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## CRIMINAL LAW—AN AGENCY FOR SOCIAL CONTROL

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THE present economic and political upheaval has produced one outstanding, dramatic conflict—between “rugged individualism” on the one hand and “planned economy” on the other. The issue involved is not a new one. Were it phrased in terms of “the rights of man” versus “the tyranny of kings,” its identity would at once be evident. Of course the present conflict has important minor variations from those which have gone before; it has more world-spread implications, the many contributing causes are more clearly seen and, consequently, less satisfying fighting or political issues can be drawn.

Those who by reason of political strategy or other circumstance have been pressed into positions of leadership are feverishly overhauling old devices for social control and attempting to devise new ones. The purpose of this article is to examine, as realistically as possible, one of the most powerful of these devices—the criminal law—in order to reveal its possibilities and its limitations as an agency for social control.

It is not necessary, for this purpose, to classify criminal law among the various other forms of social control, such as formal education, judicial settlement of civil disputes, and administrative regulation of business; nor is it necessary to compare it with the more informal devices employed by society such as are involved in home and community life, the work of the churches, the newspapers, the motion pictures, the civic clubs and numerous other similar agencies. But it is important to realize that it is one of a large number; that it must be adjusted to a loosely organized society which is only partially aware

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of existing conditions and of the very agencies which are being used to control or change those conditions. In fact, it is difficult to assume knowledge or awareness upon the part of society, because society is such a conglomerate of varying intelligences that any one of a wide range of assumptions would be accurate as to particular parts of it.

Under a tyrannical form of government, whether it be that of monarch, fascist dictator, or a "dictatorship of the proletariat," criminal law is easily understood as a weapon which the tyrant uses for domestic control, in much the same manner as he uses the army for control of dependencies or tributaries. Under such circumstances the individual does not attempt to identify himself with the government, except as a subject more or less unwillingly paying tribute in taxes, and living a precarious life, full of humiliation and distress. Under a benevolent monarchy, the king's subjects identify themselves with him personally, and regard the criminal law as his long paternal arm which reaches out to protect or punish as the need may be.

Criminal law in a democracy is a much more difficult concept. By some it is personified in terms of the policeman, who is familiarly known by many southern negroes as "The Law." Many others clearly reveal by their actions and speech that it means much the same to them, particularly when they have violated some penal prohibition or<sup>1</sup> when they are prevented thereby from doing something. The difficulty lies, particularly, in the concept of a dual relationship between the individual and his government—the individual as a part of government, helping to enforce its mandates and coercing other unwilling individuals into compliance; and the individual opposed to the state, either as a criminal and hence directly at war with it, or as one who, wishing to carry out a private purpose, is threatened by the coercion of government. The two rôles are not played with equal enthusiasm. Both the natural inclination of people and the natural rights philosophy which, prevailing at the time our constitutions and common law were in process of formation, was written bodily therein, weight the balance strongly against society. A legal philosophy which asserts that it is better for nine guilty

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1. ". . . in *People v. Lukowsky*, 159 N. Y. S. 599 calling an arresting officer a vile name was held not to constitute a breach of the peace, and even if others are present it is a matter of common knowledge that they would regard a brisk verbal retaliation on a traffic officer with the joy which comes from the vicarious gratification of a long suppressed personal desire. . . . The man who yields his liberties and waives his rights in one way will in another, and it needs but insolent enforcement of the mass of petty regulations which now prevail to destroy what remains of our personal liberties." (1930) 34 LAW NOTES 101.

men to escape than that one innocent one be punished, gives little sanction to criminal law.

The theory of criminal law which is written in the law books—offenses against the state as distinguished from injuries to individuals—has never been well understood, and is rather a reasoned conclusion than a fundamental guiding factor. Much more primitive and elemental were the factors which dominated its development. So far as the great mass of individuals were concerned, the most important function of the criminal law was the provision of an agency for satisfying the desire for revenge, as a substitute for self-help and blood-feuds. In its earlier forms, even after it had become clearly a government institution, the use of outlawry, the hue and cry, the emphasis upon immediate outcry and fresh pursuit, indicate the close relationship which still existed to tribal retaliation and even to the cry of the pack of primitive man and of animals. This was something which the people could understand and to which they were willing to give support.

We like to pride ourselves on having left far behind the cruder manifestations of human passion, including that of vengeance. Some of our sociologists even assure us that although the criminal law once served as an agency for securing "publicly regulated private vengeance," this function has now disappeared, except perhaps in a small measure where the death penalty is used in murder cases.<sup>2</sup> This is a splendid example of the truth of the maxim, the wish is father to the thought; it would be difficult to imagine a more unrealistic analysis of the facts.<sup>3</sup> The

2. Sellin, *Common Sense and the Death Penalty* (1932) 12 *THE PRISON JOURNAL* 10.

3. Jeremy Bentham, Sir James Stephen, and Oliver Wendell Holmes have recognized the importance of the vengeance motive in the criminal law and the propriety of "publicly regulated private vengeance" as a substitute for mob action and lynch law. BENTHAM, *THEORY OF LEGISLATION* (Hildreth's tr. 1864) Pt. 2, c. 16, 309; 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883) 478: "In cases which outrage the moral feelings of the community to a great degree, the feeling of indignation and desire for vengeance which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction"; HOLMES, *THE COMMON LAW* (1881) 39 *et seq.*

William McDougall, the great psychologist, has stated the proposition as succinctly as anyone: "We have seen how this instinct (pugnacious) is operative in the emotion of revenge and in moral indignation. These two emotions have played leading parts in the growth and maintenance of every system of criminal law and every code of punishment; for, however widely authors may differ as to the spirit in which punishment should be administered, there can be no doubt that it was originally retributive, and that it still retains something of this character even in the most highly civilized societies. The administration of criminal law is then the organized and regulated expression of the anger of society, modified and softened in various degrees by the desire that punishment may reform the wrongdoer and deter others from similar actions." MCDUGALL, *SOCIAL PSYCHOLOGY* (1918) 299.

fact is that the revenge motive is the *most powerful* one in the prosecution of criminal cases. That person who, having been injured by a criminal, is nevertheless only mildly concerned because the criminal has repaid him for the injury done, or because an insurance company has taken care of the damage, or who fears the criminal because of threats of death or injury, usually does not wish to aid in the prosecution of a criminal case. A prosecutor charged with the preparation and trial of such a case finds himself in a hopeless situation because the injured person is unwilling or afraid to go forward with him in giving testimony, and in helping to "make the case" which is necessary to convince the jury, beyond a reasonable doubt, and thus to secure conviction. On the other hand, the person who is burning with righteous indignation and is anxious to secure revenge, is quite ready and willing to go forward.

The revenge motive also plays an important part so far as the community is concerned. In granting or denying probation in particular cases it is necessary for trial judges to watch the temper of the community to determine the probability of success of probation. Trial judges well know that if the desire for revenge is running high in the community the granting of probation will not be well received, and not infrequently probation is denied in such cases, even though the judge and the probation officer are satisfied that the case is a proper one for affirmative action.<sup>4</sup> In a community in which the people are overwrought and excited concerning the commission of a crime, or a series of crimes, juries are apt to convict much more easily than in cases where the community is quiescent and disinterested.<sup>5</sup> Now if we add to such a community situation two additional factors, lynching is

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4. See Joseph U. Ulman, *The Trial Judge's Dilemma*, a chapter in GLUECK, *PROBATION AND CRIMINAL JUSTICE* (1933) 112 *et seq.*: "Every kind of citizen has an opinion and expresses it when an offender is sentenced. In spite of the trend of scientific thought away from the 'vengeance' basis for the determination of sentences, a large body of public opinion knows no other law . . . Finally, the judge must proceed cautiously lest he run counter to the community sense of justice. While he must not allow public or private demands for vindictive punishment to sway him toward undue severity, he must not, on the other hand, allow the advanced thought of science to sway him toward a degree of clemency that might shock the public conscience and bring the processes of the law into disrespect.' . . . If he will go cautiously, not too far in advance of his community's preconceptions and its prejudices, he may hope to direct its thought gradually into new lines and to create the soil for a new emotional reaction. Then 'it will be feasible to use the probation method in every case in which sound judgment indicates that it is the best method—best both for the protection of society and for the readjustment of the offender.'" The same is true of Parole. See CHADBOURN, *LYNCHING AND THE LAW* (1933) 13, 30.

5. This fact is so well known that it is made a proper basis for demanding a change of venue.

almost certain to result. One of these factors is a condition of flagrant inefficiency in law enforcement—"publicly regulated private vengeance"—and the other a great fear of the repetition of particularly heinous crimes such as the rape of women or children by members of other races and kidnapping and killing for failure to pay ransom. The recent great publicity given to crime news and the recent increase in organized crime of the kidnapping and racketeering type has produced hysteria in some communities quite out of normal proportions, and lynching has increased as a result.<sup>6</sup> It avails about as little to condemn such outbursts of elemental passion as to condemn the man-eating tendency of a tiger. Moreover, it avails little more to make lynching a crime. A community which sanctions a situation so barbaric will be quite ineffective in enforcing a law which prohibits it.<sup>7</sup>

An equally primitive and more mercenary factor which contributed to the development of the criminal law, and still motivates it in large measure, is the desire to use the power of government—in earlier times, the family or the tribe—to enforce payment of otherwise uncollectible debts or damages. The historians give us tables of amercements which were deemed appropriate for particular injuries in the days when the line was not clearly drawn between torts and crimes.<sup>8</sup> We are told that the distinguishing characteristic of a felony in early English law was the fact that it was a "bootless" or a non-compensable crime.<sup>9</sup> One explanation of the scale of punishments for different crimes, almost universally present before the development of the indeterminate sentence law, is to be found in the theory that society has taken the place of the individual in exacting certain compensation or retribution therefor, according to the extent of injury of each crime to society.<sup>10</sup>

The theory of modern criminal law is that an agreement to refrain from prosecuting a criminal for any valuable consideration, even the return of stolen goods for instance, is itself a crime, except in minor instances as where upon the settlement of a civil cause of action arising out of the same transaction, the court may order a dismissal of the

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6. Although this has been popularly supposed to be a phenomenon peculiar to the Southern States, the daily press recently carried stories contemporaneously reporting lynchings in Maryland, Missouri and California, three states widely separated both geographically and in racial and cultural characteristics. Moreover, the governor of one of the three states boldly announced his approval of the episode and was warmly applauded therefor by many people, although the second-thought comment seemed to be largely condemnatory.

7. CHADBOURN, *loc. cit. supra* note 4, and, same title, in (1934) 20 A. B. A. J. 71.

8. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1899) 456 *et seq.*; see also 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1923) 44 *et seq.*

9. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 8, at 464.

10. VON IHERING, LAW AS A MEANS TO AN END (Husik's tr. 1913) 366.

criminal action, or in some cases of adultery and seduction where prosecution may be made contingent upon the initiative of the aggrieved spouse or victim. Nevertheless, the old compensatory motive still prevails overwhelmingly.<sup>11</sup> The statistics presented by crime surveys indicate that a large percentage of cases are privately settled, or with the assistance of police, prosecutors and inferior criminal court judges. Prosecuting officials frequently protest that their offices are being converted into mere collection agencies. One of the most notorious abuses of the criminal law in this respect is the practice of usurious money lenders—popularly known as “loan sharks”—who, though knowing that a prospective borrower has no money in the bank, customarily require him to sign a check for the amount borrowed so that he may be forced to repay the loan by threat of criminal prosecution.

Another powerful motivating force which conditions the enforcement of criminal law is the emotion of sympathy, the feeling of compassion for the underdog. When the relentless forces of government have swung into pursuit, and the first heat of community anger has passed, there is a tendency for the community mind to identify itself with the fugitive and to resent the oppression and the unequal odds. It is a crime to conceal information concerning the commission of a felony, but what member of the lay public knows the meaning of misprision of felony? It is a crime to harbor or aid a known felon in order to prevent his prosecution or conviction, but how often do we hear of prosecutions of accessories after the fact? One of the most devitalizing elements in criminal law enforcement is the public lack of interest in prosecuting stale cases. Defense counsel are well aware of this fact and use it skillfully. Prosecutors are aware of it and customarily abandon large numbers of cases which for one reason or another have failed of speedy determination.

The very range and depth of the human emotions which go into the making and enforcement of criminal law have a tendency to permeate it with variations. The differences which exist between the criminal jurisprudence of particular states is of course well known, and the fact of their existence contributes largely to a disorganized and uneven system. What is not so well known is the great differences existing within each state. Although the law as it appears in the books may be the same for the whole state, it varies from locality to locality according to the intelligence, the religious background and the social conditions of each community. These differences are not expressed in the opinions of courts or written in the books but they are expressed in the

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11. See generally, Miller, *Compromise of Criminal Cases* (1927) 1 So. CALIF. LAW REV. 1.

verdicts of juries, in the commitments of magistrates and in the way in which discretion is exercised by prosecuting officers, police and judges. Minor differences necessarily appear in local ordinances and in the laws of the localities adopted pursuant to the terms of enabling acts, such as the so-called "local-option laws." But even as to the major felonies, reference to reports of Attorneys General and Secretaries of State will reveal continuing differences from county to county in the nature of offenses charged and in their percentage disposition.<sup>12</sup>

Not only does the criminal law vary from locality to locality, but also from generation to generation as the ideas and concepts of the people change. This is easily seen in the complete disappearance of crimes against the church and against religion. Two hundred years ago such crimes as idolatry, witchcraft, and blasphemy headed the list of capital offenses, biblical authority being cited in support thereof.<sup>13</sup> Today such crimes are solely a matter of historical interest. Another law still existing but rarely used so far as prosecution is concerned, is that of criminal libel. We are informed that a century ago, and more, this was a crime frequently prosecuted. We know that at that time, also, duelling prevailed generally. Both of these were devices for the protection of reputation and honor. Whether we no longer value honor so highly, or whether we have found other ways of protecting it, it is not necessary for us to discuss. The point is that the offense of criminal libel is one rarely prosecuted today; and duelling in its turn came to be defined as a crime and then passed out of common knowledge, because the custom of duelling itself had ceased. Similarly, concepts upon which crimes are based, or which go into their definition, change with the changing intelligence of the people. Illustrative of this is the meaning ascribed to the term "moral turpitude." As stated by Judge Learned Hand in a recent case:<sup>14</sup>

"We do not regard every violation of a prohibition law as a crime involving moral turpitude . . . All crimes violate some law; all deliberate crimes involve the intent to do so. Congress could not have meant to make the willfulness of the act a test; it added as a condition that it must itself be shamefully immoral. There are probably many persons in the United States who would so regard either the possession or sale of liquor; but *the question is whether it is so by common conscience, a nebulous matter at best.* While we must not,

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12. REP. ATTY. GEN. CAL. (1914-1916) 78-79; *id.* (1916-18) 80-81; *id.* (1918-20) 44-45; *id.* (1920-22) 70-72; *id.* (1928-30) 80-81; *id.* (1930-32) 92-93; REP. ATTY. GEN. MINN. 32) 38 *et seq.* Cf. REP. ATTY. GEN. MICH. (1929-30) 934 *et seq.* with *id.* (1931-32) 934 *et seq.*

13. LAW AND LIBERTIES OF MASSACHUSETTS (1929 Reprint) 5.

14. United States v. Day, 34 F. (2d) 920, 921 (C. C. A. 2d, 1929) (*italics added*).

indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to *what people generally feel*. We cannot say that among the *commonly accepted mores* the sale or possession of liquor as yet occupies so grave a place; nor can we close our eyes to the fact that large numbers of persons otherwise reputable, do not think it so, rightly or wrongly."

These elements of variation make the use of criminal law as an agency for social control difficult, largely because of the failure of those who attempt to use it to make proper allowance therefor. If one is to be a good marksman he must learn, not merely the adjustment of his gun, but also the proper allowances to make for variations of wind and weather as well as for variable elements in his own physical and mental makeup. The same principles hold good in the use of the elaborate and complicated engine of social control with which we are concerned.

But even as regards certain important elements of constancy in criminal law making and enforcement, our social engineers have been decidedly superficial and naive. In fact some of the most important manifestations have not even been generally recognized as elements of constancy, despite the fact that as to some of them this characteristic has prevailed in all areas, urban and rural alike, and quite regardless of racial or geographical differences. This is strikingly illustrated in that group of offenses popularly referred to as "racketeering." Contrary to the impression which might be gained from current newspaper and magazine writings, racketeering is undoubtedly as old as the intelligence of man.<sup>15</sup> Of course it has taken different forms at different times, but always it has been a trick or device by which another person has been defrauded or subjected to extortion. The expression, "a King's ransom," testifies to the antiquity of kidnapping for ransom; and the crime of conspiracy was in origin a device to prevent the obtaining of false accusations by grand juries, apparently a lucrative form of blackmail in the early days of the common law.<sup>16</sup>

It is amusing to see reported in the press from time to time, statements to the effect that a certain congressional investigating committee promises that racketeering will be soon eliminated. Whether such promises are ever made or not, they are utterly impossible of fulfillment. Racketeering is inseparable from the democratic governmental forms to which we are accustomed and from our individualistic concepts of life. The line between legitimate business enterprise and racketeering is impossible to draw in advance. Each energetic entrepreneur must try out

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15. See, e.g., CODE OF HAMMURABI (Harper 2d ed.) §§ 2, 4, 14.

16. Sayre, *Criminal Conspiracy* (1921) 35 HARV. L. REV. 393 *et seq.*



his scheme. If it wins approval then he will be a captain of industry and a benefactor of society; if his method be popularly disapproved then he will be a racketeer and either he will come under the condemnation of already existing laws or new ones will be passed to restrain others who would imitate him. This has been the history of the past. Some of the large fortunes of America were accumulated by methods now regarded as criminal. Moreover, even as to approved methods of business, it is difficult to draw the line in practice. So for example, a labor union, once regarded as a racket in itself,<sup>17</sup> is now regarded as a legal entity. If a group of individuals come into control of the union and use it to apply pressure to its members and others in the community for selfish purposes, then it becomes a racket. The well known producers' cooperatives and mutual protective associations have gone through similar experiences. In communities where a majority of the people believe that a producer's cooperative association is a necessary community venture, all manner of pressure methods used to bring in recalcitrant producers are regarded as entirely lawful. On the other hand, where the association represents only a small group in the community or where the motives of the organizers are questioned, the use of such pressures is regarded as racketeering.

Closer to official circles interesting examples are to be found which illustrate the difficulty of drawing the line between proper and improper official actions. Chief Justice Taft once thought the occasion sufficiently important to issue a warning to United States district attorneys against the abusive use of conspiracy indictments.<sup>18</sup> In New York during recent

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17. *Id.* at 406 *et seq.*, and cases cited; and see Nelles, *Summary Power to Punish for Contempt* (1931) 31 COL. L. REV. 956.

18. Under date of June 16, 1925, published in the advance sheets of the United States Supreme Court Reports, Chief Justice William H. Taft made the following "Recommendations to the District Judges": "A. We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose,—or at least with the effect,—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have the substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further, the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.

"We think it proper for us to bring this matter to the attention of the District Judges, with the request that they present it to the District Attorneys, and for us to bring it also

years, the activities of some municipal judges, police officials and enforcement league officials in "framing" women on disorderly conduct charges have constituted major scandals. Similar conduct upon the part of the lower type of justices of the peace and their constables, especially in states where such officers are still paid on the fee basis, is notoriously common. Private patrol agencies, working under city licenses and with operatives sometimes deputized as city officers, often use a method of intimidation which consists of telling fearful householders of the crimes which are being committed each night, in order to persuade them to contribute to the revenues of the agencies. Foreign language speaking attorneys and interpreters occasionally prey upon the ignorance of their countrymen, pretending that protection from judges and police must be bought. It is even quite probable that some of those persons who solicit funds for defense purposes in celebrated criminal cases are themselves racketeers. Certainly this has been demonstrated to be true in many other forms of solicitation campaigns.

It is obvious from such a consideration of the facts that racketeering is deeply rooted in our governmental and business structure. From generation to generation, new devices are tried out; slowly from time to time new crimes are defined to check some of these devices. But so long as the power of organized government is insufficient to control the activities of its restless people, or even the illegitimate activities of its own officials, we may be sure that racketeering will continue to thrive.

The popular misapprehension of facts concerning racketeering is well matched by that regarding another equally universal and important factor in the development of criminal law and its administration. The common law exempted children of tender age from all criminal liability. Children over fourteen were grouped with adults and those just under fourteen could be found liable upon proof of mental capacity. This rule of common law is still stated in the texts and is regarded as law in all jurisdictions; even though, in practically every one of them, there has been superimposed upon the common law what is known as the juvenile court law and a theory of juvenile delinquency which, where operative, renders the common-law rule practically obsolete.<sup>19</sup> Some of

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to the attention of the Attorney General, with the suggestion that he call it to the attention of the District Attorneys, as in his judgment may be proper, and all to the end that this form of indictment be hereafter not adopted hastily but only after a careful conclusion that the public interest so requires, and to the end that transformations of a misdemeanor into a felony should not be thus accomplished unless the propriety thereof clearly appears."

19. *Hills v. Pierce*, 113 Ore. 386, 231 Pac. 652 (1924); *Marlow v. Commonwealth*, 142 Ky. 106, 133 S. W. 1137 (1911); *Ex parte Chartrand*, 107 Wash. 560, 182 Pac. 610 (1919);

the older lawyers are apparently quite unaware of this développement, as is evidenced by the fact that some criminal court judges customarily try and sentence juveniles in disregard of the law; and lawyers whose practice never brings them into contact with such matters, occasionally speak of the juvenile court as a foolish proposal of foolish people. However, many others have caught the distinction. In some of the reports of crime commissions recently issued we see solemn findings to the effect that every adult criminal has a history of juvenile delinquency and the way to solve the crime problem is to eliminate such delinquency. While this may speed the development of juvenile courts and an intelligent study of child problems, all the juvenile courts in the world will not eliminate juvenile delinquency because it is nothing more than normal child behavior. Every child must make his individual adjustment to society, and in so doing must inevitably get into trouble, at least a few times. It is quite immaterial whether the delinquency is corrected in the home as a matter of family discipline, or by a probation officer and a juvenile judge. The important thing is that it be properly corrected and the experience made a useful one for the child's development. Bungling mistakes are made both by parents and by probation officers and too frequently a criminal, rather than a useful citizen, is produced. So far as the discovery that every adult criminal has a record of juvenile delinquency is concerned, that is of little help because, as a matter of fact, every adult has a history of juvenile delinquency, whether or not it be written up in the records of police departments or juvenile courts. Every successful adult owes his success in part to the lessons which he learned from the delinquencies of his youth, and the probability is that the more resourceful, aggressive, and imaginative he is in his adult life, the more delinquent he was in his youth. Now as a result of this analysis we discover the impossibility of "eliminating" juvenile delinquency, the futility of much of our present repressive criminal law and the necessity for vastly improved educational facilities in order that we may make possible the discovery of normal interests in youth and the training of youth to develop capacities for legitimate expression of those interests. This is a devastating blow to the habit-pattern thinkers and the mass-production educators. Of course the advocates of *peine forte et dure*—"good hard punishment"—as a cure-all for human depravity, will merely ignore it and proceed as formerly.

As might well have been expected, under such conditions as those described in preceding paragraphs, much of the development of criminal

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Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892 (1913); Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

law has been highly fortuitous in character. This is well illustrated by the law of larceny. It is generally recognized now that the severe penalties and unfair procedures which characterized the criminal law during the seventeenth and eighteenth centuries produced upon the part of judges an antipathy against such severity which led them to follow devious paths and to adopt circuitous methods to avoid convictions. The elaborate distinctions and intricate requirements of the law of larceny were the result. Much of this elaborate structure still survives in spite of the long lapse of time since the causative conditions ceased to exist and in spite of legislative efforts to simplify it.

Many similar examples may be easily found. Suicide was punished by burial at the cross-roads, and without the religious ritual of the church. Such punishments went out of fashion and with them went the crime itself. Felonies were distinguished from misdemeanors by the severe punishments inflicted upon felons—death, forfeiture and attainder. These punishments were prohibited by our constitutions and we have been floundering ever since in our efforts to determine just what the difference is or should be between felonies and misdemeanors.<sup>20</sup> An examination of state penal codes will reveal amazing confusion in the designation and punishment of particular offenses.<sup>21</sup>

Of course the process of the common law is frankly one of blundering along from case to case and hoping gradually to achieve certainty. As a consequence and perhaps as a matter of necessity, such concepts as criminal attempts, moral turpitude, acts mala in se, intent, insanity, corporate liability for crime and others have grown slowly and somewhat inadequately, swayed this way and that by such elements of variability and constancy as heretofore described. Generally speaking, the pressure of long felt needs has been necessary to overcome the lethargy of prejudice and habit. In order to achieve dignity and sanction for law so made and to secure respect and obedience from the people, the judges ascribed to it superhuman and mysterious attributes, described by such terms as "divine" and "natural." We may well suspect that the more realistic thinkers of those days must have realized just what they were doing and why. Those who followed them generally accepted this philosophy and asserted it without inquiry.

It would be a mistake, however, to assume that the development of criminal law has been entirely a matter of chance. That, which viewed from the longer perspective of today may seem a highly fortuitous de-

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20. *Considine v. United States*, 112 Fed. 342 (C. C. A. 6th, 1901).

21. Mikell, *The Proposed Criminal Code of Pennsylvania* (1923) 71 U. OF PA. L. REV. 99. See also the codes and statutes of the various states.

velopment, will probably appear under closer analysis to be made up of a series of planned episodes, each one of great significance to the participants; each one, perhaps, clashing with another and all interspersed with periods of inaction or blind following of inadequate precedents. We have seen that, even in its inception, criminal law was a drastic agency of social control, used in emergency situations to secure revenge or reimbursement and thus to punish or coerce dangerous or irresponsible members of society in situations where their conduct had aroused the community. Then as now society used such weapons as easily came to hand; and, then as now, it was not much troubled by inconsistencies of theory or practice which developed as by-products. The actor in human society has usually left it to the theorist to work out reasons. A splendid present-day example of the use of available weapons, without inquiring into the purpose for which they were originally planned, is found in the recent wide use which Congress has made of the commerce clause of the federal Constitution, as a basis for the enactment of criminal laws designed to prevent the manufacture and sale of impure foods and drugs, prostitution and adultery, automobile theft, kidnapping and other crimes which have been found difficult to control by state enforcement. No doubt the framers of the Constitution would have regarded this as a highly fortuitous development. But back of the enactment of each one of these statutes lies a history of social planning and engineering.

A forward step in the strategy of group planning and group action came early not only in the use of criminal law as a means of securing revenge and collecting debts or damages, but also in its use as an agency for controlling the activities of subordinate social groups and for protecting the interests and institutions of dominant groups.<sup>22</sup> Sir James Stephen professes to be unable to explain the fact that,

"The extraordinary lenity of the English criminal law towards the most atrocious acts of personal violence forms a remarkable contrast to its extraordinary severity with regard to offenses against property."<sup>23</sup>

In view of the devotion of the upper classes in England to all forms of martial pursuits, duelling and other forms of physical sports and combat,

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22. An interesting example is found in the definition of treason which appeared in the early codification. 25 Edw. III, st. 5, c. 2 (1352). The second of seven forms of treason was defined as consisting of "violating the king's consort, his eldest unmarried daughter, or the wife of his eldest son and heir." We are informed by an English commentator that "the object of this clause is to prevent the disputed successions which might result from doubts as to the legitimacy of the King's near descendants—a *very real evil in the fourteenth century.*" (italics added) (1912) 56 Sol. J. 771.

23. 3 STEPHEN, *op. cit. supra* note 3, at 109.

it is easy to suspect the working out of a dominant group interest in treating acts of personal violence with lenity, and it is equally easy to suspect the working out of a method of group control in heavily penalizing interference with rights in property. The long history of criminal law legislation designed to compel church attendance, punish dissenters and harass them in their efforts to realize their own religious ideals, is also an unmistakable example. Criminal laws to regulate the activities of negroes began to spring up shortly after their introduction into the colonies.<sup>24</sup> Initially it was supposed that the then well recognized power of masters to punish slaves and servants was sufficient, but as the number of negroes increased, laws were passed which punished them for running away, for resisting or striking a master, mistress or overseer, for wearing white linen, for holding meetings, for carrying arms, and for giving medicine—this to prevent the administering of poison to white people who believed that they “possessed the secret of various wonderful remedies.” Of course the slaves were subject also to prosecution for other crimes. In addition laws were passed prohibiting miscegenation and making it criminal for white persons to induce slaves to run away, to harbor runaways, to permit slaves to run at large or to hold meetings, or to teach negroes to read and write.<sup>25</sup> The law prohibiting the teaching of negroes was a North Carolina enactment designed both to curb the negroes and to harass the Quakers, who became the first to teach the negroes and who were regarded by the dominant social group as undesirable citizens.<sup>26</sup>

In the hands of a socially conscious or a race conscious group of people, the criminal law is in fact a weapon, or rather a whole arsenal of weapons, available, and, to a greater or less extent, used to effectuate the will of the dominant group in establishing and imposing standards of conduct. The rule of the criminal law, “ignorance of the law excuses no one” imposes upon the ignorant and inadequate members of society the will of the intelligent, adequate ones. It is quite immaterial that a person may be a member of a race or group which subscribes to quite different rules of conduct. It is quite immaterial that a particular person may be so circumstanced that he cannot even secure food, clothing or other necessities of life, without committing acts which violate such superimposed rules of conduct,<sup>27</sup> or that if such an emergency should

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24. See generally, SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* (1930) 292 *et seq.*

25. *Laws of North Carolina, from 1826 to 1833* (Session of 1930-31) c. 6, at 11.

26. See (1908) 7 *NORTH CAROLINA BOOKLET* 281 (*The Quakers of Perquimans*).

27. *BACON'S MAXIMS, 3 WORKS OF LORD BACON* (Murphy's ed. 1876) at 229: “Necessity is of three sorts, necessity of conservation of life, necessity of obedience, and necessity of the act of God, or a stranger. First, for conservation of life: if a man steal viands to satisfy his present hunger, this is no felony nor larceny.”

arise as would cause one of the members of the dominant group to commit such an act, it would be excused upon the ground of necessity. These submerged groups are not by any means exclusively race groups, although there are a number of such race groups in the United States. If the average intelligence level of the people of this country is only thirteen years as was claimed following the intelligence testing done during the World War, then obviously there must be a great many below that average. Generally speaking, these people have had no part whatever in the making of criminal laws, nor do they have any part in their administration. Nevertheless they are the ones for whom the laws are primarily made and who are designed to be controlled thereby. Only in a highly theoretical sense can it be said that they are equal with all other men before the law.

It is not the purpose of this article to consider the merits of the political proposition that all men are created free and equal or to discuss the literal implications of the proposition that all men are equal before the law. It is an interesting fact that the country which gave to the world a government alleged to be based upon such propositions was largely settled by people who left their home countries because they were not equals either in social or political opportunity. Many were exiled to this country as a means of punishment, working out social disciplines by the use of criminal law. It is an equally interesting fact that in spite of such allegation of allegiance to these political principles, the same criminal law has been taken over and elaborated in the various states and by the federal government. The same principle, "ignorance of law excuses no one" prevails not merely in principle but has been written extensively into penal statutes which require for guilt an act or omission alone, without any vestige of criminal intent. The same method of exile, from county to county and from state to state, still prevails as an agency of stupid expediency in the handling of many criminals.

However, it must not be understood that the criminal law is solely a device by which a dominant group controls the activities of an inferior one. Its theory, as it operates in the United States, is that it applies with equal vigor to all persons. Although it does not do so in many cases, nevertheless in others it does, sometimes in very dramatic and salutary fashion. Moreover, many of the crimes recently declared by our legislatures are of such character that it is impossible for members of the submerged groups to commit them. This is especially true of income tax evasions and of other regulations to control the use of great accumulations of wealth. It is interesting to note the recent emergence from the submerged groups of racketeers who by reason of their suc-

cess in the commission of crime, have subjected themselves to penalties provided under laws of the kind just mentioned.

There are so many group interests in this country that as to one particular problem one group may be submerged and another in control, and vice versa. A study of legislative activity in this field would reveal that many criminal laws have been passed to work out specific objectives on behalf of particular groups which, in many cases, may be very small. Thus laws have been passed making it a felony to "throw" a baseball game,<sup>28</sup> to steal ginseng,<sup>29</sup> to counterfeit the trademark of a manufacturer of quicksilver,<sup>30</sup> to destroy the property of power-producing and transmission companies<sup>31</sup> or to interfere with railroad tracks or railroad rolling stock,<sup>32</sup> and to steal chickens,<sup>33</sup> and making it a crime punishable by death to steal cattle or horses.<sup>34</sup> In these instances what has happened is that a particular group, interested in securing a particular end, has been able to make a sufficiently powerful showing before a particular legislature with the result that, there being no serious opposition, the legislature has granted the wish of the group and passed a law of the kind requested. In this case, the group which is favored cannot properly be called a controlling group in society and the submerged group or the controlled group may not be clearly marked at all. Moreover, much present-day criminal law legislation is of such character as to evidence the realization of a clear purpose of self-regulation or self-discipline, as for example the elaborate traffic codes which have been necessitated by the development of high-powered automobiles and the building of concrete pavements.

Nevertheless, although judged by their legislative criminal law making the American people might be supposed to be highly impressed with the desirability of using the criminal law extensively as a means of social control, paradoxically enough they resent its use wherever it seems to limit them individually. Thus it is common to hear such rationalizations as that traffic regulations are not really criminal laws, and that criminals are a distinct group of persons with distinguishing stigmata, quite unlike the rest of those members of society with whom the speaker chooses

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28. N. C. CODE (Michie, 1931) § 4499 E.<sup>3</sup>

29. *Id.* § 4258; OHIO GEN. CODE (Page, 1926) § 12478-(1).

30. CAL. PEN. CODE (Deering, 1931) § 366.

31. OHIO GEN. CODE (Page, 1926) § 12507.

32. TEX. REV. PEN. CODE (Vernon, 1928) art. 1335.

33. *Id.* art. 1442a.

34. See *United States v. Black*, Fed. Cas. No. 14,601 (C. C. D. C. 1819); *Wilcox v. State*, 50 Tenn. 110 (1871). See also, N. C. CODE (Michie, 1931) § 4506 (b) (felony to equip automobile with smoke screen device).



to identify himself. Most persons, while vehemently denying that they are criminals, will willingly or perhaps proudly tell of law violations which, in their opinions or those of their associates, "are not really crimes."

Resentment against the use of criminal law as a social pressure agency, especially in cases of political crime, is a natural heritage of many of the people who live in this country, coming as they or their ancestors did, from countries in which government meant, not a beneficent structure erected by the people, but an engine of oppression controlled by a few, because the new world was heralded as a refuge for the politically oppressed. Writing in 1882 concerning capital punishment Sir James Stephen said, "I think, for instance, that political offenses should in some cases be punished with death. People should be made to understand that to attack the existing state of society is equivalent to risking their own lives."<sup>35</sup> Of course no argument is necessary to prove that that doctrine has never had much support in the United States. Treason is, theoretically, the most serious offense in the whole category but it is so hedged about in the constitutional definition and so rarely prosecuted, that many persons have forgotten that there is such a crime. Only in war time is it possible to develop sufficient popular opposition to crimes against government to maintain successful prosecutions. The slightest legislative or administrative interference with the right of freedom of speech provokes tumultuous and prolonged opposition. Theoretically, this also is indeed a paradox, because offenses against government are the only true crimes; at least if there be any merit in the distinction between injuries to individuals and injuries to the state, as a basis for the distinction between torts and crimes. Practically, however, all the ages of political oppression have combined to develop in the minds of the people of this country intense resistance to such criminal laws; and we may expect continued opposition and resentment, together with ineffective enforcement, whenever an attempt is made to use the criminal law for the accomplishment of results which the great mass of individuals do not understand or do not approve.

On the other hand if the elemental factors—desire for revenge, desire for reimbursement, or desire for race or group dominance—are stirred and if the people see in a particular criminal law the means of achieving their desires, wholehearted support will be forthcoming. Such support will express itself in terms of favorable legislation, revenues for enforcement, the election of officers pledged to enforcement, witnesses eager to

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35. STEPHEN, *loc. cit. supra* note 3.

testify, juries eager to convict and judges—with due deliberation of course—ready to impose maximum sentences.

The fact of greatest immediate importance is that the criminal law is available for the use of any social group which can gain control and which chooses to use it.<sup>36</sup> Through the control of elected legislators and judges almost any desired results are possible. If those who sponsor a new social order for the redistribution of wealth and public ownership of property can secure such legislative and judicial control they can quickly and easily accomplish their objectives by means of taxation and criminal law. The present prevailing process of confiscation through high taxation can be indefinitely extended.<sup>37</sup> Failure to pay taxes can be punished by imposition of penalties and fines. For instance, just as Congress has recently made it a crime to possess gold, although it was formerly regarded as very commendable to save gold and use it as a medium of exchange, laws could be passed making it a crime to own or possess more than a thousand dollars worth of property, or to pay or to receive a salary of more than a thousand dollars a year. It would not be difficult to discover violations of such laws, because the records of all companies and individuals could be required to be kept open and regular inspections could be made to determine whether such laws were being violated.

Seriously speaking, we may well contemplate the possibilities of such a development as that which has been described. A recent shift in our political thinking seems to be carrying us toward a policy of the subordination of those who have been dominant and the glorification of those who have been the submerged members of the group. At the same time there is a constantly increasing complexity of industrial, political

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36. The Russian experiment is very suggestive, as an examination of the Soviet penal code will indicate. The *New York Times* for December 10, 1933, quotes from a decree signed and issued by President Kalinin under date of December 9th as follows: ". . . managers of trusts, directors of factories and members of administrative and technical personnel who are guilty of producing poor or incomplete products shall be held criminally responsible and be liable to legal repression [that is, imprisonment] for a period of not less than five years."

37. See Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 428 (U. S. 1819): "It is admitted that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." See U. S. Revenue Act of 1932, § 12, providing for surtaxes running as high as 55% and U. S. Revenue Act of 1926, § 301, providing for estate taxes running as high as 20%.

and social organization which will inevitably bring more and more conflicts between individuals. A continuation of present trends must necessarily result in further drastic procedures and perhaps even more serious limitations upon the rights, powers, privileges and immunities of individuals. In the accomplishment of this result, the criminal law provides the most effective possibilities. These possibilities are at present not by any means fully realized, but they will probably become more so in the near future both because of the activities of the present federal administration and because of the necessity for limiting the activities of the racketeers and gangsters. Once successfully used for such purposes, it will be a simple matter to turn the new devices to use for purposes of social control by the then dominant group, to create new crimes and provide summary procedures which will quickly achieve the desired results. These are perhaps the very results which our Constitution was designed to prevent. However, amendments may come which will depart from the concepts of the framers, and by the device of enlarging the membership of the Supreme Court, it is possible to secure interpretations of the Constitution equally effective as amendments.

In a situation of such importance the question naturally arises as to what is being done and what can be done to guide or direct the development of this important agency for social control. Criminal law is so large in its scope, affecting as it does all classes of people and regulating all forms of human emotional reactions, that unlike any other branch of the law it seems difficult to find a naturally selected professional group to construct and administer it. Contrary to popular belief, the legal profession is not in control of the situation nor is it willing to assume responsibility for it. In fact the attitude of the lawyer group is in large measure responsible for the lack of coordination which now exists.<sup>38</sup> The training and inclination of the lawyer usually divert him from a great interest in the social, economic and psychological background of criminal law. Rarely does a lawyer, well trained in criminal law and its administration, reach the halls of Congress or of any state legislature.<sup>39</sup> Those who do claim such preeminence are usually men who have achieved success by their skill in the political activities of prosecuting attorneys or the equally political activities of defense lawyers and trial judges. The

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38. Report of the Joint Committee on the Improvement of Criminal Justice, representing the American Law Institute, The Association of American Law Schools, and the American Bar Association (July 13, 1931). And see Miller, *Lawyers and the Administration of Criminal Justice* (1934) 20 A. B. A. J. 77.

39. It is interesting to note in this connection that the special Senatorial Committee which is in charge of investigating crime and sponsoring legislation relating thereto on behalf of the present Congress, is headed by Senator Copeland, a physician.

heart-breaking hodge-podge of special interest criminal law legislation which is flowing forth from these sources is easily explained in the light of present legislative incapacity.

Equally difficult is it for the courts to develop a criminal law which is adequate for present-day needs. Many trial lawyers, unimaginative and unaware of the real nature of the law, try their cases on the facts, largely concerned with the impression which they make upon the trial jury. Many trial judges, timid or overly concerned with *stare decisis* and harassed by the pressure of many cases, close the door of appeal, so far as they can, on new or disputed points. The very rules of law governing appeals in most states limit the opportunity, to say nothing of the inclination, of the representatives of the state to take appeals, and hence confine the activities of appellate courts even more to a consideration of procedural points or to bizarre instructions prepared by inexperienced draftsmen covering already well-settled points of law.<sup>40</sup>

Some lawyers as well as some laymen are studying the problem with real understanding, but most of them, lawyers and laymen alike, seem unable to see the forest because of the trees. This reveals itself in some as the result of an acceptance of ready-made ideas and prejudices and in others in the form of fierce resentments based upon a knowledge of some facts, without the benefit of balanced judgments which might come with wider knowledge and broader points of view. In the first group should be placed most lawyers and those who like them indulge in conventional habit-pattern thinking. These persons accept the criminal law as practically perfect, and, in response to public demands for improvement, carry on great campaigns for making more or less trivial changes in procedure or for passing more prohibitory laws and imposing severer punishments.

In the second group should be placed the sociologists, the psychiatrists, the free lance writers and certain of the teaching profession. The sociologists and psychiatrists, representing sciences which have grown up largely since many of the medievalisms of the criminal law were written into it, cannot but be depressed as a result of some of their contacts. On the other hand they have not learned the values inherent in the criminal law and, becoming impatient with parts of it, are apt to make absurd recommendations, such as the abolition of the whole structure of judicial determination.<sup>41</sup> The free-lance writers, who in their capacity of newspaper reporters, magazine article writers and biographical ghost-writers occasionally stumble onto such phenomena as the third degree, the police

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40. See, Miller, *Appeals by the State in Criminal Cases* (1927) 36 YALE L. J. 486.

41. HAYNES, *CRIMINOLOGY* (1930) 130.

court frame-up and the racketeer, are usually cynical and explosive in their denunciation of the personnel of criminal law administration and apparently convinced that political upheavals and wholesale removals of officials will cure all evils. While their discernment of the inadequacy of official personnel is revealing of correct analysis so far as it goes, their insistence upon upheavals and removals reveals a failure to understand that therein lies one of the greatest causes of inadequate personnel.

The academic group, composed of men who are supposed to speak with authority based upon dispassionate and objective investigation, frequently knows less about criminal law and its administration than the man in the street. These are the type who become vocal in connection with such cases as that of Mooney or Sacco and Vanzetti. Although the procedures followed in the cases mentioned varied not at all from procedures followed in thousands of other cases, except that those defendants were given the benefit of many more procedural and administrative devices than are most defendants, the academic brethren, being distressed at what they had heard constituted the misuse of criminal law to oppress those with liberal points of view, rushed in to joust with the criminal-law windmills and were promptly tossed out into the air again, quite confused, much irritated and still unaware of the real problem. These are the same academics who in faculty and association meetings insist that the teaching of criminal law should be very brief, and largely a matter of dialectics. Their disdainful disregard for such pragmatic considerations as police administration, the troubles of a prosecutor or a trial judge and the restatement or codification of criminal law is highly inconsistent with their articulate distress. If they were genuinely interested in discovering injustices to individuals in the antiquated old mill of criminal law administration, they could find thousands of examples in the cases of persons who, following the third degree, plead guilty to accusations and go off to the penitentiaries without fanfare or propaganda, or in the cases of those who, having been improperly convicted, are later released upon discovery of their innocence but with no pretense of reimbursement for the tragic losses which they have suffered.<sup>42</sup> If they were looking for barbaric medievalism in most aggravated form they could find it in many cases of material witnesses held in jail for months—sometimes actually lost in jails—while the persons who committed the crimes have been released on bail, their bail forfeited and no effort made to find them or to recover judgment on the bail bonds. If they were concerned with overhauling and reconditioning the previously mentioned old mill they would quickly see that much more is involved than can be cured by

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42. BORCHARD, CONVICTING THE INNOCENT (1932).

violent diatribes about injustices in individual cases, without attempt to discover the root of the evil.

This appalling lack of a controlling professional group has undoubtedly contributed to the gross inefficiency in local and sectional law enforcement which as previously indicated in turn results in lynchings and other forms of extra-legal procedures. During recent years numerous suggestions have been made, calling for the further extension of federal criminal law jurisdiction and enforcement beyond the comparatively narrow scope envisaged by the framers of the Constitution, on the theory that only in this way can the local and state situations be corrected. Recent examples of this tendency are to be found in the federal kidnapping statute<sup>43</sup> and in the proposal made by an assistant attorney general at the American Bar Association meeting in 1933, that the police forces of the entire nation, city, county and state, be consolidated into one federal force.<sup>44</sup>

There can be no doubt that the standards of administration in some localities are discouragingly low and that there is a striking lack of consistency or uniformity in local law enforcement, even as between counties in the same state. It is equally true that where the whole nation is of one mind as to the importance of effective law enforcement, as in the case of kidnapping for ransom, federal enforcement will be welcomed and will secure wholehearted local cooperation and consistently effective performance. On the other hand where opinions differ as to the desirability of a particular prohibitory law, federal enforcement may be disastrous in its effect. The attempt to enforce the liquor prohibition laws provides a good example. In some sections of the country, these laws were so unpopular that local officials actually interfered with the work of federal officers. As time went on, local approval of disobedience became so strong that there grew up a considerable disrespect for all criminal law enforcement. This was the state of public mind which disorganized police and enforcement departments, permitted politics to run rampant through them, and allowed the connivance of public officials and organized criminals in general violation of the law. Moreover, the unwholesome effect of the constant attack upon law enforcement, by way of innuendo and ridicule, made federal enforcement difficult even in states and parts of states where, prior to the passage of the federal laws, prohibitory legislation had been passed and rigidly enforced under local option.

Obviously, somewhere between these two extremes will be found the limit of possible effective federal enforcement. And that limit is much

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43. 47 STAT. 326 (1932), 18 U. S. C. SUPP. VII 408a (1933).

44. (1933) 58 A. B. A. REP. 74.

nearer the first type of offenses, such as kidnapping for ransom, than the second. Oliver Wendell Holmes has given us the test in the statement that "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>45</sup> Zealous reformers should note particularly those last four words, "whether right or wrong." To a considerable degree, especially under a democratic form of government, each community must work out its own destiny, no matter how exasperating the results may be when viewed from an academic or theoretical standpoint.<sup>46</sup> When we speak of "the community" in this sense we mean just that, the locality, the small territorial subdivision in which people are well acquainted one with another, closely knit in their social background, with a common understanding of the principles of government, of morals and of life as they believe that government and morals and life should be. This is the theory upon which is based that fundamental principle of criminal law that a man accused of crime is entitled to be tried by a "jury of the vicinage." This fact is well understood by lawyers who, knowing the resentment of the community against "foreigners," usually associate "local counsel" when going into a strange community to try a case.

From these considerations it does not necessarily follow, however, that no improvement can be made or no ironing out of particularly disgraceful local situations take place. Lifting the general level of intelligence by education, providing better trained lawyers and insisting upon higher standards of admission to the bar (already a matter of state control), extending crime surveys, providing for state supervision of particular functions by means of judicial councils and state departments of detection, apprehension, identification and probation—these and other similar methods have already been effectively used. During recent years, in connection with such developments as the juvenile court, probation, and the psychiatric and medical clinics, it has been possible to see the effect of deliberate drives made by interested and informed persons.

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45. HOLMES, *op. cit. supra* note 3, at 41.

46. An amusing minor example recently appeared in a daily newspaper of a southern city where the custom is to "shoot" fireworks at Christmas time. An ordinance of the city prohibiting such shooting was suspended by the city council for a three day period. In commenting on the action taken the press report said: "The motion was laid before the council by Councilman Aubrey Wiggins, who suggested that inasmuch as fireworks were going to be shot anyway the council might as well make it legal. Mr. Wiggins also suggested that some parents who did not care to have their children violate the law would appreciate the legal right to allow them to shoot fireworks within the Christmas period." *Durham Herald*, Dec. 19, 1933.

Federal aid and federal encouragement have much more to offer than federal supervision or domination. Of special significance is the educational work being done by federal probation officers, working outside of federal courts, in states in which probation is otherwise almost unknown. The standards used by the federal prison bureau in placing federal prisoners in county jails have done more to improve jail conditions throughout the United States than decades of protests. Yet no compulsion whatever was used in securing conformance to these standards. The same principle which is involved in granting federal aid in highway construction, agricultural education and military training could be well employed in connection with criminal law enforcement. Much of the present-day eagerness for extension of federal criminal law jurisdiction has resulted from the recognized capacity of the high-class personnel of the United States Department of Justice, particularly since the Bureau of Investigation of that department has come to be staffed almost exclusively with graduates of approved law schools. It would be quite possible for the federal government to set up standards for the selection and training of police, prosecutors, investigators, medical examiners and judges, to establish short courses for the training of such officers, and to make grants of aid in terms of money or of assistance by federal officials, conditioned upon state conformance with such standards and state use of such educational facilities. It would be quite possible by such methods largely to eliminate the present curse of police administration—political interference or domination—and to guarantee to trained police and other officials such tenure of office as would soon attract desirable candidates for professional careers to such fields. Federal aid given on this basis would accomplish more per dollar of money expended than outright expenditures for direct federal enforcement; it would preserve and stimulate that local pride and interest which is essential to effective enforcement; and it would avoid the conflicts and jealousies of overlapping jurisdictions.

In conclusion, and in part by way of summary, it is well to note that far from being a simple problem to be solved by a few procedural changes, criminal law making and administration is as far-reaching and intricate in its implications as life itself; that criminal law is only one of several agencies for social control, based upon such deepseated human emotions as desire for revenge, retribution, reimbursement and group domination, and limited by such equally powerful human emotions as desire for freedom of individual action; that because of these facts as well as because of our loosely organized system of local and federal governments, the development of criminal law must take place, in considerable measure, subject to the limitations of local understanding and ca-



capacity and the consequent unwillingness of the people to support or adequately finance a penal system which departs too far from their understanding of its purpose; that the process of development must therefore necessarily be to some extent one of trial and error based upon changes in political and economic life as well as changes in cultural background; that by means of general education, the better training of lawyers and other personnel of enforcement and administration and the efforts of intelligent individuals and associations in securing particular changes and perhaps by federal aid, the process may be made increasingly less fortuitous and more purposefully constructive of a beneficent agency for social control.