

# INDIANA LAW JOURNAL

---

VOLUME 24

FALL 1948

NUMBER 1

---

## REPORT OF THE STATE PENAL AND CORRECTIONAL SURVEY COMMISSION

To the Hon. Ralph F. Gates, Governor, the Legislative Advisory Commission, and the 86th General Assembly of Indiana:

Pursuant to Act S. 173, Ch. 360 of the Laws of the State of Indiana (1947), there was created the "State Penal and Correctional Survey Commission"; and Judge W. H. Eichhorn of Bluffton, Telford B. Orbison, Esq. of New Albany, and John K. Ruckelshaus, Esq. of Indianapolis were appointed members of that Commission. They met in the office of Governor Gates on June 2, 1947, qualified, and held the first meeting of the Commission. Judge Eichhorn died on May 27, 1948, having made very important contributions to the work of the Commission. To fill the vacancy, Professor Jerome Hall, of the Indiana University Law School, was appointed to the Commission on July 15, 1948. Orval D. Hunter, Esq. of the Legislative Bureau, was appointed Executive Secretary of the Commission. Mr. Ben Meeker of Indiana University, Division of Social Service, and Mr. Frank T. Flynn, of the University of Chicago, were appointed consultants.

The duties of the Commission, as prescribed in the statute, were "to survey the Indiana penal and correctional system, including administration costs, suitability and adequacy of buildings, training and rehabilitation programs and admission, parole and release procedures; to investigate the advisability and necessity for setting up new training programs for rehabilitation of youthful and adult offenders; to study and investigate types of new buildings needed to carry out an up-to-date program of penal administration, looking to the protection of society and the rehabilitation of offenders; to recommend effective parole and release procedures" and, also, to "make or cause to be made a complete recodification of the criminal laws of the State of Indiana, including procedure in criminal matters . . ."; and to file a report,

including the Commission's recommendations on all of the above matters.

## I

### THE PENAL-CORRECTIONAL SERVICES

#### (a) Institutions

The administration of criminal justice is of the utmost importance. No matter how sound the criminal law may be and no matter how efficient the criminal procedure, actual results are largely determined by the quality of the administration of the laws. The Commission therefore decided that Indiana ought to have the benefit of the best expert services that could be retained to study this major problem. In the United States two organizations have long enjoyed national recognition as the outstanding experts in this field, namely, the Osborne Association, Inc., with reference to penal and correctional institutions, and the National Probation and Parole Association. The Commission therefore retained these organizations to study the entire penal and correctional system, including probation and parole, and to recommend improvements. Extensive surveys were begun by these associations on January 20, 1948, and several reports were received from them by the Commission between June 15, 1948, and October 18, 1948. Mr. Austin MacCormick, a distinguished penologist and Executive Director of the Osborne Association, aided by a staff of expert assistants, surveyed the penal and correctional institutions of the State, filed a detailed report, and made many recommendations.

What, in general, are the findings of the Osborne Association? What is the condition of the penal and correctional institutions of the State?

Indiana, whose leadership and foresight in the past century were evidenced by the fact that it was the first state in the country to establish (in 1873) a separate penal institution for women, has fallen far below the standards now prevailing among the most progressive states in the operation of penal institutions. The Indiana institutions still place the major emphasis on maximum security—high walls and bars—whereas modern penology emphasizes diversification of penal institutions, ranging from maximum security where that is necessary, to medium and minimum custody, *e.g.*, an unwalled reformatory and also forestry camps and similar small open-type facilities. The availability of the latter types of institution allows a sounder classification of prison-

ers, *e.g.*, of first offenders, habitual criminals, sex offenders, alcoholics, mentally defective offenders, etc. This facilitates the rehabilitation of those who can be reformed. Fortunately the present physical plants housing adult offenders in Indiana are not in such poor condition that they must be scrapped. They can be modernized by moderate repairs. But there is great need to add several specialized institutions. It must be recognized that an adequate physical plant is essential to the operation of an effective penal and correctional system.

From the administrative viewpoint, the major weakness of the Indiana institutions is that they are wholly decentralized. There is no unified penal-correctional system in Indiana. Instead, there are various separate institutions, each practically autonomous, each operating in its own ways, each separately administered. This renders it very difficult, indeed practically impossible, to maintain consistently high standards of operation over a period of years. It accounts for the fact that disciplinary policies and methods differ markedly from one institution to another. Modern penology, supported by the example of the best penal institutions in the country, emphasizes the absolute necessity of unified administration. Only in that kind of organization can the benefits of modern knowledge regarding penal administration be utilized by the various institutions. At present, Indiana is one of ten states that do not provide for centralized administration of the penal-correctional institutions for adults. Some of these states, *e.g.*, Arizona, Delaware, Nevada, and New Mexico, do not have a large enough institutional problem to require unified administration. The other thirty-eight states, the federal government, the territories, the Army and the Navy have provided for unified control by establishing central boards or departments.

The reports of our consultants criticize many shortcomings attributed to the lack of unified administration in Indiana. We omit discussion of the obvious defects. Even with regard to relatively good work such as that being done in the operation of prison industries and farming, which are profitable enterprises for the State, there is considerable room for improvement. This is shown by the frequent overmanning of industrial jobs with consequent idleness for

many prisoners. There is the total failure in many instances to put the men to any productive work.

There is a need to centralize the purchasing of prison industrial and farm equipment and also to centralize the planning and allocation of particular industries to particular institutions. In these ways duplications can be avoided and new industrial opportunities discovered. There is need for more thorough planning of the entire industrial-farming program in the penal-correctional institutions and for integrating the supervising agency within a unified administration if well-laid plans are to be successfully implemented. If a unified administration will, as we believe, greatly improve this branch of the institutional work, it will certainly improve many other phases of the penal-correctional services.

Perhaps the most unfortunate weakness in the present operation of the Indiana penal institutions is the lack of a sound classification and treatment program. Sound classification means much more than the mere segregation of the first offender from repeaters, or escape risks from non-escape risks. It means that each individual prisoner is studied as an individual in relation to his own capacities, interests, fears, emotional stability, mental aptitudes, talents, and his day by day adjustments under confinement. Genuine classification is a continuing process which goes on throughout a man's confinement period and is not mere assignment to a certain job or a certain class upon his entrance into the prison. Good classification includes periodic re-classification so that men do not get "lost" in the institution. Good classification requires psychiatric services for the seriously disturbed men and social case-work service for men who have personal and family problems not serious enough to warrant psychiatric treatment.

Another major weakness in the present operation of the Indiana penal institutions is the lack of a good educational and vocational training program. There is not even the definite beginning of a sound vocational training program; and the educational work is, for the most part, merely a copy of the poorer grade schools. It has attracted little interest among the inmates. Accordingly, the principal opportunities for rehabilitation—by way of education and vocational training—are very largely passed over. This is unfortunate not only because the vast majority of prison

and reformatory inmates leave the institutions to re-enter community life, but also because so much progress has been made during the past twenty years in the education and vocational training of prison inmates that the requisite knowledge is available. What is needed is a staff of capable, energetic, imaginative directors of education, supervisors and teachers who can develop sound programs and make them attractive. That this can be done is shown by the experience of many prisons, *e.g.*, Atlanta and San Quentin. But again, sound, effective organization is essential if adequate educational and vocational resources are to be utilized in all the institutions. No less important are the competence of the educational staff and the security of its tenure.

Other functions that are essential, according to the standards of modern penology, are being inadequately performed in our penal institutions. We refer to medical and psychiatric services, the preparation and management of food, which requires experienced dieticians, the provision of libraries and recreation programs, which are everywhere recognized among leading penologists as essential in modern penal institutions. In all of these regards there is much room for improvement. It is shortsighted to deprive prison inmates of wholesome, balanced meals. It is cruel and hazardous to deprive them of ordinary recreation facilities that satisfy normal human needs. It is equally foolish and improvident to maintain conditions which encourage laziness and illiteracy when competent educational directors and vocational guidance experts can inculcate habits of industry and train men to do honest work.

Outstanding administrators can do a great deal to train their staffs, raise morale, and stimulate intelligent work. But they cannot do the impossible. The quality of the subordinate personnel is probably the most important single factor that conditions actual accomplishment. The personnel of the institutions is made up mostly of guards and other employees having direct contact with the inmates. These employees are at present ill-chosen and poorly trained; they are underpaid and insecure in their positions. There is an imperative need for improvement as regards their selection, training, salary, and security. A well-trained, secure, satisfied staff, directed and inspired by competent heads who administer the penal-correctional institutions in a unified

system, can restore Indiana to its former place among the leading states in this important field of public service.

The State has been fortunate in having many able, public-spirited citizens serve as members of the institutional boards—often at considerable sacrifice of their private interests. It must be recognized, however, that for some years, penal-correctional work has been highly specialized. It is generally accepted that the administration of penal institutions is professional work, requiring a trained, experienced personnel. In recent years there has been a great advance in knowledge of penology. There has been considerable accumulation of data, development of scientific methods of operation and the like; and these require professional application. No matter how able and conscientious laymen may be, they lack the professional skills and expert knowledge that is required to operate modern penal institutions successfully. The stake which Indiana has in its penal and correctional institutions, involving millions of dollars annually, as well as the inestimable value of the reformation of thousands of persons who are inmates of these institutions, can only be properly safeguarded if the services of the most competent administrators are obtained and if the general level of competence of personnel is raised. Only by the supervision of skilled, professional penologists can sound, uniform standards and continuous consistent policies be maintained. Only a competent, secure, adequately paid personnel can put the administrators' programs into actual successful practice.

In calling attention to the above major aspects of the administration of the penal institutions, we do not wish to convey the idea that the conditions are uniformly bad. On the contrary, some phases of the work, indeed at the Woman's Prison, *e.g.*, many aspects of the work, are performed in a superior manner. The total picture of Indiana penal-correctional institutions is what we have had in mind. We believe it fair to say that these institutions range in quality of plant, personnel, and administration from definitely superior in a few spots and services through average and down to a seriously inferior standard in many respects; and that there is considerable room for improvement.

In pointing out some of the weaknesses and shortcomings of the penal and correctional institutions, there is no

intention to censure any person or group of persons. It is not malevolence or fraud that is at the root of our difficulty. No person or group of persons has deliberately sought to block the progress of our institutions. On the contrary, there is abundant evidence of excellent motivation and sacrifice of personal interest to advance the state welfare in this area.

The plain fact is that we have imperceptibly become submerged in careless sub-standard ways of operating these institutions. If a single underlying cause of this condition is to be emphasized it is lack of understanding of the problems, even by many officials and otherwise enlightened citizens. And back of that is a grossly uninformed public opinion which does not appreciate the necessity for utilizing the very best penal-correctional services the State can obtain. It is still the general opinion, unfortunately shared by some officials, that repression is the only recourse, and that psychiatric and case work services, educational programs, and vocational guidance in prisons merely indicate weak sentimentality. But, apart from the humane reasons that compel one's skepticism of easy harshness, there are plenty of sound selfish reasons to reject such simple solution.

The method of harshness in prisons is simply a confession of incompetence; its only effect is to harden the offender. We need sound, scientific methods to reach into his mind and soul and revive the social, law-abiding traits that lie dormant. We cannot afford to spurn the methods of modern penology. We do so only at peril to ourselves. The inmate returns to our midst. He mingles with us and with the members of our families. If we have not taken proper advantage of the time he was in our custody, if we have not given him more understanding than he had when he entered the penal institution, if we have so far neglected our opportunity that we leave him as fully without a trade as ever he was, and the former inmate re-enters our midst only hardened and embittered, without skill or vocation, what can we reasonably expect? Accordingly we cannot shake off our responsibility as thoughtful citizens to do our utmost to provide a sound solution of this major social problem. If we understand the problem fully and if public opinion is adequately informed, we shall move in the direction of sound reform.

### (b) Probation and Parole

The granting and supervision of probation and parole are just as important as is administration of the institutions. We deal here with offenders who are thought to represent good risks as regards their being at large. Their chances of normal adjustment are good; and, accordingly, they are either spared imprisonment entirely or they are released before the expiration of their maximum terms. The probationer and the parolee need help; they need competent guidance as well as sympathetic cooperation if they are to readjust themselves. Here is a challenge that can only be met by skilled, resourceful officers, whose "load" is limited to such numbers as can actually be supervised.

What is the situation in Indiana with regard to probation and parole, as reported by the National Probation and Parole Association? The trial judges determine whether and to whom to grant probation. In the federal courts and in some states, a thorough pre-sentence investigation is required. The Indiana judges may, if they wish, request the probation officer to make such investigations, but little consistent use has been made of this important procedure for various reasons.

In many counties, the judges have not even appointed probation officers, despite the fact that such appointment is mandatory. In other counties "supervision" is the merest formality. The probation officer never leaves his or her desk, never sees the probationer, never takes the slightest hand in increasing the chances of decent readjustment in the community. In many instances, the probation officer is not equipped by education, training or experience to render any real assistance. In states where probation is successful, the reason for that success is not far to seek—the probation officers are persons of good education, trained to make careful investigations, keep detailed accurate records, anticipate difficulties before they become unmanageable, and act promptly and effectively to meet them. Their load is limited to that number of probationers who can actually be contacted at frequent intervals. The salary is adequate to attract and hold a competent class of persons. The tenure is secure. In short, in those states probation work has become recognized as a profession. The results for those states are highly advantageous.



The superiority of probation, in proper cases, over imprisonment is evident. For example, probation costs 15¢ per day as against \$2.37 per day for confinement in a federal prison. It has been estimated that in Indiana the cost for each probationer is about \$38.00 per year or less than 11¢ per day as against institutional costs of \$361.00 to \$647.00 per year or 99¢ to \$1.47 per day. This disparity in Indiana is partly due to the fact that probation officers are underpaid; but the federal figures cannot be impeached on that score. The financial saving realized in a sound use of probation is great.

But economy is among the lesser of the objectives and advantages of probation. The probationers are often first offenders or young persons and, usually, both. They have relatively good records and backgrounds. They are on the borderline between decent law-abiding conduct and criminality. With the helping hand of skilled workers who have sufficient expert knowledge to give real help, and not merely the desire to do that, the issue can be determined favorably to the individual, the community and the State.

Accordingly, it is with deep regret that we must emphasize the fact that probation work in Indiana has been greatly neglected. There are many probation officers who do fine work and there are able, conscientious supervisors who demonstrate the value of competence in this very important field. But the over-all picture is one of hit or miss selection of officers, inadequate training, lack of careful investigation and record-keeping, loads that are far too heavy to be carried by even professionally trained officers, salaries that are much too low to attract and hold a competent staff, and in addition to all of this, insecurity. It requires no expert to understand that the great challenge of rehabilitation by way of probation cannot be adequately met under such deplorable conditions.

The parole situation in Indiana is substantially better in so far as supervision is concerned than that of probation, but is much worse as to the initial selection of offenders for parole. The selection of men for probation is at least passed upon by an experienced judge who has professional qualifications for his duties. Parole in Indiana is granted by lay boards operating in connection with each institution. It is a hurried process, utilizing few data and little knowledge al-

though even when parole is administered by experts, painstaking, careful study is required. Sound standards are rarely employed, and there is little uniformity and consistency in practice. The community pays the price in serious crimes committed by parolees and in bitter, hardened offenders who deceive the lay parole boards while deserving men are denied parole.

Research on the granting of parole has been developed to a high degree in recent years. Many criteria such as age, education, record, vocation, marital status, and the like have been very carefully analyzed and prediction studies of successful parole have been made available. These studies have been correlated with the actual operation of parole. Many advances have been made in the use of psychiatry, case work, psychology, statistics, and other disciplines that can be drawn on by experts in parole to aid their judgment in selecting parolees. While selection of parolees is far from established on a scientific basis and mistakes and violations are inevitable no matter how expert a parole board may be, certain principles are nonetheless available to guide definite improvement of parole in Indiana. The decisions to place certain persons on parole and to deny parole to others, if they are to be sound and fair, must be reached after careful, detailed study of each case. The officials must not only be free from all pressures and influence from any quarter, just as are courts of law; they must also devote the necessary time, *i.e.*, full time, to the study of the many cases that come before them. And they must be familiar with the published knowledge of parole selection and have the skill to draw upon and utilize that knowledge.

Indiana is indebted to the many fine men and women who have served on parole boards at great personal sacrifice. But if the difficulties of the problem of parole are understood, and if the thorough methods, the time, study and deliberation of the parole boards in the federal government and the states most advanced in this regard are known, it can only be concluded that an impossible burden has been placed upon our boards of parole. It is unfair and shortsighted to expect laymen, no matter how competent, who are busily engaged in their private affairs and vocations to do a parole job that is comparable to that performed by boards of experts who devote their full time to this arduous task.

In light of the present status of parole in Indiana, the principal direction of wise reform is clearly indicated.

The supervision of parole in Indiana presents, on the one hand, work of as poor quality as the probation work described above and, at the other extreme, the very good work of many county probation officers and most of the district supervisors. Indeed, these latter have demonstrated how much good work can be done by even a few competent parole officers, if given a fair opportunity. But there remains much room for improvement with reference to the selection of parole officers throughout the state, the adjustment of a workable load, adequate training and, not least, fair salaries and security of tenure. In short, we need to draw upon our recent progress in parole supervision and insist that the same high quality of work be extended to all the parole supervision services in the State.

### (c) Juvenile Delinquency

In Indiana, as in all other states, the public is periodically shocked by the commission of very serious offenses by mere children. In fact, anti-social conduct by children is a daily occurrence. It raises difficult problems that seem far from adequate solution.

The Juvenile Court, an American invention created at the turn of this century, has been regarded as the most important advance in the treatment of juvenile delinquency. It is a court which functions informally and, if it is a good court, it is headed by a broadly-gauged judge, aided by a staff of competent probation officers, social workers, and psychiatrists.

Until a few years ago it was believed, when such a court had been set up, especially if provision for thorough psychological examination before trial had been made, that everything that could be done by the state had been done. The startling revelation of enormously high recidivism by children who had gone through the best juvenile courts has brought the realization that further efforts are necessary if we are to cope with juvenile delinquency adequately. This has led to widespread efforts to improve the juvenile laws and courts, to provide a sufficient number of juvenile courts and more adequate correctional services. It has emphasized the importance of prevention of delinquency and has en-

couraged the expansion of Children's Bureaus to deal with the whole problem of maladjusted, underprivileged children. It has also led to the development of community programs in many parts of the country, in which all the resources of the community are marshalled in an effort to prevent juvenile delinquency.

The situation in Indiana with reference to both the prevention and the treatment of juvenile delinquency is very uneven. On the credit side of our ledger is the excellent progress we have made in some phases of institutional treatment, especially at the Girls' Training School. On the other hand, the shortcomings in the adult probation and parole services apply equally but with greater emphasis to the juvenile problems. We do not have enough juvenile courts, headed by competent judges who are specialists in this field. Nor have we taken the necessary steps to deal adequately with the prevention of juvenile delinquency.

The need for improvement of the various services relevant to juvenile delinquency is therefore great. We need a co-ordinated long-range program, more juvenile courts, an increased number of competent personnel, and expert leadership which can administer the various services effectively and, at the same time, enlist public support. Here—as regards the children—is the most insistent challenge to our resources. It is possible to save many children from delinquency and subsequent serious criminality if we are willing to inaugurate and carry on the necessary programs.

#### (d) The Need for Unified Administration

The key to understanding the many complex problems of the entire penal-correctional field is to identify and take hold of what is essential among the many varied services performed by the institutions, agencies, and officials. If that is done, it is possible to formulate a sound program and to appraise the recommendations filed below. Throughout the entire field where officials deal with anti-social conduct, from the prevention of criminality and juvenile delinquency to probation to institutionalization and release via parole or otherwise, the central problem is a special instance of the problem of control, influence, and education of human beings. It is broadly and ultimately a problem of education with special applications to the maladjusted, the weaker, and

the anti-social members of the community. The ends of deterrence and moral education are more or less adequately provided by incarceration or supervision outside institutions. The objective that is neglected most is the correctional one. But all these aspects of what may broadly be termed the penal-correctional process are ultimately educational.

All the various specialized services in the penal-correctional field are therefore closely interrelated. The supervision of parole may differ in some details from that of probation but the central common problem is the adjustment of certain types of human being to normal social life. The question of deciding as wisely and scientifically as possible—who shall be placed on probation or parole—is intimately connected with the central problem—what is required to make a satisfactory social adjustment and what types of person show favorable chances in that regard? The parole and probation officers carry out the actual experiments which were planned by the judge and parole board when the probation or release was granted. The operation of the institutions is no less a part of this common problem. These institutions have custody of offenders for limited periods of time. The penal-correctional institutions are therefore not so much ends in themselves as they are instruments designed to prepare their inmates for law-abiding, normal life after discharge. Good “material” for parole is recognized and developed in well-administered institutions. So, too, much of the data that must guide parole boards and supervisors is or can be discovered and recorded in the institutions.

For these reasons the unification of all the penal-correctional functions of the State stands out clearly as the guiding principle to direct the general improvement of present conditions. The major application of this principle is that *all the penal-correctional services should be brought under central administration*. This is the general thesis urged by our expert consultants. It is the consensus of penologists as well as that of other informed persons. A central, unified administration headed by experienced, progressive, professional officials could provide an organization equipped to use the best of modern penology in the conduct of the various institutions. Specifically, this means bringing together, under central administration, all the work and services connected with the operation of all the penal-

correctional institutions and of probation and parole—and it would include the juvenile services and institutions. This would represent the maximum unification of all the penal-correctional services.

There are, however, certain good reasons to allocate the entire problem of juvenile delinquency, including probation and supervision of those released, as well as the juvenile training schools, to a separate State unit, preferably in the Department of Public Welfare. It has been universally accepted that juvenile delinquency is not a criminal problem and that the function of juvenile courts is not to punish children but to educate and rehabilitate them. This is also the function of the training schools and foster homes where children are placed. Thus the problems of juvenile delinquency are part of the larger problem of under-privileged children, in all its phases. The Children's Bureaus, from the great national Board at Washington to its various counterparts in the states, are specialists in the handling of children's problems. They meet and deal with delinquency as part of a general problematic situation. They gather the facts comprising the general problem. When delinquency or dependency is part of the problem and court action is desirable, the Children's Bureau has the information and experience required to handle that aspect of the problem, as well. On the other hand, it is possible that a very good liaison between the Children's Bureau and a division of the central administration of all penal-correctional services would be the most effective organization.

In any event, although there is room for debate regarding the allocation of the juvenile services, there is little reason to doubt the soundness and desirability of central administration of all the adult penal-correctional services, including probation and parole. But it is important nonetheless, to remember that there is no magic in central administration. Indeed, incompetent persons in control of all penal-correctional services would handicap the sound operation of individual institutions and services. The merits of unified, central administration presuppose competent, resourceful direction and leadership. Given that, there is no doubt regarding the desirable direction of reform in the penal-correctional services of Indiana.

## II

## CRIMINAL LAW AND PROCEDURE

(a) With reference to the recodification of the law of criminal procedure, the Commission's investigation led it to conclude that the attainment of the best results required the separation of the relevant work into a long-range and a short-range program. The objective of the long-range program is a soundly organized Code of Criminal Procedure which includes all of the best rules of criminal procedure, together with those rules of substantive law which are so closely related to the procedural rules as to require their inclusion in the Code of Criminal Procedure.

The objective of the short-range program is the immediate improvement of the Indiana rules of criminal procedure by the adoption of a number of rules which are clearly preferable to existing rules. For example, the adoption of an inclusive motion to dismiss, corresponding to Rule 12 of the Federal Rules of Criminal Procedure, would effect a marked improvement in the present Indiana rules which involve many technical, refined distinctions, resulting in uncertainty. The same is true of various other rules of criminal procedure.

With the above objectives in view, the Commission had a tentative draft of a Code of Criminal Procedure prepared by Executive Secretary Orval D. Hunter, Esq., and a small staff of technical assistants. It should be noted that Indiana is fortunate in that it can take advantage of the progress made in the United States during the past twenty years in the field of criminal procedure. The American Law Institute, after extensive studies for several years, costing many thousands of dollars, published its model Code of Criminal Procedure in 1930. Another major contribution to this field is the Federal Rules, adopted and published by the United States Supreme Court in 1946 as *Rules of Criminal Procedure for the District Courts of the United States*. In the Indiana tentative draft advantage was taken of the above progress in the field of criminal procedure. The objective was to retain as much as desirable of present Indiana criminal procedure in the light of the best current knowledge on the subject and to supplement that where necessary. In short, we sought to avoid mere innovations and, at the same time, to bring the

Indiana criminal procedure up to the best prevailing standards.

Fifteen hundred copies of the tentative draft were printed and circulated among lawyers, judges, and other interested persons throughout the State, with a request for criticism and suggestions. Efforts were made to enlist the cooperation of all of the larger Bar Associations in the State, and several of them appointed committees of lawyers with specialized experience in this field. On October 1, 1948, the Commission held a meeting in Indianapolis, devoted to discussion of the tentative draft; and representatives of all interested groups which had been consulted were present.

Subsequently thereto, the Commission selected from its tentative draft those rules of criminal procedure which, in its opinion, merit immediate consideration by the Supreme Court with a view to action by the Court in pursuance of Ch. 91, Acts 1937, § 1, p. 459 of the Indiana General Assembly, giving the Supreme Court power "to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state."

The Federal Rules of Criminal Procedure are not a legislative enactment. They are rules of Court, adopted by the Supreme Court of the United States, and binding on the Federal Courts. Rules of procedure have been adopted in this way in several states, including Indiana, and there is an increasing trend in that direction. There are several reasons to support this method of adopting rules of criminal procedure. The rules of criminal procedure are technical; hence the average legislature is not well equipped to appraise this body of law expertly or to evaluate proposals to change the existing rules. The courts, on the other hand, are admirably equipped to evaluate the rules of criminal procedure and to pass upon proposals to reform them. The courts observe the daily operation of the rules. They know the weak spots, where improvements are needed. They can readily confer with experienced trial lawyers and determine the state of professional opinion regarding the rules of criminal procedure. The adoption of rules of criminal procedure by the Supreme Court can, when necessary, be done quickly; so, too, if an adopted rule does not function well, it can easily be modified or revoked by court order. The policies underlying sound rules of criminal procedure are efficiency, sim-



plicity, fairness, economy, and the like. But the achievement of these ends in the field of criminal procedure, as stated, requires highly technical competence and experience.

In view of the recent progress in this country in the field of criminal procedure, the necessity for technical competence if sound rules of procedure are to be adopted, and the fortunate enactment of the broadly phrased law of 1937, noted above, the Commission concluded that it could best discharge its duty regarding procedure (1) by preparing a tentative draft of an inclusive Code of Criminal Procedure, which would be helpful in the long-range program and (2) by selecting certain rules for early consideration by the Supreme Court in such a way as to lead not only to immediate improvement of our criminal procedure but also to a sound legally authorized method of continuous improvement of our criminal procedure.

It would, in our opinion, be a serious mistake, as well as a legally questionable method, in the light of Ch. 91, Acts of 1937 of the General Assembly, to submit a Code of Criminal Procedure to the General Assembly for adoption by it. On the other hand, until various questions are authoritatively answered by the Supreme Court there will remain much uncertainty regarding the best methods to be pursued to attain the long-range objective—a sound, inclusive Code of Criminal Procedure. These doubts can largely be removed by the Supreme Court if it will not only consider and adopt desirable rules that are clearly within its authority, but if it will also declare its position regarding certain important questions, *e.g.*, the adoption of rules that are clarified restatements of existing legislation, as was done by the United States Supreme Court with reference to the Federal Rules of Criminal Procedure.

We wish it clearly understood that we do not suggest or imply that the Supreme Court should be expected to engage in the conduct or supervision of necessary extensive research. On the contrary, it is evident that so far as the long-range program of continuous improvement of criminal procedure is concerned, the burden of the research must be carried by other agencies; and in the following pages we recommend the creation of a state agency which could continue that work from the point to which it has been carried by the Commission's tentative draft of a Code of Criminal

Procedure. The substance of the above remarks is that the leadership of the Supreme Court, as the authorized, competent division of the government, is needed not only to effect several immediate improvements in criminal procedure but also to initiate and stabilize a continuing program to attain a sound, inclusive Code of Criminal Procedure, sanctioned by the proper authority.

(b) With reference to the recodification of the substantive criminal law, the situation and the problems are quite different from those concerning the penal-correctional services and criminal procedure. The term "Penal Code" is used ambiguously, sometimes meaning a mere collection of the criminal statutes, arranged alphabetically or in other convenient fashion; while, at other times, "Penal Code" means an organized, systematized body of criminal law. If, in addition to systematization, it is desired to eliminate all obsolete laws and other criminal laws of little or no value, and beyond that, to draft a code which adequately meets current social needs, then a very great task is presented. For the criminal law of Indiana, though resting immediately on the legislation of 1852, is much older than that. Indeed, it is as old as the English common law of crimes, and that goes back even farther than the 13th century. To bring the vast body of Indiana criminal law up to date in an organized code would require several years of thorough, painstaking research by a group of specialists as well as numerous public and semi-public hearings—and, it must be noted, many controversial questions would need to be resolved. To give only one specific instance of what is involved in such a project—a recent moderately extensive recodification of the substantive criminal law of a state about half as populous as Indiana occupied the time of seven specialists for two years, required numerous hearings, consultations, etc., and cost almost \$25,000. At the present time, with modest objectives in view, we estimate that it would take a minimum of three years of intensive work to provide a sound penal code for Indiana, and that the cost would be substantially in excess of the above amount. Instead of such a recodification of the criminal law, it would be much wiser, in our opinion, to set up an agency to study improvement of the criminal law over an indefinite period of years, charged with the duty of periodically recommending im-

provements of various parts of the criminal law. This would be a slower process but it would be sounder and much more fruitful in the long run. Accordingly, the Commission concluded that it would be delusive to submit a mere rearrangement of the existing criminal statutes as a "Penal Code," and that our duty required us, instead, to bring the actual problem to your attention.

In further consideration of the problems of penal codification, we were led to explore the question of methods, *i.e.*, the best ways and means to achieve the desired result. We thus discovered that the problems of reform of the criminal law and, specifically, the problem of setting up and utilizing sound methods to attain that end, are closely related to the problem of legal reform generally. This has led us to some very far-reaching conclusions regarding the needs in Indiana for improvement of our substantive law, including that of crimes.

In our opinion, one of the greatest advances in the direction of sound reform of the substantive law, civil and criminal, has been the creation recently of State Law Revision Commissions. New York initiated this important movement in 1934; Law Revision Commissions have also been established in New Jersey, North Carolina, and Louisiana, modeled largely after the New York pattern. (N.Y. Laws 1934, c. 597). The Law Revision Commission is a permanent state agency, consisting usually of 5 members, appointed for several years, and empowered to appoint sub-committees and consultants. The cost has ranged from about \$65,000 per annum in New York to about \$15,000 per annum in one of the smaller states. During the initial years the cost would be small and the work could be expanded to accord with needs and available financial support.

The Law Revision Commission fills a need that has been felt in this country and abroad for many, many years. The substantive law includes a vast ocean of judicial decisions, statutes, regulations, and opinions. Originating in the Middle Ages, it was received and transformed in this country, and has been modified and increased continuously. The conditions of a commercial, industrial age have had enormous effect. Despite the difficulties and the needs, the substantive law has remained largely unorganized, statutes have

been piled on statutes, and reform has been intermittent and spasmodic.

The Law Revision Commission is the most important solution to the insistent need to eliminate outmoded and defective rules and statutes, recommend required changes, simplify, clarify, and organize the entire, presently amorphous body of law. The Law Revision Commission keeps in touch with and considers the recommendations of such organizations as the American Bar Association, the American Law Institute, The Commissioners for Promotion of Uniformity of Legislation, and various learned societies. It receives suggestions from judges, lawyers, and other interested persons. It has a carefully worked out method of deciding which projects to undertake immediately, which ones to defer, etc. It is not expected to carry on any agitation pro or con with reference to the adoption of any of its recommendations. It is, instead, a research, planning, surveying agency, and submits detailed reports and records of its research, as well as specific recommendations for legal reform.

We refrain from adding any further details. (These can be found in 54 *Harvard Law Review* 221-246 (1940); and 42 *Illinois Law Review* 697-727 (1948), and references cited there.) But we think it important to emphasize certain distinctive tasks of a Law Revision Commission by noting that it is a permanent body functioning daily; whereas such an organization as the Judicial Council meets occasionally and is intended to make available the service and counsel of judges and lawyers on matters of procedure, rather than to engage in daily research and improvement of the entire law. Legislative Reference and Drafting Bureaus are chiefly concerned with new legislation rather than with improvement of the entire existing law, and they emphasize immediate needs of the legislature rather than long-range research programs on the existing law, as does the Law Revision Commission. For these and other reasons, the states which have established Law Revision Commissions continue to maintain Legislative Reference and Drafting Bureaus and Judicial Councils. The need for and functions of each of these agencies are distinctive and important.

It is possible, in our opinion, to advance beyond the achievements presently attained by the Law Revision Commissions in this country by including in that agency a

section devoted to *factual research relevant to law reform*. Law does not function in a vacuum but in an actual, living society and in relation to social and economic facts. The need for factual research as an adjunct to sound legal reform is becoming increasingly recognized. Indiana could be placed in the very forefront of legal progress by the maintenance of a competent Research and Law Revision Commission performing the services indicated above. As in New York and Louisiana, where Law Revision Commissions are maintained, the reform of the substantive criminal law would be one of the duties and objectives of such an Indiana Commission. As with reference to other branches of the law, improvements would be made not in one "fell swoop" over the entire field, but periodically and in segments, as careful research and mature study established the validity of the recommended reforms.

## RECOMMENDATIONS

### I. The Penal-Correctional Services

(The following major recommendations are, for the most part, additions to the recommendations we have made or implied above in the context of our discussion of various problems. A large number of recommendations made by our consultants are of an administrative nature and presuppose certain fundamental changes, especially the appointment of competent administrators who will put the recommendations into effect.)

In addition to the recommendations made above in this report, we recommend:

1. That a Department of Correction be created by the Legislature at the next (1949) session.

- (a) That all adult penal-correctional services, including supervision of probation and parole, be placed in, and under the direction of, the Department of Correction which shall have full administrative control over all penal-correctional institutions for adults and the supervision of adult probation and parole.

- (b) That all the juvenile delinquency services (excepting those concerning fiscal matters, which shall be in the Department of Correction) be placed in, and under the direction of, the Department of Public Welfare, in a Juvenile Delinquency Division devoted exclusively to the above

juvenile services, including administration of the training schools, the granting, revocation, and supervision of probation and release from the training schools. (The validity of this division of the penal-correctional services, *i.e.*, the allocation of all of the adult services to the Department of Correction, and of the juvenile services to a Division of the Public Welfare Department, is recognized not only among leading penologists but also by national leaders of public welfare work. See, *e.g.*, the article by M. Stevenson, Assistant Director, American Public Welfare Association, on *Probation and Parole in Relation to the State Public Welfare System*, published by the American Public Welfare Association, 1313 E. 60th Street, Chicago.)

(c) That there be created a Board of Correction, consisting of six laymen and two *ex-officio* members, namely, the Administrator of the Department of Public Welfare and the Director of the Council for Mental Health; that the six lay members be appointed by the Governor on a bipartisan basis for staggered terms of four years, and receive compensation of \$25.00 a day when on duty, together with expenses. The principal function of the Board of Correction shall be policy-making rather than administrative.

(d) That an outstanding, experienced penologist be placed at the head of the Department of Correction, with the title of "Commissioner," and that provision be made for at least two deputy or assistant commissioners, to be appointed by the Commissioner with the approval of the Board of Correction; and that an outstanding expert in the problems of juvenile delinquency be appointed to head the Juvenile Delinquency Division of the Department of Public Welfare.

2. That a Parole Board consisting of three highly qualified persons be established and placed in complete, exclusive control of the granting and revocation of paroles. The members of the Board shall devote full time to their duties. The Parole Board may be located in the Department of Correction, but it shall not be under the direction of the Commissioner or any one else, but shall, like courts of law, be entirely independent in the performance of its duties.

The above recommendations imply:

(a) That the present Boards of Trustees of all the penal-correctional institutions, juvenile and adult, be abolished; such Boards may be appointed by the Commissioner

of Correction with the approval of the Board of Correction, but shall function only in an advisory capacity.

(b) That the State Commission on Clemency be abolished; or that, if continued, its duties be restricted to advising the Governor with reference to applications for pardon, commutation of sentence, reprieve, and remission of fines or forfeitures, all of which are within the constitutional powers of the Governor.

## II. Criminal Law and Procedure

(1) With reference to recodification of the substantive criminal law, we recommend that a bill be presented to the 1949 General Assembly for the establishment of a Research and Law Revision Commission, and that, if the bill is passed, the problem of the recodification of the criminal law be submitted to that Commission for immediate consideration. We attach hereto a tentative draft of a bill to establish such Commission.

(2) With reference to criminal procedure, the Commission recommends (a) that its tentative Draft of a Code of Criminal Procedure be transmitted to the Research and Law Revision Commission, if established, or to another agency designated by the Supreme Court to continue the long-range program of improvement of the State's criminal procedure; and (b) that copies of certain proposed rules of criminal procedure, attached hereto, be transmitted to the Chief Justice of the Indiana Supreme Court with the request that the Supreme Court study those rules in the immediate future and, in pursuance of Ch. 91, Acts 1937, § 1, p. 459 of the Indiana General Assembly, adopt those rules which it approves as Official Rules of Criminal Procedure.

## LEGISLATION

Act S. 173, creating the Commission, did not require it to draft the bills necessary to put the Commission's recommendations into effect. But in the course of our investigation, we acquired considerable information regarding relevant legislation, which, we thought, should be made available. We therefore requested two of our consultants, Messrs. Orval D. Hunter and Richard C. O'Connor, to prepare tentative drafts of bills, embodying recommendations of the Commission.

We recommend that these tentative drafts be transmitted to the Legislative Bureau and that that Bureau be requested to draft the final bills to be presented to the 1949 General Assembly. We also recommend that copies of the tentative drafts be made available to all persons interested in the enactment of sound legislation on the various subjects dealt with in this Report.

#### ENCLOSURES

We transmit with this Report the following:

- (1) the tentative drafts of proposed bills;
- (2) the original copies of the various reports of the Osborne Association, Inc., and the National Probation and Parole Association; and
- (3) the Commission's tentative draft of a Code of Criminal Procedure and copies of certain rules of criminal procedure.

#### CONCLUSION

The Commission emphasizes the need for very careful planning of a sound, long-range program. The enactment of necessary legislation and judicial action are essential first steps, but the success of the program requires persistent efforts by many persons. To improve the personnel, raise the level of all the penal-correctional services, inform public opinion and enlist the necessary interest and support require the combined efforts of many thoughtful, public-spirited citizens over a period of years. The same is true with regard to the improvement of our criminal law and procedure. No miracles can be performed in the penal-correctional field or with reference to the criminal law. Nor will any system of criminal justice, however expertly designed and operated, be entirely free from error. But it is possible to make many great improvements in this field of important human relations and to preserve and advance the progress made if a wise, long-range program is vigorously supported.

Respectfully submitted,

John K. Ruckelshaus, *Chairman*  
Telford B. Orbison, *Secretary*  
Jerome Hall

November 15, 1948