THE LIMITS OF LAW ENFORCEMENT

Norval Morris

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Mr. Vice Chancellor, Mr. Dean, thank you for that mercifully kind introduction. Andrew Rutherford has apparently been cautious in briefing you on only a few of my larger improprieties. It is a privilege to be here and to play a role in the inauguration of the Institute of Criminal Justice in the Law Faculty of the University of Southampton. My anxiety as to whether my role can be useful has been lessened by the precise directions that Andrew Rutherford gave me – not quite as to what I was to say, but certainly on the themes I was to try to develop, and, even more fervently, on how long I was to take to develop them. So if this lecture confirms your worst expectations, it is Andrew Rutherford’s fault; but if perchance you are interested, even momentarily, then it is the way the themes are embroidered and developed that is to my credit! He told me I was to offer what the Americans call a “keynote” speech, lauding the purposes of the new institute, and that I should then offer some comments on recent criminal justice developments in the United States.

The avoidance of mock modesty compels me to confirm that I am the ideal person to deliver the sort of secular blessing that Rutherford had in mind. I am the very model of secular ecumenism, if there is such a person. I have a Jewish father and an Irish mother. I was brought up in the amply tolerant faith of the Church of England, and am now greatly influenced by the First Amendment of the American Constitution. My professional activities are certainly secular – you couldn’t find a theologically safer non-sectarian blesser!

Nor, if I may boast further, could you find a keynote speaker with more gratitude to this country for the work that has been done here in criminal law, criminology, and in studies of the operation of the criminal justice system. My wife and I came here in 1947, a law degree under my belt but very little law in my head, to study criminal law and criminology under the generous tutoring of Herman Mannheim and Sir David Hughes-Parry. The intervening forty years have steadily increased my sense of gratitude to them for the scholarly launching they gave me. Mannheim and Parry opened the massive gates of the English convict prisons to me and I don’t think that had been done before for a doctoral student. I wandered about convict prisons, talking to prisoners, studying records, and collecting data. Part of this work was done not far from Southampton – so I have another link that gives me pleasure to be here today.

One of those prisons was Parkhurst on the Isle of Wight. My wife and I sailed from Southampton and took up residence in an hotel near Parkhurst Prison. Daily I was passed through Parkhurst’s walls to talk to the handful of habitual criminals gathered there – mostly harmless old men with a remarkable capacity for mendacity, with which it is good for a beginning researcher to become acquainted, since he will have to live with it all his life. In the late afternoons my wife, who was then manifestly pregnant with our first child, would stand outside the gates awaiting my release so that we could walk together back to the hotel. Red-coated, looking forlorn, obviously pregnant, apparently waiting for a convict to be released, she daily received extensive and colourful advice from prisoner work gangs returning from their outside labour and who observed her standing expectant (in every sense expectant!) at the gate. “Men were deceivers ever”; they would aver! “It wasn’t any use waiting;” they would say, “paternity would surely be denied!” They expressed these and other much less circumspect comments in language that we gradually came to comprehend. Many even offered, for what they regarded as exquisitely appropriate compensation, to take on the burden of paternity themselves. It was an educative experience.

I also spent two months of my life near here at Netley Hospital completing my doctoral thesis. It was a happy time for me, apart from the thesis. I lived at the hospital, where a distant cousin was the senior surgeon. Occasionally, he would let me join him in the operating theatre in the mornings while he performed surgery. That too was educative. Food was then sometimes in short supply, as those who are as antique as I am will recall, and I used to be wakened by the same surgical cousin shooting over my head out the window at what looked to me like ancient pigeons. I suspect it was illegal: I’m not sure about it. But I learnt at least to perform the difficult task of eating pigeons with my teeth clenched to prevent the passage of the buckshot which had brought the
ancient birds to our table. As you see, I have many fond memories of this region of the world.

To be back here forty years later, helping to launch an important new initiative in criminal justice scholarship, is indeed a great joy. If this is a blessing that I am to offering, even a secular blessing, we'll need a Biblical text and I have one. It is: "More than the Philistines have been slain by the jawbone of an ass." Doubtless more will fall, even here at this Institute of Criminal Justice. We deal with a topic that attracts predictable and superficial verbosity; in other words, attracts asses. It is a topic on which cautious scholarship and accurate statements are certainly not in over-supply, neither at the scholarly level nor, most certainly, at the executive and administrative levels. One reason for this, I think, is that the public and sometimes even politicians expect too much from those who till this field. We are expected to know with some precision the causes of crime and juvenile delinquency. We are expected to be able to advise with confidence on police, prosecutorial, and judicial methods of preventing crime and minimizing its social impact. The regrettable fact is that we don't know a great deal at this level of precision and cannot meet those expectations. This does not prevent the less responsible servants and students of the criminal justice system from confidently offering their cures for crime and rapidly moving on to new pastures before the matter can be checked out.

Each month I witness a demonstration of these excessive expectations. I serve on the Police Board of the City of Chicago. It is a civilian board appointed by the mayor and subject to confirmation by the City Council. It has a role in policy formation, it has control over the dismissal and discipline of police for abuse of power or corruption, and it influences the police budget. Each month we hold a public meeting at which the Superintendent of Police reports on the rates of serious crimes in Chicago during the previous month, and compares them with the same month of the previous year. If crime rates have fallen, he compliments his police force on the excellence of their work, and their diligence and skill in crime control. If crime rates have increased, he castigates the community for its failing moral standards, its venality, and its lack of support for the police. He can hardly lose. Now, the Superintendent is no fool. He knows precisely what he is doing. He knows better than most that marginal changes in policing, such as in the number of police, will not have measurable effects on crime rates. Even if saturation policing would reduce crime, it is far beyond our means. The same is true of prosecution and defence practice, of the definition of the limits of sentencing power by the legislature, of the fixing of sentences by the judiciary, and of the work of the correctional agencies – marginal changes will not influence the prevalence or incidence of criminality.

Changes, reforms, regressions, either to the political left or to the political right, towards leniency or towards severity, have not been shown, nor are they likely to be shown, measurably to reduce the crime rate. Were we sufficiently ruthless in any of these areas, perhaps such effects could be produced; but the social costs, paid in the coining of reduction of individual freedoms for the rest of us, the allegedly non-criminal, would far exceed what we're prepared to pay in a democratic society. Does this mean that the work of the servants of the criminal justice system is unimportant and that our research efforts are therefore equally of no consequence? Not at all; it means that our expectations have to be different. It means, I believe, that we must be realistic about what my excellent colleague, Hans Zeisel, called "the limits of law enforcement." I obviously stole that phrase for the title of my address today. I will now steal the comment on it of another colleague, Edward Levi, who, thinking about the limits of law enforcement, said, "This probably is the touchstone of wisdom in this troubled area." And he adds: "It would be a most unnatural relationship between law and a democratic society if it were not so."

For this reason, among others, it seems to me entirely appropriate that criminological studies should find a home within a law school. As you know, it has not always been so; certainly not within the American tradition where much excellent criminological work is done by faculties of sociology, of social studies, of public policy studies, of psychology, and of psychiatry. Criminology is not in any satisfactory sense an independent discipline. The phenomenon of criminality, its causes and control, can legitimately be studied from a variety of disciplinary bases. In most of my recent work I have found the contributions of the social sciences essential to an understanding of the operation of the criminal justice system. Yet that doesn't minimize the point that as a home base from which to look out on reform, on the prevention and understanding of crime, the law seems to me ideal and
essential. The reason is that the criminal law controls the largest powers that the State exercises over its citizens in time of peace: it defines that difficult balance between State authority and individual autonomy on which a decent democratic society depends. The tyrant always begins by controlling the substance and implementation of the criminal law. If we get the balance right here, and hold it steady, we won’t likely go far wrong elsewhere. This is the solid foundation, in my view, on which the insights of the social sciences can build. Without that foundation, their contributions risk doing a great deal more harm than good. As an English historian phrased it: “Reform, Sir, reform? Don’t talk to me of reform. Things are bad enough as they are.”

Hence I applaud the focus of this Institute in its statement of general purpose as being concerned with the characteristics which distinguish free from authoritarian societies with respect to criminal justice, both in policy and practice. I applaud its dedication to examining the balance between order and crime control on the one hand, and the protection of civil rights and liberties on the other. Nor is this in any way an inhibiting or a narrowing focus. From such a stance one can well search out the causes of crime and struggle to evaluate competing techniques of crime prevention and control, yet remain grounded on a firm respect for the proper limitations of our capacities to remake man, to reshape societies, and to control crime.

The United States provides a wonderful laboratory to observe the shifting balance between the forces of crime control and individual autonomy. In 1988 we celebrate the bicentennial of the Constitution — a document designed to define governmental authority over citizens in a federal state. Over that period there has not been, nor is there now, agreement on how that balance is to be struck. The debate is characterized by political conflict and legal obscurity. The case law at the Supreme Court level is ornate, contentious, and requires a knowledge of the personal players. But if you step aside from the turbulence of the immediate issues you see broad and entrenched agreement in the United States on the need for governmental restraint reinforced by law. Yet the United States is a country in which the problems of crime and crime control are vastly more difficult than they are in this country. Crises test the constitutional balance in these matters in the United States, but by and large the centre holds. The “Red scare” after the Second World War, and McCarthyism with its “black lists” and its cry of “fifth amendment communists,” tested the matter, and there are constant and continuing tests at the borders of due process. Yet despite fashionable criticisms of the Warren Court for being too restrictive of police power and of the Burger Court for being too supportive of police authority, the central contours of due process hold firm.

The problems of the proper limits of undercover work, and of the adequacy of doctrines of entrapment to define those limits, strain the balance between authority and autonomy. This problem became important with “Abscam” at the Federal level, with “Greylord” in Chicago (an undercover investigation of the judiciary which proved extremely successful), and with a multitude of sting operations by the 40,000 police forces of America. For example, on the Police Board we are much troubled by the extent to which we should use undercover work against the police. After all, you’ve done that in England in the “Countryman” operation, and you’ll have to do it more if you become more concerned by these problems. But there are real difficulties here — how far may the citizen be tempted? How far may the policeman be tempted? Must suspicion focus, and how precisely must it focus, before the undercover policeman or policewoman takes on what Eve said was the serpent’s role?

New technology threatens this balance, or at least presents challenges to it: electronic monitoring makes possible new forms of control of the individual at large within the community; long lasting drugs give the possibility of chemical control of some forms of criminal behaviour; scientific testing and monitoring by urinalysis and the developing technologies of hair and nail examination provide new means of detecting and convicting drug users. These and related technologies of overhearing and overseeing offer promise of more efficient crime control, but they also offer large challenges if they are to be used in a fashion properly respectful of liberty. It is not an easy balance to hold steady.

Why does one fuss with all this? Why are we so anxious that the criminal law and its agencies and officers should be limited in their power? It’s certainly not for any
sentimental concern for the criminal. Historical lessons of the cost of untrammelled police power guide us. Behind that is the more pervasive perception of the steady fallibility of our judgement – and I mean ALL our judgements, whether elevated by the mystique of the robe or not – when our interests are involved. The temptations of power and the susceptibility of all of us to misjudge matters in our own favour combine to make the case. If any of you have any doubt on that matter, watch Wimbledon and see how the players would call balls close to the line. We frequently see things as we want to see them – it didn’t really need Freud to make the point.

All this sounds somewhat depressing, as if little had been achieved in the forty years I have tried to observe the criminal justice system in several countries. I regret that impression if I have given it. The truth is that a lot more is now known about the societal seed-bed of crime and delinquency than when Shaw and McKay first developed their area studies in the Faculty of Sociology at the University of Chicago. From studies in the United Kingdom, in Scandinavia, in Western Europe, and to a lesser extent, in the United States, we have begun to disentangle the complex and diverse relationships between the criminal individual and his ambient society. It might now be possible, if we have the will, to shape crime prevention strategies which will lessen the problems with which the agencies of criminal justice have to deal. Further, over those forty years we have learnt a great deal about the problems with which various agencies of the criminal justice system have to deal; we have learnt about the work of the police, of courts, and of correctional agencies; and have laid the foundations of knowledge and emerging professionalism which are the bases of decent and effective crime control. But much more remains to be done. We are no more than on the threshold of wisdom in this field. You need never fear that there won’t be important research and pedagogic work for the Institute of Criminal Justice in the University of Southampton.

So let me turn from general reflections about the place of criminal justice studies in a university to my second theme: some developments in the criminal justice system in the United States over the past few years.

The United States is a vast and criminoius country with a wide diversity of criminal justice systems ranging from the tolerable to the awful. One must therefore be selective. Let me offer a few random reflections which may, I hope, prove interesting.

The broad statistics of street crime and the conventional punishments in the United States over the past five years present to me an interesting set of apparent paradoxes. There’s crime enough in the United States – no one doubts that – but by both our conventional measures, reported crime in the uniform crime reports, and victim surveys in the quite sophisticated, well-managed national crime survey, street crime has either been stable or has been declining since its peak in 1981. Though the press doesn’t give that impression, the decline is not doubted in scholarly and official statements. Yet over that same period we have had a 47.7% increase in the prison population, a 57.5% increase in the number on probation, and a 22.7% increase in those on parole. Jail populations have also greatly increased. So, stable crime rates run together with exploding rates of punishment. What are the reasons? I find myself satisfied by none of the reasons offered, though each makes its contribution. Let me catalogue them briefly.

The increase in the number in prison is, it is said, attributable to the baby boom. This bulge in the population in their late adolescence and early adulthood pushed up crime rates because crime is a “16 to 22 year old man’s game.” That bulge now moves into the prison years because prison comes after crime. It is quite hard to get into prison; it takes a criminal record, mostly an adult criminal record, and the passage of time before you reach prison. The criminal years are 16 to 21, but the prison years are 21 to 30. So the movement of the demographic bulge explains crime coming down and prison populations going up. To an extent, that must be a part of it, but surely not to the extent the figures I gave suggest. In any event, it entirely fails to explain the increase in the number on probation, which normally follows a first-timer’s conviction.

Let me offer another explanation. There have been clear improvements in the federal and state criminal justice systems of the United States. Over the twenty years I have been in that country this has been clearly observable. It is true in police, prosecutorial, judicial, and correctional practices. As a result, we bring more criminals to book; we catch
and convict and punish more, even though we may draw them from a constant pool. Hence stable crimes rates and increased punishments. The problem with this explanation is that it neglects what we all think to be the most likely product of greater efficiencies and enhanced decencies in the criminal justice system: the larger willingness of the citizen to report crime, to pursue it to prosecution and conviction. The reporting of crime should have been as much or more influenced by these efficiencies as the conviction of criminals, but as both the uniform crime reports and the national crime survey demonstrate, it hasn’t. Nevertheless, this explanation does begin to throw light on the increase in numbers under correctional control of one type or another, from a pool of criminals, where that pool is assumed to be of constant depth.

Another, much simpler, explanation presents itself. It may not appeal to you, nor am I that clear about it, but I will struggle with the idea. If punitive attitudes have intensified in the community, that will influence legislative, police, prosecutorial, and judicial practice. Those attitudes are the background against which people function. I think that idea encompasses the best explanation of the paradox, but let me embroider the point just for a moment. I am not drawing a contrast between the square-jawed, hard-headed, possibly red-necked punisher – an enthusiast for the gallows, a firm believer in punishment (provided it is severe) – on the one hand, and the sentimental, bleeding-hearted excuser of crime and soft-treater of criminals like myself on the other. I’m not drawing that usual and absurd cocktail party contrast. I reject both stereotypes as absurd. I’m trying to make a somewhat different point. The same point was made by Sir James Fitzjames-Stephen: it is right and proper for the community to become less and less tolerant of violent and predatory crime – we should become less tolerant.

It is right and proper that we should try to catch more criminals, convict more and punish more by what I hope are appropriate means. Declining rates of violence in the West characterise the longer sweep of history. There have been increases in post-war periods since the ‘60s, but overall the best data we have on crime rates clearly show steadily reducing rates of personal violence and predatory crime throughout the industrialized Western World. Decreasing rates of violence are appropriately related to decreasing tolerance of violence.

The problem in the United States is that these two sensible developments are imposed on a system which has been in the past characterised by pervasive inefficiency in catching and convicting criminals. We have compensated for these inefficiencies by excessive punitiveness for the few who make their way through the criminal justice system to the punishing stage. Hence, it seems to me that development of a modulated and principled sentencing policy is of first importance.

In the usual argument there is a discussion as to whether we should be more punitive or more educative. Obviously, in the early formative years of childhood, from birth to the early school years period, more that is of importance to crime prevention occurs than anything that police, courts or corrections can later much influence. But looking at the courts and corrections, surely we want to improve their capacities and the rationality of the sentences they impose and carry out. To think that reliance on severity can compensate for inefficiencies in the early stages of the system is, I think, an unlikely expectation.

In this difficult situation, what one might call the “criminal career” approach to crime prevention is gaining both political and scholarly support in the United States. At the level of scholarship, the work of the National Academy of Sciences has been proceeding for the past three years and will soon be released. It has been stimulated by studies from Wolfgang and his colleagues in Philadelphia – indeed they originated this approach – which revealed that a disproportionate amount of crime is committed by a relatively few criminals. The extraordinary frequency of some crimes, particularly when accompanied by sprees of drug abuse, and the studies by several scholars from

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1See the very good article by Ted Gurr in “Crime and Justice: an Annual Review of Research, Vol. 3.”

the Rand Corporation (Chakin, Greenwood, Petersilla, and others), have begun to suggest that it would be possible, by selective incapacitation of these high-frequency offenders, both to reduce crime and to reduce the prison population. Scholarship is generally sceptical that this trick can be performed, and I am too, but there is no doubt that police policies of intensive enforcement of the law against specified high-frequency felons, or prosecutorial policies of selecting similar offenders for particularly intensive and unbargained prosecution are wise courses to follow.

The idea of allocating more resources against the most threatening while reducing them against the remainder is taking root. The Federal Bail Reform Act of 1984 was swiftly copied by many states and brings into the open what had long been understood to be the practice – the preventive detention until trial of those seen as particularly dangerous. That practice has been considered by two federal circuit Courts of Appeals; it hasn’t yet reached the Supreme Court. So preventive detention will, I think, come to the United States openly, as it already has in many countries. But it is in sentencing practice that the principle of trying to select the more dangerous and allocate to them the larger punitive resources emerges as a major concern. So, let me take a moment to discuss sentencing practice in order to lead up to my next topic – the United States Sentencing Commission.

Here is an overview of the background of sentencing reform: until 1975 all fifty American states, the District of Columbia, and the federal jurisdictions had indeterminate sentencing systems. Prosecutors had unreviewable discretion; judges had wide sentencing discretion (as in this country); parole boards likewise; and there were wide powers of “good time” adjustment. Indeterminate sentences came under vigorous attack about 1978, though the attack started before that with the writings of a few scholars. It is an old story and I tell it briefly. First, the system produced hypocrisy – the wide hypocrisy of the “bark and bite” system where the judge says “you will do 2 to 10 years” when in fact everyone knows it is going to be something between 16 and 24 months. Second, it produced sentencing inflation to pacify a public constantly demanding longer terms of incarcerative punishment. Third, and this is well documented, it produced gross disparities in sentencing between “like” criminals with “like” records who came before different judges, so that the personality of the particular judge proved in many cases more determinative of the punishment than the gravity of the offence.

The pretension of parole boards that they can predict behaviour in the community by observing behaviour in prison was exposed for the fraud that it is. My late colleague, Hans Mattick, used to say that parole discretion had turned our prisons into great schools of dramatic art, and he was right. It is akin, as he also phrased it, to trying to teach an aviator and to test his capacity in a submarine.

What has happened in the interim? The intensity of reform activities since 1975 has been dramatic. By 1981, 6 years later, sentencing guideline projects had been established in 23 states and I see that there is a plan somewhat along that line in this country. By 1985, 49 of the 50 states had enacted some mandatory sentencing laws for selected offenders. Nine states have abolished parole since 1975. At least fifteen states have developed parole guidelines which achieve the same results as the Federal Salient Factor Score parole guidelines. In other states, such as Massachusetts, Michigan, New Jersey, Maryland and Florida, the judiciary has taken the initiative in shaping sentencing guidelines. And there is an emerging consensus that statutory guidelines is the proper path to be followed. Again, I am not arguing that this is a good or a bad thing; I am simply saying it is happening and swiftly.

Surprisingly, the model that has emerged as the most favoured is that of the Sentencing Commission. The experience of Minnesota, the parent state of this model, has been that while the judges screamed and fought in opposition to the introduction of sentencing guidelines, when they got them, they adhered to them and were pleased with them. The “departure rates” in Minnesota since the introduction of the guidelines are very low. Among the Sentencing Commission's ongoing tasks is the elimination of sentencing disparities and the preservation of predictable principles in the sentencing process. For Minnesota this meant establishing the principle of severity for people who threaten or commit violence (which greatly increased the prison population of violent offenders) and relative leniency and a reluctance to use the prison for the non-violent.
Minnesota judges may depart from the presumptive sentencing guidelines, but only if they give reasons for doing so, and those reasons are subject to appellate review. If they depart towards leniency then the prosecution may appeal, relating the judges' reasons to the guidelines; if they depart towards severity, then the defence may appeal. And so, gradually, we may be able to develop a Common Law of Sentencing.

The movement has been successful. The departure rates are very low – the 1981 departure rate in Minnesota was 6.2%. The judges thought it was worthwhile varying from the guidelines and doing what they thought was right (and they obviously should do that) in only 6% of the cases. There is a "but" about this – there always is a "but" about every one of these reforms. The Minnesota sentencing guidelines touch only about 20% of all felony convictions; they are for the "deep-end" of the offender population. Guidelines have not been developed for non-incarcerative sentences, for community service orders, for intensive probation, or for fines.

Now Congress has moved. Under the Federal Comprehensive Crime Control Act of 1985 a United States Sentencing Commission has been appointed. It is charged with the task of developing presumptive sentencing guidelines for all federal offenders/guidelines that deal not only with imprisonment, but with all other sentences, both incarcerative and community based. It is a substantial challenge, far beyond anything that scholarship has yet achieved in this field. An excellent membership has been appointed, including three judges. A fine staff is in place. The staff director is Kay Knapp, who was the Research Director for the Minnesota Sentencing Commission. The Commission has been directed, amongst other things, to fashion sentencing guidelines which take into account the dangerousness of the offender, and which appropriately relate prison sentences to predictions of future behaviour. All judges have done that for a long while; but now there is a Congressional mandate to tilt towards leniency for those predicted not to be serious dangers and towards severity for those predicted to be dangerous. The idea has great appeal – reduce our sanctions against those who threaten us less; increase them against those who threaten us more; be both parsimonious and selective in our use of punishment. But as you well know, that idea raises a host of difficulties, both theoretical and practical. Have we the knowledge to select the fermenting wheat from the stable chaff? Can a criminal justice system tolerate the resulting apparent inequalities of punishment among equally undeserving cases?

These are large questions. The work of the Sentencing Commission will merit your close attention. Their first report must be presented to Congress in September of this year and they have some novel and far-reaching ideas to present. They are not a parochial group. They are paying the closest attention to practice and scholarship in this country. They are attending to some Western European studies as well as to a wide range of practices and research in the United States.

Let me return to one troubling aspect of this effort to incorporate predictions of dangerousness as a formal part of the armamentarium of punishment. These ideas are current in all sections of the criminal justice system; they are by no means confined to the judiciary but are prevalent among the police and the prosecutors as well. It is often said by the advocates of selective enforcement that we already do it in practice, why not do it openly? Why not make it open and controlled, rather than let it rest in its present clandestine posture? Well, that's not an easy argument to refute. No responsible police spokesman, certainly in the United States, and no scholar of the police, doubts the existence of selective enforcement within police work. To a lesser extent the same point is yielded by the prosecutors of their exercise of prosecutorial discretion. If appropriate there, why isn't it appropriate to the judge in sentencing? Is there something about the judicial robe that precludes such selectivity and imposes a necessity for equal treatment of the equally undeserving? And what are the consequences of making overt what is now covert? Perhaps more injustice will be done openly than is done covertly – don't reform, the argument goes, things are bad enough as they are! Perhaps race and class bias will then even more extensively and openly plague the American criminal justice system.

I have two other points about the criminal justice system in the United States that I want briefly to develop. I'd like to talk a little about race and crime, and a little about drugs and the police, because these have recently presented special problems.
Race is a central problem in the criminal justice system in America. The risk is that the United States will enter the 21st century as it is now, with a locked-in, criminous, Black under-class. Let me give you the ratio of Blacks to Whites in the prison and jail populations: about 7 to 1, per hundred thousand. That's a formidable difference. But what does it mean? Is it racial prejudice in the police? Is it racial prejudice in the prosecutors, the courts, the parole boards? Do we see the Black man (because it is the young man we are always talking about) as more dangerous and therefore, by our covert exercise of predictions of dangerousness, more punishable? Will making that judgement overt reduce the prejudice? We are all captives of stereotypes, so racial prejudice must function to a degree.

As we have tried to study this question seriously it appears that the contribution that is made by the criminal justice system to this larger punishment of Blacks is not very great. If you look at the comparison between arrest rates and prison terms, there is a slight adverse tilt against Blacks, but it's quite small. It certainly doesn't account for a difference of 7 to 1. After all, the largest number of victims of crimes in the United States are Black, as well as the largest number of criminals. We talk of national crime rates, but they conceal the reality. Much of the United States has the same relatively low crime rates as Europe and England. But we also have pockets of appallingly high crime rates in our destroyed inner-city areas. Young Black men, ill-educated, third generation children supported by ill-planned social welfare systems, are locked into a pattern where their role models are the pimp and the pusher. Life is hard for them, and they disproportionately come to prison and jail.

I can give you one comforting fact about these racial disparities. As we develop predictors of dangerousness and try to predict not first-time offenders, but persistence in criminal careers, "blackness" drops out as a predictor. If you are defining a prediction scale for first time serious offenders — not previously convicted offenders, "blackness" would have to be, as a statistical matter, an important predictor. But if you are looking at a prison population and trying to define who are the likely high-rate repeaters (which is what the criminal career question amounts to), you would not use "blackness" as a predictor. Other factors possibly statistically related to race would predict — excessive drug use or unemployment — but you would not effectively use "blackness" in and of itself. That raises the very difficult problem of the extent to which a criminal justice system, resting on social inequities, can play any part in rectification of those inequities.

Let me move on to my final point about drugs and the police before concluding. We have just formed a National Academy of Science Committee on "Drugs and Crime." Not the same old question of which comes first, the drugs or the crime; do people on drugs then commit crime or do juvenile delinquents then come to drugs? That still seems to me an inconsequential question. We are to address a different question, a more fundamental question: what is the relationship between drug use and crime? And it is an important question in the light of some recent research findings.

It has been shown that much drug use is not flat and regular, but is rather periodic in intensity. Related to that is the fact that some predatory offenders go on sprees of hard drug use which are associated with extraordinarily high frequencies of criminal conduct. The opinion forms that if we can begin to understand the processes of that relationship and do something about it we may be able to influence rates of predatory crime.

There are now three fairly big samples of urinalysis of arrested persons, one in New York and two in the District of Columbia. About 80% of those arrested for felonies agreed to give urine samples. Of those who agreed, over 50% in all three samples had recently been using hard drugs. Like others, I must say I found that figure astonishingly high, much higher than I would have expected.

That introduces my final point, one which I am told has not yet been raised in this country, but one which much concerns me at the moment. It concerns drug use by police, particularly the Chicago and New York police, though I think it is a problem in many city police forces in America. The best estimate we have is that on the order of 20% of our 13,000 Chicago police might well be intermittent marijuana users. I'm not surprised by that, really. At first it surprised me, but when I think of where they are recruited from, and their ages, and the pattern of marijuana use generally in the community, there is no reason to think that they would differ very greatly in this respect from the rest of the community. I suggest
that if you persuade yourselves in this country that it is different here you are probably wrong. There is no reason that the police wouldn't reflect, by and large, the behavioural patterns of the cultural group from which they come.

So what should be done about it? I don't want a person to have police powers over others and himself or herself to be using drugs; certainly not hard drugs. So we have started in Chicago and New York the unannounced, intermittent urinalysis testing of the police when any sort of suspicion is focused, when they are being inducted, when they come back from leave, and so on. We are finding quite a substantial proportion who test positive by an emit test followed by a gas spectrography test. These indicators of the presence of cannabis in the system have a false positive rate of, say, 1 in 15. What do you do? The person in front of you has tested positive and if its a 1 in 15 false positive rate, you've no idea whether he's the 1 or amongst the 14. Sometimes you find out because he makes such silly excuses and his defence is so bad in the hearing that you conclude he is obviously a user. But if not, use of the test is extremely difficult.

Tests are now emerging that can confirm pretty nearly 100% whether the result is a false positive or a true positive. The indicators of drug use are as follows: the first day of drug use, behaviour is the indicator; in the period from day two to day five it is urinalysis or blood analysis. But the new fact emerging is that for up to two hundred days after use there are residues in the fingernails and the hair follicles that are indicative of drug use. We are, in other words, on the edge of having certain and precise indicators of the use of the major prohibited drugs. The jurisprudential and social problems that will be thus revealed – and which will have to be addressed – are considerable. New challenges will emerge from these new technologies and new investigative capacities. And again we will have to confront the policy questions: how to use these new insights within the constraints this Institute properly seeks to impose on itself; how to strike yet again a decent balance between State authority and individual freedom.