ADMINISTRATION OF THE CRIMINAL LAW*

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The metropolitan newspapers during the past winter devoted much space, both in the editorial and news columns, to three matters, viz: (1) the increasing number of crimes of violence, with arrests and convictions in comparatively few cases; (2) the non-enforcement of the Volstead Act in certain portions of the country; and (3) the agitation by certain groups for the enactment of laws imposing further restrictions upon personal liberty, notably with reference to the use of tobacco and the manner of observing the Sabbath Day.

In New York, Chicago, and Philadelphia, murders seemed to occur almost daily, while burglaries and robberies were so frequent that they were sometimes tabulated in the newspapers under one heading. A Philadelphia paper1 of October 31st stated that “auto bandits, highwaymen, gunmen, pickpockets, thugs, confidence men, burglars, and crooks of almost every description are carrying on their business in Philadelphia to-day with little or no interference.”

The Volstead Act2 prohibits under a severe penalty the manufacture, sale and transportation of any beverage containing more than one-half of one per cent alcohol. In many communities of the country, particularly in the large eastern cities, it would appear that this law is being freely violated. Intoxicating liquors in small quantities can apparently be bought in many saloons, and can be procured in larger quantities through devious but safe channels. So-called soft drinks, such as root-beer, ginger ale, and “near” beer, containing more than one-half of one per cent alcohol, are being freely and openly sold. There are convincing indications that wine and beer, and possibly distilled liquors, are being manufactured in many homes. Prohibition agents have been crying out at the wholesale violation of the law and at the refusal of juries to convict the violators, while police officers have testified to the effects of such violation. The Superintendent of Police in Philadelphia stated in an interview that the arrests for drunkenness in Philadelphia during the months of August, September, and October, 1920, were 300 per cent more than during the corresponding months of the preceding year.3 Recent news dispatches from New York City indicate that juries are unwilling to convict for violations of the State prohibition law. There is an element of irony in an act, passed at the last session of the Penn-

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*The substance of this paper is an address delivered before the Pennsylvania State Bar Association, May 28, 1921.

1 North American.


syluania Legislature, providing for the sale, under license, of vinous, spirituous, malt or brewed liquors fit for beverage purposes, "other than such as are from time to time determined and found to be intoxicating by Act of Congress passed pursuant to and in the enforcement of the Constitution of the United States." This means that whiskey, for instance, containing less than one half of one per cent alcohol may be legally sold.

Shortly after the adoption of the 18th Amendment and the passage of the Volstead Act, it was announced that certain of the organizations that had advocated these measures had turned their efforts towards securing legislation restricting the production and sale of tobacco. Still more recently other organizations, according to news dispatches, have started a movement to secure legislation prohibiting all sport and business on Sunday, and bills containing such provisions have been drafted for introduction in Congress and various state legislatures.

The anomaly presented by the frequent violation of, and failure to enforce, our present criminal laws, with the accompanying agitation for new and even more stringent laws, is the occasion for this paper, the aim of which will be to analyse some of the problems inherent in the administration of the criminal law in this country, and incidentally to "point a moral" in connection with this same anomaly.

In approaching a consideration of the problem of administering the criminal law, it is appropriate at the outset to devote some attention to the scope of such law and to the manner of its enactment. At common law a crime was conceived of as a wrong committed against the public. The act might affect the public directly, as in case of nuisance, or indirectly, as in the case of murder. In all cases, however, there was a general test for determining whether an act was a crime. Blackstone said crimes are "a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." As crimes at common law were determined from the viewpoint of the public, there was a certain natural coincidence between the criminal law and the moral code, i. e., a crime was in most cases a moral wrong, and its commission was opposed by the general sentiment of the community. While the courts in determining whether an act was a crime were compelled to follow a general principle, the legislatures have never been so restricted. Apart from constitutional restrictions, they are bound by no precedents and governed by no principles. They may prohibit under a penalty acts which possess none of the qualities of a common-law crime and which have never been regarded as criminal or wrong.

In enacting laws the legislators act as the representatives of the people.

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4 House bill, 1237.
5 Blackstone, Commentaries, *5.
6 "Under sound legal conditions every infraction of law is also a breach of morals." Gareis, Science of Law (Modern Legal Philosophy Series, 1911) 42.
In theory their actions result from and are in accordance with the general sentiment of the people who are supposed to have well-considered and definite views as to what their laws should be. In practice, these two conditions seldom exist. While it is true that in an unusual situation, such as war, there may be a general demand for legislation in aid of the government’s martial activities, which demand is immediately translated into legislation by the representatives of the people, there does not exist ordinarily a well-defined sentiment on the part of the public, nor does legislative action bear a close relation to the opinions of the great mass of the people.

Even where there exists a general opinion in favor of a new law or a change in an old one, this opinion is seldom the result of deliberate thought, but is usually an emotional reaction. If a child is kidnapped under conditions arousing great popular indignation, there is likely to be a demand for harsher laws against kidnapping. When robbery and burglary become frequent, and the ordinary citizen feels in danger of losing his life or property, one notices a growing sentiment in favor of more severe penalties for these offences. When the execution of a youth or a woman, through wide advertisement by the press, is brought to the attention of the people at large, a movement to abolish capital punishment is likely to develop. It needs only a brutal murder effectually to end this movement.

It is not public opinion, but the opinion of small groups, that ordinarily determines legislation in this country. These groups, often well organized, through the activities of their members, and, in some cases of paid lobbyists, secure the introduction of bills in the legislatures, and then through the use of arguments, threats, or other methods, bring pressure to bear upon the legislators, particularly the members of the committees to which the bills are referred. It is possible to make a rough division of the legislative-seeking groups into three classes: (1) those seeking laws for their own benefit; (2) those who are disinterestedly concerned in protecting our institutions or in improving social conditions; and (3) those who desire that the conduct of other people should conform to certain standards upheld, in theory at least, by the members of the group.

Large corporations and associations of professional or business men, who seek legislation for the protection of their interests, are examples of the first class. Railroads frequently maintain lobbyists at the state legislatures to present and urge legislation favorable to the railroads, and to oppose legislation which is considered harmful to them. At the last session of various state legislatures, laws were passed, at the instance of the bankers, making it an offence to draw a check with the intent to defraud, there not being sufficient funds to pay the check, the fact of such overdraft being primafacie evidence of the intent to defraud. Examples of the second group are found in patriotic societies, which urge legislation to prevent such acts as sedition and defacement of the flag, and in medical societies, which recommend laws making
criminal certain acts endangering the health of others. Some of the organizations which secured enactment of the 18th Amendment and the Volstead Act, and which are now urging the enactment of new "blue laws," are examples of the third class. In the case of the federal prohibition laws, all three of the groups mentioned were concerned. Manufacturers, who wished to obtain larger dividends through increased production due to abstinence from alcoholic liquors on the part of their employees, societies which were eager to remove the conditions of disease and poverty resulting from excessive use of intoxicating liquors, and groups of persons who considered it immoral to drink alcoholic beverages in any quantity joined forces to secure the enactment of these laws. Some of these societies threatened to blacklist and to prevent the re-election of any Congressman not supporting the measures. According to newspaper accounts, the lobbyists of these groups were actively at work in Washington, and the galleries of both houses of Congress were packed with supporters of these measures whenever a vote was taken. Before the prohibition laws went into effect, temperance workers and saloon-keepers not infrequently joined forces in their opposition to high license laws, the former, because they considered such laws a recognition of an immoral traffic, and the latter, because these laws were against their financial interest.

Apart from the more or less definitely defined groups which influence legislation, individuals with a "hobby" frequently beset lawmakers with proposals for legislation. Many persons seek to have a law made to carry out any new idea that occurs to them, and to forbid by law any act of which they do not approve. Legislators are not free from this tendency, and in addition, they are continually confronted with the temptation to give themselves prominence by introducing new measures. Furthermore, legislators rarely give thought to the problem of enforcing the laws they enact.

A most important agency in securing legislative action is the public

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1 "An innovator who recommends or denounces a law or institution, because of its conformity or opposition to the law of nature or the moral instincts of mankind, is under the greatest temptation to make his own feelings the test of expediency, and is certainly less inclined than a Benthamite, to weigh the actual or probable effects of legislation."—Dicey, Law and Public Opinion in England (1905) 143.

2 "It often happens that a legislator, desirous of remedying an abuse, thinks of nothing else; his eyes are open only to this object, and shut to its inconveniences." Montesquieu, The Spirit of Laws (The World's Great Classics Series) 84.

3 "Parliamentary legislation, in short, if it is sometimes rapid and thoroughgoing, exhibits in this instance, as in others, characteristic faults. It is the work of legislators who are much influenced by the opinion of the moment, who make laws with little regard to general principles or to logical consistency, and who are deficient in the skill and knowledge of experts." Dicey, op. cit. 395.

4 "The time to give effect to popular opinion and to have regard for it is when laws are passed, not when they are being enforced." From editorial by William H. Taft, Philadelphia Public Ledger, Nov. 20, 1920.
press. Legislators are keenly alert to the views expressed by prominent newspapers, which both create public opinion and exercise a large influence in elections. The support of a prominent newspaper is of great assistance in securing the enactment of a particular bill. If, as sometimes occurs, a newspaper takes the initiative in proposing legislation, the measure is sure to obtain an adequate hearing at least.

In the foregoing discussion, the writer has endeavored not to express an opinion as to the merits of particular legislative enactments, but merely to analyze and describe the practical methods by which much of our legislation, particularly in criminal matters, is brought about. The conclusions from this discussion are: (a) that most criminal legislation is not based upon an analysis of the conditions to which it applies, nor upon an adequate consideration of the purpose to be attained; and (b) that such legislation is not dependent upon, nor necessarily in accordance with, the opinion of the general public.

The next problem is to determine, if possible, the extent to which the criminal laws are enforced. This problem has two aspects which must be noted and differentiated. The first involves the question whether those committing crimes are convicted and punished: i.e., whether the administrative and judicial machinery is functioning in particular cases. The second has to do with the effect that laws, providing punishment for the doing of certain acts, have upon the conduct of persons to whom these laws apply. Whatever may be the prevailing view as to the theory of punishment, whether vengeance, deterrence, or reformation, the immediate purpose of the criminal law is to deter persons from the doing of certain acts which those who make the law, the judges in the case of the common law and the legislators in the case of statutes, deem wrongful. This deterrent quality of the law has a positive side. If acts which are harmful to society in any of its phases are prevented, society is the better off for such prevention. The fewer murders, the greater is the security of human life; the less theft, the more secure is the possession of personal property; the less the sanitary laws are violated, the better is the health of the community. Thus while the immediate purpose of the criminal law is the prevention of harmful acts, its ultimate purpose is the protection of society in its different phases, or as a learned writer has recently stated it: “Criminal law exists to maintain social interests as such.”

The investigation of the extent to which the criminal law is enforced is obviously a difficult undertaking, as adequate statistics are not available and many variant elements enter into the problem. It is possible, however, to determine whether some laws are more successfully enforced than others, and whether a high degree of enforcement is to be found in any case. The crimes which attract the most popular attention are those possessing spectacular qualities, notably homicide, rob-

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1 Roscoe Pound, Future of the Criminal Law (1921) 21 Col. L. Rev. 1, 11.
bery, and burglary. These have been serious offences under nearly all systems of law and involve the ideas of both legal and moral wrongdoing. The wrongful killing of a human being is generally regarded as one of the most serious of all crimes. There are consequently the strongest reasons for a strict enforcement of the laws providing for the punishment of murder and manslaughter. As a matter of fact, the percentage of persons punished for homicide is very small. In 1917, in the city of New York there were 236 homicides, 280 arrests, and 67 convictions, with death sentences in nine cases. In 1918, in the same city, there were 221 homicides, 256 arrests, and 77 convictions, with death sentences in six cases. In Detroit during the year 1917 there were 89 murders, 104 arrests, and 14 convictions; while in the year 1918 there were 71 murders, 147 arrests, and 22 convictions. In Philadelphia during the year 1916 there were 90 murders while 16 persons were convicted, 16 were acquitted, 33 were untried, 9 committed suicide, 14 were fugitives, 2 murders being reported as unsolved. During 1917 there were 82 murders, 24 persons being convicted, 9 acquitted, 30 untried, 10 fugitives, while 9 cases were reported unsolved. During 1918 there were 109 murders, for which 112 persons were indicted. Of these 19 were convicted, 14 were acquitted, 53 were untried, 4 committed suicide, 12 were fugitives, 1 was exonerated, while 9 murders were reported unsolved. In 1919 the number of murders was 98, 10 being unsolved and 105 persons were indicted. Of these 15 were convicted, 8 were acquitted, 43 were untried, 15 were fugitives, 6 committed suicide, 4 were exonerated, 1 was ignored by the grand jury, 3 were discharged on writ. In 1920 there were 105 murders, of which 8 were reported unsolved, 10 accused persons being fugitives. There were 87 persons arrested, of whom 16 were convicted, 6 were acquitted, 58 were untried, 4 committed suicide, and 7 were ignored by the grand jury. During the year 1919 there were 336 murders in Chicago, with indictments in 131 cases. Of the 203 defendants named in these 131 indictments, 44 were convicted, 61 were acquitted, and 98 cases were undisposed of at the end of the year. The laws in this country providing a punishment for the commoner forms of sexual immorality, viz., fornication, prostitution, and adultery, are altogether statutory, as these acts were not offences at common
law, but were cognizable only by the ecclesiastical courts, whose pen-
alties were by way of penance. Great differences of legislative opinion
may be found today. In some states, all three of these acts are made
criminal. In others, one or two of them. There is just as much dif-
ference in the character of the punishment provided, this being most
marked in the case of adultery, where the penalty ranges from a fine
as low as ten dollars up to imprisonment in the penitentiary for five
years. It is common knowledge that there are few prosecutions and
convictions for these offences. At the time when the investigation
conducted by the Chicago vice commission disclosed the fact that the
yearly profits from prostitution in that city were about $8,000,000,18
an ordinance made it a misdemeanor to visit a house of prostitution.
Prosecutions for fornication seldom occur and the non-enforcement of
the law against adultery is readily seen from the fact that, though
divorces on this ground are frequent, criminal prosecutions seldom if
ever follow the divorce decrees.

Statutory laws against contraconception are very common. These
vary in scope, some applying only to the selling or advertising of any
instrument for the purpose; others covering the giving of any informa-
tion on the subject, thus including physicians; and still others apply
to those who use any method to prevent conception. It is needless to
state that violations of the second and third provisions, at least, of these
laws, are rarely punished, and the low birth rate in certain classes of
society clearly indicates the frequency of these violations. There seems
to be no doubt that there is a strong sentiment in favor of birth control
and the chief effect of the laws is to make information on this subject
expensive, and difficult to obtain by those who need it most. One of
the resultants of this condition is abortion, which is a severe offence
in all the states. Prosecutions for abortion are practically never insti-
tuted unless the mother dies. Now and then a prosecution based upon
an unsuccessful operation startles the public with its hideous details.
The horror is short-lived, however, and is due to the unsuccessful
character of the operation rather than to the operation itself. The
statements made by physicians as to the number of abortions, either by
drugs or operation, committed in our great cities is astounding. At a
meeting in Chicago called to discuss this matter, a prominent physician
stated without contradiction by the other physicians present that more
than a hundred thousand abortions occur annually in that city. Such
a condition is not peculiar to Chicago nor is it of recent development.
In a published lecture to his students delivered in 1839, Dr. Hodge of
the University of Pennsylvania spoke of the prevalence of criminal

18 Social Evil in Chicago (1911) 103. According to the Chicago Civil Service
Commission 15,000 is a conservative estimate of the number of professional pros-
titutes in Chicago in 1911. Report of Commission on Police Investigation (1911-
1912) 12.
abortion in Philadelphia. In 1868 Dr. H. R. Storer and F. F. Heard of Boston published a book on abortion, in which he estimated that during a period of eight years from 1849 to 1858, omitting 1853, there were between thirty and forty thousand operations for abortion in Massachusetts. The report of the Attorney-General of that state for the same period shows that there were in all thirty-two trials for abortion, and not a single conviction. Resolutions adopted by the American Medical Association in 1859 refer to the prevalence of abortion, and a committee of the State Medical Society of Massachusetts reported in 1858 "that the laws of the Commonwealth are already sufficiently stringent, provided that they are executed."

Dr. Storer frankly states that abortion had become an established custom, and referring to the strict and comprehensive statute on the books in Massachusetts, says: "The above statute, however, such is the public sentiment on this point, is not enforced, or is daily evaded."

The same statement is applicable today. Though there is perhaps a somewhat smaller number of abortions because of the prohibiting laws, yet the chief effect of these laws is to prevent reputable surgeons from performing the operations, thereby increasing the number of deaths because of operations performed by unskilled operators under septic conditions.

With regard to laws imposing a restriction upon what are generally regarded as personal privileges, it was pointed out at the beginning of this paper that the federal prohibition laws are, to a considerable extent, unenforced in certain communities. This is no new situation so far as laws relative to the sale of intoxicating liquors are concerned. Before the federal prohibition laws went into effect, state statutes prohibiting or regulating the sale of liquor in some states were frequently violated. "Prohibition" in Maine merely meant that liquor was sold clandestinely rather than openly and "Sunday-closing" in New York and Chicago generally meant that the thirsty patrons entered by the back door instead of the front. Many saloons, particularly in large cities, sold liquor more or less openly in violation of war-time prohibition, and even when prosecutions were instituted against violators of the law, juries were loath to convict.

H. L. Hodge, Foeticide (1869) 31.
Storer and Heard, Criminal Abortion in America (1868).
See Storer and Heard, op. cit. 54.
(1859) 12 Transactions of Amer. Med Assoc. 75.
See Storer and Heard, op. cit. 136.
"It is the firm opinion of this Committee, as well as that of practically every student of city conditions with whom this Committee has conferred, that the Sunday sale of liquor in New York can not be suppressed; that there is a persistent clientele which makes Sunday selling profitable in the face of the law; that this has the sanction of a large body of public sentiment, and that such selling will continue wherever the profit is fairly certain—and that means nearly everywhere where there is a saloon." (New York City) Report of Citizens' Committee (1912) 9.
Statutes regulating the sale and use of cigarettes are very frequent in this country. Some prohibit altogether the sale or gift of cigarettes, others simply prohibit the sale to minors. The Indiana Legislature some years ago went so far as to prohibit the smoking of cigarettes. Whatever the extent of the prohibition, these laws are seldom enforced. In Pennsylvania, at present, it is a misdemeanor to sell or give cigarettes to persons under twenty-one years of age. This law is generally violated, and very few, if any, prosecutions result from the violation.

In every community the driving of automobiles is regulated by statute or ordinance. The penalty for violating the “speed” laws is often exacted only in aggravated cases. If, for instance, the speed limit is fifteen miles an hour, a tacit understanding may exist that there shall be no arrests unless the rate of speed exceeds twenty-five miles. Associations of motorists engage employees to warn of speed traps, and insurance companies issue policies providing indemnity to the insured in case of injury resulting while exceeding the speed limit. In Philadelphia, as in most large cities, the passing of a standing street car by an automobile is prohibited. So far as the writer has been able to observe, this ordinance may be violated with perfect impunity even in the presence of a police officer.

In most cities, the sale and carrying of firearms are regulated by statute or ordinance. The large number of shootings and “holdups” indicate clearly that little, if any, difficulty is involved in the purchase of a deadly weapon by irresponsible persons. An incident which occurred in Philadelphia some months ago is typical of the general situation in this regard. A negro youth angered at a shopkeeper, who refused him further credit, went at once to a nearby pawnbroker to whom he pledged his watch and with the proceeds purchased of the pawnbroker a revolver. Returning to the shop he shot the proprietor and a customer who happened to be in the shop at the time.

Libel was a crime at common law, and in those states where the common law is not in force, has generally been made such by statute. Although libellous matter frequently is published in newspapers and other periodicals, prosecutions seldom occur.

In certain states, laws are found prohibiting certain forms of activity on the Sabbath day. Some of these laws are directed against labor, others against amusement. The extent to which they are enforced varies greatly in different communities. There is likely to be a rigid enforcement only when some organization brings pressure to bear upon the officials, whose duty it is to administer these laws. When this pressure, which is not likely to be of long duration, ceases, the enforcement lapses.

Statutes prohibiting under a penalty the use of profane language are still to be found in statute books. The Pennsylvania Act provides that if any person of the age of sixteen years or upwards shall profanely

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curse or swear, he shall forfeit either forty or sixty-seven cents for every profane curse or oath, the difference in the amount of the penalty depending upon the name or thing by which he curses or swears. Needless to say, the violator of this statute stands in small danger of prosecution.

Although laws relating to gambling are to be found in most states, they are far from uniform in scope. In some states, such as Pennsylvania, the statute is directed against the maintenance of gambling houses, and does not apply to gambling as such. In others, such as New Jersey, playing for money at any game is made illegal. The former type of law is likely to be more strictly enforced than the latter. Gambling houses may be raided and their proprietors punished, while poker and bridge games in clubs and private houses are undisturbed.

It may be safely asserted that statutes regulating the ordinary conduct of people, particularly so far as their amusements are concerned, are seldom rigidly enforced, if at all.

Within recent years, many laws prohibiting certain business practices have been enacted, but the enforcement of them involves many difficulties. Crime has been so long associated with failure, that it is not easy to charge a successful man with being a criminal. Even when prosecutions are instituted, juries are slow to convict. This was strikingly exemplified in the trial of the packers in Chicago some years ago. The prosecution presented a strong case, but the jurors apparently were not able to bring themselves to the point of finding a verdict which meant imprisonment for the wealthy packers.

The effects of non-enforcement are serious and far-reaching. The mere existence of a penal law on the statute books has little, if any, 

26 Act of 1794, 1 P. & L. Dig. 2278.
27 Act, March 31, 1860, 1 P. & L. Dig. 2345.
29 "The world's experience shows it is futile to attempt to enforce regulations which contravene the daily habits of a considerable part of the public. In such matters only the greatest common divisor of the habits of the citizens is possible as a standard of conduct really enforceable. The attempted enforcement of unacceptable rules is fruitless and always leads to corruption. We have tried the system of regulating morality by legislation for a long time, and it does not work; the community does not give any real sign of accepting this statutory standard as its rule of conduct for the purchase and consumption of liquor. This is only an illustration of the American habit of coining moral ideas into statutes which represent aspirations and not practical rules of conduct." (New York City) Report of Citizens' Committee (1912) 10.
30 "Lawlessness is a disease from which even our so-called 'best citizens' are not exempt. The history of Collector Loeb's attempt to enforce the custom laws proves this, and the business men of high standing like the officers of the American Sugar Refining Co., and others, the 'gentlemen and ladies' returning from foreign travel who do not hesitate to lie or bribe in order to cheat the United States, are melancholic witnesses to the fact." Moorfield Story, Some Practical Suggestions as to the Reform of Criminal Procedure (1913) 4 JOUR. CRIM. LAW & CRIM. 495, 497.
deterrent value and the failure to enforce it results in disrespect not only for the particular statute but for the law generally. The difficulty of enforcing the recent prohibition laws is having its effect upon the prestige of the Federal Courts, whose reputation for the certain punishment of offences was firmly established. In his book on Standards of American Legislation, Professor Freund, after pointing out the fact that in the case of "morals" legislation "the formal declaration of policies is insisted upon irrespective of whether they can be carried out faithfully or even with tolerable success," makes the following statement:

"The result is inevitably a certain demoralization of governmental standards, but the system makes possible an insistence upon high abstract moral ideas, which in other countries is deemed impracticable, and which all the time operates as an educative influence."

From a survey of the facts it appears very doubtful whether an unenforced law is an "educative influence" in the proper sense. The reverse seems to be the case so far as the federal prohibition laws are concerned. There are indications that many persons who never drank intoxicants before are doing so now simply because the sale is prohibited. "Forbidden fruits are sweet" is an old maxim that is applicable to the situation, and in addition there is the fact that in this country people are inclined to resent too strict a regulation of their personal conduct. Such regulation engenders a spirit of hypocrisy and makes lawbreakers out of otherwise upright citizens.

Graft and blackmail with the consequent demoralization of the police force are byproducts of non-enforcement, which must be given serious consideration. Recent investigations in several large cities have shown that police officials protect and even co-operate with violators of the law. Without such action on the part of the police, the bootlegger and the bawdy-house keeper could seldom operate.

When it has been demonstrated that a penal statute, because not supported by public opinion, can not be effectively enforced and that grave evils result from the non-enforcement, the proper remedy would seem to be a repeal of the law. In this country such repeal seldom occurs. This is particularly true when the statute in question is one to which the term "moral" can be applied. Many persons derive satisfaction from a survey of the facts it appears very doubtful whether an unenforced law is an "educative influence" in the proper sense. The reverse seems to be the case so far as the federal prohibition laws are concerned. There are indications that many persons who never drank intoxicants before are doing so now simply because the sale is prohibited. "Forbidden fruits are sweet" is an old maxim that is applicable to the situation, and in addition there is the fact that in this country people are inclined to resent too strict a regulation of their personal conduct. Such regulation engenders a spirit of hypocrisy and makes lawbreakers out of otherwise upright citizens.

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from the fact that a high moral standard is officially recognized, even though they do not in practice conform to such standard. Furthermore legislators lack the courage to antagonize the persons who are active in securing and maintaining this type of legislation.

Having pointed out that non-enforcement of the criminal law is, at least, not uncommon in this country, and that evils result therefrom, it is now in order to investigate the reasons for such non-enforcement. As a preliminary matter, the procedure involved in the enforcement of the law must be briefly noted. Before a person who has committed a crime of any magnitude can be punished, the following acts must be performed by the officials named: a police officer or a constable must arrest the offender; a magistrate must commit him to await the action of the grand jury; the public prosecutor must present the case to the grand jury; this body must find a valid indictment; the prosecutor must try the case in an efficient manner; the trial judge in his charge to the jury must construe the law as being applicable to the case before him; the jury must find a verdict of guilty; the judge must impose an adequate sentence and direct that it be carried into execution; and, if an appeal is taken, the appellate court must affirm the judgment. If at any stage the official or officials concerned fail to take the action indicated above, non-enforcement of the law results.

It must also be borne in mind that the functions of these officials bear a close relation to each other. Not only does a failure to act by any official in the chain prevent action by a subsequent official, but the fact that a later proceeding is not likely to be instituted by the proper official discourages action by those who should function earlier. If it appears that a trial jury, because of its previous verdicts in similar cases, is not likely to convict, a prosecutor will be slow to present the case to the grand jury. If a prosecutor, for any reason, such as an announced policy, will not proceed in certain cases, or if a magistrate will not commit, there is no incentive for the police officer to make an arrest.

The criminal law is not self-administering, as some people seem to think, but depends for its enforcement upon the action of human agencies. It is, consequently, to the fallibility and weakness of human nature that we have to look, in part, for an explanation of the inadequate enforcement of the criminal law. Apart from this consideration, which will be discussed more fully later, there are certain inherent difficulties involved in the administration of the criminal law, which

what it is, the business of prostitution can never be made in any sense legal; it can not be openly recognized as legitimate; it can not be licensed; it can not in any way secure legal standing before the courts; the wages of the harlot can not be collected by suit at law; the landlord who rents a house for such purpose is liable to prosecution.” Statement by Charles R. Henderson, who investigated the subject under the auspices of the Carnegie Foundation, quoted in Report of Minneapolis Vice Commission (1911) 34.
are often overlooked. In the first place, the person who committed the crime must be detected and arrested. This is not always a simple matter, particularly in the case of one of the more serious crimes, which may have been deliberately planned, and provision made for the escape of the criminal. The automobile has added greatly to the difficulty of detecting and arresting this class of offenders, who are enabled to commit a crime at a distant point and afterwards make a quick escape. The commission of burglaries and robberies, which are at present occurring in such numbers as to justify the term "crime wave," is greatly facilitated by the use of the automobile. In addition to the difficulty of arresting those believed to have been guilty of crimes, the police and detective forces are confronted with the problem of securing the evidence of guilt. This is no easy matter, and, in many cases, where there is moral certainty that a person has committed a particular crime, it is not possible to secure the necessary evidence. At every stage of the proceedings, defendants must be released because there is not sufficient evidence available to meet the proper requirement. No matter how eager and skilful all those concerned in the administration of the criminal law may be, from the very nature of the problem there must be many cases where the offender goes unpunished.

When we come to consider the matter of human fallibility, legal procedure presents a fruitful opportunity for error. As the trial of an accused person must be conducted according to prescribed rules, a failure, through mistake or error, on the part of an official to meet the necessary legal requirements may nullify the entire proceeding. However learned and zealous a prosecuting attorney, for instance, may be, and however free from improper motives, he may make a mistake in the drafting of an indictment or in the presentation of his case to the jury which will necessitate reversing a judgment of conviction by the appellate court. In such a case, the non-enforcement of the law results from human fallibility. As the public prosecutors are frequently inexperienced and hold office for short terms, the possibility of error is greatly increased.²⁸

As the enforcement of the criminal law depends so largely upon the action of the officials charged with the duty of administering it, it is most important to determine what are the usual qualifications of such officials, and what motives are likely to influence them in the per-

²⁸ "The prosecuting attorney and his assistants should hold office as a career. Only by such tenure can the public be assured the experience that will guarantee expert service. When the public prosecutor changes every four years and a new corps of young assistants is installed with each change, inexperience is often substituted for experience. The criminal lawyers who defend do not change. They prey upon each new staff of prosecutors until they have learned to be efficient. In the meantime the Supreme Court is compelled to reverse many cases, and press and public demand less technicality in the court of review." Harry Olson (Chief Justice, Municipal Court of Chicago), *Efficiency in the Administration of Criminal Justice* (1947) 40 N.Y. St. Bar Assoc. 275, 293.
formance of their respective functions. As the duty of deciding whether an accused person has committed a particular crime devolves upon the trial jury, it is necessary to bear in mind that the jury is in practice free to bring in a verdict of not guilty notwithstanding the law and the evidence. If, for instance, members of the jury are not in sympathy with the law which the defendant is charged with violating, they can not be prevented from expressing their disapproval of this law by acquitting the defendant. As the jurors are drawn from the community in which the alleged offence was committed they are likely to register in their votes the general sentiment of the community regarding the law in question. Thus, if the public at large does not approve of a certain law, this fact is likely to be reflected in the verdicts of juries trying persons charged with violating this law.

In a somewhat different way the construction of a law by the trial judge may be affected by the popular attitude towards it. In most of the states the judges are elected by the voters and their terms are generally sufficiently short to permit them to be candidates for re-election. In this situation they are seldom indifferent to the views of their constituents. Without suggesting any impropriety on their part, it may be said that judges are not unlikely to give a narrow construction to an unpopular law and a liberal construction to one that is viewed with favor.

As our public prosecutors are chosen by the people, their election depends upon the coincidence of their announced policies with the opinions of the voters. Instances have occurred where prosecuting attorneys have been elected on a platform of either the enforcement or non-enforcement of particular laws. When in office, they are likewise extremely sensitive to popular opinion. In the rural communities the office of prosecuting attorney is often sought for purposes of professional advancement. The incumbent hopes that his record in office will benefit his private practice. In our large cities, the office is sometimes used as a stepping stone to a higher position, for example, the governorship. It follows that it may prove detrimental to the prosecutor's interest to institute proceedings under a law of which the electorate does not approve, and there is no incentive to action of any kind where the public is indifferent.

An expert investigator has described the general police situation in this country as follows:

"Prosecuting officers, who are ambitious for further honors, maintain elaborate press bureaus for the distribution of news concerning their offices. The reporters who want to stand well with the prosecuting officer, and get all the news that is to be had, fall into the habit of taking the prosecutor's version. . . . The main concern of a modern prosecutor in one of the great cities of this country seems to have become to keep himself before the public, which he does by seeing to it that the public is informed of everything that happens in his office from his own point of view." Samuel Untermyer (1910) 36 ANNALS, AMER. ACAD. POL. & SOC. SCI. 145, 155.
"Police administration in the United States is a matter of politics. It is organized on the basis not of individual fitness, but of political faith. It is a part of the sordid system of jobs and spoils which so notoriously distinguishes much of our local government. It depends upon periodic elections, decided in most cases upon issues with which it is not even remotely associated. Although an expert service, whose efficiency is predicated on special ability and continuity of management, it is tossed about from one party to another as the prize of success at the polls. . . . With a few exceptions, therefore, political considerations constitute the dominant factor in the management of the police forces of the United States. 8

The same writer further says:

"Essentially it is the same everywhere; the head of the department appointed because he is a Democrat or a Republican or a 'personal friend of the mayor'; transfers and details made at the behest of some district boss or overlord; the force administered with an eye to the next election, and its work dictated by the political necessities of the moment." 9

The natural result of this situation is that the head of the police force, particularly in large cities, administers his office in accordance with the general sentiment of the voters, in so far as he can determine it. 40 If they favor the enforcement of certain laws, the police will be active in arresting violators; if on the other hand, they are antagonistic, the mayor and the head of the police department are not likely to jeopardize their political futures by permitting frequent arrests; if the people are indifferent, these officials will probably follow the line of least resistance and not interfere with the natural inertia of the patrolmen and detectives.

In view of the contention just made that the action of many of the officials concerned in the administration of the criminal law is likely to be affected by the popular attitude, it may well be asked—why is it that there is not a stricter enforcement of the laws against murder, robbery, and burglary, since these offences at least are universally condemned? The answer to this question is found, in part, in the inherent difficulties, already discussed, of arresting the culprit and proving his guilt. More fundamental than this, however, is the fact that while it may be safely said that practically everybody in theory disapproves of the crimes mentioned, there is not the same uniformity of opinion as to the desirability of enforcing the law in a particular case. A noted prosecutor speaking at a meeting in New York City stated his experience as follows:

8 Fosdick, American Police Systems (1920) 231, 232.
9 Ibid. 232.
40 "The trouble with most departments in most cities is the often changing of administrations, and the demand that is made of them to please the different administrations with their different opinions, instead of carrying out the law as it is written." J. L. Beavers (Chief of Police, Atlanta, Ga.) Proceed. Int. Assoc. Chiefs of Police (1915) 79.
"It has been said in effect this evening that the criminal laws are all right and that only a vigorous prosecutor is needed. I used to think that myself; I was quite well persuaded that any vigorous, aggressive, honest district attorney anywhere could enforce the law. That was at a time, however, when I believed that men and women like yourselves in this country all desired to see the laws enforced. I have learned better. I have found out that we all believe that crime should be punished in the abstract... because crime is never committed in the abstract. The test comes when a friend or a fellow director on the board or in the bank, or a brother or even a next-door neighbor, has committed a crime, and one is called upon to exercise some responsibility as an individual. I say the test then comes as to whether you really believe that the criminal laws ought to be enforced."4

Not only does it happen that those who have a part in the administering of the law are affected by their relationship to or association with those who have violated the law, but such connection or association induces others to bring pressure to bear upon those concerned in the administration for the purpose of preventing a successful prosecution. There is every reason to believe that men of influence and position will intercede with police officials or prosecutors on behalf of friends or fellow-members of business or social organizations. Newspapers also have been known to champion the cause of an accused person. Such action is likely to prove effective, for, in the first place, it requires great courage and independence on the part of a public official to oppose the position taken by a powerful newspaper, which exercises great influence at election time, and, furthermore, the newspaper is able to create an opinion of innocence in the minds of its readers, some of whom will in all probability be called as jurors. Even more significant than the influences which have been discussed is the fact that even in regard to such a serious crime as murder, the public generally is indifferent whether the law is enforced. In the case of a murder, committed in a particularly brutal manner, or in a case where the victim is a person of prominence, general interest in the punishment of the murderer may be aroused in the community where the offence occurred. The ordinary case creates no real concern. The reader of a city newspaper may take note each day that several murders have occurred since he last read his paper, and over his coffee he may indignantly exclaim that there are too many murders and something ought to be done about it, but that is as far as his interest goes. He does not write a letter to the head of the police department urging greater diligence in apprehending the murderers, nor to the district attorney demanding quicker and more efficient action; he is often not ready to serve on the jury when summoned, but endeavors to evade service by some more or less flimsy excuse; at the next election, he does not vote against the political party represented by the lax officials. According to a newspaper item, there were recently eighty murder cases awaiting trial in the courts of Philadelphia. How

4 Francis J. Heney (1911) PROCEED. ACAD. POL. SCI. 729.
much concern did the people of Philadelphia have in the outcome of these cases? If a case has been extensively advertised in the newspapers there may be passing interest, but this has to do more with the dramatic aspects of the case than with the question of law enforcement. The popular indifference regarding the enforcement of the law which has been shown to exist to a considerable extent in the case of murder increases in direct ratio as one goes down the scale of crimes. The less serious the crime, the less concern there is that it be enforced.

While it may be safely said that indifference characterizes in general the attitude of the public at large towards the enforcement of the criminal law, in some instances a positive desire that the law shall not be enforced is to be found. The most common example of this exists in the case of the so-called "blue-laws" which prohibit many forms of amusement on the Sabbath day. A great majority of the people today do not approve of such laws, and do not wish to have them enforced. Another striking example was presented by the statute enacted in Indiana some years ago prohibiting the smoking of cigarettes. As the drivers of automobiles increase in number, the sentiment against enforcing the regulations pertaining thereto becomes stronger.

With regard to the law against prostitution, a former assistant district attorney in New York, after pointing out that the law was freely violated, said:

"For the persistence in this open violation of the law, the police are little to blame. They know that they could not enforce the law if they tried, and they know as we know that the community does not want it enforced, because the community, rightly or wrongly, believes with Lecky and others that prostitution in some form or other is a necessity, and that it is only by the sacrifice of a certain percentage of the women of the community to a life of prostitution that the sexual integrity of the great majority can be preserved from violation through seduction, fraud or force."

44 "That prostitution has existed in the past, does exist now and probably always will exist, is admitted by the Commission. The state laws and the city ordinances prohibit the operation of bawdy houses, assignation houses, houses of prostitution and ill-fame. If the Police Department of the city did its sworn duty to enforce the laws of the State of Illinois and the ordinances of the City of Chicago, there could be no open houses of prostitution. However, upon the theory that public opinion permits a breaking down of the laws and ordinances in this respect, houses of prostitution and assignation have been permitted to run unmolested by the police in various sections of the city." Report of Chicago Civil Service Commission (1912) 3 JOUR. CRIM. LAW & CRIM. 62, 64.

45 "He (the police officer) is quite sure that if the attempt were made to suppress vice, not only would public opinion condemn such mischievous and futile activity, but in proportion to the local success of such efforts vice would be scattered through the more respectable residence neighborhoods and do greater harm than if left alone." J. C. Bayles (former president, Board of Health, New York City) Crime and Vice in Cities (1911) 70 INDEPENDENT, 1105, 1107.

46 Howard Gans, Some Consequences of Unenforceable Legislation (1911) 1 PROCEED. ACAD. POL. SCI. 563, 568.
The Minneapolis Vice-Commission found a "strong and well defined sentiment" in favor of tolerating prostitution for similar reasons.45

The reason why the present prohibition laws are not enforced in certain sections of the country is simply because the people in those communities do not want them enforced. The same fate will befall any other "blue laws" that may be enacted and for the same reason. It is an established fact that laws can not be enforced in the face of public disapproval. It is also a fact that, in varying degrees in this country, people do not want legal interference with what they conceive to be their legitimate personal privileges.

It is upon public opinion that the enforcement of the criminal law largely depends,46 and in this connection public opinion in this country displays certain definite characteristics. These are (1) sentimentalism, (2) intellectual dishonesty, and (3) disrespect for law. Sentimentalism is frequently manifest in connection with the trial of offenders. In the case of a woman charged with murder, particularly when the victim is a man, it is almost impossible to secure a conviction, and on the other hand a man has a small chance of escape when the prosecuting witness is a woman. Sentimental outbursts in favor of a youthful offender are not uncommon. Sometimes these are manifest during the trial and at other times after conviction in the effort to secure a modification of the punishment. In Pennsylvania several years ago, the agitation to save two youthful murderers from execution almost resulted in the abolition of capital punishment. A recent writer who made an elaborate study of the problem of law enforcement has the following to say in regard to the part played by sentimentality:

"The weak sentimentality of the community in relation to crime and the criminal is a final factor in the failure of our administration of justice, which can not be overlooked. Offenders go unpunished and the laws are used as a shield for crime because such laxity is after all in substantial accord with public opinion, or at least with that element of public opinion which follows the daily newspaper stories of our criminal courts. Our hereditary sympathies are for the under-dog, for the man who is down and out, and the criminal is too frequently pictured as-being only the victim of hard luck or bad environment, fighting for

45 Report of Minneapolis Vice Com. (1911) 39.
46 "The legislator does not create the law arbitrarily. He has no power to make rules which are not prepared for by the march of social advance. Legislation passed in any other way remains a dead letter and totally unapplied." Korkunov, Theory of Law (Modern Legal Philosophy Series, 1909) 404.
47 "We may enact laws; we may appoint Commissions; we may abuse Civil administrations for their handling of the problem; but the problem will remain just as long as the public conscience is dead to the issue or indifferent to its solution." Social Evil in Chicago (1911) 27.
48 "Effectually to check crime in a city like New York is possible only when public opinion demands it." J. C. Bayles, Crime and Vice in Cities (1911) 70 INDEPENDENT, 1106.
his life or freedom against the powerfully organized, impersonal forces of the Commonwealth.  

Another characteristic of our public opinion is intellectual dishonesty. This sometimes takes the form of deliberate hypocrisy, but is more often an unreasoning belief that things are what they are not, which manifests itself in a refusal to face facts or to see the real issue of a problem. This mental quality may be commonly observed in connection with sex matters, for instance in the blind assumption that people are good because there is a law against immorality, or in the failure to recognize the evils which accompany an unenforced law. The public permits prostitution but derives virtuous satisfaction from the existence of a prohibiting statute. If the question were considered at all, it would be readily recognized that the supply must be kept up with the demand, yet it is strenuously insisted that those who make a business of furnishing the supply shall be severely punished. No one charged with crime is easier to convict than the "white slaver."

A further form of intellectual dishonesty is the confusion of thought regarding the relation, or rather lack of relation, between private vir-

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47 Fosdick, op. cit. 44. "In the opinion of the Crime Commission the abnormal volume of crime in Chicago is due fundamentally to failure to apprehend criminals and punish crime with that certain, sure swiftness necessary to inspire fear in prospective law-breakers. So much soft-hearted sympathy has been mixed with the application of lawful force that it has become so feeble as to practically lose its effect upon the habitual criminal." Edwin W. Sims (1920) 11 JOUR. CRIM. LAW & CRIM. 21, 27.

"About three out of four persons held to the criminal court by the Municipal Court judges of Chicago are freed by the juries before which they are tried. It is apparent that the reason for this is the sympathy of jurors—not with crime, as is sometimes charged—but with men convicted of crime and with their families." Statement by McKenzie Cleland, a Judge of Municipal Court of Chicago, quoted in (1911) 1 JOUR. CRIM. LAW & CRIM. 633.


48 "Unfortunately there are two standards of morality in Chicago. One standard permits and applauds dances by women almost naked in certain places under the guise of art and condemns dances no worse before audiences from the less prosperous walks of life. The same hypocritical attitude drives the unfortunate and often poverty-striken prostitute from the street, and at the same time tolerates and often welcomes the silken-clad prostitute in the public drinking places of several of the most pretentious hotels and restaurants of the city. Houses of prostitution patronized by the lowly are closed at various times for various reasons, but the gilded palaces of sin patronized by the wealthy are immune from punishment, even to the extent of being saved the humiliation of appearing upon a police list." Social Evil in Chicago (1912) 31.

"We in America (indeed it is not confined to us) are prone to find in the mere declaration of our principles known as law, the final solution of all problems and the end of our labors. We cheerfully pass Sunday closing ordinances and buy drinks at the 'blind tiger' or if we are not so hypocritical as to do this, innocently trust to the honesty of our fellow men not to do so either." Arthur C. Train, Introduction to Aschaffenburg, Crime and its Repression (1913) p. xxii.
tues and public wrongs. When a man is charged with a commercial
crime, for instance, it is immediately advanced in his favor that he was
a poor boy or that he is kind to his wife and children. Macaulay pil-
loried such an attitude when he said of Charles I:

"A good husband! A good father! ample apologies indeed for
fifteen years of persecution, tyranny, and falsehood! We charge him
with having broken his coronation oath, and we are told that he kept his
marriage vow! We accuse him of having given up his people to the
merciless infictions of the most hotheaded and hardhearted of prelates;
and the defence is that he took his little son on his knee and kissed him!
We censure him for having violated the articles of the Petition of
Right, after having for good and valuable consideration promised to
observe them, and we are informed that he was accustomed to hear
prayers at six o'clock in the morning!"

Many persons, who would be horrified at the suggestion that they
should deliberately violate a law, have no compunction in resorting to
elaborate measures to evade it. Thus we find that it is possible to keep
within the letter of the law against giving entertainments for hire on
Sunday by forming an association under whose auspices the entertain-
ment is given, the audience consisting of the members who pay dues
instead of admission fees. A person's attitude towards the observance
of law is sometimes affected by a temporary change of environment.
The man from the country or the small city does not always live up to
the standards maintained by him at home when he goes to the great
metropolis.

The mental attitude under discussion is further exemplified in the
case of those persons who insist that laws, whose enforcement they do
not desire, should be enacted, or that laws, already enacted, should not
be strictly enforced, as this might result in their repeal or amendment.
The latter position was taken by the Supreme Court of Pennsylvania in
1893 with regard to the "Sunday Law," when it said:

"The act of 1794 is a wise and beneficial statute, and we would regret
to see it interfered with. We must, however, be allowed to express the
fear that too literal an interpretation and enforcement of it may
create an antagonism that may lead to its repeal, or at least serious
modification."

The last element in American public opinion to be discussed in this
connection is disrespect for law. This is a familiar theme and has
well served editorial writers and presidents of bar associations. In
most publications on this subject I find two common theses. The first
is that disrespect for law results from the failure of its administration
and the second is that this disrespect is a new and growing phenomenon,

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49 Essay on Milton (Smith's ed. 1898) 38.
51 "The law among the ancients was always holy. . . . To disobey it was sacri-
lege." Fustel de Coulanges, Religious Origin of Ancient Law, Evolution of Law
which threatens social disintegration. Each of these propositions is to a large extent incorrect. While it is true that there can be little respect for an unenforced law, it is more fundamentally true that a law which is not respected will not be enforced. Disrespect for law has a deeper root than in the mental reactions over its non-enforcement. As Dean Pound of the Harvard Law School pointed out in 1906, one of the inherent causes of dissatisfaction with any system of law is “popular impatience of restraint.”

In addition to this, there exists in this country, probably because of its newness, a certain contempt for obedience of any kind, and a corresponding pride in the non-compliance with prohibitions. Individuals reserve to themselves the right to sit in judgment on the value and propriety of certain laws, and the public has respect, unconsciously perhaps in some instances, but at the same time very real, for the man who holds himself superior to legal restraints. This idea is exemplified by the following statement occurring in a eulogy of the late Edward H. Harriman by the banker, Otto H. Kahn:

“He did not exactly look upon himself as a chosen instrument of Providence in the performance of his task, but he did have, and was actuated by, a profound and unwavering faith that what he, after mature thought, felt should be done, was best for the properties of which he was the directing head, was of benefit to the communities which they served, as well as to the country at large, and was ethically right, and proper to be done. He was irritable and impatient at stupid laws, as he was at all stupidity.”

The last sentence is very clarifying, and is quite characteristic of the general attitude in this country towards law. A law which is opposed to one’s interests or is contrary to one’s views is stupid, and consequently should be disregarded.

Our habit of enacting unenforceable statutes for the purpose of registering a moral sentiment has not fostered respect for law, but has been responsible for a skeptical attitude towards all regulative legislation. Business men regard the Sherman Anti-trust Law and similar enactments as representing an ideal, to which practice is not expected to attain. An effective administration of law would of course tend strongly to create a respect for it, but to secure such an administration, it would have to be made independent of public opinion. Further, it may be noted that the prevalent methods of enacting legislation are not conducive to lessening the basic disrespect for law.

The contention that disrespect for law is a new and growing condition in this country seems to be without foundation.

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32 (1906) 29 Reports of Amer. Bar Assoc. 395, 397.
33 “In some circles the feeling is growing up that obedience is the part of a dastard.” Ross, Sin and Society (1907) 81.
Pennsylvania was called in 1698 'Ye greatest refuge for pirates and rogues in America'. Penn wrote about this time that he had heard no place was more overrun with wickedness than Philadelphia, where 'some very scandalous, openly committed in defiance of law and virtue, facts so foul I am forbidden by common modesty to relate them.'

An eminent historian, in describing conditions in this country during the early part of the nineteenth century, says:

"All admitted that crime, profaneness, desecration of the Sabbath, intemperance, and pauperism, prevailed everywhere to an extent which called loudly for public interference."

The whiskey insurrection, frontier conditions, the draft riots in New York, and the period of well-recognized lawlessness which followed the Civil War are manifestations of a general disrespect for law over a lengthy period. An editorial in the Albany Law Journal for October, 1877, denounces in strong terms the indifference of the people towards the law, and an article in the Green Bag for October, 1890, describes its frequent evasions.

A writer on Sociology says:

"The weakness of the criminal law in the United States and the general disrespect for law which we find widespread in our population, is, therefore, one of the gravest signs of social disintegration which confronts the American people."

It may well be doubted whether the conclusion of this writer that disrespect for law in this country indicates social disintegration is correct. Disrespect for law, as has been pointed out, is not a new phenomenon with us. It is a characteristic of new countries, just as it is of young persons, and decreases, as the history of England shows, with age. The frequent intimations that it is of recent development are explainable on two grounds. The first is that some persons are inclined to regard as new what they observe for the first time; while the second is found in the fact that there is today a greater willingness to recognize and face unpleasant facts than was the case formerly. It is no longer felt that

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L. H. Gipson, The Criminal Codes of Pennsylvania (1915) 6 JOUR. CRIM. LAW & CRIM. 323, 341.

4 McMaster, History of the People of the United States (1895) 524.

16 Albany L. Jour. 232. The following extract from this editorial is strikingly applicable to conditions to-day: "Much reproach is justly thrown upon the administration of justice by the failure to execute the laws. Complaints arise on every hand that crime is rampant and increasing and that the laws are not stringent enough. The difficulty arises not so much from want or inadequacy of legislation, as from the indifference of society and the consequent laxity of execution of existing laws. The community seems to satisfy itself by enacting wholesome statutes, and after that quietly disregarding them."


propriety demands the making of such statements as a Vice-President of the United States made in Philadelphia several years ago when he said:

"We do respect the law in the United States in my judgment. Perhaps we have more wholesome respect for it than the citizens of any other country under the sun. . . . Respect for the law has in large measure built up this country of ours." 6

At the beginning of this paper it was suggested that it might be possible to "point a moral" from the anomaly presented by the inability to enforce certain criminal statutes and the agitation for enacting new ones. It is believed that the "moral" has clearly appeared from the discussion, but at the risk of repetition it may well be stated in conclusion for the sake of emphasis. It is simply this—the enforcement of the criminal law in this country depends upon public opinion, and laws which are not in accord with such opinion are incapable of strict enforcement. This is no new idea. In his Tract on the Popery Laws, Edmund Burke said:

"In all forms of government the people is the true legislator; and, whether the immediate and instrumental cause of the law be a single person or many, the remote and efficient cause is the consent of the people, either actual or implied; and such consent is absolutely necessary to its validity." 1

This must be accepted as a basic principle of legal philosophy, and it is in the application of this principle that the great mass of the people in this country today find protection from the tyranny of aggressive minorities. As a corollary it may be further stated that the administration of the criminal law in any community, being dependent upon public opinion, is in general just as efficient as the citizens of that community deserve.

6 Hon. James S. Sherman (1910) 36 Annals, Amer. Acad. Pol. & Soc. Sci. 193, 195, 196. On the occasion that Mr. Sherman made this statement, another speaker, Frederick C. Stevens, stated the following: "Now, theoretically, we Americans have and ought to have the greatest possible respect for law, because that is the concrete expression of the will of the people, through their duly organized institutions. We all realize that. And yet actually, we realize also, that there probably is not one of the great civilized nations of the world where there is a greater disregard of public authority than in the United States. . . . There is too little respect for our fundamental laws and obligations among the good men and women of the land." Ibid. 199, 202.

6 Works (Little, Brown & Co., 1881) 301, 320.