." Here, the convicted offender is required to spend only one to three months in an institution, after which he is released to an essentially probationary status. Since initial incarceration is often one of the most traumatic aspects of institutionalization, the short-term experience is considered to have positive learning value without the counter-productiveness of long-term imprisonment. Over the years, the recidivism rate under this program has been only 9 per cent compared to a national average estimated to be about 7 to 9 times as high. An approach usually reserved for first offenders, shock probation has been extended to several other states.

In still other instances, caseload size has been varied. Results here have been somewhat mixed but, as might be expected, it has been found generally that the quality of officer-offender contact is an important variable in determining the effect of intensity (or quantity) of contact. In short, smaller caseloads alone are not a panacea.

Too, behavior shaping or "behavior modification" techniques have been tried in the community. As is the case with reduced caseloads, such techniques are not a universal panacea. Still, they have been shown to be successful in the community. In fact, they may well be more successful here than in an institution since the context is "real life" and desirable responses can be more easily generalized.

Besides broadening the approaches to probation and parole, there has tended to be a call for broadening their use in general, probating more offenders and paroling those institutionalized after shorter periods of incarceration. No nationwide statistics were found reflecting the extent to which this call has actually been translated into action. However, California has experimented extensively with community-based treatment in lieu of institutionalization in recent years, especially for youthful and young adult offenders. In a related effort, Massachusetts is in the process of phasing out all centralized institutions for juveniles, moving to a system of community-based treatment which includes probation and small institutions.

Somewhat tangentially, there has been increasing use of work-release programs (in Texas as elsewhere), providing transitional assistance in adjustment prior to ultimate parole. Such transitional assistance often also includes both formal and informal lectures and group discussions regarding such questions as applying for a job and establishing credit, aspects of life which may seem almost mundane to many but which may demand new or different skills of the offender and be important to his not recidivating.

Several trends may be noted with respect to the rules or conditions characteristically imposed for both probation and parole. There has been a move toward reducing their number and, many would argue, making them more rational. Strict constructionism of such rules as not associating with "vicious and immoral persons" (e.g., other offenders) may create awkward situations for the probationer or parolee who has other offenders in his family or immediate neighborhood or who is employed where other offenders also are.[7] Basically unenforceable rules, such as not using "foul language," only invite gamesmanship and contempt for the law. Also, in some places probationers and parolees have been invited to participate with their officers in setting up their conditions. Evidence has shown that this does not result in lax rules as some might fear. In fact, such participation seems often to engender in the offender a sense of responsibility to abide by what he construes as a contract.

Along with these other trends have come suggestions that clear criteria for revocation be established, criteria consistent from one area of a state to another. This need not imply mandatory revocation upon infraction. Rather it is meant to eliminate a tendency to somewhat capricious revocation, generally without opportunity for review. This has been a problem especially in the case of parole. Evidence here indicates that re-commitment may be at least as much a function of the officer's orientation as it is of the offender's behavior (clearly casting doubt on some recidivism statistics).

There have also been new moves in the granting of parole itself. Not only is automatic, periodic review recommended by many, but so also

is providing the inmate with a written statement definitively outlining the reasons for the board's decision where parole is denied. Increasing attention is also being given to the inmate's right of appeal in such cases and to his right to representation at the time of review and/or appeal. Too, recommendations have been made that parole board members themselves be required to meet certain appropriate educational and experiential standards before appointment.

Finally, there is growing sentiment for de-criminalizing some offenses (specifically certain "victimless crimes") and for eliminating as official delinquencies "offenses" which would not be crimes by adults (e.g., incorrigibility, truancy or running away from home). In the latter, the juvenile probation officer might still have contacts with the juvenile. But such contacts would be on a non-official basis, more likely involving other community resources (if a cooperative relationship has been established) and avoiding the stigmatization by adjudication for the young person.

Some Closing Comments

Braden points out that:

> Constitution-makers should recognize that their task is three-dimensional, so to speak. They should strive for a consensus of interests and pressures of the day, but always in the context of the flow of history--the preservation of the good from the past and the passing on of a document that will meet the needs of the future . . . . A constitution should be a document for all seasons.[8]

This requires that a constitution be a basic framework, setting forth the rights of the people and the powers, relationships and limitations of each level of government. If it departs from this fundamental frame-

work to include basically statutory provisions, it will, of necessity, eventually become a hodgepodge of amendments. As with a building which a series of owners have each modified to suit their immediate purposes, both form and function may be lost.

While a number of problems in probation and parole have been presented, their solution is basically a statutory matter. Thus, while these systems are of concern to those responsible for constitutional revision, they are not seen as issues for inclusion in the constitution per se.

Nonetheless, the implementation of solutions to the problems in probation and parole is a matter of considerable importance, as is the consideration and possible implementation of the various current trends in these areas. It is important not for the sake of innovation and change itself, but for the sake of every citizen in the state, all of whom would be the ultimate beneficiaries of a maximally effective criminal justice system.

Footnotes

[1]An Act creating the Texas Adult Probation Board and providing for its powers and duties; amending Vernon's Annotated Code of Criminal Procedure, (V.A.C.C.P.), as amended, by adding Article 42.121, by amending Sections 6a and 10, Article 42.12, and by adding Section 3d, Article 42.12; and by declaring an emergency. p. 1.

[2]The statistics in this and the next section are derived from a variety of sources. Some of them are necessarily estimates since, for example, the State has no mandatory reporting system for juvenile delinquency or adult probation. Nonetheless, they represent the most accurate and up-to-date information available. Sources used were: Annual Report of the Texas Youth Council to the Governor for the Fiscal Year Ending August 31, 1972. Austin, Texas: Texas Youth Council, 1973, passim; Criminal Justice Council, 1973 Criminal Justice Plan for Texas. Austin, Texas: Office of the Governor, 1973, pp. 38-49; Ledbetter, J. C., Director, Adult Probation Department, Dallas, Texas, personal correspondence, May 11, 1973; Twenty-fourth Annual Statistical Report: Fiscal, 1971. Austin, Texas: Texas Board of Pardons and Paroles, 1972, passim; Towns, R. E., Director of Parole, Texas Youth Council, Austin, Texas, personal correspondence, June 6, 1973.

[3]Statistics such as these must be interpreted with some caution. Caseloads will vary from one area of the state to another. Furthermore, such figures do not necessarily imply that that many cases are carried simultaneously. For whatever reason, individuals will leave the case roll although others will, of course, be added. Even making such allowances, however, the conclusion that caseloads are characteristically too high seems inescapable.

[4]V.A.C.C.P., Article 42.12, as amended.

[5]James Robison and Gerald Smith, "The Effectiveness of Correctional Programs," Crime and Delinquency, XVII, 1 (January, 1971), 71-72.

[6]Milton Burdman, "Realism in Community-based Correctional Services," Annals of the American Academy of Political and Social Sciences, CCCLXXXI (January, 1969), 75.

[7]This is not as ridiculous an example as it may first appear to be. There is at least one case on record where parole was revoked because work conditions required such association though there was no evidence of extra-employment contact.

[8]George D. Braden, Citizens' Guide to the Texas Constitution. Austin, Texas: Texas Advisory Commission on Intergovernmental Relations, 1972, pp. 5-6.

SUMMARY OF RECOMMENDATIONS

In this report the criminal justice system was initially examined with an emphasis on a total "systems" perspective. The various functional areas were then considered individually. It is, however a fundamental belief of the contributors that it is necessary to appreciate the inter-relationships of the various agencies as well as to have knowledge of the organization and operations of each of the components. While an argument can be made that the criminal justice system is in reality a "non-system", the need to maintain an awareness of the "forest" and not a preoccupation with the individual trees is crucial to an understanding of the administration of criminal justice in Texas.

In examining criminal justice in Texas from this perspective, the most striking conclusion from the standpoint of constitutional revision which emerged was the agreement that most of the changes needed, should not be included in the new constitution. It is the consensus of the contributors to this report that, with the exception of the judiciary, the other agencies, such as the prosecutor's office or the corrections agencies, should not even be mentioned in the constitution. Because of the difficulty of obtaining constitutional changes, and the desire to maintain maximum flexibility, these matters ought to be dealt with by statute rather than through constitutional provisions. Then as new demands, approaches, tools and needs become apparent, changes will be more readily possible through legislation.

Recognizing that most of the recommendations included here should be implemented through statute, it nevertheless should be useful to have the more important recommendations listed in a single chapter. The following constitutes a listing of the major recommendations extracted from various sections of the text.

Law Enforcement

1. Provide standardized training and testing of all law enforcement officers;
2. Make the office of sheriff statutory rather than constitutional allowing for the office to be abolished in those counties where it is not needed;
3. Make the office of constable statutory rather than constitutional so that the office may be abolished in those counties where it is not needed;
4. Encourage regional law enforcement planning under the Department of Public Safety,

Prosecution

1. Require the prosecuting offices to follow the American Bar Association's standards with regard to sentencing practices;
2. Divorce the measure of effectiveness of the prosecuting offices from the conviction rate;
3. Enact a statutory scheme for the appointment by the courts of special prosecutors for cases which the prosecutor will not handle;
4. Formulate administrative techniques to guide the publication of standards for prosecutorial discretion;
5. Create a public defender system to protect the constitutional rights of indigents in criminal cases.

Courts

1. Merge the Court of Criminal Appeals and the Supreme Court;
2. Unify the judicial system under the supervision of the Supreme Court;

3. Simplify the court system by providing a single integrated trial court;

4. Simplify the court system by providing only two levels of appellate courts, (the Supreme Court and courts of appeals).

Institutional Corrections

1. Develop and enforce uniform standards for the maintenance and operation of juvenile detention facilities;

2. Require juvenile courts to report annual statistical information regarding the use and status of juvenile detention facilities in their jurisdiction;

3. Initiate studies to determine the incidence of mentally defective delinquents and develop alternatives for their treatment;

4. Expand the halfway house programs to the major urban areas of the state;

5. Create a jail inspection commission which would be charged with the responsibility of annually inspecting all jails in the state and would have the authority to close any which did not meet minimum standards;

6. Encourage local communities to explore the utility and cost effectiveness of diversionary programs as an alternative to some sentences to the county jail;

7. Create a mandatory reporting mechanism to provide annual statistical information on county jails and their operations;

8. Develop a mandatory release program to provide parole supervision for all persons released from the state's prison system;

9. Improve the salary schedule for correctional officers;

10. Maintain the self sufficiency programs of the Texas Department of Corrections.

Probation and Parole

1. Extend probation and parole services (both adult and juvenile) to all counties in the state.

2. Create a mandatory, state-wide reporting system to provide information on a broad range of activities related to all levels of probation and parole.

3. Implement the minimum educational/experiential standards of the American Correctional Association for the employment of probation and parole officers.

4. Improve the salary schedules for probation and parole officers.

5. Employ probation and parole more extensively in general as an alternative to institutionalization.

6. Initiate research in the area of community-based programs to determine the best means to success and the modifications needed in the present operations.

7. Create centers in which offenders could participate in appropriate special programs during the day (counseling, vocational training, etc.) and from which they would return to their homes each day.

8. Establish additional halfway houses for both juvenile and adult parolees.

9. Stimulate integration and cooperation of probation and parole with other community resources.

10. Encourage the use of volunteer probation and parole workers.

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