SOME ROLE/FUNCTIONS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

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I. INTRODUCTION

My opening remarks will take the form of an explanation or a justification for my choice of a topic that seems outside the expected scope of a lecture pertaining to penal science and criminology. For that is the formal title of the Chair for which this lecture is being delivered.

By definition,[1] criminology relates to the scientific study of crime as a social phenomenon; while penology is defined as the study of criminals and of their penal treatment. It is but natural to expect, therefore, that the Guevara lectures would deal on subjects such as the different theories of crime causation;[2] the problems of criminalization and the opposite process of de-criminalization; doctrines of criminal responsibility; effectiveness of penal sanctions; and similar topics related to the subject as thus defined.[3] Quite plainly, the topic that I have chosen for this morning, falls under none of these subjects. It is one clearly within the area of criminal procedure rather than of substantive criminal law.

Reasons for Choice of Topic

My choice is based on several considerations. The first is intended to dispel the notion that the concern of the Guevara Chair is confined solely to criminal law and not to its administration. A cursory reading of the brief description of the Chair in your program will show that Judge Guevara is equally concerned with the *practical* administration of criminal justice as he is with the *theoretical* study of penal law.[4]

Secondly, it is intended to give a counter-balance to the concentration on criminal law that was given by the distinguished first holder of this Chair. Professor Ambion's mastery of criminal law

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1 WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1976).

2 SCHUR, OUR CRIMINAL SOCIETY: THE SOCIAL AND LEGAL SOURCES OF CRIME IN AMERICA, see particularly, Chapter 2 on "Questionable Crime Theories".

3 KADISH & PAULSEN, CRIMINAL LAW AND ITS PROCESSES (1969) focuses on the problems of criminalization and punishment.

4 Judge Guevara has been receptive to the idea of changing the title of the chair to the broader one of criminal justice.

and his profound knowledge thereof, would be difficult for me, his former student, to even approximate. In truth, it is by reason of my concentration on the administration of criminal justice, rather than any special knowledge of criminal law, that I was appointed to succeed Prof. Ambion to the Chair.

Thirdly, my choice is intended to underscore the importance of process particularly to the study of law, although certainly not confined to it. In other words, it is to stress *process* as opposed to *structure; dynamics* as opposed to statics; and on the more elevated plane, it is to stress the process of *"becoming"* as opposed to that of *"be*ing".[5]

Importance of Process

Such deepening concern with procedure has been discerned by eminent men in law, business and politics, as the most significant principal change they underwent in their transition from youth to maturity.[6] No longer were they just concerned with what *needs* to be done. They were just as concerned with *how* things *should* be done.

True to this observation, it is recently reported that the more mature Filipino voice of experience in the United States, represented by Salvador Araneta, has opposed violent revolution as the means of terminating the martial law government of the present administration.

Similarly, it is easy enough to state what is the objective of criminal law. And that is, to secure public safety through the prevention and control of crime. What is more difficult and oftentimes perplexing, is *how* to attain that objective. Management principles showing the most effective and efficient way of achieving that objective, are not enough. Although we use catchy slogans like waging a "war against crime", the process is far from similar to a pest control campaign where one considers only the most effective method of exterminating or eliminating the unwanted pests. For, after all, even criminals are human beings who remain citizens entitled as everyone else to the equal protection of the law.

Efficiency and effectivity in the control of crimes must, therefore, be balanced by considerations based on respect for human rights, human dignity and worth. These are deeply held values in a democratic country that have been compressed into that shorthand legal

[5] The "schism in basic orientations" between substance and procedure is noted by Fuller, *Mediation-Its Forms and Functions*, 44 So. CALIF. L. REV. 305 (1971).

[6] This observation is attributed to Senator Paul H. Douglas by FULLER, ANATOMY OF THE LAW 30 (1968).

phrase that lawyers call "due process of law". It was in this connection that Chief Justice Earl Warren was prompted to observe: "The methods we employ in the enforcement of our criminal law, have aptly been called the measures by which the quality of our civilization may be judged."[7]

II. THE CONCEPT OF ROLE

Everyone seems to be speaking about roles nowadays. Various conferences explore the role of doctors, nurses, accountants, managers, other professionals and even priests!

When role is spoken of, I immediately think of a theatrical play or a movie story where actors and actresses are cast as principal characters or in supportive roles. There is a *vida* or hero and a *contravida* or villain. It would be absurd to think of playing a role all by oneself, in complete isolation from everyone else. For the idea of role is that of a relational concept. It assumes a relationship between the actor and a larger group to which he belongs. A role therefore relates to a pattern of conduct or behavior that is appropriate to a particular position in the social or political order.[8]

How Role is Defined

But where does the actor get his cues to guide his performance or conduct? In other words, how is role defined?

There are three sources of such definition. The first is inferred from the nature of the role to be performed. Second is the actor's own perception or interpretation of what is called for by the role. And the third arises from the expectation of significant other persons.

Expectation of others

Last Christmas, I received a gift from my 16-year old son that touched me deeply. It is a brass figurine fashioned by the T'boli tribesmen of South Cotabato. The accompanying card reads: "To Father, Guardian, Protector, Warrior". Now, I don't know that I have the qualifications of being a warrior! But certainly these are the significant roles that my son expects me to perform as father. And being one whose love and respect I desire to keep, my son's expectations help shape my performance in the role I have been cast.

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[7] Coppedge v. U.S., 369 U.S. 438, 499 (1962).

[8] Role theory is developed in Chapter 5 of FRIEDMAN & MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 824 (1969).

Nature of role

Role is also affected by the nature of the function to be performed. In a keynote speech delivered during the initial workshop for the training of trainors on the *Katarungang Pambarangay* Law,[9] Chief Justice Castro exhorted his audience to warn the Barangay Captains "not to act like judges!" By this, I take it he did not mean to imply that there is something wrong with the way judges behave. I believe that the admonition was meant to convey the idea that judicial behavior for trial work is inappropriate for conciliation proceedings.

Appropriateness of role performance relates to the objective sought to be attained. An impartial decision based on accurate fact-finding is the objective of adjudication. Adjudication, therefore, requires the judge to be aloof, cold and distant. In contrast, conciliation seeks to persuade the parties to amicably settle their differences. It, therefore, requires the conciliator to be warm and friendly to the parties.[10]

Role Theory Assumes Working Relationship of Organization

The concept of role serves as an organizing principle for an effective division of labor so that the goals of the organization may better be achieved. For business and industrial enterprises, maximization of profits is the basic goal. Under policies laid down by a Board of Directors, different units specialize in defined functions such as financial management, auditing, personnel, marketing and the like.

For the criminal justice agencies, the common goal that should unify them, at least in theory, if not in practice, is that of crime prevention and control. Unlike business organizations, however, there is no unifying central board that coordinates their diverse activities into a harmonious movement. They continue to retain their distinct organizational identities and independence of decision-making. Thus, the courts belong to the judicial branch of the government; while the prosecutor, probation officer, parole boards and prison officials belong to the executive branch.

These peculiar characteristics of relative independence and distinct identities explain the choice for the word "system" in the Criminal Justice System to describe the inter-relationship among the

[9] Pres. Decree No. 1508, (June 11, 1978).

[10] PE & TADIAR, KATARUNGANG PAMBARANGAY: THE DYNAMICS OF COMPULSORY CONCILIATION (1979), see particularly Chapter 9, which distinguishes the processes of conciliation and adjudication as distinct modes of dispute resolution.

different agencies. Perhaps similar reasons prompted the use of the same word in the University of the Philippines *System.*

System Approach to Crime Control—not always perceived

The integrated view that the functions of the police, the prosecutor, the courts and correctional agencies, are merely parts of what should be a unified system to control crime, is still often lost sight of.

The workload of the courts, for instance, is no more than the result of the investigative work of the police and the charging function of prosecutors. This obvious fact however, seems to have escaped consideration in the decision to circuitize municipal courts and the current proposal to abolish circuit criminal courts.[11] Both moves have been prompted by the light caseloads of these courts. But if this is so, it is because the prosecutors continue to file charges in the courts of first instance even for cases falling within the *concurrent* jurisdiction with municipal courts and circuit criminal courts. This defeats the purpose for the enlarged jurisdiction of municipal courts and the creation of circuit criminal courts, which were both intended to ease the heavier burden of courts of first instance.[12]

A circular from the Minister of Justice directing fiscals to desist from filing with the courts of first instance cases which could appropriately be filed with the municipal courts or circuit criminal courts, would easily provide an effective solution to the problem. As it is, the remedy chosen was the paradoxical one of decreasing the number of municipal courts through circuitization and simultaneously increasing courts of first instance! It is the unthinking pursuit of such contradictory decisions that lends substance to criticisms questioning whether we do have a system of criminal justice worthy to be called a system or merely a group of discordant governmental processes!

It is therefore, instructive at this point, to examine the different roles that are being played by various agencies with a view towards improvement and reform.

A. *The Police*

1. *Maintenance of Law and Order*

Let us start with an examination of the role of the police.

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[11] Abolition of circuit criminal courts was first seriously initiated by Justice Vicente G. Ericta of the Court of Appeals and now Tanodbayan.

[12] Collector of Customs v. Villaluz, G.R. Nos. L-34038, 34243, 36376, 38686, 39525 and 40031, June 16, 1976, SCRA 356 (1976).

The policeman is often popularly called a "peace officer". This is a descriptive term which seems to indicate that the function of the police is to maintain "peace and order". These are terms however, which I would like to voice some reservations about. For the word "peace" seems to connote no more than the mere absence of strife and violence. By itself and without qualifications, the word gives no indication of the quality of the peace achieved nor the means by which it is sought. To give precision to the meaning of the word, it is necessary to use qualifying adjectives such as "uneasy" to denote the temporary quality of peace, or words such as "just and lasting" to emphasize its enduring quality. Keeping the peace, while certainly important, is definitely not the main police function. The enforcement of law and the maintenance of order are what I believe to be the essential role of the police. That is why I express personal preference to calling a policeman a "law enforcement officer". To me this term accurately reflects his role of maintaining social order within the framework of law. He therefore keeps "order in the sense of protecting the public from direct harm and outrage" but keeping the performance of his duties within the bounds of law—"law in the sense of adhering to high standards of procedural legality"[13] designed to compel respect for human dignity and worth.

2. *Prevention of Crimes*

The function of crime prevention is performed by a police patrol—a policeman pounding his beat. Unquestionably the visible presence of a uniformed police officer effectively deters the commission of crime by instilling fear of immediate apprehension in the mind of an intending criminal. The traffic situation provides an excellent example. Less traffic violations resulting in a smoother flow of traffic, is manifest when policemen are present and visible. Paradoxically, however, when we see too many uniforms around, particularly here in thhe U.P. campus, we get disturbed. There is a general feeling of apprehension, of unease from a disquieting presence. So that, even assuming that government can afford the disproportionate cost or financial outlay of placing a uniformed police officer on every street corner in order to reduce crimes, such a police saturation would smack too much of the character of a totalitarian or police state as to be thoroughly offensive to all freedom loving peoples.

[13] CRESSY, CRIMINAL CIVIL JUSTICE (1971).

3. *Investigation of Crimes*

But even in a police state, it is impossible to deter all crimes. For as aptly noted by Dean Pound,[14]

> * * * fear can never be a complete deterrent. The venturesome will always believe they can escape. The crafty will always believe they can evade, and enough will succeed to encourage others.

There is but little problem if the crime is committed in the presence of an officer. For a warrantless arrest is authorized in this situation.[15] In the case of "cold crimes", the police must conduct the necessary investigation for the purpose of their detection and the identification of the criminal. This task is entrusted to investigation specialists who are popularly called "police detectives". In the more modern urban centers of the country, further specialization in narrower fields, such as arson investigation, homicide, narcotics and the like, may be undertaken. Equipped with modern laboraries for scientific analysis of evidence and possessed of professional pride in their own competence, these police investigators are challenged to match wits with the criminal without having to resort to that barbarous method of investigation known as the "third degree".

Where the police investigation results in the correct identification of the suspect, the crime is then considered "solved". The police must now take steps for the speedy arrest of the identified offender.

The foregoing overview shows that the appropriate place to start an inquiry into the criminal process is from the police stage. This contrasts with the sequence of the Rules of Court which, in Rule 110, starts the study of criminal procedure with the filing of a criminal complaint or information in court. Statistics clearly show, however, that the great majority of criminal cases are initiated, not by the filing of a charging document, but by a warrantless arrest or by a search and seizure made without warrant by the police.

It is in this area of warrantless arrests on probable cause, of search and seizures, custodial interrogation, of bugging, wiretap-

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[14] Pound, *Administration of Punitive Justice*, PROCEEDINGS OF THE AMERICAN POLITICAL ASSOCIATION, 4th Annual Meeting, December, 1907.

[15] Rule 113.6 enumerates the cases where warrantless arrests are authorized. I question the propriety of this as a proper subject of the Rules of Court since it does not have anything to do with "pleading, practice and procedure in all courts" which the Rules should govern under Article X, Sec. 5 (5) of the Constitution. See Tadiar, "The Quality of Justice Administered by the Criminal Justice System of a Capital Town," a research paper submitted to the UP Law Center.

ping and other electronic forms of eavesdropping, vehicular search, roadblocks, re-enactment of crime by the accused, and other police techniques of criminal investigation that constitutional rights become crucial. It is unfortunate that like the physician whose training is hospital-oriented, legal training suffers from a similar defect of narrow court-orientation. Thus, the study of criminal procedure focuses under Rule 115 only upon rights of the defendant *at* the trial — to the detrimental neglect of his rights *before* trial. There is no rule devoted to pre-trial rights of accused persons.

This neglect or failure to give due importance to the police stage of the criminal process is apparent even from the illogical arrangement of rights in the constitution where the rights of a defendant during the trial under Section 19 *comes ahead* of his pre-trial rights under Section 20. What is only now being realized is that, unless adequate safeguards are taken against violation of constitutional rights at the police stage, the result of the trial may well be nothing more than a formal rubber stamp of what the police had earlier secured by way of uncounselled confessions or evidence illegally seized.

Implementing pre-trial constitutional rights

It is therefore imperative that steps be taken for the effective implementation of the constitutionally guaranteed pre-trial rights of an accused. The constitution provides that "any person *under investigation* for the commission of an offense shall have the right to remain silent and to counsel and to be informed of such right".[16] This provision is undeniably the result of the persuasive reasoning of *Miranda v. Arizona*[17] which aimed at the evils of custodial interrogation by the police. Our constitutional provision, however, does not restrict or confine its scope only to police investigations. Preliminary investigations by the fiscal and by inferior court judges are, therefore, beneficially covered by the mantle of its protection. Unfortunately, however, Presidential Decree No. 911, although promulgated after the 1973 constitution, fails to impose a corresponding mandatory duty upon the fiscal to inform the respondent of his rights to silence and to counsel. The Rules of Court, promulgated in 1964, long before the 1973 constitution, have likewise not been amended to reflect these new rights.

To compel respect for these rights, I wish to propose that the certification of preliminary investigation required of the fiscal and the investigating judge shall include a statement of affirmative compliance with the duty of informing the accused of his right to silence

[16] CONST., art. IV, sec. 30.
[17] 384 U.S. 486, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966).

and to counsel. I further propose that sanction for violation of this duty should be a mandatory nullification of proceedings. Refuge in the unjustifiable presumption that official duty has been complied with,[18] should no longer be permitted to attenuate and eventually defeat constitutional rights.

Another reason for the ineffectual implementation of the pre-trial right to counsel and to bail is that no procedural rule has been adopted which clearly grants jurisdiction to appoint counsel and to grant bail to a suspect who has been detained by the police but who is not yet charged of any offense in court. It is quite understandable that a judge with whose court no complaint or information has yet been filed, will feel reluctant to exercise the power of granting bail[19] or assigning counsel to police-detained suspects at this early stage. If, after having informed a detained suspect of right to counsel, and receiving a reply that he desires but is unable to afford legal assistance, what is the police then to do? Unless we are satisfied by mere lip service to these pre-trial rights of the accused but actually tolerate their violation in practice, we must take steps to fill this omission by having the Rules be amended to explicitly confer upon the proper official the power to assign counsel and release on bail such detained but uncharged suspects.

B *The Prosecutor*

When that stage of the criminal process has been reached where the crime has been solved with the identification of the offender, the role of the prosecutor begins. It is the fiscal's principal function to assess and evaluate, in a preliminary way, the sufficiency of the evidence gathered and submitted to him by the police. His traditional role is therefore that of a screening agent to weed out malicious and unfounded suits initiated only for harrassment or other unworthy motives of vindictive persons.

Insufficiency of investigating fiscals

A serious obstacle to the efficient discharge of this screening function is the paucity in numbers of the fiscals. As a bare minimum, there should be at least one prosecutor for every trial court. There are at present a total of 1,550 trial courts all over thhe country, broken down into 926 municipal courts, 166 city courts, 423 courts of first instance, 25 juvenile courts, and 10 circuit criminal courts. To investigate and prosecute before these courts, there are available only 975 fiscals. This is short of the full strength of 1045

[18] Rule 131.5 (m).
[19] Teehankee v. Rovira, 76 Phil. 634 (1945).

authorized positions in the prosecution service.[20] But even if all the positions were to be filled upon, there will still be a shortage of 500 fiscals.

Consequences of shortage

Aside from the slow pace of preliminary investigation, I see several other consequences flowing from this numerical inadequacy of prosecutors that have adverse effects on the administration of justice. First, the direct filing of complaints in court by the offended party himself or by the police,[21] without any prior screening, is still allowed as a practical remedy to the problem. Harassment suits and trumped up counter-charges to coerce an extrajudicial settlement, thus often find their find way to the courts.

Such direct court filing of cases, detract from the efficient use of judicial time which is wasted in the conduct of preliminary investigations. In one case,[22] the Supreme Court, while upholding the power of the Circuit Criminal Court to conduct preliminary investigation, admonished a judge not to fritter away his time in such investigations and advised him to concentrate on the task of adjudication which is the proper judicial function.

Further, in order to process a greater number of cases, cross examination of prosecution witnesses by defense counsel during fiscal's preliminary investigation, has been disallowed by Presidential Decree No. 911.[23] The question nevertheless persists as to whether the savings in prosecutorial time spent in preliminary investigations by such a denial of cross-examination, may not have been effected at the price of a less effective screening that eventually wastes judicial time spent in trying charges without merit. Cross-examination could well have screened out such unmeritorious cases early enough in the process to prevent their entry to the courts. An empirical study with a cost-benefit analysis of this problem, may lead to a re-examination of this current procedure. It is unfortunate that there is still a dearth of socio-legal studies of this sort that could lead to the making of more sound policy decisions.[24]

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[20] Data supplied by Fiscal Rodrigo Cosico of the Ministry of Justice, an LL.M. student of the author.

[21] Rule 110.2.

[22] Collector of Customs v. Villaluz, *supra*, note 12.

[23] Republic Act No. 732 (1952) and Rule 112.14 give to the accused the right "to cross-examine the complainant and his witnesses". Presidential Decree No. 911 (1976) has now disallowed this right.

[24] I have long advocated collaborative research studies between sociologists/anthropologists and legal scholars. See Tadiar, *The Administration of Criminal Justice in the Philippines: Some Aspects for a Comparative Study With That of the United States*, 47 PHIL. L.J 547 (1972). The most significant socio-legal study made recently is that surveying the legal profession by sociologist Manuel Bonifacio and lawyer Merlin Magallona, still unpublished.

Diversion of offenders

The evaluation of evidence to determine probable cause for filing an information has always been the traditional function of the prosecutor. The adequacy of this conventional role may, with good reason, however, be now questioned in light of the pressing problem of court docket congestion.

Court statistics show that there are pending before all courts, the appalling number of about 450,000 cases.[25] At the bare minimum of two parties involved in a litigation, there are 900,000 persons affected by such pending cases. Multiplied by six as the number of the average-size Filipino family, there are 5 million 400 thousand persons who must be dissatisfied in varying degrees with the slow pace at which justice is being administered.

Such a problem is of serious dimensions. Not only does it lower the quality of justice administered by the judiciary; it also puts into question and grave doubt the capacity of the judiciary to be an effective and efficient instrument of justice.

An attempt to remedy the problem is being made with the implementation of the *Katarungang Pambarangay* law which imposes conciliation as a pre-condition to judicial recourse.[26] While this may do much to alleviate the situation, the limitation of the measure must be recognized. For one thing, compulsory conciliation in criminal cases is limited, as it should properly be, only to petty offenses which are punishable by no more than 30 days imprisonment or ₱200.00 fine.[27] This will therefore ease the problems only of municipal and city courts. In so far as criminal cases are concerned, therefore, barangay settlement of justice will have no effect on the workload of the higher level courts. Since criminal cases constitute approximately 60% of the workload of CFI and for the municipal and city courts, as high as 3/4 or 75% of their caseload, it is easy to see that a complementary measure to the barangay justice system, must be resorted to if only to make a dent on this grave problem of court docket congestion

The supplementary measure that I wish to propose is the relatively new concept of non-criminal diversion[28] of certain offenders for some narrowly defined crimes.

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[25] Data from the Supreme Court Statistician, in round numbers.
[26] Pres. Decree No. 1508 (1978), section 6.
[27] *Ibid.*, sec. 3 (3).
[28] An early proponent of this innovative approach is Harvard Law Professor James Vorenberg, Director of the Center for the Advancement of Criminal Justice and Executive Director of U.S. President's Crime Commission.

After conducting a preliminary investigation, the prosecutor has only a restricted choice of two dispositional alternatives—one is to charge the respondent against whom probable cause has been found; and the other is to dismiss the case for insufficiency of evidence.

This narrowly circumscribed prosecutorial discretion seems to be based on a policy requiring full enforcement of the criminal law. This is inferred from the Rules of Court provision mandating that criminal actions *must* be commenced against *all* persons who appear to be responsible for the commission of a crime.[29] While such a policy has served to curb unjustified selectivity in the prosecution of crimes, a re-examination in light of societal development and changed conditions, is now certainly required. A full enforcement of all our penal laws, including for instance, the failure to plant a tree,[30] would not only be unrealistic but would so strain our resources as to result in a breakdown of the entire system. It would be impractical, for example, to arrest, charge and try all the thousands of demonstrators against one cause or another, particularly, idealistic students, professionals and members of the clergy. Penologic objectives of deterrence and reformation could just as well be achieved by a conditional suspension of prosecution. When former Senator Tañada and others were released from detention and not charged for participating in a demonstration without permit, reportedly on orders of President Marcos, the concept of diversion was only being operationalized. When former Beatle Star Paul McCartney was deported, rather than prosecuted, in Japan, for illegal possession of marihuana, another diversion was effected.

Diversion would give to the fiscal in appropriate cases, a dispositional alternative to the filing of a charge. Conceptually, it is similar to probation as a sentencing alternative to imprisonment. Diversion would merely carry the idea of probation earlier in the criminal process. Thus, in one case,[31] some bored high school students were arrested for playing *cara y cruz* with some nominal bets. Technically, they are just as guilty of gambling as professional syndicated gamblers A perceptive fiscal, however, dropped the gambling charge against these youthful offenders with a stern warning that repetition of the same offense will surely entail prosecution and on condition that they return to school. This condition was readily agreed to by grateful parents who were just elated by such assistance to save their children from the pitfalls of juvenile delinquency to which they were headed.

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[29] Rule 110.1.

[30] Pres. Decree No. 953 (1976).

[31] This is one of the cases I cited in the research study I mentioned in *supra*, note 15.

Under the Child and Youth Welfare Code,[32] these young offenders would have been entitled to suspension of proceedings. But they would have had to undergo the whole traumatic process of detention, bail, trial and adjudication of guilt before eventually being given the benefit of this wise sentencing alternative. The perceptive fiscal had only given them that second chance at an earlier stage in the criminal process.

When I first broached this idea of diversion, the initial reaction of some private practitioners was primarily one of skepticism and cynicism arising from what is essentially a distrust of prosecutorial integrity. This attitude is reflected in the pejorative appellation given to a fiscal who secures too many dismissals as a "FIX-CAL". The implication is that he has refrained from prosecuting an otherwise meritorious case for an unworthy consideration that is primarily beneficial to himself. This cynical attitude against government officials is similar to that against *Barangay* Captains that we encountered in seminars on the *Katarungang Pambarangay* Law. Barangay Captains were reviled as being "no-read-no write" officials. But the fact that abusive practices have been engaged in by some fiscals, is not a justifiable cause for condemning the whole prosecutorial arm of the government. This would be like outlawing the bolo, a most useful tool, simply because it has also been used for killing. There are many dedicated fiscals whose integrity is beyond reproach. Besides, fiscals provide a major source for appointments to the judiciary. And certainly, there is yet no general condemnation of judges, even those who were once fiscals. The important thing is not that danger of abuse might and often do arise. What is crucial is that procedural safeguards could be devised that would effectively reduce or even eliminate such abuses. It is therefore essential to do away with this emotional block to meaningful reform. It is time to give fiscals the opportunity to prove as trustworthy as judges in administering criminal justice in a manner that will accomplish its penologic objectives and not from a desire for personal gain.

Testing reform proposals by flexible rules.

All hypotheses must be tested against their assumptions. The concept of diversion is that it will help unclog court dockets without detracting from penologic objectives. As with all untried reforms, it is best that the experiment be made through flexible rules that could easily be modified as the need may arise. Circulars by the Minister of Justice could provide the ideal tool to try out the new role proposed for the fiscals.

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[32] Pres. Decree No. 603 (1974), as amended.

Offenses appropriate for diversion

The circulars would enumerate what type of offenses or factual situations in the commission of the crime, are considered appropriate for diversion. Among these cases may be included, vehicular accidents which, by reason of the compulsory insurance coverage now required by law, are presently seldom prosecuted to a final decision, thereby unnecessarily clogging court dockets. Estafa charges[33] which, in many cases are no more than attempts to collect a civil obligation, unjustifiably perverting the proper use of criminal sanctions, would also qualify for diversion. Factual situations could include offenses committed by a close relative. This includes marital quarrels and family disputes. Experience shows that prosecution for these types of offenses are frequently washed out by reconciliation, forgiveness or pity after the passage of time. Offenses committed by an in-school youth with no prior police record, may also be considered.

Conditions for suspension of prosecution

The specific conditions under which prosecution will be suspended must be clearly spelled out. A condition proposed by the American Law Institute is that the accused must "not engage in specific activities and conduct related to the conduct underlying the charge against him".[34] An example of this condition is to require the accused to abstain from drinking alcohol or other intoxicating beverages where inebriation was a pre-disposing factor that led to the commission of the crime. Another condition is to require the defendant to participate in a supervised rehabilitation program which may include treatment, counselling, training and education. This may be imposed on drug addicts or offenders with psychological problems.

In one rather bizarre case,[35] a seventeen year old boy broke into the bedroom of an attractive lady teacher in the middle of the night while everyone was asleep. Awakened somehow, the young woman found the boy kneeling beside her bed fondling himself. Upon being aware that he was discovered, the boy then fled. Nothing had been stolen and no one was injured. Upon these facts, the decision was made to suspend prosecution for violation of domicile conditioned upon the youth undergoing psychiatric treatment. He was found to be suffering from emotional disturbance with sexual fantasies.

Pre-charge diversion is an innovative approach to the administration of criminal justice. It has been found in the United States to be an effective method of dealing with tractable offenders and

[33] REV. PENAL CODE, art. 315.
[34] AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1972).
[35] *Op. cit.*, note 15.

of responding to the grave problem of court docket congestion. This new role for the fiscal is certainly worth experimenting with.

C. THE COURTS

The essential role of the trial court judge is to adjudicate the guilt of the defendant upon evidence that meets societal standards of sufficiency both as to quantity as well as quality. The adjudicative role is not unlike that of a historian seeking to reconstruct a past event through testimonial and documentary evidence. In performing this role, it will be beneficial for the judge to try to keep it separate from his sentencing functions.[36] Analysis will show that the nature of the two processes contrasts sharply with each other.

Adjudication is an "act-oriented" process while sentencing is a "person-oriented" process. Thus, in a prosecution for murder, the only focus of inquiry is whether or not the defendant did the specific act of violence, that is, the act of stabbing, shooting, poisoning or whatever, that resulted in the untimely death of the victim. It is irrelevant at this stage for the judge to consider that the assailant may be a prominent and respected member of the community or that the victim is a jobless derelict or ne'er-do-well who is a liability to both his family and the community.

The irrelevance of the personal characteristics of parties relates to the immateriality of such considerations to the attainment of the object of penal law — to punish crimes and thereby deter their commission and make society secure. Deterrence must be made to operate upon all persons alike.

Significance of blindfolded lady symbolizing justice

It is to dramatize the irrelevance of such personal characteristics to the adjudicative stage of trials that the lady symbol of justice is appropriately blindfolded. The judge must not allow such personal characteristics, social status or differential stations in life to unjustifiably tilt the balance of the scales of equal justice for all. In the slogan of the New Society, *"Walang mahirap o mayaman. Walang malakas o mahina. Sa harap ng batas, ang kapwa mo at ikaw, pantay pantay."* To underscore the importance of ignoring personalities in adjudication, judges must ever be reminded of that special oath, not required of other officials, that they will "administer justice without respect to person and do equal right to the poor and the rich."[37]

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[36] A bifurcated trial and sentencing is among the reforms I had earlier proposed. *Op. cit.*, note 24.

[37] Rep. Act 296 (1948), sec. 3, otherwise known as the Revised Judiciary Act.

The act-orientation of the adjudicative process is of such importance that it has been elevated to a constitutional provision. Thus, it is provided that no valid judgment shall be made unless it "shall clearly and distinctly state the facts . . . on which it is based."[38]

After adjudicating the defendant guilty of the crime charged, the criminal process moves on to the sentencing stage.[39] With the transition, the judge must likewise shift his focus from the legally defined *act* that was committed to the *person* who committed it. In the imposition of the proper sentence, the lady justice must as it were, remove the blindfold from her eyes to look at the personal character of the offender. This must be so in order that punishment for crimes may be individualized to suit the particular personality of the offender. The judge must make a deliberate choice from among different sentencing alternatives, now available to him, that is, imprisonment, probation or suspension, in light of the peculiar personality of each offender.

Exclusion of prejudicial evidence

To ensure the accuracy of the fact-finding process so essential to adjudication, procedural rules have been formulated to guard against the insidious entry of prejudicial evidence. Prejudicial evidence has been defined as that class of evidence that has little or no rationale or logical weight but because of its emotional impact, may improperly persuade the judge to decide the case adversely to the person against whom the prejudicial evidence is offered.[40]

Evidence of similar acts[41] and evidence of the bad moral character of the accused[42] belong to the class of prejudicial evidence that the prosecution is not initially permitted to prove. Thus, the fact that the defendant is a drunk, has loose morals or hangs around with pimps and prostitutes, cannot be proved by the prosecution. What is sought to be avoided by this exclusionary rule is the danger that the defendant may be convicted, not because he actually *did* the crime charged but because he is the kind of person that the judge thinks *might* do it.

Paradoxically, however, we continue to allow prejudicial evidence through the procedural joinder of civil and criminal actions.[43] The prejudicial effect of a grieving widow in black mourning or a

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[38] CONST., art. X, sec. 9.

[39] Rule 120.1, defining judgment, recognizes the distinct character of sentencing which comes only after an adjudication of guilt.

[40] ROTHSTEIN, EVIDENCE IN A NUTSHELL (1970).

[41] Rule 130.48.

[42] Rule 130.46.

[43] Rule 111. The separation of the civil action from the criminal is also among the reforms I had advocated, *op. cit.*, note 24.

grief stricken child testifying on hospital and funeral expenses incurred for the deceased victim, the support and care he gave to his family, the bright prospects for professional advancement, and all such evidence tugging at the emotions, certainly cannot be denied. Understandably, the sympathy for the bereaved family and the corresponding outrage at a senseless killing, may move the judge to convict in cases precisely where he should not.

To avert this real danger of probable miscarriage of justice, the solution I would like to propose is both simple and practical: formulate a procedural rule to defer presentation of evidence relating to civil damages until after and only upon an adjudication of guilt. Not only will this promote accuracy of the fact finding process; it will also eliminate the wasteful expenditure of judicial time spent in hearing evidence of civil damages in cases where acquittal is the eventual verdict.

It must, however, be not only the accuracy of the fact-finding process that the judge should be concerned with. For that is only one pan in the scales of justice — an aspect of efficiency in accomplishing a given task.

If efficiency and effectivity in deterring crimes were the only concern, that objective could just as well be reached by indiscriminately punishing all criminal suspects without regard to their actual guilt. The terror of punishment, upon which the objective of deterrence is founded, is even more effectively implanted by punishing on mere suspicion alone rather than upon an accurate determination of guilt.[44] But that is not the standard which our country, with its democratic values and ideals, has elected to base our system of administering justice upon. Under our values, not only must guilt of the accused be proved beyond reasonable doubt.[45] It must be proved only by evidence secured by means consistent with standards of fairness, decency and propriety. These standards are constitutionally guaranteed through the Bill of Rights — the right to due process of law, right against unreasonable searches and seizures, privacy of communication, privilege against self-incrimination, right to counsel and to fair trial, and many other rights lawyers are so familiar with. These rights provide the countervailing weight that gives balance to the scale of justice. They also provide the most significant distinction between a police state and a democratic country.

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[44] The concept of deterrence is explored in Tadiar, *A Philosophy of a Penal Code*, 52 PHIL. L.J. 165 (1977).

[45] Rule 133.2.

Until recently, we sought to compel respect for these rights through criminal and civil sanctions that victims may take against abusive policemen. Experience has shown, however, that our reliance has been misplaced. These remedies have proved to be ineffective. Coerced confessions and other illegally seized evidence, which the *Moncado* court held to be admissible, continued to be utilized to secure conviction of an accused.

In 1967, *Stonehill* adopted the exclusionary rule that bars the use of illegally seized evidence. In 1973, our new constitution expanded the rule to exclude uncounselled confessions. And this is where some difficulty or conflict for the judge may arise.

The dilemma that a judge faces is illustrated in the landmark case of *Miranda v. Arizona.* You will recall that Miranda was an indigent Mexican with pronounced sexual fantasies who was charged with kidnapping and rape. He was interrogated by the police for no more than two hours. There was no hint that he was subjected to any form of physical torture during that relatively short period. The only infirmity to his written confession was the admitted fact that he was not advised of his constitutional rights to remain silent and to counsel. There was likewise no question that Miranda was guilty of the crime charged.[46] But since the only evidence against him was his own tainted confession, the effect of the exclusion was to set him free.

If the judge sees his role as relating only to the accurate determination of guilt, he will most certainly find it extremely difficult, if not impossible, to set free a guilty defendant as a consequence or sanction for the violation of his constitutional rights.

It will be well for a judge facing such a dillemma to recall the ominous words of Mr. Justice Clark, in the case of *Mapp v. Ohio*[47] that

> Nothing can destroy a govermnent more quickly than its failure to observe it own laws; or worse, its disregard of the charter of its own existence.

And the words of Mr. Justice Brandeis in the case of *Olmstead,*[48]

> The government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

[46] Miranda was subsequently re-tried and convicted.
[47] 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1181 (1961).
[48] Olmstead v. U.S., 277 U.S. 438 (1928). Dissenting opinion.

Recalling these quotations, perhaps will make the judge realize the importance of his role requiring him to balance his function of punishing the guilty with his equally important other function of compelling respect for the constitutionally guaranteed human rights of an accused.

CONCLUSION

In conclusion, I wish to stress the importance of frequently re-examining the roles that, officially or personally, we now perform so that we may determine their continued relevance in light of ever-changing conditions and relationship.

I would like to close by paraphrasing John Donne's immortal words "No man is an island entire of itself; every man is part of the main."

> The violation of any man's human rights diminishes me because I am involved in mankind. Therefore, do not send to know for whom the bell tolls; it tolls also for thee.