DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION

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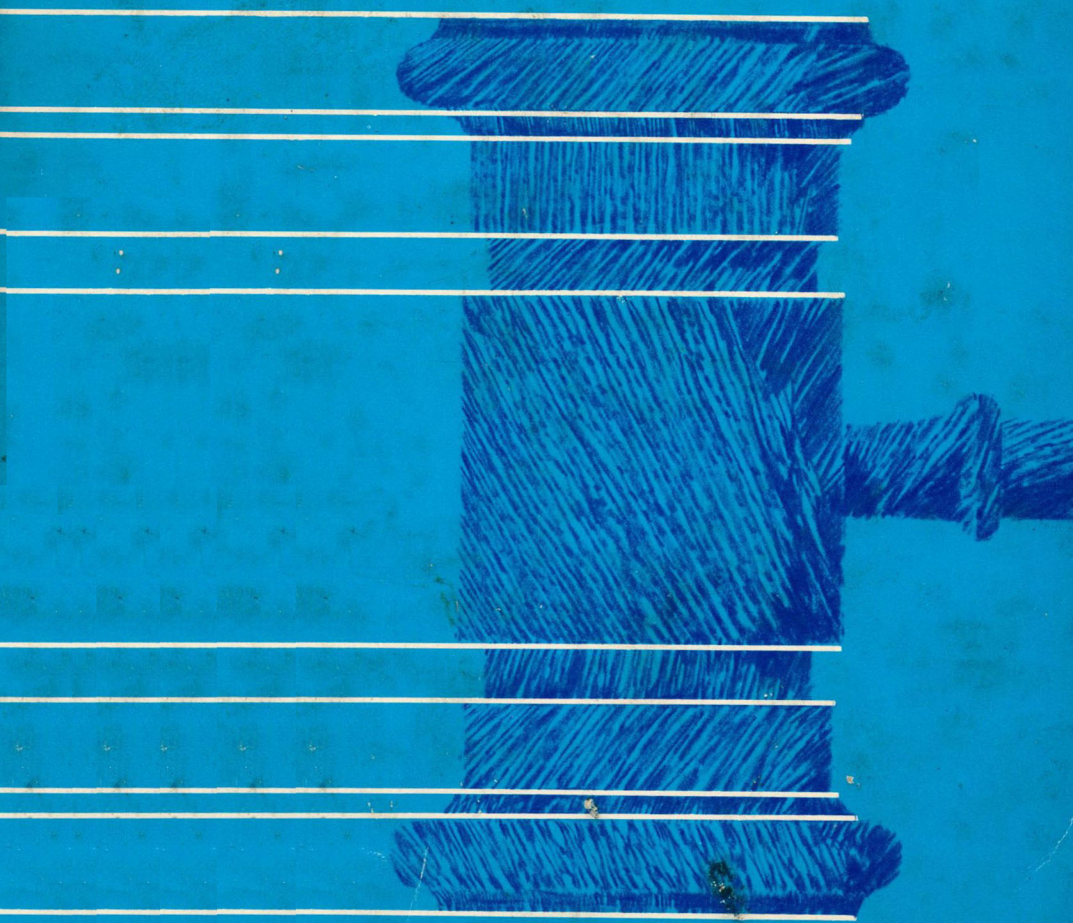

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Decisionmaking in Criminal Justice

To Karol and Betty

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Finally, we each want to thank the other for accepting the responsibility for the errors in the book.

The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation.

N. Baker, "The Prosecutor—Initiation of Prosecution," *Journal of Criminal Law, Criminology and Police Science* 23:770 (1933).

Preface

It will be argued in this book that the study of decisions in the criminal justice process provides a useful focus for the examination of many fundamental aspects of criminal justice. Indeed, an understanding of the decisions made by victims of crime, police, prosecutors, judges, corrections administrators, and paroling authorities is critical to an understanding of the criminal justice process. These decisions are not always highly visible. They are made, ordinarily, within wide areas of discretion. The objectives of the decisions are not always clear; and indeed, the principal objectives of these decisions are often the subject of much debate. Usually they are not guided by explicit decision policies. Often the participants are unable to verbalize the basis for the selection of decision alternatives. Adequate information for the decisions usually is unavailable. Rarely can the decisions be demonstrated to be rational.

By a "rational decision" we mean "that decision among those possible for the decisionmaker which, in the light of the information available, maximizes the probability of the achievement of the purpose of the decisionmaker in that specific and particular case."[1] This definition, which stems from statistical decision theory, points to three fundamental characteristics of decisions. First, it is assumed that a choice of possible decisions (or, more precisely, of possible alternatives) is available. If only one choice is possible, there is no decision problem, and the question of rationality hardly will arise. Usually, of course, there will be a choice—even if the alternative is to decide not to decide, a choice that, of course, often has profound consequences. Choosing to do nothing (report a crime,

make an arrest) has its impact; and the prison inmate whose case is "continued" for later parole consideration would no doubt agree that "delay is the deadliest form of denial."[2] Second, it is assumed that some information is available for use in arriving at the decision. Again, the idea of a rational decision made wholly without information would hardly occur to us. Ordinarily it is expected that if a decision is to be made, some information will be available. Third, there is assumed to be a goal or a set of goals, purposes, or objectives to be achieved (or maximized or minimized). If it is not known what is sought to be achieved, then it is not possible to assess the rationality of any particular decision choice.

There is no requirement that we prefer rationality, but we assume that rational decisions generally are preferred and sought in the criminal justice system. We admit the preference and the assumption.

It will be argued that available methods of diagnosis, classification, and prediction are inadequate at present to provide much useful guidance to law enforcement, prosecutorial, judicial, or correctional decisionmaking. Much has been learned, however, that can contribute to such guidance, and we seek to summarize some of this knowledge and to point to areas of ignorance requiring research on these topics.

It is clear that increased rationality in criminal justice is likely to be achieved only after it has become possible to identify more explicitly, with adequate operational definitions, the specific objectives of each phase of the apparatus intended to reduce, control, or at least cope with problems of delinquency and crime (or in some other sense to provide justice). A second requirement must be the identification, adequate description, and perhaps the elaboration of additional alternative decision choices at each step. The third necessity, of course, is the requirement of information. By the term "information," we do not refer to mere data, no matter how carefully collected or how reliable, but to those data that, by demonstrable relevance to objectives, reduce uncertainty in the decision under consideration. Thus, having information implies having knowledge of the relation of the datum in question to the decision objectives; and such knowledge often is wholly lacking in the criminal justice system.

If the decisionmaker, whether victim, policeman, or, judge, is unclear about the objectives of a given decision, that person hardly can be expected to behave rationally in the sense of maximizing the probability of achieving that undefined purpose. Of course, people do have objectives in making decisions, but often they are only vaguely felt and difficult to express. A profound lack of clarity

of definition and of adequate measurement of objectives abounds in the criminal justice system.

Moreover, these objectives are sometimes conflicting. Given a mixed set of criminal justice goals, including such possibly conflicting aims as retribution, deterrence, rehabilitation, reintegration, or desert, it is not surprising to find absent a clear consensus on objectives within or among criminal justice agency personnel. At each step in the processes of these systems, which require decisions with remarkably profound impact on the subsequent lives of the persons involved, fundamental conflicts may be readily perceived. The most basic, perhaps, is a conflict between perceived essentials of justice that require provision of just desert (punishment or reward) and various utilitarian perspectives that stress crime reduction. In this book we emphasize utilitarian aims; these are compatible with the rational, pragmatic, and probabilistic frame of reference that we have sought to employ.

We may briefly justify our focus on utilitarian aims. Among juvenile justice procedures, what are the objectives, for example, of taking a child into custody by law enforcement personnel? Setting aside the due process issues raised subsequently to (what amounted to) the arrest of Gerald Gault,[3] one may ask whether the objectives of the decision problem confronting the sheriff's officer in a like situation are clear, reasonably well agreed upon, and hence permit assessment of the rationality of the decision. Was the purpose to ensure Gerald's availability to the juvenile court? Was the "arrest" or the subsequent detention thought to be required to prevent Gerald's harming of others or himself or his running away? Much attention has been given to the constitutional issues stemming from this famous case and to the potential impact of the decision of the Supreme Court of the United States on the philosophy and practice of the juvenile courts. Little attention, however, has been given to the fundamental questions that must be asked when the *rationality* of the decisions (of the officer or the juvenile court judge) is examined. This is not to minimize the importance of the legal issues involved. It is, rather, to assert that the legal questions may have little to do with whether or not decisions are taken in such a way as to maximize the probability of achieving the presumed objectives of those decisions.

When the postadjudication decision for placement of the young offender is considered, the situation is analogous to the sentencing of adults and the objectives are no more clear. To argue the relative merits of *parens patriae* and criminal sanctions adds little to the needed clarification. If this is correct and if, for example, the

philosophy of the juvenile courts leads to assignment of a greater degree of importance to rehabilitative or other utilitarian aims and less to desert, this does not negate the importance of specifying when and how the assessment of rehabilitation (or crime reduction generally) is to be made. Only when such criteria are developed can we ask whether boys in Gerald Gault's circumstances rationally ought to be placed in custody, in detention, or in the training school—in addition to asking whether constitutionally correct procedures are followed.

With this example from the area of juvenile justice, we should point out that only occasional and cursory discussion of some aspects of that system appear in this book. Authors who set out to describe and to analyze major decisions in the criminal justice process are confronted quickly with a critical decision themselves: which decisions, among the scores that occur between the initial definition of conduct as illegal and the decision to release a punished person from state control, should serve as examples for the inquiry? Compelling arguments could be made that nearly every decision in the juvenile and criminal justice processes ought to be regarded as critically in need of careful study. Most juvenile and criminal justice decisions can be regarded rightly as vitally affecting both the lives of those about whom the decisions are made and the welfare of the community. In part, our decisions were made pragmatically: we assumed the juvenile justice system decisions generally to be beyond a reasonable scope for our efforts, and the decision points to be discussed are those about which most recent research has been concerned (and, consequently, about which most is known). It was our further aim, however, to select those decisions made by individual actors in the criminal justice system that have the greatest impact on the system as a whole.[4] For that reason, we begin in Chapter 2 with a discussion of the decision to report a crime to the police.

The decision of the victim of crime as to whether or not to report the offense to the police is of such a critical nature that the victim may be regarded fairly as a principal gatekeeper to the criminal justice system. Yet if we ask how much is known of the objectives of the victim (in calling or not calling the police), we find that the answer is, "surprisingly little." How often, and in what circumstances, does the victim seek mere retribution? When, in reporting a crime, is the victim concerned to achieve the offender's incapacitation? Is deterrence sometimes an aim in crime reporting, as it is, apparently, in sentencing or parole decisions? What objectives are sought by the victim when an event perceived as a crime is *not* reported?

The decisions made by police are similarly complex and not yet well understood, although more research has been done on this topic. If a crime is reported to them or discovered by them, it is they who ordinarily must decide what is to be done next. Generally, they must decide whether or not to invoke the law. This involves deciding whether or not a crime apparently has occurred. It may involve deciding on legal issues such as "reasonable suspicion" or "probable cause." In deciding whether or not to make an arrest, the police officer may have various discretionary choices—for example, arrest, issue a citation, refer to a social agency, offer counsel, do nothing. Again, the objectives may be diverse. General goals are subject to debate. Information to guide general policy or individual decisions may be lacking.

The discretion in decisionmaking exercised by prosecutors has perhaps been less noticed in the past, less in the public eye, than that of police or judges. Nevertheless, it is very broad, and the decisions have profound consequences for the rest of the criminal justice system. Prosecutors too must decide whether or not to invoke the law. Is the defendant to be charged? If so, what specific offense or offenses will be alleged? Shall the accused be brought to trial or should a plea of guilty to a lesser offense be negotiated? What resources should be brought to bear on the necessary investigation? Again, the prosecutor may have a variety of goals—increasing convictions, winning cases, "cracking down" on specific kinds of offenses, or more generally, aims of deterrence, incapacitation, rehabilitation, or desert. Some recent research has focused on the information needs of the prosecutor to aid in the selection of alternative courses of action in pursuit of diverse objectives.

Should an accused person be held in custody before trial? A foundation of American law traditionally has been the presumption of innocence before trial. Bail may be used to help ensure the availability of the defendant in court, but the Constitution of the United States prohibits that it be excessive. Some have advocated, nevertheless, the preventive detention of some accused—not for what they may have done but for what they may do. Within this context, we seek to examine the goals and information needs of the court for decisionmaking on bail and "release on recognizance." Again, both general policy and individual case decisions are involved. Fundamental issues of liberty and crime control are at stake.

The judge, in passing sentence, traditionally has had much autonomy and much discretion. Yet he or she is dependent upon the police, the prosecutor, and the probation officer (among others) as sources of information. The often conflicting goals of the entire

criminal justice system are those typically expressed by individual judges: desert, rehabilitation, incapacitation, deterrence—in short, the provision of both deserved punishment and crime control. Thus, the aims may be derived from moral principles or from utilitarian purposes of crime reduction. Alternative dispositions, once the determination of guilt has been made, are increasingly complex. They generally must be selected within legal constraints that vary markedly among jurisdictions. And these decisions generally must be made in the absence of clear consensus on the aims of sentencing, without an explicit, clearly articulated policy guiding the exercise of discretion. They are made also in the absence of a systematic procedure for feedback on the consequences of decisions, even in terms of the later criminal careers of those sentenced. Also absent, therefore, is convincing evidence of the relationship of a given disposition to deterrence, incapacitation, or rehabilitation. Furthermore, there is no demonstrated consensus on deserved punishment. In short, most present sentencing decisions involve complex goals, much data, little information, diverse alternatives, considerable discretion, and little structured policy.

The correctional institution administrator must run a distinctive type of hotel facility without benefit of a reservation service. Typically, the jail or prison administrator has little to say about who comes to stay or for how long. Within the institutional confines, however, there are many decisions to be made. These, as elsewhere in the system, are of two general types—policy decisions and individual decisions. General policy decisions may involve, for example, the development of appropriate (effective?) programs of treatment for differing kinds of offenders. Individual decisions may be required with immediacy—for example, assign to suicide prevention watch or place in protective custody—or they may appear more mundane—select work assignment; place where beds are available; decide initial custody classification—or they may be critical to rehabilitative aims—place in educational programs or in vocational training; recommend counseling; place in institution nearest family. The aims are similarly complex. Often, they appear to conflict—as when custody and security concerns and those of treatment are at odds. Some correctional research may help to inform these decisions, but much remains to be done to sort mere data from useful information to guide correctional decisions to greater rationality.

Probation, although typically an "arm of the court," also may be considered to be a part of corrections—namely, corrections in the community. Parole, which generally refers to supervision in the community after a period of incarceration (rather than in lieu of it)

may be regarded in the same way. Probation decisions do not end with the placement by the judge of the convicted offender in that dispositional category. Rather, a process of decisions by probation staff is then initiated. Some of these have to do with placement—for example, in case loads of varying size, methods, or levels of intensity of supervision or surveillance. Others, of course, address whether or not an assertion of probation violation (to the court) or parole violation (to the paroling authority) is to be made. The objectives, alternatives, and information needs are, in general, similar to those that obtain in other parts of the system.

Paroling decisions are highly visible, much discussed, and widely debated. Goals of parole board members tend to reflect a variety of differing perspectives—sanctioning, treatment, fairness, citizen representation, and gatekeeping (reservation service). Like judges, parole boards have been subject to much criticism for alleged arbitrary and capricious decisionmaking, for disparity in the granting or denial of parole, and for ineffectiveness. As with sentencing decisions, much research has been done, and much remains to be learned. Similar needs for consensus on goals, for structured policies governing the exercise of discretion, and for information demonstrably relevant to both policy and individual decisions are apparent.

These are all complex decisions, and our title, given both this complexity and the importance of the topic, is presumptuous. Our goals are more modest: to examine some of this complexity, to discuss some of the recent research relevant to the concept of rationality in decisionmaking, and to point to some areas in which further inquiry is most needed. We do not claim expertise in all the areas discussed. Each of the critical decision points examined involves a large topic in itself.

Some large topics are omitted, or nearly so, altogether. General deterrence and incapacitation provide two closely related examples.[5] The empirical evidence bearing on these two important traditional utilitarian aims of the criminal justice system has obvious importance for decisions—of both policy and individual focus—discussed throughout this book. Similarly, we have not attempted to provide a comprehensive review of evidence bearing on rehabilitation; a number of recent overview discussions are available.[6] And although we focus on decisions, a large body of literature on decision theory generally has been ignored—not because it is perceived as irrelevant, but because it would extend the scope of the discussion beyond the tolerance of even the most sympathetic reader.

When the criminal justice system is considered from a perspective of decisions, it is apparent immediately that decisions are the stuff

of that system. Thus, few aspects of criminal justice are found to be outside the plausible scope of discussion. It might be argued that the greatest omission in this book is a chapter on the decision of the offender to commit a crime. There is a reason, however, for omitting such a chapter, in addition to the obvious one that the topic involves much of criminology, sociology, psychology, psychiatry, and related disciplines. It is that we have sought to focus on information needs, objectives, and choices within the criminal justice system, toward the end of more reasoned and logical dealing with the problem of crime after it has occurred.

Even within the criminal justice system, additional large areas of inquiry have been ignored. Examples include the entire process for determination of guilt or innocence, the subject of plea bargaining, the topic of disciplinary hearings in confinement, and in general, issues of determination of probation or parole violation. Issues related to decisions of competency to stand trial are little discussed, and those concerning the insanity defense are ignored. Concerning these and related important topics not given their fair and proper share of attention, we plead guilty but ask that others address them.

We do not deal sufficiently, either, with the question of the nature of a decision. What, after all, is a decision? Is it a process or an end state—that is, a termination of a process? Are decisions of different kinds, such that information is processed differently in different cases? Are there different kinds of decisionmakers—for example, persons who process information, to arrive at decisions, in different ways? If so, does this have significance for the forms of presentation of information to the decisionmakers? These, too, are important issues, little discussed in this book.[7]

We stress *rationality* throughout this book, but that is not because we believe it to be the only, or even the most important, concern of criminal justice decisionmakers. Obviously, concerns of fairness, justice, legality, and even symbolism are essential features of most of these decisions. Each could provide themes to be scrutinized in respect to any of the decisions discussed in this book. Rather, our stress on the rational exercise of discretion derives from our belief that it is an understudied and yet a critical aspect of criminal justice decisionmaking.

This book differs from many discussions of criminal justice decisionmaking not just because of its emphasis on rationality, but for its primary emphasis on scientific social research. To be sure, some legal analysis is undertaken, principally in the context of discussions of decision goals. But our concern with the idea of *information* leads us to examine research that attempts to discover

how decisions actually are made in the criminal justice system and whether they are made in ways compatible with purported aims. Traditionally, these areas of inquiry have fallen into the realm of social science.

We stress rationality, and we urge a scientific outlook, but we trust we will not be mistaken as propounding these as a sole driving force for progress toward criminal justice. Rather, in agreement with Bertrand Russell, we would note that "The impulse toward scientific construction is admirable when it does not thwart any of the major impulses that give value to human life, but when it is allowed to forbid all outlet to everything but itself it becomes a form of cruel tyranny."[8] Science increases knowledge, and knowledge brings power. It is apparent that the increased rationality through social science that is sought may be exercised safely only in a context of values beyond the scope of discussion here. That suggests a further limitation of this book; but, indeed, it stems from a limitation of science. Russell concluded his essay on science and values by stating, "The dangers exist, but they are not inevitable, and hope for the future is at least as rational as fear."[9]

We have not attempted to review all of the research bearing on the important areas of decisions discussed. On the contrary, we have been selective in our attempt to review those studies that best inform about the concepts of information, goals, and alternatives. And we limit our analyses to studies of routine cases in the system; all too often discussions of decisions in criminal justice focus on the unique, exceptional cases, to the detriment of an understanding of how decisions typically are made. Despite these omissions, we have sought to deal with areas of particular importance to criminal justice if the decisions of significant actors in that system—and hence procedures and programs—are to be made more rationally.

We have tried to write for our colleagues in criminal justice research and in criminal justice administration, at the same time hoping that the book will be found useful to students. These are in some respects diverse audiences, and we are aware that going down the middle of the road may disrupt traffic both ways. We have sought, however, to refer the reader elsewhere for more detailed, more technical, or more thorough discussion of critical points.

In the final chapter we identify ten requisites for increased rationality in criminal justice decisionmaking. These requisites are derived from our analyses of the decisions discussed in this book. We also attempt a reconciliation among the apparently conflicting goals that seem to abound in the criminal justice system. In this final chapter we assert that the application of scientific methods to criminal

justice decisionmaking offers the greatest hope for improvement of our system of justice. We are well aware that to argue in favor of a central role for facts in a world of values will be seen as short sighted by some, naive by others—a dangerous revision to an inglorious and thoroughly discredited earlier era or an embarrassingly optimistic faith in the potential for change. Our consolation lies in our belief that the alternative position rests on the implicit supposition that progress will be made when presumptions are regarded as facts, when untested hunches are acted upon with vigor, when goals are unspecified, and when trendy alternatives are accepted for their novelty alone.

The theme of the book involves goals, alternatives, and information as three legs of the stool on which the decisionmaker sits. If goals are unclear or confused, if alternatives are unrelated to them, or if information is irrelevant—if any one leg is weak—he or she who sits upon the stool must sit with trepidation.

Michael R. Gottfredson
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NOTES

1. L. Wilkins, "Perspectives on Court Decision-making," in D.M. Gottfredson, *Decision-making in the Criminal Justice System: Reviews and Essays*, Crime and Delinquency Issues: a Monograph Series (Washington, D.C.: Government Printing Office, 1975), p. 70. This discussion, and indeed our analytic framework, draws heavily upon Wilkins' argument. See also, L. Wilkins, *Evaluation of Penal Measures* (New York: Random House, 1969).

2. C.N. Parkinson, *The Law of Delay*, 2nd ed. (Boston: Houghton Mifflin, 1971), p. 119.

3. *In re* Gault, 387 U.S. 1 (1967).

4. The frame of reference that stresses the interdependence of the decision points that make up the criminal justice system is stated in F. Remington, D. Newman, E. Kimball, M. Melli, and H. Goldstein, *Criminal Justice Administration* (Indianapolis: Bobbs-Merrill, 1969). See especially Chapter 1.

5. See, for example, National Research Council, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on the Crime Rate* (Washington, D.C.: National Academy of Sciences, 1978).

6. See, for example, L. Sechrest, S. White, and E. Brown, eds., *The Rehabilitation of Criminal Offenders: Problems and Prospects* (Washington, D.C.: National Academy of Sciences, 1979).

7. See, for discussion of these and related issues, Wilkins, *Supra* note 1 at 59-81.

8. B. Russell, *The Scientific Outlook* (New York: W.W. Norton, 1962), p. 260.

9. *Id.* at 269.