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Discretionary Criminal Justice in Law School Education and Legal Scholarship

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DISCRETIONARY CRIMINAL JUSTICE IN LAW SCHOOL EDUCATION AND LEGAL SCHOLARSHIP*

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INTRODUCTION

In the United States today, we are questioning some of the fundamental underlying assumptions of criminal law and procedure and the administrative apparatus for their implementation. We continually ask whether the criminal law is relevant to the control of broad categories of behavior now within its purview,[1] and whether instead of deterring crime, the law may be in some instances a causal factor of criminality.[2] We question the validity of an administrative structure characterized by the label "assembly-line justice,"[3] which is to say no justice at all. This examination is a necessary and important process which shall and must continue on all fronts.

Reappraisal of the criminal justice system has revealed a disparity between prevailing perceptions and reality. This dichotomy is perhaps most apparent with respect to the popular view that the criminal process entails an open aboveboard contest between well-matched adversaries before an expert judge and a jury of peers.[4] Although the nation is seemingly beguiled by the Perry Mason image of criminal justice, in reality the criminal process bears little resemblance to the adversative ideal and is more accurately described as a covert administrative process.[5] In sum-

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*The term "discretionary criminal justice" or "discretionary justice," used frequently throughout this paper, was coined by Professor Kenneth Culp Davis. *See* K. DAVIS, note 12 *infra*. The term denotes and emphasizes the exercise of administrative discretion on the part of state officials in the pretrial criminal justice process.

The author wishes to express his sincere gratitude to Professors Walter Gellhorn and Peter L. Strauss of the Columbia University School of Law for their editorial comments.

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[1]*See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968), particularly Part III; E. SCHUR, CRIMES WITHOUT VICTIMS (1965).

[2]"[P]ublic branding as the perpetrator of a specific 'criminal' act is a crucial step in the individual's progress toward a criminal 'career.' " E. SCHUR, *supra* note 1, at 5.

[3]THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) [hereinafter cited as KATZENBACH REPORT].

[4]Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEX. L. REV. 289 (1965). "First of all, to laymen law *is* the adversary trial process." *Id.* at 294.

[5]*See* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS TASK FORCE REPORT 42-45 (1973) [hereinafter cited as COURTS REPORT].

ming up this state of affairs, one commentator expressed the following view:

> The assumption that anyone accused of a crime in the United States has a right to a full adversary trial of his guilt or innocence—with well prepared advocates for each side, carefully overseen by an able, even-handed judge, searching diligently for the truth and satisfying all legal rules and safeguards—is fundamental to the American system of justice and to the populace's confidence in it. Yet, with few exceptions, this concept has become little more than a still celebrated myth both in the folklore of the law and in formal jurisprudence. Not only in Perry Mason dramas, but also in real-life appellate court decisions, in the body of criminal law and in urgent legal controversies, . . . there exists little in the way of formal rules, high court pronouncements, or even informed legal or public opinion to ensure that justice is done in the substitute way that men and women are actually "tried" every day in American courts.[6]

The "substitute way" of "trying" a case referred to above is, of course, the administrative process.

Indeed, most criminal cases are not resolved in the courtroom but rather in the stationhouse, in the prosecutor's office, and in the corridors of the courthouse. Today's criminal justice practice is minimally adversary[7] and primarily administrative, with probably 90 percent[8] of all cases being resolved administratively prior to reaching the courtroom.[9] At present, plea bargaining in the hallways of the courthouse is more likely to determine the fate of the accused than is an adversary battle in the courtroom.

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[6]L. DOWNIE, JUSTICE DENIED 32-33 (1971).

[7]According to a study by the President's Crime Commission, only about 8 percent of the persons apprehended as suspects in index crimes were processed fully through formal steps of a criminal prosecution. COURTS REPORT 15.

[8]Guilty pleas alone account for 90 percent of all convictions and a substantial percentage of guilty pleas are the product of plea bargaining. KATZENBACH REPORT 9. This, taken together with other forms of administrative disposition such as screening and diversion, led the writers of the *Courts Task Force Report* to conclude that over 90 percent of all cases are disposed of through the exercise of prosecutorial discretion. COURTS REPORT 16.

[9]Although persons pleading guilty, either as a product of a bargain or otherwise, do go before the court, it is usually no more than an empty ritual ratification of the guilty plea:

> Although the participants and frequently the judge know that negotiation has taken place, the prosecutor and defendant must ordinarily go through a court room ritual in which they deny that the guilty plea is the result of any threat or promise. As a result there is no judicial review of the propriety of the bargain—no check on the amount of pressure put on the defendant to plead guilty.

KATZENBACH REPORT 9.

The *Courts Task Force Report* reaches a similar conclusion, although no statistics were available to demonstrate the point.

The image of the adversary contest as a hallmark of American criminal justice is perpetuated not only in the lay world but also in the curriculum of a great number of law schools. Some of the most popular criminal law casebooks now in use fail to deal with the problem of the informal criminal justice administrative process.[10] Although we must not lose sight of the litigated case, we must bring into view the bulk of criminal cases which are "litigated" informally in the administrative arena. At the present time, a major part of the criminal process—the administrative disposition of cases—is largely excluded from consideration in law school. This omission derives in part from continuing overemphasis on the case method as a pedagogical device and, perhaps more importantly, from the failure of criminal justice scholarship to provide a viable alternative teaching method.

Legal education must incorporate the reality of the informal disposition of criminal cases. To accomplish this goal, data must be systematically gathered to form the basis for the development of new teaching methods. Interdisciplinary research centers should be established to study administrative criminal justice in full detail, and law schools can and should be in the forefront in the development of this research capability. Collection of empirical data will lead to the creation of new materials for teaching criminal law, and, in turn, criminal law scholars will be in a position to exert influence geared toward the development of a structured administrative criminal law process. Such a process will enhance the system of justice by providing a formalized check upon the exercise of discretion by the state in this important area. Following a brief discussion of the present state of the criminal justice process and how it is taught in the law schools, we shall turn to considerations relevant to incorporating this process into the legal curriculum.

I. DISCRETIONARY JUSTICE

Some of the most important decisionmaking in the criminal justice system is engaged in by nonjudicial personnel, particularly the prosecutor, who has been called "the most powerful

[10]According to Professor Pye, "*Perkins* is probably the most popular casebook now being used . . . . Plea bargaining and prosecutorial discretion are covered in one sentence." Pye, *Law School Training in Criminal Law: A Teacher's Viewpoint*, 3 AM. CRIM. L.Q. 173, 174 (1965). A more recent casebook contains more extensive materials on prosecutorial discretion. However, it presents, for the most part, only extreme examples in which judicial intervention was required and in which there are appellate opinions available. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES (1969).

official in local government."[11] The most basic example of prosecutorial discretion inheres in the concept of "selective enforcement." Professor Davis describes it in the following words:

> When an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified, the result is a power of selective enforcement. Such power goes to selection of parties against whom the law is enforced and selection of the occasions when the law is enforced. Selective enforcement may also mean selection of the law that will be enforced and of the law that will not be enforced; an officer may enforce one statute fully, never enforce another, and pick and choose in enforcing a third.[12]

The importance of prosecutorial discretion remains undiminished following the enforcement decision. In many respects, the prosecutor is more important than the judge since it is the former who decides whether a given defendant will go to trial or whether a guilty plea will be accepted in lieu of a trial.[13]

Prosecutorial discretion is exercised through a variety of techniques, among which the principal ones are the following: (1) *screening*: the exclusion of the case from the criminal process;[14] (2) *charging*: the determination of the formal legal grounds upon which the case shall be predicated;[15] (3) *plea bargaining*: the decision to accept a plea of guilty in exchange for either a lower charge or a promise by the prosecutor to recommend a lower sentence than might otherwise be expected;[16] and (4) *diversion*: the determination to halt or suspend formal criminal proceedings (after the case is screened into the system but before conviction) on the condition or assumption that the accused will do some-

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[11]Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, 771 (1933).

[12]K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 163 (1969). Of course, the police and corrections officials also exercise extensive decisionmaking power. For excellent studies of the exercise of police discretion, see J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY (1966); Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

[13]L. DOWNIE, *supra* note 6, at 185-86.

[14]COURTS REPORT 16, 17-26.

[15]Although the charge process is distinct from the plea negotiation, the two are closely related by the prosecutor's expectations at the time of charge as to the likely course bargaining will take, and by the important role bargaining for reduced charges plays in the exercise of the prosecutor's discretion. KATZENBACH REPORT 11. Charging was not dealt with as a distinct process in the *Courts Task Force Report*.

[16]COURTS REPORT 42-65.

thing (undergo treatment, for example) in return.[17] With some exceptions,[18] the preceding determinations are made unilaterally by the prosecutor. These critical decisions, affecting the great bulk of criminal cases, are neither confined,[19] structured,[20] nor checked[21] by anyone (with the exception of the actual plea bargain, in which instance the court's role is generally little more than a *pro forma* ratification of the prosecutor's decision).[22] These decisions are secluded from public scrutiny and, in many instances, from other actors within the criminal justice system, including persons within the prosecutor's own office.[23]

Few modern thinkers would take issue with the fact that discretion plays an inevitable part within any legal system. Although ideals are often framed in terms of the preeminence of the rule of law[24] over the notion of discretion,[25] discretion must inevitably exist at every level:

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[17]*Id.* at 27-41.

[18]In some jurisdictions the police still make some of the discretionary decisions usually reserved for the prosecutor. This is particularly true in the lower courts. The practice has been criticized by a number of reports, the most recent of which is the *Courts Task Force Report*. The grand jury, of course, has a screening function in some jurisdictions, but the prosecutor generally controls those functions through his presentments to the grand jury. The prosecutor has also been forced to commence an action or to stop it through judicial intervention, but these cases are extreme examples. An interesting selection of such cases on the control of prosecutorial discretion is presented in S. KADISH & M. PAULSEN, *supra* note 10, at 1072-99.

[19]"By confining [discretion] is meant fixing the boundaries and keeping discretion within them." K. DAVIS, *supra* note 12, at 55. It generally involves rulemaking "to replace vagueness with clarity." *Id.* at 57.

[20]"[R]ules which establish limits on discretionary power confine it, and rules which specify what the administrator is to do within the limits structure the discretionary power." *Id.* at 97.

[21]"Checking" refers to someone inspecting another's decision. *Id.* at 142-43.

[22]KATZENBACH REPORT 9.

[23]*See* K. DAVIS, *supra* note 12.

[24]Rule of law may be defined as:

> The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power [excluding] the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government.

K. DAVIS, *supra* note 12, at 31, quoting from A. DICEY, THE LAW OF THE CONSTITUTION 198 (1915).

[25]Discretion has been defined as:

> [A]n authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals.

Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. REV. 925, 926 (1960). On a less abstract plane, discretion has been defined in the following terms:

> Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of laws and of men.*[26]

The dangers in a departure from the ideal of the rule of law are well expressed on the stone facade of the Department of Justice building in Washington, D.C., where the words "Where law ends, tyranny begins" are engraved. With respect to this aphorism, however, Professor Davis points out that:

> [I]n our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.[27]

American jurisprudence is, nonetheless, filled with forebodings concerning the exercise of discretion. Pound, for example, noted that:

> From beginning to end of a prosecution we must rely upon the discretion of officials. But in criminal law the dangers involved in discretion are obvious. All discretion is liable to abuse, and the consequences of abuse, affecting the general security on the one side, and life or liberty on the other side, are much more serious than in civil controversies.[28]

Several serious dangers inhere in the predominant reliance on administrative decisionmaking reflected in the criminal justice system. Informality and invisibility in the system of nontrial administrative disposition give rise

> to fears that it does not operate fairly or that it does not accurately identify those who should be prosecuted and what disposition should be made in their cases. Often important decisions are made without adequate information, without sound policy guidance or rules, and without basic procedural protections for the defendant, such as counsel or judicial consideration of the issues. Because these dispositions are reached at an early stage, often little factual material is available about the offense, the offender, and the treatment alternatives. No record reveals the participants, their positions, or the reason for or facts underlying the disposition. When the disposition

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> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

K. DAVIS, *supra* note 12, at 4.

For a comprehensive discussion of the controversy between the exponents of the rule of law and those who favor a discretionary view of the administration of law, see K. DAVIS, *supra* note 12.

[26]K. DAVIS, *supra* note 12, at 17.

[27]*Id.* at 3.

[28]R. POUND, CRIMINAL JUSTICE IN AMERICA 75 (1930).

> involves dismissal of filed charges or the entry of a guilty plea, it is likely to reach court, but only the end product is visible, and that view often is misleading. There are disturbing opportunities for coercion and over-reaching, as well as for undue leniency. The very informality and flexibility of the procedures are sources both of potential usefulness and of abuse.[29]

Even more basic dangers involve concepts of fair warning, notice, and equality of treatment.[30]

The real and apparent dangers inherent in a system of justice which relies predominantly on informal administrative procedures for the disposition of the fate of offenders who invoke its machinery deserve our full and critical attention and scrutiny. Controls must be placed on the exercise of discretion. Certainly the judiciary has been sensitive to this issue, and landmark cases of the last decade attest to that concern.[31] Yet these cases, important as they are, turn on issues which form only the tip of the iceberg of administrative discretion. The great mass of cases disposed of through selective enforcement remains hidden from review. The need for an "administrative law" to regulate discretionary decisionmaking is apparent.[32] Traditional administrative law, which most often concerns itself with the regulation of economic behavior, in part reflects an attempt to bring discretion closer to the rule of law. Analogously, a similar body of principles should be developed with which to regulate the nonjudicial and low visibility operations of criminal law. In the words of Professor Goldstein:

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[29]KATZBACH REPORT 4.

[30]Under the rule of law, the criminal law has both a fair-warning function for the public and a power-restricting function for officials. Both post- and pre-verdict sanctions, therefore, may be imposed only in accord with authorized procedures. No sanctions are to be inflicted other than those which have been prospectively prescribed by the constitution, legislation, or judicial decision for a particular crime or a particular kind of offender. These concepts, of course, do not preclude differential disposition, within the authorized limits, of persons suspected or convicted of the same or similar offenses. In an ideal system differential handling, individualized justice, would result, but only from an equal application of officially approved criteria designed to implement officially approved objectives. And finally a system which presumes innocence requires that preconviction sanctions be kept at a minimum consistent with assuring an opportunity for the process to run its course.

Goldstein, *Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 544, 547-51 (1960).

[31]*See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[32]*See generally* Remington, Book Review, 55 NW. U.L. REV. 505 (1960).

> A regularized system of review is a requisite for insuring substantial compliance by the administrators of criminal justice with these rule-of-law principles. Implicit in the word "review" and obviously essential to the operation of any review procedure is the visibility of the decisions and conduct to be scrutinized.[33]

How law schools might contribute to such a development is the subject of the remainder of this paper.

II. DISCRETIONARY JUSTICE AND THE CRIMINAL LAW CURRICULUM

The failure to develop an administrative law for the control of discretionary justice in the criminal process is inextricably intertwined with the focus of the present day law school criminal justice curriculum and the failure of legal scholarship to transcend the severe strictures imposed by that curriculum. Traditionally, criminal law has been treated as the poor relation of legal education, getting short shrift in a single first-year 3-hour course. Many law schools have acknowledged that the traditional role of criminal justice in the curriculum has not been its proper one, and as a result criminal law has enjoyed increased prosperity in recent years.[34] Yet the major quantitative changes are still to come as evidenced by the fact that criminal law courses in American law schools still comprise only 5 to 10 percent of the overall curriculum, while in Europe such education often exceeds 30 percent.[35]

The truly significant changes, however, must be qualitative, and in terms of quality, criminal justice legal education is sadly lacking. This shortcoming is not so much a consequence of what is taught as opposed to what is not taught. To the extent that the criminal justice curriculum fails to take into account the concept of "discretionary justice"—the process responsible for the disposition of the great bulk of criminal cases—it must be considered fundamentally inadequate. Highlighting the need for incorporating the study of the discretionary justice process into the criminal justice curriculum is in no way intended to denigrate the importance of teaching traditional criminal law and procedure. Substantive criminal law will and should retain a central role in the teaching process because of the obvious relevance of substantive

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[33]Goldstein, *supra* note 30, at 550.

[34]Remington, *Growing Involvement in Criminal Justice Administration*, 1968 WIS. L. REV. 355.

[35]Kadish, *Roundtable on Criminal Law*, 20 J. LEGAL ED. 426, 433 (1968). In 1965, Professor Pye estimated that only 5 to 7 percent of the total law school curriculum was devoted to criminal law. Pye, *supra* note 10, at 178.

issues to the administrative process concerning the dispensation of criminal justice:

> The issue is not, therefore, whether to continue to teach the substantive criminal law and criminal process, but is rather how it ought to be taught and how much emphasis it ought to be given in relation to . . . discretionary justice.[36]

The teaching of discretionary justice will complement but not supplant traditional criminal law in the curriculum. Understanding of each will be enriched by exposure to the other.

What, then, are the reasons for the failure to incorporate "discretionary justice" into the criminal justice curriculum? In part, it relates to the limited time afforded criminal justice in the overall curriculum due to the competition with other materials traditionally considered to be of greater import. Perhaps a more fundamental reason is the long tradition of the case method as the primary teaching device in legal education.

The criminal law course, through a study of cases and statutes, has traditionally been employed at least as much for initiating the first-year law student into the rites of doctrinal analysis as for any other purpose. Yet the case method yields only the most limited insights into the problems inherent in discretionary justice. Appellate review is an *ad hoc* process, unplanned and unsystematic. Courts do not actively ferret out actual or potential abuses, and therefore appellate decisions do not necessarily accurately reflect the problems which beset a particular process.[37] They tell only part of the story, and the law student, learning by virtue of the case method, can only discover the part of the story which the cases reveal.[38] Even if appellate review were more systematically comprehensive, the assumptions implicit in the decisions made by those who administer the criminal law cannot always be discerned from an analysis of appellate decisions, but

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[36] Remington, *supra* note 32, at 506.

[37] "The judiciary, under our conception of separation of powers, is not given the task of comprehensive substantive revision." Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 J. LEGAL ED. 253, 266 (1964).

[38] Questions of great significance . . . have been left for decision to the courts on a case by case basis. Whether an issue is dealt with therefore depends less upon its significance than upon the accident of whether it comes to the attention of an appellate court.

> Until very recent years issues of major importance to police and correctional agencies were not given sustained attention in the law schools unless the issues were reflected in appellate decisions.

Remington, *The Law, the Law School, and Criminal Justice Administration*, 43 TEX. L. REV. 275, 282 (1965).

can only be studied through analysis of human behavior at an empirical level.[39]

In 1955, Professor Wechsler recognized the bondage of legal scholarship to the litigated case and suggested that legal scholarship could contribute significantly to the development of the law

> by systematically focusing on legislative questions, marshalling analysis, and research to the legislative problems of its field; it has important special competence that should be brought to bear on formulating legislative policies entitled, on the merits, to prevail. The thesis . . . has especial relevance today, for we are living in an age that may well prove to be the greatest legislative age in the entire history of man.[40]

What Professor Wechsler had to say in the fifties on the need to focus on legislative problems remains equally applicable today. But at least as applicable today is the need to focus on the discretionary justice process. The program for criminal justice scholarship in the seventies will focus on the confining, structuring, and checking of discretionary justice.

In this context, the problem for legal education goes beyond over-reliance on the case method to considerations concerning what is to replace it. An alternative is understandably difficult to develop because discretion, the central pivot on which these issues turn, is by its nature elusive and not readily amenable to empirical analysis. Adequate teaching materials to deal with low visibility administrative decisionmaking in criminal justice do not presently exist. The first step is to gather information which can serve as a basis for the development of teaching materials.

Certainly the myriad studies published by both governmental and private entities are insufficient. While they are utilized in a variety of new casebooks, these studies can do little more than point out the problems involved. Such reports, whether published in the form of broad suggestions or more authoritative black-letter standards, are predicated largely upon educated guesses modified by the degree of political compromise necessary to get them into print. Common sense and horse trading are insufficient bases for the formulation of policy in an area in which fundamental rights of both the individual and society are in jeopardy.

Problems related to the administration of discretionary justice require application of a methodology which has rarely been

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[39]Mause, Book Review, 84 HARV. L. REV. 504, 515 (1970).

[40]Wechsler, *Legal Scholarship and Criminal Law*, 9 J. LEGAL ED. 18, 28 (1956).

employed by either public or private entities or by legal scholars. This methodology transcends the scope of present day legal research methods. As Professor Kadish has observed, even the studies conducted by the American Bar Foundation are

> only a selected beginning of recording systematically the basic data with respect to the day to day functioning of the agencies of criminal justice which are indispensable to any meaningful reform.
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> Only through such [interdisciplinary and empirical] studies are revealed the ways in which working administrative adaptions are made to the criminal law system, such as the short-circuiting process of the guilty plea or the diversion of sentencing determinations to the prosecutor. And only through such studies can we accurately perceive the principles and structures of law which have become functionless or dysfunctional, the gaps between effective legal restraint and the exercise of authority and the implication upon a subtle and sometimes unpredictably interconnected system of changes at any single point.[41]

Pound's observation made 45 years ago that American law schools could aid in the improvement of criminal justice "with the facilities already at hand and with the methods of which our law teachers are already masters"[42] is no longer applicable.[43]

The task for legal scholarship with respect to "discretionary justice" is twofold: one, to provide satisfactory teaching materials; and two, to provide an adequate conceptual basis upon which reforms of the process of discretionary justice may be predicated. The latter aspect is of especial significance. Unless an "administrative law" is developed for the criminal justice administrative agencies to curb actual and potential abuses of discretionary decisionmaking, the state may eventually become saddled through judicial intervention with a correlative of the exclusionary rule.[44]

Legal scholarship has the opportunity and perhaps the responsibility to add to the development of such an administrative law as it has the responsibility to produce appropriate teaching

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[41]Kadish, *supra* note 35, at 431.

[42]Pound, *What Can Law Schools Do for Criminal Justice*, 12 IOWA L. REV. 105, 106 (1927).

[43]Kadish, *supra* note 35, at 433.

[44]The exclusionary rule, intended by the Supreme Court to affect future police in-custody interrogation practices, has not had the desired effect:

> In part this is so because many police departments never even learn of what the court has said in such cases [*Escobedo*]. In part it results from the difficulty in translating the requirements of judicial decisions into workable police practices which will conform to such requirements.

Remington, *supra* note 38, at 284. Of whatever value the exclusionary rule might be in modifying administrative behavior, it would appear that internal controls are superior to a negative sanction imposed externally.

materials. The question then becomes one of determining how legal scholarship can best proceed to achieve these ends.

III. INCORPORATING DISCRETIONARY JUSTICE INTO THE CURRICULUM

A meaningful approach to discretionary justice requires "at the minimum—a facility of interpreting behavioral research and—optimally—an ability to conduct such research . . . legal educators should confront this fact and begin to restructure curricula."[45] Legal scholars must develop skills in the area of social science research, allowing them to work closely with behavioral scientists and, ultimately, enabling them to employ systematic data gathering techniques within the law school context.[46] Professor Kadish has summed up this proposition in this manner:

> Training in social science methodology for law teachers, bringing social and behavioral scientists on to law faculties, close working affiliation between law schools and social scientists in other departments of the universities, establishment of institutes in connection with law schools which can provide an organized structure to provide interdisciplinary research of this kind—there are precedents for each of these methods in the law school world today.
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> What is important is that they be moved from the periphery to the center of law school research efforts in the criminal law.
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> . . . .
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> Course work would certainly continue, but the materials would transcend the study of cases, the statutes, doctrines and principles. The operational research work of the law teacher would itself become the subject of study, its insights, its discoveries, its methodologies and its consequences, and systematic study of the methodology and substance of the behavioral sciences would also find its proper place.
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> In addition, law schools would cultivate lines of affiliation with other departments of the universities in education as well as research. Programs of combined education, leading to both the LL.B. and the Ph.D. whether in sociology, social psychology, criminology or other fields, offer a potential not yet actually explored.[47]

The Vera Institute of Justice in New York City can serve as a model of the type institute called for to provide an organized structure for interdisciplinary research and study at a law school, and the establishment of institutes similar to Vera might go a

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[45]Mause, *supra* note 39, at 515.

[46]"One of the skills that legal scholars in criminal law must develop . . . is the ability to achieve a working relationship with persons in the behavioral sciences." Cohen, *supra* note 37, at 269. "Systematic observation, surveys, interviews, experimentation, data collection—these techniques and methods will have somehow to be brought within the law schools." Kadish, *supra* note 35, at 431.

[47]Kadish, *supra* note 35, at 431-32.

long way towards achieving the goals mentioned by Professor Kadish.[48] While Vera is not affiliated with a law school, its structure and operational scheme should be examined with a view towards establishing similar organizations to work closely with or within law schools. While such organizations require funding, their spinoff projects can in large part be self-supporting through consulting and other arrangements.

Instead of consulting independently for criminal justice agencies, professors might well work through an institute at their own law school and thus make their work more observable to students. In addition, a Vera type of operation could bring social scientists into closer collaboration with the law school (without necessarily bringing them onto the faculty) and thereby afford both law students and professors a better opportunity to study social scientific methodology firsthand. The affiliation of social scientists with law schools would assure access to the more specialized empirical research knowledge which lawyers generally do not possess. It would assure as well that the legal scholar will not be burdened with the more technical methodological aspect of the studies, thereby making his talents available to identify policy problems and allowing him to make the necessary value judgments as to the application of the results of the studies undertaken.

The social scientist can participate not only in legal research but in the teaching of law as well. Similarly, students from other disciplines in the university can be brought into the law school classroom as regular students in the criminal justice curriculum. The benefits to both the law students and the students from other disciplines who jointly engage in criminal justice research is clear.[49]

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[48]The Vera Institute of Justice has been praised by numerous individuals and entities dealing with criminal justice problems, especially for its pioneering work in release on recognizance programs which have successfully demonstrated a viable alternative to money bail. While the Institute has restricted its activities to New York City, other projects predicated on the Vera model have been established in cities throughout the United States. Vera's work with public drunkeness in the Manhattan Bowery Project and its study of diversion through the Manhattan Court Employment Project have also met with notable success. A Vera-like organization has been established in Cleveland, and as is Vera, it is a private foundation unaffiliated with any academic institution. The Vera Institute is a wholly private research foundation, begun in 1961 through a generous endowment by a private citizen and aided financially by the Ford Foundation. For a detailed description of the Institute's history, goals, and future plans, see PROGRAMS IN CRIMINAL JUSTICE REFORM, VERA INSTITUTE OF JUSTICE TEN-YEAR REPORT 1961-1971 (1972).

[49]George, *The Imperative of Modernized Criminal Law Teaching*, 53 KY. L.J. 461, 468 (1965).

The interdisciplinary approach employing social scientists and their methodology undoubtedly will be the primary tool for legal education and teaching in the area of discretionary justice in the future. Other techniques, however, should not be excluded from consideration.[50]

While not all law school graduates will become involved in the criminal justice process, most of those who operate the process are lawyers. The majority of legislators, most judges, and all prosecutors and defense attorneys are law school trained. The influence of law schools on the criminal justice process is, therefore, decisive. The lesson the law student must learn through the criminal justice curriculum is one which can provide the theoretical underpinning necessary for the later development of discretionary justice concepts when the students later serve as legislators, judges, defense attorneys, and, most importantly, as prosecutors.

The need for infusion of a behavioral science approach into the criminal justice curriculum should not be confused with the adoption of a clinical approach. While clinical observations are a part of the behavioral science methodology, behavioral science methodology is not necessarily a part of a clinical approach. The value of clinical education or practice programs as a tool in legal education is not in issue here. What is desperately needed is the kind of strictly structured inquiry which is the hallmark of behavioral science methodology. Casual clinical observations involved in visiting a prison or courthouse are certainly in order but do not lead to this end. While such exposure may point up the disparity between the classroom lesson and the real life situation, it should only be an incidental part of the educational experience. Even clinical course work (where the student works through a problem) has negligible value to social scientific inquiry, since general observations of the overall process cannot be validly extrapolated from such isolated contacts. The best opportunities for valid generalizations are afforded by the rigid controls inherent in a formally structured social scientific inquiry.

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[50]Professor Mueller, for example, has called for the inclusion of comparative law in the criminal justice curriculum, contending that while foreign law is not necessarily superior to ours, it does offer a vantage point from which to make a better evaluation of our own process. Mueller, *The Teaching of Comparative Law in the Course on Criminal Law*, 11 J. LEGAL ED. 59 (1958). Studies of West German criminal law indicate that the prosecutor's discretion can be very limited and still be effective. K. DAVIS, *supra* note 12, at 191-95. Professor George suggests that "one of the best ways to study your own system is to study another's." George, *supra* note 49, at 473.

Also, the benefits of student participation in clinical education must be balanced against the time strictures placed on the curriculum. Empirical study is ordinarily a long term affair which often requires followup to determine the reliability and validity of the results. The law student is not in attendance at the law school long enough to see most such studies through to completion. Thus, while he should be imbued with the concept of methodology and its applications, pedagogical considerations dictate that ordinarily he will receive only the end product through the curriculum. As a result, empirical study will be conducted by the legal scholar for the benefit of the law student and, of course, for the benefit of the criminal justice process and society at large.

CONCLUSION

For the most part, the nation's criminal justice process is predicated not on the adversary model but, instead, on the discretionary justice model. Neither legal scholarship nor legal education reflect that fact. This disparity between what is taught in law school and what actually transpires in the process must be eliminated if we are to make the criminal justice process effective both in terms of protecting individual liberties and in terms of maintaining order and security in the society.

At the heart of discretionary justice lies the idea that for every doctrine or principle of the criminal law there is an underlying mechanical process for its implementation. That process has both visible and invisible parts. The invisible parts are those which involve the exercise of discretion by criminal justice officials. Insofar as the exercise of discretion remains unconfined, unstructured, and unchecked, it has the power to devastate every principle and doctrine of the law.

Legal scholarship must move forward in preserving those doctrines and principles of law meriting retention by illuminating for the law student, in particular, and for the criminal process, in general, what is now shrouded in darkness. While the case method does not have to be abandoned to achieve this end, it does have to be preempted in part and supplemented. Primarily, this will require the inclusion of social scientific techniques into criminal justice scholarship and education. In the end, the legal scholar and the law school, through their students, can have a profound influence on the process of discretionary justice.