

# Between Brain and State: Herbert C. Hoover, George W. Wickersham, and the Commission That Grounded Social Scientific Investigations of American Crime and Justice, 1929–1931 and Beyond

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# **BETWEEN BRAIN AND STATE: HERBERT C. HOOVER, GEORGE W. WICKERSHAM, AND THE COMMISSION THAT GROUNDED SOCIAL SCIENTIFIC INVESTIGATIONS OF AMERICAN CRIME AND JUSTICE, 1929–1931 AND BEYOND**

JAMES D. CALDER\*

*The National Commission on Law Observance and Enforcement, more popularly known as the Wickersham Commission, was embedded in President Herbert C. Hoover's broader policy initiative to improve the federal criminal justice system. Hoover also believed that the results would provide state and local governments with models for upgrading all other justice systems. President Hoover instructed the chairman, former U.S. Attorney General George W. Wickersham, to assemble a group of leading scholars and the best research findings, mainly from the nascent social sciences, to investigate the causes and costs of crime, Prohibition enforcement, policing, courts and antiquated criminal procedures, and prisons, parole and probation practices, among other topics. Prohibition, it is argued, was not the central focus of the Hoover–Wickersham efforts. Through the morass of divisive and festering Prohibition controversies, however, Hoover and the Wickersham group stayed the course to complete the project in 1931. Ultimately, the Commission's fourteen reports languished in relative obscurity through years of the Depression, World War II, and the postwar economic boom. They served as a collective summary of the first federal initiative to examine one of America's most costly social problems. As time passed, they were cited as foundational guideposts in several later federal and state studies, policy*

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AUTHOR'S NOTE: This article includes material from a chapter in the author's earlier book, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER'S INITIATIVES* (1993). The context of this Article is more narrowly focused on only one aspect of Hoover's policies on crime. It reflects a recasting of the discussion of the Wickersham Commission in light of later crime commission investigations.

*initiatives, and agency changes. Recognizing contributions and disappointments in the Commission's work, the net product set the tone for future studies of the American justice system while it provided the President and the nation with a tool for closing the gap between "brain" and "state."*

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## I. INTRODUCTION

All new Presidents are apprehensive about information needs and what they will require during their presidency to craft and implement policies. Quietly, and sometimes reluctantly, Presidents develop as self-learners while simultaneously serving as public educators. Presidents consume vast quantities of information and they apply the essence with relative competence as they learn about and define the road ahead. Information, indeed, is the core commodity for transforming public expectations and policy ideas into objectives. Necessarily all received information must be reliable and timely, and Presidents must reach levels of confidence about these requirements by consulting with a wide range of sources. Presidential scholar Thomas E. Cronin once argued that broad consultation serves to narrow what he described as “the separation of brain and state.”<sup>1</sup> Chief executives appoint policy-skilled cabinet heads, they meet frequently with experienced and trusted personal advisers, and they read and reflect extensively. Large-scale challenges sometimes call for committees or commissions to gather and analyze information in the hands of special subject-matter experts. Congressional supporters and detractors are sized up for what they know, what they support, and what they can contribute.<sup>2</sup> Close personal and political friends round out the knowledge trust.

All this was no less true in 1929 when Herbert Clark Hoover was handed the reins of executive power from Calvin Coolidge.<sup>3</sup> In this article, I apply Cronin’s concept to Hoover’s appointment of the

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1. Thomas E. Cronin, *On the Separation of Brain and State: Implications for the Presidency*, in MODERN PRESIDENTS AND THE PRESIDENCY 51, 52 (Marc Landy ed., 1985). In essence, the reference is to the activities and decisions of presidents that transform them from informed candidates to sophisticated policy makers. *Id.* at 51–53.

2. See generally ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER (2012). Caro praises Lyndon Johnson’s skill in mining information from all of these sources during his first rather difficult days in office to his resignation in 1968. See *id.* at xv–xvii. Johnson demonstrated a particular skill in mastering a wide range of information resources, thus permitting him to reach closure on dozens of domestic policy matters. *Id.* Much like Hoover, Johnson faced burdensome challenges as President that required him, not always successfully, to defend policies built on the acquisition and digestion of massive amounts of information. *Id.* See generally Cronin, *supra* note 1, at 52–53 (explaining that presidents and their staffs have to “embark upon major learning undertakings” for unexpected and complex issues).

3. President Calvin Coolidge was perhaps the presidential model most opposite so many of his predecessors, seemingly uninterested in the presidency, in learning too much, or in engaging in a full measure of public policy concerns in his time. See WILLIAM. K. KLINGAMAN, 1929: THE YEAR OF THE GREAT CRASH 7–8 (1989) (giving a brief glimpse into the dour nature of the man purported to have an “astute political mind”).

National Commission on Law Observance and Enforcement, also known as the Wickersham Commission, to investigate crime and the conditions of federal, state, and local justice systems in the United States.<sup>4</sup> I discuss the scope, depth, and relative quality of the Wickersham Commission and its contributions to Hoover's ultimate objective—the education of a nation then challenged by a persistently rising crime problem and relatively weak systems for addressing it. First steps toward meeting this objective were to lay bare certain defective, obsolete, and plainly inadequate operations of federal, state, and local systems and to set out practical remedies for reducing inefficiencies while improving the overall quality of justice administration. His actions constituted, I argue, one of the most important milestones in twentieth-century domestic policymaking. I do not argue, however, that Hoover's work on crime-control policy fully achieved its intended objectives, or that the Commission's reports about conditions were given the attention they deserved at the time. Hoover's contributions resided mainly in a firm commitment to convince the public that the very best information about conditions of rampant crime and poor-quality justice administration could be assembled in a coherent explanation of serious problems and best practices for improving policing, courts and judicial procedures, and places of incarceration. In doing so, Hoover also expressed his belief that the quality of justice delivery was intimately linked to the quality of American life. In this respect, Hoover's inaugural address spoke volumes about his expectations and his priorities: "To consider these evils," he said, "to find their remedy, is the most sore necessity of our times."<sup>5</sup> Hoover was the first President to formally address these matters. The standing these matters held among so many other competing priorities was revealed by their leading position in his speech, which was broadcast by radio both around the country and around the world,<sup>6</sup> and delivered in person

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4. This article incorporates and relies upon records of the National Commission on Law Observance and Enforcement located at the National Archives and Records Administration in Washington, D.C. Where possible, I have included record group and box number information as recorded in my research notes and from copies of letters and other documents in my personal collection.

5. President Herbert C. Hoover, Inaugural Address (Mar. 4, 1929).

6. Although President Calvin Coolidge's 1925 inauguration was the first to be broadcast by radio, Hoover's 1929 inauguration was the first to be recorded on talking newsreel. See *Inaugural History*, CBS NEWS, <http://www.cbsnews.com/htdocs/politics/inauguration/history.pdf> (last visited Apr. 8, 2013). The address was broadcast to listeners in, among other places, Tokyo, Leningrad, and even Antarctica.

before a cold and wet throng of 50,000 spectators on March 4, 1929.

Contextually, Hoover's presidency (1929–1933) marked two important transitions in American history, each one contributing to his legacy certain highs of policy successes and the inevitable lows of unmet objectives. In each case, as with all modern presidencies, blame for failures carried over into post-presidential retrospectives whether or not different actions or inactions could have changed outcomes. First, Hoover took office in an atmosphere of prosperity and good feeling, but his administration ended tragically in a climate of economic doom and emotional despair. Hoover, of course, did not cause the Great Depression, but he was not entirely blameless in its management.<sup>7</sup> More than the experience of any previous economic downturn, American economic faith had been permanently altered. Second, while Hoover's support for continuing Prohibition seemed eminently sensible in 1928, by 1932 it had become an unshakeable albatross—indeed, an irritable beehive of controversy. In the midst of economic crisis and thirteen years of endless debates about alcohol manufacturing and consumption, the increasingly intrusive concerns for crime causation and control, and the governmental systems intended to address them, demanded broad and systematic investigation. Never again would American social policy discourse ignore the implications of government's role in attempting to control private morality.

Admittedly, in the nearly 140 years after passage of the Judiciary Act of 1789,<sup>8</sup> and during the 60 years after the Justice Department was created in 1870, the malaise of Prohibition brought new political alignments and created new incentives to study the larger concerns for crime and justice in American society. Hoover focused on clarifying the extent to which complex federal, state, and local justice systems had languished without direction for several decades and thereby had fallen into corruption and inefficiencies at odds with the basic ideals of American life. He was simply unwilling to further ignore these deteriorated conditions, partly but not wholly driven by a Prohibition

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7. An endless number of excellent books have been published on the Great Depression, including discussions of Hoover's philosophical and policy positions. *See generally* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY (Michael D. Bordo et al. eds., 1998); ROBERT S. MCELVAINE, THE GREAT DEPRESSION: AMERICA, 1929–1941, at xiii–xiv (1984); AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 3–4 (2007); GENE SMITH, THE SHATTERED DREAM: HERBERT HOOVER AND THE GREAT DEPRESSION (1970).

8. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

policy that had pushed the government's responses toward widespread public scandal. How, Hoover asked with a much broader concern in mind, could the public respect the law when the conditions of its administration were so antiquated, inefficient, physically deplorable, untrustworthy, and intermittently unjust? Leaving aside the many factors that led to the creation of the Eighteenth Amendment and to the Volstead Act,<sup>9</sup> the newly elected President Hoover forthrightly declared that the most important issues at stake centered on a better system of American justice. He was willing to put the matter squarely on the political table and to publicize the findings when the Wickersham Commission completed its work.

Space limitations require that I sidestep extensive discussion of Prohibition in relationship to Hoover's appointment of, and the achievements of, the Wickersham Commission.<sup>10</sup> Some historians and political scientists have tended to regard these two matters as an inherently matched pair, in essence a view that Hoover's interest in the Commission was limited to finding ways out from under the Prohibition problem. A close reading of Hoover's pre-presidential life, however, reveals significant evidence in the opposite direction. Hoover possessed an exceptionally thoughtful mind given to ideas about the individual in American democracy, humanitarian principles, the role of government in improving the quality of American life, the value of scientific evidence in public-policy formation, and efficiency in the delivery of justice. True, Prohibition had not escaped Hoover's thinking in 1928 and he did not avoid its quandaries as he tasked the Wickersham Commission's commencement during his first days in office. Had Hoover insisted on allowing Prohibition to drive all (or even the majority) of his perspectives on crime control and justice administration, however, and if he had permitted mental absorption of the endless political and social carping about the alcohol issue, he could easily have organized a commission to defend a corresponding policy. Factually, the issue was rife with obvious political disincentives that commanded

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9. See U.S. CONST. amend. XVIII; National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

10. The scholarly and popular literatures on Prohibition are extensive and thus too numerous to cite with any fair degree of inclusiveness. See, e.g., DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* (2000); DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010); ANDREW SINCLAIR, *PROHIBITION: THE ERA OF EXCESS* (1962); LAWRENCE SPINELLI, *DRY DIPLOMACY: THE UNITED STATES, GREAT BRITAIN, AND PROHIBITION* (2008).

respect from both presidential candidates.<sup>11</sup> Practically speaking, as later economic events would establish, Prohibition was becoming a political nightmare and a popular-interest loser.

Considering the matter with a long-term view, there is plenty of evidence that in the years before World War I Hoover enjoyed daily cocktails, had consumed high-quality wines, and had even taken the occasional drink in private settings during and following his presidency. Clearly, Hoover was no prude on the subject of alcoholic beverages, nor did his public views on alcohol deliver him into the political hands of ardent prohibitionists. He was well-versed in the details, positions, and personalities on both sides of Prohibition, and he was wise enough to avoid capture by one camp or the other. By 1928 his support for Prohibition was compartmented in several different sectors of his reasoning, some of which may have appeared contradictory and floating around in what David Burner characterized as “a neat and undoubtedly sincere straddle.”<sup>12</sup> On one hand, he held firm to strictures related to amending the Constitution. After all, thirty-six states had ratified the Eighteenth Amendment by which a social control mechanism had been imposed. A strong popular belief had evolved that the long and storied history of widespread toleration of alcohol consumption necessitated the imposition of a national law. The Congress and the states, Hoover believed, were therefore obligated to take up the matter if they chose to do so. Unquestionably this perspective appeared to have directly challenged his views on individualism and the need to restrain governmental actions in the lives of private citizens. On the other hand, he was deeply concerned about popular nullification of the law as expressed by a sizeable number of people, including the criminal element, who flaunted alcohol consumption and who were not interested in constitutional justifications. Perhaps Hoover assumed that

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11. During the 1928 presidential campaign, candidate Herbert Hoover “committed himself” to supporting Prohibition. See RICHARD NORTON SMITH, *AN UNCOMMON MAN: THE TRIUMPH OF HERBERT HOOVER* 32, 105 (1984). In the course of winning the ultimate objective, he recognized that he had little room to maneuver politically. See KLINGAMAN, *supra* note 3, at 16, 20–30. In this author’s view, he was sincere in maintaining his position to uphold the Constitution’s Eighteenth Amendment, a necessary approach in order to clearly distinguish his candidacy from his anti-Prohibition opponent, Democrat candidate Al Smith. There was little question about Smith’s views in support of repealing Prohibition. Neither candidate wanted to address the issue head on, particularly because they both realized that some members of the press would continue to raise caustic issues such as the mix of religion with Prohibition opposition or support. In the end, Hoover won election in a landslide. See *infra* note 38 and accompanying text.

12. DAVID BURNER, *HERBERT HOOVER: A PUBLIC LIFE* 203 (1978).

the people who favored Prohibition, as well as opponents who refused to relinquish America's alcohol-soaked heritage, would patiently await resolution through enlightened acceptance of the political will.

Contradictions and straddling aside, Hoover's interest in the continuation of Prohibition likely sprang from his sincerely held functional perspectives on family life and the circumstances of work environments. For many decades alcohol had imposed significant damage on families and individuals and its excesses had impacted worker productivity and safety in the new industrial age. It was in these areas that Hoover's political pragmatism could find a balance and a sanctuary from criticism.<sup>13</sup> Frankly, an explanation may have resided at an even more basic level. In his private moments, Hoover may easily have agreed with Walter Lippmann's blunt commentary regarding the "wets" and "drys," that is, that both parties were "substantially insane."<sup>14</sup> In my view, therefore, Hoover had every reason to regard Prohibition as a noisy background issue that required some measure of attention by the Wickersham Commission. Prohibition, however, was not an issue Hoover permitted to hijack his objective of closing the separation between brain and state concerning the significantly larger matter of American justice administration. Ultimately he wanted a body of knowledge that would address the methods and parameters of antiquated practices in policing, prosecuting, and imprisoning law violators made worse by, but not limited to, the excesses of Prohibition.

## II. HOOVER'S BACKGROUND AND INTERESTS IN CRIMINAL JUSTICE MATTERS

Hoover named many fact-finding bodies like the Wickersham Commission, as did the Congress.<sup>15</sup> Later in his administration, Hoover was sometimes criticized for having done so, thus providing his opponents ammunition they needed during a deepening economic crisis. But Presidents before Hoover frequently used study commissions to enrich personal knowledge and to educate the public on the complexities of important policy matters, and the Congress had its own

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13. *Id.* at 107. Hoover had shown himself to be a political pragmatist on the issue of Prohibition several times in earlier years dating back to World War I. *Id.*

14. OKRENT, *supra* note 10, at 304.

15. Presidents from Theodore Roosevelt through Herbert Hoover had named 139 committees or commissions, while in the same period the Congress named 171 such bodies. White House Statement on Committees and Commissions, 1932-33 PUB. PAPERS 173, 173 (Apr. 24, 1932).

rich history of naming special commissions and committees. Pre-Hoover Presidents such as Roosevelt, Taft, Wilson, Harding, and Coolidge and their respective congressional peers had named approximately 482 such groups.<sup>16</sup> None of these groups, however, was charged with comprehensive investigations of the causes of rising crime or the interplay of justice system components across the spectrum of topics from crime prevention and policing to punitive sanctions and rehabilitation. Calvin Coolidge's National Crime Commission (1925–1929), for example, was ill-conceived and produced nothing of consequence. Its membership was a collection of inexperienced elites, and it lacked a methodology for mining information. Its findings were singularly vapid.<sup>17</sup>

Hoover's approach to fact-finding and policy options about crime and justice was cutting edge for its time. He believed that by calling upon leading experts in the relatively new social and behavioral sciences he could draw together some consensus about major problems and viable solutions. His faith was not unfounded, however, as evidenced by the willingness of leading practitioners and scholars to embrace his initiative. Unlike Coolidge, Hoover wanted the top people to explore, summarize, and present all aspects of then-current crime and justice studies. He expected that improvements in justice system processes would benefit from a publicly-funded inquiry. In essence, he was confident that government could produce the kind of science-based findings that could positively impact the crime problem and improve the quality of justice organizations and practices. Hoover knew, of course, that discussions about American justice systems could not sidestep the nettlesome issue of Prohibition enforcement. Such a maneuver would have attracted punishing political criticisms that could easily have undermined the more important work, such as detailed examination of so many difficult challenges facing law enforcement and law observance apart from the alcohol issue. For decades, incessant yammering about the subject made the political middle ground difficult to navigate. Thus, it was necessary for Hoover to carefully choose his words in his inaugural address: the trends of rising crime and falling confidence in the justice system were "only in part due to the additional burdens

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16. *Id.*

17. See John H. Wigmore, *The National Crime Commission: What Will It Achieve?*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 312, 313–15 (1925). See generally E.R. Cass, *National Crime Commission Conference*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 497 (1928) (providing a summation of this Commission).

imposed on our judicial system by the eighteenth amendment.”<sup>18</sup>

In 1928 Herbert Hoover was regarded as something of a national icon, liked by Democrats and Republicans. He won the election by a landslide, entering office with strongly held ideas about matters of state and a limited but affirmative role for government in addressing social problems such as crime and justice system administration. An engineer by training and experience, he insisted upon thorough study before making critical decisions. Government policies, he believed, should be grounded in scientific findings, thus yielding the maximum in operating coherence and agency efficiencies. Also, he was, as the historian Ellis Hawley once observed, a committed believer in the “associative state,” a view of governance that argued for economic and social progress based on cooperative links between government and private interests through methods of science and efficient productivity.<sup>19</sup> Hoover, like other adherents to principles of scientific management,<sup>20</sup> held great faith in the discovery of facts through subject-matter consultations with experts, formal investigations, and commissions and committees.

Creation of the Wickersham Commission clearly demonstrated Hoover’s principal drive to instruct the nation on prospective reforms to the then-current justice system practices and to do so through publication of investigations and results bearing the stamp of scientific credibility. And the experts he chose for the work were faced with difficult challenges. In 1929 American criminal justice at any level was easily characterized as a toxic mix of arrogance of power, incompetence, corruption, procedural obsolescence, rampant civil-liberties abuses, marginal preparation, and secretive and sometimes brutal conduct.

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18. Hoover, *supra* note 5.

19. Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an “Associative State,” 1921–1928*, 61 J. AM. HIST. 116, 116–19 (1974–1975).

20. Scientific management can be generally described as organization and management methods for improving mainly manufacturing productivity. See ROBERT KANIGEL, *THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY* 6–7 (1997). It took root in the late nineteenth century largely through the theoretical and applied foundations of Frederick Winslow Taylor. *Id.* In revolutionary fashion, Taylor’s principles were adopted widely by industrial leaders and government agencies and held prominence for several decades thereafter. *Id.* at 7. Volumes too numerous to cite have been written about these principles. Taylor’s life and work are excellently narrated in Kanigel’s, *The One Best Way: Frederick Winslow Taylor and the Enigma of Efficiency*. See generally *id.*; Charles Walcott & Karen M. Hult, *Management Science and the Great Engineer: Governing the White House During the Hoover Administration*, 20 PRESIDENTIAL STUD. Q. 557 (1990) (providing a window into Hoover’s managerial approach as applied to his White House staffing structure).

Many of the largest police and court systems were controlled by the heavy hands of ward bosses, gangsters, and the unchallenged power of administrators ranging from police chiefs to prison wardens. Prosecutorial functions suffered with impossible caseloads, corrupt practices, complicated or nonexistent rules, and low-grade lawyering. City and county jails were often cesspools of brutality and inhumane conditions. State prisons were frequently harsh places in which overcrowded conditions led to public health crises and riots. And parole and probation practices remained thwarted and underutilized options as alternatives to incarceration. Hoover, a Quaker by religious roots, had learned a great deal about such conditions through life experiences and associations with many experts, and he recognized over time that although a President lacked sufficient powers to change state and local justice conditions, he could expose some of the worst aspects by public investigation. He could also offer affirmative recommendations that were consistent with his strong faith in the federalist system of American government. He never argued that the Wickersham Commission was the perfect solution, nor did he claim it was the only solution. Surely in his post-presidential years<sup>21</sup> he must have reflected on the pathway he opened for an even broader national discussion about crime and justice.

Motivations to reform criminal justice conditions evolved from Hoover's early years as a developing entrepreneur and organization leader. These motivations advanced later when Hoover served as a federal administrator, and they reached full consideration during his run for the presidency. Born in 1874 and raised in central Iowa and Oregon, Hoover's early life included the hardships of being an orphan and a wrenching but supportive resettlement in his youth. Hoover never attended high school, but he completed a college degree in geology at Stanford University. Hoover's mining career advanced rapidly in Australia and later in China, where he ran headlong into entrenched elements of corruption that, although not amenable to permanent change, caused him to improve his business accounting and operational practices. Within his own mining company, Hoover discovered fraudulent transactions attributable to a business partner's handling of company securities, thus sharpening his awareness of unethical and illegal business operators. The historian George H. Nash eloquently

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21. Hoover died at the age of 90 in 1964, and he is buried at the Hoover Presidential Library in West Branch, Iowa. See SMITH, *supra* note 7, at 239.

describes the events in Hoover's experiences up to 1917.<sup>22</sup> Hoover's early interests in justice administration appeared with increasing frequency between 1914 and 1928. As mining successes expanded, others, such as business colleagues, diplomats, and journalists, recognized certain organization and management skills that found use in World War I. In quick order, Hoover emerged as an internationally recognized hero in refugee resettlement during the Belgium food relief effort.<sup>23</sup> Here again, Hoover confronted the problem of corruption in fraudulent schemes that diverted food from friendly to enemy hands. Hoover was irate and his anger caused him to reorganize the distribution system and impose rigorous controls. Not by choice, the food relief experience elevated his political profile after World War I, and soon his name was placed in nomination in the Republican presidential convention of 1920. President Warren G. Harding named him Secretary of Commerce in 1921, and Calvin Coolidge retained him when Harding died in 1923.

Throughout his Commerce years, Hoover stood firmly against cartels created to fix prices.<sup>24</sup> He was heard to proclaim in 1924, "When legislation penetrates the business world it is because there is abuse somewhere. . . . In the main . . . the public acts only when it has lost confidence in the ability or willingness of business to correct its own abuses."<sup>25</sup> The Teapot Dome oil reserves scandal in 1923–1924 honed public understanding of such abuses of trust. Hoover was so disgusted with the whole mess that he contemplated resignation from the Cabinet.<sup>26</sup> In addition to organizing study commissions to bring business and government closer on matters of international trade, he organized special enterprise groups interested in new innovations and related regulatory problems, such as regulation of the airwaves. These ventures led, in the case of the new police radio bands, to innovations and regulatory conventions for the rapidly expanding radio industry. Meetings and visits led to associations with innovative and respected police chiefs, such as the eminent Chief August Vollmer of Berkeley,

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22. See generally GEORGE H. NASH, *THE LIFE OF HERBERT HOOVER: THE HUMANITARIAN, 1914–1917* (1988).

23. *Id.* at 34–36. Nash's full chapter, "Who's Hoover?," captures the full context of Hoover's evolution from efficient engineer to widely recognized leader. *Id.*

24. BURNER, *supra* note 12, at 173.

25. HERBERT C. HOOVER, *THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920–1933*, at 171 (1952).

26. SMITH, *supra* note 11, at 102.

California; New York City Police Commissioner Arthur H. Woods; Detroit Police Commissioner William Rutledge; attorney and author of police histories Raymond B. Fosdick; and police consultant Bruce Smith and others.

### III. ADDITIONAL CRIMINAL JUSTICE ASSOCIATIONS

Hoover expanded associations with other elements of justice administration after 1920. Additional police contacts included the director of the Bureau of Investigation, John Edgar Hoover (no relation to then-Secretary Hoover). The Bureau had experienced significant scandal in its first fifteen years of operation and in 1924 it desperately needed a new director. With Secretary Hoover's support, J. Edgar Hoover was selected to clean up the agency.<sup>27</sup> Other associations included Lawrence Richey, the former undercover agent for the Secret Service during the Theodore Roosevelt and Woodrow Wilson presidencies, and Mabel Walker Willebrandt, the head of the Justice Department's tax, prisons and prohibition enforcement division and the highest ranking woman in federal service.<sup>28</sup> Legal and judicial associations included William J. Donovan, the prominent war hero, New York lawyer, and assistant attorney general in the Justice Department's Antitrust Division (and later the chief of the Office of Strategic Services in World War II);<sup>29</sup> Harlan F. Stone, the former Columbia Law School dean and Attorney General; William D. Mitchell, the Solicitor General under President Coolidge and an astute legal mind skilled in administrative efficiencies; Charles Evans Hughes, the former progressive Governor of New York, U.S. Secretary of State, and judge on the Court of International Justice; Roscoe Pound, the dean of the Harvard Law School; and Felix Frankfurter, the progressive lawyer and

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27. Secretary Hoover was asked by Attorney General Harlan F. Stone whether he knew "of a good lawyer-administrator to run the Bureau," and Secretary Hoover recommended J. Edgar Hoover. ATHAN G. THEOHARIS & JOHN STUART COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* 83 (1988). Stone subsequently appointed J. Edgar Hoover as director. *Id.* at 84. J. Edgar Hoover and Herbert Hoover would become close friends. *Hoover Heads: A Tale of Two Hoovers*, HERBERT HOOVER PRESIDENTIAL LIBRARY & MUSEUM, <http://hoover.archives.gov/hooverhead/peopleandplaces.html> (last visited Apr. 9, 2013); see also RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 143 (1987); SMITH, *supra* note 11, at 389; THEOHARIS & COX, *supra*, at 83.

28. See DOROTHY M. BROWN, *MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW* (1984) (providing an excellent biography).

29. DOUGLAS WALLER, *WILD BILL DONOVAN: THE SPYMASTER WHO CREATED THE OSS AND MODERN AMERICAN ESPIONAGE* 38-41, 116 (2011).

holder of a distinguished chair in law at Harvard. Sanford Bates, the nationally recognized superintendent of the Massachusetts prison system, along with several other officials in the new era of progressive corrections, had also come to Hoover's attention.<sup>30</sup>

Many of the people Hoover had met in criminal justice circles were offered or became part of his presidential administration: J. Edgar Hoover remained director of the Bureau of Investigation; Richey became Hoover's ranking personal secretary (of three in the White House);<sup>31</sup> Willebrandt (labeled the "generalissimo") briefly remained head of the Justice Department's Prohibition work;<sup>32</sup> Woods served as a background adviser on law enforcement matters; Donovan was offered but turned down an ambassadorship to the Philippines when Hoover reneged, writes historian Douglas Waller, on his promise to appoint Donovan as Attorney General;<sup>33</sup> Stone was named by Hoover as Associate Justice of the Supreme Court; Mitchell became Hoover's Attorney General; Hughes was named Chief Justice of the Supreme Court; Pound was named as a member of the Wickersham Commission; Frankfurter consulted with Pound and the Wickersham Commission and joined others in writing the contentious and unpublished Mooney-Billings report; and Bates served as the first director of the Bureau of Prisons until 1936.

By 1928 these associations had schooled Hoover on a range of criminal justice issues. Popular public discussions included concerns for rising and deepening crime problems in American society, including stories of rampant "gangsterism" and corruption by public servants. No national statistics were available at the time to measure the seriousness of these concerns, however, and public policy was hard-pressed to pinpoint which among them required the most immediate attention.

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30. In general, progressive corrections practices, including humanitarian methods of punishment and rehabilitation, were subjects grounded in values buried in Hoover's Quaker upbringing and which continued to inspire his thinking well after 1920.

31. Hoover's three secretaries were Lawrence Richey, his personal secretary and gatekeeper for access; George Akerson, his public relations secretary; and French Strother, his administrative secretary. See *Herbert Hoover: Domestic Affairs*, MILLER CENTER, <http://millercenter.org/president/hoover/essays/biography/4> (last visited Apr. 9, 2013).

32. She was on Hoover's list for possible removal in 1929 because of unfortunate remarks she made during the 1928 presidential campaign about Al Smith, Hoover's opponent, linking Smith's Catholicism with his opposition to the Prohibition made during the 1928 presidential campaign. See JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER'S INITIATIVES* 42-43 (1993).

33. WALLER, *supra* note 29, at 40-41.

“Organized crime” entered the lexicon of news commentators and reporters.<sup>34</sup> Racketeering appeared to place a stranglehold on many urban governments and Hoover developed a particular focus on the corrosive aspects of the Al Capone organization in Chicago.<sup>35</sup> Prohibition enforcement, of course, took center stage as the 1928 presidential campaign neared conclusion.

Lest we overemphasize Hoover’s ongoing ties to important leaders and thinkers in criminal justice, I rush to make clear that he had many other policy areas he wished to explore during his administration, and he recognized that there were many competent criminal justice experts who could carry out the operational work. Keenly aware of Prohibition’s impact on the federal justice system, for example, he wanted the experts to identify ways to encourage state and local governments to move past their habits of malingering on enforcement responsibilities. The new fields of criminology and public administration could be called upon in this area since they had published research proclaiming the negative effects of Prohibition on city, county, and state agencies.<sup>36</sup> There was also a fledgling group of criminologists available to give some attention to local- or state-level study of justice systems.<sup>37</sup> Others held expertise in the problems of the federal system, a relatively small patchwork of agencies cobbled together to meet the demands of periodic spurts of expansion in the previous three decades. America in 1929, Hoover knew, remained a nation operating on a shoestring criminal-justice budget, but he also believed that the experts could offer recommendations that would move

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34. See, e.g., *Chicago Vice Profit Put at \$13,500,000*, N.Y. TIMES, May 22, 1928, at 10; *Philadelphia Judge Opens War on Gangs*, N.Y. TIMES, Aug. 18, 1928, at 15.

35. Herbert Hoover employed the term “organized crime” in his Annual Message to Congress on the State of the Union on December 3, 1929. President Herbert Hoover, Annual Message to Congress on the State of the Union (Dec. 3, 1929). The term appeared infrequently in popular usage but it became more common after 1930. Before then, “racketeering” was the more commonly used term of reference. See, e.g., *Blames Public Laxity for ‘Racketeering,’* N.Y. TIMES, Oct. 2, 1928, at 7; *Middle West Drys Stage Bitter Fight*, N.Y. TIMES, Nov. 4, 1928, at 2.

36. Articles and books abound and can be found via JSTOR and other searches using such terms as “Prohibition and Crime” or “Prohibition and Public Administration.” A few interesting articles include: *Crime Situation Reviewed by Noted Criminologists*, 11 SCI. NEWSL. 39, 39–41 (1927); Raymond Moley, *Some Tendencies in Criminal Law Administration*, 42 POL. SCI. Q. 497, 518–23 (1927); Leonard D. White, *Public Administration*, 1927, 22 AM. POL. SCI. REV. 339, 342 (1928).

37. See generally BURDETTE G. LEWIS, THE CLEVELAND FOUND., CORRECTIONAL AND PENAL TREATMENT (1921).

systems beyond mere muddling along in a condition of grossly obsolete institutions and legal procedures. In simple terms, he understood that the escalating strains of Prohibition enforcement had pushed local, state, and federal systems over the edge of a high cliff that had been rising even higher for many years. Despite any naturally occurring political constituency, it was becoming increasingly obvious that a call for formal investigation was a sensible idea with bipartisan political support and the help of the very best minds. National political will and supportively inclined political leadership remained, however, the two most important ingredients needed to study a myriad of problems and urge ameliorative policy responses. Parts of Hoover's campaign speeches projected an image of enthusiastic willingness primed to forthrightly address the issues of law observance and enforcement.

#### IV. WICKERSHAM COMMISSION BEGINNINGS

The election of 1928 resulted in a landslide victory for Hoover.<sup>38</sup> His inaugural address left no doubt about the significant changes he expected for federal justice administration. Citizen engagement, however, was critical to the containment of escalating crime and support for law observance and enforcement. Hoover made no apologies for the difficulties he faced in walking a narrow path between supporters and political adversaries. Solutions to the crime problem were discoverable, however.<sup>39</sup> It was necessary, Hoover argued, to learn more before

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38. Hoover received 21.4 million popular votes and 444 electoral votes, while Al Smith received 15 million popular votes and 87 electoral votes. David Liep, *1928 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1928> (last visited Apr. 9, 2013). All but seven states voted for Hoover. *Id.*

39. Both Democrats and Republicans were aware of its deleterious effects on rational discourse. Unquestionably Hoover and his opponent, Al Smith, recognized that the constitutionally based policy had fully strained the capabilities of all justice system elements. Changes were needed but there were no easy solutions. The problem resided in the law itself and the unwillingness of more than half the population to admit to its abject failure as a standalone solution to alcohol consumption. Parts of local, state, and federal systems were considered rife with incompetence and insufficient enforcement capacity, and the Treasury Department's Prohibition Bureau was the perfect example of the worst case of government performance. Other federal elements were only marginally functional. Some part of the problem also lay in the low skills or corruption of people heading state agencies while other administrative and political entities simply turned a blind eye to the need for modernizing law enforcement, judicial, and penal institutions. Indicators of reform-minded leadership were on the horizon, however, due mainly to the slow but persistent advances in police and penal administration. What remained necessary to catalyzing the intellectual roots of change was a triggering mechanism, an element that was unlikely to appear unless a national level expose

rendering judgments. Hoover was aware that the experts would face difficulties as soon as they applied study results and reasoning to complex problems well beyond Prohibition, such as crime conditions, causative factors, escalating juvenile delinquency, immigration abuses, cumbersome legal procedures, and crowded jails and prisons. It was clear to Hoover that focused attention on these subjects would attract controversy from interests vested in continuation of the old ways and when specific defects were given national level exposure. Hoover and his teams of experts were not dissuaded by these challenges, however. As a counterbalance to the status quo, Hoover's appointments to the fact-finding commission would include mainly respected academics and practitioners from the relatively new social and behavioral sciences, including criminology, the "realist" movement in American law, political science, psychology, public administration, and sociology.

Recognizing that the Congress guarded its prerogatives in overseeing federal organizations and operations, the Wickersham Commission was instructed to avoid reorganization proposals that might raise eyebrows in congressional committees and in the halls of enforcement and judicial functions. In a press release on March 19, 1929, Hoover declared, "I am not looking for dramatics. I am looking for substantial, permanent advance of the country to a realization of the necessity of enforcing the laws of the United States as they are on the books."<sup>40</sup> This was followed on June 6 with a special message to the Congress inviting the creation of a congressionally named joint committee to examine questions of Prohibition enforcement and matters related to reorganization and consolidation of enforcement functions, yet another indication of a desire to distinguish this issue from the Commission's mainstream work.<sup>41</sup> He proposed that as the Commission developed findings it would share them with congressional committees. Unquestionably this proposal was a calculated political approach aimed at strengthening the notion of executive-legislative cooperation on shares of the results of joint investigations. The Congress, after all, had provided the initial funding of \$250,000 for the Commission's work.<sup>42</sup>

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revealed the depths of the situation.

40. The President's News Conference, 1929 PUB. PAPERS 30, 32 (Mar. 19, 1929).

41. Special Message to the Congress Proposing a Study of the Reorganization of Prohibition Enforcement Responsibilities, 1929 PUB. PAPERS 178, 178 (June 6, 1929).

42. *House Restores \$250,000 for Hoover's Law Board: Dry Padlock Drive Looms*, N.Y. TIMES, July 3, 1930, at 1. Work with the proposed congressional committee was to be headed

Chairman Wickersham got to work in spring 1929.<sup>43</sup> One writer observed Wickersham's jaunty style and the youthful spring in his step, notable because the former Attorney General was seventy-one years old: "There is nothing calm nor judgelike in his manner. . . . While younger men wilted under the terrific heat, dressed in a pongee suit and a silk shirt, he rushed from one room to another, directing his assistants, seeing visitors, joking and keeping everyone in good humor."<sup>44</sup> Actually, he was Hoover's third choice for the position after Harlan Stone and Charles Evans Hughes had declined.<sup>45</sup> Hoover and Wickersham dated their relationship to World War I and to meetings during Hoover's Commerce years. They had shared similar views on the value of the Sherman Antitrust Act<sup>46</sup> in addressing the concentration of monopolistic enterprises.<sup>47</sup> Other selections for Commission membership developed from Wickersham's contacts with well-known scholars and practitioners across various relevant disciplines. To get the intended useful and far-reaching results, and with full knowledge that the scope of the task had no historical precedent at the national level, meant Wickersham could not afford any delays.

Membership commitments were in place on May 20 and the Hoover-Wickersham plans for study were set out in the first meeting with all eleven commissioners at 2:30 p.m. on May 28, 1929, in the temporary Justice Department quarters. The Commission's offices were not yet completed.<sup>48</sup> The President was warm, firm, and direct in setting

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by John L. McNab, a prominent San Francisco lawyer. Statement on the Appointment of John McNab to Study and Formulate Plans for the Improvement of Prohibition Law Enforcement, 1929 PUB. PAPERS 309, 309-10 (Oct. 1, 1929); *John L. M'Nab Dies; Coast Lawyer*, 77, N.Y. TIMES, Mar. 19, 1956, at 92.

43. David J. Hanson, *Wickersham Commission*, ALCOHOL: PROBLEMS & SOLUTIONS, <http://www2.potsdam.edu/hansondj/Controversies/Wickersham-Commission.html> (last visited Apr. 9, 2013). Wickersham set aside his lucrative New York law practice and served as the Commission chairman without pay. S. J. Woolf, *Wickersham Talks of Life and the Law*, N.Y. TIMES, Sept. 8, 1929, at 3.

44. Woolf, *supra* note 43.

45. CALDER, *supra* note 32, at 13-14.

46. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006).

47. See James Clifford German, Jr., Taft's Attorney General: George W. Wickersham (Oct. 1969) (unpublished Ph.D. dissertation, New York University).

48. Eventually the headquarters was moved into the newly constructed Tower Building at 14th and K Street in Washington, D.C. *The Wickershambles That Led to the End of Prohibition*, METRO JACKSONVILLE, Apr. 8, 2010, <http://www.metrojacksonville.com/article/2010-mar-the-wickershambles-that-led-to-the-end-of-prohibition>. The building is now considered a landmark for its art deco architectural design and its set-back form, unique among tall downtown Washington office buildings. See National Register of Historic Places

forth an expectation of commitment to scientific investigations and to meaningful recommendations in all the areas under study. Hoover's remarks never mentioned Prohibition. His public statements had already clarified the Commission's purpose. As expressed in editorial columns and letters to newspaper editors, anticipatory press coverage yielded high expectations. Hoover said that he wanted the investigations to formulate "constructive, courageous conclusions which will bring public understanding and command public support of its solutions."<sup>49</sup> Hoover was unwilling to compromise on improvements that he expected to be made to justice system practices, including reinstatement of the rule of law in civilized American governance processes. "The American people," Hoover said,

are deeply concerned over the alarming disobedience of law, the abuses in law enforcement and the growth of organized crime, which has spread in every field of evil-doing in every part of our country. A nation does not fail from its growth of wealth or power. But no nation can for long survive the failure of its citizens to respect and obey the laws which they themselves make. Nor can it survive a decadence of the moral and spiritual concepts that are the basis [sic] of respect for law nor from neglect to organize itself to defeat crime and the corruption that flows from it. Nor is this a problem confined to the enforcement and obedience of one law or the laws of the Federal or State Governments separately. The problem is partly the attitude toward all law.<sup>50</sup>

Clearly, both the tone and substance of these remarks were far-reaching in their scope of appeal.

Chairman Wickersham and Attorney General William D. Mitchell then delivered welcoming remarks. The Justice Department, Mitchell said, was fully supportive of the Commission's work and would assist in any ways it could.<sup>51</sup> Hoover, Mitchell, and Wickersham returned to their

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Registration Form, Tower Building, U.S. Dep't of the Interior § 8, at 1 (Aug. 8, 1995), available at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/95001084.pdf>. At the time it was constructed, it was the tallest office building in Washington, D.C. *Id.*

49. Herbert C. Hoover, Remarks at the First Meeting of the National Commission on Law Observance and Enforcement (May 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 10).

50. *Id.*

51. Remarks at the First Meeting of the National Commission on Law Observance and Enforcement, 1929 PUB. PAPERS 159, 160 (May 28, 1929).

offices. The room full of eager commissioners got down to business. Discussion was lively and gave strong indications about the prospects for vigorous debate concerning the subject matter of and approaches to the research agenda. Commissioner Paul J. McCormick, a federal district judge from the Southern District of California, pushed for priority to be assigned to law enforcement criminal procedure, in particular, he felt that it was necessary to find ways to speed up the criminal justice process and to consider expanding the lower federal courts to add a new level that would handle the massive criminal caseload. “‘The basic evil,’ McCormick announced without hesitation, ‘lay in the professional criminal lawyers,’ police ‘third degree’ tactics, and ‘marketed injustice.’”<sup>52</sup> Commissioner Ada L. Comstock, a sociologist and the president of Radcliffe College, recommended that the state of mind of lawbreakers was worthy of research concerning lawbreakers’ perceptions that beating the law was a “meritorious game.”<sup>53</sup> Commissioner Monte M. Lemann, a distinguished New Orleans trial lawyer and the president of the Louisiana Bar Association, wondered whether Prohibition was at the root of many Americans’ general disrespect of the law. Commissioner Frank J. Loesch, a judge, a citizen leader in Chicago’s anti-gangster efforts, the vice president of the Chicago Crime Commission, and a notable member of the Chicago Bar Association, zeroed in on more specific issues of jury challenges, jury instructions, bail practices, and judicial waivers of felony cases to misdemeanors. Judge William S. Kenyon, the former U.S. Senator from Iowa and a sitting judge on the Eighth Circuit, said that most criminals “of the gangster type bore foreign names,” and that criminal defense lawyers were “the greatest obstacle in the way of the administration of justice.”<sup>54</sup> As a Prohibition supporter, Kenyon insisted upon an objective study of the question. Late in the Commission’s work, Kenyon showed some objectivity when he claimed he was “appalled at the venom and malice of the people whom we term the ‘wets,’ and . . . the stupidity of the ‘ultra drys.’”<sup>55</sup> Commissioner William I. Grubb, a

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52. CALDER, *supra* note 32, at 79.

53. *Id.* (quoting Ada Comstock).

54. *Id.* (quoting William S. Kenyon); Wickersham Commission, Meeting Minutes (May 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 1) [hereinafter Minutes].

55. CALDER, *supra* note 32, at 79–80 (quoting Letter from William S. Kenyon to George W. Wickersham (Mar. 23, 1931) (on file at the National Archives and Records Administration at RG 10, Box 16)).

federal district judge from the Northern District of Alabama, blamed the problem on juries' unwillingness to convict offenders. Conversely, Commissioner Kenneth R. Mackintosh, a prominent Seattle lawyer and the former chief justice of the Washington Supreme Court, took a more contemplative approach by suggesting "the need for more scientifically derived statistics and measures of court efficiency" useful in reducing docket congestion.<sup>56</sup> Finally, Commissioner Henry W. Anderson, a prominent Virginia lawyer, a twice-defeated candidate for Governor of Virginia, the president of the Virginia Bar Association, and former colleague of Hoover's in the World War I famine relief effort, reinforced the need for statistics by proclaiming that, "far too many remedies had been proposed without more precise data."<sup>57</sup> Anderson's unique claim was that "the main offenders in society were in the 'highest class' and the 'lowest class' while the great middle was comparatively law abiding."<sup>58</sup> Anderson accused the government as the lawbreaker and called for its cleanup before expecting the public to gain new respect for the law.<sup>59</sup>

All of the commissioners were well-known to Hoover. The Commission's membership consisted of ten men and one woman, all highly respected in their fields and all with lengthy and sometimes controversial histories. The number of commissioners was chosen, most likely, to match the number of projects that would be selected for study. Newton D. Baker and George Wickersham were the most prominent practitioner-scholars while all except the law professor Roscoe Pound (the only academic) were distinguished practitioners. Baker had been President Wilson's embattled Secretary of War and an acclaimed architect of World War I planning; an author; and later a partner in the Cleveland law firm of Baker, Hostetler & Sidlo.<sup>60</sup> Wickersham, as a former U.S. Attorney General, had shown his teeth in the Taft era when he aggressively prosecuted several corporate trusts and had opposed federal incorporation of the Rockefeller Foundation, a special-interest organization with a slick method for further empowering John D.

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56. *Id.* at 80; see Minutes, *supra* note 54.

57. CALDER, *supra* note 32, at 80; Minutes, *supra* note 54.

58. CALDER, *supra* note 32, at 80.

59. *Id.*; Minutes, *supra* note 54.

60. See generally SEWARD W. LIVERMORE, POLITICS IS ADJOURNED: WOODROW WILSON AND THE WAR CONGRESS, 1916-1918 (1966) (providing a discussion of Baker's situation during World War I).

Rockefeller's Standard Oil Company.<sup>61</sup> As the law professor William F. Swindler once quipped, Wickersham "was aware . . . of the difference between efficiency and monopoly. The answer to him was a form of government surveillance to promote efficiency and to control monopoly."<sup>62</sup> Wickersham feared that the legal system lacked the capacity to keep watch over a growing threat, and thus "he seized upon the only (though imperfect) weapon at his command, the Sherman Act, and set out to slay giants."<sup>63</sup>

Although the Commission was headed by a profoundly skilled lawyer and former U.S. Attorney General, Pound was clearly the Commission's anchoring intellectual giant and one of America's most towering legal scholars. As professor and then dean of the Harvard Law School, he had authored several articles and books on criminal justice and had made significant contributions to legal theory development. He had real-world experience, also, in leading the Cleveland crime commission study in 1922 and was thereby well-suited for calming contentious internal factions.<sup>64</sup> In part, his role was to attract the best minds to the Commission's consulting projects while remaining fiercely independent on the matters within his expertise. Persistently direct in written communications, for example, he wrote to Commission secretary Max Lowenthal concerning the credentials of a particular judge who had applied to serve. Pound used the occasion to offer views on the public's knowledge of the federal judiciary's failings:

What I do know is that very few people in this country have any adequate notion of the problem of judicial organization. I have been studying that since 1906, and know that it is a very big problem . . . .

I have not talked with a federal judge yet who had any conception whatever of judicial organization beyond that of his own state.<sup>65</sup>

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61. 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 662 (1964).

62. WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932*, at 137 (1969).

63. *Id.*

64. Some evidence suggests that Pound did not actually write much of the Cleveland study report frequently applauded by scholars in criminology and the history of criminal justice. See ALFRED BETTMAN, *CRIMINAL JUSTICE SURVEYS ANALYSIS* 50 (1929).

65. CALDER, *supra* note 32, at 81 (omission in original); Letter from Roscoe Pound to Max Lowenthal (Aug. 3, 1929) (on file at the National Archives and Records Administration).

Adding more criticism based on his experiences, Pound wrote two district judges with whom he had discussed the problem and who had “denied that they had the power to comment on the evidence in a charge to the jury. It is that sort of thing which we are up against in any attempt to do something for judicial organization and procedure in this country.”<sup>66</sup> Pound could also be complimentary. On the work of the criminologist Sheldon Glueck, he wrote, “Glueck’s work is absolutely first class,”<sup>67</sup> and concerning the social work expert Edith Abbott, he wrote, “I am rejoiced that [she] is to undertake criminal justice and the foreign born. No one could be better. She is the sort of ‘expert’ who can be of use to you.”<sup>68</sup>

A long list of advisers and consultants constituted a virtual who’s who of pre- and post-1930s behavioral and social sciences, criminology, the law, and practitioners from specializations throughout criminal justice organizations nationwide. Every academic discipline demonstrating a published concern for crime and justice administration was included. Research support staffs included dozens of prominent academics of either rising or established prestige. Independent investigations, published reports, and policy recommendations originated with such luminaries in criminology, law, and public administration as Edwin H. Sutherland, Thorsten Sellin, Sheldon Glueck, Felix Frankfurter, Raymond Moley, Francis Sayre, Samuel C. May, Frederic A. Ogg, W. F. Willoughby, Howard W. Odum, William E. Mosher, Luther Gulick, Raymond B. Fosdick, and Charles E. Merriam. Most research products were aimed directly at the main objectives of the Commission’s topical plan, but relevant peripheral interests were also recognized. Consultants Sutherland and Merriam introduced fledgling theories and new data on crime and justice administration. Sutherland was already a prominent professor of criminology following publication of the leading textbook in the field.<sup>69</sup> Merriam, an internationally recognized University of Chicago political scientist, was

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at RG 10, Box 24).

66. Letter from Roscoe Pound to Max Lowenthal, *supra* note 65.

67. CALDER, *supra* note 32, at 81 (quoting Letter from Roscoe Pound to George W. Wickersham (Aug. 22, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24)).

68. *Id.* (quoting Letter from Roscoe Pound to Max Lowenthal (Aug. 14, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24)).

69. See MARK S. GAYLORD & JOHN F. GALLIHER, *THE CRIMINOLOGY OF EDWIN SUTHERLAND* 61–65, 81 (1988). See generally EDWIN H. SUTHERLAND, *CRIMINOLOGY* (1924).

known for his service on the Chicago City Council, as Chairman of the Council Committee on Crime and author of numerous articles and books.<sup>70</sup> Writing to Jerome Michael at Columbia University in August 1929, Wickersham remarked about the quality of his research staff, “We have found it difficult to secure the services of the best experts in the country, but we have thought it wiser to employ none but the very best rather than to seek more rapid progress with others who are not of the first order.”<sup>71</sup> Equally prestigious practitioners and university administrators were asked to serve as experts and consultants. August Vollmer, perhaps the most recognized authority on American policing, had recently retired as chief of police in Berkeley, California, and was teaching at both the University of California and the University of Chicago.<sup>72</sup> For the first year of operations Max Lowenthal filled the Commission’s most important administrative position: as Commission secretary, he was central to the forward progress and stability of the Commission’s work. His exceptional administrative skills were well-known to Hoover and Wickersham. He calmed and coordinated diverse interests and specializations across the fourteen project groups, and was frequently called upon to soothe the ruffled feathers of talented members, staff, and consultants. As a seasoned government employee with access to Presidents and staffers, he was equipped with invaluable knowledge of the networks of information on police operations and influential leaders, statistical compilations, personnel backgrounds, and other essentials useful to the commissioners. Lowenthal’s initial objective, complementing Pound, was to expedite the search for researchers but to do so by avoiding “selection of any persons who are not absolutely first-rate.”<sup>73</sup>

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70. For a fascinating article published fourteen years before the Commission began its work, see Charles E. Merriam, *Findings and Recommendations of the Chicago Council Committee on Crime*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 345 (1915).

71. Letter from George W. Wickersham to Jerome Michael (Aug. 22, 1929) (on file at the National Archives and Records Administration at RG 10, Box 9).

72. Pound praised Vollmer’s work, his national reputation, “experience, wide information and sound sense.” Letter from Roscoe Pound to George W. Wickersham (June 17, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24).

73. Letter from Max Lowenthal to Roscoe Pound (June 27, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24). Lowenthal quit this anchor position in July 1930, greatly disturbed by “antics in the realm of political expediency.” CALDER, *supra* note 32, at 83. Essentially, he concluded, the Commission’s progress was too frequently bogged down in debates over Prohibition and thus had drifted away from its central mission. *Id.* He was replaced immediately, however, and the work moved forward to the production of reports. He was replaced by William F. Barry. *See id.* at 81 n.33. August

## V. GETTING DOWN TO WORK

The Commission's structure was organized to address fourteen discrete subjects, appearing in fourteen reports: *Prohibition*; *Criminal Statistics*; *Prosecution*; *Enforcement of Deportation Laws*; *Child Offenders in the Federal System*; *Federal Courts*; *Criminal Procedure*; *Penal Institutions, Probation, and Parole*; *Crime and the Foreign Born*; *Lawlessness in Law Enforcement*; *Cost of Crime*; *Causes of Crime*; and *Police*. Ultimately, these fourteen topical groups resulted in fourteen numbered reports.<sup>74</sup> Clearly the Commission's study topics were guaranteed to attract internal controversies. In fact, it became increasingly clear throughout the succeeding months that American criminal justice had become a complex arena of academic and practitioner dialogue, and in some cases a hotbed of serious problems for which there were no simple solutions. Among the new breed of criminologists the study of crime had taken off in many theoretical directions. Policing was only beginning to address the challenges of its nineteenth-century legacies and its new school of professionalism. Courts at all levels were jammed with criminal cases, procedures were antiquated, and plea bargaining was a common response to severe caseload burdens. Jails and prisons continued their eighteenth- and nineteenth-century practices, which were made worse by crowdedness, prisoner idleness, and brutal punitive practices.<sup>75</sup> Disagreements in these and other areas were manifested when some commissioners boycotted attendance at meetings and in a small number of cases delayed or refused to sign final reports. Most disagreements, however, were resolved amicably and in the end the group demonstrated healthy signs of the contentious nature of the crime problem and its administration in society. Some of the topics, indeed, were inherently incendiary and nearly impossible to discuss in a manner that would find points of consensus, such as Prohibition enforcement, deportation and immigration policies, police lawlessness, and juvenile crime.

The Commission's substantive meetings got underway in June 1929.

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Vollmer provided the Commission with a report of his recommendations for other distinguished police chiefs. See Letter from August Vollmer to George W. Wickersham (Sept. 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24).

74. See *infra* Part VI (discussing all fourteen of the official report titles).

75. See generally SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 68-69 (1980) (discussing poor conditions in jails and prisons and the difficulties faced by prison administrators).

The research agenda was clarified, data collection and dissemination strategies were developed, and the division of labor was allocated. On June 18, Alfred Bettman, the former special assistant to Attorney General A. Mitchell Palmer and an expert on World War I espionage cases, summarized the findings of the earlier Cleveland and Boston crime surveys, the models that Pound believed would serve well the group's organizational interests.<sup>76</sup> Commissioner Loesch briefed the group on his discussions with Walter A. Strong, publisher of the *Chicago Daily News*, a key information source on the gangster problem in Chicago.<sup>77</sup> Strong had offered to arrange a "successful educational campaign" regarding the Commission's work, thus lending the support of publicity. Corruption and lawlessness, Loesch argued, were frequent occurrences among government law enforcers and this topic, he believed, rated high rank among the various investigations. On June 19, the budget allocations for the various research projects were announced,<sup>78</sup> and further discussions explored additional lessons from earlier and ongoing local crime commissions, police and Prohibition matters, and court and criminal procedures.

In clear terms, commissioners agreed that scientific investigation would apply in all studies and the most recent and methodologically sound approaches would be employed. As Lowenthal wrote in August 1929,

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76. BETTMAN, *supra* note 64, at 50; Laurence C. Gerckens, *Bettman of Cincinnati, in THE AMERICAN PLANNER: BIOGRAPHIES AND RECOLLECTIONS* 120, 126 (Donald A. Krueckeberg ed., 1983). Bettman graduated from Harvard Law School in 1898, after which he worked as a prosecutor in Ohio and then as a special assistant to the U.S. Attorney General on matters involving espionage and the alien enemy law. Gerckens, *supra*, at 121–22, 126. He then worked for Roscoe Pound on the Cleveland crime survey. BETTMAN, *supra* note 64, at 50.

77. Commissioner Frank Loesch and Walter A. Strong, the publisher of the *Chicago Daily News*, among a small number of others, played a key role in gathering and transmitting intelligence on the Al Capone outfit and other racketeer groups in Chicago. See the following works for brief discussions of their roles in the Capone investigation in particular: LAURENCE BERGREEN, *CAPONE: THE MAN AND THE ERA* 293, 364 (1994); HOOVER, *supra* note 25, at 276–77; and ROBERT J. SCHOENBERG, *MR. CAPONE* 172, 203–04 (1992).

78. Resolutions were reached on the budgets for ten major research topics: causes of crime (\$15,700); costs of crime (\$7,500); courts (\$6,000); crime and the foreign born (\$7,500); official lawlessness (\$12,500); police (\$5,000); penal institutions, probation, and parole (\$6,500); Prohibition (\$50,000); prosecution (\$7,500); and statistics (\$1,000). CALDER, *supra* note 32, at 84. The Congress had authorized an initial total operating budget of \$250,000. *Dry Foes to Oppose Wickersham Board in Obtaining Funds*, N.Y. TIMES, July 20, 1929, at 1. This total was later doubled. Arthur Crawford, *Hoover Signs; Wins His Point; Congress Ends*, CHI. TRIB., July 4, 1930, at 1 (noting the appropriation of an additional \$250,000).

We are endeavoring in the fields of our study to proceed in a spirit of scientific inquiry, to put before the country only data which has been arrived at scientifically and impartially, so that the country may have a real foundation of facts on which to consider each aspect of what the President in appointing this Commission called “the dominant issue before the American people.”<sup>79</sup>

State-of-the-art survey research was used to acquire data pertaining to hundreds of questions posed to authorities at all levels of government and from influential organizations and individuals. For example, one survey of police manpower found that six American cities had substantially higher police-to-population ratios than six European cities, which suggested that crime was a function of police presence.<sup>80</sup> Psychological consultants developed several attitude studies pertaining to crime, prohibition enforcement, and criminal court practices. Other experts—such as economists, law professors, political scientists, and sociologists—were responsible for developing most of the survey instruments. The Commission also employed public hearings, and in them the commissioners sought to acquire information from knowledgeable persons. The Commission did not use hearings “merely to satisfy the desires of various individuals to air their views.”<sup>81</sup>

#### VI. PHASES OF THE COMMISSION’S WORK AND THE WORK PRODUCTS

The Wickersham Commission’s congressional funding came through beginning July 1, 1929. Work evolved in four distinct phases over the succeeding twenty-five months in which the Commission faced the dual pressures of sustaining high-quality research and writing and knowing that both funding and time were in short supply.

The first phase included a series of regular meetings in Washington in the late spring, early summer, and fall of 1929, pressing on into the spring of 1930. Early sessions were held behind closed doors and were devoted to the organization and conceptualization of the subjects for assignment to project consultants. Definitions of project priorities were

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79. CALDER, *supra* note 32, at 85 (quoting a Letter from Max Lowenthal to D. Stevens (Aug. 1929) (on file at the National Archives and Records Administration at RG 10, Box 9)); see also *Text of President Hoover’s Address*, N.Y. TIMES, Apr. 23, 1929, at 2 (memorializing the speech in which Hoover spoke the quoted phrase).

80. Wickersham Commission Survey Results for June and July 1929 (on file at the National Archives and Records Administration at RG 10, Box 4)).

81. Letter from Max Lowenthal to Roscoe Pound, *supra* note 73.

critical since the process for securing expert commitments would require considerable time. As field research projects got underway, communications back and forth between Wickersham, Pound, Lowenthal, and others increased exponentially. Letters and reports appeared to reflect the excitement of any new venture in which the researcher was asked to apply what he or she knew well to a focused task. The Commission returned to an *en banc* meeting on September 4 to assess progress, firm up the list of consultants, and outline project approaches. Some members of the Congress were publicly bothered by the alleged secrecy of the Commission's activities, but Hoover and Wickersham held firm to a plan to wait until spring 1930 to hold public hearings. First priority was given to the Prohibition study group since that was the pressure-filled topic of interest to some in the Congress. Wickersham was clear, however, that the other projects were equally important. This balance was symbolized in the chair's meeting with several of the nation's prominent police chiefs in Washington in late September.<sup>82</sup> Wickersham assigned himself as chairman of the Prohibition group but remained in an *ex officio* capacity. Newton Baker, an opponent of constitutional Prohibition; Judge Kenyon, an ardent Prohibition advocate; and Dean Ada Comstock, who had no pronounced opinions on the subject, rounded out the full membership. Early projects and surveys, such as crime and crime statistics, federal courts, criminal procedures, crime and the foreign born, penal institutions, and crime causation commenced work at the home offices of the consultants in various university and professional organizations across the country.

By October a considerable amount of work had been accomplished just as several news reports elevated concerns about the six major prison riots that had occurred during the summer and early fall of 1929.<sup>83</sup> Even more challenging to a warm welcome of early results was a preliminary report's dispatch to the White House on "Black Monday," the day of

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82. *Police Chiefs Confer upon Crime in Cities*, CHRISTIAN SCI. MONITOR, Sept. 24, 1929, at 4.

83. During mid- to late-1929, several deadly riots occurred at some of the most densely populated and outmoded prisons in the United States. Particularly noteworthy are the riots in New York at Auburn, Dannemora, and Sing Sing prisons and the federal prison riot on August 1, 1929, at Leavenworth Penitentiary in Kansas. See, e.g., *3,700 Convicts Riot at Leavenworth; One Dead, Many Hurt*, N.Y. TIMES, Aug. 2, 1929, at 1; *Many Prison Riots in Last Six Months*, N.Y. TIMES, Dec. 12, 1929, at 3. Hoover maintained close watch over the evolving circumstances in these matters. See, e.g., Statement on Plans for Federal Prison Reform, 1929 PUB. PAPERS 245, 245-46 (Aug. 6, 1929).

the stock market crash. Instantly, the news of economic matters trumped crime and justice system reforms. Even so, Hoover announced that he would review the report in December before submitting it to the Congress in January 1930. Simultaneously he announced increased law enforcement and prosecution efforts in the various federal districts. Not long thereafter, Senators Carter Glass of Virginia and William Harris of Georgia accused the White House of conducting a “star chamber” process on the matter of Prohibition by allowing the Commission to theretofore deliberate in secret meetings.<sup>84</sup> Glass and Harris had been instrumental in securing the funds for the Commission’s work and they insisted on a clear resolution of the Prohibition matter. The fuss extended for several months and the controversy threatened to cut off further funding of the Commission’s work beyond the end of the fiscal year.

During spring 1930 Wickersham and officials in top government and private sector positions went on the lecture circuit as the consultants carried on their studies.<sup>85</sup> Wickersham lectured on several topics in legal circles;<sup>86</sup> Hoover carried out more formal law enforcement speeches;<sup>87</sup> Attorney General Mitchell put pressure on U.S. attorneys to control the number of dropped prosecutions in liquor law cases;<sup>88</sup> the United States Attorney for Washington, D.C., Charles Tuttle, announced an investigation into bail bonds extortion;<sup>89</sup> Prohibition Commissioner James Doran spoke of his agency’s need for more men to support his more aggressive enforcement practices;<sup>90</sup> the president of the American Automobile Association, T.P. Henry, urged improved laws to curb the number of stolen automobiles;<sup>91</sup> and the historian James Truslow Adams enlightened the public with a perspective that America had a long tradition of lawlessness.<sup>92</sup>

Phase two began in the spring of 1930 with yet another outburst of

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84. *Senate Drys Hit Wickersham Board*, N.Y. TIMES, Dec. 21, 1929, at 14.

85. *Lays Lawlessness to Weak Judiciary*, N.Y. TIMES, Mar. 30, 1930, at 21.

86. *Wickersham Says Public Is Dissatisfied With Law*, WASH. POST, Apr. 30, 1930, at 7.

87. *Wickersham Flays America’s Prisons*, WASH. POST, May 9, 1930, at 3.

88. *Mitchell Curbs His Aides on Dropping Liquor Cases; Dry Senators in New Clash*, N.Y. TIMES, Dec. 29, 1929, at 1.

89. *Tuttle to Conduct Bail Bond Inquiry*, N.Y. TIMES, Jan. 17, 1930, at 15.

90. *Doran Backs Guns to Enforce Law*, N.Y. TIMES, Jan. 18, 1930, at 10.

91. *Declares Car Thief Abets Other Crime*, N.Y. TIMES, Mar. 2, 1930, at 16.

92. James Truslow Adams, *Our Deep-Rooted Lawlessness*, N.Y. TIMES, Mar. 9, 1930, § 5, at 1.

controversy from congressional quarters. On May 1, 1930, the Congress was asked for a supplemental appropriation bill for the fiscal year 1931 to secure an additional \$250,000 to allow the Commission's work to continue. Congressional reaction was hostile, particularly from "dry" circles influenced mainly by Senator Glass, Representative Fiorello LaGuardia, and others. Harkening back to Hoover's broad interpretation of the use of funds to study far more than the Prohibition problems, the aging Senator Glass announced that he would seek to cut off the Commission's funds.<sup>93</sup> Hoover, greatly angered by the narrowness of Glass's perspective, proposed to fund the Commission with private finances, immediately running headlong into a question of whether or not this was constitutional. On May 27, the day Hoover signed the law transferring the Prohibition Bureau to the Justice Department and other legislation to create two additional prisons, Wickersham told fellow commissioner Newton Baker that Senator Glass's resolution had passed. Most of the commissioners were supportive of Hoover's approach and agreed to continue, however, although from the judges on the Commission there were some concerns about the legality of private funding. Hoover stood his ground when, on June 27, he issued a public statement in which he acknowledged congressional resistance to the new appropriations for the Commission's work but insisted that the other areas of commission work required attention. The date set by the original funding authorization for an end to the Commission's work was June 30, 1930. Tensions grew in the standoff between the House, the Senate, and the White House. Pushing his insistence one step further and reminding the Congress that commissioners were "volunteers serving solely out of regard to public interest," Hoover announced that he would "secure from private sources the \$100,000 necessary to carry this work forward to completion." Astutely, the statement included a suggestion that the Commission should establish a separate committee on Prohibition.<sup>94</sup> After two weeks of controversy, the Senate finally conceded to provide an additional amount of \$250,000 for the Commission's continuation for one more year.<sup>95</sup> If there was one redeeming quality to the entire matter, it was that the public and the Congress were put on notice in an

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93. *Committee Votes Crime Group Curb*, WASH. POST, June 24, 1930, at 2; *Dry Enforcement Shift Completed*, WASH. POST, July 1, 1930, at 2.

94. Statement on the National Commission on Law Observance and Enforcement, 1930 PUB. PAPERS 267 (June 27, 1930).

95. Crawford, *supra* note 78.

abundantly clear manner that Hoover's objective was to study all the originally intended topics in the context of the criminal justice system.

Phase three commenced in the summer of 1930 with the new funding in hand but with no less drama. In late July, Commission secretary Max Lowenthal suddenly announced his resignation with the claim that he needed more time for his own research and to accommodate pressing family matters.<sup>96</sup> Behind the scenes, however, others commented that Lowenthal had been greatly disturbed by dissension that had occurred among certain of the Commission members. The announcement presented a small obstacle to progress, though it was somewhat easier to accommodate since the Commission was in summer recess. William F. Barry, Lowenthal's immediate assistant, was readily available to take the administrative lead. This was a period of major study efforts by the consultants on all of the originally intended projects. Wickersham convinced twelve law schools to join together in a study of the federal courts including the development and administration of a survey to quantify the work of all phases of trial court administration, civil and criminal. Such cooperation across schools had been exceptionally rare.<sup>97</sup> Hardly any news of the internal workings of the individual investigations carried out by the consultants appeared in news releases. A major dispute over crime statistics had already been resolved and most of the other studies had moved beyond survey stage to analysis and draft writing of individual reports. Meanwhile, the President's and the Attorney General's time were taken up by the circumstances of the Al Capone investigation and the escalation of the veterans' bonus issue.<sup>98</sup>

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96. *Quits Hoover Law Board*, N.Y. TIMES, July 31, 1930, at 12; *Wickersham Silent on Lowenthal's Act*, N.Y. TIMES, Aug. 9, 1930, at 5.

97. *Law Schools Study of Courts Approved*, CHRISTIAN SCI. MONITOR, Jan. 26, 1931, at 5.

98. CALDER, *supra* note 32, at 129–31, 203–07. Two full-length historical studies of the Bonus March circumstances are found in DONALD J. LISIO, *THE PRESIDENT AND PROTEST: HOOVER, MACARTHUR, AND THE BONUS RIOT* (1994), and STEPHEN R. ORTIZ, *BEYOND THE BONUS MARCH AND GI BILL: HOW VETERAN POLITICS SHAPED THE NEW DEAL ERA* (2010). After taking office, President Hoover ordered the Internal Revenue Bureau (through Treasury Secretary Andrew Mellon) and the Bureau of Investigation (through Attorney General William Mitchell) to conduct intensive investigations of Al Capone to find evidence of possible tax evasion, Prohibition offenses, and contempt of court. See CALDER, *supra* note 32, at 129. Work on the Capone matter had evolved slowly in the last days of the Coolidge administration but escalated in intensity from mid-1929 to the trial, which took place October 6–18, 1931. *Id.* at 129–55. On another domestic front, Hoover and Attorney General Mitchell closely monitored reports and communications to and from the White House on a matter of great importance to the background of the 1932 election. During the summer of 1931, Hoover opposed congressional authorization to pay World War I veterans an increased loan

Phase four was represented by completion of the final reports during the period of May to the end of June 1931. Press releases and final publication of all fourteen reports occurred during the following month. Wickersham remained in his position for a few more days after the commissioners cleaned out their personal belongings and returned to their regular positions. Union Station in Washington was a hubbub of travel activity while dozens of large boxes of records were stacked up and awaited shipment to archival warehouses.

It is not possible in this space to provide detailed summations of the fourteen volumes of commission reports. The final reports have been adequately summarized in other places through the years since July 1931, including appearances in congressional documents, law journals, official reports, archival reports, and national newspapers such as *The New York Times* and *The Washington Post*. I will, however, briefly capture the major themes of these work products to demonstrate the high level of frank and sometimes stridently expressed debate concerning major issues of the times and pathways the commissioners found to future study initiatives. A full reading of all the reports leaves the reader with an exceptionally rich education concerning the conditions of and informed thought about crime and justice and administrative processes in the 1920s. The diversity and richness of the records and final reports make a compelling prima facie case for the achievement of Hoover's central educational objectives. They teach the nation some valuable lessons about the conditions of American justice, and no evidence was ever presented that there had been any interference in or mischaracterization of the studies by President Hoover.<sup>99</sup> From the beginning of the Commission's work in mid-1929,

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amount on money owed to them, believing that new taxes would be needed to fund the costs. *Id.* at 205. This action stirred severe negative reactions in the press for the remainder of the year and into 1932. Also in 1932, several thousand veterans descended on Washington, D.C. and set up an encampment at the Anacostia River Park. *Id.* at 206–07; ORTIZ, *supra*, at 2. As the weeks passed and more veterans arrived to expand their demonstrations conditions at the camp became dangerously explosive and unhealthy. Hoover and his advisers closely monitored the situation for several weeks. Ultimately, the encampment was destroyed by military personnel armed with bayoneted weapons and small tanks, a scene that did not help an already deteriorating public image of Hoover in the run-up to the 1932 campaign. CALDER, *supra* note 32, at 206–07. For more details about these matters that occupied the President's attention in 1931 and 1932, see *id.* at 203–07.

99. One allegation of manipulation of the study appeared in the press. See *Hoover's Hand Suspected in Doran's Dry Law Speech*, WASH. POST, Aug. 16, 1929, at 1. The charge was based on news speculation that somehow George Wickersham influenced what Prohibition Commissioner James Doran had to say in a speech at the University of Virginia

Hoover was not interested in reports that merely glossed over the controversies in favor of blandly circumspect or shallow studies.

Following are overviews of the reports in order of their report numbers. Although there were several areas of controversy along the road to completion of the Commission's work, some issues, such as criminal statistics and the cost of crime, required more detailed discussion for what they uncovered in terms of deep philosophical divisions that would have long-lasting implications for estimating the amount of crime and considering the economic burdens on society.

No. 1: *Preliminary Report on Observance and Enforcement of Prohibition* (26 pages)<sup>100</sup>

Officially delivered to the Congress on January 13, 1930, the preliminary report made four basic recommendations: (1) The Department of Justice should have sole responsibility for investigation and preparation of all cases under the Volstead Act; (2) the many confusing and contradictory statutes affected by the Eighteenth Amendment should be codified and made more succinct; (3) the provisions of the padlocking portion of the enforcement statute should be made more effective; and (4) petty cases involving Prohibition violations should be handled by U.S. commissioners and thereby removed from federal district courts.

No. 2: *Report on the Enforcement of the Prohibition Laws of the United States* (162 pages)

Reports No. 1 and No. 2 reflected the measure of discord that had been expressed in the early Commission meetings, a circumstance that should not have been unexpected. Hoover, after all, had made a purposeful decision to assemble and support the Prohibition study group because it represented all perspectives on the Prohibition matter. He had no fear of controversy. In the end, to the amazement of some observers, only the refusal of Judge Monte Lemann to sign reports

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Institute of Public Affairs regarding the White House interest in getting the states to do more policing and adjudicating with respect to Prohibition cases. *See id.* Even granting the possibility of such alleged influence, it would have been unnecessary in view of so many earlier public statements by Hoover and Wickersham who had argued forthrightly for more state action and responsibility. Moreover, Doran's testimony before the Commission in May 1929 was a clear indication of his appreciation of state responsibilities. *See id.*

100. *Text of Two Reports by Commission on Observance and Enforcement of Dry Law*, N.Y. TIMES, Jan. 14, 1930, at 20.

stirred any recognition that the professionalism of the membership had been other than relatively harmonious. More bothersome to the Commission, however, was contradictory testimony. In one extreme example, in June 1929 Assistant Secretary of the Treasury Seymour Lowman offered astoundingly optimistic testimony: "I want to say to you of the Commission that in my opinion the amount of liquor coming into this country by smuggling has now been reduced to a minimum."<sup>101</sup> Lowman had assumed that the amount of liquor coming in from Mexico was minimal because the border was well-protected and the Mexicans were not interested in whiskey.<sup>102</sup> Although the Prohibition Bureau's jurisdiction was limited to internal enforcement, the Customs Bureau's "elaborate intelligence unit all over the world" was tracing liquor shipments and furnishing sufficient tariff and smuggler information.<sup>103</sup> Even more astounding was Lowman's report declaring that smuggling from Cuba was hardly a problem,

[B]ecause we have a close agreement with the Cuban Government. The Cuban Government is cooperating with the American Government in a wonderful way so far as smuggling . . . is concerned, and our special service over there is in very close touch with theirs. While there may occasionally be a little rum that gets into this country from Cuba, the amount is small.<sup>104</sup>

Here was a high official of Prohibition enforcement advising the Commission essentially that the illegal production and distribution of alcohol was an internal problem that more judges and convictions could correct much faster than more Prohibition agents.

Commissioner Frank Loesch was incensed. Based on his extensive experiences in Chicago, he scoffed that such testimony was completely without foundation. He asked,

Will you give me an explanation that I have not been able to get from anyone else, how such men as [Al] Capone, [Terry "Machine Gun"] D[r]uggan, [Frankie] Lake, [George "Bugs"] Moran and others could operate on the extensive scale on which they are operating, and run great quantities of liquor into that

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101. CALDER, *supra* note 32, at 85.

102. *Id.*

103. *Id.*

104. *Id.* at 85–86; Minutes, *supra* note 54.

section supposedly from Canada?<sup>105</sup>

Loesch pointed out that Canadian authorities were unwilling to accept responsibility for the Volstead Act's enforcement against liquor smuggling because they considered this an internal problem for the United States government to regulate.<sup>106</sup> Canada's only concern, as Doran had testified earlier, was in the exportation of liquor on the basis of completion of "an honest export paper" reflecting the true destination.<sup>107</sup> Doran told Loesch, "One of the things that aids them [the gangsters] is the corruption at key spots" in the United States.<sup>108</sup> Although twenty-five agents were devoted to internal corruption detection, Doran reported that the vast majority of the cases these agents investigated were unfounded.<sup>109</sup> This left Loesch and the other commissioners scratching their heads—it was hard to believe the Prohibition Bureau could report that success was just around the corner when liquor shipments continued to flow freely into the country.<sup>110</sup> The Commission was tasked with making sense out of the confusion.<sup>111</sup> The mandate called for the Commission to study a spectrum of criminal justice administration issues extending well beyond Prohibition.<sup>112</sup> Yet the disharmony produced by members who agreed with Loesch only aggravated the ongoing sores that reached deep in the history of Prohibition and to the constant contradictions of hardworking government employees asked to enforce an impossible situation. The preliminary and final reports, although detailed and voluminous, reflected these basic confounding circumstances. In the end the reports added up to approximately 80,000 words divided into two major sections: the first half discussed the enforcement problems while the second half reflected the wide range of commissioner opinions. When the votes were taken, seven commissioners (Anderson, Baker, Comstock, Grubb, Loesch, Mackintosh, and Pound) favored an immediate change while three (Kenyon, McCormick, and Wickersham) favored continued enforcement but a later referendum. Lemann refused to sign.

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105. CALDER, *supra* note 32, at 86.

106. *Id.*

107. *Id.*

108. *Id.*

109. Minutes, *supra* note 54.

110. CALDER, *supra* note 32, at 86.

111. *Id.*

112. *Id.*

No. 3: *Report on Criminal Statistics* (203 pages)

Oddly, the subject of crime statistics stirred considerable internal disagreement among those most interested in the reporting of crime to government agencies and outwardly to the public. The first federal crime statistics had been included in Attorney General A. T. Akerman's annual report of 1871, but for nearly sixty years thereafter, no formal system of collection and reporting had been implemented (with the minor exception of Census Bureau efforts in the mid-1920s). Accurate statistics reflecting a comprehensive activity report of federal, state, or local criminal justice systems were simply not available to the commissioners. New data, therefore, required development. Felix Frankfurter observed: "One cannot withhold expression of the feeling that every contact one has with American criminal statistics discloses how seriously lacking we are even in the most primitive instruments of knowledge."<sup>113</sup> George Wickersham responded: "I suppose that in a rapidly developing civilization, reliable records note the last stages of progress. Assuredly that seems to be the case in these United States."<sup>114</sup> It was important for the Commission to address the issues of what data to collect, how to collect data, and what reports would be published from data collections.

The statistics panel divided along two stridently argued points of view, separated mainly along academic-practitioner lines: on one side was Harvard law professor Sam Bass Warner, who wanted the Census Bureau as the central repository for crime statistics; on the other side were police consultants and their respective organizational affiliations in the International Association of Chiefs of Police (IACP) Committee on Uniform Crime Records and the Bureau of Municipal Research. Warner urged a study aimed at establishing a "unified system of criminal statistics," in which police, prosecution, and penal statistics would be uniformly collected and published."<sup>115</sup> Commission secretary Max Lowenthal held Warner in high regard for playing an instrumental

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113. Letter from Felix Frankfurter to George W. Wickersham (Sept. 6, 1929) (on file at the National Archives and Records Administration at RG 10, Box 12).

114. Letter from George W. Wickersham to Felix Frankfurter (Sept. 10, 1929) (on file at the National Archives and Records Administration at RG 10, Box 12).

115. CALDER, *supra* note 32, at 88 (quoting a Letter from Sam Bass Warner to Bruce Smith (July 5, 1929) (on file at the National Archives and Records Administration at RG 10); Letter from Leonard V. Harrison to George Wickersham (July 12, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4); Letter from Sam B. Warner to Bruce Smith (July 5, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4)).

role in the introduction of prosecutorial and prisoner statistics in the Census Bureau. Warner aimed to standardize the reporting of statistics on crime, including data from police, jail, court, prison, probation and parole agencies.<sup>116</sup> Alfred Bettman of Cincinnati, an expert on the operations of district attorneys and a colleague of Roscoe Pound's during the Boston and Cleveland crime studies, agreed to contribute his research on prosecution statistics.<sup>117</sup>

Meanwhile, the IACP had the support of major state and local crime commissions.<sup>118</sup> This competing faction contended that the IACP should direct all national collection and interpretation of police statistics, ultimately turning that task over to the Department of Justice. The faction

included the membership of the IACP's Advisory Committee on the Uniform Crime Reports, including Bruce Smith, police consultant; William Rutledge, commissioner of police in Detroit; August Vollmer, chief of police in Berkeley, California; and advisory committee members Leonard V. Harrison [of the] New York City Police Department; and J. Edgar Hoover . . . of the Bureau of Investigation.<sup>119</sup>

Author and attorney Raymond B. Fosdick also entered the fray.<sup>120</sup>

116. *Id.*; see also *id.* at 242 n.59 (summarizing a 1927 Census Bureau report titled INSTRUCTIONS FOR COMPILING CRIMINAL STATISTICS).

117. *Id.* at 88 (citing a Letter from Max Lowenthal to Roscoe Pound (July 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 24)). Bettman had previously worked as an assistant to John Lord O'Brien when O'Brien was an Assistant Attorney General for the Justice Department's war legislation division. *Id.* at 242 n.60; *Named Aide to Hoover Law Board*, N.Y. TIMES, July 2, 1929, at 12. Warner opposed the federal government's collection and publication of police crime data for four reasons:

First, he believed that police data were collected and published for an insignificant part of the country. Second, local police data were, by definition, unreliable indicators of the crime picture. Third, federal law enforcement statistics were not included, and to include them would require lengthy development. Finally, Warner argued that state statistical bureaus should serve as receiving points for police statistics before they were passed to the Bureau of Census. The latter proposal suggested that police statistics should have been treated no differently from judicial statistics, with parallel collection remaining at the state level.

CALDER, *supra* note 32, at 88–89.

118. *Police Chiefs Confer upon Crime in Cities*, *supra* note 82, at 4.

119. CALDER, *supra* note 32, at 89. There were several other members. See *id.* at 242 n.61.

120. In rather blunt terms, Smith offered a summary of the IACP's perspective. *Id.* at 89. Beginning in 1927, the IACP organized a “complete scheme for national crime

Wickersham, Roscoe Pound, and Sam Warner were equally boisterous in their opposition to police statistics as the only significant measure of crime.

The only common ground was an intellectual agreement among the adversaries that criminal justice policy could not advance without improved statistical collection. Reporting to the full commission on March 12, 1930, Chairman Wickersham concluded, “The more the work in the various branches of the Commission’s inquiry continues, and particularly the work with respect to activities of the Federal Government, the more it becomes obvious that a thorough survey and overhaul of the statistics of the Federal administration of criminal justice is necessary.”<sup>121</sup> The Commission had every intention of compiling model statistics for later use by the state agencies. Correspondingly, it also desired to cultivate political support for state statistics units while crafting a codified and systematic arrangement of data to blend with federally collected information. Naturally, the latter objective was an uphill climb. Commissioners could not always agree on which statistics should enter the model and which statistics were likely to be available from state or local governments.<sup>122</sup> The Department of Commerce had observed in June 1929 that authoritative and reliable statistics were available in only a few jurisdictions. By retaining Morris Ploscowe to give particular attention to federal criminal statistics, the Commission believed that

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accounting, comprising manuals for the use of police departments and a national bureau of criminal statistics, record forms, and a detailed procedure’ that had already received the approval of numerous police departments.” *Id.* Warner became an unyielding opponent of the IACP system during the summer of 1929. *Id.* Wickersham requested that Warner report on crime statistics following the Commission’s first meeting. *Id.* Warner submitted his completed report to Max Lowenthal on June 14. *Id.* In his report, Warner extensively critiqued the availability of police agency crime statistics as well as the agencies’ statistical gathering techniques. *Id.* Warner argued that police evaluations of the extent of crime in the United States lacked statistical rigor. *Id.* Moreover, he posited that respect for criminal statistics would improve overall if the Department of Commerce’s Census Bureau performed the data collection and analysis. *Id.* After all, he asked, “[W]hat agency of the federal government had more experience with statistical matters than census[?]” *Id.* Further study of the options proceeded in spite of the increasing interpersonal hostilities of those involved. *Id.*

121. Notes for the Meeting (Mar. 12, 1930) (on file at the National Archives and Records Administration at RG 10, Box 19).

122. Data on race, nationality, or country of birth of offenders were rarely available from city governments. Sam Warner wanted to collect such information via the Census. Letter from Charles H. Willard to Sam B. Warner (Nov. 26, 1929) (on file at the National Archives and Records Administration at RG 10, Box 31).

the subject of statistics lies at the very threshold of any consideration of the problem of crime in the United States [and that] it is of the utmost importance that every state as well as the national government should adopt the best, the most thorough, the most informative scientific basis of keeping statistical records pertaining to crime.<sup>123</sup>

The police faction promoted legislation to create a bureau in the Justice Department specifically organized for the collection of “uniform crime reports.”<sup>124</sup> Bruce Smith was convinced that it was “rather doubtful whether the support of the police chiefs for any other system could be secured; and I am sure that without such support from individual police departments, no system of police statistics can even get under way.”<sup>125</sup> The police chiefs took a firm stance against Warner’s proposal. Smith linked the interests of the IACP to those of the Justice Department’s Bureau of Identification and Information, and he claimed that the bureau had been “originally established through the almost unaided efforts of the [IACP]. It follows that the Association has a very special and intimate interest in that Bureau and desires to make the monthly and annual returns [i.e., crime reports] to it.”<sup>126</sup> Smith drew the battle lines over centralized police statistics, and he refused to concede to any portion of Warner’s opposition.<sup>127</sup> Bureau of Investigation director J. Edgar Hoover, a crony, was the beneficiary of centralized Justice Department statistics.<sup>128</sup>

In the middle of the fray, Roscoe Pound accused Raymond Moley of politicizing the statistics issue in an effort to embarrass the President. Moley was agitated by this charge and appeared to threaten to take this issue further. Baker cut through the fog of personality differences, petty jealousies, and internal politics. Writing to Moley in late October, he concluded that the differences of view did not “involve the principles upon which the collection of statistics should be based, but rather the appropriate agency through which those principles [of statistics

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123. George Wickersham, Address to the Boston Chamber of Commerce (Mar. 12, 1931) (on file at the National Archives and Records Administration at RG 10, Box 33).

124. CALDER, *supra* note 32, at 90.

125. *Id.*

126. *Id.* at 90–91.

127. *Id.* at 91 (citing a Letter from Bruce Smith to Leonard V. Harrison (July 9, 1929) (on file at the National Archives and Records Administration at RG 10, Box 31)).

128. *Id.*

collection] should be applied.”<sup>129</sup> Baker was completely exhausted by the whole matter. He wanted a resolution, telling Moley,

I cannot . . . imagine that the difference is either very fundamental or very important. . . . You will be interested to know that I am getting letters from all over the United States on this subject, which rather mystifies me, since such casual knowledge as I have of the matter would hardly seem to justify the summoning of so many forces.<sup>130</sup>

Lowenthal had hoped he could be present at the bargaining session between the competitors: “I thought maybe you [Sam Warner] mightn’t mind my sitting in for a few minutes to see how science works and truth and wisdom are arrived at.”<sup>131</sup>

Warner and Pound “had come up against a deepening tradition of police professionalism[,] which had strong roots in the links between several young, aggressive thinkers and police chiefs who were part of the new wave of municipal reform.”<sup>132</sup> On June 11, 1930, the Bureau of Investigation received statutory authority to collect and report only police statistics.<sup>133</sup> After all his work to foster the introduction of comprehensive, multiagency statistics, Warner’s legacy was a lonely, yet spirited retort to his victorious adversaries that he published in the *Harvard Law Review*.<sup>134</sup> The outcome determined the approach to crime statistics for the next twenty-five years. In the end, one eloquent review of the Commission’s work on statistics observed,

[I]f the Wickersham Commission (and its experts, the latter of whom did have an understanding of the grief involved in the beginnings of this task) had given their blessing to the existing project [of police-collected statistics], and had suggested concrete steps for remedying apparent and anticipated defects, the

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129. Letter from Newton D. Baker to Raymond Moley (Oct. 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4).

130. *Id.*

131. Letter from Max Lowenthal to Sam B. Warner (Sept. 23, 1929) (on file at the National Archives and Records Administration at RG 10, Box 31).

132. CALDER, *supra* note 32, at 95; *see also* Thomas A. Repetto, *Bruce Smith: Police Reform in the United States*, in *PIONEERS IN POLICING* 191, 191–92 (Philip John Stead ed., 1977).

133. CALDER, *supra* note 32, at 95.

134. *Id.* *See generally* Sam Bass Warner, *Crimes Known to the Police—An Index of Crime?*, 45 *HARV. L. REV.* 307 (1931).

gathering of criminal statistics which the Commission so emphatically approved would have been furthered, rather than retarded to no particular purpose.<sup>135</sup>

No. 4: *Report on Prosecution* (337 pages)

This report was largely written by Commission consultant Alfred Bettman, who was then considered one of the foremost international experts on the work of prosecutors' offices. It contained a somewhat tedious outline of the criminal prosecution function in the United States. It moved on to the central concern for the political position faced by most prosecutors since they were mostly elected officials who sought the further benefits of their performance in achieving higher political offices. Other defects of the prosecution function included office disorganization, decentralization of activities and widespread diffusion of responsibilities, and general incompetence or low staffing in many prosecutors' offices. The report offered five recommendations addressing the prosecutorial offices and prosecutor competency, removal of political aspects in selection, improved organization of office functions, prospective state controls on prosecutors, and the review of the grand jury system.

No. 5: *Report on the Enforcement of the Deportation Laws of the United States* (179 pages)

The deportation study was largely comprised of a report by attorney Ruben Oppenheimer, from Baltimore, who detailed enforcement conditions. Essentially, the study argued with the support of data that deportation laws and the attendant elements of administration were grossly defective and unjust. The study points out that there was reason to believe that many aliens had been subjected to Labor Department investigations and hearings and were deported for insufficient reasons although many rightfully could have remained in the United States. In essence, aliens were not provided with any system or procedure that required a court hearing, only administrative rulings by the Labor Department. Nine of the commissioners signed the report in full agreement with its findings while two dissented for reasons tied to either the insufficiency of the evidence presented by Oppenheimer or the need for a special commission to handle deportation cases.

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135. Lent D. Upson, *Report on Criminal Statistics*, 30 MICH. L. REV. 70, 74 (1931).

No. 6: *Report on Child Offender in the Federal System of Justice* (175 pages)

Juvenile crime also interested the Commission, especially since the federal government had virtually no resources to address the problem.<sup>136</sup> Clifford Shaw's work with delinquents had been widely publicized and was thus made useful as a primary source of information. The Commission's director of research, Clair Wilcox, commented on Shaw's work after observing the methodology of several previous studies: "Most of our inquiries have related primarily to urban areas because it is there that material is most readily to be collected and it is there that the problem of organized crime makes its appearance."<sup>137</sup> The final report would be the federal government's first formal reflection on juvenile crime and the operations of the court system when juveniles came before it. The report's many sections summarized data on "the number of children violating federal laws, methods used in children's cases by federal authorities, and possibilities for more adequate treatment of juvenile offenders."<sup>138</sup> Hoover used the report to inform his proposals for changing federal practices regarding criminal actions involving juvenile offenders.<sup>139</sup> The problem had been that juvenile offenders were treated like adult offenders and there was no juvenile probation system in place to move them quickly out of deplorable institutions. Hoover, in fact, wanted to move all juvenile offenders under federal control back to state control, especially since the vast majority of such persons had been convicted of acts that resulted in crossing state jurisdictional lines.<sup>140</sup>

No. 7: *Progress Report on the Study of Federal Courts* (123 pages)

In early 1929, the dean of the Yale Law School, Robert Hutchins, proposed to Herbert Hoover that a special study was needed of the federal courts. Modeled on a state court study, the Commission was chartered to study federal courts in Connecticut, West Virginia, Ohio, and Louisiana. Central to this study was a review of a massive number of civil and criminal cases over a five-year period. The federal courts

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136. CALDER, *supra* note 32, at 98.

137. *Id.* (quoting a Letter from Clair H. Wilcox to B. L. Melvin (May 12, 1931) (on file at the National Archives and Records Administration at RG 10, Box 18)).

138. *Id.*

139. *Id.*

140. *Hoover Urges States to Protect Children*, N.Y. TIMES, Jan. 16, 1931, at 16.

committee on this study was comprised of the deans of twelve of the best law schools in the nation. Work began in August 1930 and ended in June 1931 with the committee report.

No. 8: *Report on Criminal Procedure* (51 pages)

In one of the briefest Commission reports, only fifty-one pages in length, George Wickersham was able to complete an objective that he had worked on for several years: the adoption of many of the American Law Institute's recommendations for revising federal and state criminal procedures. The committee on criminal procedures produced significant evidence of antiquated procedures that had contributed to delays and higher costs to local governments, along with rampant political influences on prosecutors and judicial functions. Pound and Wickersham believed that the work to modernize criminal procedures had finally reached a level of public interest and that it was possible to find support for change in legislative bodies. Wickersham's proposed recommendations included less-than-unanimous jury verdicts in non-capital cases, simplified appellate processes, procedures to determine mental conditions of defendants, waiving of jury trials in certain cases, summons in lieu of warrants in minor cases, bail discretion rules, prosecution by information rather than indictment, simplified indictment processes, rules for offenses involving crimes related to in-flight aircraft, and rules for protracted trials and trials in which a member of a jury dies or becomes ill.<sup>141</sup>

No. 9: *Report on Penal Institutions, Probation and Parole*  
(343 pages)

The Commission's work on prisons, jails, and pre- and post-institutional care was conducted by some of the most distinguished experts in the nation on these subjects: Dr. Frank Tannenbaum and Dr. Hastings Hart. The authors relied upon extensive information and research from an advisory committee comprised of the most prominent leaders in the jail and prison fields in the several states—a virtual who's who of penal institutions work. The report's seven sections provided extensive exploration of the state of penal institutions in the United States; classification processes for prisoners; labor and industry in institutions; education for prisoners; parole practices; probation

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141. *Efficiency Urged in Court Procedure*, WASH. POST, May 11, 1930, at 2 (describing changes proposed by Wickersham while he was president of the ALI).

practices; and concluding remarks. Mainly focused on state and local systems, the report summarized conditions of substantial overcrowding, disciplinary practices, weak or entirely inadequate education provisions, gross deterioration of reformatories for juveniles, abusive labor and industry practices, and deficient probation and parole practices. A special paper was also provided on the deplorable conditions in jails across the nation. Overall, despite its strong indicators of conditions and practices violating basic principles of concern to progressives in the 1920s, this report had no natural political alliances in the Congress. Even with a significant number of prison riots in the summer of 1929, it appeared that many more decades of advances in the new methods of penology would be required before popular concerns would match the concerns of the Wickersham Commission findings. Chairman Wickersham, upon reading the final report, was greatly disturbed that it had failed to carefully distinguish between conditions in state versus federal institutions. He wrote to Federal Prison Director Sanford Bates to acknowledge this failure and to make note of the significant progress that had been made in the previous two years in upgrading all federal prison facilities and provisions.<sup>142</sup> Many state officials admitted to the horrible conditions present in their prison facilities while others remained defensive.<sup>143</sup>

No. 10: *Report on Crime and the Foreign Born* (416 pages)

Of special concern to the Commission was crime among the foreign-born. Post-World War I nativist generated interest in this topic due to their belief that immigrant populations were more criminal in nature than other groups.<sup>144</sup> The Commission's objective was to take up "the question whether or not there was an undue proportion of crime coming into the mill of justice from the foreign born."<sup>145</sup> In 1926, for example, Carl Kelsey wrote,

[W]e have sought evidence to justify our emotional reaction against strangers. It is discovered that criminals have entered the country as well as missionaries and we have sought to

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142. *Wickersham Sorry for Penal Report*, WASH. POST, July 31, 1931, at 4.

143. *Prison Heads Admit Need for Reforms*, N.Y. TIMES, July 28, 1931, at 19.

144. CALDER, *supra* note 32, at 95.

145. *Id.* at 95-96 (quoting a Letter from George W. Wickersham to Commission (June 3, 1930) (on file at the National Archives and Records Administration at RG 10, Box 10)).

understand, unconsciously hoping that our study would show that the later arrivals were more likely to be criminals than were their predecessors.<sup>146</sup>

However, “[i]n the three years after Kelsey’s observations, several studies failed to show a link between immigrants and crime.”<sup>147</sup> Commission consultant Edith Abbott commented, “[C]harging our high crime rates against the foreign-born is merely evading the real difficulties of life, instead of trying to solve them.”<sup>148</sup> In the main, the fallacy, she noted, “lies in the ready acceptance of the easy theory that our social difficulties are not to be charged to our own mistakes and failures.”<sup>149</sup> Abbott went on to conclude that:

For more than a century there has been continuously in this country a clamorous group who have tended to emphasize only the difficulties connected with immigration and to lose sight of all its beneficial effects. Unfortunately these attacks on the alien have frequently laid stress on the popularly supposed relation between immigration and crime. Statistics have never justified their assumptions.<sup>150</sup>

Her analyses for the Chicago Crime Commission in 1915 had, in fact, similarly concluded that the native-born, not the alien, contributed a substantially larger percentage of crime.<sup>151</sup> In contrast to nativist views, Abbott believed that “we should be seriously disturbed that in the enforcement of the law the alien does not at all times meet with the even handed justice that America demands.”<sup>152</sup> With patience and tact Abbott’s final report in June 1931 offered no evidence of any

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146. *Id.* at 96 (quoting Carl Kelsey, *Immigration and Crime*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 165 (1926)).

147. *Id.*

148. *Wickersham Board Frees Foreign-Born of Big Crime Blame*, N.Y. TIMES, Aug. 24, 1931, at 1.

149. *Id.*

150. CALDER, *supra* note 32, at 96 (quoting Report of Commission Consultant Edith Abbott’s Conclusions (on file at the National Archives and Records Administration at RG 10, Box 2)).

151. *Id.* (citing a Letter from Monte M. Lemann to Max Lowenthal (June 26, 1929) (on file at the National Archives and Records Administration at RG 10)); Merriam, *supra* note 70, at 346–47; *see also Find Foreign Born Commit Fewer Crimes*, CHI. TRIB., Aug. 24, 1931, at 3.

152. CALDER, *supra* note 32, at 96 (quoting a Letter from Monte M. Lemann to Max Lowenthal, *supra* note 151); *see also* EDITH ABBOTT, *THE TENEMENTS OF CHICAGO 1908–1935* (1970) (reflecting similar sentiments).

extraordinary representation of the so-called foreign-born in crime statistics.<sup>153</sup> A trail of unanswered questions seemed longer than the list of what had been discovered.<sup>154</sup>

No. 11: *Report on Lawlessness in Law Enforcement* (347 pages)

Primarily, the study of official lawlessness inquired into police “‘third-degree’ tactics and other abusive justice system practices.”<sup>155</sup> The work was conducted by Professor Zechariah Chafee, Jr., Walter H. Pollak, and Carl Stern, and was announced in mid-October 1929.<sup>156</sup> Pound and Loesch initiated the study, “favoring a thorough consideration of the controversy.”<sup>157</sup> Some on the Commission rejected the study for ideological reasons, whereas others were concerned that facts would be hard to authenticate.<sup>158</sup> In July 1929, a preliminary paper on the subject was drafted, but Wickersham restricted the research effort shortly thereafter, fearing that congressional funding decisions for the entire effort could be jeopardized due to the Commission’s consideration of such a controversial topic.<sup>159</sup> Chafee and his team

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153. NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIME AND THE FOREIGN BORN 91–96 (1931) [hereinafter REPORT ON CRIME AND THE FOREIGN BORN]; *Commission Clears Aliens of Excessive Crime Rate*, WASH. POST, Aug. 24, 1931, at 1.

154. Reference was made to “organized crime” in relationship to the “foreign born” toward the end of this report. REPORT ON CRIME AND THE FOREIGN BORN, *supra* note 153, at 189–90. The activities of gangsters in the Chicago and New York areas primarily concerned Hoover and the commissioners, but the foreign-born investigation was entirely free of any interference from the aggressive Hoover-driven Al Capone investigation. Unquestionably, people in those times tended to link immigration policies, crime among specific immigrant groups (typically Italian-Sicilian), and reports of gangster involvement in killings and corruption. Abbott’s report, however, was light years from such activities in terms of its focus and methodology. *See id.* at 189–93.

155. CALDER, *supra* note 32, at 96.

156. *Id.* *See generally* Pollak and Chafee to Aid Crime Board, N.Y. TIMES, Oct. 16, 1929, at 19.

157. CALDER, *supra* note 32, at 96. A special investigator on the “Lawlessness” study group, Ernest J. Hopkins, delivered a speech to the membership of the Prison Society in 1933 observing that the work of prison administrators and staff was made more difficult when the police are permitted to abuse criminal offenders. *See* Ernest Jerome Hopkins, *The Truth About the Third Degree*, 13 PRISON J. 16 (1933). For a classic book on the subject, see EMANUEL H. LAVINE, *THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSÉ OF POLICE BRUTALITY* (1930).

158. CALDER, *supra* note 32, at 96.

159. *Id.* (citing a Letter from George W. Wickersham to Kenneth R. Mackintosh (July 18, 1930) (on file at the National Archives and Records Administration at RG 10, Box 19)); *see also* Letter from Zechariah Chafee, Jr., to Max Lowenthal (Feb. 21, 1930) (on file at the

“developed leads on hundreds of cases throughout the federal court system, many involving Prohibition officers who violated search warrant requirements and used brutality in arrests, as well as numerous acts of abuse that occurred in enforcing immigration statutes.”<sup>160</sup> In particular, Chafee wrote to Leopold Friedman requesting that he present the full Commission with “the film of the police ‘rough-housing the Communists’” along with Friedman’s suggestions on police abuse.<sup>161</sup> After news accounts of the study revealed the cities in which significant “third degree” practices had been commonplace, police departments complained that facts had been distorted or constituted lies.<sup>162</sup> President Hoover wrote to Solicitor General Thomas D. Thacher in late August 1931 praising the Justice Department’s work to investigate the alleged brutal conduct of certain police officers in the Washington D.C. Police Department while acknowledging the department’s “able and devoted police force.”<sup>163</sup>

No. 12: *Report on the Cost of Crime* (657 pages)

During early meetings commissioners took up the costs of crime to the private sector, principally private protection of life and property. Goldthwaite H. Dorr, the assistant director of munitions during World

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National Archives and Records Administration at RG 10, Box 8); Letter from Max Lowenthal to Zechariah Chafee, Jr. (Feb. 25, 1930) (on file at the National Archives and Records Administration at RG 10, Box 19).

160. *Id.* See generally *Police Brutality Flayed in Wickersham Report*, L.A. TIMES, Aug. 11, 1931, at 1 (providing an excellent summary of the report).

161. CALDER, *supra* note 32, at 96 (quoting a Letter from George Wickersham to Leopold Friedman (Apr. 3, 1930) (on file at the National Archives and Records Administration at RG 10)); PRELIMINARY REPORT, NON-OBSERVANCE OF LAW BY GOVERNMENT OFFICIALS ENGAGED IN ENFORCING LAWS (July 30, 1929) (on file at the National Archives and Records Administration at RG 10, Box 20).

162. See *Blow to Morale of Police Seen in Commission Views*, WASH. POST, Aug. 11, 1931, at 5 (quoting police chiefs who variously assert the study is biased, or that police no longer employ “third-degree” tactics); *New York Officials Deny Being Brutal*, N.Y. TIMES, Aug. 11, 1931, at 12 (reporting denials from the chief of police, district attorneys, and the acting U.S. attorney in New York City); *Wickersham Data Hit Police Forces*, WASH. POST, Aug. 2, 1931, at 2 (reporting on the study’s findings of police abuses in New York, Chicago, Los Angeles, Kansas City, Cleveland, Minneapolis, Denver, and others, while notably bestowing unqualified praise on Milwaukee).

163. *President Spurs Brutality Inquiry*, N.Y. TIMES, Aug. 28, 1931, at 2. From 1874 until noon on January 2, 1945, the federal city of Washington, D.C., was the official responsibility of the President. See Act of June 20, 1874, ch. 337, 18 Stat. 116, *repealed by* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 711, 87 Stat. 774, 818 (1973). Moreover, the President was entrusted with naming the District of Columbia Commissioner. *Id.*

War I and special assistant to the Attorney General, chaired the research committee, reporting to Commissioner Monte Lemann. Hoover had recognized during his Commerce Secretary years—as had many in the business community—that private police and security devices had become commonplace additions to law enforcement methods. Wickersham has also made such observations, particularly with respect to the business costs associated with private guards and money couriers. Businesses were encountering not only the costs of such crimes as burglary, larceny, and shoplifting, but also the costs of private detectives and insurance. The Commission effort received only a small budget to carry out the innovative work of the subcommittee. Some corporate heads, such as Henry S. Dennison of Dennison Manufacturing, agreed to perform research inside their plants if secrecy could be maintained.<sup>164</sup> Dennison and other business leaders had other interests in agreeing to study internal crime costs, namely that they wished to have a pretext to evaluate the positive impact of Prohibition on their workers.<sup>165</sup>

Roscoe Pound was particularly interested in the costs of private business protections and their links to the overall economic costs of crime in society. Along with this concern he wished to have the Commission estimate the extra costs imposed on law enforcement tied to crime with costs of police work if crime was reduced.<sup>166</sup> The committee on ‘costs’ gave close attention to such matters as the costs of burglary prevention equipment, costs of armored cars for transporting money and valuables, and costs of private police and watchmen employed by large and small businesses.<sup>167</sup> The goal was to estimate any costs in relationship to the administration of federal, state, and local governments.<sup>168</sup> The committee encountered significant and sometimes intractable problems in locating reliable information, especially since it was necessary to request data from a diverse range of companies and governmental entities.<sup>169</sup> Commission secretary Lowenthal expressed trepidation regarding these matters in a letter to Commissioner

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164. CALDER, *supra* note 32, at 97.

165. *Id.*

166. NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE COST OF CRIME AND CRIMINAL JUSTICE IN THE UNITED STATES 1 (1931) [hereinafter REPORT ON THE COST OF CRIME AND CRIMINAL JUSTICE IN THE UNITED STATES].

167. *Id.* at 2–3.

168. *Id.* at 2.

169. *Id.* at 2–4.

Lemann:

I do know that a great deal of unreliable information is floating round and I hope that you will feel that with you on the Committee you will be able to make at least one important contribution—preventing a lot of people from palming off on us material which is worse than pitch.<sup>170</sup>

The committee's work continued with estimating federal costs but in mid-1930 it was forced to delay work on the private costs,<sup>171</sup> perhaps the most innovative aspect of the whole project. In the end, the Commission's report on the costs of crime and its prevention was far ahead of its time and would find significant application in future investigations.<sup>172</sup>

No. 13: *Report on the Causes of Crime* (862 pages in two volumes)

The study of causes of crime had evolved from debates in popular and scholarly circles most intensively since 1900. The Wickersham Commission summations and analyses of the data and theories were published in two parts and were focused mainly on social and psychological factors. Leading these studies were such rising stars in criminology as Thorsten Sellin and Edwin Sutherland. Morris Ploscowe, a fellow at Harvard University, joined in the oversight of the research by Mary van Kleeck from the Russell Sage Foundation, Dr. Emma A. Winslow of the United States Children's Bureau, and Ira de Augustine Reid of Haverford College. Commission member Judge Henry Anderson, who had originally sponsored the subgroup, abstained from signing the final report due to disagreement with the results. The value of the two volumes lay in the skeletal outline of criminological theory development. Ploscowe's group laid out several causative factors contributing to the escalation of the nation's crime problem, particularly with respect to criminal personality development and the decline of social values. Each of these areas, Ploscowe suggested, bore the most promise for new research. Economic and political factors pointed to the relative normality of criminal attitudes toward the acquisition of money

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170. Letter from Max Lowenthal to Monte Lemann (June 28, 1929) (on file at the National Archives and Records Administration at RG 10, Box 17).

171. REPORT ON THE COST OF CRIME AND CRIMINAL JUSTICE IN THE UNITED STATE, *supra* note 166, at 2–3, 5.

172. See generally *id.* at 1–9.

and that the sources of large amounts of money resulted from the corruption of political systems. Volume 2 concentrated on the geographical and ecological studies in several cities by criminologists Clifford Shaw and Henry D. McKay. A critique of the report concluded that the investigators were clearly aligned with the view that poverty was at the core of juvenile crime causation in addition to “conflicting social and cultural imperatives, distorted personalities, sub-group loyalties, and criminal definitions of social situations.”<sup>173</sup>

No. 14: *Report on Police* (140 pages)

The second-briefest report in the collection, a study of maladies of police administration, was not intended as a review of the extensive literature on policing already on the record. Rather, the initiative, led by Berkeley’s former police chief August Vollmer, set out a limited number of defects in the ways police organizations were managed and what they needed to improve the respect of their functions by a public that demanded their work in capturing criminals. In June 1929, exceptional pressure was put on Vollmer to set his calendar for regular trips to Washington from his new position as professor of police administration at the University of Chicago. Wickersham had struggled to secure Vollmer’s participation, and he desperately needed this most knowledgeable and reputable expert to lead the investigation of police organizations and activities.<sup>174</sup> Vollmer’s serious health problems, however, precluded an agreement to serve until later in 1929. Writing an old friend, Vollmer said that he needed sympathy rather than congratulations for his grudging agreement to serve. He left Berkeley on September 29 on leave for six months to begin classes in Chicago. Thereafter, he said, he was willing to contribute to the Commission *Report on the Police* and to the *Report on Lawlessness in Law Enforcement*.<sup>175</sup> Aided by two assistants, Vollmer drafted the report on the police during the next eighteen months, resolving that there were six major defects in the operations of many police departments: First, police chiefs and their offices across the nation were largely controlled by

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173. J.P. Shalloo, *Report on the Causes of Crime*, 22 J. CRIM. L. & CRIMINOLOGY 777, 781 (1932).

174. Letter from George W. Wickersham to August Vollmer (June 12, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4).

175. Letter from August Vollmer to George W. Wickersham (June 26, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4).

political forces and their terms in the position were too short.<sup>176</sup> Second, local police departments suffered from a severe shortage of competent police officers and supervisors and their positions largely depended on local political bosses.<sup>177</sup> Third, departments lacked effective communications systems by which to learn about criminal actions and to maintain effective investigative records.<sup>178</sup> Fourth, too many large city police organizations had been captured by corrupt politicians.<sup>179</sup> Fifth, police executives in many cities were not prepared to deal with concentrations of foreign-born populations that were both key elements in the crime problem and in the detection and prevention of crime.<sup>180</sup> And sixth, far too many different types of duties were expected of police personnel thus calling for new types of specializations in the ways police work was accomplished.<sup>181</sup>

#### A Fifteenth Report?

Indeed, there was a fifteenth report containing a full accounting of all the expenses associated with each Commission investigation.<sup>182</sup> It was, after all, a necessary element in the Commission chair's duties to report to the President and the Congress how the money for this twenty-five-month project was spent, a particularly important matter since criticism had come from various directions in a generally bad economic time. On the day the Commission ceased operations, it was reported that approximately \$20,000 to \$25,000 of the total allocation of \$500,000 could be returned to the United States Treasury. Chairman Wickersham remained in Washington in special offices near the White House in order to close out the accounting, box up files, and await the President's official declaration that the work had been completed.<sup>183</sup>

#### Lost But Later Found Report: The Mooney-Billings and Other Special Cases

Springing from the Commission's work on *Lawlessness in Law*

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176. *Wickersham Report on Police*, 2 AM. J. POLICE SCI. 337, 337-39 (1931).

177. *Id.* at 339-40.

178. *Id.* at 340-41.

179. *Id.* at 341.

180. *Id.* at 341-42.

181. *Id.* at 342-43.

182. *Wickersham Group Will Dissolve Today*, N.Y. TIMES, June 30, 1931, at 52.

183. *Wickersham Board Passes from Stage*, N.Y. TIMES, July 1, 1931, at 16; *Wickersham Group Will Dissolve Today*, *supra* note 182.

*Enforcement* was a most contentious special-consultant investigation undertaken by the Harvard University law professor Zechariah Chafee, Jr., and the law partners Walter H. Pollak and Carl S. Stern of the New York firm of Engelhard, Pollak, Pitcher & Stern. In addition to the full complement of work on the main body of the “Lawlessness” study, Chafee and Pollak had proposed studies of the 1916 California bombing trial and conviction known as the Mooney-Billings case.<sup>184</sup> They also proposed studies of the Sacco-Vanzetti case<sup>185</sup> and the Centralia cases<sup>186</sup> but there is some evidence that the Commission rejected a budget allocation for all of them. Beyond the two main elements in the *Report on Lawlessness in Law Enforcement*, “The Third Degree” regarding police abuses, and “Unfairness in Prosecution,” the consultants had expected to add the special studies. A document titled *Mooney-Billings Report* was submitted to the Commission in June 1931.<sup>187</sup> The Commission then considered this report and ruled that the Mooney-Billings document “was beyond its province to investigate individual cases with a view to making recommendations as to their disposition.”<sup>188</sup> A group of Senators, led by Senator Burton Wheeler, objected to the Commission’s publication of the *Report on Lawlessness in Law Enforcement* absent the Mooney-Billings report, and moved to gain approval of a Senate resolution to force President Hoover to forward the report to the Senate.<sup>189</sup> The controversy dragged on through the fall and winter of 1931. The White House and the Justice Department withheld the report, but in January 1932 it was officially released to the Senate by Attorney General Mitchell. It was not published at taxpayer expense as Senator Burton had hoped. Earlier, George Wickersham had reported that he had been notified of Pollak’s work on the special investigations but the Commission had in November 1930 rejected a motion to spend funds on individual cases.<sup>190</sup> As further intrigue evolved in early January 1932, Attorney General Mitchell announced

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184. See ZECHARIAH CHAFEE, JR., ET AL., *THE MOONEY-BILLINGS REPORT: SUPPRESSED BY THE WICKERSHAM COMMISSION* (1932).

185. See generally ARTHUR GARFIELD HAYS, *TRIAL BY PREJUDICE* 319–28 (1933).

186. See generally *id.* at 252–69.

187. A private publisher, Gotham House, Inc., published the report. See CHAFEE, JR., ET AL., *supra* note 184.

188. *Id.*

189. *3 Senators Seeking Mooney Case Data*, WASH. POST, Dec. 20, 1931, at M23; *Delves Into Mooney Case*, N.Y. TIMES, Dec. 22, 1931, at 21.

190. Letter from George W. Wickersham to Newton D. Baker (June 17, 1931) (on file at the National Archives and Records Administration at RG 10, Box 5).

that the full Chafee–Pollak–Stern 600-page document could not be found,<sup>191</sup> but mysteriously it surfaced on January 9 and was forwarded to the Senate Judiciary Committee. A statement was issued that the report had actually been submitted along with the *Report on Lawlessness in Law Enforcement* in June 1931.<sup>192</sup> Wickersham had been disturbed by the discovery that Pollak had used Commission funds for the “Lawlessness” study and had included the study of the Mooney–Billings case. Apparently at the time he urged Baker to avoid formal recognition of the report because of the lack of time available to the whole Commission and that the Commission had not been charged to investigate state cases. Also, the research director, Clair Wilcox, knew of the study’s existence since many requests had been sent to Chafee to get the report completed no later than June 1, 1931. At the time the draft was received, several commissioners rejected its contents flatly and their animosity ensured refusal to publish the final product.<sup>193</sup>

#### VII. PERSPECTIVES ON CONTRIBUTIONS AND DISAPPOINTMENTS

All Commission reports moved toward publication in the late spring and early summer of 1931. President Hoover had read many of them during his breaks at Rapidan Camp, his Virginia retreat. Work stopped by June 30 and several reports had been submitted to the White House or were at the Government Printing Office.<sup>194</sup> Yet to make their public appearances were the reports on *Police; Prisons, Parole, and Probation; Costs of Crime; Causes of Crime; Crime and the Foreign Born; and Lawlessness in Law Enforcement*. Experts returned to their positions with obligations only to submit their final expense statements. Only office cleanup remained. There were no celebrations of the Commission’s completion but newspapers expressed great anticipation of the reports.

The task had been long and arduous, but it was now complete and subject to the normal democratic processes of contemplation and critique. At this point in time—2013—we are able to look back on the efforts expended by the Commission and to consider some perspectives on what it all meant then and what markers it left for later commissions

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191. *Wickersham Report on Mooney Is Missing; Mitchell Hunts 600-Page Book for Senate*, N.Y. TIMES, Jan. 7, 1932, at 8.

192. *Data Aired on Mooney*, L.A. TIMES, Jan. 9, 1932, at 1.

193. Letter from George W. Wickersham to William S. Kenyon (June 17, 1931) (on file at the National Archives and Records Administration at RG 10, Box 5).

194. *Wickersham Group Ends Work Tonight*, WASH. POST, June 30, 1931, at 2.

with similar missions to educate the public and inform the policy processes. While it is always dangerous to impose too many conclusive observations on an event as complex and productive as one product in a president's total efforts in a four-year administration, I offer some observations based on my close examination of the total effort of the Wickersham Commission. I have arranged my observations, first, in terms of significant advances and contributions and, second, in terms of some disappointments. By no means do I suggest that my listing and discussions of disappointments rise to the level of failures.

#### *A. Advances and Prospects*

True, the Wickersham Commission's work and its final products were largely ignored for many years. Little fanfare followed their mid-1931 completion. The nation was in no mood to recall the labors of eleven dedicated experts called to task by a then-popular President and a former Attorney General from the Taft era. Part of the problem lay in President Hoover's inability or lost interest in communicating its value. Part of the problem lay in the complexities and voluminous pages set out in the reports. Part of the problem lay in the disastrous economic peril. And part of the problem lay in the hostility of the Roosevelt administration to anything tied to Hoover. The reports were not ignored, I argue, because of the substantive merits of what the fourteen volumes laid out as an agenda worthy of attention then and in later decades. Indeed, they were timely and they offered real value to improving justice systems in the United States. So, as dangerous as historical speculation can be, I count six major advances and prospects of the Commission's work.

First, President Hoover and the nation were provided with a bold, broadly studied, and evidence-based collection of criminal justice system ills. Beyond the virtually intractable situation of Prohibition—a problem that held doubtful prospects for any full resolution in 1929 and certainly not within the power of the President—the Commission urged aggressive confrontation of such issues as abusive conduct by police agencies, unlawful conduct of federal authorities in matters of immigration enforcement, horrible conditions in state and local jails and prisons, measurement of and myth-busting about crimes of the foreign born, and the disorganization and obsolescence of courts and their procedural guidelines. Willingness to tackle such issues demonstrated Hoover's and the Commission's willingness to take on subjects for which there was little political capital to be gained and for which there was only a small political constituency.

Second, perhaps without any particular objective in mind, the Commission's work served as a voice box for a budding community of criminological scholars. It greatly encouraged criminal justice professionals to think and plan for a future represented by a substantially greater emphasis on professionalism based on lawful conduct and social expectations of quality justice. The Commission's findings opened Pandora's box by offering for public consideration what I often regard as "closet topics."<sup>195</sup> Admittedly, the Commission's exposition of the justice system defects was limited, but then their time at work was also greatly constricted and the opportunities for reasonably immediate implementation thereafter completely absent.

Third, the bold admissions reflected in the reports set new standards of care for succeeding studies and professional conduct associated with matters of justice administration. While it is true that the reports reflected past and then-current conditions, revelations contained in the reports forced a limited number of possible reactions. As with any form of cognitive dissonance, the listeners had only three basic options: fully agree, totally disagree, or find various ways of accommodating and explaining away what they heard. The guarded and well-reasoned crafting of the research findings spoke directly to those police administrators, judges and court administrators, prosecutors and defense lawyers, and jail and prison wardens about conditions that a panel of experts (drawn mainly from their realms) called into question. There was no turning back from admitting to the problems. Straight away, the burden of improvements was delivered into their hands, mainly at the state and local levels.

Fourth, the Commission's work was not limited to a narrowly framed "trial" of single issues or a set of circumstances. From the

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195. In essence, "closet topics" refers to subjects that are far less likely to be openly or regularly discussed in conversations or written works or in social or political gatherings. Typically they remain behind the scenes in private contexts, and even in that setting there may be formal or informal limitations on expression. Examples in modern times abound: illegal use of narcotics by doctors and other health care workers; annual flight of automatic weapons illegally smuggled into Mexico versus massive coverage of illegal narcotics entering the United States; sexual abuse of children and women across cultural, economic, political, or religious divides; and the high costs of employee and customer theft in the retail industry versus low prosecutorial interest in bringing indictments. The term has been in use since at least the nineteenth century: "Strange stories had already begun to be told of his confused notions and eccentric manners, and every day it became more and more an object of real importance upon public grounds to avoid the necessity of discussing in the royal closet topics of an irritating nature." TORRENS M. TORRENS, *THE LIFE AND TIMES OF THE RIGHT HONOURABLE SIR JAMES R. G. GRAHAM* 434-35 (1863) (internal citations omitted).

beginning Hoover held to a much deeper intention, and his determination in this respect was largely the basis for urging the Commission to disallow special-case considerations, a matter that played out in the Mooney-Billings report controversy. Note should be taken of the multiple case approach taken across the fourteen reports. Multiple crime theories were considered; multiple crime studies were reviewed to mine their contributions; multiple surveys were conducted; multiple police departments were consulted about lawlessness; multiple courts were studied; and multiple prisons and juvenile detention facilities were put under the glass. There was, indeed, an intentional focus on representativeness of conditions and problems across the nation. This was (and is) in the best tradition of social science research.

Fifth, contrary to the opinions of some observers through time, the Commission's work was not completely forgotten.<sup>196</sup> Unquestionably, the Depression's onslaught turned the general public's attention to matters of economic survival. This result was certainly not expected when the Commission got underway in 1929, and it was not possible for either the President or the Commission to simply stop its work and to renege on the realities of poor-quality justice administration that had festered for years unattended at the national level. Forward progress in the work was the only option, but admittedly the downward turn in the economy meant that less popular interest was a distinct possibility. The larger consideration, however, is that the findings and prospective improvements set out in the Commission's reports, while serving as a general education for the public's consumption, called for serious attention and response by the subject-matter experts. Police, court, and prison administrative misconduct, while raising eyebrows among the general public, required actions by willing legislative bodies, gutsy mayors and state governors, and bold critical thinkers within these bureaucratic institutions.

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196. A number of sources offer competing views on the legacy of the Wickersham Commission. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 274 (1993) ("But in the end, the reports sat on the shelf; not much came of the commission's many recommendations."); JOHN P. KENNEY, *POLICE ADMINISTRATION* 15 (1972) ("Surprisingly many of its recommendations are as timely today as when reported but major changes did not take place as a result of the Commission's work."); U.S. DEP'T OF JUSTICE, *PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME* 198-200 (1934) (noting in 1934 that the Wickersham reports were "gathering dust on the shelves of college libraries"); Richard L. Strout, *Little Orphan Annie*, *CHRISTIAN SCI. MONITOR*, Apr. 21, 1967, at 20 (recalling the Wickersham Commission's work in the wake of the U.S. Supreme Court's then-recent decision in *Miranda v. Arizona*).

And finally, the roots of the Wickersham Commission were not just in the past. Rather they reached back and they reached forward by setting out the observed conditions that required immediate action. They avoided panaceas and utopian conceptions; rather, all the observations reflected a level of reasonableness that would allow federal, state, and local governments to act in ways that were consistent with the political expectations of progressive Republicans and conservative and liberal Democrats. The “good government” movement that had begun in the 1890s, after all, was supported across the political spectrum. What could be so horribly wrong with addressing affirmatively the injustices in the immigration system and its uncontrolled deportation practices? What could be so wrong with admitting that foreign-born peoples were not responsible for the largest percentage of the urban crime problems? Given the recent enfranchisement of women in political participation, what could be so wrong with addressing human trafficking by racketeers (reflecting on political will in 1910 to pass the Mann Act)?<sup>197</sup> And what could be so wrong with admitting that the criminologists were unsettled in what caused crime, and what political and social incentives or disincentives prevented all police departments, court systems, and institutions of incarceration from reaching for performance levels that the professional researchers had no difficulty in identifying? It was only a matter of time, in essence, before most of the Commission’s findings would reach acceptance and drive significant changes.

### *B. Disappointments*

As I look back contextually on the corpus of the Commission’s work, I count a few glaring disappointments:

Hoover’s intention was to assemble broad and prestigious representation on the Commission in order to ensure exploration of all the major areas of crime and justice administration. His intentions, however, did not ensure representation by blacks or other racial and ethnic groups in American society. Hoover had been advised by several commissioners and numerous citizens to include blacks and others as commissioners and participants in the studies. Black leaders argued that blacks had endured more than a century of police abuse, rigged

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197. For an excellent historical perspective on this legislation to control interstate transportation of women for illicit purposes, see generally DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* (1994).

courtrooms, and harsh prison treatment, and that they were overrepresented in crime statistics for reasons that demanded inquiry. The Harvard law professor Zechariah Chafee, Jr., wrote to Wickersham, "My indebtedness to some members of that race has been so great that I should be very sorry indeed not to have the Commission pay adequate attention to their problems and the injustices which they have suffered in connection with the enforcement of the law."<sup>198</sup> Federal Judge Joseph C. Hutcheson, Jr., of Houston, Texas, believed that a study of crime, criminal justice, and conditions of blacks in the South could be conducted without serious negative political implications for the Commission.<sup>199</sup> After consideration of possible black membership, Hoover decided against such an appointment on the basis of its violation of his principle of having no special interest representation. Instead, he appointed a white woman, Ada L. Comstock, and a small number of women consultants to represent all groups other than white.<sup>200</sup> Unlike Wilson, Harding, and Coolidge, there is no evidence Hoover disregarded the horrors of lynching and the plight of blacks in the criminal justice system. But as Donald Lisio has remarked, Hoover's dry, sterile utopianism presented an image to blacks of detachment and a somewhat naïve faith in the cooperative spirit between the races.<sup>201</sup> In the campaign of 1928 both Hoover and Al Smith failed to take a position on racial violence. Hoover was, however, a national politician who, like so many other progressive thinkers, feared backlash from southern members of Congress. The contradiction in all of this, however, was that Hoover appointed black representatives to the Haitian study commission.<sup>202</sup> Ironically, the black educators on that

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198. Letter from Zechariah Chafee to George Wickersham (June 7, 1930) (on file at the National Archives and Records Administration at RG 10, Box 8). Wickersham returned Chafee's correspondence to say that the budget did not permit a special study of Negroes and criminal justice administration.

199. Letter from Max Lowenthal to Newton D. Baker (Oct. 21, 1929) (on file at the National Archives and Records Administration at RG 10, Box 4).

200. Some exceptionally important correspondence on the matter of crimes in and affecting the black population in both rural and urban settings includes exchanges between Comstock and van Kleeck and Wickersham, examples of which include: Letter from Mary van Kleeck to George W. Wickersham (Feb. 19, 1930) (on file at the National Archives and Records Administration at RG 10); Letter from Walter White to Mary van Kleeck (Mar. 19, 1930) (on file at the National Archives and Records Administration at RG 10, Box 10).

201. DONALD J. LISIO, *HOOVER, BLACKS, & LILY-WHITES: A STUDY OF SOUTHERN STRATEGIES* 274-82 (1985).

202. See HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI, 1915-1934*, at 185 (1971); U.S. DEP'T OF STATE, *REPORT OF THE PRESIDENT'S COMMISSION FOR THE*

commission were denied passage on Navy ships bound for Haiti, but were able to continue their work with private means of transportation.<sup>203</sup> Hoover's minimal efforts at outreach, along with several other rather small initiatives and legislative proposals, added to the sharp decline in support he suffered during the 1932 campaign.<sup>204</sup>

A second disappointment resulted from Hoover's failure to declare what should or would be done with the Commission's results. There was, as we would say in modern times, no "exit strategy" toward either the continuation of research or affirmative commitments to ensure implementation at the federal level and to build a plan to encourage state and local progress. In fact, Hoover's 1932 campaign hardly referenced the work of the Commission and how the findings might have been folded into an action plan. One was left to wonder: Was all the hard work intended as a searching examination for examination's sake, or was it intended to find application in a second term in office? Did the narrowing of the brain-state gap have an ultimate action side, or was the Commission's work limited to floating marvelous results and indicators of needed change? Were the findings simply too overpowering in complexity and implications? Was public education short-circuited and were further discussions blocked by the atmosphere of suddenness when the final reports were submitted and the Commission doors were closed? Perhaps the defect in this area stemmed from Hoover's failure to engage the public in the problems of justice system responses, that is, did the public have a stake in the results and, if so, could they see what that stake was?

And, third, there were topics that were given no significant place, or no place at all, on the agenda of the Commission. Indications from developments in criminology and in society, in my view, suggest that several important issues should not have been ignored. First is the matter of crimes committed by businesses, corporations, and stock traders, and other persons in positions of economic power—in essence, the kinds of offenses that Edwin Sutherland later termed (and not much later) "white collar crimes."<sup>205</sup> Against the backdrop of the stock market crash in late 1929, ideas for research reports remained under

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STUDY AND REVIEW OF CONDITIONS IN THE REPUBLIC OF HAITI (1930).

203. See SCHMIDT, *supra* note 202, at 185.

204. CALDER, *supra* note 32, at 183–88.

205. See Edwin H. Sutherland, *Crime and Business*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 112, 112 (1941); Edwin H. Sutherland, *Is "White Collar Crime" Crime?*, 10 AM. SOC. REV. 132 (1945); Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

consideration well into 1930. Legal and social science journals in the 1920s had frequently explored such topics as embezzlement, stock fraud, insurance fraud, market rigging, faked market sales, and similar topics.<sup>206</sup> The Commission's *Report on the Cost of Crime* was limited to estimating the costs to society without reference to perpetrators or victims of high stakes crime.

Next, some but not much attention was given to illegal narcotics, despite the fact that a very significant percentage of the federal prison population was comprised of "drug pushers," and the fact that Hoover and the Congress created the Bureau of Narcotics and Hoover appointed Harry J. Anslinger as its acting director in 1930.<sup>207</sup> After the passage of the 1914 Harrison Narcotics Act,<sup>208</sup> primarily a revenue law, federal authorities arrested thousands of doctors well into the 1930s who had illegally dispensed opiate and other regulated substances.<sup>209</sup> The Advisory Committee on the Traffic in Opium and Other Dangerous Drugs had been established by the first Assembly of the League of Nations on December 15, 1920, but the U.S. was not formally a member until 1933.<sup>210</sup> From 1900 until the late 1920s, the United States had been actively but quietly working on the matter of the massive quantities of opiates illegally imported into the U.S. from China and Japan, and the Justice Department had engaged in several investigations of smugglers, including the gangster Arnold Rothstein.<sup>211</sup> Meanwhile, as the social

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206. Selected scholarly articles from the times that demonstrate the rising interest in business crimes and corporate frauds include: Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1926); William Byron Forbush, *The National Honesty Bureau*, 1 J. SOC. FORCES 127 (1922-1923); William D. Gordon, *Irregular Practices in Building and Loan Associations*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 49 (1926); H. J. Kenner, *The Fight on Stock Swindlers*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1926); Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928); Keyes Winter, *Parasites of Finance*, 224 N. AM. REV. 516 (1927).

207. JOHN C. MCWILLIAMS, *THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS, 1930-1962*, at 13 (1990).

208. Harrison Narcotics Tax Act of 1914, ch. 1, 38 Stat. 785, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236, 1292.

209. EDWARD JAY EPSTEIN, *AGENCY OF FEAR: OPIATES AND POLITICAL POWER IN AMERICA* 104 (1977).

210. *See* LEAGUE OF NATIONS UNION, *SUMMARY OF THE WORK OF THE LEAGUE OF NATIONS: JANUARY 1920-MARCH 1922*, at 27 (2nd ed. 1922); DOUGLAS VALENTINE, *THE STRENGTH OF THE WOLF: THE SECRET HISTORY OF AMERICA'S WAR ON DRUGS* 19 (2004).

211. Two excellent references to the government's work to investigate Rothstein are: LEO KATCHER, *THE BIG BANKROLL: THE LIFE AND TIMES OF ARNOLD ROTHSTEIN* 293-96 (1994), and DAVID PIETRUSZA, *ROTHSTEIN: THE LIFE, TIMES, AND MURDER OF THE*

activist Ellen N. LaMotte consistently revealed in her books that the British and other governments had been active participants in the distribution of opium from the Far East.<sup>212</sup>

And finally, Hoover's separate committee on *Recent Social Trends in the United States*, also appointed in 1929, was not integrated to any degree with the matters of crime and justice administration, particularly in terms of how social trends bore on the increasing amount of crime since 1900.<sup>213</sup> Interestingly, the reports of this body, the work of President Hoover's Research Committee on Social Trends, a massive tome of 1568 pages, paid little attention to the Prohibition issue and contained only brief discussion of crime's relevance among the other competently researched trends. Hoover wrote the foreword to this work, a clear indication of his satisfaction with all of the results. I hesitate to render too harsh a criticism here since the topic of Prohibition remained largely a congressional priority that had consumed twelve months' time of the Wickersham Commission. Moreover, in 1929, the Congress was unlikely to have permitted a broad social science venture tying together discussions about economic, political, and social trends in relationship to crime. I believe, however, that the Wickersham Commission and the Hoover administration could have greatly expedited exposure of crimes by elites and illegal narcotics peddling by several decades and thus broken ground in similar ways as the reports of the cost of crime and lawlessness in policing had accomplished.

#### VIII. BACK TO THE FUTURE: COMMISSIONS AND COMMITTEES AFTER WICKERSHAM

In the end, the most significant contributions of the Wickersham Commission were open, comprehensive, and courageous actions to forthrightly address a range of issues laying bare crime and justice conditions that for many years had stimulated a diverse and sophisticated body of research that called out for policy implementation.

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CRIMINAL GENIUS WHO FIXED THE 1919 WORLD SERIES 323 (2003).

212. Ellen N. LaMotte wrote four books on this subject. ELLEN N. LA MOTTE, *THE ETHICS OF OPIUM* (1924); ELLEN N. LAMOTTE, *OPIUM AT GENEVA* (1929); ELLEN N. LA MOTTE, *THE OPIUM MONOPOLY* (1920); ELLEN N. LAMOTTE, *SNUFFS AND BUTTERS* (1925).

213. The committee that wrote this report was officially known as the President's Research Committee on Social Trends. See PRESIDENT'S RESEARCH COMM. ON SOC. TRENDS, *RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS*, at vi, xi (1933).

Commission reports on lawlessness in law enforcement, on police, on prosecution, and on the courts, for example, suggested a critical need for cooperation among individuals and agencies. The *Report on the Cost of Crime* introduced an actor—the private police—that had theretofore been unrecognized in the larger scheme of crime prevention or even lawlessness behind the corporate veil. The theme of corrupting influences and the impact on the operations of government were explored in the reports on *Prohibition Enforcement* and *Lawlessness in Law Enforcement*. Although unintended at the outset, the Prohibition reports, in addition, opened a national dialogue about the extent of government intrusion into private life and private vices thus ensuring that any future national policies on vice controls would attract attitudes that included toleration of nullification in a democratic society. The *Report on Criminal Statistics*, and the heated controversy that preceded its publication, set the tone for centralizing and making uniform crime data and data collection methods while it stimulated a useful and decades-long argument among criminologists about the ongoing needs for diverse statistical compilations.

In essence, the Wickersham Commission provided pathways toward new and significantly better analyses of the crime problem that, despite Hoover's belief in technocratic solutions, were destined to expand and further diversify. Indeed, the brain-state gap was significantly narrowed by the copious and detailed material in the reports. The Depression decade, followed by years of war and postwar fatigue, took its toll on the national concern for doing much with the information gleaned from the reports. Clearly, by 1950, urban crime, including juvenile delinquency and organized crime, reached deeply into the hallways of local, state, and national governments, thus suggesting that at least some of the findings of the Wickersham Commission were destined to reappear or beg for updating. It was not that the reports contained no valuable information that could have been turned into programmatic initiatives; rather, it was that the information had reached well beyond the common person's ability to think about the complexities of what they proposed at a time when bread on the table (and later national security) were more pressing objectives. As one commentator said of the *Recent Social Trends* volumes, and in my view equally relevant to the Wickersham reports, "Studious statesmen, like Mr. Hoover, might be able to make something out of this huge mass of material, if they were so minded, but the ordinary working politician, like the conventional average citizen,

requires his food for thought predigested.”<sup>214</sup>

In the succeeding decades, the topics of crime and the administration of justice retained a prominent place at federal and state levels, cutting across ideological and party lines. Reports written by many groups gave minimal recognition to the Wickersham group. Most such efforts failed to make sophisticated conceptual or substantive connections, however, between the earlier work and the then-current concerns. The following is a brief summation of the committees, commissions, and conferences regarded as offspring of the Wickersham Commission:

In June 1933, three months after Hoover’s relatively obscure and somewhat unpleasant departure from the presidency, the Senate passed Resolution 74 directing the Commerce Committee to conduct an investigation into crime and criminal practices.<sup>215</sup> Not unexpectedly, President Roosevelt and Attorney General Homer S. Cummings needed their own venue on the matter of crime. Cummings, therefore, formed a Conference on Crime held on December 10–13, 1934, in Washington, D.C. Five hundred participants attended these sessions and President Franklin Roosevelt gave the opening speech to call attention to public activation of continued interest in America’s crime problems. The conference resolved to establish a national institute for criminology to train police in crime detection techniques, great cooperation between all law enforcement organizations, condemnation of parole and probation abuses, improvements in criminal laws and procedures, condemnation of lynching and use of private police to suppress industrial conflicts, and creation of a permanent crime conference venue to meet every two years.<sup>216</sup> Cummings used his position to deliver several speeches across the nation on crime and justice topics. He was particularly instrumental in furthering the work of his predecessor, Attorney General Mitchell, in advancing procedural changes in the federal court system, expanding funding and reorganization measures in federal law enforcement, and securing passage of several key pieces of crime legislation. The Conference proceedings were published in 1934.<sup>217</sup> Noteworthy is the lineup of keynote speakers in addition to Cummings: President Franklin

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214. Arthur N. Holcombe, *Report on Recent Social Trends in the United States*, 27 AM. POL. SCI. REV. 222, 227 (1933).

215. 77 CONG. REC. 5716–17 (1933) (statement of Sen. Royal Copeland); *see also* S. REP. NO. 75-1189 (1937). Note that the report was published four years after the committee’s opening assignment.

216. *8-Point Plan Urged to Wipe Out Crime*, N.Y. TIMES, Dec. 14, 1934, at 1.

217. U.S. DEP’T OF JUSTICE, *supra* note 196.

D. Roosevelt and Herbert Hoover's Secretary of State, Henry L. Stimson. From all appearances, it looked as if President Roosevelt's address, and indeed the Attorney General's conference, were intentionally organized to match Hoover's and Wickersham's leadership in crime control policy five years earlier.

New York's Governor Herbert Lehman followed suit in 1935 with a conference of experts from policing and other criminal justice areas, held over four days in Albany, New York, in late September and early October. Proceedings of this conference included sections on crime prevention, detection and apprehension, prosecution and the court, institutional care, and probation, parole, and rehabilitation. Only one cited reference was made in the New York proceedings to the Wickersham Commission's reports, but at least a small number of experts in attendance included consultants who had worked on the Wickersham investigations.<sup>218</sup> One of the most pronounced themes of this conference was the insistence on agency coordination and cooperation, a theme that was suggested by the disarray so evident in justice systems nationwide for several decades. This was also a theme demonstrated time and again during Prohibition and one that persisted into the late 1980s with federal investigations of organized crime.

Senator Robert M. LaFollette, Jr.'s, Subcommittee of the Senate Committee on Education and Labor gained national prominence between 1936 and 1939 when it exposed the surveillance, physical intimidation, and other techniques used by large employers to prevent workers from organizing labor unions. The report, published in 1939, was particularly helpful in probing the amount of oppressive conduct—including employers' use of private police, who often employed abusive tactics.<sup>219</sup> This work moved beyond the Wickersham Commission by joining the revelations about the amount of private policing explored in the *Cost of Crime* report with the ignored topic of private police abuses not explored in the *Report on Lawlessness in Law Enforcement*.

Senator Harry Truman's Special Committee to Investigate the National Defense Program began operations in 1941 to probe corruption in the war production effort. Largely ignored by criminologists and many historians, this committee extended the Wickersham Commission's concerns for the "Cost of Crime" in

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218. STATE OF N.Y., PROCEEDINGS OF THE GOVERNOR'S CONFERENCE ON CRIME, THE CRIMINAL AND SOCIETY 350 (1935).

219. S. REP. NO. 76-6, pt. 2, at 1 (1939).

American society, although from an entirely opposing direction. Truman's initiative in leading the committee served as a lightning rod for criminological studies of crimes and unethical practices occurring inside major American war production and support facilities,<sup>220</sup> thus extending the Wickersham investigations into crime costs in the private sector. Here was an investigation into the costs of crime to the taxpayers as a function of racketeering by overt or covert means by corporations and labor unions.<sup>221</sup>

Organized crime had been discussed by some of the Wickersham Commission consultants in connection with the "Lawlessness" study and others, but the subject was never fully developed. Juvenile and adult gangs had only recently come under academic scrutiny by criminologists and the Prohibition circumstances expanded their profile. The investigation of Al Capone by the Hoover White House, the Justice Department, and the Bureau of Internal Revenue jettisoned studies of gangsters and their bases of economic and political power in urban areas. Apart from the war industry investigations, with few exceptions the ongoing concerns for growing economic power of racketeers, in particular, were shelved during World War II. Interest at the state and local levels returned, however, in the late 1940s. California's Governor Earl Warren established a Special Crime Study Commission (the Standley Commission) on Organized Crime in late 1947. Between 1948 and 1950, this group produced four reports that extended earlier work to focus on the sources of racketeering economic power, largely in gambling enterprises and their impact public corruption.<sup>222</sup> Frank Loesch, the Wickersham commissioner most closely familiar with the circumstances of racketeering in the 1920s, had cautioned many times about the growing strength of organized criminal elements.

President Harry Truman delivered the opening address to the Attorney General's Conference on Organized Crime held in the Great Hall at the Department of Justice on February 15, 1950. Following in the traditions of Herbert Hoover and Franklin Roosevelt to spur on the work of crime study groups and conferences, Truman called for improvements in law enforcement capabilities to deal with racketeering,

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220. Marshall B. Clinard, *Criminological Theories of Violations of Wartime Regulations*, 11 AM. SOC. REV. 258, 258, 261 (1946).

221. ALONZO L. HAMBY, *MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN* 251-53 (1995).

222. See STATE OF CAL., FINAL REPORT OF THE SPECIAL CRIME STUDY COMMISSION ON ORGANIZED CRIME 11 (1953).

including emphasis on rooting out police corruption.<sup>223</sup> In succeeding months Senator Estes Kefauver's Special Committee to Investigate Organized Crime in Interstate Commerce was created in mid-1950 following a special conference of experts held in Williamsburg, Virginia, in January of that year. President Truman had addressed the earlier conference to call attention to the dramatic increase in racketeering. The Kefauver hearings began in 1951. They drew wide public attention as racketeers were for the first time shown on national television.<sup>224</sup>

From 1957 to 1960, Senator John McClellan's hearings on labor racketeering developed out of the investigative work of the Select Committee on Improper Activities in Labor and Management. This committee represented the largest government probe into organized crime, an indication of the expansion of racketeering well beyond what had been suggested in the Wickersham efforts.<sup>225</sup> It would not be the final effort to investigate this major economic, political, and social problem for the remainder of the twentieth century.

President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice was commissioned in 1965 and ended its work in 1967. This effort was the most directly linked to the design of the Wickersham Commission more than thirty-five years earlier. The scope and depth of the work of this commission was significantly greater in many respects than the Wickersham group, and it represented the first occasion for the Executive Branch to return to broad national study efforts since 1929-1931. A key contrast, as suggested by Professor Samuel Walker, was the extent to which Johnson's commission moved well beyond mere study and revelations of crime and justice system problems to an expanded justification for progressively nationalizing crime control policies.<sup>226</sup> The volumes of its work were carefully read

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223. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S CONFERENCE ON ORGANIZED CRIME (1950).

224. See, e.g., *Crime Report Ties O'Dwyer to Gangs*, L.A. TIMES, May 2, 1951, at 1 (providing an example of the public attention the racketeers received in the wake of the Committee's hearings). The Committee produced three interim reports and a final report. See S. REP. NO. 81-2370 (1950) (first interim report); S. REP. NO. 82-141 (1951) (second interim report); S. REP. NO. 82-307 (1951) (third interim report); S. REP. NO. 82-725 (1951) (final report); see also 96 CONG. REC. 12,275 (1950); 97 CONG. REC. 1640 (1951); 97 CONG. REC. 4572 (1951); 97 CONG. REC. 10,874 (1951) (noting the submission of the four reports).

225. See generally *Investigation of Improper Activities in the Labor or Management Field: Hearings Before the Select Comm. on Improper Activities in the Labor or Mgmt. Field*, 85th Cong. pts. 1-4 (1957); S. REP. NO. 85-1417 (1958).

226. Samuel Walker, *Reexamining the President's Crime Commission: The Challenge of Crime in a Free Society After Ten Years*, 24 CRIME & DELINQ. 1, 4, 10 (1978). In the area of

and applied in the development of the Omnibus Crime Control and Safe Streets Act (1968), which Lyndon Johnson signed with some reluctance due to its electronic surveillance provisions.<sup>227</sup>

Late in Lyndon Johnson's second term tensions produced by the war in Vietnam combined with the spring 1968 assassinations of Martin Luther King and Robert F. Kennedy. Significant racial discord in several large urban areas lay in the background context and atmosphere of violence. Conditions of war protests, summer heat, and grinding poverty mixed with unaddressed discrimination and racial tensions leading ultimately to the Los Angeles Watts riot in 1965, the Detroit riot in 1967, and the Washington, D.C. riot in 1968. In July 1967, following riots in Newark, NJ and Detroit, MI, President Johnson named the National Advisory Commission on Civil Disorders (Kerner Commission), and one year later in July 1968, in the wake of the King and Kennedy assassinations, he named the National Commission on the Causes and Prevention of Violence (Eisenhower Commission).<sup>228</sup> Although these Commissions were not direct descendants of the Wickersham Commission, it is reasonable to observe that their origins in the socio-economic conditions and crime in black communities harkened back to the lack of black representation on the Wickersham Commission that could have addressed such matters in the 1929–1931 study agenda. Clearly, the nation could have advanced aggressive consideration of lynching and the economic and social ingredients of crime in minority areas if the Wickersham reports had tolerated at least

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organized crime, Professor Dwight Smith has argued that the Johnson Commission transformed the Wickersham Commission's work as a study of a phenomenon to a modern focus since 1965 on names and specific criminal organizations. See Dwight C. Smith, Jr., *Wickersham to Sutherland to Katzenbach: Evolving an "Official" Definition for Organized Crime*, 16 CRIME, L. & SOC. CHANGE 135, 143–46 (1991).

227. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. Title III provided for wiretapping under specified conditions. 82 Stat. at 211–25 (codified at 18 U.S.C. §§ 2510–2520).

228. *Foreword to NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS*, at v (1968). This Commission was appointed by executive order of President Johnson in July 1967, Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967), and issued its report in March 1968, Michael H. Schill, *Race, the Underclass, and Public Policy*, 19 LAW & SOC. INQUIRY 433, 433 n.1 (1994). The Violence Commission "worked through the end of the Johnson administration, but its life was extended by President Nixon and it reported out in December 1969. Its task force reports were titled: *Violence in America: Historical and Comparative Perspectives*; *The Politics of Protest: Violent Aspects of Protest and Confrontation*; *Firearms and Violence in American Life*; *Assassination and Political Violence*; *Law and Order Reconsidered*; *Violence and the Media*; and *Crimes of Violence*."

one special study as part of the *Report on the Causes of Crime*.

New York City's Commission to Investigate Alleged Police Corruption was coined the Knapp Commission after its chairman, the federal Judge Whitman Knapp. This commission investigated the rising and persistent tide of reports that many new police personnel were regularly receiving graft payments. As it turned out, the problem of police corruption in New York ran much deeper than a few new police officers, and the experiences in that city were not unique to the New York Police Department among the growing collection of large urban departments. Called together in 1970 by New York City's Mayor John V. Lindsay, the Knapp commission once again took up one of the Wickersham Commission's major topics, "Lawlessness in Law Enforcement."<sup>229</sup>

President Richard Nixon's National Commission on Criminal Justice Standards and Goals<sup>230</sup> was formed in 1971 to set out benchmark criteria for assessing organizations across all elements and all levels of the criminal justice system (that is, policing, courts, and corrections). One can easily link the earlier work of the Wickersham reports on *Police*, the *Courts and Criminal Procedure*, and *Prisons and Jails*. The language of these and other reports in the Wickersham series was replete with references to standards for the operations of these functions as important to the elevation of public support for law and its observance.

The significant rise in crime from the 1950s through the 1970s spawned an ever-expanding private police market for protection services. Following the Wickersham Commission, no detailed formal study had been undertaken of this development and its implications for American justice administration until the Department of Justice in the Nixon administration awarded a contract in 1970 to the RAND Corporation to study private police in the United States.<sup>231</sup> With hardly

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229. See Michael F. Armstrong, *Foreword to KNAPP COMM'N, REPORT ON POLICE CORRUPTION* (1972); NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 1* (1931). Judge Whitman Knapp was appointed by New York Mayor John V. Lindsay in mid-1970, held hearings in late 1971, and reported out the following year. Armstrong, *supra*.

230. See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *PROCEEDINGS OF THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE 1* (1973). Established by the Law Enforcement Assistance Administration, a division of the U.S. Department of Justice, during President Nixon's first administration in 1971, the Commission produced a series of extensively detailed reports that attempted to provide standardized guidelines for the administration of justice agencies and citizen crime prevention initiatives.

231. See generally JAMES S. KAKALIK & SORREL WILDHORN, U.S. DEP'T OF JUSTICE,

any reference to the history of private policing, including no reference to the Wickersham Commission's *Report on the Cost of Crime*, RAND's five-volume reports provided a basic outline of the nature and extent of the private policing industry, its problems, its regulations, and how the law affects its operations. It also evaluated the benefits, costs, and risks to society of private security with the purpose of proposing policies and legislation to improve regulatory controls. Increasingly in the 1970s, government investigations of crime turned attention back on expanded citizen involvement. This initiative was largely intended to recalibrate the relationship between government and citizen shares in the problem of crime. Through the decades following the Wickersham Commission *Report on the Cost of Crime*, criminologists, econometricians, and victimologists have all contributed to an ever-expanding research literature on economic, political, and social costs of crime for communities, local and state governments, and individual citizens.<sup>232</sup>

President Ronald Reagan's administration returned to a focus on crime and criminal justice. The emphasis, however, was shifted to special topics such as violence, organized crime, and pornography. The task of organizing the commission on violent crime was assigned to

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PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS (1971). Five volumes were originally published under contract by RAND in 1971 and made available to the public the following year. *Id.* at v–vi. The reports were titled *Private Police in the United States: Findings and Recommendations* (vol. 1), *The Private Police Industry: Its Nature and Extent* (vol. 2), *Current Regulation of Private Police: Regulatory Agency Experience and Views* (vol. 3), *The Law and Private Police* (vol. 4), and *Special-Purpose Public Police* (vol. 5). *Id.* These reports can be considered direct descendants of concerns raised by George Wickersham in 1929 when he observed the costs to business organizations of private police protection against crime.

232. There is evidence that academic interest in estimating the costs of crime commenced in the early 1920s. Interest in this topic advanced after President Johnson's Commission reports were published but intensive research and writing the combined interests in criminal justice costs and in the impact on victims emerged in the 1970s. For some examples of articles of an on-going and thriving interest in crime costs, see generally Mark A. Cohen et al., *Studying the Costs of Crime Across Offender Trajectories*, 9 CRIMINOLOGY. & PUB. POL'Y 279 (2010); Paul Dolan & Tessa Peasgood, *Estimating the Economic and Social Costs of the Fear of Crime*, 47 BRIT. J. CRIMINOLOGY. 121 (2007); Robert G. Hann, *Crime and the Cost of Crime: An Economic Approach*, 9 J. RES. CRIME & DELINQ. 12, 13 (1972); Elizabeth Moore & Michael Mills, *The Neglected Victims and Unexamined Costs of White-Collar Crime*, 36 CRIME & DELINQ. 408 (1990); John K. Roman, *How Do We Measure the Severity of Crimes?: New Estimates of the Cost of Criminal Victimization*, in 17 MEASURING CRIME & CRIMINALITY 37, 38 (John MacDonald ed., 2011); Natalie Taylor & Pat Mayhew, *Financial and Psychological Costs of Crime for Small Retail Businesses*, TRENDS & ISSUES CRIME & CRIM. JUST., no. 229, June 2002, at 1. It is also interesting to reflect on the fact that Wickersham Commissioner Frank J. Loesch discussed the direct and indirect costs of racketeering.

Reagan's first Attorney General, William French Smith.<sup>233</sup> The commission's mission was narrow in scope and intended only to make recommendations to the Attorney General on ways that the federal government could combat violent crime, and to recommend changes in federal law and its enforcement, criminal procedure, issues of federalism in criminal justice, juvenile crime, and issues regarding victims of crime. While the focus on violent crime had become more common from the 1960s forward, concerns for maintaining effective criminal procedures in the federal system of criminal justice represented a direct link back to the Wickersham Commission's work.

Reagan's Commission on Organized Crime was formed in July 1983 as a twenty-member panel to make a full analysis of national and regional circumstances associated with organized crime and to recommend any needed legislative initiatives to assist then-current law enforcement efforts.<sup>234</sup> The Commission's findings were largely summations of hearings conducted in various cities in the United States. Analyses of special problems were published in 1986, but their impact was minimal since they were largely based on what law enforcement functions in various regions already knew and merely passed on to the Commission on Organized Crime. Clearly, organized crime had evolved by many degrees from the first minimal explorations by the Wickersham Commission. Significant emphasis was given to drug trafficking, business and labor corruption, and financial institution compromise. Compared with the investigations done by the Task Force on Organized Crime, a subcomponent of Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice, the Reagan commission served as little more than a reminder that organized crime remained a menacing element that commanded financial and organizational power. Shades of the Wickersham Commission report on crimes of the foreign born were manifested in the Reagan commission hearings on the then-current fears of Asian organized crime. In this context, the Reagan-era investigations continued a traditional supply-side perspective that America's problems with alcohol, drugs, corruption, gambling and other

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233. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT (1981).

234. PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY (1986). This report consisted of several volumes on a wide range of topics such as money laundering, drugs and drug trafficking, business and labor union corruption, gambling, and the associated federal law enforcement challenges.

forms of vices were partly grounded in some foreign influence.<sup>235</sup> Reagan and his second Attorney General, Edwin Meese, were convinced that insufficient attention had been paid to the issue of pornography. At nearly 2000 pages, the final report of the Attorney General's Commission on Pornography attempted to document the social and interpersonal harms resulting from the dissemination of pornographic materials and it linked increasing spread of such material to organized crime groups.<sup>236</sup>

#### IX. WRAPPING UP: HOOVER, BRAIN, STATE, AND WICKERSHAM

As it turned out, President Hoover's original high-minded vision for the Wickersham Commission had only a few months of much-heralded recognition before the economic bubble burst in the wake of the October 1929 stock market crash. Thereafter, apart from everything else on the President's plate, the struggle was to sustain enthusiasm for his ideas and the imagined contributions of the Commission. As Hoover biographer George Nash has observed, the President remained an arguably reclusive captive of the White House from late 1931 through the campaign of 1932.<sup>237</sup> Close aides and friends who observed Hoover's increasing unwillingness to communicate and to appear in public forums were told that the press of work in Washington was more important and demanding of his time. In this respect he seemed to be his own worst enemy. He seemed to be defeating himself, a sense that had also crept into the Roosevelt campaign strategy.<sup>238</sup> Here was the engineer, the rational systems thinker and progeny of scientific

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235. For an example of an article from the early 1930s, see generally Constantine Panunzio, *The Foreign Born and Prohibition*, 163 ANNALS AM. ACAD. POL. & SOC. SCI. 147 (1932).

236. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT, at v, 291, 303 (1986). The work of this commission was intended to counterbalance opposite findings in the report commissioned by President Johnson in early 1969, see Act of Oct. 3, 1967, Pub. L. No. 90-100, 81 Stat. 253, but rejected by President Nixon later that year, see Statement About the Report of the Commission on Obscenity and Pornography, 1970 PUB. PAPERS 940, 940 (Oct. 24, 1970). The Johnson-era report was then publicly released about one year later. See generally COMM'N ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

237. George H. Nash, *Herbert Hoover's 1932 Campaign*, MILLER CENTER (Jan. 23, 1992), <http://www.millercenter.org/scripps/archive/forum/detail/717>. Dr. Nash, the official biographer of Herbert Hoover, delivered this lecture at the University of Virginia's Miller Center.

238. DAVID A. SHANNON, *BETWEEN THE WARS: AMERICA, 1919-1941*, at 144 (1965).

management, the philosophical leader of the associative state, the man who argued in 1928 and 1929 for fixing American criminal justice systems completely prostrate and out of touch save for a few special engagements. At the time, people had no way of knowing that their highly popular candidate of 1928 was a man who disliked talking before large crowds, who despised the hypocrisies and silliness of Prohibition, who was grossly uncomfortable on the campaign trail, and who believed that people and systems (including the criminal justice system) would come to understand and therefore instantly fix the problems that had been identified by scientific study.

Herbert Hoover was a lifelong student, and when he saw conditions and operations that needed fixing, he learned what he needed to know to fix them. He knew how to organize people and processes to get things done. Those characteristics were clearly evident in his work in China, his work in food relief, his work as Commerce Secretary, and his work to save thousands of lives during the Mississippi flood tragedy of 1927. As President, however, he failed to estimate the length of time that would be required to move past the tedium of the Prohibition issue. Even with the results of the Wickersham Commission in hand in 1931, he was incapable of transforming what he had called for into political messages in service of his own candidacy for a second term. Simply put, his time on the particular task ran overtime, and he ran out of gas in his willingness to use what he learned to political advantage. He ran out of interest in the centrality of criminal justice reforms, and the polity ran out of interest in the face of dire economic priorities.

As applied to criminal justice matters, Hoover's associative state envisioned a large amount of collaboration that was expected to run horizontally and vertically. It expected local and state governments to take responsibility for law observance and enforcement, both symbolically and operationally. It expected to have the voluntary and impassioned support of civic, business, legal, and labor organizations to aid in encouraging governments to find solutions to problems. Intensely idealistic, Hoover believed strongly in a well-informed American public, but he was incapable by 1932 of going on the stump to lead in communicating the need to press on with the business of criminal justice reforms. His faith in the Wickersham Commission as mainly a discovery and informational device was fundamentally correct in relationship to his own limited interests in resolving the Prohibition enforcement issue and in promoting support for the law until it was changed. But he failed to understand that alcohol and its social and marketplace popularity were forces that voluntary associations and the law would never

successfully suppress. By the time results appeared regarding the many other areas of discovery, he was too tired and distracted by economic and international issues to contribute much to the public's need to learn more about the respective justice system problems. Clearly, he would have objected to the conditions he must have observed by the mid-1940s that the federal government had moved rapidly into resolving the crime problem in ways that, in his time, were largely state actions.<sup>239</sup>

The Wickersham Commission's investigative efforts were purposely promoted to enlighten informed approaches to crime and justice. They were pioneering efforts that attracted the intellectual and practical orientations of the leading scholars across the spectrum of emerging social and behavioral sciences. By 1929 these new intellectual ventures had discovered the laboratories for testing their theories about human behavior in criminal conduct, police, courts, and jails and prisons. They had settings in which they could gather data from captured subjects to develop testable hypotheses while they advanced hopeful ideas about controlling crime and improving the quality of social life. They could inform the prospective actions of state governors, legislative bodies, and local government administrators.

The entire activity of the Wickersham Commission from start to finish achieved one half of the brain-state relationship. It taught the President what he needed to know, and to some extent it taught the public certain specifics about what had happened to American justice delivery. It was less than successful in achieving the other half of the equation: the timely fulfillment of recommended changes in many but not all of the areas under study. Lest I appear too harsh, Hoover's fundamental approach to policy implementation was cautious and bottom-up; conditions of economy and social interest in justice system matters were upside down in 1932 versus 1929; Hoover was a tired and unwilling candidate for another four years in the White House; and the President was simply not the person to sell the product he so enthusiastically promoted for study. The product itself—the collection of fourteen reports—is an example of what American scholars are capable of turning out when asked by a President to take a national or international problem seriously, to debate and find points of agreement, to focus on the realities of their recommendations, and to lay on the President's desk a body of information useful over time in improving the

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239. See David Fellman, *Some Consequences of Increased Federal Activity in Law Enforcement*, 35 J. CRIM. L. & CRIMINOLOGY 16 (1945).

quality of American life. We have witnessed some failures in the commission study process and we have experienced some mediocre study processes and reports. But we have also benefited from precedent-setting works like the Wickersham Commission produced in the amount of time it had to achieve its objectives. As C.H. Willard, the Commission's research director, observed in June 1929, "In dealing with the social disease called crime the country is now at the stage at which England found itself a hundred and fifty years ago when public sanitation in towns was born, first as a groping idea, and later maturing into a science."<sup>240</sup> Willard believed that the Commission could accomplish three objectives: it could assemble and judge the existing facts; it could educate the public with respect to the facts; and it could "help make possible the future program for getting facts and applying the treatment which can be deduced from such new facts."<sup>241</sup>

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240. CALDER, *supra* note 32, at 216.

241. Letter from Charles H. Willard to file (June 10, 1929) (on file at the National Archives and Records Administration at RG 10, Box 20). Willard served as Max Lowenthal's assistant.