

PROPOSED REFORMS OF AMERICAN CRIMINAL LAW

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A century ago England was in the throes of a strong movement to reform the administration of the criminal law.¹ John Howard² and Elizabeth Fry³ had exposed the debauching influences of English prisons. Sir Samuel Romilly had denounced⁴ the substantive law with its penalty of death for more than two hundred offenses. Some judges and many juries evaded their manifest duties under the law. Called to fix the value of goods stolen for which the penalty might be death, juries made absurd under-valuations to evade the extreme penalty and judges gravely approved the official lie.

But the power of the gallows was not given to the courts in vain. Conscientious fulfillers of the code of blood were much in evidence. Mere children were hanged. A young mother whose husband had been stolen from her by a government chain gang, when ejected from her home with her children, entered a draper's shop and took up a piece of cloth, but dropped it on the counter when she saw the eye of the proprietor upon her. A law existed to the effect that anyone who lifted an article from a counter with intent to steal should be hanged. The shopkeepers of the row declared an example necessary. The babe at her breast which she was feeding when the hangman called was taken from her and she went to the gallows.⁵ A member of Parliament declared⁶ that there was in 1777 in Newgate a girl of fourteen whose master had been hanged for counterfeiting and would herself have been burned by an eccentric penalty of the law but for chance intervention of a high official. Yet when it was proposed in 1810 to abolish the death penalty for stealing any article of the value of less than five shillings Lord Eldon declared that the foundation of the law

¹ Wontner, *Old Bailey Experience* (1833); ² Stephen, *A History of the Criminal Law of England* (1883) ch. 21, ³ *ibid.* ch. 26; ² Pike, *History of Crime in England* (1876) ch. 12; Poland, *Changes in Criminal Law and Procedure since 1800, A Century of Law Reform* (1901) 43-66.

² Howard, *The State of the Prisons in England and Wales* (1777).

³ Corder, *Life of Elizabeth Fry* (1853).

⁴ Atkinson, *Life and Principles of Sir Samuel Romilly* (1920); Romilly, *Observations on the Criminal Law of England* (1810).

⁵ *Speech of Rt. Hon. Sir William Meredith, Bart. in the House of Commons, May 13, 1777, in Committee on a Bill Creating a New Capital Felony*, reprinted as the first of "A Series of short articles to appear occasionally in Numbers designed for General Circulation" under the caption *Punishment of Death* (5th ed., 145th thousand, 1831-32) 5.

⁶ *Ibid.*

would be shattered if such molly-coddling were permitted, and the bill was killed in the House of Lords.⁷

Because conditions were so shocking to the new liberalism of the second and third decades of the nineteenth century the struggle for reform continued far into the century and until the present English criminal law eventually emerged. This in many points is less severe than our own, but far more prompt and sure, and hence more of a terror to law-breakers. It was the consensus of opinion among English law reformers that it was the promptness and certainty of the punishment of crime rather than its severity which caused terror to the underworld of crime. At least eighteenth century experience seemed to demonstrate that the severity of its laws was fruitless. Gambling on the possibility of tender juries or judges, offenders "took a chance" and the crowds that were encouraged to attend a public execution were notoriously victimized by pickpockets whose offense carried the death penalty. An English judge even recorded that a forger who came before him to receive the death penalty was convicted for using a paper forged by a woman in a room where, lying at the time, was the body of a man just hanged for forgery.

America failed to join the movement for criminal law reform initiated at the beginning of the last century. The New England States, with criminal codes founded largely on the Old Testament, had only fifteen to twenty offenses for which the penalty might be death, while Pennsylvania, whose original code was at least influenced by the New Testament, had only one death penalty; and America was in 1800 gradually wiping out the English laws forced upon it by colonial governors and returning to its relatively milder penalties.

But the good was the foe of the better and with few exceptions our seventeenth century codes with their retarding technicalities were not modified in the interest of either efficiency or humaneness. Such changes as were made were usually prompted by isolated and spectacular crimes and frequently resulted in ill-advised and uncoordinated remedies. Nor did the first and second decades of the twentieth century produce much better results. Only within the last few years has the demand for comprehensive reform of the criminal law made itself felt. One of the first manifestations of the new demand for reform of the criminal law was the appointment, at the meeting of the American Bar Association in 1921, of a committee of five on Law Enforcement. The members of the committee were William B. Swaney, Chairman, of Nashville, Marcus Kavanagh, of Chicago, Charles S. Whitman, of New York, Wade H. Ellis, of Washington, D. C., and Charles W. Farnham, of St. Paul. Its report⁸ was presented at the meeting of the

⁷ Cf. Poland, *op. cit. supra* note 1, at p. 45.

⁸ *Report of the Special Committee on Law Enforcement*, 47 Reports of American Bar Association (1922) 424-432.

Bar Association in 1922 and approved by a mixed gathering after a brief discussion. For time given gratuitously, for extensive travel, for conducting and attending public hearings, and for seeing through the task undertaken, the committee deserves public thanks.

The opinion of the committee regarding the state of criminality confirms the recorded opinion of Chief Justice Taft and other qualified authorities. It declares that "particularly since 1890 there has been and continues, a widening, deepening tide of lawlessness in this Country,"⁹ and records as its comparative judgment that "the criminal situation in the United States, so far as crimes of violence are concerned, is worse than that in any other civilized Country."¹⁰

Certain of the committee's recommendations are of high value and merit prompt adoption. Chief among these is the recommendation¹¹ that a Federal Bureau of Records and Statistics be established under the Department of Justice at Washington to which criminal authorities in the several states must regularly report. The committee wisely adds¹² that without knowledge of the real situation "it will be impossible to thoroughly diagnose or to properly deal with the problems of crime which confront us." Confirmation of this statement might be drawn from the contrast between the helpless ignorance of this country as to the increase or decrease of criminality during and since the war in comparison with Canada and England. The recent annual reports of criminal statistics for those countries carefully and dispassionately analyze criminality during and since the war and offer highly instructive conclusions as to the increase of certain crimes and the decrease of certain others during the periods in question.

The same topic has been hectically debated in this country but no official information is forthcoming since the last report of the National Government touching on crime. Aside from the report of the Attorney-General which deals only with crimes covered by national laws the only information to be obtained is in a report of the Census Bureau for 1910. And this gives nothing but the prison population for that year. Certainly if the public desires that we make progress in dealing with the much debated crime problem, we must begin with knowledge which we wholly lack at present. How long will it be before our National Government assumes the task, now borne by practically all civilized governments, of collecting and publishing annually statistics of crime and of court and prison records?

Certain other very practical recommendations of the committee drawn probably from the experience of its members strike at existing defects of procedure. Among them are that the state be given the same rights of appeal as the defendant;¹³ that the state have the right to

⁹ *Ibid.* 427.

¹⁰ *Ibid.* 428.

¹¹ *Ibid.* 424.

¹² *Ibid.* 424.

¹³ *Ibid.* 431.

amend indictments;¹⁴ that there be but one appeal from a judgment of conviction;¹⁵ that bail abuses prevalent in certain states be corrected;¹⁶ and that a proper time limit be established by law during which judges may consider dilatory motions.¹⁷ The committee also recommends that the jury cease to be the final judge of the law and the facts as to certain crimes in certain states.¹⁸ The emphatic comment of the committee seems sound and should meet the approval of clear-thinking lawyers.

In the recommendation¹⁹ that the prosecuting attorney may call attention to the silence of the defendant if he fails to take the stand, attention is called to an experiment thus far tested only in Ohio, but which should have attention throughout the country. In view of the reason for the protection of the silence of the defendant which has long ceased to be necessary, the provision ought to be abandoned or continued because of some much better reason than the mere fact that it is now in the law. Once a criminal trial ceases to be a game or a contest or a legal proceeding governed by rules of a hoary tradition and becomes a search for the truth without fear and without favor, what evidence is likely to be so informing as that of the party alleged by the state to have committed the act under investigation?

The recommendation²⁰ that the manufacture and sale of pistols be prohibited except for governmental use would reach a serious evil at the source. It would be helpful to know from what statistics the committee obtained its finding that over ninety per cent. of the murders in this country are committed by the use of pistols. We know no present authority in a position to ascertain the truth in this matter, but if such exists it should be quoted or else the statement should be offered as an opinion rather than a finding of fact.

The formal endorsement²¹ by the committee of the measure now before Congress to punish lynching and mob violence and of the bill to increase the number of federal judges is perhaps warranted, but we think they should be supported by a statement of facts or agreed reasons upon which these recommendations are based.

It is to be regretted that the committee did not see fit to share with the public what the Chairman declared²² to be the one purpose kept in view throughout the investigation—that every statement should be amply supported by facts. Few of the committee's statements are supported by any published facts. Some seem unwarrantedly loose, some carelessly made, and some contradict the committee's own declaration. For instance, in view of the committee's assertion²³ (which is a fact) that

¹⁴ *Ibid.* 431. ¹⁶ *Ibid.* 431. ¹⁸ *Ibid.* 431. ²⁰ *Ibid.* 430.

¹⁵ *Ibid.* 431. ¹⁷ *Ibid.* 431. ¹⁹ *Ibid.* 431.

²¹ *Ibid.* 431. An Act of Sept. 14, 1922 [Public Act—No. 298—67th Congress. H. R. 9103] provides for the appointment of additional federal judges.

²² (1922) 16 CURRENT HIST. MAG. 918.

²³ *Report of Committee on Law Enforcement, supra* note 8, at p. 424.

there are no criminal statistics in this country, its statement²⁴ that burglaries increased by 1200 per cent. during the last decade may be a good guess but cannot be founded on fact since no reported facts exist to prove it.

The committee's members were judges and lawyers of wide experience. It is therefore particularly to be regretted that their report shows also a lack of agreed principles and limited progressive vision.

Even more disappointing are two statements of fact in the committee's introduction. With reference to the reason why "crime flourishes," the committee declares²⁵ that "the prevalence of the abnormal volume of crime in our larger cities is the result of years of molly-coddling and sympathy by misinformed and ill-advised meddlers." A statement so sweeping and indiscriminating would reflect on the intelligence and knowledge of the committee if one did not conclude from other evidence to the same effect that the statement was due to mere carelessness.

Were it true that our police, prosecuting attorneys, judges, and juries had all been dominated by molly-coddlers for a period of years it would be a serious indictment of these officials. We assume those members of the committee who had been or were prosecuting attorneys or judges wished to plead guilty of the offense; but we are entitled to ask for evidence before we concede the just application of the charge to their associates and contemporaries. Doubtless individual judges besides the committee have been molly-coddlers but the molly-coddling of individual officials is far from the whole story. Did the committee give attention to the changing of industrial conditions and our increasingly complex social life, and did the committee consider the history of the criminal law in this country and find that these factors were unrelated to the problem of current criminality? Unfortunately we find no evidence that the committee was informed as to the history of the criminal law or took cognizance of social conditions and recent social development. The competence of the committee for its task is seriously challenged by its lack of such information.

Another instance of the looseness of statement and ignorance of the committee is contained in a quotation from former Justice John W. Goff, who, the chairman states,²⁶ "made a remarkably able and constructive address before us." Justice Goff's statement, the most extended of any quoted by the committee, ends with a declaration that²⁷ "all statutory legislation has had a tendency within the last quarter of a century in favor of the criminal."

The sentence has the same loose and sweeping quality as that of the committee in relation to molly-coddling. It may be disposed of by

²⁴ *Ibid.* 428.

²⁵ *Ibid.* 426.

²⁶ (1922) 16 CURRENT HIST. MAG. 920.

²⁷ *Report of Committee on Law Enforcement, supra* note 8, at p. 427.

reference to a few facts. During the past twenty-five years there has been passed in practically every state in the Union a series of laws to which has been added other legislation aimed at traffickers in vice. New and more severe laws have been passed providing penal offenses for the misuse of employment agencies for immoral purposes and for the punishment of offenders exploiting in various ways the commercial relations of the poor, such as pawn shops and loan agencies. Nor should it be forgotten that in 1901, following a striking case of kidnapping, twenty-four states passed laws the next year increasing the penalty for that offense. In 1910 two National laws²⁸ were passed against the white traffic and the writer had the word of the Attorney-General in 1911 that he had expended more money to execute these laws efficiently than for the execution of any other laws which he was charged to enforce, with the sole exception of the Interstate Commerce Act.²⁹ Ex-Justice Goff may be excused for his error in an extemporaneous speech before the committee, but the committee cannot be excused for approval by quotation of a statement, the incorrectness of which should have been known by every member of the committee.

Still another recommendation of the committee must be condemned because too sweeping and without facts to sustain it. The committee recommends³⁰ that only first offenders be eligible for probation and parole and that neither probation nor parole be permitted to those convicted of homicide, burglary, rape, or highway robbery.

The first probation law was enacted in Massachusetts in 1878.³¹ Since that time probation, the release of offenders after conviction on trial or plea of guilty, has extended throughout the country and parole, the release of offenders after serving a certain term in prison, has grown through the adoption of indeterminate sentence laws. Both probation and parole merit checking up, which has not been done with either adequacy or thoroughness. Nearly all declarations that probation has succeeded are based on the conduct of probationers while under the watchful eye of the court and the success of parole is judged by the good conduct of the ex-prisoner during the period of parole. The public, of course, wants to know how offenders to whom probation or parole is applied behave when they stand alone. Figures on this point are far too limited. The committee's opinion is formed on impressions or concealed facts. The reports available³² seem to show that probably more than three quarters of offenders so treated make good during probation and parole.

To deny probation or parole to all second offenders and to all guilty of certain offenses is to go back to the standards of the English criminal

²⁸ Act of March 26, 1910 (36 Stat. at L. 263); Act of June 25, 1910 (36 Stat. at L. 825).

²⁹ Act of Feb. 4, 1887 (24 Stat. at L. 379) as amended.

³⁰ *Report of Committee on Law Enforcement*, *supra* note 8, at p. 430.

³¹ Leeson, *The Probation System* (1914) 4; Mass. Acts, 1878, ch. 198.

law of the eighteenth century. Every prosecuting attorney of experience knows that the seriousness of an offender's misconduct may or may not be judged by the offense with which he is charged. The writer recalls being surprised by the remark of an exceptionally severe prosecutor that as a class he would defend those charged with murder with a clearer conscience than for any other offense. He then recalled a case of murder he had prosecuted where guilt was clearly proven but the justification was so great as almost to merit acquittal. Yet such offender could not receive parole under the committee's blind recommendations. Discrimination is admittedly difficult but the power to discriminate comes from education and experience, and if the committee thinks the majority of our judges are not thus qualified, they should have voiced a ringing appeal for better judges. This they did not do.

The committee asserts that no one should be able to say that justice is denied to the poor. Many do say it and easily prove their case in specific instances if they wish to take the trouble. To remove this very grave indictment of the machinery of justice, the committee offers only a vague recommendation³³ that members of the Bar should contribute free service in meritorious cases. But how shall they find out that the case is meritorious? Further if the committee had gone more deeply into the subject they would have learned that in criminal cases the need of reputable counsel does not depend upon the merits of the case or upon the merits of the defendant. The important evil to be remedied, at least in our large cities, is the low character of the shyster lawyers often drawn by criminal defendants and the malign influence exerted by such counsel. Their influence is debauching and anti-social just at the time when criminals are likely, if ever, to be susceptible to advice to abandon their criminal ways. These lawyers are also usually unscrupulously greedy and it is in the knowledge of the writer, gained as a prosecuting attorney and from other prosecutors in various cities, that shyster lawyers falsely assure their clients that with money the judge or the prosecuting attorney can be reached. Many a criminal now in prison believes, because his counsel told him so, that if he had put up more cash, he would now be a free man and that many of his friends obtained their freedom because their counsel "fixed" some one. It is to be regretted that the committee did not investigate this subject more thoroughly and give their findings of the experience of New York, Los Angeles, and the State of Connecticut with the Public Defender. The latter is alleged to contribute to the good repute and efficiency of the court and the better protection of society as well as to the provision of proper legal representation and defense for indigent clients.

In contrast to the work of the committee is a report made last August

³² Reports of the National Probation Association.

³³ *Report of Committee on Law Enforcement, supra* note 8, at p. 432, 433.

by a special committee of the Canadian Bar Association.³⁴ The Canadian report is carefully written, well coördinated, free from loose or inaccurate statements of fact, and it presents a broad, progressive, and instructive program for further improvement in the criminal law and its administration for Canada. So much of the report as related to prisons was adopted and the committee was requested to continue its work and present a more detailed report at the next annual meeting of the Canadian Bar Association. With such competent advisors Canada seems well on the road to further progress.

Our own country greatly needs the constructive effort of lawyers as able and experienced as the members of the American committee, but to make their work of greater value the committee should have realized that the fundamental problem is one of social conditions and social relations. They might also have seen that the present is conditioned by the past and that remedies for present evils must be based on thorough study of past history and of current economic and social conditions.

³⁴ Proceedings of the Seventh Annual Meeting of the Canadian Bar Association for 1922.