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Barrock Lecture: The Accidental Crime Commission: Its Legacies And Lessons

Franklin E. Zimring

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BARROCK LECTURE

**THE ACCIDENTAL CRIME COMMISSION:
ITS LEGACIES AND LESSONS***

FRANKLIN E. ZIMRING**

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Judged by its initial mission, and by its influence on the problems that inspired its creation, the Wickersham Commission (“Commission”) created in 1929 by President Herbert Hoover was an unmitigated failure. The President had created the Commission as an apologist for, and in an attempt to reform, the federal law that created and administered the prohibition of alcohol in the United States in the years after 1919. Remembered now as the very first national commission on crime, both its primacy and its focus are urban legends in substantial part. It wasn’t the first national crime commission—that was appointed

* On October 4 and 5, 2012, Marquette Law School held a conference on the Wickersham Commission—so named after its chairman, George W. Wickersham, a former attorney general of the United States. The occasion—the 80th anniversary of the conclusion of the Commission’s work—provided an opportunity to reflect on the federalization of law enforcement in the intervening decades. The conference’s keynote address was the Law School’s annual George and Margaret Barrock Lecture on Criminal Law, delivered by Franklin E. Zimring, the William G. Simon Professor of Law and Wolfen Distinguished Scholar at the University of California, Berkeley.

** Trevor Gardner provided extensive and valuable research help in this process. Lawrence Friedman, Samuel Walker, and Carl Zimring provided informed historical comments on an earlier draft. Michael O’Hear proved to be a historically informed legal scholar with helpful commentary. James Calder tutored me on historical sources for Wickersham budgets.

by President Calvin Coolidge in 1925.¹ And it wasn't really created as a national commission on crime. The lion's share of crime is the province of state and local government: state criminal codes and prisons, county courts and sheriffs, and municipal police. But the primary focus of the Wickersham Commission was on Prohibition and on the observance of the Federal Volstead Act.² This not only was a guarantee that Prohibition would remain the Commission's central focus, but it also provided a potential diversion from much of the illegitimacy, corruption, and lawlessness of the local governance of crime in America.

I. INTRODUCTION: A DIFFERENT COUNTRY

The United States of 1929 was a very different nation from 1969 or later, in ways that would have doomed any examination of crime and law enforcement short of a very radical critique. For starters, the United States was dominated by legal systems that were overtly racist, ranging from Jim Crow horrors in the South to the more subtle but pervasive forms of race discrimination in housing, education, and miscegenation law through most of the North. And lynching was still not an uncommon practice in much of the American South until the middle of the 1930s—one national count averaged seventeen cases per year in the decade between 1926 and 1935.³

A national commission to study crime and justice thoroughly in this era would need the likes of W. E. B. Du Bois and Norman Thomas rather than the good Republican burghers and establishment lawyers that manned the Wickersham Commission. And even a true blue-ribbon commission on Prohibition would, by the early 1930s, have had to acknowledge that the "great experiment" was beyond any hope of redemption. If Herbert Hoover had designed this enterprise as the launching pad for a new, improved version of the Volstead Act, the Commission's task was hopeless from day one.

And not just because Hoover had appointed the wrong commission or waited a bit too long. The changes that had overtaken the Prohibition experiment in its short career were so profound that the

1. See Franklin E. Zimring & Gordon Hawkins, *Crime Commissions*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 353, 353 (Sanford H. Kadish ed., 1983).

2. The title of the Commission, National Commission on Law Observance and Enforcement, was an obvious euphemism for Prohibition.

3. See *Lynchings, By Year and Race, 1882-1968*, THE CHARLES CHESNUTT DIGITAL ARCHIVE, available at http://www.chesnuttarchive.org/classroom/lynching_table_year.html (last visited Mar. 28, 2013).

nation that had created the push for Prohibition was not the same nation in which the experiment was conducted. The temperance movement had its roots in an America of towns and rural areas, the United States of the turn of the twentieth century.⁴ Most of the nation's population lived outside urban areas in 1900, and much of the population in rural areas and small towns feared and distrusted the big cities, which were expanding dramatically with industrialization, and the surge of immigration that greatly diversified the national landscape between 1890 and 1920. The 1920 census was the first time that the number of persons living in urban areas equaled the number living in rural areas.

So the occasion for this conference in 2012 is a bit of a mystery. How did this hopeless venture end up being viewed as a precedent-setting and positive contribution to the ways in which the national government learns about crime and criminal justice? I will provide my take on this question in three installments. Part II will describe how the Commission was structured and staffed and the broad ambitions of the Commission's work on crime, police, and prosecution. Part III will propose four important innovations in Wickersham that later commission efforts adopted. And Part IV will consider governmental alternatives to blue-ribbon commissions and how they have functioned in recent history.

II. FUTILITY IS THE MOTHER OF INVENTION

I suspect that the impossibility of the Commission's original mandate may have helped to remake it into the enterprise we remember and honor. Unlike the Coolidge Administration's slapdash commission on crime in the mid-20s, the Wickersham effort had significant financial resources—the initial budget of \$250,000 in 1930 dollars was quite substantial, and the final expenditure, close to \$500,000, was the inflation-adjusted equivalent of just under \$7 million in 2012.⁵ President Hoover and many of its members considered it an important

4. See generally JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986).

5. For Wickersham funding, see JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER'S INITIATIVES* 84 (1993) (noting the initial budget), and *Senate Yields on Wickersham Fund; Votes All*, CHI. TRIB., July 4, 1930, at 2 (indicating the final budget). The Consumer Price Index (CPI) Inflation Calculator demonstrates that \$1 in 1930 is worth \$13.75 in 2012. See *CPI Inflation Calculator*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 28, 2013).

undertaking. The commitment of Hoover to science and empirical data probably motivated the resources that made Wickersham more than a gesture. The resources and standing of this blue-ribbon institution became an opportunity for sustained analysis of issues and phenomena tangentially related to Prohibition and the federal criminal justice system, issues such as crime and criminal justice in the broader American landscape.

The substantial resources available to the Wickersham Commission provided the opportunity to avoid one of the central academic complaints that greeted the early Coolidge Commission, that the commission lacked “expert knowledge” and “special experience.”⁶ What the Coolidge Commission lacked was a staff and therefore any substantive research. With financial resources, the new Wickersham Commission could employ a staff and fund papers by expert consultants.

And this the Wickersham Commission did with precedent-setting energy. The vast majority of the consultant papers published by the Commission were not about Prohibition or its enforcement but about crime and criminal justice. Both the methodology of Wickersham in generating expert reports and the volumes produced by the Commission’s experts are the enduring legacy of Wickersham. Depending on experts and deferring to expert judgment had profound impact not only on how commissions did their work but also on the substance of commission reports. This was the key innovation of the commission, what I shall call the “Wickersham model.” And this methodological legacy had a substantial impact on the many commissions that used methods close to the Wickersham model a generation later in the golden age of national commissions.

With very few exceptions, the Wickersham Commissioners were not radical progressives, but the staff and consultants that produced Wickersham’s reports were emerging and established pantheons of social science (Clifford Shaw and Henry McKay⁷), social services (Miriam Van Waters⁸ and Edith Abbott⁹), and the legal academy

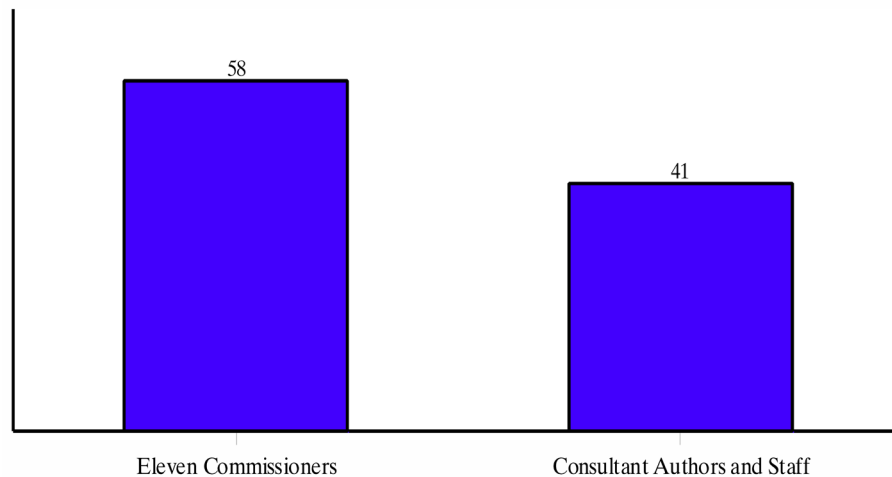
6. John H. Wigmore, Editorial, *The National Crime Commission: What Will It Achieve?*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 312, 312–13 (1925).

7. See generally CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENTS IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES* (1942); CLIFFORD R. SHAW & MAURICE E. MOORE, *THE NATURAL HISTORY OF A DELINQUENT CAREER* (1931).

8. See ESTELLE B. FREEDMAN, *MATERNAL JUSTICE: MIRIAM VAN WATERS AND THE*

(Zechariah Chafee¹⁰ and Sam Bass Warner¹¹). Only two of the eleven commissioners were academics (Roscoe Pound¹² and Ada Comstock¹³), but the lion's share of the staff reports that are the permanent record of the commission are the work of academics and reform-oriented lawyers.

Figure 1: Median Age in 1929 of Commissioners Compared to Staff and Consultants, Wickersham Commission¹⁴



One other important contrast between staff members and consultants on the one hand and commissioners on the other was demographic. The median age of thirteen authors or coauthors of

FEMALE REFORM TRADITION 57–58 (1996).

9. See Mary Jo Deegan & Michael R. Hill, *Edith Abbot*, in *WOMEN IN SOCIOLOGY: A BIO-BIBLIOGRAPHICAL SOURCEBOOK* 29, 29–31 (Mary Jo Deegan ed., 1991).

10. See DONALD L. SMITH, *ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW* 1 (1986).

11. See, e.g., Sam Bass Warner, *Creating a Plan for Criminal Court Statistics*, 14 J. AM. JUDICATURE SOC'Y. 88, 88 (1930).

12. See, e.g., Roscoe Pound, *The Future of Law*, 47 YALE L. J. 1, 1 (1937).

13. See, e.g., Susan Margot Smith, *Ada Comstock Notestein: Educator*, in *WOMEN OF MINNESOTA: SELECTED BIOGRAPHICAL ESSAYS* 208, 214–16 (Barbara Stuhler & Gretchen Kreuter eds., rev. ed. 1998). See generally ADA LOUISE COMSTOCK, *THE EVOLUTION OF AN EDUCATOR: AN ANTHOLOGY OF PUBLISHED WRITINGS OF ADA LOUISE COMSTOCK* (Barbara Miller Solomon ed., 1987).

14. Trevor Gardner computed ages for all members of the Commission from published sources and for the following thirteen staff and consultants: McKay (28), C. Shaw (29), S. Simpson (31), R. Oppenheimer (31), C. Wilcox (31), B. Smith (37), M. Van Waters (41), W.H. Pollack (42), Z. Chaffee (44), H. Dennison (52), E. Abbott (52), A. Volmer (53), and H. Hart (78).

staff/consultant volumes was forty-one, and only four of the thirteen were over age forty-five in 1929 when the venture was launched. By contrast, the median age in 1929 of the eleven members of the commission was fifty-eight, and only one member was under fifty when appointed.

The generational difference between staff and members and the academic orientation of the experts writing reports made the emphasis on staff effort into a shift from an older, establishment, practitioner orientation (perhaps still reflected in brief commission reports) to the lengthy, empirical studies of the social scientists and the reform-oriented briefs of the policy-oriented lawyers.

The two reports on Prohibition that were separately issued in January 1931 might have been an arresting example of the difference in tone between commissioners and staff experts. The two reports combined extensive and powerfully written observations of the costs and ineffectiveness of Prohibition in the 1920s with a rather unenthusiastic endorsement of continued efforts to modify and improve Prohibition itself.

Franklin P. Adams famously celebrated this mixed message in a brief poem, the only published poetic critique of national commission output that I have encountered:

Prohibition is an awful flop.
We like it.
It can't stop what it's meant to stop.
We like it.
It's left a trail of graft and slime.
It don't prohibit worth a dime.
It's filled our land with vice and crime.
Nevertheless, we're for it.¹⁵

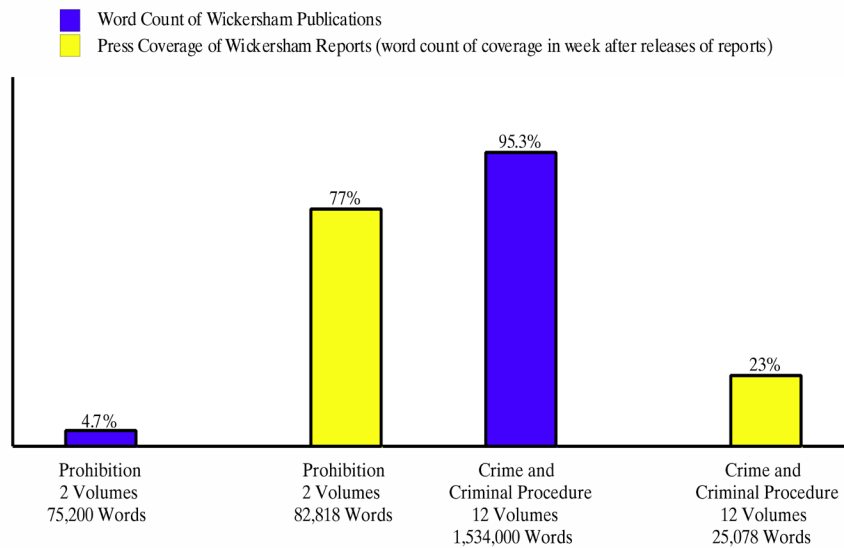
Part of the dissonance of these reports' findings and their conclusions must be attributed to the need to respect Herbert Hoover's

15. Todd Shepherd, *Michigan's Wine Shipping Restrictions: A Valid Use of Twenty-First Amendment Control or Sleight of Hand Legislation Discriminating Against the Free Market?*, 88 U. DET. MERCY L. REV. 583, 589 n.65 (2011) (quoting Franklin P. Adams, *The Wickersham Report*, N.Y. WORLD (1931)). Lawrence Friedman reported to me that the Franklin P. Adams ditty was adopted from an earlier ditty that begins: "Tobacco is a dirty weed/I like it," often attributed to Graham Lee Hemminger in a college humor magazine. *History*, PHROTH, <http://www.phroth.com/history/> (last visited Mar. 28, 2013) (noting that Hemminger wrote the poem in 1915 for the predecessor to Phroth, Froth, a Penn State humor magazine).

wishes. But why then the hard-hitting analysis of costs? Perhaps this came in part from the influence of staff on this documented history, since staff did most of the work and much of the writing. And the documentation in the 1931 report was integrated into the arguments for repeal that were a major theme in the two years after it was issued. The report is credited by later observers with aiding the cause of repeal.

After the January 1931 release of the Prohibition materials, the next release of Wickersham reports came in late April (crime statistics), with the next eleven volumes being issued between June 7 and August 23, 1931.

Figure 2: Length of Reports and Extent of Press Coverage, 14 Wickersham Volumes (1931)¹⁶



The figure below illustrates the uneven patterns of public attention to the work product of the commission. The *New York Times* published a word count of all the commission's publications in August of 1931,¹⁷ which the figure below compares to level of news coverage provided by

16. Word counts of reports, computed in *The New York Times*, August 24, 1931. *Id.* Press coverage (words devoted to Prohibition reports in the week after publication, *The New York Times*) count by Trevor Gardner. I do not include the one report the staff wrote and the Commission did not publish—a re-examination of a notorious 1916 case privately published in 1932. See ZECHARIAH CHAFEE, JR. ET AL., THE MOONEY-BILLINGS REPORT: SUPPRESSED BY THE WICKERSHAM COMMISSION (1932).

17. *Wickersham Slate Finally Is Cleared*, N.Y. TIMES, Aug. 24, 1931, at 2.

the *Times* in the week after reports were issued.

While the Prohibition reports were less than 5% of the published product of the Commission and only two of its fourteen reports, they received the majority of immediate public attention. The Prohibition reports accounted for more than three-quarters of the verbiage on Wickersham in the *New York Times*. While none of the other reports generated more than a small fraction of the ink of the Prohibition materials, the distribution of attention to the rest of the reports did reflect the appetite for controversy and scandal. The report on lawlessness in law enforcement got twice as much coverage as the next most-discussed non-Prohibition report (6,932 words versus 3,626 for the volume on prosecution). The more important contrast is that “lawlessness” in law enforcement got more than ten times the attention that was accorded to the other report on police which was released earlier. Even before electronic journalism, there was evidence of the adage, “if it bleeds, it leads.”

What was to eventually commend this effort as a model of governmental research in crime and criminal justice was not what commanded public notice in the early 1930s.

III. THE WICKERSHAM MODEL: FOUR ELEMENTS

The Wickersham Commission is not normally regarded as a major landmark in the march toward the repeal of Prohibition. A recent history of the end of Prohibition, *Last Call* (2011), has only three references to the Commission’s work in its index and regards the reports as of minor influence.¹⁸ But Wickersham had more influence on the methods and functions of national commissions. When I speak of the “legacies” of the Wickersham exercise, I am trying to identify four ways in which the structure and focus of this early commission of inquiry set precedents that can be observed in the cluster of national commissions that operated a generation later in the United States.

I stop short of demonstrating that the similarity in structure was a clear case of cause and effect. The four features of interest in this regard are (1) staff dominance, (2) an emphasis on empirical research, (3) a preference for long-range perspective instead of targeting a finite number of discrete policy proposals, and (4) an explanatory and retrospective orientation that often makes such reports into ceremonies

18. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 320, 334, 351, 467 (2010).

of adjustment to changes that have already happened rather than proponents of change.

A. Staff Dominance

The formal relationship between commissioners and staff in Wickersham and all other such bodies is hierarchical—the commission selects the staff and the staff works for the commission. But, in fact, once the staff members have been selected by the commission, they tend to exercise considerable power over the work of a commission. There are three features that maximize the impact of staff in Wickersham and every other American effort I know of—numbers, expertise, and authorship. In a well-funded exercise like Wickersham, there are more staff than commissioners, and the staff may also devote more time to the enterprise than persons nominated to commission status because of the latter's other prominent positions, which will often restrict their participation in commission efforts. The two academics on the Wickersham Commission were both busy administrators—the dean of a law school and the president of a college. The academics on staff were presumably less preoccupied with administrative duties.

Then there is the matter of expertise. The staff were selected for their expertise in specific areas—August Vollmer for law enforcement, Edith Abbott for immigrants and crime, Miriam Van Waters for young offenders, etc., so that their credentials created substantial influence.

Finally, in American commissions, it is the staff who write most of the official prose. All but one of the enormous subject-matter reports of Wickersham were authored by staff (the apparent exception being *The Causes of Crime* tome), and staff reports visibly dominate the output of the commissions on crime (1967)¹⁹ and on violence (1969).²⁰ The author of a report generates what real estate agents call “sweat equity” for determining the substance of the report. If you write the report, you have real influences on what it says.

So the power of commissioners and senior staff is extremely important at the front end of the commission process—because they determine who will staff the process. But once an expert staff has been

19. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 311–12 (1967) [hereinafter PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE].

20. U.S. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY: FINAL REPORT, at xvi–xix (1969) [hereinafter U.S. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE].

selected, the balance of power shifts to the staff.

The most prominent exception to that U.S. commission pattern of staff dominance is quite consistent with the influence of authorship on outcome. During the era of government commissions on pornography, the British Home Office appointed a committee chaired by Professor Bernard Williams, a moral philosopher from Cambridge University. This low-budget committee was of exceptionally high intellectual quality, and Bernard Williams, the committee chair, wrote much of the report.²¹

All of my short list of the causes of staff dominance were on display in the Wickersham experience and would become also the pattern of operation in the commissions of the 1960s and 1970s. This may not be the result of later efforts explicitly modeling themselves on Wickersham so much as the natural result of the same processes that produced staff influence in 1930 doing so again in the U.S. commissions on crime, violence, and pornography. Either way, the Wickersham Commission was a preview of coming attractions for the national commissions that followed.

B. An Emphasis on Empirics

The Wickersham Commission produced fourteen volumes, a total of 1.6 million words. We have already seen that 95% of that verbiage didn't directly concern Prohibition.²² But what types of perspective and ambition produced this verbal landslide? To impose a verbal construct from the current era, what Wickersham became was the first "data-driven" analysis of issues in crime and justice by a governmental commission in the United States. And the staff dominance I just mentioned was an important cause of this emphasis on empirics in two senses. The academics and reform-oriented lawyers who were on staff believed in empirical research, and they had the time and energy to gather the data and write the reports. So the Commission was data-driven because the staff were data-driven. And this was a feature of most if not all of the policy commissions on crime and violence that were clustered in the 1960s and early 1970s.

21. See GORDON HAWKINS & FRANKLIN E. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* 10-13 (1988).

22. See *supra* note 17 and accompanying text.

C. Taking the Long View

One other feature of the Wickersham endeavor that has been repeated in later efforts is an emphasis on long-range perspectives rather than specific, discrete policy choices. On almost all the topics considered, the aim of the reports produced was to comprehend the phenomena and systems being considered rather than to focus on arguments for specific policy change (the possible exception here is criminal statistics). The emphasis in Wickersham on perspective rather than a specific policy program was overdetermined. President Hoover's position on Prohibition certainly wasn't broadly popular with either commissioners or staff. And everything the staff reported on the problematics of enforcement in Prohibition pointed in the opposite direction from Hoover's hopes. Perspective was the only refuge in the extraordinarily complicated politics of Prohibition in 1931.

And most of the other social science topics considered by Wickersham staff reports—crime and immigration, juvenile delinquency, the impact of disorganized city neighborhoods on crime rates—were efforts to create broad understanding rather than to mobilize legal change. On the procedural side of the Commission's agenda, for topics such as police corruption and the third degree, it was the level of government of this federal Commission rather than the lack of a policy agenda that restrained the Commission's action agenda. There were no direct levers available to the national government in 1931, such as federal financial aid or constitutionally based reversals of state criminal convictions as carrot or stick for state and local compliance with federal standards. Shortly after Wickersham, one of its staff lawyers, Walter Pollak, argued the winning side of *Powell v. Alabama* (1932),²³ the beginning of federal court controls on state criminal process.

More striking than the orientation to perspective that Wickersham adopted is the fact that most of the later commissions also favored broad understanding and policy instead of centering attention on a specific reform. The 1967 crime commission, generally regarded as the most successful of the genre, was organized around long-term development in areas such as police, crime statistics, juvenile justice, and organized crime.²⁴ Both the civil disorder (Kerner) and violence (Eisenhower)

23. *Powell v. Alabama*, 287 U.S. 45, 47, 49–50, 73 (1932).

24. See generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 19.

commissions argued for enormous changes in American society and government, but each was committed to change of such breadth that no specific law or session of a legislature could serve as a focus of activity.²⁵

At the other end of the spectrum, there were commissions on pornography and gambling that did not seem intent on arguing for *any* sharp changes in policy.²⁶

There have been, in other words, very large differences in the orientation of national commissions to social and legal change, yet an overarching similarity in the sense that no commission report in the modern era was centered on a finite list of specific changes as the core of an action agenda.

D. The Commission as Ceremony of Adjustment

The central inconsistency identified in the Franklin P. Adams poem about Wickersham²⁷ was the sustained documentation of the failures and social cost of Prohibition combined with the absence of any explicit recommendation by the Commission to repeal the Prohibition amendment and legislation. But a more generous reading of Wickersham's work on Prohibition is that its extensive documentation of cost and ineffectiveness provided a foundation for many supporters of Prohibition to accept the inevitable repeal of Prohibition two years later when it came. In this sense, the Commission's fact finding was much more important than its divided and convoluted policy recommendations. Further, if this is an accurate reading of Wickersham's historic function on Prohibition, then it was an important precedent for another common function of later national commissions—what can be called the creation of a ceremony of acceptance and social adjustment to changes that are taking place.

The most remarkable example of this “ceremony of adjustment” function relates to the commissions of inquiry on pornography that popped up all over the developed world after the late 1960s. The United States had a national commission in the late 1960s that reported in 1970.²⁸ Great Britain had one that reported in 1979.²⁹ Canada had a

25. See generally U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (1968); U.S. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 20.

26. See FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE 473–513, 545–633 (2007).

27. *Supra* note 15 and accompanying text.

28. HAWKINS & ZIMRING, *supra* note 21, at 7–10.

Special Committee on Pornography and Prostitution in 1985,³⁰ and Attorney General Edwin Meese commissioned a second report on pornography in the United States that reported in 1986.³¹

And what did all these commissions recommend as legislative action? Not much at all. Because that wasn't the primary social and political function of the inquiries. Most of the commissions followed rather than preceded the widespread availability of pornography. Only the 1970 Pornography Commission was issued prior to the theatrical release of *Deep Throat* in the United States (1972).³² The commissions were investigations of the effect of a new status quo that was emerging in most developed countries—all the social science was intended to reassure publics that Western civilization could survive *Debbie Does Dallas*.³³ Even the Meese Commission, created to reassure conservative constituencies that pornography was harmful and objectionable, did not urge broad legal change but was, rather, an attempt to discredit the moral claims of liberals.³⁴ And the National Commission on Gambling in the 1990s was similarly more concerned with regarding the growth of gambling as survivable than with advocating any path-breaking legal changes.

In its own precedent-setting and peculiar fashion, perhaps the Wickersham Commission's mixed teachings on Prohibition were an attempt to explain and justify the formal undoing of alcohol Prohibition that was by then looming on the American horizon.

IV. THE COMMISSION THAT NEVER WAS

The cluster of national commissions that reported on problems of crime and violence in the 1960s and 1970s is now itself a generation or more removed from contemporary American government and public policy discourse. There are, to be sure, a number of commissions of inquiry appointed by federal and state governments to consider particular subjects—and some of the topics come close to crime and violence. But we had no national commission on school violence in the wake of Columbine to parallel the Eisenhower Commission on Violence

29. *Id.* at 12.

30. *Id.* at 25, 227.

31. *Id.* at 13–16.

32. *DEEP THROAT* (Gerard Darniano Film Productions 1972).

33. *DEBBIE DOES DALLAS* (School Day Films 1978).

34. HAWKINS & ZIMRING, *supra* note 21, at 13–15.

(1969)³⁵ and the Kerner Commission on Civil Disorder (1968).³⁶ (The commission to investigate the September 11 disaster is the exception that proves the rule on this: it was a body, like the Warren Commission, asked to confirm an official historical account and not consulted for policy.)

It appears that what I would call a broad national commission approach to survey policy options in areas such as crime, drugs, violence, and race has passed from the American scene. The last major attempt that I would put in this category was President Clinton's "Initiative on Race."³⁷ And that isolated effort came two decades after any sustained use of commissions of inquiry about crime policy. Why?

There are two alternative explanations for the decline of the national policy commission. One theory is the commission departed because it failed as a useful enterprise. The other theory is that commissions came to be regarded as a threat to governmental policy orthodoxy. The most important evidence that the day of the national commission had passed by the late 1980s concerns the drug emergency and the public moral panic over drugs during the decade after 1985. That decade witnessed the ascendance of drugs to number one on a list of citizen-nominated "most serious problems" nationally, multiple layers of federal and state legislation, the creation of a national drug control agency with a drug czar, and annual editions of a glossy national drug control "strategy" to energize and reassure the population.³⁸

Indeed, the 1980s and 1990s witnessed almost everything a government is expected to do with novel and threatening problems *except* appointment of a high-level national commission on drug policy, and this trend was hardly an accident. The annual report of the nation's drug czar was designed as the opposite of a national or citizens' commission; it was an official document under the control of the

35. U.S. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 20.

36. U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 25. The Commission to represent the September 11 disaster is the exception that proves the rule on this. It was a body like the Warren Report asked to confirm an official historical account and not consulted for policy. *See generally* THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES: THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).

37. *See* ADVISORY BOARD'S REPORT TO THE PRESIDENT, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE (1998).

38. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL (1992).

executive branch policy makers in the field. It was, to borrow a phrase from a famous Argentine film, *The Official Story*.³⁹ A presidential commission of any degree of independence was probably considered too great a risk to generate unwelcome conclusions. In that same pattern as Marquette Law Professor Michael O'Hear has reminded me, the federal sentencing commission created in the 1980s keeps empirical evaluations of sentencing as "in house" efforts rather than tolerating external review.

The absence of a real national commission on drugs did not escape public notice. Walter Cronkite, near the end of a long and distinguished career in news reporting and analysis, concluded an hour-long special broadcast on drugs in 1995 with the following:

It seems to this reporter that the time has come for President Clinton to do what President Hoover did when Prohibition was tearing the nation apart: appoint a bipartisan commission of distinguished citizens, . . . a blue-ribbon panel to reappraise our drug policy right down to its very core with a commission with full investigative authority and the prestige and power to override bureaucratic concerns and political considerations, . . . and present a comprehensive drug policy for the future.⁴⁰

Cronkite's view of the Wickersham Commission was informed by nostalgic distortions of epic proportions. After all, a majority of the commissioners had maintained their support of the Eighteenth Amendment.

But more than nostalgia suggests that a Wickersham-style analysis of the War on Drugs in 1990 or 1995 (or ever) might have destabilized the major elements of drug Prohibition for at least an important segment of the public and would hasten rather than retard the pace of policy change. And there is support in the history of Wickersham for this view. The *pro forma* support of Prohibition by most commissioners did not count for much in public or legislative opinion. The powerful fact-finding in the report on Prohibition probably had greater impact. Much as the Franklin P. Adams poem quoted earlier may have been intended to make fun of the commission, the poem accurately portrayed a mixed

39. THE OFFICIAL STORY (Historias Cinematograficas Cinemania 1985).

40. JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 14–15 (2d ed. 2012) (quoting *The Cronkite Report—The Drug Dilemma: War or Peace?* (Discovery Channel television broadcast June 1995)).

message that many on the commission staff and some commissioners wanted to make a part of the public record of the Prohibition experience. Any such forceful cost accounting of the modern war on drugs would provide little comfort to the drug control authorities. Whatever its flaws, the candor and balance of Wickersham on Prohibition enforcement makes William Bennett's first *National Drug Control Strategy* look like the front page of Soviet-era Pravda by comparison.⁴¹

While the absence of a national commission on drugs in the late 1980s makes it clear that the age of the presidential commission on crisis problems in crime had passed, what is less clear is whether the drug emergency of the mid-1980s played an important role in pushing commissions off the national agenda or whether the lack of a 1980s drug commission was merely a result of the fact that the age of "policy" commissions on crime had already come to an end.

Either way, the drug warriors of the 1990s would have been right to fear the impact of a national commission. No matter their biases and political sensitivities, the staff and the members of such commissions usually have a commitment to fact gathering and to the importance of their problem in the larger national landscape. Perhaps we overdosed on national commissions in the era of Warren, Katzenbach, Kerner, and Eisenhower, or perhaps we tended to overstate the acuteness of the problems put before commission bodies and to call for too many resources and too much change to remedy these selected national problems. But in a political system and public consciousness that find problems easy to ignore, sustained attention on important chronic problems will often serve the public good.

V. A DANGEROUS THOUGHT EXPERIMENT

One interesting test of the value and limits of commissions of inquiry as a public policy tool is a "thought experiment" along the lines suggested by Walter Cronkite.⁴² Imagine that President Clinton had appointed a national commission on drug control in 1997 (prudence suggests the year after rather than the year before a presidential

41. See Zimring & Hawkins, *supra* note 1, at Chapter 1. Michael O'Hear has reminded me of another place where a government agency has supplanted independent fact-finding with research and evaluation under the control of the agency it should evaluate: the U.S. Sentencing Commission. Here, too, the monopoly of in-house research generates self-promotion to a problematic degree.

42. See *supra* note 40 and accompanying text.

election). What sorts of questions might such a body have asked? What sorts of research might have emerged? What types of policy changes might this commission have considered and recommended? What short-range and longer-range policy changes might have occurred in its wake?

Like many thought experiments, there is considerable room for different assumptions and presumed effects in the future that we are asked to imagine in my Cronkite commission experiment. And it is easy to use a mythical national commission as a magical mechanism that will change public prejudices and overcome persistent political logjams. Walter Cronkite seemed to be hoping for some such magical transformation with his televised plea in 1995.⁴³

My own view of the impact of our imaginary drug commission is much less optimistic than Cronkite's but still leaves ample room to see a National Commission on Drug Control as a public benefit well worth its modest costs. It could settle some factual questions, resolve disagreements about costs and outcome of public programs, and clarify difficult choices. It could outline the nature of the drug problems we had best learn to live with and perhaps identify other problems that are not inherently part of government's ongoing involvement in drugs.

It could do many of the modest but important things that the Wickersham staff and commissioners accomplished in 1931. And that, in my judgment, would be a considerable improvement on the public relations puffery that executive government now manufactures. The commission of inquiry model that Wickersham brought to American crime and criminal justice probably served the public interest far better than some of its recent alternatives. If so, this conference is well-timed for serious students of the American future.

43. *Id.*