

FOREWORD

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If only policymakers today had learned the lessons of the “American Bar Foundation Survey of Criminal Justice” in the 1950s, many blunders could have been avoided. It becomes ever more apparent that many policy initiatives of the 1970s and 1980s were misconceived and ineffective. Every state and the federal government enacted mandatory penalty laws; many jurisdictions adopted sentencing guidelines of varying degrees of rigidity; some abolished parole release; some banned plea bargaining. Some of these changes were misconceived in that they ignored the complexity of the criminal justice system and the near certainty that efforts to eliminate discretion will move it someplace else. Many of the changes were ineffective in that they failed to deter crime or reduce disparities, their ostensible rationales. Often they were circumvented by lawyers, judges, and corrections officials, too often they treated defendants unjustly, and nearly always there were unintended, undesired consequences.

The ABF survey, an intensive examination of criminal justice processes from defendants’ first contacts with the police through processing by prosecutors and courts to probation and parole supervision and revocation, was the most extensive and, probably in constant dollars, most expensive empirical investigation of the criminal justice system ever undertaken. In *Discretion in Criminal Justice*, Lloyd Ohlin and Frank Remington and their colleagues describe the survey, its findings, the base of knowledge on which it stood, and subsequent developments concerning the issues and practices it identified.

Discretion in Criminal Justice may be more timely in the 1990s than in the 1950s, when the survey was conducted, or in the 1960s, when five books reported its findings. In the 1950s and 1960s indeterminate sentencing was little challenged; it was taken for granted that rehabilitation was a primary goal and that judges and correctional officials needed ample discretion to tailor sentences to offenders' needs and prospects. Today, by contrast, few see rehabilitation as a primary goal of sentencing, and official discretion is widely distrusted—from the right, from concern for the chimera of “undue leniency”; from the left, from concern that discretion will be exercised invidiously or capriciously. Because exercise and control of discretion are central modern policy issues, the survey's evidence on how discretionary systems operate is especially salient.

The survey's findings punctured myths and illuminated insights. Among the demolished myths were belief in the desirability or the existence of full enforcement of the law by the police, the belief that it is possible to eliminate discretion within the system, the belief that the primary police role is law enforcement, and the belief that attrition of cases after arrest implies inefficiency, corruption, or both.

The key findings documented the distance between the law in action and the law in books. First, most of the important discretionary decisions are made at the bottoms, not the tops, of bureaucracies—the cop on the street, the assistant district attorney, and the line probation officer decide when not to take action and often what action to take. The concerns and perceptions of low-level officials are at least as important to understanding how decisions are made as are the ostensibly governing laws and policies. Second, the survey demonstrated the interconnecting complexity of the criminal justice system, the myriad ways that multiple actors make or shape decisions, and the even more complex patterns of interactions among different officials. Third, the survey revealed the practical and normative problems in balancing the competing calls for unstinting application of legal rules and sensitive appreciation of situational and human needs—whether posed by plea bargaining or by police arrests in cases in which individualized probable cause cannot be shown. Fourth, the survey documented the systems quality of the criminal justice system, the “hydraulic” nature of discretion, the certainty that efforts to

limit the discretion of some officials nearly inexorably lead to shifts of discretion to other officials. Fifth, the survey demonstrated how court “work groups,” with their own sets of patterned relations and norms, importantly shape how the system works overall and in individual cases.

In the years since Maine in 1975 abolished parole and became the first determinate sentencing jurisdiction, followed by countless innovations elsewhere intended to structure, confine, limit, or abolish discretion, stacks of research reports have confirmed the ABF survey’s findings and documented foreseeable, undesirable consequences that could have been avoided. Mandatory penalty laws have produced widespread circumvention, cynical manipulation, and gross injustices and have undermined the system’s credibility. Harsh and mechanical sentencing guidelines have encountered comparable resistance, circumvention, and hypocrisy. Plea bargaining bans have seldom done more than trigger compensating changes in other processes. Parole abolition has removed the institutional capacity to reduce aberrantly long sentences and to ameliorate prison crowding. As the 1990s unfold, policymakers are again beginning to understand that quick fixes do not solve complex problems, that the interacting discretions of the criminal justice system make mechanistic solutions unrealistic.

The great value of this book is not in the memorialization of a path-breaking research project and the tracing of its influence but in its lessons for the here and now. The survey is at least as relevant to our time as to its own, and if this book redirects the attention of researchers and policymakers to the original survey’s findings, it will have accomplished a great deal.

It is curious that the survey is less well known than its originality, size, and enduring relevance might make one expect. Although most of the published reports deal with court processes, the survey’s clearest influence has been on police research and policy. A spate of publications on police discretion based on the survey appeared long before the books that reported the survey’s findings. By the mid-1960s, social scientists interested in the police had followed the survey’s then-innovative practice of putting researchers into police cars to observe how police do their jobs, giving rise to the most important case studies of policing in modern times—by Egon Bittner, Albert J. Reiss, Jr., Jerome Skol-

nick, James Q. Wilson, and others. A path leads to the police policy experiments of the 1970s and 1980s and to the policy prescriptions of problem-oriented and community-based policing in the 1980s and 1990s.

Influence on prosecution, sentencing, probation, and parole is less apparent. It is bewildering that policy debaters in the 1970s and 1980s argued over whether restraints on judicial discretion would shift power to the prosecutor, rather than over what the survey showed to be the real questions: how much power would be shifted, in what circumstances, and with what effect. Similarly, social science research in the 1970s and 1980s on prosecutorial and judicial discretion, on court work groups, and on the effects of policy innovations reveals little awareness of the ABF survey, often to the detriment of the more recent work. Empirical investigations of the effects of changes in sentencing policy, for example, often look only at disposition of cases once they result in formal charges or indictments and blithely ignore the possibility—entirely predictable from the survey—that policy changes may alter prosecutors' decisions about charges or indictments or cause shifts in the locus of plea bargaining from post- to preindictment, making comparisons of case dispositions postindictment inherently misleading.

Why the survey did not have more influence on social science research is unclear. One possible explanation may be that the survey's origins lay in the legal community and its execution largely in the hands of lawyers. A second may be that the volumes, when they appeared, were published by Little, Brown, a publishing house familiar to lawyers and legal scholars, but less familiar to social scientists. A third is that the five reports were published ten to fifteen years after the data were collected, and inferences about timeliness and topicality may have become confused. Whatever the explanation, both the quality of social science research and the wisdom of criminal justice policy have suffered.

The survey had substantial indirect influence on criminal justice policy and research through the careers of the scholars who shaped it and were shaped by it. In a fascinating story that is probably until now known only by insiders, Donald Newman tells of the origins of the School of Criminal Justice at Albany, which became the model for criminal justice education in the United States and had its roots in the survey. The primary and

most influential advisor to the State University of New York in creating the school was Frank Remington, director of field research for the survey. Newman himself, then working in Wisconsin on survey data, was invited to become the school's first dean and became its second. The initial teaching materials at Albany focused on the survey's methods and findings and led to a delineation between "criminology," the subdiscipline of sociology interested in the origins and manifestations of deviance, and "criminal justice," in which Albany specialized, focusing on the operations and effects of the criminal justice system. Within the law schools, for many years the only textbooks in use for teaching criminal justice administration were developed by lawyers and social scientists who had worked on the survey. Finally, the survey created a cadre of influential policy-concerned scholars whose careers placed them in positions of great influence. Some of this is briefly noted in appendix A.

The survey's findings, especially as reported and revived in the essays in this book, are as fresh and timely today as they were forty years ago. I hope that this time the research and policy communities will read and heed and avoid in the 1990s the avoidable mistakes of the 1970s and 1980s.