

The background of the entire cover is a close-up, slightly blurred image of the American flag, showing the stars and stripes in detail.

The National Law Library

Volume Two

**Crime &
Criminal Law**

by

Morris Ploscowe

**Deputy Commissioner of Investigation
New York City**

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*"It does not require a majority to prevail, but
rather an irate, tireless minority keen to
set brush fires in people's minds."
– Samuel Adams*

PREFACE

There is a universal interest in crime. Novelists and detective story writers have grown rich from the exploitation of this theme. Pulp magazines specializing in crime and crime detection are read by the thousands. Millions of Americans have enjoyed a vicarious participation in an exciting game of "cops and robbers" through following the pursuit of public enemies by "G-Men."

The thoughtful among those interested in crime invariably ask two questions: (1) Why crime? (a) What can be done about it? Unfortunately there is no simple answer. About the only statement that can be made concerning crime causation which will not be challenged today is that crime results not from a single universal "cause" but from a variety of factors. What these influences are, how they operate in general or in the production of an individual crime, still await exact determination. This fact makes crime prevention and control extraordinarily complex and difficult. Successful methods of prevention and control must rest upon a valid body of data concerning causes. Without such data, specific proposals for the prevention and control of crime are based upon hopes rather than facts. Frequently, these hopes are not realized and we have as a result the current disillusionment regarding so-called progressive measures for the control of crime, such as probation, parole and the Juvenile Court.

Attempts at crime prevention and control have not waited for the millennium when scientists could agree as to causes of crime. Long before questions of causation were raised, methods of dealing with crime were devised and agencies were set up to administer them. These methods and agencies have been modified from time to time

by changes in public opinion regarding crime and criminals and by different conceptions of the relation of the individual to the state. There is considerable doubt in the public mind today as to whether these agencies and methods are as effective as they should be for the purposes for which they were intended. Are police departments efficient in detecting criminals and uncovering crimes? Do prosecutors convict a sufficient percentage of those caught by the police? Do judges deal adequately with offenders after conviction? Are the so-called guarantees of individual liberty in our criminal procedure, which protect the innocent, a refuge for the guilty? These are some of the questions which suggest themselves.

Discussions of causes of crime and methods of dealing with crime and criminals are complicated by the fact that crime is no single, dearly defined phenomenon. Crime includes a wide variety of prohibited conduct, ranging from public drunkenness to murder. In general, particular types of conduct are prohibited because they are felt to be so inimical to the maintenance of decent and orderly social relations that the state may deprive a man of life, liberty or property upon their commission. But an examination of the criminal law makes it evident that, on one hand, many forms of misconduct which would seem to fall in the above category are not prohibited and, on the other, the designation of many acts as crimes is not necessary for the general security. Crimes are defined by the criminal law, but the definition of many crimes leaves a great deal to be desired. Some definitions cover too wide a field, others are too restrictive to serve as satisfactory instruments of the general security. Similarly, not all homicides, robberies, thefts and rapes are crimes. Under certain circumstances, the law recog-

nizes certain defenses to charges of crime. But the delineation of such defenses as insanity, self-defense, duress, etc., has given rise to countless difficulties and differences of opinion.

This volume attempts to present some of the problems in regard to the nature and causes of crime and criminals, the definition of crimes, the organization of administrative agencies which deal with crime, the procedure used in the prosecution of crime and the disposition of offenders after conviction. Countless books have been written and will continue to be written on each of these topics and their myriad subheadings. This one volume of some three hundred pages attempts to touch on so many of them, not so much because of the author's temerity as because of his painfully acquired realization that all these topics are inter-related and inter-dependent. Any one of them cannot be adequately dealt with, without taking into account a good deal of practically all the others. Much of our trouble in the United States in this field lies in our acting as if we were dealing with separate unrelated problems.

It is the purpose of this book to suggest to the layman the intricate and inter-related nature of that aspect of human conduct, and our attempts to deal with it, which comes under the heading of "Crime and Criminal Law."

I wish to acknowledge the thoughtful assistance and encouragement of Professor Nathan Isaacs of the Harvard Business School, Professor Julius Stone of the University of Leeds and of my wife, Zelma Friedman Ploscowe. Mr. Harry C. Kane, Mr. Sidney P. Shipman and Mr. Leon Malman, of New York City, were kind enough to read the proof.

Morris Ploscowe



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Part I

Crime & its Causes

Crime & Its Causes: Introduction

1. The Magnitude of the Crime Problem

The amount of crime in the United States runs into astronomical figures. In 1935, three-quarters of a million cases of murder, manslaughter, rape, robbery, aggravated assault, burglary, larceny and auto theft came to the attention of the police authorities in 1,423 cities of about 57,000,000 population. Yet even this huge total underestimates the actual amount of crime committed in these cities. On the one hand, many crimes never come to the attention of the police. On the other, in some communities police hesitate to present a real picture of the criminal situation for fear of hostile criticism. The tremendous size of the American crime problem is further evident from the number of accused. In 1935, 2,890,000 persons were held to answer charges of crime ranging from drunkenness and traffic offenses to robbery and murder in 898 cities of about 33,000,000 population. If these figures are typical for the country as a whole, then in that year about one person in every eleven in this country came into conflict with the law.¹ The country's prison population gives another indication of the size of the crime

problem. In one year, 1933, a floating population of about 700,000 persons charged with crime was incarcerated for some length of time in Federal and State penal and correctional institutions, local jails and workhouses, either serving sentences or being held pending trial.²

Crime takes a tremendous toll in life, property and human suffering. It is customary for writers who wish to drive home the implications of the crime problem to cite some stupendous figure on the cost of crime to the community, but these figures are pure guess work. It is impossible to estimate with any degree of accuracy what crime costs. One may say that tremendous sums are obtained each year by the racketeer, hold-up man, house and loft burglar, safe blower, pickpocket, auto thief, swindler, fake stock seller, and other criminal gentry. A single stock fraud, such as that in the Insull case, involved an estimated loss to investors of \$146,000,000. The cost of crime reasonably includes the cost of administering criminal justice. In the United States this item is said to be in excess of \$350,000,000 annually. According to the investigations of the Wickersham Commission, the average per capita

cost of criminal justice in cities of over 25,000 is \$5.35 per year.³

The economic burden of crime is borne by young and old, rich and poor, strong and weak, without discrimination. The modern racketeer, being no Robin Hood, scorns no source of income. His "pinball" games and slot machines take the child's nickels as well as those of the adult. His "numbers" game extracts money from those who can afford to gamble at odds of about 1,000 to 1 as well as those who cannot. Both rich and poor housewives pay higher food prices because of the criminal's control over certain phases of the handling, marketing and the delivery of food-stuffs.⁴ Large and small business men, laboring men and capitalists are blackmailed by bogus trade and protective associations and racket control of labor unions.⁵ The criminal levies tribute from the whole community.

2. Empiricism in Crime Control

The criminal's activities are so widespread, they affect so many different phases of social and economic activity that the control of crime is of vital importance, but it cannot be had merely by decreeing more severe penalties

for criminals. Severity of punishment as a method of crime control was tried from the 14th to the 18th centuries. Both in England and on the continent the death penalty and corporal punishment were used extensively for offenses which today might result in a short term of imprisonment, a small fine or probation. Crime flourished despite the fact that executions were public and the death penalty was often inflicted in horrible forms, such as breaking on the wheel and burning at the stake. Medieval law enforcement officials were not thoroughly efficient in detecting the guilty and as a result criminals took their chances of escaping detection and punishment quite as they do today. This phenomenon was perfectly apparent to the medieval artists whose familiar prints of public executions show pickpockets plying their trade in the crowd surrounding the gallows on which unluckier or less skillful pickpockets were being hanged.

Crime cannot be controlled by bloody repressive measures, since they do nothing to remove its underlying causes. Fundamental factors productive of crime must be isolated, and remedial measures must be devised to remove them before any real progress can be made in the control and prevention of crime. Crime, in other words, must be treated like any other pathologic phenomenon. The greatest strides in the prevention of disease were made when their causes were isolated and the methods of transmission determined. Prophylactic measures were then planned which served as checks to the disease. Before causes of disease were discovered, physicians treated it empirically. Sometimes this treatment is the correct one; quinine was used in the treatment of malaria long before physicians had any light on the genesis of malaria, but the

treatment of disease based on empiric observation often has little relation to factors causing the disease. The patient, if he survives at all, does so despite the efforts of the doctors and not because of them. Without a knowledge of its causes, we are applying the same blundering technique to the control of crime that was formerly applied to the treatment of disease. The penal system is subjected to continuous experimentation in the name of better methods of crime control, yet it is a question whether such relatively recent innovations as probation, parole, the indeterminate sentence, the juvenile court, the reformatory, represent any fundamental advance toward the elimination of crime.

3. Variety of Criminal Behavior

The search for causes of crime, however, is no small undertaking. There is the primary difficulty that crime is not a single, clearly defined phenomenon, but is, on the contrary, an aggregate of different types of behavior whose only common characteristic is prohibition by law under threat of a penalty. Crime in a modern state touches every phase of individual, social, political and economic activity. The individual's existence, physical integrity, and liberty of movement are protected by designating as crimes, murder, manslaughter, mayhem, assault and battery, kidnapping, abduction and false imprisonment. The social interest in the physical integrity of women and children is manifested by prohibitions against rape, carnal abuse and indecent assaults. Incest, sodomy, seduction, indecent exposure, and prostitution are prohibited to further the social interests in the general morals. The law attempts to protect the possession, use, enjoyment and acquisition of property against wrongful takings by

force, violence, or putting in fear, as in robbery, burglary and extortion; or by stealth, fraud or breach of trust as in larceny, embezzlement, obtaining property by false pretenses, forgery and counterfeiting. In the interest of security of property also, prohibitions are laid down against its destruction as in arson and malicious mischief. The tranquillity of family life is the objective of prohibitions against bigamy, adultery, non-support and desertion. Treason, bribery of officials, perjury, and violations of the election laws are prohibited as interferences with the organization and the due course of government. The general health and

safety is fostered by provisions against the sale of narcotics, the improper labeling of drugs and poisons, the illegal practice of medicine, the prescription of standards of buildings and by a host of motor vehicle regulations. Disorderly conduct and public drunkenness are prohibited in the interests of public convenience and morals. These are but a few of the many acts set forth as criminal in state codes. Bare enumeration shows the diversity of behavior involved. Causative factors which may explain one offense fail wholly to explain another.

4. Types of Offenders

Those, too, who commit crime differ very widely. There is no single criminal type recognizable by any clearly marked physical, moral or psychological characteristics. The murderer differs from the pickpocket, the confidence man from the rapist. Nor are criminals convicted of the same crimes like each other. The man who shoots his mistress in a fit of jealous passion cannot be compared with the gangster whose specialty is taking rival gangsters "for a ride." But though the personalities of individual criminals may differ, they can still

be divided into a number of broad and ill-defined categories. A consideration of the various types of offenders enables one to understand better the causative factors and the significance of each type in the problem of crime.

(1) **MENTALLY DISEASED OFFENDERS** One must distinguish the mentally disordered and mentally defective criminals from those who are mentally normal. Mental defect and disorder may be the compelling force in all kinds of crime. Sex attacks on children by old men may be the result of senile dementia. A man with a delusion of persecution is likely to turn on his imagined oppressor and kill him. A disorder of the sex instinct may stir kleptomaniac desires for fetishistic sex objects, or may produce the disorder known as pyromania, which is an irresistible desire to set fires. Mentally retarded offenders may be used as tools by normal criminals to carry out predatory acts, such as burglaries, robberies and larceny. Various kinds of behavior disorders follow attacks of epidemic encephalitis (sleeping sickness). If the mentally defective or mentally disordered individual did not know at the time of the commission of the crime the nature and quality of his act, or if he did not know it was wrong, then he is exempt from punishment. He may be incarcerated in an asylum, if he is dangerous to the general security, but he cannot be sent to prison as an ordinary offender. Unless the abnormality has the effect of excluding knowledge of right and wrong or of the nature and quality of the act, the mental defective or mentally diseased offender may be punished as any ordinary criminal. In such cases, however, the burden of distinguishing offenders according to their mental states is simply shifted to the prison authorities.

Mentally abnormal offenders present quite different and in many respects much more difficult problems of discipline and treatment than normal criminals.

It is impossible to estimate with any degree of accuracy the proportion of mentally disordered or defective offenders in the criminal population. Psychologists and psychiatrists disagree in their definitions, classifications and methods of diagnosis of the various mental ills. This is especially true of the type of mental disorder, the psychopathic personality, which is one of the labels affixed to a large proportion of criminals by many psychiatrists. Of the 4,392 defendants examined prior to trial between 1927 and 1934 by the Massachusetts Department of Mental Diseases, 693, or 15 per cent, were found to be insane, mentally defective or suggestively abnormal.⁷ Surveys of jails, penitentiaries and prisons indicate that higher percentages of the inmates of these institutions suffer from some kind of mental defect or disorder. Bernard Glueck in his pioneer study of the inmates of Sing Sing Prison, for example, found that 12 per cent were mentally diseased or deteriorated, 28.1 per cent were intellectually defective, and 18 per cent were classifiable as psychopathic.⁷ But we shall see, in our discussion of the psychiatric factors in crime causation, that there is no inevitable relation between the mental disorders of these offenders and the crimes which resulted in their conviction and incarceration.

(2) **THE EPISODIC OFFENDER.** Distinctions must be made among the episodic, occasional, professional and habitual offenders. The episodic offender is a generally law-abiding individual who under stress of a particular set of circumstances or temptation commits a criminal act. The

circumstances or the temptation may never occur again; it may have been but one episode, though a serious episode, in an otherwise blameless life. Murderers are frequently of this character. The killing may be a desperate measure resorted to by the offender to resolve an acute personal situation. This is illustrated by the "American Tragedy" killing in Massachusetts. Newell Sherman was the son of a former chief of police; his family had been well-respected and law-abiding citizens for generations. He was a church member and sang in the choir; he was the father of two small children, yet he deliberately drowned their mother by taking her out in a canoe and overturning it. The causative factor appears to have been his infatuation for a younger woman whom he wished to marry.⁸

Episodic offenders are frequently involved in killings which arise out of altercations or brawls and in many of these they have been under the influence of liquor. In Cambridge recently, a candidate for mayor, while intoxicated, killed a waiter by kicking him in the stomach in a dispute over change from a twenty dollar bill. The offender was a college and law school graduate, a World War veteran, a judge advocate and a lawyer for many years. This type of offender makes up a considerable percentage of those who commit offenses against property, such as larceny, embezzlement, receiving stolen goods and burglary. The trusted clerk, cashier, or secretary, who after many years of faithful service succumbs to the temptation of taking his employer's money, the woman who cannot resist buying a fur coat or a diamond ring at a bargain price, though she knows that the article is stolen, the man who steals because he is at the end of his resources, are some of the common types of modern criminals.

(3) THE PROFESSIONAL CRIMINAL. The professional criminal is a very different person from the episodic offender. A crime in the life of the professional is no regretted episode, but a planned incident in a career; for the professional criminal is the career man of crime. He depends upon his specialty for the money necessary to pay his bills. "I was never out for glory and was always out for the buck," asserts Danny Ahearn, one of New York's literary gangsters.⁹

"If I had all the money I wanted, I would be just as honest as anybody," states a professional thief studied by the Gluecks; "that is, if I had enough so I could do what I wanted to do without working. I never liked work. I hate it and never will work.... I have never committed a crime for the sake of doing the crime.... I want the money. I have been in this game for ten years and am looking forward now to doing some big things when I get out."¹⁰

This desire for money, regardless of the means by which it is obtained, keeps the professional criminal continually alert to the possibility of new criminal ventures.

"I was always planning new crimes and longing for an-other chance to show my *stuff*," states one young criminals "My mind ran in a gutter and that gutter was crime."¹¹ Or as Jack Black, a reformed ex-burglar put it: "I thought in terms of theft. Houses were built to be burglarized, citizens were to be robbed, police to be avoided and hated, stool pigeons to be chastised, and thieves to be cultivated and protected. That was my code; the code of my companions. That was the atmosphere I breathed."¹²

It becomes inevitable, then, that a large proportion of crimes against property will be the work

of professional criminals. In the Missouri Crime Survey (1925—26) it was estimated that well over 50 per cent of all major crimes were the work of professional criminals; in Chicago in 1927-28, 78 per cent of the property crimes were attributed to them.¹³

The menace of the professional criminals cannot be measured by the mere number of crimes for which they are responsible. Most of the serious crimes are the work of professionals. A mere tyro in crime does not usually begin his career with a bank robbery, a loft burglary, the organization of an industry on a racket basis, the management of a business which deals in stolen goods or even the picking of a pocket. All such crimes require considerable technical skill, foresight and courage, qualities which can only be acquired after a long apprenticeship in minor criminal roles.

Organization immeasurably increases the power of the professional criminal to do harm. It permits a variation of technique and a specialization of activity which make for more efficient operation and considerably cut down the risk of successful detection and prosecution by law enforcement agencies. These features of organized crime are illustrated by the following description of a predatory gang:

"First, is a 'spot' man, who goes out and finds stores to be robbed, studying their defense and getting all the advance information in the greatest detail, so that an absolutely mathematical plan, timed to the second, can be laid. Second, are the robbers or bandits themselves, usually detected or drugged desperadoes. Third, is the bandit leader, the field captain. The notorious Whittemore occupied this risky place in his gang. . . . Fourth in line are the middle men. They do the actual planning of the raid.

They are the brains of the active 'mob'—and they stay pretty well in the background. The stolen goods are delivered to them and they take them to the fence, who is the fifth interest in the gang. There is often, if not always, a sixth rank, the backer. As a rule this man is not generally known as an underworld character. He has means, credit, a certain reputation. He often gets the funds for criminal enterprises from banks of the highest and strictest probity, which take the attitude that the backer's business is his own and do not inquire into it.

"These backers and fences are the real master minds. They not only finance the criminals, dispose of their loot and keep them in the field, but they procure lawyers and political influence; they pull every pullable wire and they actually get the basic information and lay the broader plan of underworld operation. In a military comparison, they take care of the strategy of crime and leave the actual tactics of individual crimes to the middle-man."¹⁴

(4) THE HABITUAL CRIMINAL The profit motive is usually absent from the crimes of the habitual criminal, yet, like the professional, the habitual criminal is subject to a set of inner compulsions or habit patterns which cause him to persist in a course of criminal conduct despite repeated appearances before criminal courts or incarcerations in institutions.

The most numerous type of habitual offender is the drunkard. About one third of the offenders who appear before the Massachusetts inferior courts are charged with drunkenness. Many of these offenders are citizens who are usually sober and industrious, but who occasionally go off on a spree; a large proportion of the drunks who appear in the Massachusetts courts and those of every other

state, however, are inveterate offenders. A typical case is Frank H— who, in the course of years, appeared 147 times before Boston's Municipal Court and 14 times before the Superior Court on drunkenness charges. Probation, jail, the house of correction and the State Farm were all tried out on Frank with no effect on his appetite for drink. He is the peaceful type of drunkard who never gets arrested for anything except drunkenness or allied offenses, such as disorderly conduct. But there are many habitual drunkards who become involved in other types of crime. The drunkard whom liquor stirs to a fighting frenzy is frequently seen in criminal courts on charges of assault and battery, mayhem, manslaughter and even murder. Many drunkards commit minor offenses against property in order to obtain the money necessary to buy liquor.

There are other types of habitual offenders besides drunkards. The narcotic addict in states which make the use and possession of narcotics a criminal offense, the pyromaniac who sets fires with no thought of profit but in response to some peculiar mental quirk, the offender who secures sexual satisfaction through the exposure of his person, the homosexual who indulges his unnatural passions, the confirmed tramp, beggar and vagrant, are all familiar habitual criminal types.

A large proportion of these habitual offenders are in need of mental and medical care.¹⁵ Their habitual criminality may be largely the product of their mental deterioration. Few of our county jails and prisons are equipped to give the habitual offenders the kind of treatment that they need. Like Frank, therefore, they float in and out of institutions without any appreciable modification in their behavior patterns.

(5) OCCASSIONAL OFFENDERS. Many of the offenders who have rather frequent conflicts with the law are neither habitual nor professional criminals. They do not draw their living from crime like the professional criminals, nor are they impelled to crime through the force of deep-seated habit patterns like the habitual offenders. These occasional offenders usually attempt to work at some trade or occupation and try to lead a law-abiding life, but they are unable to resist the temptation to commit some minor crime when the opportunity presents itself. These offenders intersperse periods of lawful employment with short visits to jails or houses of correction, or they may be tried out on probation or parole a number of times in the attempt to make them law-abiding citizens. Sometimes they do settle down after a period of intermittent criminal activity and do not again come into conflict with the law. Others may gradually abandon the pretense of making an honest living and become professional criminals.

A case of the latter type is Dennis who was studied by the Gluecks. Dennis was the black sheep of a respectable Boston Irish family. During his youth Dennis had acquired some industrial skill as a machinist's helper and held two jobs for as long as a year and a half. When he was regularly employed, he seemed to have no trouble with the police. He was first arrested at the age of nineteen on a charge of drunkenness and released by the probation officer. Shortly afterwards he was arrested for larceny of a bicycle and was given six months probation. Not long thereafter he was again arrested for larceny from a building and the case was nolle prossed. When he was twenty-three, he was committed to the house of correction for eight months on a charge of assault and battery. At the age of twenty-

four, Dennis was arrested for breaking a plate glass window of a shoe store and taking one shoe. For this offense he was sentenced to the Massachusetts Reformatory on a five-year indeterminate sentence. After twelve months in the Reformatory he was released on parole. He worked for a plumber as a helper for one year. Soon thereafter he was arrested for larceny from a common carrier. For this offense his parole was revoked and he was returned to the Reformatory. He was released again and was again arrested within a few months for larceny from a common carrier. After a third release, he worked for a truckman for four months and was arrested and returned to the Reformatory for larceny from the person. He was paroled for a fourth time and worked as a teamster for a year and a half till the end of his parole period. Thereafter he was arrested a number of times for larceny, vagrancy and violation of the liquor laws. At the time he was interviewed by the Gluecks at the age of thirty-seven, he was engaged in the business of bootlegging which he regarded as a perfectly legitimate occupation "if you can get away with it."¹⁶

(6) JUVENILE OFFENDERS. Legally there is considerable difference in status and treatment between juvenile delinquents and offenders presumed to have reached maturity.¹⁷ The usual criminal processes of preliminary hearing, indictment by Grand Jury and trial by jury are not applied to juvenile delinquents. In most states, special Juvenile or Children's Courts have been established to deal with them. These courts employ a much more informal procedure than is permissible in adult cases. Moreover, many cases which come to the attention of the Juvenile Court are never dealt with formally by the Court, but are adjusted unof-

ficially without a Court hearing by the probation officer or by the judge.

The conception of juvenile delinquency differs considerably from that of adult crime. The laws usually provide that when a juvenile delinquent commits an act which is criminal in an adult, the child will be guilty not of the crime committed, *i.e.*, larceny, burglary, arson, etc., but of juvenile delinquency. A child may also be dealt with as a delinquent for acts, or for a course of conduct, not criminal in persons over the juvenile court age. The Pennsylvania statute, for example, provides that a "delinquent child" shall mean a child (a) who violates any law of the state or any ordinance or regulation of any subdivision thereof, or (b) who is habitually disobedient or beyond the control of his parents or other lawful authority, (c) who so deports himself as to injure or endanger the morals, health or general welfare of himself or others.¹⁸

A large proportion of the acts which bring children before the Juvenile Court are violations of the penal laws. For example, per cent of the 59,412 delinquent boys whose cases were reported to the Children's Bureau of the United States Department of Labor in 1933 were referred to the Juvenile Courts for various types of stealing, such as burglary, larceny, auto theft, robbery, shoplifting, embezzlement, etc. Twenty-nine per cent of these boys were referred "for acts of carelessness and mischief," which include among other things destruction of public and private property, malicious mischief, tampering with the United States mails, arson, carrying concealed weapons, gambling, disorderly conduct, etc.¹⁹

The offenses which juvenile delinquents commit are usually trivial in themselves. They may raid or break into the corner candy or grocery store or engage

in shoplifting of inexpensive articles in department stores, or go through the pockets of helpless drunks, cut the lead pipes out of unoccupied houses, steal bicycles, break windows, etc. Occasionally juveniles are concerned in much more serious antisocial conduct, even in murder. Three New York boys whose respective ages were thirteen, thirteen and eleven, stole a revolver from a police station and tried to hold up a man under the influence of liquor. When he refused to pay any attention to them, they killed him and took his money.²⁰ In another recent New York case, John Macarm, a boy of thirteen, beat his companion of ten to death with a sash weight in an abandoned house. John then hid his body in a closet, where it lay concealed for three months. The boys had entered the house to cut out and steal lead pipe. John resented the younger boy's suspicion that he would not divide the proceeds of the joint theft fairly?²¹

The chief significance of the juvenile delinquent in the crime problem, however, is not the objective gravity of the offenses which bring him to court, but the fact that he is the embryonic professional criminal. "Practically all confirmed criminals begin their careers in childhood and early youth," writes Healy.²² The New York Crime Commission, which made a study of 145 adult offenders, concluded that "the majority of these men committed to state prisons and to the state reformatory began their delinquent careers as children. They presented behavior problems in school and later became truants."²³ The Gluecks studied a group of 1,000 juvenile delinquents who passed through the Boston Juvenile Court and the Child Guidance Center of the Judge Baker Foundation. Five years after they had been referred to the Court, 568 had been convicted of serious of-

fenses and 167 were convicted of minor offenses. Most of these youths were convicted more than once during this period, since the average (mean) number of convictions was 3.3.²⁴ Unless the behavior of the juvenile delinquent is diverted into socially acceptable channels, there is considerable likelihood that he will become a permanent social menace.

(1) Uniform Crime Reporting VI (1935), No. 4, 5; VII (1936), No. 1, 25. These police figures receive confirmation from other sources. In New York City alone in 1934 about half a million persons were brought before the Magistrates' Courts charged with various offenses. In Massachusetts about 220,000 defendants annually come before the Inferior and Superior Courts.

(2) Bureau of the Census, Prisoners in State and Federal Prisons and Reformatories, 1933. The 101 state prisons and reformatories and 16 Federal institutions held 136,947 prisoners on Dec. 31, 1933.

(3) National Commission on Law Observance and Enforcement, Report on the Cost of Crime, No. 12, 439.

(4) The Mayor of New York City. recently directed a campaign against racket control of one food product, the artichoke. All artichokes in New York City apparently passed through the hands of one company controlled by the racketeers. All wholesalers were compelled to buy from this company at double the cost of the artichoke in the open market. See *The New York Times*, Dec. 22, 1935.

(5) A Grand Jury which investigated racketeering in New

York recently made the following findings: "We find that most of the rackets in this city are based on the systematic extortion of money from business by the criminal underworld, through pretended trade and protective associations, labor union racketeers or plain intimidation. The various legal immunities given to labor unions have unfortunately made them in a number of instances particularly attractive instruments for extortion and coercion by criminals. We have found that many labor unions and their helpless members are being mercilessly exploited by current leaders and gangsters who run the union for their own profit, preying upon business and union workers." *The New York Times*, Dec. 27, 1935.

(6) The examinations were made in accordance with the provisions of the Briggs Law, which requires a routine mental examination by the Department of Mental Diseases of all defendants indicted for a capital offense, or who have been indicted more than once for any other offense, or who have been previously convicted of a felony. Chapter 123, Sec. 100a, General Laws of Massachusetts (Terc. Ed.). The 693 defendants were classified as follows: Insane, 66; Observation Advised, 143; Mentally Defective, 388; Other Mental Abnormalities, 96. See W. Overholser "The Briggs Law," 25 *Journal of Criminal Law* 859, 865 (1935).

(7) National Committee for Mental Hygiene, First Annual

Report of The Psychiatric Clinic of Sing Sing Prison, Dr. Bernard Glueck, Director, Publication No. 11. The psychopathic group were the most difficult to define because of the vague character of this form of mental deviation.

(8) See his confession in the *Boston Herald* for July 14, 1935.

(9) D. Ahearn, "How to Commit Murder," 243.

(10) Sheldon and Eleanor T. Glueck, "Five Hundred Criminal Careers," 59.

(11) Clifford Shaw, "The Jack Roller," 108.

(12) Jack Black, "You Can't Win," 241.

(13) A. V. Lashly, "The Professional Criminal and Organized Crime," 4.

(14) Association of Grand Jurors of New York County, "Criminal Receivers in the United States, 14-15.

(15) Victor Anderson made a study of 100 habitual drunkards and found that 37 were feeble-minded, 7 were definitely insane, 7 were suffering from epilepsy, 17 showed signs of alcoholic deterioration and 32 were psychopathic personalities. "The Alcoholic As Seen in Court," 7 *Journal of Criminal Law* 89-95 (1916-17).

(16) Sheldon and Eleanor Glueck, *op. cit.*, 71-74.

(17) The age limits for juvenile delinquents vary somewhat as between states. Sixteen, seventeen or eighteen are the usual maximum ages in which cases can be disposed of by juvenile court methods. A higher age limit has been fixed in a few states, *e.g.*, California, Iowa, Arkansas.

(18) Pennsylvania, General Assembly of 1933, Act No. 312, 1449.

(19) United States Children's Bureau, Juvenile Court Statistics, 1933, table Va; 57

(20) *The New York Times*, June 17, 1935.

(21) *The New York Times*, Dec. 20, 1936.

(22) W. Healy, "The Individual Delinquent," 10. "Habitual adult offenders, that is, those who commit crime as a mode of life or with some degree of frequency as distinguished from the occasional offender who commits the occasional crime of impulse or passion, normally and usually begin their habits of delinquency or tendencies toward anti-social conduct in childhood, youth and adolescence," states Bettman. National Commission on Law Observance and Enforcement, Report on Prosecution, 78-9.

(23) New York Crime Commission Report for 1928, 315.

(24) Sheldon and Eleanor Glueck, "One Thousand Juvenile Delinquents," 151-154.

Causes of Crime

1. Research into Causation

The variety of offenders concerned in crime and the different kinds of behavior designated as criminal make it hardly likely that a single universal cause of crime will ever be discovered. As Burt states, "Crime springs from a wide variety and usually from a multiplicity of alternative converging influences. . . . The nature of these factors and their varying combinations differ greatly from one individual to another"¹; and, one might add, from one crime to another. Nevertheless, research on causes of crime in the realm of physical and mental factors has been largely dominated by the idea that crime could be ascribed to some physical or mental abnormality of the offender. The underlying assumption of this research has been that most individuals adjust themselves to the demands of society because they are sufficiently normal in their mental and physical reactions to stay within the limits of the law. But some individuals fail to make this adjustment. They kill, steal, rob and rape. Crime must be the product of their twisted bodies and warped minds. As Kurella puts it, "The world of crime recruits itself from among the number of the

less-developed individuals of the nations concerned; for it is an obvious deduction from the law of organic variability that among all the individuals born as members of any civilized race there should be some who are congenitally incapacitated to attain the normal mean level of development peculiar to that race."²

2. Physical Factors

It is to Cesare Lombroso, an Italian psychiatrist, that modern criminology owes its first thoroughgoing attempts to discover the mental and physical abnormalities of the criminal. The basic concept underlying Lombroso's work was that a man's mode of feeling and the actual conduct of his life are determined by his physical constitution and that this constitution must find expression in his bodily structure.³ This was an old notion with a history going back to the Greeks. From it had sprung the pseudo-sciences of physiognomy, which sought the character of the individual from the outlines of his face, and phrenology, which sought the mental and moral capacities of the individual from the protuberances of his skull. As a result of his researches, Lombroso asserted that anoma-

lous and degenerative physical conditions were to be found in the criminal, particularly in his skull and brain.⁴ Since similar anomalies were also encountered in non-delinquents, Lombroso declared that the distinction between the criminal and the non-criminal lay in the number and character of the stigmata.⁵ The more highly stigmatized individuals constituted for Lombroso a distinct physical type, which he called the "born criminal," which constituted 40 per cent of the criminal population. He ascribed these abnormalities to an arrested embryological development, which in turn was owing to two causes: to atavism, the re-appearance of characteristics present in man in the earlier stages of his evolution, and to degeneration and diseased conditions of the human organism.⁶ Because of these factors, all criminals, said Lombroso, tended to lose their distinctive racial and national characteristics and approach one type, that of the savage, man in a primitive phase of development.⁷

Certain sub-species of criminals became apparent to Lombroso. Thus assassins, ravishers, incendiaries, and thieves could be distinguished according to physi-

cal characteristics not only from the general population, but from each other.⁸ The born female criminal, Lombroso found, was in her physical characteristics, more like the born male criminal than like other women.⁹ He also found anomalies, similar to those of the born criminal, in the morally insane and the epileptic.¹⁰ In epilepsy one of the fundamental phenomena is an alteration of the superior inhibitory centers of the nervous system. This phenomena is also present in criminality. Lombroso asserted that epilepsy therefore lies at the basis of crime. Although the epileptic, the morally insane, the criminal, have many characteristics in common, they are not identical. "The epileptic is an exaggeration of the morally insane, as the latter is of the born criminal, as the born criminal is of the occasional criminal, criminaloids and criminals from passion."¹¹ There is thus a hierarchy of criminality on an epileptoid base.

Unfortunately the defects or anomalies of the delinquent's constitution which Lombroso took to be causative factors in delinquency and which were supposed to establish a born criminal type, did not meet the test of criticism. Long before the classic work of the Englishman Goring, continental critics were pointing to the defects in Lombroso's methods and were finding the anomalies indicative of delinquency in law-abiding individuals.¹² Goring submitted 3,000 English convicts to exact anthropometric measures and compared them with students of English universities, soldiers, hospital inmates, etc. He dismissed as superstition the point of departure of Lombroso's work that the inward disposition of a man is reflected and revealed by the configuration of his body. He roundly criticized Lombroso for his use of rough methods of direct observation without instruments to

establish his so-called anomalies. Goring denied that anomalies could be visible to the senses and yet defy measurement. As a result of his researches he stated:

"Low foreheads, high palates, outstanding ears, oxycephaly, hydrocephaly, sub-microcephaly, etc. [anomalies described by Lombroso], are only colloquial descriptions of rough measurements on a coarsely divided scale of characters which, precisely described, must be exactly measured upon a scale finely and accurately divided."¹³

Goring discovered no evidence confirming the existence of a physical type of criminal such as Lombroso described. He did, however, find that "all English criminals (with the exception of those technically convicted of fraud) are markedly differentiated from the general population in stature and body weight," and that "thieves and burglars (who constitute 90 per cent of all criminals) and also incendiaries, as well as being inferior in stature and body weight, are also, relatively to other criminals and the population at large, puny in their general bodily habit."¹⁴ These conclusions Goring designates as the sole facts at the basis of Lombroso's science of criminal anthropology.

Despite these findings, followers of Lombroso consider that Goring supports rather than demolishes their theories.¹⁵ Although he found, as the Lombrosians asserted, that criminals were differentiated from the law-abiding population and from each other, to Goring the differences were quantitative, not qualitative. They did not create a distinct type in which physical deviations were evidence of anti-social motivations, although to some extent physical differences from non-offenders mark those who are put in prisons or institutions, for the reason that physical weakness handicaps a man

not only in the struggle to make a living, but in the effort to escape apprehension for criminal acts.

The difficulty that Lombroso encountered in attempting to explain behavior in terms of physical deviation exists today, namely, the lack of a standard of normality by which abnormality may be determined. Pende describes the situation with great clarity:

"There are still large gaps in our knowledge of the normal proportions of the various tissues and organs of the various sections of the body... Especially little do we know of the variations which these proportions undergo during the various stages of life in the two sexes. A knowledge of these would throw much light on the genesis of many anomalous forms of general constitution."¹⁶

Simple physical measurements, used widely, have shown that defects are common, that the average person quite irrespective of his behavior has physical deviations from a standard in many respects. The Thomases therefore conclude correctly that "the association of physical defect with crime cannot be determined until the amount of physical defect in non-criminals is known. 'Normal' physical development and growth must be objectively determined before we can trace out and measure the degree of association of various physical states with various behavior manifestations."¹⁷

Lombroso's assertion that "born criminals" were epileptics and his assertion that all criminality rests upon an epileptoid basis has never been accepted, for the simple reason that it has never been proved. Lombroso extended his concept of epilepsy much too far. Everything possible was considered by him as in some way related to epilepsy.¹⁸ That some delinquents suffer from epilepsy is hardly surprising

since the malady is common enough in the general population. Healy found that of the 1,000 delinquents he studied, 7 per cent were epileptic.¹⁹ Nor is it difficult to understand why epileptics come into conflict with the law when one considers psychological traits generally associated with them: emotional instability, egocentric tendencies leading to self-assertion and defective appreciation of the rights of others, excessive obstinacy, a lowered power of moral inhibition. Nevertheless, epilepsy cannot be termed a cause of crime in and of itself simply because in an individual case the criminal is suffering from the disease. As Healy states, "the making of the confirmed criminal out of the epileptic is the result partly of his own innate mental and physical tendencies, partly of the formation of mental habits according to the laws of mental life, and is partly due to social conditions. No small factor in this is the epileptic's continual regarding of himself as an anti-social being, a possible breaker of laws."²⁰

Attempts have been made to discover to what extent criminality can be ascribed not to anthropologic peculiarities or to epilepsy but to other pathologic and diseased conditions in the physical constitution of the criminal. The insufficient material bearing on this question shows disagreement as to results. Burt, for example, observes, "The frequency among juvenile delinquents of bodily weakness and ill-health has been remarked by every recent writer. In my own series of cases, nearly 70 per cent were suffering from such defects and nearly 50 per cent were in urgent need of medical treatment. In London I find that defective physical conditions are roughly speaking 1¼ times as frequent among delinquent children as they are among non-delinquent children from the same

schools and streets."²¹ Burt, be it noted, has tried to make a comparison of the physical conditions of delinquents with non-delinquents. Other investigators have simply studied delinquents and noted that a large percentage are suffering from various diseases or are in poor physical condition.²² Healy and Bronner, however, did not find the delinquents they examined in poor physical condition. They write, "These charts may be fairly utilized as negating certain older ideas that delinquents and criminals were the malnourished, the underdeveloped members of society, exhibiting thus the effects of poverty. Rather the charts show surprisingly good conditions of development and nutrition for a very large share of our cases."²³

Even if it could be assumed that a certain degree of physical defect and diseased conditions exists among criminals, proof is still wanting that these are causes of crime. As Dr. Alberta S. Guibord remarks, "The relation of previous health conditions to subsequent modes of conduct is at present altogether speculative. To say that a constant correlation exists is presumptive in view of everyday evidence that society exhibits a large number of persons of varying degrees of physical disability who are entirely free from criminal or delinquent conduct."²⁴ The difficulty here, too, is that there are no reliable statistics as to the incidence of such disabilities in the general population or the social class from which the criminal is drawn. Until such statistics are available and it is shown that the criminals as a class are greater sufferers from physical disabilities than the law-abiding population, it will simply be a presumption to assume that physical defects and disabilities are causes of delinquency. Nevertheless, tuberculosis, heart disease, hernia, defects of vision, etc., may be found in individual

cases to be causes of delinquency in so far as they prevent or tend to prevent the sufferer from earning a living, just as Goring suggested that inferior physique may be at the bottom of a man's criminal behavior by handicapping him in legitimate occupations.

3. Endocrinological Factors

The attempts to explain crime on the basis of physical defects or abnormalities present in criminals do not explain how such defects motivate behavior. Endocrinology, the study of glandular activity, attempts to fill this gap in present-day knowledge. The endocrinologists assert that the functioning of the glandular system not only determines physical development, but also the evolution of instincts and dispositions, emotions and reactions, character and temperament. Just as certain patterns are formed in the body by a particular arrangement of the ductless glands, so the mind also receives its patterns from the same source. "One or several glands possess a controlling or superior influence above that of the others in the physiology of the individual, and so become the central gland of his life; it is dominant indeed, so far as it casts a deciding vote or veto in its everyday existence as well as in its high points, the climaxes and emergencies. These glandular preponderances are determining factors in the personality, creating genius and dullard, weakling and giant, cavalier and puritan. All human traits may be analyzed in terms of them because they are expressions of them."²⁵ A man's criminality may thus be the result of the functioning of his glands and this is asserted by many writers. Grimberg, for example, states that emotional instability caused by a congenital defect in the functioning of the endocrine glands has a marked influence in the causation of delinquency.²⁶

Schlapp and Smith point out that “criminals are of two broad types, the deficient and the defective. They are either of subnormal mentality or of faulty mental or nervous constitution. Which class numbers the most individuals in its ranks cannot be said at present, but it does not matter since it is now certain that both types are similarly produced.”²⁷ The determining factor in the production of the delinquency is “the mental, nervous and glandular soundness of the individual. A diseased nervous system is incapable of healthy or social responses even under the best practicable training. On the other hand, a thoroughly normal equipment will probably be little damaged even by exposure to extremely bad environment.”

Unfortunately the enthusiasm of the endocrinologists has out-run their scientific temper. The science is still in its infancy. Experimenters have reported diametrically opposed results from similar researches. Definitive norms of glandular functioning and of emotional stability are still lacking. Law-abiding individuals likewise suffer from glandular disturbance and emotional instability. “Nothing will strike the clinical investigator with more force,” write Schlapp and Smith, “than the fact that deficient of the same precise type may be criminal or non-criminal apparently in response to nothing more than caprice or chance.”²⁸ Thus the wide claims of the endocrinologists that personality characteristics, conduct trends and criminal behavior are all explicable in terms of glandular functioning, have not been substantiated.²⁹

4. Mental Factors

We pointed out above that mental defect and mental disease were causative factors in some crimes. Specialists in the study of pathologic mental conditions, however, have offered an expla-

nation of most crime in terms of mental abnormality. The underlying assumption here, too, is that since the criminal acts differently from the law-abiding individual he must be a different sort of being. But the abnormality is sought in the mental rather than in the physical sphere.

“A really healthy mind does not originate conduct that is criminal,” states the Arizona Mental Hygiene Society, “mental health entails socialization and therefore precludes anti-social conduct.”³⁰

Dr. Goddard stated in 1919, “Every investigation of the mentality of criminals, mis-demeanants, delinquents and other anti-social groups has proven beyond the possibility of contradiction that nearly all persons in these classes, and in some cases all, are of low mentality. Moreover, a large percentage are feeble-minded. . . . It is no longer to be denied that the greatest single cause of delinquency and crime is low grade mentality, much of it within the limits of feeble-mindedness.”³¹ He estimated that at least 50 per cent of all criminals were mentally defective. Similar opinions have been expressed by other observers equally experienced in the diagnosis of mental deficiency.³²

Despite these positive statements, the influence of defective intelligence in the causation of delinquency has not been accurately determined; mental tests which have been used to measure levels of intelligence were not standardized and different results have been obtained depending upon the test used.³³ The testers have not been agreed on the mental level which represented deficiency, whether 9, 10, 11, 12, or 13 years was the proper standard. The norms for defective intelligence were fixed at too high a level by many testers.³⁴ Most of the tests have been given to delinquents in institu-

tions, but these are a highly selected group. Cleverer criminals are not caught. Even among the delinquents that are caught, the defectives are more apt to be found in institutions since they are less likely to receive probation or parole.³⁵ Most mental tests, moreover, have not differentiated the delinquents tested according to the type of crime committed, yet there are marked differences in the intelligence of criminals concerned in different offenses. “It is particularly interesting to note,” states Goring, “that the percentage of mentally defective murderers is nearly twice as great as the percentage of persons convicted of other forms of personal violence; that receivers of stolen goods are on the average much more intelligent than thieves; that stack-firing, which is a crime of passion, associated more highly than any other with imbecility, must be distinguished from other forms of arson which are crimes perpetrated by persons of much higher grade of intelligence and for motives of personal gain; that indecent assaults upon children and unnatural sexual offenses are related to weak-mindedness much more than are crimes of rape upon adults; and that embezzlements, forgery and most kinds of fraud are peculiarly intelligent crimes, absent in a marked manner from the records of mentally defective persons.”³⁶

It is evident that earlier investigators have exaggerated the role of mental deficiency as a cause of crime.³⁷ Some delinquents are unquestionably mentally defective and it is probable that the proportion of defectives among criminals is somewhat greater than in the general population.³⁸ Even in mentally defective criminals, however, the crime is not exclusively caused by deficiency in intelligence. Lack of intelligence and criminal tendency are in no sense

interchangeable terms. In the feeble-minded individual, as in the normal individual, behavior is the result of innate tendencies and environmental influences. The environments in which many of the defective delinquents live "make it difficult for individuals of even higher mental levels to make successful adjustments."³⁹ A majority of the mental defectives studied by the Children's Bureau of one Delaware county were in an environment which made normal standards of living impossible. The home life of these defectives was marred by extreme poverty, alcoholism, immorality and neglect.⁴⁰

5. Psychiatric Factors

In place of an explanation of crime in terms of intellectual deviation, the psychiatrists have sought explanations in terms of abnormalities in the emotional and volitional fields. Mental disorder becomes the outstanding cause of crime and not mental deficiency. Like the mental testers the psychiatrists have made extensive studies of delinquents and criminals in institutions. The psychiatrists, too, have had a tendency to make exaggerated claims as to the causative influence of mental abnormalities in crime. "From studies of unselected groups of prisoners in different parts of the country, which may be justifiably considered a fair sampling of the population within our jails and prisons, we see that it is indeed a conservative statement when we claim that one-half of the criminal class is so by virtue of mental abnormalities,"⁴¹ is a typical statement.

Of all the mental disorders psychopathic personality furnishes the most significant contingent of criminals according to the psychiatrists. In the county jails of Kentucky, 45.3 per cent of the inmates were diagnosed as psychopathic. Similar diagnoses were made of 35.3 per

cent of the state prison inmates in North Dakota, 42.2 per cent of the inmates of New York county jails and penitentiaries and 18.9 per cent of the prisoners in Sing Sing prison. The psychopathic criminal is called "the arch criminal in the realm of mental deviation."⁴² He "furnishes us," according to the Missouri Crime Survey, "with our delinquent problem. The unstable, neurotic, poorly balanced, weak-willed individual with marked character defects and personality handicaps, but often with good intelligence, is the most difficult problem we have to meet in handling criminals."⁴³

Unfortunately for the psychiatrist, the psychopath is only a vaguely differentiated clinical type. In the psychopathic personality, character, feeling, instinct and will are primarily affected, but the difference between the psychic qualities of the psychopath and those of the normal individual is one of degree and not of kind. Whether a particular manifestation shall be classed as normal or as psychopathic depends wholly upon individual judgment. It is completely within the discretion of the psychiatrist to determine how acute and frequent symptoms need to be before a diagnosis of psychopathy will be made. This explains why the percentages of psychopaths found in the same institutions vary so greatly. In the jails of Georgia and South Carolina only 3 per cent and 9 per cent respectively were diagnosed as psychopathic as compared with 45.3 per cent in Kentucky. Reports from New York and Massachusetts institutions show about 10 per cent of the incoming criminals to be psychopathic personalities. On the other hand, 88.3 per cent of all the offenders admitted to the Illinois Reformatory between 1919-29 received this diagnosis.⁴⁴

Mental abnormality alone does not explain the crimes of the psychopath. This is clearly

emphasized by both Birnbaum and Glueck. "It is only necessary to refer to definite prevailing traits of the psychopaths, their lack of inner control and power of resistance, their weakness of will, their susceptibility and sensitivity to milieu in order to recognize the fact that the psychopaths are especially endangered by the environment as regards both the tendency to social acts and the inclination to a social character formation,"⁴⁵ states Birnbaum. Glueck comes to a similar conclusion:

"In any psychopathological study of the offender, the error must be avoided of seeing the cause of the criminal act entirely in the constitutional make-up of the individual. That such is not the case does not require much proof. *The criminal act, in every instance, is the resultant of the interaction between a particularly constituted personality and a particular environment.* Because 59 per cent of the total number of cases examined were classifiable in psychopathological terms, *it does not at all mean that these individuals were predestined to commit crime.* In fact there are in all probability many more psychopathologically classifiable people outside of prison than there are within prison. That more of them do not get into prison is due to the fact that they have had the many benefits of suitable environment and the protection which goes with these benefits, a protection of which those who do get into prison have been deprived to a greater or lesser extent."⁴⁶

6. Hereditary Factors

Physical or mental defects or abnormalities may be transmitted from parents to offspring. If such abnormalities are productive of crime, then the primary cause of crime is not the defect or the abnormality itself, but the heredity of the criminal. An individual born

with particular mental and physical abnormalities is therefore predestined to crime like the “born criminal” of Lombroso. “What we regard as delinquents,” states Grimberg, after a detailed examination of thirty delinquent girls, “were primarily biological products of an improper mating, with the resultant transmission of a psychic defect. To a great extent, the shaping of life of these girls was predestined . . . following definite biological rules, for they were born devoid of the potentiality to adjust themselves to our social order.”⁴⁷ Environmental influence had little to do with the delinquency of these girls since they were born without the capacities for social adjustment.

The fact that the “family incidence of crime is not fortuitously distributed... is not entirely independent of lineage” but tends to be restricted to particular stocks or sections of the community,⁴⁸ lends plausible justification to the theory that defective heredity is largely responsible for crime. The 540 persons of Juke blood and the 169 of X blood (*i.e.*, persons not of Juke blood) who married into the Juke family (709 persons in all) produced 140 criminals and offenders, 60 habitual thieves, 50 common prostitutes and 180 paupers.⁴⁹ The 480 Kallikaks, descendants of an illegitimate union of a Revolutionary soldier and a feeble-minded woman, produced 3 persons convicted of felonies, 8 keepers of houses of ill fame, 24 confirmed alcoholics, and 33 persons guilty of sex immorality, mostly prostitutes. No known criminals were discovered in the 496 descendants of the same soldier and a normal wife.⁵⁰

The fact that specific families produce many criminals whereas many families do not is not necessarily proof that criminals from such families are born to crime, nor that environmental influences play no part in the fashioning of delinquent careers or in the cau-

sation of specific acts of delinquency. Pende has pointed out that although the physical constitution of the individual is determined by the internal, evolutionary destiny assigned to each individual at the moment of conception, deviations from the average human type are subordinated to both the laws of heredity and to environmental actions. It is impossible to make any exact distinction in the influence of environmental factors and factors of the hereditary disposition.⁵¹ If both heredity and environment condition physical development, it is inevitable that they will also condition the development of psychic qualities and their expression in behavior. Thus, if a child is born into a family that is delinquent and criminal, it is likely that he may also become criminal, but this will not be due solely to the fact that he does not inherit capacities for social adjustment, or to hereditary defect or abnormality. The patterns of behavior which the child absorbs in his immediate environment will have as much to do with conditioning his activities as any hereditary equipment received from his ancestors. As Aschaffenburg puts it: ‘A child that is surrounded by criminals from its earliest youth soon learns to think like them and never has the chance to develop other views.’⁵²

7. Social Factors

Criminal behavior, whether it is that of the mental deviate or that of the mentally normal individual, is socially conditioned. It results from individual reaction to environmental influences. Explanations of crime in terms of physical or mental abnormality or defective heredity are incomplete and one-sided since they isolate the criminal from his environmental setting. The effect of social and environmental influences which make for crime may be studied best in juvenile and ado-

lescent offenders. Habit patterns are in the process of formation and have not become definitely fixed and established. Professional criminals owe their careers of crime largely to influences at work on them during early youth. The professional criminal appears as the final result of the failure of family, school, church, community and penal and correctional institutions to inculcate social attitudes and habits of conduct.

The family has the primary task of educating the child to respect the behavior codes of the community, but the delinquent’s family is usually severely handicapped for the performance of this function. “Practically no child brought before the Juvenile Court has a home that fulfilled the standards of the biologically healthy family group,” states Miss Van Waters.⁵³ Of 2,000 young recidivist offenders studied by Healy and Bronner, only 7.6 per cent were living under reasonably good conditions for the upbringing of a child.⁵⁴ The families of the 1,000 delinquents studied by the Gluecks were “on the whole unwholesome or underprivileged.”⁵⁵

The homes of many of these delinquents are marred by poverty. Eighty-eight per cent of the 1,000 juveniles studied by the Gluecks were clients of social welfare agencies.⁵⁶ Of the homes of juvenile delinquents studied by Burt, 56 per cent were rated as poor or very poor, and he adds, “the figures show very trenchantly, were any figures needed for the purpose, that poverty makes an added spur to dishonesty and wrong.”⁵⁷ Poverty brings with it the usual concomitants of dreary and unsanitary habitations, congestion in the home, life in slum areas where play facilities and opportunities for the constructive use of leisure are lacking, work for the mother and her consequent inability to give her children ad-

equate supervision, constant worry about obtaining the bare necessities of life, and insufficient time and energy to devote to children's problems.

Many delinquent homes are crippled by the death of one or both parents or by divorce, desertion or separation. Of the criminals and delinquents studied by Shideler, the Catholic Charities Probation Bureau, Slawson, and Shaw and McKay, 50.7 per cent, 47.1 per cent, 45.2 per cent and 42.5 per cent respectively, came from broken homes.⁵⁸ With one parent missing and the other parent at work, adequate training and discipline of children becomes very difficult. The presence of a stepparent in the home does not cure the situation, but is apt to raise new conflicts for the child.

But even when the parents are living together, the home life of the delinquent is far from being a happy one. As the New York Crime Commission points out: "Too frequently one or both may be addicted to the use of liquor, may be immoral or refuse to provide for or support their dependents.... The effect of bad family life in the making of delinquents cannot be stressed too strongly, and by bad family life is meant a family in which there is constant bickering and fighting, where obscene and indecent language is used, where there is little or no sympathy, interest, or understanding between the parents and the children and where there is a lack of moral standards and no real religious or spiritual life."⁵⁹

An undue proportion of delinquents come from immigrant homes. The Gluecks in their study of 500 reformatory graduates found that the proportion of native-born persons of foreign or mixed parentage among the graduates was two and one half times what it is in the general population.⁶⁰ Children are not

likely to accept the guidance of immigrant parents if they are out of tune with the world they live in. Many immigrant parents, as Zorbaugh observes, limit their horizons to the ghettos and Little Sicilies, the world of other immigrants of the same country,⁶¹ but the child lives in the American world. He attends school and learns the language better than his parents. He runs the street and picks up an external acquaintance at least with the American scene. He develops a sense of superiority to his parents, who understand neither the language nor the community in which they live. It therefore becomes extremely difficult for the parent to transmit his racial heritage and code of morals to his children. The usual situation of parent and child is reversed. Instead of the parents interpreting the external world to the children, the children of immigrant parents are frequently called upon to perform that function for the parents.

The mere fact that delinquents come from immigrant homes or homes that are underprivileged, broken or demoralized, does not necessarily explain their delinquency. These delinquents may have brothers or sisters who do not come into conflict with the law. Many such homes do not produce delinquents. On the other hand delinquent children also come from so-called "good" homes. It is not the objective situation of the family, *i.e.*, whether the home is congested, poverty-stricken or broken by death, divorce, etc., which has a bearing on delinquency, but the psychological and emotional interrelations within the family. If the child has a feeling of security and ease in the family, if he is certain of the affection of the parents, he is able to withstand considerable environmental pressure. "Lacking this fundamental emotional comfort, he is open to these pressures. Thus we find

that a certain proportion of young delinquents and pre-delinquents come from homes which seem to provide an excellent environment until the psychological situation within the family circle is understood."⁶²

Healy and Bronner in their recent "New Light on Delinquency and Its Treatment" give ample documentation to show the importance of emotional disturbances in family relations as a cause of delinquency. No less than 91 per cent of the delinquent children studied were suffering from major emotional disturbances arising, for the most part, out of their relations with members of the family. Only 13 per cent of the non-delinquent children of the same families showed evidence of any such inner stresses or tensions and then to a much less degree than the delinquents. These emotional disturbances in the delinquents were due to feelings of being rejected, unloved, or insecure in affectional relations, or of being thwarted in self-expression or to marked feelings of inadequacy or inferiority or to disturbances arising from family disharmonies, parental misconduct, the conditions of family life or parental discipline, or to bitter feelings of jealousy toward one or more children with the same parent or parents as themselves (siblings), or to a deepset internal mental conflict. According to Healy and Bronner, these emotional discomforts and frustrations obstruct the flow of normal urges and wishes into channels of socially acceptable behavior. The child seeks for compensatory or substitutive satisfactions. Delinquency is one means of finding such satisfactions.

Delinquency is, however, not the inevitable issue of the child's emotional tensions and conflicts. He could be directed to seek compensation and satisfaction for thwarted urges in socially accept-

able channels. Some social agency could take him in hand and provide the guidance which he does not receive from his family, but unfortunately, child guidance work is in its infancy. Most communities are poorly equipped with child guidance facilities. The social agencies and community influences with which the child comes into contact may either create new sources of tension and difficulty or give direction to the urge to find satisfaction in delinquency.

This is especially true of the school, which has the child for a longer time than any other social agency. Emotionally distorted children, children who are below par mentally, do not fit very well into the standard school curriculum, yet the average school system has little more than repressive measures with which to meet the temper tantrums, irritability, mischief-making, sex overtures, stealing or truancy, which are expressions of the child's maladjustment to the school curriculum. But repression usually leads to further rebellion against authority and discipline. Thus the school does little to check developing anti-social attitudes in the children entrusted to its charge; in fact, the rebellion against school authority manifested in truancy is frequently the first step in a criminal career. "The criminal of today was in too many cases the truant of yesterday," writes the New York Crime Commission. "That does not mean of course that every child who is today a truant will become a criminal tomorrow, but that the chances are the criminal group will undoubtedly be recruited more in proportion from the truant group than from the non-truant group." Of 251 boys who were committed to truant school in New York City, 51 per cent required the attention of the Court and the police in the six to eight years following their release from this institu-

tion.⁶³ Another New York study of 145 offenders committed to State Prison showed that 60 per cent were either truants or behavior problems in school, or both. "The great majority, because of lack of interest in formal school work or because of limited mental equipment, indicated early in their school careers that they would not or could not profit by formal academic training."⁶⁴

The community in which the child lives is another factor in the direction of his activities. The responsibility of the community for delinquency may be seen especially in so-called "delinquency areas." It is asserted that the various parts of a city do not contribute equally to crime and delinquency; these forms of prohibited behavior are especially characteristic of the slum area. In such areas crime and juvenile delinquency, if not approved, are at least apt to be tolerated by a substantial proportion of the adult population. The community, then, not alone does not perform its function of directing the individual's behavior into socially desirable channels, but places its stamp of approval upon actions which must be discouraged.

Shaw and McKay, using official statistics, assert that they have established the existence of delinquency areas in Chicago, Philadelphia, Richmond, Cleveland, Birmingham, Denver and Seattle.⁶⁵ The existence of delinquency areas in New York, Minneapolis and London has been noted by other observers.⁶⁶ Unfortunately, as Mrs. Robison has clearly demonstrated, official statistics on which all the studies are based are inadequate for the purpose used. Court figures are not only insufficient but also misleading as an indication of even the approximate extent of juvenile delinquent behavior.⁶⁷ The recorded delinquency is influenced by such things as differences in

the degree to which national, racial and religious groups provide facilities for the care of delinquents without court action, their different attitudes toward specific forms of delinquency and the adequacy of police protection in specific areas.

It still remains true, however, despite Mrs. Robison's study, that a considerable number of delinquents and criminals do come from slum areas, characterized by poor housing conditions, great poverty and dependence, marked absence of a home-owning class, largely foreign populations of inferior social status, unwholesome types of commercial recreation and inadequate open-air play facilities. These areas afford little constructive neighborhood influence and a considerable proportion of their citizens are apt to show a tacit admiration of the criminal and his exploits, instead of a thorough condemnation. The criminal's way of life offers a quick way out of the hard labor and the squalor which is the lot of so many of the inhabitants of the area. Some forms of delinquency and crime may be traditional in the area, such as stealing coal or raiding freight cars. Many older offenders, moreover, reside in the slums or are to be found in its pool rooms, gambling houses and houses of prostitution. These gentry have prestige in the neighborhood. They are the "big shots;" and, idolized by many of the younger boys, tend to set their patterns of behavior. To become a "big shot" himself will bring the youngster recognition and esteem from his fellows. Danny Ahearn, a notorious New York gangster, is an excellent example of such community education in crime. "Here is food for thought. Danny himself, although he has never pondered the matter, was "taken" as a child. He is one of ten children. Chance placed him on the lower East Side. He looked up to and admired and

gave loyalty to the “big shots” of the neighborhood, who liked him because he was “a nice, fresh little kid,” and flattered him because it was their nature to flatter, by allowing him to carry their guns. He grew up in their company, copied their manners, learned their code. Then chance gave him his first break.”⁶⁸

An instrument for perpetuating and transmitting delinquent habits of behavior in slum areas is the boys’ gang. As Zorbaugh points out, it is “an adjustment that results from the failure of the family and the community to meet the boys’ problems.”⁶⁹ This failure is particularly acute in the slum area, where play facilities are so inadequate and environment so unsatisfactory. The gang offers opportunities for play, excitement and adventure in company with other boys. Within the gang the boy finds recognition, acceptance and security, which he does not find in his family life, and an escape from the irksome restrictions of school. But to have status in the gang, the boy must engage in its activities. These are defined by the wider community of which the gang is a part. Juvenile gangs assimilate behavior patterns existing in the community and will engage in crime and delinquency if these are familiar activities in their neighborhood. “In those interstitial sections of Chicago,” writes Thrasher, “where neglect and suppression of boyhood combine to produce gangs, there are found adult social patterns of crime and vice which are naturally reflected in the activities of the unsupervised gang or club. In the poverty belt, the deteriorating neighborhood and the slum, there is little understanding of the interests of the boy or the situations they meet in everyday life.... Hence without wholesome direction from the home or the larger community, the gang adopts the patterns which have prestige in its own social environ-

ment, selecting those which appeal to it and setting them up to be followed by its own members so far as the group controls them.”⁷⁰ Delinquency is an established social tradition in certain gangs which is transmitted from the older to the younger members. Participation in delinquent activities is one of the requirements for membership.

Confirmation of the role of the gang in delinquent behavior is seen in the fact that delinquency is usually group activity. One study of 6,000 instances of stealing by juvenile delinquents disclosed that two or more boys were involved in 90.4 per cent of the cases.⁷¹

Eventually the young delinquent may be apprehended in some delinquency. He may be arrested, held in a detention home and appear in the Juvenile Court. One might expect that these experiences would have a sobering effect upon him and bring him to a realization of the error of his ways. The effect may, however, be quite the opposite. A child who engages in a delinquency without being caught may be secretly ashamed of his activities. But after he has been caught, the situation is defined for him. He is made acutely aware of his “badness” by the ignominy of arrest and court appearance. He is publicly tagged as a bad boy and his family will not usually let him forget his badness. While his arrest and court appearance may be a source of reproach in his family, it is a distinction in his gang. The member of a gang who has demonstrated his ability in delinquency or has “done time” in a correctional institution has prestige and plays a leading role in the life of the gang.⁷² Thus the gang will expect him to live up to his reputation for “badness” and the boy will usually attach far more value to the opinion of his companions than to that of the family which failed to meet his needs.

He will continue his career of delinquency which will mean further apprehensions, and court appearances, and eventually committal to an institution. This pattern of behavior is repeated time and again.

The purpose of the institution will be to correct and reform him, to remold his habits so that he will not come into conflict with the law. As a matter of fact, the stay at the institution may further speed the process of demoralization of the juvenile delinquent. The institution has a difficult task before it, for it must attempt the social adjustment of delinquents where family, school, church and community have failed. The wisest officials and the most enlightened methods would be necessary to bring about a change in them. Unfortunately the science of redirecting human behavior is none too well developed and the personnel of institutions are too frequently unaware of the few established rudimentary principles. It is therefore not surprising that the institution frequently fails in its mission. Not only does it not produce a change for the better, but it may be responsible for a definite change for the worse. Existing criminal tendencies in the individual delinquent are strengthened by a hostile attitude toward institution officials, a feeling of loyalty to the other inmates and the not unnatural preoccupation with the one common interest the boys had before coming to the institution, that of crime. In addition, the actual transmission of criminal techniques from the more experienced delinquents to the less experienced, often turns the institution into a mere school of crime. Testimony to this effect is found in many biographies and autobiographies of criminals.

“I entered the jail an amateur in crime” writes Scott, “and stayed there a little over three months. In that time I learned more of the devious methods which crooks

use against society than I had ever dreamed of knowing. What a commentary on justice! What responsibility rests upon a State which makes no provision for the separation of the young and old in crime!"⁷² Scott is not alone in his condemnation of juvenile institutions.

Another criminal, in an anonymous autobiography, writes:

"Looking back now, after so many years of bitter experience, I realize what a terrible school in crime that prison really was to the many young boys who were serving short sentences there. The daily contact with other and older criminals constituted a course in degeneracy and law breaking. The volumes of cheap dime novels and Wild West stories, which circulated secretly in the place, were merely so many textbooks in that breeding place of criminals and hotbed of immorality. The average citizen, going securely and peacefully about his daily business, little realizes that the taxes he pays are actually helping to support such institutions today, where boys of tender age, with their minds in the most impressionable period of development, are turned, not into useful and law-abiding citizens, as they should be, but into law breakers and anarchists, dangerous enemies of society."⁷²

Thus, despite his incarceration the boy is returned to his home, community and gang unreformed, unrepentant and better equipped to carry on criminal activities.

8. Economic Factors

The economic organization of society with its philosophy of materialism and its lack of security for the individual are potent factors in the causation of crime. Investigations made both here and abroad have definitely established the close relation between times of economic stress and crimes against property. The eco-

nomical dislocation resulting from monetary inflation in Germany and Austria after the War resulted in record-breaking increases in property crimes. In 1913 there were 79,554 convictions for simple larcenies in Germany. In 1923 at the height of the inflation there were 286,178 convictions. In 1925 after the mark had been stabilized, the convictions for larceny fell off to the 1913 level. "Each point that the mark fell during the inflation period," writes Liepman, "increased the impulses to dishonesty. Everything became valuable and every conceivable object was in danger of being stolen. All reckoning, all responsibility, all consideration for more than the immediate present had lost its sense."⁷³ In a careful study of the effects of the business cycle on crime in England, Dorothy Thomas found that "burglary, house and shop breaking and robbery show a definite tendency to increase in a business depression and to decrease with prosperity."⁷⁴ A similar study by Emma Winslow of unemployment and crime in Massachusetts concludes that, "Unemployment is revealed as an important causative factor in vagrancy and in crimes against property..... The relative importance of crimes against property in the total of criminality is such as to establish industrial stabilization as a significant element in any program of crime prevention. The conclusion seems inescapable that the assurance of economic security might be expected to bring with it an appreciable reduction in the amount of crime."⁷⁵

The increase in property crimes during periods of economic stress is largely the work of episodic offenders, individuals who have never before come into conflict with the law. Many of them commit their crimes under the impulse of dire need. Hunger is a bad counsellor. A typical case is that of the unemployed printer

who had gone to Long Island to look for work which he did not find. On the street he saw a purse protruding from under the arm of a woman who was passing. He approached from behind, snatched the purse and then ran. He dropped it in running. He was awkward, never having tried this kind of thing before. To the arresting officer the man explained his predicament saying that he had had nothing to eat for two days and had hoped to get money for food and room rent by stealing the purse. He said that he was sorry for what he had done and that he would not break the law again, had never done it before.⁷⁶

Necessity is not the only stimulus to crime during periods of economic depression. Some individuals cannot stand the reduction in income which depression brings. They wish to enjoy all the things that they were able to afford during good times. They may seek to supplement their depreciated income by criminal activity. Unemployment leaves an individual with much more time on his hands and exposed to many more temptations than if he were working. As Root has pointed out of the prisoners studied by him, if the prisoner claims he was out of work and is asked whether he was without funds, he usually answers "No." The prisoner's problem, states Root, was one of idleness. On the street with nothing to do and the cheap movie, pool room and dance hall to attract him, contact with the curbstone loafer, time to drink and gamble, seeking any amusement and excitement to avoid ennui or thought of future consequences if he does not find work; these and similar factors rather than being on his last dollar are the psychic effects to be emphasized.⁷⁷

Our economic organization has stimulated crime through other forces than its crises. Predatory crime has followed in

the wake of the tremendous expansion of commerce and industry in this country in the last hundred years. "Every acceleration given to industry, commerce and banking by improved machinery and power, by railroads, telegraphs and telephones—has been followed not only by a marked increase in the number of criminals who prey upon credit, but a serious expansion in their boldness and ingenuity," states one report.⁷⁸ The expansion of commerce and industry has simply provided additional opportunities for the commission of crime. This criminality goes on in good years as well as in bad years and is largely the work of the professional criminals.

The professional criminal draws the basic philosophy of his calling from the economic system. He is after the same great good, wealth, as the capitalist who talks about rugged individualism. He is fully aware of the strength of the money motive in American life and the fact that it is one of the indispensable conditions to social prestige and approval. He is also aware that such prestige and approval are by no means dependent upon the methods by which wealth is obtained. "The faith upon which our economic civilization reposes," writes Tawney, "the faith that riches are not a means but an end, implies that all economic activity is equally estimable whether it is subordinated to a social purpose or not. Hence it divorces gain from service and justifies rewards for which no function is performed or which are out of all proportion to it."⁷⁹ The gangster summarizes this attitude in language much more blunt: The test of social esteem is not how did you get it, but have you got it? The facts of our commercial development lend support to the gangster's contention.

9. Political Factors

Society opposes to the criminal an army of police officials, prosecutors, judges, probation and parole officers and jailers. It expects that the threat of detection, prosecution and punishment will be sufficient to deter many individuals from criminal activity and will keep the crime rate down to a reasonable level. If, however, law enforcement agencies are inefficient and if the possibilities of punishment are remote, few individuals will be deterred in fact and the high crime rate is to be expected. It is the opinion of many observers of the crime problem that the defective operation of law enforcement machinery is one of the principal factors making for crime in this country. "It is not too much to say that the administration of the criminal law in this country is a disgrace to our civilization and that the prevalence of crime and fraud which here is greatly in excess of that in European countries is due largely to the failure of the law and its administration to bring criminals to justice,"⁸⁰ stated Chief Justice Taft in an address which is frequently quoted. Similar opinions have been expressed by others. "I believe I am in a position to express what is in the mind of the average good citizen today," states Prentiss; "It is apparent and conceded that the administration of criminal justice has absolutely collapsed and the reason we have the appalling condition now confronting us is because criminals go unpunished."⁸¹ The Chicago Crime Commission in one bulletin declared, "Crime flourishes because criminals escape punishment," and in another, "Maladministration of justice is probably the chief factor in the entire crime situation."⁸²

Surveys which have been made of police, prosecutors, courts, probation and parole officers in various parts of the country have clearly documented American inefficiency in law en-

forcement. The police catch too few offenders. Of those caught, too small a number are convicted and if convicted many are not adequately punished. An analysis of the work of law enforcement agencies is presented in other parts of this book. It will suffice here to point out that their inefficiency is due to defective leadership, personnel, organization, procedures and provisions of the substantive criminal law.

Law enforcement agencies are handicapped by protective arrangements between their officials and criminals, or between criminals and powerful politicians who can influence their operation. "There is not a single law enforcement agency" stated J. Edgar Hoover in a recent speech, "which is not menaced in some degree by the efforts of political manipulation. Corrupt political meddling in police work constitutes a tremendous public menace. I often wonder whether political leaders feel that the police are supposed to serve them or to serve society."⁸³ We have noted that it is particularly the professional criminal who avails himself of these protective arrangements in order to cut down the risks of his calling. How far the risks can be eliminated by these means is evident from the following comments contained in a report on crime in Chicago made in 1915. After enumerating the various classes of professional criminals, the report states:

"These men carry on their work from year to year apparently without fear of successful interference with their occupation. Occasionally raids, arrests and round-ups are made and in some instances convictions are secured, but broadly speaking this group of enemies of society have entrenched themselves in such a manner as to have little to fear from the law. They have formed a crime system which gives its members a reasonable

sense of security. Among the members of this fraternity the rates for insurance against conviction of crime ought not to be much higher than the prevailing rates outside of the fraternity for burglary insurance or hold-up insurance. It is possible that a pick-pocket may be arrested and convicted, just as it is possible that the citizen may have his pocket picked, but the chances are equally great in either case. They have built up lines of defense consisting in part of the corrupt lawyer, the fixer, the corrupt politician, with the further assistance of our antiquated system of criminal procedure, until they have made their business about as safe from governmental interference as any other form of business.”⁸⁴

Thirteen years later, at the time of the Illinois Crime Survey, professional and organized crime was still operating under official protection in Chicago. As Landesco points out, “Criminal business enterprises, like vice, gambling and bootlegging, were carried out under adequate police protection. Torrio’s (the predecessor of Al Capone) power rested in large part on his ability to insure protection to his fellow gangsters. Immunity from punishment appears to be an almost indispensable element in maintaining the prestige and control of a gangster chief, as is indicated by Torrio’s retirement after serving a prison sentence.”⁸⁵

There is a long record of official protection of crime in New York as well as in Chicago. The Seabury Report of 1932, with its evidence of police collusion with offenders and political control of judges and other law enforcement officials in New York, was but the last of a series of such reports beginning with the New York Assembly investigation of 1875. A flagrant example of official protection for law breakers came to light in Brooklyn recently. Drukman, a shipping clerk

in the employ of the Luckmans, had gambled with his employer’s money. He was murdered by the Luckmans, assisted by one Fred Hull, apparently as the result of a quarrel over the money. The police virtually caught the killers in the act. Yet no indictment was found by the Grand Jury to which the case was first presented. A special prosecutor, Hiram Todd, was however appointed by the Governor, who succeeded in obtaining an indictment from another Grand Jury and in convicting the Luckmans and Hull of murder in the second degree.⁸⁶ Mr. Todd in addition obtained conviction against four individuals, one of whom was a member of the prosecuting staff, for bribery in connection with the case. (See also page 255.)

The alliance between the criminal politician and law enforcement officials is to be found in other American cities besides New York and Chicago. As Merriam and Gosnell point out, “that robbery, theft, fraud and even murder should receive recognition in any political circle seems at first incredible, but the grim and incontestable facts cannot be wished away. Those familiar with the politics of our cities are well aware of these conditions, and the symptoms are by no means confined to cities. In some cases, this arrangement is casual and unorganized. But in the large cities, it becomes more comprehensive and approaches the dignity of a system.”⁸⁷

(1) Cyril Burt, “The Young Delinquent,” 599-600.

(2) H. Kurella, “Cesare Lombroso,” 46.

(3) *Ibid.*, 18.

(4) C. Lombroso, “L’uomo delinquente,” (5th ed., Turin,

1896), 1,207,331. A detailed description of the number and variety of anomalies to be found in criminals as discovered by Lombroso and his disciples is to be found in Havelock Ellis’s “The Criminal.”

(5) But how many abnormalities must be found before we can stigmatize an individual as a “born criminal”? Professor Ottolenghi, a distinguished pupil of Lombroso, answers this question, according to Havelock Ellis’s “The Criminal,” (278). Ottolenghi divides the criminals according to the amount of physical deviation from the normal into three general classes (1) the more complete degenerative type with more than five anomalies, (2) the incomplete type with more than three, and (3) the normal type with less than three.

(6) Lombroso, *op. cit.*, II, 58. “The atavic theory of crime is completed and corrected with the addition of insufficient cerebral nutrition, incomplete nervous functioning, there is added in other words—disease to monstrosity.”

(7) Lombroso’s introduction to August Drahm’s “The Criminal.”

(8) “L’uomo delinquente,” I, 333.

(9) Lombroso, “The Female Offender,” 187.

(10) “L’uomo delinquente,” II, 55.

(11) *Ibid.*, II, 60.

(12) Before Goring’s, the most important critique of Lombroso’s work was Adolf Baer’s “Der Verbrecher in anthropologischer Beziehung.” See also A. Debierre, “Le crane des criminels”; and Gabriel Tarde, “La criminalite comparee.”

(13) Charles Goring, “The English Convict,” 17-18.

(14) Goring, *op. cit.*, 200. Cyril Burt in “The Young Delinquent” (11) came to similar conclusions. “The delinquent child as such conforms to no criminal type. The same reservation, however, has to be made as before. In height and

weight and in general bodily growth, the delinquent child departs, and that very frequently, from the normal."

(15) "Charles Goring, *The English Convict: a Symposium*," in *5 Journal of Criminal Law and Criminology*, July 1914, 207-240.

(16) N. Pende, "Constitutional Inadequacies," 33.

(17) W. I. and D. S. Thomas, "The Child in America," 490.

(18) P. Nacke, "Die Ueberbleibsel der Lombroso-soschen Theorien," 50 *Archiv fur kriminol. Anthropologie*, 326. Lombroso showed here quite clearly another defect characteristic of much of his thinking, *i.e.*, the acceptance of similarity for identity. Merely because some psychological and physical characteristics of the epileptic and the criminal were alike, did not necessarily show that they were both caused by the same pathologic process.

(19) W. Healy, *op. cit.*, 416.

(20) W. Healy, *op. cit.*, 420.

(21) "The Young Delinquent," 249.

(22) L. L. Stanley, "Disease and Crime," 14 *Journal of Criminal Law and Criminology*, May 1923, 103—109; Dr. William H. Kraemer, "Medical Science in its Relation to Crime," *American Prison Association Proceedings*, 1916, 122; V. V. Anderson and Christine Leonard, "A Study of the Physical Condition of 1,000 Delinquents Seen in Court," 10 *Journal of Criminal Law and Criminology*, May 1919, 82—89.

Alberta S. Guibord summed up her findings in her study, "Physical States of Criminal Women," made in the reformatory at Bedford Hills, New York, and published in *8 Journal of Criminal Law and Criminology*, May 1917, 82—95, as follows:

"1. The group of women here studied is characterized by a high degree of physical defectiveness.

"2. The physical defects are or were primarily to a large extent preventable in that they are the

result of faulty nutrition, bad hygiene, bacterial infection and other concomitants of ignorance and poverty.

"3. The physical defects resulting as they do in some degree of discomfort and inefficiency, unquestionably played some part in the conditioning of delinquency."

See also Amy Hewes, "A Study of Delinquent Girls at Sleighton Farm," 15 *Journal of Criminal Law and Criminology*, Feb. 1925, 598-619.

(23) Healy and Bronner, "Delinquents and Criminals," 132. In "Sex Delinquency in Adolescent Girls," Amelia Bingham has the following to say of girls examined by her: "On the whole the girls are remarkably free from organic defects; they show ordinary development for age and race and their state of nutrition is surprisingly good." 13 *Journal of Criminal Law and Criminology*, Feb. 1923, 494.

(24) A. S. Guibord, *op. cit.*

(25) L. Berman, "The Glands Regulating Personality," 22.

(26) Grimberg, "Emotion and Delinquency," 112.

(27) Schlapp and Smith, "The New Criminology," 119.

(28) *Ibid.*, 152.

(29) William Healy writes in "Human Biology and Racial Welfare," (E. V. Cowdry, editor) 399, "Conservative scientific endocrinologists who have undertaken very careful and prolonged special examinations of offenders for us, account for very little indeed of the anti-social behavior in their reports, and in spite of the much advertised and much used extracts of glands [they] offer very few suggestions for treatment."

(30) National Committee for Mental Hygiene, *Arizona Mental Hygiene Survey*, 47.

(31) H. Goddard, "Human Efficiency and Levels of Intelligence," 73, 74, and, "Feeble-mindedness, Its Causes and Its

Consequences," 9.

(32) See the summary of these opinions in James Burt Miner's "Deficiency and Delinquency," 166, and in E. H. Sutherland's "Mental Deficiency and Crime," published in Kimball Young's "Social Attitudes," Ch. XV.

(33) Gilliland noted that if 100 delinquents in the Columbus Ohio workhouse were given 12 standard mental tests, the percentage found delinquent might vary from 10 per cent to 50 per cent depending upon the test used. "The Mental Ability of 100 Inmates of the Columbus, Ohio, Workhouse," 7 *Journal of Criminal Law and Criminology* 857—866 (1917).

(34) Thus 24.1 per cent of the draft army tested during the war was feeble-minded if the army tests accurately determine defective intelligence. A number of psychologists gave the army tests to adult delinquents in several institutions. On this basis, "Adult delinquents score about the same as the draft army of the same race and nationality in the same state."

(35) Of 574 individuals charged with the commission of a felony before the Court of General Sessions of New York, 11.9 per cent were diagnosed mentally defective, whereas 16.2 per cent of those found guilty were mentally defective. The mentally defective received fewer suspended sentences. 35.2 per cent of all felons received this favor, but only 18.2 per cent of the defective felons; 64 per cent of those found guilty were sentenced to institutions as against 81.8 per cent of the defectives. Benjamin Malzberg, "On the Relation of Mental Defect to Delinquency," 10 *Journal of Criminal Law and Criminology* 218-221 (1919). There also seems to be less likelihood that defectives will be paroled. In 1921 in Joliet prison, the mentally defective were said to constitute 28.6 per

cent of the prison population, but only 15.6 per cent of those paroled were defectives.

(36) Goring, *op. cit.*, 180.

(37) Sutherland analyzed about 350 reports of mental tests administered to about 175,000 criminals. The proportion diagnosed as feeble-minded decreased from about 50 per cent in the average study of 1910-14, to 20 per cent in the studies of 1925-28. The decrease was due primarily to alterations in the methods of scoring the tests. "Mental Deficiency and Crime," Ch. XV of "Social Attitudes," edited by Kimball Young. See also Sutherland, "Principles of Criminology," 94-96.

(38) Zeleny has pointed out that the results of testing criminals have not been corroboratory owing to variable types of interpretation of test results, and that investigations of studies in apparent disagreement will reveal similar results when interpreted in the same manner. He therefore analyzed three studies by Murchison, Ader and Ericson and eliminated their variable factors. He came to the conclusion that these studies "when compared in terms of standards as nearly constant as it is possible to make them, and in terms of the best available standards for the non-criminal population, revealed slight criminal mental inferiority, expressed in terms of a ratio of 1.26:1.38, 38 *American Journal of Sociology*, 564—576 (1932—33).

(39) "The Social Adjustment of the Feeble-Minded," a group thesis study of 898 feeble-minded individuals made by students in the School of Applied Social Sciences in Western Reserve University, 1930, 184.

(40) Emma O. Lundberg, "A Social Study of Mental Defectives in New Castle County," Delaware, U. S. Department of Labor, Children's Bureau, Publication No. 24, 21.

(41) Groves and Blanchard,

"Introduction to Mental Hygiene," 60-61.

(42) Orbison, "Constitutional Psychopathic Inferior Personality," 10 *Journal of Delinquency* 428 (1926).

(43) Missouri Crime Survey, 405.

(44) Sutherland, "Principles of Criminology," 100.

(45) Dr. Karl Birnbaum, "The Social Significance of the Psychopath," in "Some Social Aspects of Mental Hygiene," edited by F. E. Williams, 76.

(46) National Committee for Mental Hygiene, First Annual Report of the Psychiatric Clinic, Sing Sing, 12.

(47) Grimberg, *op. cit.*, 35. .

(48) Goring, *op. cit.*, 258.

(49) See R. L. Dugdale, "The Jukes," and A. H. Estabrook, "The Jukes in 1915."

(50) See H. H. Goddard, "The Kallikak Family."

(51) Pende, *op. cit.*, 24.

(52) G. Aschaffenburg, "Crime and Its Repression," 127. A recent technique for measuring the influence of heredity and environment in criminality is the study of twins. Lange, in "Crime and Destiny," investigated the criminality of 30 different sets of twins. Thirteen sets of these twins were monozygotic (identical twins), products of the fission of a single egg. Seventeen sets were dizygotic (non-identical twins), products of the fertilization of two different eggs. Of the thirteen sets of monozygotic twins, both twins were criminal in ten cases.

Of the seventeen cases of non-identical twins, only two sets were criminal. This leads Lange to the conclusion that "so far as crime is concerned monozygotic twins react in a definitely similar manner, dizygotic twins behave quite differently." This conclusion appears justified from Lange's evidence, but he goes further and states, "that as far as the causes of crime are concerned, inherited tendencies play a preponderant

part" ("Crime and Destiny," 46). It is difficult to see how this conclusion is supported by a study which has been made. No attempt is made by Lange to correlate the criminality of the ancestors with the criminality of the twins. In only one or two cases was any criminality reported in the parents of the identical twins. On the other hand the homes of these twins were marred - by economic insecurity, drunkenness, discordant family life, illegitimacy, and the death or desertion of their parents. No evidence is presented as to conditions in the homes of the dizygotic twins.. Differences in the homes of the monozygotic and the dizygotic twins may explain the differences in their criminal reactions.

(53) Miriam Van Waters, "Youth in Conflict," 67.

(54) Healy and Bronner, "Delinquents and Criminals," 128-9.

(55) Sheldon and Eleanor T. Glueck, "One Thousand Juvenile Delinquents," 80.

(56) *Ibid.* 69.

(57) Cyril Burt, *op. cit.*, 66—67.

(58) E. H. Shideler, "Family Disintegration and the Delinquent Boy," 8 *Journal of Criminal Law*, Jan. 1918' 709—32, 713. E. J. Cooley, "Probation and Delinquency," 87 et seq.; Slawson, "The Delinquent Boy," 353. Shaw and McKay, National Commission on Law Observance and Enforcement, Report on Causes of Crime, Volume 2.

(59) New York Crime Commission Report, 1938, 324. The following are some of the homes of girl delinquents studied by W. I. Thomas ("The Unadjusted Girl," 209-11):

"A family of 13 children; father a drunkard who deserted them; mother scrubs and cleans; a very poor, dirty, and crowded home."

"Family 'very degraded'; father, a drunkard, criminally abused two little girls (who later

became delinquent wards of the court) and then deserted the family to avoid prosecution. Mother married again, but stepfather also drank and was so abusive that wife and children left him."

"Father, a man of bad habits, deserted; mother drank; she said girl had inherited unfortunate tendencies from father." "A family of fourteen children, six of whom died; father was immoral and cruel to his wife, and very unkind to his children; he deserted, leaving family to charity; the girl left home because of ill treatment and became immoral."

"Father, professional gambler, utterly irresponsible, deserted his family; one boy was always 'wild' and one girl went to a house of prostitution."

"Father and mother, both shiftless, begging people who will not work; father periodically deserts family, who were all in

Home for the Friendless at one time and who are often destitute and a public charge. Father is now in old soldiers' home and three of the children are in a soldiers' orphans' home."

"A family of six children, one girl delinquent; home dirty and untidy, with two beds in parlor; mother has a bad reputation, drinks habitually and always has the house full of men. Father deserted at one time, and family has been helped by a charitable society constantly for two years."

"A family of seven children; father, an habitual drunkard, supposed to be a fruit peddler but really a common tramp; deserts periodically but always comes back; very brutal to wife and children when he is at home, and responsible for demoralization of two older girls; family a county charge and on records of three relief societies."

"A very degraded home; father drunken and immoral, abused girl's mother shamefully before her death; criminally

abused girl when she was only seven and then abandoned her. Girl brought to court at the age of twelve on charge that, she was 'growing up in crime.

"Lillie, a German girl, seven years of age, whose father, now dead, is said to have been as near a brute as a human being could be, whose mother is insane, and whose sister is abnormal, was brought in as incorrigible and immoral."

"Vera, a seventeen-year-old girl, whose father's address is unknown, and whose mother is insane, found employment as a barmaid in a concert hall, and afterwards became a prostitute.

"Rosie, a sixteen-year-old Russian Jewess, whose mother is in the hospital for the insane, and whose father abandoned her, was brought into court on the charge of immorality."

"Annie, a fifteen-year-old girl, whose father was frozen to death and whose mother is of unsound mind, has two brothers who are imbeciles. She is herself feeble-minded, and has been the mother of three illegitimate children—probably the children of her imbecile brothers."

(60) Sheldon and Eleanor T. Glueck, "Five Hundred Criminal Careers," 119.

(61) H. W. Zorbaugh, "The Gold Coast and the Slum,"

(62) Groves and Blanchard, "Introduction to Mental Hygiene," 83.

(63) New York Crime Commission Report, 1927, 285; 1928, 444.

(64) New York Crime Commission Report, 1928, 325.

(65) Shaw and McKay, *op. cit.*

(66) A study of 145 offenders in Sing Sing and Elmira made by the New York Crime Commission indicated that the offenders from Greater New York came principally from six congested slum sections of the city. New York Crime Commission Report, 1928, 325. On delinquency areas in New York,

see also Irving Halpern, "The Slum and Crime." Elmer came to the conclusion from his studies in Minneapolis and St. Paul that juvenile delinquency was localized in specific areas in the city, designated as zones of transition. "Maladjustment of Youth in Relation to Density of Population" American Sociological Society Proceedings, 1925, 138—140. Burt found that the various boroughs of London contributed unequal proportions to juvenile delinquency, *op. cit.*, 67—76.

(67) Sophia Robison, "Can Delinquency Be Measured?" 76.

(68) D. Ahearn, *op. cit.*, 17.

(69) Zorbaugh, *op. cit.*, 154.

(70) Thrasher, "The Gang," 252.

(71) Shaw and Myers, "The Juvenile Delinquent," Illinois Crime Survey, 663.

(72) Wellington Scott, "Seventeen Years in the Underworld," 24; "In the Clutch of Circumstance," 55

(73) M. Liepman, "Krieg und Kriminalitat," 72.

(74) Dorothy Thomas, "Social Aspects of the Business Cycle," 139.

(75) Emma Winslow, "Relationships between Employment and Crime Fluctuations As Shown by Massachusetts Statistics," National Commission on Law Observance and Enforcement, Report on Causes of Crime, I, 312.

(76) *Ibid.*, 203.

(77) W. T., Root, "A Psychological and Educational Survey of 1916 Prisoners in the Western Penitentiary of Pennsylvania," 201.

(78) Association of the Grand Jury of New York, *op. cit.*, 10.

(79) Tawney, "Our Acquisitive Society."

(80) This statement was made in a speech in Chicago on Sept. 16, 1909, reported in the *Chicago Daily News*, Sept. 17, 1909, 16.

(81) Quoted by Frank A. Goodwin, "Community Versus Criminal," *Massachusetts Law Quarterly*, May 1926, 3—27, 5.

(82) Bulletin of the Chicago Crime Commission, Feb. 10, 1922, 3, *ibid.*, No. 17, 35. For similar opinions see Kavanagh, "The Criminal and His Allies," 234, 243; Child, "Battling the Criminal," 48, 267. See also Illinois Crime Survey, Editor's Preface by Wigmore, 5.

(83) Speech by J. Edgar Hoover, "Police Problems Today," Sept. 22, 1936.

(84) Chicago City Council, Report on Crime, 1915, 163.

(85) Illinois Crime Survey, 918.

(86) Hull appealed and his conviction was reversed; but on his new trial he was found guilty of murder in the first degree. He was sentenced to death, but sentence was commuted to life

imprisonment by the governor.

(87) . E. Merriam and H. F. Gosnell, "The American Party System," 148.



Part II.

The Substantive Criminal Law

The Nature & Development of Criminal Law

1. Fundamental Criteria of the Criminal Law

The criminal law is distinguished from other branches of the law by two fundamental criteria. First, the criminal law prohibits acts under threat of a specific punishment which will follow if the act is committed.¹ The law says to a man, you shall not steal, kill, rape, etc. If you do, you will be punished. You may be put to death, imprisoned, fined, put on probation or disqualified from holding public office. In the case of civil wrongs, however, such as trespass and breaches of contract, the law gives to the injured party a right of action against the man who caused the injury. He must repair the damages he has caused. He may be required to make a money payment, or to perform specifically the engagement entered into. Imprisonment or fines for contempt lurk in the background to enforce certain kinds of civil process, but only if the defendant refuses to abide by the judgment rendered by the court. In the criminal law, prohibitions are enforced exclusively by methods of compulsion or restraint of the individual by the state.

Secondly, crimes are looked upon essentially as violations of

public interests, and are repressed by proceedings taken in the name of the people or the state. A criminal prosecution is entitled "State versus Doe" or "People versus Doe," even though it may have originated in the complaint of a private party. Civil proceedings, however, are carried on throughout by the party whose interests have been adversely affected. The proceeding is entitled "Jones versus Doe." The State is not a party. It provides a tribunal before which Jones may prove his claim, and machinery to enable him to collect it once he has obtained judgment. But it is not otherwise concerned. In a civil proceeding, moreover, if Doe offers Jones a satisfactory sum to settle the case out of court, Jones can freely withdraw his complaint. But the money payment made to a victim of a crime has no such effect on a criminal proceeding. The complaining witness cannot on his own initiative quash the criminal prosecution. Only the agents of the state may dispose of criminal prosecutions. The prosecuting attorney may do so in many states through the exercise of his power of *nolle prosequi*. In other states the consent of the judge must be obtained for a dismissal

of the criminal prosecution.

Although the consequences of criminal acts and the mechanics of the enforcement of the criminal law differ from other branches of the law, their purposes are similar. The fundamental purpose of all law is the control of human conduct for the furtherance of individual and social interests. Life in society cannot go on without some limitation of human activity. Individuals tend to a maximum satisfaction of egoistic needs. Unfortunately there are not enough material and cultural goods to satisfy everyone. Society faces a "condition of overlapping or conflicting claims in which the goods of human existence would be lost or wasted, or at least the satisfactions derived from them would be small, if individual application of them to individual claims and demands were not ordered."² It is the function of the law to do this ordering, to limit the spheres of collective interests, and individual claims and interests. Ideally, its task is one of satisfying claims or demands with the least amount of friction and the least amount of waste so that the means of satisfaction may be made to go as far as possible. The maintenance of certain individual and collective

interests is left to the sanctions and procedure of the civil branch of the law. Some individual and social interests, however, are protected by the full weight of police, prosecutors and jailers.

2. Interests Protected by the Criminal Law

With the possible exception of treason, there are no crimes which have been punishable at all times and at all places. Treason is punished everywhere because it is always a distinct threat to the existence of the social group. But no other crime has ever touched social existence so intimately as everywhere to require repression by the criminal law. Even murder, which today is the most serious of crimes, was once left for redress to private action. In primitive systems of criminal law, when one member of a clan was killed by a member of another it was the duty of the kin of the victim to avenge his death. At a later stage of development, money payment might be made to the offended clan to buy off its vengeance. With the rise of the modern state, however, human life became an interest protected by the state and murder was no longer a matter for individual or clan adjustment.

The kinds of interests that will be protected in any country and the extent to which the criminal law will be used for their protection differ at various times in a country's history and as between countries; they depend upon the political, social and economic organization of the state, its cultural development and its moral and religious ideas. The Puritan colonists of the Massachusetts Bay Colony wished to establish "a religious commonwealth in which the laws of Moses were to be supreme."³ Their code of laws adopted in 1640 contained 12 capital offenses, every one of which is founded upon the authority of

the Old Testament. For guidance in the interpretation of the laws the colonists turned not to lawyers, but to the clergy. Today, the criminal law of revolutionary countries like Russia, Italy and Germany differs in many respects from other European countries. The maintenance and furtherance of the new political, social and economic regimes arising from these revolutions is considered of the most vital importance. Political, social and economic crimes which threaten their existence are repressed with far greater severity than the ordinary crimes against the individual. All three countries have abandoned the fundamental principle of European law that political offenders should be treated more leniently than ordinary offenders. Under the Russian penal law, for example, counter revolutionary activities, sabotage, destruction of railroads and public buildings, terrorism and espionage are all punishable with death, while murder may be punished by only 8 years imprisonment. The severity of the Russians in dealing with the former class of offenses may be noted in the recent treason trials. Of thirty-two defendants tried, twenty-eight were executed and only four were sentenced to imprisonment.

3. The Expansion of the Scope of Criminal Law

The United States has seen a tremendous extension in the scope of the criminal law. The first New York Act on crimes and punishments (Dec. 10, 1828) had, for example, two hundred and fifty sections. The 1934 edition of the New York Penal Law contains about 1,000 sections. Approximately 362 changes, additions and amendments were made in the New York Penal Law between 1921 and 1934. There are, moreover, over 400 penal provisions in the New York General Statutes. Federal authority over crime has

also received an enormous extension in recent years. Although the Federal government has no inherent power over crime, it has legislated widely in pursuance of the express powers granted to it by the Constitution. The Harrison Narcotic Act, the National Firearms Law, the Anti-Kidnaping (Lindbergh) Law, the Dyer Motor Vehicle Theft Act, the acts prohibiting the transportation of stolen property across state lines and the sending of threats across state lines for the purpose of extortion, and the recent law making the robbery of a National or Federal Reserve Bank a federal offense, mark the growth of the Federal penal law.

The expansion of the criminal law is the inevitable concomitant of the development of modern civilization. The population of the entire country in 1790 was 3,929,625. There were only 6 towns with a population of over 8,000. The urban population of the country was 131,472 or only per cent of the total. By 1930, however, the population of the country was 122,775,046. There were 5 cities of over 1,000,000 population. Of the population 56.2 per cent lived in the urban areas. Coincidentally with this population growth has come the tremendous expansion of commerce and industry and the means of transportation and communication. Contacts between individuals have been accelerated. The possibilities and the methods whereby one individual can inflict injury upon others have increased enormously. The criminal law has been expanded in an attempt to keep pace with and ward off these many new possibilities of injury to individual and social interests. This generation has seen the multiplication of attempts through laws to curb the operation of motor vehicles and to deal with the increasing number of injuries caused by the use of automobiles. It has seen the imposi-

tion of new prohibitions designed to safeguard the health, safety and welfare of industrial workers. As well, penal sanctions have been increased to protect consumers from adulterated foods, from inferior or misrepresented articles of merchandise. It beholds new restrictions in the marketing of securities. The expansion in the criminal law is contained for the greater part in state laws, but recently there has been increasing resort to Congress for new penal legislation. This has been made necessary on account of the difficulty which states encounter in combating a highly mobile criminal class which uses all the improved methods of transportation and communication to commit depredations without regard for state boundaries which the law enforcement agencies of the several states have to respect.

Though much of the extension of the scope of the criminal law in this country is inevitable, a contributing factor has been the traditional eagerness of the American legislator to add a criminal penalty to every change he makes in the existing legal structure. As Pound puts it, "Every lay law maker turns instinctively to the criminal law when he comes to provide a sanction for his new measure, and every statute adds one more to the mass of prescribed penalties for which a criminal prosecution may be invoked."⁴ The tradition of quick recourse to the criminal law is of long standing in this country. It goes back to the days of the Puritan legislation of the Massachusetts Bay Colony. No detail was too small to engage the attention of the Puritan legislators and no subject was too difficult for them to legislate upon. "From the form of religious observance to the style of women's hats, and from the enactment of laws relative to capital offenses, to the width of the female sleeve, they passed

laws with the utmost confidence."⁵ But neither the Puritan nor the modern legislator has been any too well aware of the fact that there were limits to the effective use of the criminal law as an instrument of social control. Particular types of behavior do not cease merely because the legislature has seen fit to prohibit them. The satisfaction derived from the behavior may be so deeply rooted in human desires that the penalties decreed are completely inadequate to deter it. Law-enforcement machinery may be unable to enforce the new prohibitions in addition to the hundreds already on the books. The prohibition may also call into being evils almost as harmful in their social consequences as those which it was intended to cure. Official corruption, gangsterism, the widespread disregard of law all antedated the Eighteenth Amendment, but they received a tremendous impetus from the attempt to enforce its provisions. Similar evils still arise from the attempt to enforce prohibitions against prostitution and gambling. There is probably no large city in this country where these activities are not carried on in complete violation of the law and where part of their profits have not been used at some time to buy official immunity.

4. The Persistence of the Common Law of Crimes

Legislation is not the only source of the criminal law. In every state, to a greater or lesser extent, the common law of crimes, *i.e.*, the unwritten or customary law of England and the statutes of general application passed before the colonies declared their independence, containing principles applicable to conditions here, are still in force. This is true even in states like New York, Ohio, Georgia, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Oklahoma, Or-

egon and Texas, which have expressly attempted to abolish the common law of crimes and require that an act to be a crime must be prohibited by a statute of the state.⁶ The attempts to eliminate the common law have failed because none of the state statutes covers the entire field of crime and punishment. State criminal codes frequently omit reference to specific doctrines of the criminal law, such as those relating to culpability, insanity, duress, necessity, self-defense, defense of others, etc. Resort must be had to the common law in order to fill the gaps left by the statutory materials. Statutes frequently designate offenses by their common-law names without defining them. The laws merely provide that one who commits burglary, assault, battery, larceny, etc., shall be punished by a specific penalty. The courts must necessarily look to the common law for the elements of these offenses. Lawmakers, too, paid more attention to the common law than to the actualities of the moment. Even, when offenses are defined, this is usually done as at common law, leaving the constitution of the various crimes precisely as though there had been no statutory definition.⁷

The continued reliance upon the traditional, centuries-old common law indicates that no state has ever succeeded in formulating a coherent set of principles, adequate to the needs of the state at the moment. There are many so-called state penal codes, but these do not systematically lay down the provisions of the criminal law. They are simply attempts at compilation to provide ease of reference. They are defective even for this purpose. This is illustrated by the classification of offenses in use in the various states. New York and seven other states use an alphabetical arrangement in their penal codes. This would seem to be

the simplest method of setting forth crimes so that they could be easily discovered, but a few examples from the New York penal law show the defects of the alphabetical arrangement even for this purpose. Prostitution, for example, appears under the title "Women." The standards prescribed for marking silver are laid down in the article entitled "Business and Trade," the rules concerning the stamping of platinum are laid down in a separate section entitled "Platinum Stamping." There is a prohibition against forging or counterfeiting railroad, steamship, or other passage tickets in the section entitled "Forgery" while other offenses concerning such tickets are found in a section entitled "Passage Tickets." Twenty-eight other states group the offenses roughly according to the types of crime. Massachusetts, for example, classifies its crimes as follows: Crimes against governments, against the person, against property; forgery and crimes against the currency; crimes against public justice; against public policy; against chastity, morality, decency, and good order; desertion and non-support. But these categories are frequently not very illuminating. Many different types of crime are brought under a single heading—Dropping glass on a public way or beach, prohibitions against cabmen leaving horses insecurely tied, and against protruding hatpins are all in the chapter entitled "Crimes against the Person" which includes murder, robbery, rape and kidnapping.⁸ Injury to a building, for instance, is in the chapter entitled "Crimes Against Property."⁹ But destruction or demolition of a building by rioters is in the chapter "Crimes Against the Peace."¹⁰

Even these standards of classification, defective as they are, are not maintained in the rest of the states. Some states classify only part of their crimes, and oth-

ers make no pretense of classification at all, simply running their offenses together in a manner that reminds one of Coke's disorganized treatise on the criminal law written in the seventeenth century.

These defects in classification are not merely formal. They are symptoms of the general state of confusion of the existing criminal law. No state has as yet clearly defined the interests which it seeks to protect by means of the criminal law, and the attacks upon those interests which ought to be prohibited. There can be no satisfactory classification until a state makes a painstaking analysis of its criminal laws, in terms of such interests and attacks. Only then will it be possible to discover whether the criminal law covers all the acts which may be deemed socially dangerous and gives to the various social and individual interests the protection it ought to give in our existing civilization.

American criminal law codification is in direct contrast with the European. In Europe, codification is an attempt at thoroughgoing revision of the criminal law in order to make it a more effective instrument against crime. In this country, states have taken the common law as a basis and have passed numberless laws supplementing, superseding and modifying the common law. The result is that the inadequacies and inconsistencies which have long existed in the common law system have been perpetuated and to them have been added the inconsistencies between the statute and the common law.

5. The Felony-Misdemeanor Classification of Offenses

A typical instance of the confusion of the present criminal law may be seen in the felony-misdemeanor classification of offenses. Some gradation of offenses is necessary because they differ in their seriousness to the indi-

vidual and to the general security. "Shooting craps" by a group of young men, in violation of the prohibition against gambling, is obviously not such a severe threat to the social order as murder or manslaughter. Some classification of offenses in terms of seriousness is necessary as a procedural device. Not all offenses should be treated with the same set of formalities and the same methods of safeguarding individuals accused of crime. Less serious crimes can and should be handled by more expeditious methods than those used in handling offenses for which the punishment may be a long term of imprisonment.

The fundamental division of the criminal law, from the point of view of the gravity of the offenses, is the one into felonies and misdemeanors. Many procedural rules and rules of the substantive law are dependent upon this classification. Unintentionally causing death in the commission of a *felony* is murder, but it is only manslaughter if the criminal act was a *misdemeanor*. To constitute burglary, a house must be broken into with the intent to commit a *felony* therein; the intent to commit a *misdemeanor* is not enough. Trial by jury is a constitutional right of those accused of felonies. Misdemeanors may be tried by a judge without a jury. A police officer may arrest without a warrant any person whom he reasonably suspects of having committed a felony. He may only arrest misdemeanants without a warrant if the offense was committed in his presence. A police officer may kill a felon if it is necessary to effect his arrest or to prevent his escape, but killing a misdemeanant under these circumstances is murder.

At common law, the term felony was used to designate the more heinous crimes and felonies were generally punishable by death and forfeiture of goods.

Misdemeanor came to designate the less serious offenses which were not punishable by death or forfeiture. Although imprisonment has been widely substituted for the death penalty, felonies are still taken to mean the more serious offenses which entail the more severe punishments. The usual statutory rule is that a felony is a crime punishable by death or confinement in a state prison. All other offenses are known as misdemeanors.

Unfortunately, state legislators do not consistently grade offenses as felonies or misdemeanors according to the gravity of the offense. In Pennsylvania, for example, "Embezzlement by a servant is a felony, while embezzlement by a banker, trustee or guardian is only a misdemeanor. An attempt to rape is a misdemeanor only, while an attempt to burn a stable or a mill is a felony. Assault and battery with intent to rob is a felony, but if the intent is to rape, the offense is a misdemeanor. Uttering counterfeit gold or silver coins is a misdemeanor only, but uttering copper coins for less than their value is a felony. Purposely and with malice aforethought cutting out a person's tongue, eye or hand is a misdemeanor only; but giving away a toy, on which is painted by way of advertisement a flag of the United States, is a felony."¹¹ Nor does it necessarily follow that felonies are more severely punished than misdemeanors. "Larceny. the penalty for which is a fine of not more than \$ 500 and three years' imprisonment, is made a felony, while malicious burning of a warehouse is a misdemeanor only; yet the latter is punished by a fine of \$ 2,000, and ten years' imprisonment. So embezzlement by a servant, while a felony, is only punishable by three years' imprisonment, while embezzlement by a factor is a misdemeanor, yet punishable by five years in prison. Selling an

article in which is printed or painted by way of advertisement a flag of the United States or of Pennsylvania, is a felony, but is punished by a fine of only \$ 500 and imprisonment for six months. Receiving stolen goods is a felony, punishable by a fine of \$ 500 and three years imprisonment, while forgery, a misdemeanor only, is punishable by twice as great a fine, and imprisonment three times as long."¹²

While legislators designate offenses as misdemeanors and affix to them the punishment for felonies, courts in the application of constitutional guarantees, such as the right to trial by jury, have refused to abide by the name given to the offense but have looked to the punishment imposed. In a recent New York case for example, the defendant was convicted by a magistrate without a jury of a violation of the general business law. The offense was designated a misdemeanor by the statute. The maximum punishment prescribed, however, was two years' imprisonment and \$ 5,000 fine. The defendant contended that his right to trial by jury was violated since the offense was really a felony despite the statutory designation. This contention was upheld by the appellate court.¹³ The courts do not agree on the question whether the maximum or minimum punishment prescribed by the statute, or the punishment actually imposed in a particular case, determines the offense to be a felony or a misdemeanor. The felony-misdemeanor classification, despite its importance is plainly the source of confusion and inconsistencies and justifies the comment of one writer who says: "The distinction between felony and misdemeanor is a curious specimen of law-making to be in force in this day and country, with its fixing of the dividing line between crimes infamous and otherwise by the possibility

of punishment by imprisonment for one year or less, and its effect of making felonies of crimes denominated as misdemeanors in the statutes which denounce them. This is truly. . . a reversion to barbaric law."¹⁴

6. The Principle of "Nullum Crimen sine Lege."

The persistence of the common law stands in the way of a complete realization of one of the fundamental principles of criminal law of the western world, namely that no act can be deemed a crime unless expressly prohibited by law at the time it was committed. This principle is recognized by the provisions of the Federal Constitution against *ex post facto* laws. It is recognized by codes which, like that of New York, lay down that, "No act. . . shall be deemed criminal or punishable except as prescribed or authorized by this chapter, or by some statute of this state not repealed by it."¹⁵ The doctrine of no crimes or penalties without pre-existing law is one of the fundamental safeguards of individual liberty. In every country there is a tendency to use the criminal law to oppress unpopular individuals and causes. The power to make *ex post facto* laws would be a convenient instrument for this purpose, by making acts criminal which were non-criminal at the time they were done, or by changing the punishment for crime after the fact, or by altering the rules of evidence applicable at criminal trials. English legal history before the revolution of 1688 is replete with instances of such acts. The Germans supplied a recent example of *ex post facto* legislation in authorizing the beheading of Van der Lubbe for burning the Reichstag, when the penalty for arson at the time of the fire was a term of imprisonment only. A constitutional barrier stands in the way of the adoption of such laws in this country.

7. The Doctrine of Common Law Misdemeanors

But if full effect is to be given to the principle of no crime without pre-existing law, it is necessary not only to ban *ex post facto* laws, but to lay down fixed and certain categories of criminal conduct as well. It must be possible for an individual to know what is a crime at the time he acts, so that he may govern himself accordingly. He does not have this knowledge when the definitions of the various crimes are so vague that they may be interpreted according to the whims and prejudices of police officers, prosecutors, and judges. This vagueness is characteristic of the common law of crimes.

As a general rule, any act or any omission of a legal duty that injures or tends to injure the community at large to such an extent that public policy requires the state to interfere and punish the wrong-doer is a crime at common law. As the Court stated in *Ohio versus Lafferty*,¹⁶ "Whatever acts, then, are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only MAY but MUST, be repressed and punished... ." Acts of malicious injury to another's property which are done in such a way as to provoke violent retaliation, such as killing a horse, cow, or other domestic animals, or breaking windows; acts which scandalously affect the general health or morals of the community, such as casting a dead body into a river, eavesdropping, indulging publicly in profane swearing; acts which are provocative of public disturbance, such as disturbing a religious congregation at worship, or disturbing a town meeting, tearing down an advertisement set up by commissioners for a sale of land, or agreeing to fight, though no fight takes place, have all been held to be

common law misdemeanors.¹⁷

It is not necessary to find any precedent for making specific acts criminal. It is enough that the judge feels that the act in question comes within the vague criteria of acts "wicked and immoral in themselves" or "punishment required by public policy." The doctrine of common law misdemeanors, therefore, leaves considerable room for the exercise of the innate prejudices of individual judges in designating particular conduct as criminal.

Legislators have not entirely dispensed with the use of broad and vague principles to formulate crimes, even where they have put the criminal law upon a statutory basis. Sec. 43 of the present New York Law, for example, reads "A person who willfully and wrongfully commits any act which seriously injures the person or property of another or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency - . . . is guilty of a misdemeanor." There is room for the exercise of considerable discretion in such vague terms as "seriously injures," "seriously disturbs" and "seriously endangers."

8. The Common Law Doctrine of Conspiracy

The common law crime of conspiracy is in daily use by prosecutors, and is as vague and as ill-defined as common law misdemeanors. A criminal conspiracy is defined as a combination of two or more persons to do an unlawful or criminal act by unlawful or criminal means. If every unlawful act done by two people were a conspiracy, then one could not object to the vagueness of the rule. So long as two or more people were concerned in any unlawful act they would be subject to a criminal prosecution. But this conception of criminal conspiracy blurs the boundaries of the civil and criminal law. It would

involve law enforcement agencies in every civil dispute, for example, a breach of contract, so long as the breach was the work of two or more people. Courts have, therefore, tried to draw a line between those unlawful acts in which the public is sufficiently interested to justify prosecution and unlawful acts which must be left for redress to the Civil courts. In a Massachusetts case, the Court drew the line as follows:

"It is the consensus of opinion that conspiracy, as a criminal offense, is established when the object of the combination is either a crime, or if not a crime, is unlawful, or when the means contemplated are either criminal, or if not criminal, are illegal, provided that, where no crime is contemplated either as the end or the means, the illegal but non-criminal element involves prejudice to the general welfare or oppression of the individual of sufficient gravity to be injurious to the public interest?"¹⁸

What will be recognized as "prejudice to the general Welfare" or "oppression of the individual" within the terms of this definition rests largely within the discretion of the Courts. This is brought out very clearly by a recent Kentucky case in which three defendants were convicted of conspiracy "to engage in the business of lending money at excessive rates." The state had no law making the practice of usury a crime. Nevertheless, the majority of the Kentucky Appellate Court, in the case of *Commonwealth v. Donoghue*, upheld the conviction in terms similar to those used in the above Massachusetts case:

"According to the overwhelming weight of authority the objects of the conspiracy need not be an offense against the criminal law for which an individual could be indicted or con-

victed, but it is sufficient if the purpose be unlawful. . . It cannot be said, however—and care must ever be exercised in the application, as all courts recognize—that the term “unlawful” includes every act which violates legal rights of another or such as may create a right of action. The proper rule undoubtedly is that all such acts as have the necessary tendency to prejudice the public or to injure or oppress individuals by unjustly subjecting them to the power of conspirators are sufficiently tainted with the quality of the unlawfulness to satisfy the requirements as to conspiracy. It is said that the influence of the act or purpose upon society determines whether a combination to accomplish it is a criminal conspiracy.”¹⁹

But the dangers of the doctrine of conspiracy were ably set forth in the dissenting opinion in this case:

“ . . . However indefensible the exaction of usury may be, it is a matter that should be regulated by the Legislature and not by the courts. Already the conspiracy doctrine has been worked overtime, and should not be extended unless plainly required. When a court on the theory of conspiracy declares an act to be a crime, which was not recognized as a crime at the time it was done, its decision savors strongly of an *ex post facto* law. . . . The decision not only presents a strained application of the conspiracy doctrine, but its chief danger lies in the fact that for all time to come, it will be the basis for the creation of new crimes never dreamed of by the people.”

The indefiniteness of criminal conspiracy makes it a favored weapon against unpopular groups or individuals who cannot be convicted of a specific crime. In the eighteenth century and the

early part of the nineteenth, long before the labor injunction was known or used, a prosecution for criminal conspiracy was one of the favored methods of fighting labor unions. When laborers combined to increase wages, their leaders risked jail for their efforts, but employers who combined to depress wages did not run a similar risk.²⁰ Employers never hesitated to exercise all the power they possessed. They combined and conspired but escaped punishment, while their employees were made to feel the full weight of the law. “Prejudice to the general welfare” or “oppression of sufficient gravity to be injurious to public interest” tended to be measured by the general predilections of prosecutors and judges.

9. The Doctrine of Strict Construction of Penal Statutes

The doctrines of common law misdemeanors and criminal conspiracy stand in direct contrast to another fundamental rule of the common law, namely, that penal statutes must be strictly construed. Through this principle a degree of certainty, precision and definiteness is required of statutes which is not found in the common law system itself. The rule arose because the courts hesitated frequently to apply the death penalty to the large number of cases in which capital punishment was provided for by statute. The judges therefore sought by a strict and frequently absurd construction to temper the severity of penal statutes. Courts still persist in requiring from penal statutes a degree of certainty and precision which they do not require when they apply the principles and doctrines of the common law, despite the fact that strict construction is no longer “*in favorem vitae*.” In a case decided by the United States Supreme Court, the defendant McBoyle was convicted of trans-

porting a stolen airplane across the state line under the National Motor Vehicle Theft Act which defines a motor vehicle as an automobile, automobile truck, automobile wagon, motor cycle, *or any other self-propelled vehicle not designed for running on rails*. The Court discharged McBoyle, saying that the act covered only vehicles moving on land?²¹ Again, a statute which made it an offense for pawnbrokers to charge more than 3 per cent a month on any loan, was held not to cover one who charged 3 per cent interest and an additional 3 per cent of the amount of the loan for “storage.” In a Michigan case, the defendant was convicted of operating an employment agency without a license in contravention of a statute which required employment agencies “engaged for gain or profit” to obtain licenses. The conviction was quashed in the Appellate Court because the information on which the prosecution was based did not allege that the agency was operated for “gain or profit,” but that a “fee” was charged to persons seeking employment?²³ Decisions similar to these have occurred even in states which have tried to modify the common law rule and which direct courts to construe penal statutes according to the fair import of their terms.²⁴

(1) “Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture or imprisonment, he commits a crime.” *People v. Hanrahan*, 75 Mich. 611, 612, 42 N.W. 1124, 4 L.R.A. 751 (1889).

“A description, definition and

denouncement of acts necessary to constitute a crime do not make the commission of such acts a crime unless punishment be annexed, for punishment is as necessary to constitute a crime as its exact definition.”

Matter of Ellsworth, 165 Cal. 677, 681, 133 Pac. 272 (1913).

(2) R. Pound, “Interpretations of Legal History,” 157, 158.

(3) Bradbury, “Laws and Courts of Massachusetts Bay Colony,” 137.

(4) R. Pound, “The Future of the Criminal Law,” 21 *Columbia Law Review* 1, 13 (1921).

(5) Bradbury, *op. cit.*, 145. In 1636 it was enacted that a penalty of shillings would be imposed for every yard of lace made or sold to be worn upon any garment in the country, binding or small edging lace could however be used upon garments or linen. Bradbury, *op. cit.*, 154. In it was ordered that “no person ... shall spend his time idly or unprofitably under pain of such punishment as the court might inflict.” “Laws and Liberties of Massachusetts,” 1649, 38.

(6) Sec. 22 of The New York Penal Law, for example, reads: “No act or omission ... shall be deemed criminal or punishable, except as prescribed or authorized by this chapter, or by some statute of this state not repealed

by it. . .

(7) See “Uncertainties and Inconsistencies in Substantive Criminal Law,” 11 *American Bar Association Journal* 738 (1925).

(8) General Laws of Massachusetts (Terc. Ed.), Ch. 265.

(9) Ch. 266, Sec. 104, *Ibid.*

(10) Ch. 269, Sec. 7, *ibid.*

(11) W. E. Mikell, “The Proposed Criminal Code of Pennsylvania,” 71 *Univ. of Pa. Law Review* 99-114, 102 (1922-23).

(12) *Ibid.*, 103.

(13) *People v. Bellinger*, 269 N. Y. 265, 199 N.E. 213 (1935).

(14) J. L. Hopkins, “The New Federal Penal Code,” 3—4.

(15) New York Penal Law, Sec. 22.

(16) *Tappam Ohio Reports*, 1817, 81, 82.

(17) See F. Wharton, “Criminal Law” (12th ed.), 1, 31—33.

(18) *Commonwealth v. Dyer*, 243 Mass. 472, 138 N.E. 296 (1923).

(19) *Commonwealth v. Donoghue*, 250 Ky. 343, 348, 63 S.W. (2nd) 3.

(20) This was pointed out long ago by Adam Smith: “When masters combine together in order to reduce the wages of their workmen, they commonly enter into a private bond or agreement not to give more than a certain wage under a certain penalty. Were the workmen to enter into a

contrary combination of the same kind not to accept of a certain wage under a certain penalty, the law would punish them very severely; and if it dealt impartially, it would treat the masters in the same manner.” “An Inquiry into the Wealth of Nations,” Bk. 1, c. 10, pt. 2., 22.1.

(21) *McBoyle v. U.S.*, 283 U.S. 25, 75 L.Ed. 816, 51 Sup. Ct. Rep. 340 (1931).

(22) *State v. Goldenberg*, 30 Del. 458, 108 Atl. 137 (1919).

(23) *People v. Goulding*, 275 Mich. 353, 266 N.W. 378 (1936).

(24) *Livingston Hall*, “Strict or Liberal Construction of Penal Statutes,” 48 *Harvard Law Review* 748-774 (1934-35).

Factors in Criminal Liability

1. Development of Concept of Criminal Responsibility

In primitive systems of law, criminal liability was based upon the causation of the physical act alone. The mental attitude of the actor was immaterial; whether the act was intentional or accidental or the result of negligence, whether it was done by a lunatic, a drunkard or an infant was of no consequence. The individual was held to answer purely upon the basis of causation.

Liability irrespective of fault is traditional in the Anglo-Saxon criminal law, as in other primitive systems. It held a man answerable not only for consequences which he intended to produce, but also for any consequences of which he was the visible cause. Even though a man was the unwitting cause of a killing, the kinfolk of the deceased could and did exercise their right to take blood revenge upon the slayer. When it became possible to buy off vengeance by the payment of blood money, such payment was held to be due to the injured man or his kin, irrespective of intent and irrespective of culpability. As an old English compilation of laws

puts it, "If someone in the sport of archery or other form of exercise kill another with a missile or by some such accident, let him repay, for the law is that he who commits evil unknowingly must pay for it knowingly."¹

So deeply rooted were these principles of absolute liability in the law, that when a system of criminal law replaced the system of blood revenge and blood money, it was still too artless to formulate any principle which would excuse a man who killed through accident or self-defense. The injustice of putting persons in such case to death was clearly felt, and the rule came to be that they should be found guilty of homicide but be recommended to the King for pardon.² In a precedent book of Edward I's time, a justice is supposed to address the following speech to one whose plea of self-defense had been approved by the verdict of a jury: "Thomas, these good folk testify upon their oath to all that you have said. Therefore, by way of judgment, we say that what you did was done in self-defense; but we cannot deliver you from your imprisonment without the

special command of our lord the King; therefore we will report our condition to the King's court and will procure for you his special grace." Even so, the lands and goods of the offender were declared forfeit.

A substantial break in the Anglo-Saxon criminal law notions of liability without fault came about under the influence of the Roman and canon law. Medieval scholars discovered that the Roman law made distinctions in criminal liability on the basis of the mental attitude of the offender in the doing of the particular act. The canon law, with which the ecclesiastics who acted as judges during the Norman period of English history were familiar, emphasized the mental elements in crime as in sin. The physical result in and of itself did not bring liability in the criminal law of the Roman empire nor in the canon law. Some degree of moral guilt or lameworthiness was required before the offender was held responsible. Bracton, the leading medieval writer on the English law, was so much impressed by these Roman and canon notions that he asserted, "we must con-

sider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be different because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (*nocendi voluntas*) intervene, nor is a theft committed except with the intent to steal.”³

Many eminent writers have restated Bracton’s idea, postulating moral responsibility based on freedom of the will and the ability to choose between right and wrong as prerequisites of criminal responsibility. Two and one-half centuries ago Hale wrote: “The consent of the will is that which renders human actions either commendable or culpable.”⁴ A century later Blackstone stated: “All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of will. The concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act.”⁵

In the latter part of the nineteenth century, Bishop, the leading American textbook writer, stated; “There can be no crime, large or small, without an evil mind.... Punishment is the sequence of wickedness ... it is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent without which it cannot exist.”⁶ Shortly thereafter, Salmond wrote: “Two conditions must be fulfilled before penal responsi-

bility can rightly be imposed. One is the doing of some act by the person to be held liable. The other is the *mens rea* or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits. Before the law can justly punish the act an inquiry must be made into the mental attitude of the doer.”⁷ Even the courts utter the same sentiment. “It is a sacred principle of jurisprudence,” states one court, “that the intention to commit the crime is of the essence of the crime and it is therefore intolerable tyranny to hold a man for the commission of an offense of which he was ignorant at the time of its commission.”⁸

2. Criminal Liability without Fault in Present Criminal Law

Not one of the writers or courts has given an accurate generalization of the existing bases of criminal liability. Moral responsibility and criminal responsibility are not interchangeable terms and never have been. Men are daily held liable by the courts without reference to fault in large numbers of cases involving offenses. Again, they are held liable criminally for many offenses when the sentence is out of all proportion to the fault involved; indeed, there is necessary correlation between fault and criminal liability in but a restricted number of offenses. The development of various doctrines affecting criminal liability, such as the bearing on it of insanity, infancy, drunkenness, and ignorance or mistake of law or fact, has not given us a clear-cut adoption either of the principle of moral responsibility or that of liability without reference to these factors. As the law now stands, rules have been evolved on the basis sometimes of moral responsibility and sometimes of absolute liability.

Of the host of cases in which

men have been held to answer without reference to fault, the Mixer case is typical. The defendant Mixer, a driver in the employ of a common carrier, was charged with the illegal transportation of liquor. The liquor was contained in a sugar barrel and there was nothing about the appearance of the barrel to arouse suspicion as to its contents. But Mixer was found guilty by the trial court and his conviction was sustained. The Massachusetts court declared in the course of its opinion:

“In the prosecution of crimes under the common law apart from statute, it ordinarily is necessary to allege and prove a guilty intent, and as a general principle a crime is not committed if the mind of the person doing the act is innocent. . . . But there are many instances in recent times where the legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the prohibited act constitutes the crime, and moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public, the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. There are many illustrations of such exercise of legislative power, as, for instance the selling of milk below a designated standard; ... the driving of an unregistered automobile; ... being present where gaming implements are found; ... obstructing a highway more than five minutes, even through unlawful interference by trespassers; .. bigamy and adultery by marriage with one honestly, upon reasonable ground, but mistakenly, sup-

posed to be single; ... killing for sale an animal under a designated age; ... being present where implements for smoking opium are found; ... admitting a minor to a billiard hall; selling adulterated milk; ... storing and selling naphtha; ... sale of imitation butter inadvertently not wrapped as directed by the employer and required by law.... This principle has been very frequently applied to statutes respecting intoxicating liquor.”⁹

In the offenses mentioned in this decision, where the penalties are comparatively light and where the social damage may be very great, holding men to act at their peril may be a necessary standard for the enforcement of law. It is easy for the accused to assert that he did not know he was transporting intoxicating liquor or that the article sold was adulterated and it is extremely difficult to disprove lack of knowledge, nor can time be taken to make lengthy investigations of large numbers of minor offenses. If a *mens rea* were required for such offenses, they could generally be committed with impunity.

In recent years there has been a growing tendency to extend to felonies, to crimes punishable by long terms of imprisonment, the rule that men act at their peril and that “*mens rea*,” or a guilty mind, is not necessary for criminal responsibility. There are a number of cases in which men and women have been convicted of bigamy, though they may have acted under a reasonable belief that their former spouses were dead or that they had a valid divorce. A similar attitude has been taken in other cases. A defendant charged with selling opium in violation of the Harrison Act claimed that the knowledge of the character of the drugs sold was essential to make out the offense. The court held, however, that the purpose

of the act is “to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute.”¹⁰ In another case, the defendant was charged with violating a statute making it a felony for a director or officer of any bank to borrow money from it without the authorization of the board of directors. The defendant alleged that he had acted under the belief that the money had been obtained for him from another bank. But the defendant’s belief was immaterial. So long as the money actually came from his own bank, he was liable to the penalties of the statute.” Another defendant was charged with selling securities in violation of a statute which prohibited such sale unless a permit from the corporation commissioner was first obtained. He had been advised by counsel that what he was selling were not “securities within the meaning of the act.” But this did not protect him. He had “to ascertain at his peril whether his act was prohibited by statute.”¹²

In cases like these, courts frequently make their decisions turn on questions of statutory construction. A legislature can by statute create a crime without including the element of criminal intent and if the statute does not contain words indicating that an intent is required, a man will be held to act at his peril. The question involved, however, is far more fundamental than mere matters of statutory construction, for the courts are concerned much more with acts which are anti-social and dangerous to the social security than with an individual’s state of mind at the time of his action. They believe that the liability without fault, of the older law, is more conducive to maintaining the general security than the subjective standards of the doctrine of *mens rea*. The difficulty of proving presence or

absence of moral guilt, or knowledge of particular facts, makes it much simpler from the point of view of law enforcement to dispense with these elements altogether. Although the common law crimes may still be held to require proof of moral blameworthiness to some degree, in the case of the statutory crimes of today absolute liability may be imposed.

3. Doctrine of “Mens Rea.”

Mens rea, or a guilty mind, is an essential element of many offenses, and this fact causes the writers quoted above to speak of criminal liability and moral responsibility as interchangeable terms, but for many of these offenses liability is frequently imposed upon a slender basis of moral guilt. Men are frequently held to answer for the consequences of acts which far exceed their intentions. Coke stated in the seventeenth century: “If one shoot at any wild fowle upon a tree and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunum* for it was not unlawful to shoot at the wild fowle, but if he had shot at a cock or hen or any tame fowle of another man’s and the arrow by mischance had killed a man, this had been murder, for the act was unlawful.”¹³

Coke’s doctrine still survives in the modern rule that an accidental death occurring in the course of a felony is murder, a rule which was applied in the Hauptmann case. If the death resulted accidentally from the commission of a misdemeanor the accused may then be held for manslaughter. “The law seems now clearly and definitely settled,” stated the Alabama Court, “to the effect that one causing the death of another, proximately as a result of being engaged in the performance of an unlawful act . . . is guilty of manslaughter . . . regardless of any question of triviality

of the act being performed or of degree of dereliction in the manner of performance.”¹⁴ Thus one who causes the death of another by assault and battery, though there may be not the slightest intention to effect death, is guilty of manslaughter.”¹⁵ In some states the doctrine laid down by the Alabama Court has been applied against defendants for deaths occurring accidentally while they were driving unregistered automobiles or while they were driving without a license. A similar rule was applied in a North Carolina case in which the accused pointed a gun in jest, believing it to be unloaded, in violation of a statute making it a misdemeanor to point a gun at another “in fun or otherwise and whether the gun or pistol shall be loaded or unloaded.”¹⁶

The general doctrine of *mens rea* itself does not spring from any single central conception of moral guilt, such as knowledge of and freedom to choose between right and wrong. The mental elements differ with respect to each crime. In murder, the unlawful killing must be done with “malice aforethought,” which, as we shall see, has been interpreted as “a man endangering state of mind.” Larceny requires a taking away of property out of the possession of another with the mental attitude known as “*animus furandi*.” This is generally held to mean the intent to appropriate the property to a use inconsistent with the rights of the person from whom it is taken, but has been construed by some courts to mean a taking “*lucri causa*,” that is, for the benefit of the thief. Burglary is the breaking and entering of a dwelling house in the nighttime with the intent to commit a felony therein. The intent to commit a misdemeanor is not enough. In arson, the intent to burn or destroy a building is essential, but if the offender unintentionally causes a fire, when en-

gaged in the commission of a felony, this fact may be sufficient to make him guilty of arson. Forgery requires a general intent to defraud. In malicious mischief, the courts differ as to whether the malice must be directed against the owner of the property or whether wanton and reckless destruction of property without regard to the state of mind toward the owner is sufficient. *Mens rea*, therefore, may be defined as that state of mind which the courts or the Legislature in a particular jurisdiction have declared to be necessary for the specific crime in question.

4. Criminal Negligence

In determining the *mens rea* necessary to constitute various crimes, courts and legislators have largely had in mind the commission of intentional acts which bring about results that the law seeks to prevent. But, on the other hand, injuries to persons and property may be caused by negligent as well as intentional acts. A railroad switchman falls asleep, and his failure to set a switch causes a train wreck in which many people are killed and injured. A man drives his auto at an excessive rate of speed on a city street, and knocks down a pedestrian. A man tosses a cigarette from his window; it falls upon an awning below and causes a disastrous fire. In none of these cases can it be said that the defendant intentionally caused the harm or the damage which actually resulted, yet they make it clear that serious damage to person and property may be caused by a failure to live up to reasonable standards of care and prudence in the performance of one’s duties or in the activities of daily life.

It is evident as well that in negligence we are dealing with a mental state which is different from that prevailing when a man intentionally brings about a crimi-

nal result. In the latter case a man directs his mind and his energies toward bringing about an illegal result and therefore sets himself aggressively against the law. But where a man acts negligently, he has no wish to produce the harm which actually occurs. If he perceives that such harm is possible that, for example, he may run down a pedestrian because of his excessive speed, he acts in the hope that such a misfortune may be avoided. Or the possibilities of a harmful result may not be present at all in the mind of him who does a negligent act. The man who tosses a cigarette out of the window may not remember that there is an awning below on which the cigarette might fall.

Men are held to act at their peril and are held responsible for the consequences of certain acts which far exceed their intentions, because these standards of criminal responsibility are conducive to the general security. It might, therefore, be expected that the threat of criminal punishment would also be used as a means of inculcating greater prudence and care in the doing of acts which are likely to affect others, but present rules of criminal liability cover only imperfectly the commission of negligent acts. Where death is caused by a negligent act, the individual responsible may be held to answer for involuntary manslaughter. But the burning of a building caused by negligence is not punishable as arson, nor is the negligent misuse of funds by a trustee punishable as embezzlement. Many courts also refuse to hold persons for assault and battery, where the physical injury complained of was due to negligence.

In offenses like manslaughter, where criminal liability can be based upon negligence, a high degree of carelessness or imprudence is usually required before liability is imposed. This is evident

from the following statements:

“(1) The negligence which will render a person amenable to criminal prosecution must be something more than is required to sustain a civil action. To have this effect it must be gross or wanton and of a character implying a reckless disregard for the safety of others under circumstances likely to cause injury.”¹⁷

(2) To take the place of intent the negligence must be gross and such as to indicate a willful and wanton disregard of the probable results to others.

(3) Negligence sufficient to supply criminal intent is similar in character to “gross negligence of tort law and consists in reckless or indifferent omission to do what a reasonable and prudent person would do under the same or similar circumstances.”

The punishment of negligent acts, then, is based upon a surprisingly different set of standards from those applied in cases where men are held to act at their peril and where they are held to answer for the results of acts which far exceeded their intentions.

5. Ignorance and Mistake of Fact and Law

Predilections in favor of absolute liability for crime irrespective of subjective guilt have largely dictated the legal rules on ignorance and mistake of fact and law. Such ignorance and mistake are immaterial in the statutory offenses which do not require *mens rea*. The defendant’s ignorance that the drug sold was opium, that the loan came from his bank or that he was selling “securities,” did not excuse from criminal liability in the three cases noted above. So long as what was done came within the terms of the legal prohibition, the defendant’s knowledge or ignorance was wholly immaterial. On the other hand, in cases of offenses where a *mens rea* or guilty

mind is an essential element, if the facts present in the mind of the accused when he committed the questionable act negated his *mens rea*, then he cannot be held liable. A burglar charged with the burglary of a house cannot excuse himself on the ground that he intended to break into a different house, but a man who kills another in his house, acting under the reasonable belief that he is a burglar, cannot be held liable.¹³ It is criminal to commit burglary, but not to kill burglars. By the same reasoning, a man who walks off with another’s overcoat from a restaurant cannot be held for larceny if he believed that the coat was his own. In some states, the belief of the accused that he had a valid divorce will protect him against a charge of bigamy if, after he remarries, the divorce is found to be invalid.

Nevertheless, even if a man is charged with an offense requiring “*mens rea*,” if the act he has done is inherently wrongful or immoral, ignorance or mistake of fact may not excuse. Lack of knowledge that the woman with whom intercourse was had was insane is no defense to a charge of rape.¹⁹ Nor is lack of knowledge of the age of the girl a defense, where she is below the age of consent. “The manifest purpose of this legislation,” states the New York court, was to protect the morals of young girls; and, to render the enactment effective, neither the consent, nor the previous chastity of the girl, nor her representations, nor information derived from others as to her age, nor her appearance with respect to age, is a defense to a prosecution. . . .”²⁰

Mistakes or ignorance that are caused by negligence do not excuse in the case of offenses that require the *mens rea* for conviction. “No man can be acquitted of responsibility for a wrongful act,” states one court, “unless

he employs the means at his command to inform himself. Not employing such means, though he may be mistaken, he must bear the consequences of his negligence.”²¹ If the courts were truly interested in subjective guilt, they would be compelled to find that even unreasonable and negligent mistakes, if honestly made, excuse from liability. A man can hardly be said to have a guilty mind if he honestly believes in a given set of facts and acts accordingly. But the courts are more interested in laying down objective standards to which individuals must conform at their peril than in the doctrine of *mens rea*.²²

What has been said above is particularly evident in the rules as to ignorance and mistake of law. Ignorance of the law does not excuse, is the fundamental proposition of the criminal law. It does not matter that the accused is a foreigner and that his action is permitted in his country, or that he was on the high seas and could not possibly have known of the promulgation of the law, or that he consulted eminent counsel and was informed that his action did not fall within the terms of the law. Courts are holding men liable in such cases without reference to fault, asserting that “Every one is presumed to know the law” or “The intentional doing of the prohibited act supplies the *mens rea* necessary to make out the crime.” It is easy to plead ignorance of the law and difficult to disprove. A rule that it excuses from liability offers a medium for guilty offenders to escape punishment.²³ The American law, however, might do well to emulate certain of the European codes which make a bona fide mistake of law a sufficient reason for mitigating the punishment.

6. Insanity

The rules on insanity again

show the oscillations of the law between the two notions of moral responsibility and liability without reference to fault. The widest possible adoption of the defense of insanity is found in the New Hampshire rule which makes mental disease and criminal irresponsibility interchangeable terms. So long as the crime was the product of the mental disease, the accused must be acquitted under the New Hampshire law. The following instructions were given to the jury in a case in which the accused had killed his wife: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be not guilty by reason of insanity if the killing was the offspring or product of mental disease in the defendant."²⁴ The majority of states in this country decline to follow New Hampshire in applying such a thoroughgoing test of irresponsibility. In most of them, insane offenders are excused from liability for their crimes only if their mental disease was such at the time of the commission of the crime that they did not know the nature and quality of the act they were doing. If they did know the nature and quality of the act, they must have been without knowledge that it was wrong. In other words, responsibility is a legal, not a psychiatric, concept. Its object is to determine which persons shall be punished and not which persons are insane. The offender must first have some mental disease or disorder before he can invoke the rules as to insanity, to be excused from criminal liability. But the mental disorder must have had the specific effect of excluding knowledge of the nature and quality or the wrongfulness of the act. This was clearly brought out by Hewart, Lord Chief Justice of England:

"For the purpose of the phy-

sician, examining a person in order to ascertain whether he is insane, it may be enough to find that the patient is suffering from disease of the mind and is in consequence laboring under a defect of reason. When these two facts are established it may follow naturally that the patient needs medical care and attention. But when the question is whether a person is to be excused from responsibility for what appears to be his criminal act, disease of the mind will not of itself afford an excuse. . . . If excuse there is to be on the grounds of insanity, it must be further established that the defect of the reason was of a particular kind and exhibited particular characteristics, that is . . . that it prevented the accused person from knowing what he was about or... prevented him from knowing that he was doing what was wrong."²⁵

This fundamental Anglo-American test of criminal responsibility was laid down in the celebrated case of Daniel McNaghten. The latter, intending to kill Peel, Prime Minister of England, shot and killed Drummond, his secretary, thinking he was Peel. McNaghten was a paranoiac suffering from delusions of persecution and believed that Peel was one of the enemies who were hounding him. The jury found McNaghten not guilty by reason of insanity. This verdict was the subject of a debate in the House of Lords and it was determined to take the opinion of the fifteen judges of England on the law governing the question of unsoundness of mind which would excuse from criminal responsibility. In answer to the questions put to them, the judges laid down the right and wrong test noted above.²⁶

In the majority of American jurisdictions, the knowledge and ability to distinguish right from wrong is the only test of the responsibility of the mentally disor-

dered, but it has not been an easy matter to apply this formula of criminal responsibility in the concrete cases coming before the courts. The formula appears simple enough on its face, but every word is loaded with ambiguity and there has been no semblance of unanimity in its application. "Some courts deal with right and wrong in general, some with right and wrong to the particular act involved, and many of them use the concepts interchangeably and indifferently. Some states have adopted the right and wrong test from the point of view of moral wrong, some from the point of view of legal wrong, some include both; some cite the 'nature and quality' test disjunctively with the right and wrong rule, some conjunctively. Many decisions jumble these all together, throwing in other scraps of opinion and dictum for good measure," writes Glueck.²⁷

One of the difficulties in applying the McNaghten formula lies in the meaning of the word "wrong." In the McNaghten case itself the term is used in two different senses, as "legal" wrong and as "moral" wrong. The sense in which the word is used may affect the result reached in any particular case. In a New York case, a priest cut the throat of his mistress at the altar of a church. He knew at the time of the commission of the murder that it was prohibited by the laws of the State of New York, but he heard the voice of God calling upon him to kill the woman as a sacrifice and an atonement. He, therefore, could not have believed that it was morally wrong to kill in this instance. The jury was told that the term "wrong" in the rules excusing from liability on the grounds of insanity, meant "contrary to the law of the State?" The priest was, therefore, found guilty of murder. The Court of Appeals, however, found that this was error, stating in the course of its

opinion: “we hold ... that there are times and circumstances in which the word wrong as used in the statutory test of responsibility ought not to be limited to legal wrong... Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that according to the accepted standards of mankind it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong.”²⁸ Thus if the facts were as the defendant contended, he should have been acquitted on the ground of insanity.

Juries often disregard these rules which excuse offenders from punishment for their crimes. For instance, there was the California case of Boltares, an illiterate Mexican. Boltares, believing that the Garcia family were planning his death, bewitching him and “putting bugs in his head,” wiped it out completely, killing Garcia, his wife and three children. On trial, Boltares pleaded not guilty by reason of insanity. Five hospital attendants familiar with lunatics, who had observed Boltares day and night, agreed that the man was insane. Two experts chosen by the prosecution and the defense and two of the three experts designated by the court concurred in this opinion. Nevertheless the jury found Boltares guilty, eight minutes after the case was submitted to it, and he was executed in due course.²⁹

The test laid down in the McNaghten case leaves wholly out of account a large number of mental disorders which affect the volitional and not the intellectual spheres of the mind. A man may know the difference between right and wrong—may know that

it is wrong to kill, steal, set fire to buildings, etc., but he may be suffering from the kind of mental disorder which makes it impossible for him to resist the commission of such acts. Kleptomania and pyromania, for example, are not mere figments of a lawyer’s brain exercising great ingenuity in defense of a client. Psychiatric literature is full of instances of thefts, fires, homicides, committed by persons who were incapable of resisting the impulses to commit these acts. Nevertheless, in most of the states of this country, and in England as well, the law will not relieve offenders of this kind from responsibility for their acts; here, again, courts show their predilection for finding liability irrespective of fault. It is elementary that there can be no moral responsibility without freedom of choice and consequently where an offender suffers from an irresistible impulse to commit a criminal act, we cannot regard him as one having normal freedom of choice, for he cannot control own actions. The law, however, considers these acts so dangerous to society that their authors must be punished.

This tendency to treat mentally disordered defendants on the same plane as those in full command of their mental faculties may be seen in the rules on insane delusions. One of the questions put in the McNaghten case concerned the responsibility of one accused of crime, yet laboring under partial delusions, though not in other respects insane. The opinion stated that such an accused must be considered in the same situation as if the facts with respect to which the delusion exists were real. If such facts were a legal excuse or justification for the conduct of the accused, then he must be acquitted; otherwise he was guilty. In one case, the accused without any provocation shot one Parks who was coming toward him. The

accused was laboring under insane delusions with respect to Parks, stating that he had killed Parks because Parks intended to marry his mother, that Parks was carrying a pistol and was ready to shoot him at sight.³⁰ Neither statement was true. Under the test laid down in the McNaghten case, the defendant would have been held responsible if the jury believed that the shooting was owing to the victim’s supposed intentions toward the defendant’s mother. On the other hand, the jury would have had to acquit if it believed the shooting arose out of the defendant’s delusion that he was acting in self-defense. This is what the jury would do in any case of mistake of fact where the question of insanity was not involved.

7. Intoxication

Lack of knowledge of the nature and quality of an act or lack of ability to control one’s actions may be caused by drunkenness as well as by mental disease. Nevertheless, drunkenness is in general no excuse for crime. If a person drinks voluntarily, becomes intoxicated, and in that condition commits an act which would be a crime if he were sober, he is fully responsible. The common law, according to Blackstone,³¹ looked upon drunkenness as an aggravation of the offense rather than as an excuse for criminal behavior. Today drunkenness is no aggravation, but in most cases it is no excuse.

If the crime is one that requires *mens rea*, and the man is so drunk that he does not know what he is doing, he can hardly have the *mens rea* necessary for the crime. Courts and text writers, however, find the *mens rea* in the mere fact of becoming drunk.³² “The effect of drunkenness upon the mind and upon men’s actions ... are facts known to everyone,” writes the Louisiana Court, “and it is as much the

duty of men to abstain from placing themselves in a condition from which so much danger to others is to be apprehended, as it is for men to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences." This court is under the impression that men are free to choose whether or not they will drink. This may be true of persons who occasionally go off on sprees, but it is not true of the habitual drunkard; his craving for alcohol is so strong that it cannot be resisted by any mere effort of the will.³⁴ Moreover, even assuming that men are free to drink, there is still no such inevitable relation between drunkenness and crime as to compel courts to treat crimes committed under the influence of liquor as intentionally caused. Many people get drunk. Few commit crimes under the influence of liquor. Logically, then, since there is only a slight possibility that when a man gets drunk he will commit a crime, he should be charged with a negligent rather than an intentional crime. This is precisely what some European codes do.³⁵ The American view which charges him with having committed an intentional crime, though he was too drunk to know what he was doing, is another application of the notion of liability without fault, or liability based on a slender degree of fault.

Courts justify these rules on drunkenness by the needs of the general security. "In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication," one court has said, "but human laws are based upon considerations of policy and look rather to the maintenance of personal security and social order rather than to an

accurate discrimination as to the moral qualities of the individual' The general public must be protected against criminal drunkards, and as yet no more effective method for the purpose of social security has been evolved than that of treating them as if they had committed their crimes while sober.

There are two classes of cases, in which intoxication will be a bar to liability: where the accused is charged with a crime the definition of which requires a specific intent as one of its essential elements, his drunkenness may be shown as negating the existence of the necessary specific intent—Thus, one who is so drunk that he does not know what he is doing, and who tries to break into a house, cannot be guilty of burglary since he did not have the intent to commit a felony therein. Likewise, a drunkard who drives away a car under the drunken impression that it is his own, cannot be held for larceny, since he did not have the "*animus furandi*" necessary for larceny. Similarly, where first-degree murder requires a premeditated design to kill, the intoxication of the accused may show that no such design existed.

Drunkenness may also excuse from liability if the crime *was* committed while the defendant was insane as a result of his drinking and the fact that the cause of the insanity was drunkenness is held to be immaterial. He is treated like any other insane offender who commits a crime but the insanity must be a fixed and settled malady. Temporary insanity owing to drunkenness will not excuse. This is shown in the case of Nick Kraemer who had committed a crime while temporarily insane with drink. On the morning of the homicide he came home after a night's absence terribly intoxicated. Calling for his Sunday clothes, he took them into the yard and chopped them

up into little pieces with a hatchet. When the deceased, Mary Cooney, tried to get him to desist, he threatened her life with the hatchet. Three hours later, he was shrieking in the backyard of a nearby grocery. At 12.30 he went in to have dinner with the woman, and, in the course of the dinner, he killed her. He later came out of the house, walking erectly, with a staring look in his eyes. He took a hat from a ten-year-old boy and put it on his head. On trial, Kraemer was convicted of murder.³⁶ Although the circumstances of this crime differ in no essential respect from that of one committed under the influence of delirium tremens, the conviction was upheld by the Appellate Court, because the fit of insanity was temporary in nature. Courts know that the drunkard who commits a serious crime will be incarcerated in an asylum if excused. from liability on the ground that he was temporarily insane at the time of the commission of the crime. From this asylum he will be discharged as cured a short time after admission. On the other hand, a man suffering from a permanent insanity due to drink will be committed to an asylum for a long stay. It is therefore easy to make the illogical distinction between temporary and permanent insanity. Both are caused by drunkenness. But in one case courts say that the fault implied in the drinking was "remote," in the other it is "proximate" and with these two threadbare words, they solve all the difficulties.

8. Infancy

In all the doctrines discussed the emphasis has been upon the state of mind of the individual offender at the time a criminal act was committed. At the common law, a similar approach was made toward the problem of the young offender. His liability was determined in connection with a spe-

cific act. It was a moral liability, moreover, which had crystallized into hard and fast rules.

At common law, infants up to the age of seven were presumed incapable of committing crime. At the age of fourteen, children were fully responsible for virtually all crimes and were treated like adults. Between seven and fourteen, however, there was a twilight stage of criminal responsibility. An infant between the age of seven and fourteen was *prima fade* incapable of committing a crime-

The closer he was to seven years of age, the stronger the presumption, but this presumption of incapacity could be rebutted by the prosecution. If it appeared to the court and jury that the infant "could discern between good and evil" at the time the offense was committed, he could be convicted.³⁷ Strong and pregnant evidence was necessary to show that the accused knew and understood what he was doing. If such evidence was present in any particular case, the offender's tender years were no bar to his suffering punishment like any adult offender.

Many examples of young offenders between the ages of seven and fourteen who were executed for their crimes have been noted in the books. At Abington Assizes in 1629, John Dea, an infant between eight and nine years of age, was indicted and found guilty of burning two barns. It appeared upon his examination that he had "malice, revenge, craft, and cunning," and he was therefore sentenced to death and duly hanged. Two more cases are noted by Hale: in one, a girl of thirteen years had killed her mistress and was ordered burned to death for this act; in another case, an infant of nine years killed his companion and hid himself. By the act of concealing himself, the boy made it apparent to his judges that he

could discern good and evil and was accordingly hanged.³⁸ In another case in 1748, William York, a boy of ten, killed and hid the body of a little girl of five. The judges of England agreed that "he 15 certainly a proper subject for capital punishment and ought to suffer, for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity." The judges continued, "There are many crimes of the most heinous nature which children are very capable of committing... and therefore though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offenses . . . the law ought to take its course."³⁹

These precedents carried over into the early part of the nineteenth century. An English report states: "You may take at random any volume of Old Bailey records between the years 1800—1825 and find with certainty the record of some young person under sixteen, receiving sentence of death or transportation for some trivial offense which in modern days would be punished by a small fine or dealt with under Probation Act."⁴⁰ In New Jersey, as late as 1828, a boy of twelve was executed for homicide.⁴¹

Since the law was interested in the guilt of the young offender in the commission of the criminal act with which he was charged, he was submitted to the same formalities of arrest, prosecution, and trial as any adult. Children were arrested, brought before a magistrate for a preliminary hearing, bound over to the Grand Jury, and tried by jury. If found guilty, sentence was passed upon them. These proceedings were a "solemn farce."⁴² The child was rarely able to understand their nature and purpose. Once having been

convicted, the child was stamped a criminal. The child soon developed attitudes in keeping with the role assigned to him. This was particularly easy in view of the fact that segregation of young from old offenders is a comparatively modern development. In jails, prisons, and houses of correction, the juvenile offender was thrown into contact with criminals old in the ways of crime. These men were ready teachers. The result of these methods of dealing with juvenile delinquents was that the very punishment meted out to them hardened them in the habits of crime. Society, by holding children to the same rules of liability as adults, instead of making decent citizens out of its bad boys, "permitted them to become the outlaws and outcasts of society."⁴³

In the 1890's it became evident to a group of earnest people that the traditional methods of dealing with juvenile delinquents were doing more harm than good. They realized that the law had to make a break with the past if the treatment of juvenile delinquents was to be made effective. Whatever place punishment had in the penal system in dealing with adult offenders, it had no place in dealing with juveniles. If young offenders were to be prevented from becoming adult offenders, it was necessary that the law probe more deeply. It could not be satisfied with the mere determination as to whether a crime had been committed. It had to consider the young offender as an individual and attempt to determine the causes of his delinquency. Instead of punishing for a crime committed, the young delinquent should be subjected to a treatment likely to remove those causes.

In order to realize these ideas, the new attitudes had to be written into the laws, and new techniques had to be evolved for

dealing with young delinquents. Beginning With the Illinois Law of 1898, juvenile court and delinquency laws spread to the entire country. The essential idea back of the juvenile delinquency laws is that if a child commits an act which would be a crime if done by an adult, he shall not be held to answer for the crime committed, but shall be considered as a delinquent. The term "delinquency," moreover, as used in the statutes covers more than the commission of criminal acts by juveniles. Children may still be considered delinquent if their associates or their habitual course of conduct are such that they are in danger of falling into evil ways and becoming criminal.

Juvenile delinquency statutes, then, are less concerned with the specific act which brought the child to the attention of the authorities than with the question of whether the child who did the act is in need of care and treatment. The act done is merely a symptom which indicates that the parental care and guidance which would make the child a good citizen are lacking and need to be supplied by the state. The state should not punish the child, but should provide measures of treatment which will make it possible to readjust and rehabilitate him and teach him the essentials of good citizenship. As the court points out in *In re Lundy*: "The [juvenile delinquency] act, in its application to the delinquent, is not punitive in its nature or purpose. The policy underlying this law is protection, not punishment. Its purpose is not to restrain criminals to the end that society may be protected and the criminal perchance reformed; it is to prevent the making of criminals. Its operation is intended to check the criminal tendency in its inception, and protect the unformed character, in the facile period, from improper environment and influences. In short, its motive is to

give to the weak and immature a fair fighting chance for the development of the elements of honesty, sobriety and virtue essential to good citizenship."⁴⁴

9. Self-defense

That a man has a right to defend his person, liberty and property from unjustifiable attacks thereon, is an elementary principle of law. So elementary does this right appear, that it has been written into the constitutions of some of our states. "All men have certain natural essential and inherent rights, among which are the enjoying and *defending life, and liberty, acquiring, possessing and protecting property,*" states the New Hampshire Constitution.⁴⁵ But the law which gives the right of self-defense also lays down its limitations. The amount of violence which an individual may use in repelling an attack upon his liberty, person or property, is not left to his discretion. A man making an unlawful assault upon another does not, *ipso facto*, become an outlaw. Injury to him beyond the limits laid down in the law is a crime. It becomes, therefore, highly essential to determine how far one may go in defending oneself from unjustifiable attack. Violence is with us something of a national tradition and every man may at some time be in a position where he will be called upon to defend himself and his property.

We come naturally by the tradition of violence if one judges by the development of the law of self-defense. One may defend one's person and property by means other than the killing of an aggressor but apparently our ancestors rarely stopped short of killing. The rules of self-defense were evolved from the law on homicide. Even in our modern books, one must turn for discussions of self-defense to the sections on homicide. It is therefore in connection with the circum-

stances under which one may kill in self-defense that this subject will be discussed.

The basic rule in the law of self-defense is that the killing must have been a necessary means of warding off an immediate attack, which threatened death or serious injury to the slayer. Necessity, however, is a relative concept and varies according to the different circumstances in which the right to self-defense may arise. It also varies among the states, with respect to the same set of circumstances. Thus, one may be found guilty of manslaughter and possibly of murder in one state on facts which in other states may entitle one to an acquittal. Clearly a man should be excused when he kills in self-defense under an honest apprehension of death or great bodily injury, although in fact there was no such danger. The rule as to mistake of fact applies in this as in other branches of the law, but the honesty of the belief, *i.e.*, whether or not the defendant was actually under an apprehension, is a question for the jury. That the deceased reached for a non-existent weapon is one of the well-worn excuses in homicide cases, of which murderers seek to avail themselves. Must the jury, in deciding whether the accused believed that he was in danger of death or bodily injury, apply an objective standard of what a reasonably courageous and prudent man under the circumstances would have believed, or must it apply a subjective standard? A coward, or a nervous, timid, or weak man will see danger to himself, where a reasonably courageous and physically fit man will be under no such apprehension. There is authority for the application of both standards in the law of self-defense. The Florida court states that: "The slayer is to judge from the circumstances by which he is surrounded and as they appear to

him, but if he acts upon appearances and takes life, he does it at his peril, and he cannot justify the killing unless there are circumstances which would induce a reasonably cautious man to believe that it was necessary to save his own life or to save himself from great personal injury.”⁴⁶ The Ohio Court, on the other hand, in a case where a sickly old man shot a vigorous young man under the apprehension of an attack, stated: “Guilt is personal and . . . the conduct of any individual is to be measured by that individual’s equipment, mentally and physically. He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would so do. A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer and braver man might be.”⁴⁷

A fundamental disagreement as to the necessity which would justify a killing in self-defense may also be seen in the differing views concerning a man’s duty to retreat, to run away, rather than kill, if he can. Disagreement exists as to whether one who is feloniously attacked is under a duty to run away from an assailant. A father gets very angry with his son and attacks him with a pitchfork. The son can avoid the assault by running away. Is he under a duty to run or can he stand his ground and meet force with force, even to the taking of life if necessary, to prevent bodily injury to himself? The states which declare that the son is under a duty to run find no necessity for the killing if he stands his ground. Such was the opinion in the Iowa court in the above case: “Where a person is assailed by another who attempts to take his life or inflict great bodily injury, and the assailed can manifestly secure safety by retreating, then it is not necessary to take the life of the

assailant to prevent the consummation of the felony attempted,” stated the Court.⁴⁸ But many states hold that a man is under no duty to retreat, and may stand his ground when attacked. “It is tradition,” writes the Kentucky Court, “that a Kentuckian never runs. He does not have “A true man who is without fault is not obliged to fly from an assailants who by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm,” writes the Ohio Court.⁵⁰ “Human life is sacred,” states the Missouri Court, “but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist . . . the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor.”⁵¹

The doctrine of “retreat to the wall” is of less importance today than it was at common law. The rule was originally evolved when the sword or rapier was the final arbiter of all disputes, while today firearms are in general use. It is virtually suicide to attempt to escape from a man with a rifle or sub-machine gun in his hands. No state requires a man to run where he will increase the danger to himself by doing so. Still, there is wisdom in retaining the rule requiring retreat in cases such as the one cited above, where it might be applicable. As the Court puts it in *State v. Gardner*:

“The doctrine of retreat to the wall had its origin before the general introduction of firearms. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require in many cases an attempt to escape from a hand-to-hand encounter with fists, clubs, and

even knives, as a condition of justification for killing in self-defense, while it would be rank folly to so require when experienced men armed with repeating rifles face each other in an open space....”⁵²

The duty to retreat from an attack if it is at all possible, rather than to kill, is not imposed for all circumstances. Even in states which otherwise require retreat, a man may stand his ground when attacked in his dwelling house. A real or apparent necessity still determines whether or not a man has a right to kill to ward off such an attack, but again it is a necessity which leaves out of account the possible means of escape through retreat. That his dwelling house is a place of refuge for the protection of a man and his family is summed up in that commonplace of Anglo-Saxon jurisprudence that a man’s house is his castle. The inmate of a house “need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.”

The rule of standing one’s ground on one’s premises, however, has not been restricted to a man’s house or dwelling. It has been ruled that he may stand his ground in the immediate vicinity of his residence, at his place of business, in a room which he has rented for the time being, in the clubrooms of a club of which he is a member, in a box stall at a fairground occupied as office and sleeping quarters, in a tent, a root house. Even a house of prostitution was held to come within the meaning of a “home” or

“castle.”⁵³

While all states agree that a man may stand his ground when attacked in his house, in two classes of cases he must withdraw or retreat before he can claim a right to kill in self-defense. A and B get into a heated argument which eventually results in their fighting. If, however, A attempts in good faith to withdraw from the fight, but B despite this withdrawal pursues him and continues the conflict, A may kill in self-defense to prevent grave personal injury or death to himself. On the other hand, where A provokes⁵⁴ an attack by B and then kills B to prevent injury to himself, he cannot justify the homicide on the grounds of self-defense; but, if after the fight has begun, A indicates a bona fide desire to withdraw from the fight and B continues to attack him, A may have his right to self-defense restored. One who is to blame for the initial difficulty cannot justify a necessity or “blame” for the killing which his own acts brought out. A reasonable notice to his adversary that he declines further conflict should constitute a sufficient withdrawal. If B has been dazed by the shock of the original attack, and believes that the conflict is still in progress, A must bring home the fact of withdrawal to his adversary at his peril.⁵⁵

The necessity for a killing or for the infliction of serious bodily injury in self-defense is determined in the light of the principle that there must be some proportion between the measure of defense and the attack. One cannot resist an assault with fists, by using a knife or gun, where there is no great inequality in physical equipment between the two opponents. Likewise, one cannot resist an unlawful arrest which is an infringement of personal liberty by killing the police officer who tries to make the arrest. Necessary force may be used in defense of property, but in the

absence of violence by an intruder, a landowner may not inflict great bodily harm upon him, or use means to eject him which seriously endangers his life.

“A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention,” writes the Arkansas Court. “But in the absence of an attempt to commit a felony he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of Preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield and appeal to the Courts for redress.”⁵⁶

10. Prevention of Felony and Escape of Felons

Closely related to the rules of self-defense is that branch of the law which justifies a homicide committed when it is reasonably believed to be necessary for the prevention of a felony. The usual rule is that only the more serious felonies containing some element of force and surprise may be prevented by a killing. At common law, and by the statutes of many states, a homicide committed for the prevention of murder, robbery, burglary, arson, rape, sodomy and the like was justifiable. Secret felonies, unaccompanied by the use of violence or surprise, such as pocket picking or breaking into a house in the daytime, may not be prevented by a killing. These rules limiting justifiable killings to the more atrocious crimes emphasize that the law does not value human life too

cheaply, even if it be the life of a lawbreaker. Such a rule is a necessary one in this country where an entirely too free use is made of firearms as a means of preventing slight injuries. The following occurrence in Chicago is typical:

“Up in the early morning hours today, nursing an aching tooth, Joseph Kirner saw a figure stealing toward his back porch toward a bottle of milk left by an early delivery man Kirner got a pistol and fired one shot, he explained at an inquest later: ‘Just to scare him.’ The bullet struck Edward Schulte, seventeen years old, uncle of the fourteen-month-old son of Mrs. Josephine Wozniak. The wounded boy crawled off and died a few hours later. With him was Arthur Wozniak, who said that he and Edward had raided Kirner’s milk supply two days before. ‘Our milk deliveries were stopped because we could not pay a bill for fifteen dollars,’ said Mrs. Wozniak at the inquest. ‘My husband is out of work. He has applied for relief for ten weeks. My baby cried for two days. Edward’s father hasn’t a job.’ There are seven children in the Schulte and Wozniak families. Cris J. McGarible, deputy coroner, told Kirner that he had no right to shoot the Schulte boy. The coroner’s jury ordered Kirner held for the Grand Jury.”⁵⁷

The law is not so tender of human life when it comes to a question of apprehending a felon or preventing his escape. Force even to the extent of killing may be used if necessary to effect the arrest of a felon or prevent his escape. Any felony will justify this. There is no limitation to the more atrocious crimes, as in the case of prevention. Only a few states limit the rule by express statutory provision making it unjustifiable to kill a person who attempts to escape arrest, unless the officer is threatened with death or great bodily injury.⁵⁸

11. Necessity

The failure of the criminal law to work out logical and consistent bases of criminal responsibility becomes still further evident when the rules relating to excuse because of necessity, duress and marital coercion are considered. The general rule as to necessity as an excuse from criminal liability was laid down by Lord Mansfield as follows: "Wherever necessity forces a man to do an illegal act, *forces* him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind."⁵⁹ The necessity or compulsion which will excuse from crime must be present, imminent and impending, and of such nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. "A threat of future injury is not enough. Such compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense."⁶⁰

This rule has been applied in cases where individuals have joined a party of traitors when threatened with death for not doing so, when a vessel put into a port which was prohibited by an embargo law in order to escape destruction from a storm, where a parent withdrew a child from a school without the consent of the school board because of the child's ill-health, where a crew rose and deposed the master. The courts refuse to apply this rule in cases of homicide, though the will and intention may be lacking in this as in other crimes. It is true that where an accused claims that he committed a murder through immediate fear of death or great bodily harm to himself, the facts usually do not bear out his contention. In the one case in which the issue of fear of imminent death, as an excuse for homicide, was squarely presented, the Court found the de-

fendants guilty of murder.

The defendants in the English case of Regina v. Dudley and Stephens⁶¹ were members of the crew of an English yacht which was shipwrecked 1,600 miles from the Cape Of Good Hope. They were compelled with two other members of the crew to take to an open boat belonging to the yacht. They had virtually no food, and no water in the boat except such rain as they caught in their oilskin capes. After being adrift eighteen days, they killed and ate Parker, -a young boy. The boy would probably have died before they reached land in any event, since he was in a very weak condition. If the men had not fed upon the boy, they would have died of starvation and thirst. They were picked up four days after the killing, in the lowest state of prostration. The court refused to recognize their necessity as an excuse for the murder and passed sentence of death upon the prisoners, stating in the course of its opinion: "It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime." The sentence of death was commuted to six months' imprisonment.

12. Marital Coercion

In cases in which the defense of compulsion or necessity as allowed, there must, as we have seen, be a real threat of death or serious bodily injury to excuse

from criminal liability. In states which still permit a wife to raise the defense of marital coercion, the mere commission of a crime by a wife in her husband's presence is sufficient to excuse her from liability, unless the prosecution can show definitely that she acted of her own free will. This presumption of coercion in respect to offenses committed in the presence of a woman's husband has been applied in such cases as larceny, receiving stolen goods, burglary, possession of burglar's tools, robbery, arson, forgery, mayhem, assault and battery, abortion, uttering counterfeit money, selling intoxicating liquors, selling obscene pictures and aiding prisoners to escape.

The presumption of marital coercion arising from the commission by a wife of a crime in her husband's presence has been eliminated in many states. The New York Penal law, for example, reads: "It is not a defense to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband."⁶² In states which still retain the presumption, Courts have held "slight evidence" or "very slight circumstances" showing that the wife acted of her own free will, sufficient to rebut it. As the Federal Court pointed out: "This defense of marital coercion as a protection to women engaged in the commission of crime is not a favored one, and, at least in modern times, has almost lost all solid foundation for its existence. It has been abrogated by statute in some states, and might well be in all. ... It is almost an absurdity in this day to pretend that husbands can or do coerce their wives into the commission of crimes, and, where coercion appears as a fact, the court or jury would always allow it to mitigate punishment, or it might well be a recommendation to executive clemency; but to hold it to be pre-

sumed as a fact, in all cases where the husband is present, is the relic of a belief in the ignorance and pusillanimity of women which is not, and perhaps never was, well founded, and does them no credit.”⁶³

13. Entrapment

The struggle against crime has many of the characteristics of a war, but a war in which there is no armistice or peace treaty. As in other wars, the forces of attack and defense resort to stratagems, to deception and fraud in order to catch the adversary off his guard. The criminal, if he is in his right mind, will use every artifice to avoid detection. The agent of law enforcement must meet the criminal at his own game. He cannot meet a skulking enemy with open-handed tactics alone. He, too, must employ deception and set traps for offenders. When a wrongdoer is caught in the snare set for him by detectives or policemen, he pleads as a defense, “I was entrapped. Because of the bait which was held out to me by the government agent, I committed a crime, which I would not otherwise have been guilty of. It is unconscionable for your agent to induce me to commit this crime and then turn around and prosecute me for its commission.” How far does the law recognize such a defense?

Where the intention to commit the crime originates in the mind of the accused and the officers of the law obtain information of his intention, but allow him to go ahead and commit the crime, merely facilitating its execution, the accused cannot plead entrapment. A man who obtains information that his store will be broken into in the night, may conceal a reception committee of police officers therein to greet the burglars on their arrival. The latter cannot excuse themselves on the ground that they thought that it was safe to break into the

store, otherwise they would not have attempted it. Nor is a thief excused who takes a wallet from a man who feigns a drunken stupor, the man being a police officer. Nor did a lawyer have a defense to a charge of using the mails to defraud, where he mailed fraudulent accident claims to a railroad which had been forewarned by one of the purported claimants.”⁶⁴

The trap which is set for, the offender must not be so perfect that no offense at all is committed. Every crime consists of a number of different elements which must all be present before the accused can be found guilty of the particular crime, if a shopowner, in his zeal to catch a burglar, leaves the door or window of his shop open, as an inducement for the burglar to come in more easily, or if his servant opens the door for the burglar, there is no breaking and consequently no burglary. Similarly, a plan to entrap a thief may be so perfect that the owner of the goods may be put in the position of consenting to the taking, eliminating the possibility of larceny. This is illustrated by a well-known case in Wisconsin. The accused was charged with the larceny of three barrels of meat. He had approached D, an employee of the P. Company, to help him steal some meat. It was arranged between D and the accused, that the former would have a number of packages of meat placed on the loading platform of the P. Company, and that the accused should drive up to the platform and remove the packages. D agreed to the proposition, which was disclosed to the P. Company. In order to trap the defendant, four barrels of meat were left on the platform. The platform boss was told that a man would call for them. The accused drove up, loaded three barrels on his wagon and drove away, the platform boss making no objection

since he thought the meat was intended for the accused. “The design to trap a criminal went a little too far... in effect preventing the taking of the property from being characterized by any element of trespass.” The P. Company in effect had by its acts consented to the taking of the meat.”⁶⁵

In another class of entrapment cases, the officer or his decoy does some act directly provoking the crime. Liquor and narcotic agents may pose as thirsty citizens or as drug addicts in obtaining evidence of illegal liquor and narcotic sales. They may also use known drug addicts or drunks to make the purchase for them. This is illustrated by a recent case coming before the United States Supreme Court. The defendant, Casey, was convicted of purchasing 3.4 grains of morphine which did not come from a package bearing Federal stamps. Casey had practised law for many years in Seattle. He was in the habit of visiting the jail there and defending prisoners addicted to the use of narcotics. The jailer suspected that Casey was also smuggling drugs for his clients. A stool pigeon, by the name of Cicero, posed as a drug addict under arrest. Casey accepted him as a client. At his request and for value received, Casey sent him some morphine soaked in a towel. The majority of the Court ruled that there was no entrapment.”⁶⁶

Again, it is not entrapment where the accused sends obscene matter through the mails in response to a post-office inspector’s decoy letter,⁶⁷ or where a post-office inspector sends a letter to a doctor stating that he had got a girl into trouble and asking for information as to an abortion, and the doctor replied giving such information in violation of a statute.⁶⁸ In cases like these, the accused is usually engaged in a habitual course of

wrongdoing. Law-abiding citizens do not sell liquor, or deal in narcotics and obscene matter. Nor do law-abiding doctors perform abortions, no matter how plainly the appeal for the abortion is made. It is therefore permissible to provoke one engaged in a habitual course of conduct, to a particular violation of the law which will be no more than a single instance in a uniform series.⁶⁹

There is, however, a limit to what the government agents or their decoys may do in provoking the commission of the crime. They cannot work upon the sympathy of the accused in soliciting its commission. The court ruled in one case that the defendant was entrapped, where his ex-mistress was used as a decoy. She complained that she was suffering from stomach trouble for want of narcotics. The defendant gave her the address of a dealer in narcotics. The Court states: "If the Government took advantage of the sympathy of the defendant for his mistress and thereby induced him to put her in touch with Z (the dealer in narcotics), acting in the belief that he would alleviate her sufferings, there would be an entrapment."⁷⁰ In another case, the conviction was reversed where the prohibition agent lured the defendant to sell him some liquor by repeated and persistent solicitations and by taking advantage of the sentiment aroused through reminiscences of their experiences as companions in arms during the World War.⁷¹

Police officers may not actively persuade, induce and solicit men to commit crimes who themselves had no criminal intention, and who without such blandishments would not have committed them. Courts will not stand by and see officials "beguile innocent though ductile persons into lapses which they might otherwise resist."⁷² It is not the duty

of officers of the law to incite and create crimes in order to punish them. A peculiarly glaring instance of this kind occurred in Illinois. The defendant had been induced by a detective to participate in a burglary. The methods used by the detective to stimulate participation in the burglary were outlined in the course of the opinion as follows:

"After becoming thus acquainted, this detective, by the liberal and extravagant use of money in treating to whiskey, beer and cigars, caused these young men to follow after him, seek his association, answer his requests and comply with his wishes. Plausible, self-contained and strong, he was calculated to work on their weaker natures. Well dressed and affable, he pleased them, and an apparent liberality with money—even giving one or two dollars at a time to these young men on different occasions—made him an object of admiration, and he easily led and influenced them. He endeavored to excite a desire for crime by intimating that his means were thus acquired. He suggested and proposed that they should engage in the commission of burglaries, robberies, etc., and sought to induce them to engage with him in such acts. Day after day, and night after night, his efforts were not directed to the arrest of criminals, but his mental powers and robust health with the use of money, were directed towards an effort to make criminals of these young men. With plenty to drink and smoke and eat at his expense, he sought to undermine and dazzle their mental and moral strength and lead them into the commission of crime. Ambitious, doubtless, to succeed in his chosen pursuit, with him the conviction of those theretofore guilty was less an object than that he might fasten on some one the commission of a crime. If he could make the criminal, and induce the commis-

sion of a crime and cause the arrest of the actor, or throw around him a web of circumstances that would lead to conviction it would redound to the glory of his chief and cause his advancement. With him the end justified the means, and the reputation of the agency to which he belonged and his own advancement were apparently his object. Such means and agents are more dangerous to the welfare of society than are the crimes they were intended to detect and the criminals they were to arrest."⁷³

All cases of abuse of official power in stimulating the commission of crime are not as clear as this one. Courts have sometimes gone to unreasonable lengths to upset the work of law-enforcement officials. Such a case occurred in Indianapolis. The defendants, police officers, were indicted for conspiracy to violate the prohibition laws. The prohibition unit had had notice of widespread violation of the prohibition laws in Indianapolis, which were committed with the connivance of the police. The prohibition agents, in order to get evidence, opened up what purported to be a pool room but which operated as a speakeasy, and put a well-known bootlegger in charge. The defendants received protection money from L and also helped L distribute his liquor. The court upset the conviction of these policemen on the ground of entrapment. It stressed the fact that there was no evidence that these defendants were engaged in wrongdoing prior to the above crime. It stated that where the conduct of the government agents was intentionally deceptive and designed to induce another to do something which he would otherwise not have done, then there is an entrapment.⁷⁴

These police officers were not inexperienced youths who were seduced by an "agent pro-

vocateur.” If the government agents were engaged in the violation of the prohibition law, it was the sworn duty of the police to make an arrest. Instead, they attempted to profit financially, to betray the trust that the citizens had put in them. Entrapment here is probably a shield behind which the court showed its hostility to the prohibition laws. But at the same time it granted immunity to a number of crooked policemen.

(1) Leges Henrici Primi, c. 88, Sec. 6. “Indeed, according to these laws, a man ought to pay whenever he cannot swear that he has done nothing whereby another was further from life or nearer to death.” *Ibid.*, c. 90, Sec. 11. A. Loffler in “Die Schuldformen des Strafrechts,” 16, cites a Swedish writer holding the same point of view: “If someone not voluntarily, but accidentally, inflicts a wound, he must nevertheless pay the full compensation, for a wound hurts just as much whether it is accidentally or intentionally inflicted.”

(2) Pollock and Maitland, “History of English Law,” II, 478.

(3) Bracton, “De Legibus et Consuetudinibus Angliae,” 101b cited in F. B. Sayre, *Mens Rea*. 45 *Harvard Law Review* 9871026, 985 (1931-2).

(4) Hale, “Pleas of the Crown,” Chap. II.

(5) Blackstone, *op. cit.*, Book IV, Ch. 2, 20.

(6) Bishop, “Criminal Law,” I, 192.

(7) Salmond, “Jurisprudence” (3rd ed.), Sec. 127.

(8) *Duncan v. State*, 26 Tenn. 148 (1846).

(9) *Commonwealth v. Mixer*, 207 Mass. 141, 142, 93 N.E. 249, 31 L.R.A. (n.s.) 467 (1910).

(10) *U.S. v. Bailint*, 258 U.S. 250, 66 L. Ed. 604, ‘P Sup. Ct. Rep. 301 (1922).

(11) *State v. Lindbergh*, 125 Wash. 51, 215 Pac. 41 (1923).

(12) *People v. McCalla*, 63 Cal.

App. 783, 220 Pac. 436 (1923).

(13) Sir E. Coke, “Third Institute,” Ch. 8, 56.

(14) *Karasek v. State*, i68 So. 454, 455 (Ala. 1936). The New York Penal Law (Sec. 105a) reads “A homicide is manslaughter in the first degree when committed without a design to effect death: By a person engaged in committing or attempting to commit, a misdemeanor affecting the person or property of the person killed, or of another”; ... So me Courts apply the doctrine of holding men liable for the unintended consequences of their acts only where the original act which was done was *malum in se* and not *malum prohibitum*.

(15) *People v. McKeown*, 31 Hun N.Y. 449 (1884).

(16) *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 17 L.R.A. (n.s.) 308 (1908).

(17) H. R. Brill, “Cyclopedia of Criminal Law,” II, 1126.

(18) *Levett’s Case*, Cro. Car. 538, 79 Eng. Repr. 1064, Sayre’s “Cases on Criminal Law,” 248.

(19) *State v. Dombrowski*, *supra*.

(20) *People v. Marks*, 130 N.Y.S. 524, 525, 146 A.D. 11 (1911). Coin. pare Brett’s opinion in *Regina v. Prince*, 13 Cox Cr. Cas. 138 (1875).

(21) *Dotson, v. State*, 62 Ala. 141, 34 Am. Rep. 2 (1878).

(22) In an English case a woman placed a naked child on a hot shovel in the honest belief that it was a deformed fairy, sent as a substitute for the real child who would be restored if the changeling were thus imperilled. Her belief did not prevent her conviction and imprisonment. C. S. Kenny, “Outlines of Criminal Law 68 (1926 ed.). In another case, the accused, an Indian, shot and killed his own foster father, believing him to be a “Wendigo,” an evil spirit in human form which ate human beings. He was held to have been properly convicted of manslaughter. *Reg. v. Machequonobe* 2 Can. Crim. Cas. 138

(23) Certain types of mistakes of law are treated like mistakes of fact and excuse from liability. Where the mistake is not as to the existence of the crime itself, but as to the operation of some collateral rule of law, it is a valid defense to a criminal prosecution. A man may know for example that larceny is a crime, but he may appropriate certain goods for his own use, believing that they are his. Ownership is determined by the application of specific rules of law. If the man has made a bona fide mistake in the operation of these rules, then he cannot be convicted of larceny.

(24) *State v. Jones*, 50 N.H. 369, A.R. 242. (1871).

(25) “Even tho [the defendant] may be mentally abnormal or defective,” states the California Court . . . “he is under our law held to full responsibility for his act, unless the evidence brings him within the strict legal meaning of insanity.” *People v. Kimball*, Calif., 55 Pac., (2nd) 483,5 Cal. (2nd) 608 (1936).

(26) *McNaghten’s Case*, 10 Clark & Fennelly 200 (1843). Beale, “Cases on Criminal Law,” 326.

(27) 5. 5. Glueck, “Mental Disorder and the Criminal Law,” 217.

(28) *People v. Schmidt*, 216 N.Y. 324, 339 (1915), 110 N.E. L.R.A. 1916, D 519; A.C. 1916, A 978. Despite the error in the judge’s charge, the court affirmed the conviction because the defendant repudiated his defense on the ground of insanity and attempted to obtain a new trial on an entirely different set of facts. He therefore admitted that the jury was correct in its finding that he was sane.

(29) S. E. Williams, “The Insanity Plea,” 130.

(30) *Bolling V. State*, 54 Ark. 588, 16 S.W. 658, (1891).

(31) W. Blackstone, *op. cit.*, Book IV, c. 2, 25, 26.

(32) Bishop, *op. cit.*, 294.

(33) *State V. Kraemer*, 49 La. Ann. 766, 774, 22 So. 254, 39 L.R.A. 263 (1897).

(34) Norman Barnett in ‘legal Responsibility of the Drunkard,’ 44, points out that the state of drunkenness and chronic alcoholism must be carefully distinguished. In the former there is a condition produced by the free will of the party. In the case of chronic drunkards, the man becomes drunk without knowing what he is doing or what the results are. He has a diseased brain and perverted ideas. Further, without being actually drunk, the man may commit homicide or murder owing to the diseased state of his brain and yet not be fully responsible for his action. The brain of the chronic drunkard is easily excited to anger and he may take awful vengeance for a trifling injury. The chronic drunk is especially liable to kill or hurt. He becomes violent on slight Provocation.

(35) Art. Norwegian Code, Art. 82, Greek Project of 1924.

(36) State v. Kraemer, supra.

(37) Sir Mathew Hale, ‘Pleas of the Crown,’ I, 26.

(38) *Ibid.*, 26—27.

(39) York’s Case, Foster Cro. Cas. 70 (1748). The boy was, however, pardoned on condition of entering the sea service.

(40) Home Office, Fourth Report of the Work of the Children’s Branch, 12—13 (1928).

(41) State v. Guild, 10 N.J.L. 163 (1828).

(42) The Child, the Clinic and the Court, 320.

(43) Julian Mack, ‘The Juvenile Court,’ 23 HL.R. 104-122, 107 (1909-10).

(44) *In re Lundy*, 82 Wash. 148, 151, ¶43 Pac. 885, Ann. Cas. 1916 E. 1007 (1914).

(45) Article 2, New Hampshire Constitution. See *Aldrich v. Wright*, 53 N.H. 398, 16 A. R. 339 (1873).

(46) *Lane v. State*, 44 Fla. 105, 32 So. 896 (1902).

(47) *Nelson v. State*, 42 Ohio. App. 252, 254, 181 N.E. 448 (1932).

(48) *State v. Donnelly*, 69 Iowa 705, 707, 27 N.W. 369, 58 A. R.

234 (1886).

(49) *Gibson v. Comm.* 237 Ky. 33, 34 S.W.(2nd) 936 (1931).

(50) *Erwin v. State*, 29 Ohio St. 186, 199 (1876).

(51) *State v. Bartlett*, 170 Mo. 658, 669, 71 S.W. 148, ¶51 (1902).

(52) *State v. Gardner*, 96 Minn. 318, 327, 104 N.W. 971 (1905).

(53) *State v. Kennade*, 121 Mo. 405, 26 S.W. 347 (¶894).

(54) ‘Provocation’ sufficient to take away a man’s right of self-defense is no fixed and definite concept. Abusive words by the accused are sufficient in some states, in others, not. Some courts have held that a man caught in adultery cannot plead self-defense to a charge of manslaughter. But where a paramour attempted to run away and was overtaken and assaulted, he was allowed to plead self-defense to the killing. ‘If the defendant used language toward the deceased that a reasonable man would expect to bring on a fight, then the law denies him the plea of self-defense.’ *State v. Hunter*, 82 S.C. 153, 63 S.E. 685. The Missouri Court, however, denies that abusive words will be sufficient to deny a man’s right to defend himself. J. Miller, ‘Criminal Law,’ 214.

(55) *People v. Button*, 106 Cal. 628, 39 Pac. 1073, 28 L.R.A. 597 (1895).

(56) *Carpenter v. State*, 62 Ark. 286, 310, 36 S.W. 900 (1896).

(57) N.Y. *Times*, Aug. 4, 1935, 3.

(58) Brill *op. cit.*, II, 1149 *et seq.*

(59) *Rex v. Stratton*, 21 How. St. Tr. 1046, 1223 (1779).

(60) *People v. Mehri*, 212 Mich. 601, 610, 180 N.W. 418 (1920).

(61) *Regina v. Dudley and Stephens*, L.R. 14 Q.B.D. 273, 288, (1884).

(62) New York Penal Law, Sec. 1092.

(63) *U.S. v. Do Quilfeldt*, Fed. 276, 278 (1881).

(64) *Hill v. U.S.*, 73 Fed. (2nd) 223 (1934).

(65) *Topolewski v. State*, 130 Wis. 244, 109 N.W. 1037, Beale, ‘Cases on Criminal Law’ and Edition, 240, (1907).

(66) *U.S. v. Casey*, 276 U.S. 413, 72 L. Ed. 632, 48 Sup. Ct. Rep. 373 (1928).

(67) *Grimm v. U.S.*, 156 U.S. 604, 39 L.Ed. 550, 15 Sup. Ct. Rep. 470 (1894); *U.S. v. Becker*, 62F (2nd) 1007

(68) *Kemp v. U.S.*, 41 App. D.C. 539, 51 L.R.A. (n.s.) 825 (1914).

(69) *U.S. v. Becker*, supra.

(70) *Wall v. U.S.*, 65 Fed. (2nd) 993.

(71) *Sorrells v. U.S.*, 287 U.S. 435 (1932), 77 L.Ed. 413, 53 Sup. Ct. Rep. 210.

(72) *U.S. v. Becker*, supra.

(73) *Love v. People*, 160 Ill. 501, 504, 32. L.R.A. 139.

(74) *O’Brien v. U.S.* 51 Fed. (2nd) 674 (1931).

Inchoate or Incomplete Crimes

1. Preparation for Crime

Crimes usually require preparation, planning and search for favorable opportunities to carry them into execution. Human aid must be solicited and materials acquired to carry out the plan. Even the best conceived crimes may fail to achieve the result intended through no fault of the perpetrators. The law must reach into this complex of preparation, solicitation, and attempted crime. Otherwise, attempts will be repeated, preparations will be carried through to completion, solicitations will be renewed and new combinations will be entered into to assure success.

Some steps in the preparation of crime are punished as separate and distinct offenses. Certain kinds of assaults, for example, are applications of physical force and violence as a means to an end. Thus a gun is discharged at a man with intent to kill him. A man seizes and chokes a woman into submission, intending to rape her. A thief points a gun at his victim to put him in fear, so that he will give up his valuables. The assault in these cases is a stage in the commission of a murder, a robbery or a rape.

Though the end may not be achieved, these acts are punishable as separate and distinct crimes: assaults with intent to commit murder, rape, and robbery.

Another type of preparation for crime which is made specifically punishable is the possession of such objects as burglars' tools, concealed weapons, dies and instruments used for counterfeiting. These are not usually procured for any good purpose and hence their mere possession is punishable. Likewise, on the theory that criminals do not congregate for objects which society can tolerate, some State laws attempt to penalize their consorting together. For example, a New Jersey statute reads:

"Any person who shall be apprehended in any municipality of this state ... and shall have no legitimate business in said municipality . and who shall be proven to have consorted with known thieves, burglars, pickpockets, swindlers, confidence men or other classes of criminals ... shall be deemed and adjudged a disorderly person."¹

Three stages which may occur in any crime, to wit, solicitation, conspiracy and attempt, have been marked for special treatment in criminal law. If these had been created at one time, it would have been clear that the demarcation between these crimes, inchoate or incomplete, expressed the desire of the law to prevent men from taking the road leading to complete crime. Solicitation reaches the mere endeavor to induce or persuade another to commit a crime. Conspiracy covers the agreement or the combination for an unlawful or criminal purpose. The law of attempt is concerned with the overt acts which are done or steps which are taken to carry out the criminal resolution. All these crimes have developed independently and each has its own individual characteristics. The three crimes do not form coherent parts of a single pattern.

2. Solicitation

A wishes to kill B. He has not the courage to do it himself. He therefore solicits C to do the killing. A is owner of a store. Business is going badly and the sum of money in his fire insurance

policy looks attractive. He therefore solicits B to commit the arson. A wishes certain merchandise, furs, silks, automobiles, etc. He does not wish to pay the market price. He solicits B to steal the articles for him. Men who will kill, burn or steal for a price can be found in the underworlds of our large cities. Murder rings, arson rings, and thieves who steal to order, are not mere figments of the imagination of detective story writers.

In each of the above situations, A is guilty of a misdemeanor. So long as the crime solicited by A is a felony, the law has no difficulty. It is a crime at common law to solicit another to commit a felony. It is immaterial whether the person solicited does or does not intend to comply with A's wishes. A's crime is complete by the mere act of solicitation.

Liability for the solicitation of misdemeanors is not so clear. A is a member of a city council which is considering the granting of a public utility franchise. He approaches the president of the public utility company for a bribe for his favorable vote. A is a friend of C who is being prosecuted for a crime. He offers B, a witness for the prosecution, a sum of money to leave town and not appear at the trial. A is in love with B's wife. He solicits her to have intercourse with him. In the bribery cases, the solicitation has been held to be criminal. In the adultery case, the solicitation has been held to be non-criminal, if adultery is made a misdemeanor by the State law. There are no inherent reasons for this difference in treatment. Some misdemeanors may be more serious in their social consequences than others; solicitation to commit these offenses is held to be a crime. Solicitation in the case of less serious misdemeanors is considered non-criminal. The standard of measurement of the degree of se-

riousness which justifies making solicitation a crime, varies between courts. Thus the precise limits of solicitation are vague and indefinite. A well-planned criminal law would clearly lay down the offenses to which solicitation is criminal, as is done in the European law.²

It is to be noted that the law on solicitation has not as wide a scope as the law of conspiracy. A man may be held criminally liable where he is engaged in a conspiracy to commit an act which is unlawful though not necessarily criminal, as well as where he is engaged in a conspiracy to commit a criminal act. A man may, however, be held liable for solicitation only where the act solicited is a crime. Nevertheless, the stages in the preparation of the crime at which conspiracies and solicitation are punishable, are the same. The mere request that a man commit an offense of a specific gravity is criminal in the one case and the mere agreement to do the unlawful act is criminal in the other.

3. Criminal Attempts

The range of acts to which the doctrine of criminal attempts applies, is different from both solicitation and conspiracy. In general, to attempt to commit any crime is a misdemeanor whether the crime attempted is a felony or a misdemeanor and whether it is a common-law or a statutory crime.³ The scope of criminal attempts is there fore more extensive than solicitations on the one hand, and less extensive than conspiracy on the other. Not only is the scope of criminal attempts different, but liability is based on completely different principles from those applying to the other two crimes. In solicitation and conspiracy, the will directed toward the prohibited result plus the fact of soliciting or combining is sufficient to bring liability. In criminal attempts, however, ob-

jective tests of adequacy of the materials employed to produce the result intended and proximity to the completed crime are applied to the overt acts done, before the defendant is held liable for a criminal attempt. Mere acts of preparation to commit crime are distinguished from acts which are so close to the final result that criminal liability is imposed. The New York case of *People v. Rizzo*,⁴ given below, indicates how far courts will go in holding specific action tending toward crime to be unpunishable acts of preparation.

The defendant Rizzo and three others planned to rob one Rao, who was to carry a payroll from a bank to a construction company. They armed themselves and cruised about in an automobile looking for Rao. The defendant asserted that he could identify him and point him out to the others, who were to do the actual robbery. The four men stopped at the bank and at various buildings which were being constructed by the company, hoping to encounter Rao. Their actions aroused the suspicions of two police officers who arrested them. Rao had not been to any of the places visited by the gang nor had he been seen at any time during the tour. The defendant and his accomplices were convicted of attempted robbery by the trial court. Only the defendant, Rizzo, appealed. His conviction was set aside by the New York Court of Appeals.⁵ The acts which were done by the defendant and his accomplices, though they clearly manifested their intention to rob, had not gone far enough toward the accomplishment of their object. The defendant and his three accomplices might have been convicted of conspiracy. If the defendant had solicited the others to commit the hold-up, he could have been convicted of solicitation, but the conviction for attempted

robbery was wrong. "The law must be practical," stated the court, "and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for the timely interference?"

Is there any certain criterion of nearness or proximity which will enable courts to distinguish punishable attempts from non-criminal acts of preparation, with some degree of logic and certainty? The answer is definitely in the negative. Each case is decided on its own facts. It has been said that "the more serious the crime attempted, or the greater the menace to the social security from similar efforts on the part of the defendant or others, the further back in the series of acts leading up to the consummated crime should the criminal law reach in holding the defendant guilty of an attempt."⁶

This standard is an eminently reasonable one, yet the New York Court failed to follow it. Apparently there could not have been an attempt in the Rizzo case until a gun had been placed by one of the holdup men against Rao's ribs.

In the field of criminal attempts there is considerable room for the judges to exercise their discretion. If the judges in any particular case believe that the defendant ought to be punished, they find that the acts have gone far enough toward the completed crime. If they do not think that the defendant has done enough to merit punishment, they will designate his acts as mere preparation. A line of authorities can be cited to justify either choice. This is evident when the Rizzo case is compared with a recent California decision, *People v. Lombard*.⁷ The defendants had been found guilty of an attempt to kidnap for the pur-

pose of extortion. They had intended to kidnap someone in the city of Redlands. They drove there in a car which contained sheets, pillow cases, twine and a writing tablet. They reconnoitered the house of an intended victim and wrote out and tore up an extortion note. No further act was done to carry out the actual kidnaping. The appellate court of California sustained their conviction for attempted kidnaping. It would seem that the acts done in this case were less close to the prohibited result than in the New York case. The explanation for the two decisions may simply be that kidnaping was much more unpopular in California in the year 1933 than was robbery in New York in the year 1927.

The arbitrariness of the line between preparation and attempt is further evident when the Lombard case is compared with another important California decision, *People v. Murray*.⁸ There the defendant had been convicted of an attempt to contract an incestuous marriage. He had eloped with his niece and had sent one of the persons who was to witness the marriage ceremony to get the magistrate who was to perform the ceremony, when he was arrested. The Supreme Court of California set aside the conviction stating in the course of its opinion that "until the officer was engaged and the parties stood before him, ready to take the vows appropriate to the contract of marriage it cannot be said in strictness that the attempt was made." If a similar rule had been applied in the Lombard case, there could have been no conviction until the actual attempt to take hold of the victim had taken place.

For the protection of society, the law requires a different approach in the field of criminal attempts than the one hitherto employed. The attempt to lay down a line which would sepa-

rate acts of preparation from criminal attempts has resulted in confusion and conflict and has not adequately provided for the general security. The hold-up men in the Rizzo case, like the kidnapers in the Lombard case, were dangerous offenders who fully intended to commit serious crimes and had taken steps to carry out their intentions. Lack of success in both cases was owing to circumstances over which they had no control. Yet the uncertain line between preparation and criminal attempts enabled one set of offenders to escape. A more rational approach toward criminal attempts would consider, not whether the acts done are sufficiently proximate to the completed crime, but whether they have unmistakably revealed the intention of the accused to violate the law. One who has formed the intention to commit a crime and has taken any steps to carry it out is a dangerous person with whom the law must deal. This approach to liability for criminal attempts would therefore be little different from that in solicitation and conspiracy, where mere inducement or agreement to commit crime is enough, but in criminal attempts some overt act manifesting the intention to violate the law, should continue to be required.⁹

Some statutory definitions of criminal attempts apparently provide for the approach suggested. The Missouri definition reads:

"Every person who shall attempt to commit an offense prohibited by law and *in such an attempt shall do any act toward the commission of such offense* but shall fail in the perpetration thereof shall ... be punished as follows. . ."¹⁰

It would seem that under such a definition, an accused may be held to answer for an attempted crime so long as any overt act is done which clearly displays an intention to commit the crime. The

Missouri court, however, with that curious blindness which afflicts many judicial tribunals when they are dealing with legislation changing the common law, stated that the statute coincided with the common law.¹¹ As a result of this interpretation, the court was able to set aside a conviction for attempted murder, where a woman and her lover had plotted the death of the woman's husband, to collect his life insurance and had done, as the dissenting judge put it, "everything within the contemplation of malicious human ingenuity to enable the putative murderers to commit the crime. . ."¹²

The new approach, once laid down, will have to be made in terms so plain that the courts will not be able to disregard it. It will embody the central idea that there is no social advantage in permitting individuals to plot and prepare serious crimes, and that as soon as the disposition to break the law has been manifested in overt acts, the general security requires that the law step in.

If criminal attempts are judged from the point of view of the individual's dangerousness, rather than from the acts he does, the problem of the so-called impossible attempts will give much less difficulty than it does at the present time. A man who believes that he can kill by putting powdered sugar into another's coffee or by pointing an unloaded gun, or by performing magical rites, is more in need of a psychiatrist than a jailer. He is not held guilty of a criminal attempt under present cases which require some apparent adaptation of means to bring about the criminal result in-tended. Neither would he be held to answer under a subjective approach. But if the man does not know that the means he is using are inadequate, for example, if he believes that the gun is loaded or that the pow-

dered sugar is arsenic, the inadequacy of the means used should not prevent his conviction of an attempt, for he is a potentially dangerous offender. There is some conflict in the decisions as to whether liability should be imposed in these cases.¹³ Offenders whose means are adequate to the end they propose, but whose plans are made impossible of fulfillment by extraneous circumstances, ought to be held liable as heretofore, as they are under most of the decisions at the present time. A man who tries to kill by shooting into an empty room believing that his victim is sleeping there and a man who attempts to pick a pocket which happens to be empty, are dangerous offenders despite their failure to realize their criminal intentions. By parity of reason, under the proposed subjective approach to the law of attempts, criminal liability would be imposed where the failure to carry out the criminal resolution was owing to some legal barrier. A person who buys lace in France believing it to be French, although it is in fact American, and tries to smuggle it into this country;¹⁴ a fence who buys goods believing that they are stolen, when they have not been stolen;¹⁵ a boy of thirteen years and eleven months whom the law presumes incapable of rape and who tries to have carnal intercourse with force and violence and against the will of a woman;¹⁶ would be held guilty of attempted smuggling, attempted receiving of stolen goods and attempted rape. In every one of these cases the disposition to bring about a result which the law forbids has been clearly manifested by some overt act. It is against such a disposition that the law ought to act.

The adoption of the subjective approach would bring the law of attempts into harmony with modern ideas as to the ends and aims of the criminal law. The tra-

ditional criminal law has been interested essentially in external acts. The modern criminal law professes to be interested much more in the rehabilitation of the personalities who commit such acts. Attempts, even if they fail according to the legal standards of the existing law, reveal anti-social tendencies against which some measures ought to be taken, quite as much as if the act had been completed. The law cannot go so far as to deal with every intention to commit a crime when that intention remains in the realm of words alone, but as soon as the intention is expressed by an overt act which clearly shows a design to carry out that intention, then the law ought to step in.

(1) New Jersey Acts of 1933, Chap. 280, 752. Attempts to prohibit the consorting or mere association of criminals or persons of evil reputation are frequently held unconstitutional. See *Ex Parte Smith*, 135 Mo. 223, 36 S.W. 628, 33 L.R.A. 606 (1896). *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223 (1934).

In the *Smith* case, a municipal ordinance made it an offense "knowingly to associate with persons having the reputation of being thieves, prostitutes, gamblers, etc. . ." The Court in declaring the ordinance unconstitutional stated that if the Legislature may forbid one to associate with certain classes of persons of unsavory reputation, it may determine the associates of anyone. It denied "the power of any legislative body in this country to choose for our citizens who their associates shall be."

A statute similar to the one in the *Smith* case was recently upheld by the New York Court of

Appeals. The statute was interpreted to require four elements before the offense was complete:

- (1) An intent to provoke a breach of the peace.
- (2) Proof of the defendant's evil reputation.
- (3) Consorting with thieves and criminals.
- (4) For an unlawful purpose.

The mere association or consorting of criminals in and of itself was held to be no crime. *People v. Pieri*, 269 N.Y. 315, 199 N. E. 495 (1936).

(2) See for example Art. 115 *Codice Penale* (Italy) Art. 49a *Strafgesetzbuch* (Germany) 1877.

(3) Some courts have held that this rule does not apply to statutory misdemeanors which are merely *mala prohibita*.

(4) 246 N.Y. 334, 337, 158 N.E. 888, AL.R. 711 (1927).

(5) The other three defendants who had not appealed were serving time in the penitentiary when the court upset the decision in the Rizzo case. The court, therefore, recommended that the District Attorney bring their cases before the Governor so that a pardon might be granted. The court also praised the police work in this case.

(6) F. B. Sayre, "Criminal Attempts," 41 *Harvard Law Review* 821-59, 845 (1927—8).

(7) Cal. App. 525, 21 Pac.

(2nd) 955 (1933).

(8) 14 Cal. 159 (1859).

(9) The absurdity of the attempt to lay down an objective line which will distinguish acts of preparation from punishable attempts may be seen in the cases of attempted burglary. They are presented by Professor Beale as follows:

The defendant takes an impression of a lock of the house in order to get a false key made; he is not yet guilty of attempt. He procures tools and meets a confederate at a distance from the house; he is not yet guilty. He hires a hack to go to the house; he is not guilty. He looks at it to examine it; not guilty. He carries his tools to the house, lays them down and goes to get a tool he had forgotten, or examines the house to pick out a fit place to break, guilty. He breaks down the gate of the yard, he goes up the steps to the porch, he tries to break open the door, he breaks glass in the window, he breaks open the door and fires into the house, he is undoubtedly guilty." "Criminal Attempts," 16 *Harvard Law Review* 491-507, 505 (1902-3).

In each case we are dealing with a man who manifested a clear-cut intention to burglarize a house, and in each case, an overt act was done toward carrying out

that intention. To make the defendant's responsibility depend upon how much he was able to do before the police arrived on the scene, is to invite him to come back and try again where he has been interrupted too soon.

(10) Missouri Revised Statutes, 1919, Sec. 3683.

(11) *State v. Davis*, 319 Mo. 1222, 6 S.W. 2nd 609 (1928).

(12) *Ibid.*, at 616, and *State v. Lourie*, 12 S.W. 2nd 43 (1928). Compare *Groves v. State*, 116 Georgia, 516; 42 S.E. 755, 59 L.R.A.

598 (1902).

(13) Compare *Regina v. Gamble*, 10 Cox C.C. 545 (1867); *State v. Clarissa*, 11 Ala. 57 (1847); *Commonwealth v. Kennedy*, 170

Mass. 18, 48 N.E. 770 (1897); *Kunkle v. State*, 32 Ind. 220 (1869); *State v. Clover*, 27 S.C. 602, 4 S.E. 564 (1888).

(14) The case of *Lady Eldon*, Wharton, *op. cit.*, 304, note 9.

(15) *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906).

(16) *Commonwealth v. Green*, 19 Mass. 380 (1824).

Some Typical Offenses

1. Larceny, Embezzlement and Obtaining Property by False Pretenses

The confusion to be found in the classification of offenses with regard to the social interests to be protected and the relative gravity of the attacks upon them is reflected in the definitions of individual crimes. Here, too, there is only an approximate realization of the interests to be conserved and only an inadequate analysis of the attacks which should be prohibited.

In a society organized upon the basis of private property, the criminal law might be expected to be clear as to the limits and nature of the protection it will afford that property. Yet the definitions of some of the property crimes reveal that the protection given at the present time is inadequate, despite centuries of experience in dealing with property crimes. This is evident when the question of what property may be stolen is considered. At common law, only personal possessions were the subject of larceny. Real property or things attached to the realty could not be stolen. Thus, it was larceny to take and

carry away crops which had been cut and stacked, but it was merely a civil trespass to cut and carry away growing crops or trees. While pieces of paper could be the subject of larceny at common law, a paper containing a valid obligation of debt, such as a promissory note or a bill of exchange (choses in action) could not be stolen. Although personal property generally was a subject of theft, a dog could not be stolen for the curious reason that he was of a "base nature." These rules as to the subject of larceny have largely been changed by statute in the various states, but the statutes have not necessarily resulted in any simplification of the distinctions between property which could and property which could not be stolen. As Hall puts it: "If he (the layman) should seek an answer to so apparently simple a question as to what can be 'stolen,' he would be introduced into a labyrinthine network of legal propositions woven into innumerable statutes and cases. A long list of specific objects, including such curiosa as animals *ferae naturae*, appended to an enumeration of several

types of property, winding up with a general blanket clause which would make all the prior cataloguing more mysterious than ever, purposes to answer his inquiry."¹

Nor have the statutory changes adequately covered all kinds of property. A New York case affords a good example. The defendant, general manager of a wool-combing company, entered into an agreement with another company to comb 20,000 pounds of raw wool. The defendant was to use the machinery and the workmen of his company without the knowledge of its officers, and was to receive twenty cents a pound for so doing. A good part of the work had already been done and \$2,097.92 had already been paid to the defendant, when the officers of his company uncovered his activities. The defendant was charged with grand larceny and was convicted in the lower court, but the conviction was thrown out in the upper court, on the ground that the unauthorized use of the equipment and laborers of the corporation by the defendant did not constitute a taking of personal property from the posses-

sion of the true owner, or the withholding or appropriating to their own use of any personal property, within the meaning of the New York Penal Law. Thus it did not matter that the company which employed the defendant had suffered considerable material loss through the defendant's act. The loss was not in the form of "property" which could be stolen within the meaning of definitions of larceny.²

A recent Illinois case indicates a similar inadequacy in the range of interests covered in the law of embezzlement. Pentis was the treasurer of the village of Brookfield. He used the funds of the village to buy its special assessment bonds for himself at a considerable discount. He then turned the bonds over to the village charging their full face value. He pocketed the difference between the amount that he paid for the bonds and their face value. Pentis was convicted of embezzlement in the trial court. The Illinois Supreme Court, however, threw out the conviction on the ground that the profits resulting from the use of the money of the village were not the subject of embezzlement. It apparently did not matter to the Court that the profits were made through a gross misuse of the village's funds, or that the village was out of pocket the difference between the purchase price of the bonds and their face value. The law of embezzlement, according to the Court, did not reach Pentis's abuse of his official position and his breach of the fiduciary obligations owed to the village.³

Another serious defect in the definition of crimes against property is over-specialization. Differentiations between crimes have come to be made according to the methods by which the property was wrongfully taken or obtained. Larceny, embezzlement and obtaining property by false pretenses are distinct crimes in

many states. The essential element in larceny is the taking, *i.e.*, obtaining the dominion over the property and carrying it away, that is, removing it from the place where it originally was. This taking had to be "wrongful" or "felonious." If the accused came by the property rightfully, *i.e.*, where it was stored with him by the owner, and he later, converted it, the act was embezzlement and not larceny. Embezzlement is distinguished from larceny in that it is a breach of trust, the conversion of property which has come rightfully into the possession of the embezzler. There is, however, a well-established exception to these rules. When the man to whom the property was entrusted, the bailee, broke bulk, that is, drew off some of the wine in the barrel entrusted to him, or sold some of the packages entrusted to him, such action was held to re-vest possession in the owner, and a subsequent conversion of the goods was larceny and not embezzlement. If the bailee, however, sold the goods entrusted to him without breaking bulk, he was only guilty of embezzlement.

The intricate and technical character of the concept of possession, which is fundamental in larceny, is further evidenced by the distinction which is made between custody and possession. A servant or an employee who has been entrusted with certain goods by a master or an employer to take to a specific place, has custody of the goods only, constructive possession remaining in the master. If the servant appropriates the goods to his own use, he is guilty of larceny and not embezzlement, but if a third person gives a servant some property to take to his master, the servant has possession, and not custody. A subsequent conversion of such goods is embezzlement and not larceny, since the master was never in possession of the

goods. But if the servant deposits it in any place that his master has designated for such goods, a cart, a drawer, or a storeroom, and the servant later appropriates the goods, the offense is larceny, since the master obtained possession by the act of deposit. If at the time of depositing the goods, the servant intended to steal them, leaving them in the place of deposit only temporarily, the offense may be held to be embezzlement.

The necessity of distinguishing larceny from obtaining property by false pretenses introduces additional complexities. Where a man voluntarily turns over property to another, relying upon the latter's false and fraudulent misrepresentations, the act of converting the property may be either larceny or obtaining property by false pretenses. It is larceny if the owner of the property intended to turn over custody of the property only, and did not intend to pass title. It is obtaining property by false pretenses if the owner intended to pass title to the property, relying on the false pretenses made to him. If John Doe, for example, hires a car to drive from New York to Washington, he is guilty of larceny and not of obtaining property by false pretenses if he drives to Chicago and sells the car. On the other hand, if John Doe buys the car instead of hiring it, and gives a false check in payment and later sells it, he is guilty of obtaining property by false pretenses. The owner of the car in the latter case intended to pass title to the car on receiving the check, relying on its genuineness.

The limits of larceny and obtaining property by false pretenses are not always as clear cut as in the above examples. It is not always easy to determine in any specific transaction whether or not title to the property passed and hence whether the offense

was larceny or obtaining property by false pretenses. This is illustrated by the conflict of opinions between courts in cases where property has been obtained through the impersonation of another. If A comes to B and represents that he is C or C's servant and on the strength of that false representation obtains a loan of money which he appropriates to his own use, the offense would be obtaining property by false pretenses in some states,⁴ and larceny in others.⁵ Courts taking the former view point out that A intended to pass title to the money on delivery to B; the subsequent conversion of the money was therefore obtaining property by false pretenses. Courts holding the latter view state that A intended to pass title to C and not to B. Title therefore did not pass to B and the offense committed was larceny.

The distinctions between larceny, embezzlement and false pretenses are not purely academic. A prosecutor must pick the correct designation for the facts in the particular case before him. Otherwise he is likely to find that a verdict of guilty in the lower court will be upset by the appellate court on the ground that the facts did not constitute the offense as charged in the indictment, but a different offense. To avoid the necessity of making these distinctions between larceny, embezzlement and false pretenses, some statutes define larceny so as to include acts constituting embezzlement and false pretenses. These statutes, however, have not completely succeeded in doing away with the distinction between these offenses. In dealing with thieves, swindlers, embezzlers and confidence men, prosecutors are still harassed by refined distinctions drawn by the courts. These have sometimes refused to uphold convictions where the indictment alleged larceny and the offense

was embezzlement or false pretenses, even though the latter offenses were included in the statutory definition of larceny. In cases where the courts have thus distinguished, they have found variances between the pleadings and the proof offered at the trial. This is illustrated by a New York case in which the defendant had made false and fraudulent misrepresentations in order to induce a sale of carpets which were delivered to him and appropriated by him. He was indicted for grand larceny under the New York statute which classed the offense of obtaining property by false pretences as larceny. But the Court of Appeals threw out his conviction.⁶ The statute, according to the court, distinguished four different methods of committing larceny and the precise method of commission had to be alleged in the indictment and proven at the trial before a defendant could be properly convicted. The court apparently disregarded the fact that it was the purpose of the statute to get away from the necessity of making these distinctions. This is another example of the judicial fondness for common law concepts.

2. Receiving Stolen Goods

Property obtained by larceny, embezzlement or false pretenses is of no value to the thief, swindler or embezzler, unless it can be converted into cash. Petty or occasional thieves may steal articles for their own consumption; the professional thief steals for the purpose of sale. Unless the fruits of his crime are banknotes, the goods stolen must be converted into money if the thief is to enjoy them. The receiver of stolen goods is the conduit through which the robber's loot returns to the channels of legitimate trade. Sometimes the receiver is an out-and-out criminal whose general business is confined to stolen articles. He

may be the financial sponsor for a gang of burglars, hi-jackers or thieves who steal to order for him. Frequently the receiver has a legitimate business to clothe his criminal activities. A jeweler may sell honestly acquired as well as stolen gems. A garage man or dealer in used cars may occasionally buy stolen cars for resale. Many receivers of stolen goods, however, are not dealers, since they buy stolen goods for immediate consumption or use. A woman may be approached by a thief to buy a fur coat, a diamond ring, a case of salmon, or soap at an advantageous price. The temptation of the bargain may overcome her scruples as to the origin of the goods.

The first English statutes on the subject of receiving stolen goods punished the receiver as the accessory after the fact to the larceny.⁷ The disadvantages of this method of dealing with receivers is that the latter cannot be convicted of any crime, unless the thief is first convicted of a larceny. So long as the thief is kept out of the way, the receiver is safe from prosecution though his place may be full of stolen property. Most of the states of this country therefore make the receiving of stolen property, knowing it to be stolen, a distinct substantive offense. The receiver is guilty of a misdemeanor or a felony depending on the grade of the original theft or on the value of the goods stolen.

These statutes may adequately cover the occasional receiver who buys a single article for consumption or use and whose prosecution must be based on his course of conduct in connection with that specific article. Modern statutes, however, do not meet the problem presented by the professional receiver. These men are engaged in a habitual course of conduct with respect to stolen property. Their stores and their ware-

houses may be full of the proceeds of burglaries and thefts, yet the statute compels the state to select one or two articles, and prove that they were stolen and that the accused had knowledge of their stolen character, at the time he received them. Proof of knowledge is particularly difficult. By the time of trial, the receiver is ready with a bill of sale to show that the articles in question were bought in the ordinary course of trade. Many states will not allow the fact that a great deal of stolen property was found on the premises of the accused to be used in evidence against him, to show the likelihood that the article on which the prosecution was based was received with knowledge that it was stolen. The state can introduce such evidence only if the goods were obtained from a single thief. Many states require the prosecution to show also that the accused had actual knowledge of the stolen character of the goods at the time he received them. That the accused knew of facts and circumstances sufficient to raise the suspicions of an ordinarily intelligent man, or sufficient to satisfy a reasonable man that the goods were stolen, is not enough. In many states, the possession of recently stolen property does not raise the presumption that it was received with knowledge of its character, in contradistinction to the rule in larceny that the possession of recently stolen property raises the presumption that the possessor is a thief.

This complex of substantive and evidentiary rules makes the task of convicting the professional receiver peculiarly difficult. A departure from accustomed patterns of dealing with the offense of receiving stolen goods must be made if the fence is to be dealt with adequately, and the prospects of profit from larcenies considerably diminished. Instead of concentrating attention upon

a single act of receiving stolen property, the law should distinguish between the dealer in stolen articles who buys to resell and the occasional receiver who buys for the purpose of consumption and use. The possession of a relatively large stock of stolen property, the fact that the accused is engaged in the business of buying and selling merchandise which is stolen, should be the principal factors to be taken into account in fixing the status of the accused. New York has already taken a step in this direction; its statute reads:

“A person who, being a dealer in or collector of any merchandise or property . . . fails to make reasonable inquiry that the person selling or delivering any stolen or misappropriated property to him has a legal right to do so, shall be presumed to have bought or received such property knowing it to have been stolen or misappropriated. This presumption may, however, be rebutted by proof.”⁸

This statute puts a duty of “reasonable inquiry” upon a dealer in merchandise and raises a presumption of knowledge of the character of the property in the absence of such inquiry. The statute, however, does not go far enough, since a prosecution must still be based upon the single act of receiving, instead of a habitual course of conduct in dealing with stolen goods.

3. Burglary

Just as the larceny concept does not cover all wrongful takings, the elements of the crime of burglary do not cover all wrongful trespasses upon private property even when such trespasses are made with a felonious intent. Burglary was defined at common law as the breaking and entering a dwelling house in the nighttime with intent to commit

a felony therein. Since burglary was essentially an offense against the habitation, before a house could be the subject of burglary it must have been used and occupied as a dwelling house. No person need actually have been present in the house at the moment it was broken into, so long as the house was usually used for dwelling purposes. Breaking and entering an unoccupied house, a shop, store, warehouse or other building was not burglary, even though it was done with the intent to commit a felony. This rule of the common law has been extensively modified by statute in this country. Burglary, under these statutes, includes the breaking and entering of many different types of buildings and structures, such as shops, stores, warehouses, railroad cars, etc., but no building or structure which is not specifically included in the legislative enumeration can be the subject of burglary. Legislatures have not always been careful enough to cover every type of structure, and many burglary prosecutions have been thrown out by appellate courts because the particular premises which were broken into were not the subject of burglary under the state law.⁹

At common law and usually under the statutes, no man can be convicted of burglary unless he came on the premises by “breaking and entering,” but courts differ in their conception of the terms “breaking and entering.” Some degree of force is usually required to effect the entry, though the actual amount of force used may be very slight. Thus, it is not burglary to make an entry into a house through an open door or window; the opening of a closed door or window, however, even if it is not latched or fastened, is a sufficient breaking. Courts have disagreed as to whether there was a sufficient “breaking” to justify a charge of

burglary where the door or window is partly open and it is necessary to open it further to gain entry.¹⁰ There is also a dispute among courts as to whether it is a burglary if the accused enters without breaking and then has to break out in order to escape. This was made burglary by an English statute of 1712,¹¹ but many courts have held that this is not burglary in the United States.¹² There is, however, authority to the contrary.¹³

4. Arson

Like burglary, arson is an offense against the habitation. It is defined at common law as the malicious and willful burning of the house or outhouse of another." The house burned must have been a dwelling house, before the offense could be designated as arson. Statutes have made buildings other than houses and many other forms of property the subject of provisions as to arson, but it is impossible to enumerate all these forms, and consequently many other forms of property are not covered by existing statutes. For example, the Massachusetts statute, after enumerating various buildings as the subjects of arson, states, "whoever wilfully and maliciously ... burns a bridge, lock, dam, flume, ship or vessel of another shall be punished by imprisonment in the state prison for ten years."¹⁵ This section does not cover the burning of such conveyances as railroad cars, automobiles, auto-trucks, airplanes, etc. Another section covers the burning of stocks of grain, hay or other vegetable products.¹⁶ Fruit or mineral products are not mentioned.

At common law the owner of a house could not be convicted of arson if he set fire to it, even if his purpose was to defraud the insurance company. Similarly, a tenant could not be held guilty of arson if he set fire to property

occupied by him. Where states have adopted the crime of arson without otherwise defining it, the common law definition controls, leaving the inadequacies which we have just noted.

5. Homicide

If in property crimes the meshes of the net are spread too far apart, so that individual criminals may slip through too easily, other crimes are so generally defined as to include completely diverse types of offenders and diverse types of conduct of varying degrees of seriousness to society. This may be seen most clearly in the definitions of homicide and of rape.

Murder is the most serious crime in the law. In most states it is punishable by death or life imprisonment. It is defined at common law as an unlawful killing with malice aforethought. "Malice" in this definition does not bear its ordinary meaning of "hatred" or "malevolence." It is a broad and vague concept covering every intentional killing done without legal justification, excuse or mitigation. The killing of Dutch Schultz and three members of his gang by other gangsters is murder. But so is the killing by a husband of his invalid and bedridden wife, at her request,¹⁷ or the killing by a mother of her newborn illegitimate child to hide her shame.¹⁸ The law looks not to the motives which caused the act resulting in death, but to the intention with which it was done.

"Malice aforethought," however, is not limited merely to intentional killing. Even if the accused had no actual design to take life, so long as he intended to inflict some great bodily injury upon the deceased or some other person, he is guilty of murder. A drunkard who threw a beer glass at his wife, striking a lamp which she was carrying and thereby causing a fire in which she was burned to death, was

held guilty of murder "whether he intended the glass to strike his wife, his mother-in-law or his child, or whether he acted solely from general malicious recklessness."¹⁹ Choking a man violently, though not intending to kill him,²⁰ hitting a man with an iron pipe,²¹ shooting at him intending to cripple him,²² constitute murder if death results from such acts.

There may be murder even without an intent to inflict great bodily injury, though the commission of a reckless act which in its consequences naturally tends to destroy the life of a human being. A man who displaced the fixtures on a railway track, thereby causing a derailment of a train in which a passenger was killed, was held guilty of murder, though he intended to stop the train before it reached the displaced track, hoping that by such a deed of seeming heroism he would win employment from the railroad or money from the passengers.²³ It is murder to shoot into a crowd, a dwelling house, or a train, though there may be no intent to kill or injure anyone, if a death occurs as a result of these acts. The Alabama court sustained a conviction of murder where the accused, with a drawn pistol, was seeking a quarrel with a third person which the deceased endeavored to prevent, the killing occurring through the accidental discharge of the pistol.²⁴

A killing is also murder if it occurs in the course of the commission of a felony, though the accused may have had no intent to kill. Hauptmann was convicted of murder, though the Lindbergh baby was killed supposedly as the result of an accidental fall from the ladder, because the death occurred in the commission of a burglary. In Indiana, a defendant was held guilty of murder in a case in which a woman he had raped swallowed bichloride of mercury, "distracted with the pain and shame so inflicted upon her."²⁵

Defendants have also been held guilty of murder where the killings occurred as the result of arson,²⁶ robbery,²⁷ and abortion.²⁸

It is evident from the above cases that in murder the law is essentially interested in acts which endanger human life. This is true even of murders occurring in the course of the commission of felonies. There is a general tendency to limit the operation of the felony-murder rule to felonies dangerous to life. Perkins, after an exhaustive study of "malice aforethought" therefore comes to the conclusion that it means "a man-endangering-state-of-mind."²⁹ Murder would then be an unlawful killing resulting from a man-endangering state of mind in the killer, yet all murders, no matter what the social situations out of which they arise or the motives which produced them, are treated on the same plane.

To some extent the law does attempt to distinguish the more heinous from the less heinous forms of homicide. The criteria employed for this purpose, however, are grossly inadequate and inconsistent. Murder in most state codes is divided into degrees. Murder in the first degree, according to many codes, is a killing by poison, lying in wait, or in the course of the commission of a felony, usually arson, rape, burglary and robbery. Premeditated killings are also murders in the first degree. All other killings which were murders at common law are murders in the second degree.

Of the above criteria, only the killings occurring in the course of the commission of a felony appear to have some necessary relation to heinousness. Robberies, rapes, arsons, and burglaries are not usually committed from laudable motives. The persons committing them are frequently dangerous offenders. Thus, there seems to be a very

good reason for punishing for deaths occurring in the course of such offenses with the greatest severity. But poison may be administered from merciful as well as from base motives. In a case in Michigan, a wife got her husband to obtain Paris green for her. She was a hopeless invalid and administered the poison herself. For all this, the sentence to life imprisonment for murder imposed on the husband was sustained by the appellate court.³⁰

Lying in wait, as a criterion of first degree murder is a remnant of the Germanic prejudice in favor of open killings as opposed to secret killings from ambush. The fact that the murder was committed from ambush, however, sheds no light on its intrinsic gravity. Lying in wait may be used by a husband who is taking vengeance upon another for an outrage to his wife or child, as well as for the accomplishment of a gang murder. In a Texas case, a first degree murder verdict was upheld where the deceased had threatened to kill the accused and went about armed for the purpose of carrying his threat into execution, but was himself killed from ambush by the accused.³¹

The principal criterion of first degree murder is the presence or absence of premeditation, but in the criminal law, premeditated murder does not mean a cold-blooded, planned, deliberate murder. The premeditation need not have existed for any length of time before the killing for it to be considered murder in the first degree. "The act may follow the intent as rapidly as thought may pass through the mind," states one court,³² yet the killing may still be premeditated homicide, murder in the first degree. Premeditation therefore simply means intention to kill, which must have existed just before the fatal blow was struck. Such intention may arise from a variety of reasons which have little to do

with heinousness. The two Pennsylvania criminals who planted dynamite on a railroad track in order to blow up a car carrying a large payroll, killing the paymaster and three guards, were guilty of premeditated murder.³³ But a husband who broods over his wife's adultery and finally shoots her paramour is likewise guilty of a premeditated murder.

Poison, lying in wait, and the commission of a felony, are at least definite criteria, which make it possible to distinguish between first and second degree murder when deaths result. Nevertheless, if murder is defined generally as "an unlawful killing with malice aforethought," and if "aforethought" has any meaning, then there is no real distinction between it and "premeditation," which makes an unlawful killing murder in the first degree. The tenuousness of the distinction between the two degrees of murder is clearly brought out by Cardozo:

"The present distinction between the two degrees of murder is so obscure that no jury hearing it for the first time can be expected to assimilate it; and understand it. I am not at all sure that I understand it myself. Upon the basis of this fine distinction, with its obscure and mystifying psychology, scores of men have gone to their deaths."³⁴

The law distinguishes between murder and manslaughter, but the criteria here too are inadequate. A voluntary killing is manslaughter when the fatal blow is struck in the heat of passion as the result of adequate provocation. "To reduce an intentional blow, stroke, or wounding resulting in death, to voluntary manslaughter," states one court, "there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the prisoner beyond the control of his reason and suddenly impelling him to the

deed.”³⁵ A more or less violent assault which provokes an immediate retaliation will be sufficient to reduce the homicide to manslaughter. On the other hand insulting words, indecent and provoking actions or gestures, though they may produce the same degree of passion as a blow, will not do so. Some cases have recognized the inconsistency in this common-law rule and make the distinction between murder and manslaughter turn upon the existence or nonexistence of passion, irrespective of the means by which it is aroused.³⁶ To reduce the killing to manslaughter, the assault must be made upon the accused himself or upon a near relative. An assault upon a close friend will not have this effect, no matter how much passion has been aroused.³⁷

Provocation without passion will not reduce the killing to manslaughter. For example, in a Pennsylvania case where a man shot the deceased one hour after the latter had killed the accused’s cousin, the court held that this killing did not in the slightest degree tend to mitigate the accused’s offense.³⁸ By the same reasoning, a husband who shot his wife’s paramour one hour after he had caught them in adultery, is guilty of murder, whereas if he had shot him immediately, that is, on discovering them in the act, the killing would be manslaughter. On the other hand, the killing of a police officer who attempts to make an illegal arrest is held in many states to be manslaughter only, without regard to the question whether or not the slayer acted in the heat of passion aroused by the illegal arrest.³⁹

The failure of the law of homicide to make rational distinctions in the relative gravity of different types of homicide places an unusual burden upon the jury in any murder case. No matter

what the law is, the jury will usually take into account whether the penalty of death or life imprisonment is not too harsh as applied to the particular defendant before them. They may therefore bring in a verdict against the law and the evidence. They may find the accused guilty of manslaughter where he is clearly guilty of murder, or they may acquit him entirely if they feel that the penalties for manslaughter are too harsh. This tendency of juries to acquit in a homicide case where the penalties provided by law were felt to be too harsh, may be seen in the Carroll case. Donald Carroll, Jr., 16 year old son of a retired army officer, shot and killed his 18 year old pregnant sweetheart, after entering into a suicide pact with her. Carroll had intended to shoot himself also, but lost his courage. At the trial, counsel for Carroll put up the absurd defense that he was laboring under such defective reasoning as not to know the nature and quality of his acts. The shock of the blast of the gun was, however, sufficient to restore Carroll to his normal senses. This defense was accepted by the jury which acquitted Carroll of killing his sweetheart “by reason of insanity.” It is highly probable that the jury was less concerned with Carroll’s insanity than the penalty to which he would have been subject, had it found him guilty of murder. It undoubtedly felt that the punishment provided by law was too harsh and, therefore, expressed its disapproval of legal provisions by accepting the flimsy defense of insanity made out by Carroll’s attorney. Had the jury found Carroll guilty of murder, tremendous pressure would undoubtedly have been exerted upon the Governor to commute, modify or change the sentence and bring the penalty in some relation to the popular estimate of the gravity of the crime.

Any attempt to lay down a

fixed penalty for a particular crime will necessarily work harshly in many instances. In offenses other than murder, this has been recognized by providing penalties between minimum and maximum limits. In homicide, however, owing to the feeling that deprivation of life is such a serious matter, the fixed penalty, usually death or life imprisonment, has been retained, giving rise to the difficulties which have been noted above. Flexibility in sentences for homicides would therefore seem to be necessary for any rational treatment of this offense. Imprisonment between minimum and maximum limits, with the death penalty reserved for the most serious instances of unlawful killings, would make it possible to bring the penalties for homicide into some relation to popular estimates of the gravity of the killing. If this change in penalties for homicide is not made, the law should lay down, more clearly and efficiently, criteria for distinguishing serious killings punishable by death or life imprisonment from the less serious offenses punishable by lighter penalties. European criminal codes have made new definitions in this sense. For example, these codes designate infanticide,⁴⁰ killing with the consent of the victim,⁴¹ and killing as the result of the suicide compact,⁴² as less serious homicides to be punished by comparatively light penalties. These types of homicide would be considered murder by the American law.

6. Rape

Under existing statutes of this country, rape is sexual intercourse by a man with a woman not his wife, under any one of the following circumstances: (1) When the intercourse is had against her will and without her consent, through force and violence or through threats or fear of great bodily harm; (2) when the woman

is so insane or imbecile as not to know the nature of the act she is doing; (3) in certain cases where the consent to intercourse was obtained by fraud; (4) where the intercourse is had with a girl below a certain age, even with her consent.

Rape is one of the most serious crimes in the law and at common law was a felony punishable by death. In a number of states in this country death is still a possible penalty and even where death is not imposed, the convicted rapist is usually sentenced to long terms of imprisonment. Indeed, the mere attempt to commit rape may be repressed with the utmost severity as in the recent Texas case of *Garza v. State*. Garza broke into the room of one Miss Schmidt, dragged her out into the yard of the house where she was living, choked her, threw her on the ground and attempted to rape her. Before any intercourse took place, he was frightened off by a dog. He was convicted of assault with intent to rape and sentenced to fifty years imprisonment.⁴³

In view of the seriousness of the crime of rape and the penalties which may be incurred, it is particularly essential that conduct be included under the term rape which is socially so injurious and reprehensible that the full force of the law must be used in its repression. It ought to be clear exactly what is meant by rape. Of all the terms used, it would appear that sexual intercourse would be the easiest to define, yet there is conflict among the courts in this country as to whether mere penetration is sufficient or whether the completed act of coition is necessary to make out the crime.⁴⁴ The prevailing rule is that penetration is sufficient.

Considerable differences of opinion exist as to the meaning of lack of consent on the part of the woman. A well-known Mas-

sachusetts case states that the question comes down simply to the determination of whether the woman was willing or unwilling.⁴⁵ But courts differ as to the conditions under which they will infer willingness or lack of willingness. One element is universally insisted upon: the woman must resist, except where she is compelled to yield to such an array of force that resistance will be completely useless. The courts attempt to distinguish between cases of genuine and feigned resistance, but they disagree in the amount of resistance necessary before the sex intercourse may be considered rape. Some courts have stated that the crime can only be committed where there is "the utmost resistance" or "the utmost reluctance" on the part of the woman.⁴⁶ The woman must "oppose the man to the uttermost limits of her power."⁴⁷ Most courts however are less exacting. "The law does not require of the woman who seeks to protect her chastity that she shall resist as long as either strength endures or consciousness continues," states the Arkansas court. "It is essential that she shall not at any time consent, but none of the cases hold that she has consented because through fear for her life or bodily safety she has ceased to resist or fails to make an outcry."⁴⁸ As the California court put it in a recent case: "Resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends upon the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance and the degree of force manifested."⁴⁹

Courts and legislatures insist that consent and resistance are necessary where the condition of the woman makes them possible. But if a woman is insane or imbecile, so that she does not know

the nature of the act she is doing, or if a woman is intoxicated or is under the influence of drugs or has fainted, she is in no position to consent to any act of intercourse. In these cases the law presumes that the intercourse was had without her consent. But except where a man deliberately drugs a woman in order to have intercourse with her, the conduct involved is in no sense as reprehensible as where violence is used. Where a woman has drunk herself into a state of insensibility, and the man with whom she has been drinking has intercourse with her while she is in that state, the "rape" is of a totally different character from one resulting from a brutal attack upon a woman. In the cases of insane and imbecile women, the accused may not know of his companion's mental state. He may have believed that he acted with the woman's consent. Yet many courts hold him liable for rape,⁵⁰ despite the long-standing rule that ignorance of fact excuses from criminal liability though ignorance of law does not.

The most numerous class of rape cases are those in which intercourse was had with a girl with her consent, where she is below the age at which the law deems her capable of giving a valid consent. The common-law age of consent was ten years, but this has been extended in this country to 12-18 years by legislators, fired by a zeal to protect the virtue of young women. "The intention of the law," writes the New York court, "is to protect unmarried girls from carnal copulation, such intercourse being fraught with peril to the morals of the community and to the wellbeing of the individual. With the age of consent fixed at 18 years, it may not confidently be stated that all girls under that age do not comprehend what they are doing when they consent to intercourse. The law, however, deals

with all, and not with individuals. In law, the act of intercourse or the attempt to have intercourse is without their consent and against their will. The state says that they do not consent, or that their apparent consent shall be disregarded.”⁵¹

Lack of knowledge of the girl’s age is no defense to the man in these rape cases, nor is the lack of chastity on the part of the girl a defense in most states. The girl may have been the moving factor in obtaining the intercourse, yet the man is held responsible. One court spoke out against this rule: “We have in this case a condition and not a theory. This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives so far as this record shows, fell under her seductive influence... . The girl was a common prostitute as the record shows. The boys were immature and doubtless more sinned against than sinning. They did not defile the girl. ...Why should the boys, misled by her, be sacrificed? What sound public policy can be subserved by branding them as felons? Might it not be wise to ingraft an exception in the statute? But that is a question solely for the lawmakers; courts must construe the statute as they find it.”⁵²

The law has made adequate provision for the more dangerous offenders. Rapists who commit murder go to the chair upon being caught and convicted. Those who violate women by brute force are subject to long terms of imprisonment and usually get them. In the consent cases, particularly where the girl is very close to the legal age of consent, the law bears down too harshly. This is evident from the recent Missouri case of *State v. De Moss*?⁵³ De Moss was charged with having had intercourse with Imogene, a girl not

quite 14, on Dec. 12, 1934. He married the girl in March 1935, and thereafter lived with her as his wife. This did not prevent his conviction of statutory rape and his sentence to five years imprisonment. The Appellate Court, however, aware of the absurdity of sentencing a man to a long term of imprisonment for intercourse with a girl who later became his wife, threw out the conviction, ostensibly on the ground that the evidence did not support the verdict. The very fact that the act of having intercourse with a girl under the age fixed by law is called rape, unconsciously prejudices judges and jurymen. The minimum sentences which may be imposed for this offense are frequently very high. These offenders seldom find mitigation through the imposition of probation or the granting of parole. Many judges believe that sex offenders should be treated more harshly than other types of offenders and often refuse probation even in cases where it should be used. Even after these defendants serve sentence, they may have some difficulty in obtaining early release on parole through the prejudice of parole boards against sex offenders. It would seem that there is a strong necessity for reconsidering the law in rape cases.

(1) J. Hall, “Theft, Law and Society,” 37.

(2) *People v. Ashworth* 220 N. Y. App. Div. 498, 222 N.Y. Supp. 24 (1927).

(3) *People v. Pentis*, 362 Ill. 306, 199 N.E. 805 (1935).

(4) J. H. Beale, “The Borderland of Larceny,” 6 *Harvard Law Review* 244-256, 254 (1892-93). *Thorne v. Turck*, N.Y. 90, 46 A.R. 126 (1883). *Rex v. Coleman*, 2 East P.C. 672 (1785).

(5) *Harris v. State*, 81 Ga. 758, 7 S.E. 689, 12 Am. St. R. 355

(1888). *State v. Kosky*, 191 Mo. 7, 90 S.W. 454 (1905).

(6) *People v. Dumar*, 106 N.Y. 502 (1887). Compare *People v. Miller*, 169 N.Y. 339, 88 A.S.R. 546 (1902).

(7) 3&4 W. & M. Ch. 9, Sec. 4, Anne. Ch. 31, Sec. 6, 7 & 8 Geo. IV, c. 29, Sec. 54.

(8) New York Penal Law, Sec. 1308. An excellent discussion of the crime of receiving stolen goods may be found in Hall’s “Theft, Law and Society.”

(9) See for examples *Cool v. Commonwealth*, 94 Va. 799, 26 S.E. 411 (1896). *State v. Wilson and Downing*, 47 N.H. 101 (1866). *People v. Richards*, 108 N.Y. 137, 15 N.E. 371, 2 Am. St. R. 373 (1888).

(10) Compare *Commonwealth v. Strupney* 105 Mass. 588, 7 A. R. (1870). *Rose v. Commonwealth*, 40 S.W. 245, 19 Ky. 272 (1897) and *State v. Lapoint*, 87 Vt. 115, 88 Atl. 523, 47 L.R.A. (ns.) 717 (1913). *Claibome v. State*, 83 S.W. 352, 113 Tenn. 261, 106 Am. St. Rep. 833 (1904).

(11) 12 Anne, Chap. 7, Sec. 3.

(12) *White v. State*, 51 Ga. 285 (1874). *State v. MacPherson*, 70 N.C. 239, 16 A. R. 769 (1874).

(13) *State v. Ward*, 43 Conn. 489, 21 Am. R. 665 (1876). *State v. Bee*, 29 S.C. 81, 6 S.E. 911 (1888). *Lawson v. Commonwealth*, 160 Ky. 180, 169 S.W. 587, L.R.A. (1915), D. 972 (1914).

(14) Sir William Blackstone, op. cit., Book IV, 220.

(15) General Laws of Mass. Ch. 266 Sec. 4.

(16) *Ibid.*, Sec. 5. (17) *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

(18) *Jones v. State*, 29 Ga. 594, 607 (1860).

(19) *Mayes v. People*, 106 Ill. 306, 307, 46 A. R. 698 (1883).

(20) *Comm. v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1925).

(21) *Comm. v. Dillard*, 313 Pa. 420, 169 Atl. 138 (1933).

(22) *Stovall v. State*, 106 Ga. 443, 32 S.E. 586 (1899).

- (23) *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897).
- (24) *Holmes v. State*, 88 Ala. 26, 7 S. 193, 16 Am. St. R. 17 (1890).
- (25) *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932).
- (26) *State v. Meadows*, 330 Mo. 1020, 51 S.W. (2nd), 1033 (1932).
- (27) *Comm. v. Lessner*, 274 Pa. 108, 118 Atl. 24 (1922).
- (28) *State v. Leeper*, 70 Iowa 748, 30 N.W. 501 (1886).
- (29) R. Perkins, "Malice Aforethought," 43 *Yale Law Journal*
- (30) *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).
- (31) *Lander v. State*, 12 Tex. 462 (1854).
- (32) *People v. Weeks*, 104 Cal. App. 708, 712, 286 Pac. 514 (1930).
- (33) *Comm. v. Szachewicz*, 303 Pa. St. 410 (1931), 154 Atl. 483 *Comm. v. Nafux*, *ibid.* 418.
- (34) Benjamin N. Cardozo, "What Medicine Can Do for Law," *Bulletin of the New York Academy of Medicine* (2nd ser.), No. 7, 597.
- (35) *Comm. v. Drum*, 58 Pa. 9, 17 (1868).
- (36) So long as the means were of such a nature as to excite the passions of the mass of men and so as to enthrall their reason. *State v. Grugin*, 147 Mo. 39, 42 L.R.A. 774, 47 S.W. 1058 (1898).
- (37) *Comm. v. Paese*, 220 Pa. 371, 59 Atl. 891, 17 L.R.A. (N.S.), 795 (1908).
- (38) *Reese v. State*, 90 Ala. 614 8 So. 818 (1890).
- (39) *Comm. v. Carey*, 66 Mass. 246 (1853). *Rafferty v. People*, 69 Ill. Ill, 18 A.R. 601 (1873).
- (40) Art. 290 Dutch Code, 217 German Code, 578 Italian Code (1931).
- (41) Art. 216 German Code, 579 Italian Code, 235 Norwegian Code.
- (42) Art. 236 Norwegian Code, 580 Italian Code.
- (43) *Garza v. State*, 94 S.W. (2nd) 439; Tex. (1936).
- (44) Compare *Blackburn v. State*, and *Comstock V. State*, 14 Neb. 205, 15 N.W. 355 (1883).
- (45) *Comm. v. Burke*, 105 Mass. 376, 7 AR. 531 (1870).
- (46) *State v. Burgdorf*, 53 Mo. 65 (1873).
- (47) *People v. Carey*, 223 N.Y. 519, 119 N.E. 82 (1918).
- (48) *Zinn v. State*, 135 Ark. 342, 351, 205 S.W. 704 (1918).
- (49) *People v. Cook*, 52 Pac. (2nd) 538; 10 Cal. App. (2nd) 511, 514 (1935).
- (50) *People v. Griffin*, 117 Cal. 583, 49 Pac. 711, 59 Am. St. R. 216. (1897). *State v. Dombrowski*, 145 Minn. 278, 176 N.W. 985 (1920).
- (51) *People v. Gibson*, 232 N.Y. 458, 461: 134 N.E. (1922).
- (52) *State v. Snow*, 252 S.W. 629 (1923).
- (53) *State v. De Moss*, 92 S.W. (2nd) 112 (1936).



Part III.

*The Enforcement
of the Criminal Law*

Administrative Agencies

Statistics on Law Enforcement

The combined efforts of many different officials and agencies are necessary to bring criminal prosecutions to a successful conclusion. Police officers, magistrates, medical examiners or coroners, prosecutors, grand juries, trial court judges, petty juries, may all be called upon at some stage in a criminal prosecution. It has been apparent for a long time in America, that the sum total of the efforts of these agencies is far from satisfactory. The police clear up too few cases and arrest too few suspects. "The percentage of arrests is in many instances exceedingly low," states the New York Crime Commission. "Recent figures show that the arrests made for burglary in Rochester are only 12 per cent of the total burglaries officially reported by the police. In New York the ratio is 14 per cent; in Schenectady, 17 per cent, and in Syracuse, 7 per cent. Similarly, arrests in Rochester for robbery represent about 30 per cent of the reported rob-

bery cases; in Schenectady 10 per cent and in Buffalo slightly less than 3 per cent."¹ Similar data is reported from Missouri. The statistical conclusions reached by this survey have shown that for the year from October 1, 1923, to October 1, there were approximately 13,000 serious major crimes reported to the police of St. Louis. Of these 13,000 offenses, only 964 resulted in criminal prosecutions In Kansas City for the same year . . . of 5,261 offenses reported to the police, there were 276 prosecutions."²

One of the most startling facts developed by the crime surveys of the last fifteen years is the relatively small number of convictions obtained in relation to prosecutions begun. Cases end much less frequently in convictions than in dispositions which involve the release of the accused, such as dismissals at the preliminary hearing, or at the hands of the prosecutor, the failure of the grand jury to find indictments, or acquittal in the trial courts. In New York City in 1926

out of 8,144 felony cases entering the court of preliminary hearing, 3,065 resulted in convictions of some offense, felony or misdemeanor, but only 881 resulted in conviction for felony, of which 330 were for the offense charged. Expressed in percentages, 37.7 per cent of the cases resulted in convictions of some sort, but only 4 per cent resulted in convictions for the offense charged. Of 13,117 felony cases instituted in Chicago and Cook County in '926, convictions of any type were secured in only 19.8 per cent and for the offense originally charged in only 4.9 per cent. The figures for Cincinnati show that in 1,445 cases 744 convictions of felonies and misdemeanors or 51.6 per cent were secured, of which 247 were for the offense charged or 17.2 per cent. Presumably before the prosecution was instituted there was some sort of investigation made either by the police or by the prosecuting officials. There must therefore be something wrong, as Mr. Bettmann points

out, with an administration of criminal justice which for every hundred prosecutions which it begins obtains a conviction for the offense charged in only four or five as in New York or Chicago, or even seventeen as in Cincinnati.³

An analysis of the organization, powers, duties and actual functioning of the various agencies involved in the criminal process should throw some light on the fundamental reasons for achieving such poor results in view of the large amount of effort expended. It will be seen that the inefficiency in the administration of criminal justice, of which there has long been justifiable complaint, is not owing to one cause or the malfunctioning of one agency but is the cumulative result of many different causes and the inadequacy of many different agencies.

I. MUNICIPAL POLICE ADMINISTRATION

1. Police Functions

Intelligent and conscientious police work is of peculiar importance in the enforcement of the criminal law. The police, who are the first line of defense against crime, have two fundamental duties. The first is to prevent crime; the second, to apprehend offenders after crimes have been committed, through the processes of criminal investigation. Since the police are the first to come into contact with crime, their action necessarily conditions the work of other agencies of law enforcement. Unless offenders are arrested, and evidence of their guilt is gathered, there will be little for courts and prosecutors to do. "Certain it is," states the Chicago Citizens' Committee, "that if protective patrols are not maintained, many crimes will be committed without fear of immediate police interference; that if criminal investigations are lax, rela-

tively few apprehensions will be made; and that if apprehensions are not made, the balance of the criminal-justice machine will never be put in motion."⁴

While the enforcement of the criminal laws and municipal ordinances is the primary police task, this is by no means the whole of the police function. In contrast to England where police departments have been set up for the single purpose of maintaining law and order, our police departments have been used as a catch-all for a wide variety of miscellaneous functions which could not be assigned easily to some other branch of the municipal government, and which have only a remote connection with the enforcement of the criminal law. Traffic regulation, the licensing of public hacks and drivers, pawnbrokers, secondhand shops and junk dealers, pool rooms, dance halls, public exhibitions, Sabbath entertainments, parades, private watchmen, private detectives, railroad police and street vendors; the conduct of a public ambulance service; the supervision of paroled convicts; the registration of voters and verification of poll lists, the enumeration of inhabitants; the examination of prostitutes for venereal diseases; ice breaking in navigable waters; the provision of temporary lodging for the homeless and emergency relief for the destitute; management of free employment agencies; the running of neighborhood entertainments and dog pounds are among the functions which are entrusted to the police. The performance of some of these functions is quite beyond police capacity, and others are so burdensome "as to divert the attention both of police administrators and the rank and file away from the fundamental business of protecting life and property."⁵

Competent observers have sometimes criticized American

police systems as being unfitted either in organization or personnel to carry out the wide variety of functions entrusted to them. "The police department," states Vollmer, "is the most wasteful and inefficient branch of our government, and very little thought has been given to the subject of improving it."⁶ Fosdick writes in a similar vein. "The American police department shows its greatest weakness [in respect to its adaptability for the work it is required to do]. As the community's instrument for the protection of life and property, it seems primitive and crude. It has developed without plan or design, its purposes never accurately determined, often vaguely conceived. It has seldom been modeled from the point of view of what it was intended to accomplish."⁷

2. Police Organization.

Municipal departments are rarely organized on any satisfactory territorial basis. Our police organization dates from the horse and buggy days, when cities and towns were scarce and more or less isolated from each other. Each city and town established its own police department to take care of the criminality within its borders, which was essentially local in character. During the last century there has been a tremendous urban development. Existing cities have undergone an enormous expansion. Satellite communities have been established around each large city. Trolleys, buses, subways, railroads, private automobiles, make transportation between the different parts of such urban areas a matter of minutes, and make municipal boundaries meaningless lines on a surveyor's map. Criminals move as freely through the various cities and towns comprising such areas as the law-abiding population.

If the police departments were adequately organized, account would be taken of the changes in police needs wrought by urbanization and the development of means of transportation and communication. But the patterns which were suited to the semi-rural conditions of an earlier day have continued to be employed; each city and town in an urban area has a separate police department. In the metropolitan area around Boston, there are about fifty independent police forces. In and around Chicago there are about three hundred and fifty; around Cincinnati there are one hundred and forty-seven. The jurisdiction of every police department ends with the boundary line of the city or town to which it belongs. This makes impossible an adequate mobilization and apportionment of police facilities throughout the area. One police department may be over-manned, it may have an excess of mechanical equipment, yet neither its excess of manpower nor equipment can be put at the disposal of the city which is insufficiently supplied with either. One city in the area may have an excellent detective bureau, equipped with all the latest techniques for criminal investigation and identification, it may have an excellent training school for police recruits, while other cities and towns will struggle along with poor detective facilities and inadequate methods of police training. A city or town with a poor police department may be the base of operations for criminal gangs working in other parts of a metropolitan district, yet there is little that other departments can do to compel it to maintain adequate standards of police efficiency and clean up the criminal situation in the city. To some extent the handicaps of numerous independent forces in one urban area are being overcome by voluntary cooperation between po-

lice departments. Yet the basic difficulties of limited jurisdiction, of inadequate utilization of police facilities in terms of needs, and the varying levels of efficiency maintained by each department cannot be overcome by mere voluntary agreements.

3. Head of Police Department

American cities have failed to provide satisfactory methods of administrative leadership and direction of police forces. For example, some police departments, particularly in the smaller cities, are managed by committees of the City Council. Some are run by independent administrative boards either in the form of bipartisan, nonpartisan, or unipartisan boards varying widely in size, source of appointment and functions. In cities having the commission form of government, the direction of the police force is divided between the technical head of the force, the Chief of Police, and the elective Commissioner, generally known as the Commissioner of Public Safety. The present trend in police departments is for single-headed control by a chief appointed by the mayor or the city manager of the city.

Committee and board control have almost universally failed as methods of achieving satisfactory direction of police departments. Success with these forms of control has only been had in the small cities where the burden of police management is not too heavy. "Wherever the police department is of sufficient size to constitute a real administrative problem requiring continuous attention, the police board has proved to be so unwieldy that a vigorous and consistent policy is exceedingly difficult to secure," states the New York Crime Commission. "In many instances it is little more than an ingenious device for the equitable division of patronage. There have been in-

stances, both in this state and elsewhere, in which the police board has been deadlocked for months at a time, and thereby incapacitated for performing any but the most routine of its functions. Of all the methods employed for police control, the administrative board has proved least successful."⁸

The division of control between the Chief of Police and the Commissioner of Public Safety, in commission government cities, has also proved to be a highly unsatisfactory method of running police departments. It is expected in such cities, that the Commissioner will leave the technical details of police management to the police chief, and that he will be content with formulating general policies and maintaining a general supervision over the work of the department. But this division of function is more easily realized in theory than in practice. Generally, commissioners attempt to run police departments as well as to formulate their policies. The result is frequently conflict between the chief of police on the one hand and the commissioner on the other. The commissioner can usually gain the upper hand in this dispute because of his superior administrative and political position, but this does not satisfactorily resolve the difficulties of police management. Commissioners of Public Safety are generally laymen with no special knowledge of police problems. They are usually elected for short terms and there is a high degree of turnover in these officials. Thus police departments of commission cities are subjected to the twin evils of amateur and transient direction.

The present trend in the direction of police departments is toward single-headed leadership under a chief of police appointed by the mayor or chief executive of the city. The principal virtue of this method of control is that it

centralizes responsibility. The public knows whom to hold to account for failures in the work of the police department. In and of itself, however, this method of control cannot achieve satisfactory results unless a competent chief of police is appointed in the first instance. The mayor of a city is not always at fault for making a poor appointment. His field of choice is unduly restricted by traditions of home rule and legal requirements as to residence. He cannot import an official who has demonstrated his competence in some other city or town. The choice of a chief of police from within the ranks of the municipal police department may be limited to men who had little education when they entered the police department and who learned little while on the force. To escape from the necessity of appointing a glorified "pavement pounder" as head of the police department, the mayor may choose a civilian for his chief. Unfortunately, few laymen are equipped by their past education and experience to run police departments. In general, they do not have the technical grasp of police problems nor the ability to lead and inspire men or to deal with the general public which is necessary for the successful direction of a police department. Mayors, in the past, have not been well aware of the need for special qualifications in their chiefs of police. The classic example is that of the Indianapolis mayor who appointed his tailor as chief of police on the ground that "he knows how to make good clothes, he ought to make a good chief."

If a man of sufficient native ability, intelligence and adaptability is chosen to head a police department, he can, in time, master the details of his job and become a good chief of police; but no sooner has a chief of police learned the essentials of his task and begun to prove himself, than

he is apt to be turned out of office. A change in the direction of the police department usually follows the election of a new mayor. There may even be a number of different changes under the same mayor. The larger the department and the more difficult its problems, the greater the turnover in police chiefs is likely to be. New York had five different commissioners between January 1, 1926, and January 1, 1935; Chicago had fourteen commissioners over a period of thirty years. The average tenure of office of police heads in cities of more than 500,000 population is a fraction over two years. In 575 cities of more than 10,000 population, the average term of office for the police chief was reported as 4.28 years.⁹ Adequate direction of police departments is impossible where police chiefs are such birds of passage. Equally serious is the effect of transient direction on police morale. The inevitable shake-up follows every change in the head of the police department. Men who have become familiar with one district are transferred to another. Police morale is undermined when transfers are unjustified, or are made for some sinister purpose.

Lack of security of tenure makes it very difficult for a chief of police to resist the pressure of special groups, demanding illegal or extralegal favors. This is clearly brought out by the following comments in the Portland survey:

"The tenure of the chief is a matter of great importance. No police force, and no other similar body, can maintain a high standard of efficiency if its chief is constantly being changed. Even more important is the fact that one of the worst threats to the efficiency of the police force is outside influence.... Churches, lodges, politicians, business men, business organizations, labor or-

ganizations and other groups and individuals are constantly exerting pressure of one sort or another. The pressure may be only to retain a popular policeman on his present beat. It may be and often is more insidious.... The chief cannot now afford always or often to ignore that pressure and it permeates the force. If he [the mayor] has the power to remove the chief at will, the chief and the entire force are likely, indeed are almost certain, to consider very seriously any request from any source which has or purports to have influence with the mayor's office. The force can only be relieved of the baneful effect of such pressure by relieving the chief from the dangers of political removal."¹⁰

4. Police Rank and File

Recent surveys of police departments indicate that not alone is police leadership ineffective, but that the quality of the rank and file of the department falls far short of the standard necessary for the effective performance of police duties. The Wickersham Report on Police, for example, bluntly asserts that "the great majority of police are not suited either by temperament or education for their position."¹¹ This failure to obtain suitable material for policemen is caused by defective *methods of selection*. Residence requirements hamper the choice of the rank and file as well as that of the chief of police. Age limits are too high, permitting the appointment of men who are too old to become good police officers. In England and Scotland, the maximum age for appointment to the police force is 28. In this country maximum limits prescribed by law vary from 28 to 50. A survey of the Kansas City and St. Joseph, Missouri, police departments points out that the authorities in those cities frequently accepted recruits above the age of 40. "It is inevitable," states the survey,

“that the personnel thus secured should be characterized by an unduly large proportion of the shiftless, the unemployed and the unemployable.”¹²

Tests which have been used to determine the capacity of police candidates have been poorly adapted to this purpose. They do not single out special aptitudes nor select special types of men in the light of department requirements, nor do they guarantee that the department will get men with the intelligence necessary to live up to a reasonably high standard of police work.

“Civil service examinations which were originally designed to improve the service appear to raise the intellectual standard of the force but little,” states Vollmer. “Minneapolis and Los Angeles might as well have picked the first men that applied for positions as to go through the farcical motion of examining the candidates. The men selected by the Civil Service Examiners in those cities show little if any improvement in intellectual qualities over the policemen selected by the political ward captains in Kansas City, where the candidates admittedly possess no other qualifications than loyalty to the party in power.”¹³

Investigations into the character of applicants for positions on the police force have been largely perfunctory, despite the fact that the peculiar temptations in police work make it absolutely necessary to secure men of integrity and strong moral fiber. As a result, some departments have actually appointed applicants with criminal records to the police force.

Partisan political considerations play too great a role in the selection of policemen. This is inevitable where there are no civil service rules as to selection. Positions on the police force, like other municipal jobs, will then be parceled out according to service

to the dominant political organization. Civil service, however, has not altogether done away with political considerations in the choice of policemen. “The police chief of one of the larger cities of the state admits that the civil service commission in his community is used for political purposes and that the best police applicants never lead the eligible list,” states the New York Crime Commission. “In another city the ward leaders control the selection of police recruits and the places are parceled out according to a fixed ration for each ward The plain fact is that both civil service commissions and police administrators are appointed by and subject to the same municipal authority. If the city government is disposed to allow partisan considerations to run riot, that end can be secured about as easily with civil service control as without it. There is nowhere any one formula or statutory clause which will serve to prevent political manipulation.”¹⁴

Much might be obtained even from men who were poorly selected, if they were adequately trained for their tasks, and if they were kept under strict discipline in the performance of their duties, but neither methods of training nor methods of discipline have been altogether satisfactory in most American cities. *Police training* is practically nonexistent in the smaller cities and towns. A police recruit is given a gun and a club, and told to go forth and enforce the law according to his lights. Where police schools do exist, poorly planned curricula and inferior teaching methods are the rule rather than the exception. In Boston, for example, police training consists of three hours per day of classroom work and four hours of student patrol during a single month. Recruits are required to listen to 29 lectures on consecutive days on police rules and regulations, the

Massachusetts General Laws, traffic regulations, motor vehicle laws, liquor laws, the law of arrest, etc. “One need only to glance at the above list,” writes Harrison, “to realize how bewildered the former chauffeurs, clerks and laborers must be, when so many and varied legal discussions are hurled at them in rapid succession. It is not unreasonable to suppose that nine-tenths of it goes in one ear and out of the other.”¹⁵ There is inadequate realization, even in the larger police departments, of the complex nature of the policeman’s task. The recruit is put through the mill of the training school in far too short a period for him to acquire its essentials. Boston, Louisville, Detroit, Chicago and New York allow 30, 50, 60, 70 and 90 days respectively for the training of their policemen. Vienna, which has one of the best continental police forces, takes two years to turn out a policeman.¹⁶

Laxity in discipline is almost inevitable where the head of the force is a bird of passage chosen on the basis of political considerations rather than upon his grasp of police functions and police administration. Such a chief of police does not command the respect of his subordinates, nor will he necessarily obtain from them submission to and obedience to his orders. Where the head of the force seeks to enforce high standards of discipline, he may find that he is hindered rather than helped by the legal provisions regulating discipline. Contrary to the situation which exists in Boston, where responsibility for discipline rests squarely upon the head of the police department, the police officer in most American cities who has been subjected to a major disciplinary measure such as dismissal from the force, has the right to appeal against such an order to the civil service commis-

sion or to the courts. Policemen have been given these guarantees against dismissal because of a desire to prevent administrators from playing politics with the personnel of their departments. Unfortunately, the standards of civilian bodies like Civil Service commissions or courts, who are not at grips with the police problem, are necessarily different from those of heads of police departments. Derelictions in duty which the latter may regard as serious enough to justify dismissal from the force may be looked upon by the former with much more leniency. For example a police chief knows that intoxication while on duty renders a policeman worse than useless. He may, therefore, believe that this offense justifies dismissal from the force. A civil service commission or a court, on the other hand, may take a much more lenient attitude toward drunkenness, and may, therefore, refuse to support the commissioner's action. Thus, the head of a police department may be reluctant to impose any major disciplinary measures, because of his fear that the appellate tribunal will not take the same view of the offense that he does. He can not risk reversal of his disciplinary action, because this will impair his prestige within the department. A police head, therefore, must take as *his* criteria in disciplinary matters, not the standards which he believes should be maintained, but those which he believes the appellate body will support. Guarantees which have been laid down to protect police officials against bad administrators hinder good ones in their attempt to keep policemen up to high standards of efficiency and conduct.

5. Police Patrols

The police department performs its function of preventing crime chiefly through the maintenance of patrols. The latter are

also of great value as an aid to the apprehension criminals. The patrolman is the eyes and ears of the police force. He picks up, in the course of his tour of duty, considerable information which throws light on the activities of actual or potential offenders. Police departments are handicapped in the maintenance of patrols by insufficient manpower. In many cities police departments are woefully undermanned, and depression budgets have not permitted any increases of personnel. The lack of manpower available for patrol is made more acute by the necessity of supplying men for the performance of duties which may have little relation to law enforcement. Inside work at Federal, state, county and municipal offices, special details to public exhibitions, games, the homes of public officials, newspaper offices, streetcar lines, commercial organizations, and the performance of a variety of miscellaneous functions assigned to the police by the city charters, cause a tremendous drain on the number of men available for patrol. "In city after city," comments Bruce Smith, "it is rare indeed that more than one-fourth of the uniformed force is actually available for patrol duty. This means that under the prevailing three-platoon laws, only about one-twelfth of the total force is actually on patrol at any given time. The thin blue line has been stretched to the breaking point."¹⁷ In Buffalo in 1925, out of a grand total of 1,162 police department employees, only about 100 patrolmen were available for patrol duty at a given time. They were responsible for patrolling over 700 miles of streets. The New York Crime Commission stated that this situation was not unusual in other cities of the state. In Chicago, of a total force of 6,712 men, only 750 were available for the daily patrol needs of an urban area of 211 square miles, leaving only

250 men available for each of the three shifts. The committee making the Chicago survey found instances when only one foot patrolman actually stepped out of the station house to begin an eight-hour tour.¹⁸

Police chiefs have generally failed to employ the men available for patrol in the most advantageous way possible for the protection of life and property in their cities. The patrol needs of a city are inevitably influenced by the shifts of population within the city, changes in the character of particular neighborhoods, changes in the volume and types of crime and the methods of criminals. A farsighted police administrator would periodically make adjustments of his patrol arrangements in terms of existing problems. He would attempt to do what a few police chiefs, such as Vollmer, in Berkeley, and Arthur Woods, in New York, have tried to do, namely: to analyze patrol beats in terms of hazards and distances as a basis for revising existing patrol methods. But most police chiefs are content to accept traditional arrangements and methods. The fact that a given number of patrolmen have been used in a given area in the past is sufficient justification for employing the same number in the present, despite the fact that the needs of the area may have changed materially.

6. Detective Bureaus

Most of the criticisms which have been made of police organization and procedure apply with equal or greater force to the organization of detective bureaus and to their methods of pursuing criminal investigations. The personnel of detective bureaus is largely inferior to the nature of the tasks confronting them. Political considerations frequently determine the choice of the detectives, but neither here nor elsewhere in governmental

administration is there any necessary relation between capacity and personal influence. Nor have the civil service commissions evolved wholly satisfactory methods of choosing detectives. "No written examination can fairly test the peculiar qualifications of a successful detective, such as ability to remember faces, developed habits of observation, aptness in securing evidence from witnesses, and above all, a facility in obtaining the pertinent and essential facts of a given situation"¹⁹ Little attempt is made to give to new recruits to the detective bureau a satisfactory training in the techniques of criminal investigation which have been developed by practical policemen and scientists working in the laboratory. Detective work puts a man peculiarly on his own, yet methods of supervision of the work of individual detectives are very lax. A thoroughgoing record of all that was done in the investigation of a case containing the statements of witnesses, the nature of clues followed, etc., would be invaluable to a district attorney who is called upon to prosecute a suspect. Yet detective bureaus in many cities fail to keep adequate records of investigations. Ignorance and incompetence of detectives largely explain why third-degree methods are so extensively used in criminal investigations in this country. Torture of a suspect is an easy means of obtaining evidence which the detective either does not know how to get by other methods, or which he is too lazy to go after.

II. RURAL POLICE ADMINISTRATION

1. The Sheriff

If urban areas are being poorly served by present police arrangements, the rural police problem is even more acute. Traditional rural police agencies, the

sheriffs and constables, have become utterly incapable of dealing with modern problems of crime. The sheriff is an elective county official, chosen for a short term, usually two to four years. He is the chief police officer of the county. All judicial and ministerial officers and all city officials are required to aid him, and the male population is subject to his command, "in the prevention and suppression, not only of violent breaches of the peace, but of all public offenses."²⁰ As the Iowa Code puts it: "It shall be the duty of the sheriff, by himself or deputy, to preserve the peace in his county, to ferret out crime, to apprehend and arrest all criminals, and in so far as it is within his power, to secure evidence of all crimes committed in his county, and present the same to the county attorney and the grand jury; to file informations against all persons who he knows, or has reason to believe, have violated the laws of the state, and to perform all other duties pertaining to the office of sheriff, or enjoined upon him by law."²¹

The sheriff is called upon to perform a wide variety of administrative functions in addition to his police duties. He is required to attend all sessions of the court held in his county either in person or by deputy, to summon prospective jurors, serve the process of the courts, levy its executions, and attachments. He is custodian of the county jail and must feed the inmate; and he may also be custodian of the county court house. He may function as an overseer of highways, as tax collector, as custodian of the county funds and as executioner of the condemned. These activities are as unrelated as they are diverse.

Sheriffs have preferred to concentrate on these administrative duties rather than on law enforcement, because they are much more lucrative. Sheriffs are usually paid by fees for the perform-

mance of their official acts. In any county in which there is considerable civil litigation, these fees may reach large amounts. Sheriffs, likewise, may derive considerable revenue from the care and feeding of prisoners, but there is little income to be obtained from the difficult and even dangerous work of digging up evidence of violations of the law and apprehending offenders. The law-enforcement powers of the sheriff have therefore undergone a process of attrition and decay. In New Jersey, for example, sixteen of the state's twenty-one sheriffs admitted that they did not take seriously their statutory duty to apprehend criminals. One sheriff in a large rural county stated, "In all my experience with the sheriff's office for the last twelve years, the sheriff has never been called upon to apprehend a criminal." A survey in Missouri noted that the average sheriff considers it his general duty to investigate crimes. But unless rather extraordinary circumstances surround the particular offense, he does not act. It is evident that the two-gun sheriff with the shining star on his vest, quick on the draw and ready to shoot it out with desperadoes and cattle rustlers, has passed into oblivion along with the passing of the frontier.

2. Constables

The constable, who is an official of a subdivision of the county, like the town or township, has also permitted his law-enforcement duties to lapse. Like the sheriff, he is generally an elective official chosen for a short term. He is charged with the duty of keeping the peace as well as other functions such as serving process, issuing notices for local elections, collecting taxes, etc. He also is paid in fees and therefore "receives no compensation for doing protective police work, for crime prevention, or for perform-

ing the difficult, dangerous, or unpleasant services which policing often entails.”²³ As a result, constables have almost ceased to function as factors in the enforcement of the criminal law.

3. County Constabulary; Highway Patrols; State Police

To some extent the needs of rural crime control are now being met by new agencies which have been developed in various parts of the country. County constabularies of varying size, and subject to a variety of public authorities, have been established in a number of counties. Highway patrols, charged generally with the enforcement of the motor vehicle laws, have been created in many states. In a number of states these patrols are given general police powers. The most promising police development in recent years, however, has been the establishment of state police forces in eleven states. These forces are not subject to the territorial limitations which hamper municipal and county police. Their jurisdiction extends to the entire state. Their personnel standards have, in general, been higher than those of municipal forces. They are also somewhat less exposed to political attack by ward heelers and local politicians, since they are directed from the state capital. The creation of the *state police*, however, has by no means solved the problem of adequate protection for rural areas, to say nothing of the police problems of the entire state. The state police have simply been superimposed upon existing police agencies, and do not make up for their deficiencies. The forces are too small. As with municipal departments, moreover, the state police have been charged with a wide variety of functions that have nothing to do with police work. State and local police have coordinate authority, and conflicts between them frequently

arise when the former are active on the territory of the latter.

Thus, despite the establishment of state and county police forces, the problem of adjusting police organization and methods to the volume and type of crime to be controlled throughout the state remains as one of the great challenges to American governmental administration.

III. THE CORONER

Few agencies of American government are as grotesque and ineffective as the coroner. Upon this official depends in no small measure the strict enforcement of the criminal law in homicide cases. It is the duty of the coroner to investigate all deaths which are not due to natural causes and in which a question of criminal responsibility may be involved. He must fix the cause of death and determine the responsibility therefor. The investigation includes an inspection of the body, an autopsy when necessary, and an inquest constituting an examination of witnesses before a jury.

For a proper exercise of his functions the coroner requires a mastery of three different techniques and disciplines. The cause of death must be determined from a medical point of view. Such a determination may be made through an inspection without an autopsy, but if it is to be thoroughly done, it must be “by questioning which is as careful and searching as that which a thoroughly trained physician uses in attempting to reach a diagnosis ... and by an inspection which should approach in thoroughness the physical examination which a physician makes of his living patient.”²⁴ But it will be impossible to discover what caused death without an autopsy in many cases. Specialized knowledge of the fields of pathology, bacteriology, toxicology, microchemical

analysis, may then be required for successful diagnosis. The coroner must also be acquainted with the methods of scientific criminal investigation. He must not only determine the causes of death; he must fix the responsibility. This may require a knowledge of fingerprinting, ballistics, dust analysis, photography, the taking of footprints, etc. Finally, the coroner must have all the experience and skill of a good practising attorney or trial judge. At the inquest he presides over a jury and examines witnesses in order to bring out the facts surrounding the death.

But coroners are usually neither trained pathologists, detectives, nor lawyers. They may be undertakers, farmers, barbers, dentists, osteopaths, collection agents, bowling alley managers, or candy-makers. In a few states it is required that coroners be practising physicians, and physicians are frequently chosen for the office, even where this requirement does not exist. The ordinary practising physician however, does not even have the necessary experience and training to make successful autopsies. Nor is he a lawyer or detective. Moreover, there are few well-trained physicians who are making a satisfactory income from their practice who would risk the unpleasantness of the political campaign necessary to secure election to the coroner’s office for the meagre rewards which this office brings. Thus throughout the country in both rural and urban areas, the office is filled by incompetents. A report on the New York City Coroner system, which led to its abolition, stated that of the sixty-five men who had filled this position not one was thoroughly qualified by training or experience for an adequate performance of the duties of his office.²⁵

Because of the incompetence of the coroner’s office, in-

spectations of bodies and autopsies are clumsily and carelessly performed. Coroner's verdicts are ludicrous in their inadequacy. An analysis of 800 coroner's inquisitions made in New York indicated that in 40 per cent of the cases there was a complete lack of evidence to justify the cause of death which was certified. The following are a number of typical verdicts from Cleveland; with the comments of Herman Adler who examined them:

"Indeed, we cannot entirely suppress a sense of the ridiculous," states Mr. Adler, "when we read over the list of causes of death as officially recorded by the coroner of Cuyahoga County for the year 1919.

"The first entry for the year is: No. 22942: 'Could be suicide or murder,' a reassuring statement and one calculated to promote confidence in the guardians of public safety.

"Again a few lines further along we read: No. 22957: Auto accident or assault.' Certainly this expresses a doubt which the public would be interested to have resolved further. No. 23178: 'Aunt said she complained of pneumonia looked like narcotism.' No. 23035: 'Could be assault or diabetes.' No. 23187: Diabetes, tuberculosis, or nervous digestion.' No. 23512: 'Could be diabetes or poison.' No. 23241: 'Looks suspicious of strychnine poisoning,' and this suspicion must forever poison the mind of anyone who turns the pages of the coroner's record because the county of Cuyahoga did not believe it important to know whether this was a case of homicide, suicide, or an accident."²⁶

Since the office is elective and therefore political, pressure can be brought to bear on the coroner to turn business over to favored undertakers, and these use their influence to prevent autopsies from being performed, be-

cause they interfere with embalming processes, however much they may assist in the determination of the cause of death. In Chicago, a recent coroner opposed the making of autopsies, because of the contributions which were made to his campaign fund by undertakers.

There is frequently rivalry between the police, prosecutor and coroner for newspaper publicity in any sensational case. There may therefore be very little cooperation between the police, prosecutor and coroner. Experienced prosecutors feel that the coroner's inquest hinders the administration of justice in homicide cases. They therefore make their own investigations, as though the coroner did not exist. "The coroner does nothing which must not be done over again," comments one prosecutor. "No reliance can be placed upon anything he has done, nor can he be trusted to do anything right. Every case in which there may be criminal responsibility must be watched. The body of the deceased is barely cold before the experienced prosecutor begins to guard against the probable mistakes of the coroner."²⁷

No state has as yet provided an adequate substitute for the coroner system. In some states the functions of the coroner have been transferred to the justice of the peace or some inferior court judge, but this merely perpetuates the lay coroner under another name, and all the inadequacies of the coroner system are still present. This was forcibly pointed out by a prosecutor in a New York County. "Our justices, acting as coroners, are just about as useful as a vermiform appendix, and we ought to have an operation cutting them out of the body politic. They don't know anything about medicine, so rely upon their family physicians for medico-legal advice. Furthermore, they don't know anything

about evidence, so often destroy evidence of crime by their bungling.... The police and prosecutor are often helpless to prevent such errors because the acting coroner has full statutory authority, and doesn't hesitate to use it."²⁸

In two states and in two New York counties, the office of the coroner has been abolished and its duties conferred upon the prosecutor. This eliminates the conflicts between the prosecutor and the coroner which have been noted above. It centralizes authority for the investigation of the homicide, but it still leaves unsolved the problem of furnishing the prosecutor with the expert assistance necessary to determine the cause of death.

In a number of states, and in New York City, the office of the coroner has been supplanted by a medical-examiner system. Under this system, the medical examiner has the single function of determining what caused death from a medical point of view. The judicial and investigational functions of the coroner are transferred to police, prosecutor and judges. When highly trained medico-legal experts are made medical examiners, as in New York City, and in Suffolk County, Massachusetts, the medical-examiner system is the solution of the problem of determining the causes of unnatural deaths. But when the ordinary practising physician is made medical examiner, as is the case throughout most of the states which use this official, it represents little advance upon the coroner system. There is again a failure to recognize that investigation into the causes of death requires the application of a number of highly specialized techniques which are completely beyond the capacities of the ordinary physician. Moreover, in establishing the medical-examiner system along county lines the states make the same mis-

take as in the case of the coroner. None except the larger counties can afford to engage the experts, and supply the facilities necessary for the medico-legal work of determining the causes of death. This is quite beyond the resources of rural counties even if the personnel could be found.

A departure from the traditional approach on county or local lines is necessary if a state is to obtain adequate investigation of cases of suspected homicide. A state ought to establish a number of adequately staffed and fully equipped medico-legal centres to which all dead bodies should be sent and in which all autopsies should be made as a matter of routine. Only by so doing will it be possible to make a permanent improvement in the enforcement of the law in homicide cases. In Europe, such a system exists in the form of medico-legal institutes which have been established in connection with most of the university faculties of medicine. These institutes are used by the police and prosecutorial authorities of the various countries to make inspections and autopsies in all cases of suspected deaths. They bring to the investigations of these deaths all the resources of modern science and all the resources of the medical faculty. They make it possible for European police officials and prosecutors to proceed on the basis of scientific knowledge of the causes of death rather than the patent ignorance of coroners' verdicts, as in this country.

IV. THE PUBLIC PROSECUTOR

After a comprehensive survey of law enforcement in the state, the Missouri Crime Survey concluded that "the public prosecutor has more power and discretion in the processes of law enforcement than ... any other official." The Survey went on to

say, "A prosecutor who is lacking in ability, diligence and energy or who, for political or other reasons, may be inclined to temporize with the lawless elements or yield to the pressure of special favors can do more to break down the whole machinery of criminal law administration than probably all the other agencies together."²⁹

The tremendous power of the prosecutor has developed largely out of the practical operations of the prosecutor's office. Its statutory basis is exceedingly vague. There are large numbers of laws on the books in every state which give the prosecuting attorney the right to initiate and prosecute specific offenses. But all these particular provisions are included under a general provision such as that of Illinois:

"The duty of each state's attorney shall be to . . . commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned."³⁰

Nowhere in the laws is there to be found a specific enumeration of the elements which a prosecutor must find in any specific complaint or in any violation of the law which comes to his notice before he takes action. This gives the prosecutor a tremendous discretion as to the cases in which he will use his official powers of prosecuting individuals charged with crime. Every day, hundreds of complaints of crime pour into prosecutors' offices. The shopkeeper who has received a bad check, the woman whose daughter has been seduced, the wife who has been deserted, the employer whose bookkeeper has run off with his money, all come to the prosecutor's office to demand vengeance. Laymen, however, do not make fine distinctions between the civil and criminal law.

So long as they have been aggrieved, they feel that the prosecutor is the proper official to redress their grievances. The prosecutor is, therefore, deluged with complaints as to civil breaches of the law as well as crimes.

It is the duty of the prosecutor to sift out these complaints. Where only a civil breach of the law is alleged, complainants will be advised to employ a private attorney. Where a crime is clearly indicated by the complaint, the prosecutor may, if there is insufficient evidence as to the guilt of the accused, refuse to proceed further unless the complainant can produce such evidence. On the other hand, he may reserve the case for further investigation by his office. In many cases, even though sufficient evidence of crime is present, the prosecutor may decide not to institute criminal proceedings. The prosecutor may have a perfectly valid reason for taking this course. He may not, for example, wish to put the county to the expense of extraditing an offender who is out of the jurisdiction. On the other hand, as we shall see presently, much of the criticism of the prosecutor's office results from the fact that improper motives frequently dictate the decision not to prosecute.

Whatever action the prosecutor takes is fraught with serious consequences for the accused, his victim and the social security. Yet the decision to prosecute or not to prosecute rests largely in his discretion. Even where prosecutions are begun by agencies other than the prosecutor, he still has an almost unlimited control as to whether they will come to trial. A private individual or police officer may have an accused brought before a magistrate or justice of the peace on a complaint that a crime has been committed. The accused may be held for action by the grand jury. The

latter body may indict the accused. But the prosecutor can prevent the indictment from being brought to trial through the exercise of his power of *nolle prosequi*. "He [the District Attorney] has absolute control over criminal prosecutions and can dismiss or refuse to prosecute any of them at his discretion," writes one Court.³¹ Many states have attempted to abolish this power of the prosecuting attorney to dismiss prosecutions at his discretion. They require the prosecutor to obtain the consent of the trial court for such dismissals, but these checks on the prosecutor's discretion have worked very poorly in practice. Courts are too dependent upon the prosecuting attorney for information concerning cases, and the decision as to which cases will come to trial still rests fundamentally with him.

A prosecutor must have adequate evidence before he can bring any criminal proceeding to trial. If such evidence is not furnished by the complainant or by the police, the prosecutor must go out and get it. Many laws, moreover, particularly those dealing with vice, gambling and liquor, require the prosecutor to unearth evidence of violations and not merely wait until other agencies do so. In other words the prosecutor is expected to be a detective as well as a lawyer. But again these powers of criminal investigation are nowhere clearly defined. How much the prosecutor shall do himself; how much he shall leave to the police, the sheriff's office, or other agencies, rests largely within his discretion. In urban centers, an efficient prosecution of crime will require that he engage in criminal investigation on an extensive basis. The special prosecutor, Thomas E. Dewey, appointed by Governor Lehman in New York to prosecute cases of organized crime and racketeering, could not wait in his

office for complainants or the police to furnish him with evidence of violations of the law before taking action. This had apparently been the policy of the regular district attorney whom Mr. Dewey superseded. The result was that racketeering and organized crime were rampant and unchecked in New York. It was absolutely essential that Dewey organize an investigating staff as well as a prosecutorial staff to unearth the evidence of violations of the law as a basis for action by his office. Because of the thorough character of the investigations made by his staff, Mr. Dewey has been able to secure the conviction of many dangerous professional criminals who had previously acted without fear of the law.

After evidence of violation of the law has been gathered it must be sifted, analyzed, and prepared for presentation to the trial court. Success at the trial is in large measure dependent upon the care with which these functions have been performed. At the trial, the prosecuting attorney acts as the advocate for the state. He brings out the evidence on behalf of the state, examines witnesses and makes his plea to the court or jury.

The prosecutor's power over criminal cases does not stop when they are finally disposed of in court. In many states the Governor or the Parole Board is required to obtain the opinion of the prosecutor when a prisoner is considered for a pardon or a parole.

It is evident from this summary review of the prosecutor's powers and duties that the position is one of vast responsibility and of tremendous importance for law enforcement. As has been stated by the Massachusetts Supreme Judicial Court:

"The powers of a district attorney under our laws are very

extensive. They affect to a high degree the liberty of the individual, the good order of society, and the safety of the community. His natural influence with the grand jury, and the confidence commonly reposed in his recommendations by judges, afford to the unscrupulous, the weak or the wicked incumbent of the office vast opportunity to oppress the innocent and to shield the guilty, to trouble his enemies and to protect his friends, and to make the interest of the public subservient to his personal desires, his individual ambitions and his private advantage. The authority vested in him by law to refuse on his own judgment alone to prosecute a complaint or indictment enables him to end any criminal proceeding without appeal and without the approval of another official. Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order. Profound learning and unusual intellectual acumen, although eminently desirable, are less essential. A district attorney cannot treat that office as his selfish affair. It is a public trust. The office is not private property, but is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare."³²

Despite the powers and responsibilities of the office, there is no departure from the usual governmental patterns in the organization of prosecutor's offices and in the selection of personnel. He is a local officer with a limited territorial jurisdiction. In over half the states the prosecutor is a county official. In a number of states, however, the prosecutor is not chosen by counties, but by judicial districts or circuits. In seven states, in addition to the

district or circuit attorney, there is a prosecuting officer in every county. The district attorney usually acts in the courts of general jurisdiction, whereas the county prosecutor acts in the municipal or county courts which have only a limited criminal jurisdiction.

In all but five states popular election is the method of choosing the prosecutor. In New Jersey and Florida, he is appointed by the Governor with the advice and consent of the Senate. In Delaware the prosecutor is appointed by the Attorney-General, and in Connecticut, by the judges of the various courts.

In general, the term of office of the prosecutor is a short one. It is only two years in twenty states, and four years in twenty others. In New York the term is three years, it is five years in New Jersey, six years in Louisiana, and eight years in Tennessee.³³

In rural counties, it is the practice of young lawyers, recently out of law school, to run for the office of prosecuting attorney. The fixed, though small, salary, the advertising which this office brings, and its promise of legal experience are attractive to the young practitioner. In Missouri the median age of prosecutors was from 21 to 29 years. A large majority of them had less than ten years' experience as lawyers before becoming prosecuting attorneys for the state. In Indiana, a judge stated that most of the prosecuting attorneys of the state were young and inexperienced men, although the defendant was usually able to obtain the best legal talent available. These young men do not remain in office very long. In Missouri about half of the prosecutors served but one term of two years. Most of the rest only served four years. Six years of continuous service was very rare.

A rural prosecutor is usually handicapped by the lack of facilities to perform his functions ad-

equately. He has insufficient library equipment. On his shelves, textbooks, treatises, digests, law reviews and reports from other states are conspicuous by their absence. A set of local reports, a form book and a statute book may be the sum total of his reference volumes. The rural prosecutor has insufficient or no clerical help. Seventy out of the eighty-six Missouri prosecutors stated that their counties authorized no clerical assistants. The rural prosecutor is neither trained in criminal investigation nor has he detectives at his command that he may use for this purpose. He must either rely upon the existing inadequate rural facilities to dig up evidence or must obtain it himself, as best he can. Nor can the rural prosecutor devote all his time to law enforcement. Most of the time spent in his office is taken up with complaints of private citizens which deal with civil breaches of the law. The prosecutor is legal advisor to a variety of county agencies he must represent the county in its civil suits. Suits for tax money have in recent years put a heavy burden upon him. Prosecutors usually do not drop their private practice on being elected to office. The small salary and the short term make it inadvisable to do so. But the practice of law cuts even further into the amount of time which a prosecutor has available for the fundamental duties of law enforcement. Moreover, it may result in conflict between private obligation and official duties, when an actual or potential lawbreaker hires the prosecutor or his partner to represent him.

The prosecutor's offices in large urban centers are much better equipped for the performance of their duties. Library facilities are adequate, clerical, legal and investigational assistance is provided for, the prosecutor is usually a mature experienced practitioner. The chief handicap of

urban prosecution is the political nature of the office. The office is a great political prize and political machines make a vigorous effort to capture it and elect their candidate. The connection between organized crime and corrupt political machines is of long standing in this country. In return for money payments, or for services at the polls on election day, the political leaders come under obligation to the gangster and the criminal. It is vital to this combination that control be had of the prosecutor's office. This control makes it possible to guarantee an immunity from molestation for criminal enterprises. Thus, only a member of the political machine will be permitted to run for prosecutor in the first instance. While in office he will be expected to listen to the demands of his political superiors. The prosecutor's office in this country is not an end in itself. It has been, for example, one of the principal ways of reaching the governorship. A prosecutor must therefore play the party's game unless he wishes to commit political suicide, but playing the party's game involves sanctioning its unholy alliance with the criminals operating in the community.

Control of the prosecutor's office is sought by political machines in urban communities because this office carries with it considerable patronage. As soon as a new prosecutor is elected, a completely new staff of assistants whose choice is dictated by the party hierarchy is put into office. Thus the advantage of whatever experience and competence the former members of the staff may have had is lost.

A prosecutor can let politics season justice, or he can run his office in an inadequate and ineffective manner because he is an independent local official and is practically free from any central supervision. The Attorney-General is the chief legal officer in the state, but he rarely exercises' any

very effective supervision over the local prosecutor's office, despite provisions of law in many states which give him supervisory powers, the right to require reports and a concurrent jurisdiction over criminal prosecutions. Prosecutors are elective officials responsible to the citizens of their communities. They hold their title by as good a right as the Attorney-General. They are frequently powerful political figures and interference with their office may bring political retaliation upon the Attorney-General, himself desirous of continuing in office or of being a candidate for a better one. Short of misconduct amounting to a crime, or of gross misfeasance in office or abuse of authority, it is rare that the central state authority will step in and interfere with the functioning of the local prosecutor's office. The ballot is the chief check against the abuse of the prosecutor's power, but this is a poor substitute for routine supervision. The public is too apt to judge the effectiveness of a prosecutor's work by what he does in some sensational case. It knows very little of what the prosecutor does with the hundreds of larcenies, embezzlements, burglaries, robberies, forgeries, etc., which never break into the newspapers. It hears very little of the bargains which the prosecutor makes in accepting pleas of guilty or of the large number of cases in which he refuses to take action on complaints made to him.

The deficiencies of organization of the prosecutor's office, the lack of centralized supervision, the failure to recruit and retain competent talent, the lack of facilities for the performance of the manifold duties with which it is charged, the political nature of the office, are the basic reasons for the inefficiency in the prosecution of crime in this country. Large numbers of prosecutions

are dismissed with little careful consideration of the facts. "Practically every one of the surveys," writes Bettman, "discloses the haphazardness and carelessness of the prosecutor's dispositions, and practically every one of them arrives at the recommendation of greater formalities and more careful procedural steps."³⁴ In the Illinois Crime Survey, Mr. Healy adds, "In spite of every evidence in the law that the *nolle prosequi* is legally intended to be exercised only in unusual cases, it is in fact used with the utmost freedom." This criticism is reiterated in the Missouri, Cleveland and Georgia surveys of criminal justice. It is not always apparent on the face of the court record that the prosecutor has adequate reason for his action. Because of the careless and haphazard way in which the prosecutor's discretion is used in the initiation and dismissal of criminal prosecutions, "it is a mode of disposing of criminal causes without trial and without review on grounds nowhere recorded and quite unascertainable."³⁵

The prosecutor is no more efficient in the preparation of cases and their presentation to the trial court. "The prosecuting attorneys of Missouri are in the main unable to prepare the state's case with anything like the thoroughness that the average civil case is prepared," writes the Missouri Crime Survey.³⁶ A similar complaint is uttered as to Chicago: "The system now employed in the preparation and trial of cases is also at fault. Assistant state's attorneys are commonly assigned to a single court room and take charge of all cases called in that room. Thus it frequently happens that cases are tried by attorneys who are utterly unacquainted with the evidence which they are to present and who have had no opportunity to confer with witnesses until the day of the trial. The natural result of this prac-

tice is that prosecution is inefficient and unnecessary errors are committed."³⁷ The prosecuting attorney in Cleveland, "pits his unpreparedness, with such assistance as he may obtain from the police department, against the carefully prepared case of the defendant's attorney. He takes the proof in the way it has been prepared by the police or the municipal prosecutor, making the best of what he gets, or, in more serious cases, attempting to remedy the defects or omissions. An unusually sensational case sometimes affords an exception to this practise, but the exceptions are few."³⁸

Nor is the fact that the prosecuting attorney obtains large numbers of convictions through pleas of guilty any guarantee that he is effectively enforcing the law. The plea of guilty is not made by individuals who realize that their case is hopeless and who therefore throw themselves on the mercy of the court, to be dealt with as leniently as possible, consistent with their crime. A dangerous offender who pleads guilty usually makes some arrangement with the prosecuting attorney, which may be satisfactory to him but which may not conduce to efficiency in law enforcement. As the Illinois Crime Survey states:

"When the plea of guilty is found in the records, it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the state's attorney- If the prisoner is charged with a severe crime which for some reason or other he does not care to fight, he frequently makes overtures to the state's attorney that he will plead guilty to a lesser crime than the one charged.... These approaches, particularly in Cook County, are often made through another person called a fixer.... We found many cases in which the plea accepted and the pun-

ishment inflicted seemed trivial in comparison to the magnitude of the crime committed.”³⁹

In a typical case, the defendant had hijacked a truck loaded with silk which was valued at \$27,000 to \$30,000. He was charged with armed robbery and was subject to a penalty of from ten years to life. A plea of guilty was accepted to the offense of petty larceny and the defendant was sentenced to one-year imprisonment, and fined one dollar. When the records of eighty persistent Massachusetts offenders were examined, it was found that they were frequently put on probation even for the second, third and fourth serious offense, instead of receiving prison sentences.⁴⁰ In many cases the probation sentence was undoubtedly the result of a bargain with the district attorney in return for a plea of guilty.

V. COURTS AND JUDGES

The work of enforcing the criminal laws does not depend upon the police and the prosecutors alone. The police may be energetic in obtaining evidence and the prosecutor may do a good job in preparing the case for trial. Unless the courts which try cases are equipped to deal intelligently and impartially with the evidence, and with the accused after conviction, the work of police and prosecutors will largely be set at naught. This is but another illustration of the composite nature of criminal law enforcement. Each agency does only part of the task of prosecution and punishment of the guilty and elimination of the innocent. Satisfactory law enforcement depends upon efficiency at each stage of the criminal process and complete cooperation between agencies.

1. Judicial Organization

The states differ considerably in the details of their judicial organization and any exact analysis of state courts, their jurisdiction, functions and relation to each other, must be made in terms of the law of the particular state. There are, however, fundamental patterns in the organization of the criminal courts which are common to all the states. Every state makes some attempt to distinguish between courts of inferior criminal jurisdiction and courts of general criminal jurisdiction. The inferior criminal courts are known by a variety of names, such as, justice of the peace courts, police courts, magistrates' courts, recorders' courts, mayors' courts, city courts and municipal courts. They are not usually set up exclusively for the disposition of criminal cases, but have a limited jurisdiction over civil matters. In criminal cases, these courts have the power to try without a jury the large mass of petty offenses, misdemeanors and violations of local ordinances, which make up the bulk of criminal law violations in this country. In felony cases and in serious offenses which these courts have no jurisdiction to try, they have the power to hold the preliminary examination; that is, to determine whether there is a *prima facie* basis for holding the accused for the grand jury and for trial. The inferior courts also have the power to issue warrants for the arrest of accused persons on complaint made to them of the commission of an offense and to admit defendants brought before them to bail as a condition of their provisional release while awaiting trial.

2. Courts of General Criminal Jurisdiction

Courts of general criminal jurisdiction exist in every state. These courts, like the inferior courts, are not usually set up to deal exclusively with criminal

prosecutions. The same court which functions as a court of original jurisdiction in civil cases, also handles criminal prosecutions. The latter are dealt with in different terms or sessions than civil cases, the same judges disposing of both classes of business. In the larger urban centers, continuous sessions may be necessary to dispose of all the criminal business. The judges of the civil courts may therefore serve in rotation in the criminal division. Separately organized criminal courts of general jurisdiction are maintained in some states, but even in such courts the judges may be drawn from the civil courts. Like the inferior courts, the courts of general criminal jurisdiction have a varied nomenclature. They may be known as Superior Courts, Criminal Courts, Courts of Oyer and Terminer and General Jail Delivery, Quarter Sessions Courts, Circuit Courts and District Courts. There is no agreement among the states as to the exact powers, functions and duties of these courts of general criminal jurisdiction, even where they bear the same name. Such variance may be found within the confines of a single state, but certain duties are usually performed by all these courts. They have the right to summon the Grand Jury to enquire into all crimes and offenses committed within the jurisdiction of their court. They have jurisdiction to try felonies and major offenses, either on the indictment of the Grand Jury or on an information filed by a prosecutor. Defendants are either tried by the judge, sitting alone without a jury, where the state has made provision for the waiver of trial by jury, or the charge against the defendant may be determined by a jury. Courts of general criminal jurisdiction usually have the right to determine the disposition of the charges of minor offenses, on appeal from the inferior criminal

courts. Appeals from courts of general criminal jurisdiction are heard either in the intermediate courts of appeal, where these exist, or by the highest appellate court of the state.

3. Defects of Judicial Organization

Informed observers have agreed for some time that the inferior criminal courts and the courts of general criminal jurisdiction have not been functioning as efficient agencies of law enforcement, owing to deficiencies in the organization, procedure and personnel of the courts. The fundamental defect in court organization is its lack of internal unity. The administration of justice is a state function and not a function of the local communities, but our courts have inherited the tradition of bringing justice to the door of the litigant, which arose before the development of modern methods of transportation and communication, when contacts between local communities were few and travel was slow and costly. The result has been a wide distribution of court facilities organized upon a local basis, a multiplicity of courts of overlapping and conflicting jurisdiction and a failure to work out a rational system of courts planned to meet the judicial needs of the state as a whole.

Courts are manned by judges who are locally elected or who are appointed from among persons resident within the jurisdiction of the court. There is no interrelation between courts of coordinate jurisdiction, and, except for appeals, there is no necessary relation between inferior courts and courts of general jurisdiction. Individual courts tend to operate in watertight compartments. They employ different standards, apply different policies and go their own individual way in the decision of the cases and controversies which come before

them. Thus courts in different parts of a state employ completely different standards in sentencing offenders, making it possible for a defendant charged with the same crime under similar circumstances to be sent to prison for a term of years in one court, put on probation in another court, and fined in a third. The decentralization of courts makes it impossible to utilize effectively the available judicial manpower to cope with judicial business. There are courts in which the load exceeds the man power and others in which the man power exceeds the load. In the first six months of 1935, the five judges of the Ninth District of the Second Department of New York sat for an average of 104 days each while the judges of the Fourth District, Third Department, sat on an average of 53 days each. The judges of the Ninth District, therefore, had about twice as much work to do as the judges of the Fourth District. Unless special provision is made by statute, there is no way in which judges of a quiet court can be brought to assist the judges of a busy court.⁴¹ The result is likely to be congested court calendars, delayed justice and hurried and superficial examination of individual cases in urban centers which have a great deal of judicial business.

Internal unity, which is lacking in the state judicial system as a whole, is also lacking in most of the individual courts with numerous judges. No one judge is responsible for the effective functioning of the court as a whole. Most courts have no executive chief justices charged with such duties as the effective utilization of the manpower of the court, the preparation of court calendars, the maintenance of uniform policies and the discipline of individual judges. Every judge is a law unto himself. The abuses resulting from the situation are clearly

pointed out by the New Jersey Judicial Council; it calls attention to the fact that New Jersey's Common Pleas Court has no administrative head:

"Each of the judges has equal power with the others. The general rule is that each judge carries on a separate and independent court and each judge does from time to time some of all the different kinds of work the court has jurisdiction to do. It is impossible that different judges should take precisely the same view in the matter of sentences in the criminal courts . . . or in the numerous miscellaneous matters which come before the Court. In consequence, we have one measure of justice in one room and another in a nearby room. The system does not tend to equality of justice and efficiency of administration. Under these conditions the lawyers cannot be expected to do otherwise than to jockey and manipulate to bring their clients for sentence before the judge they consider most lenient in general or specially towards the particular crime of which their client may have been guilty. As the business is conducted, he, the defendant's lawyer, can usually accomplish this without difficulty where pleas of guilty or *non vult* are to be interposed."⁴²

These defects of judicial organization have been recognized for many years and have called forth a movement for the unification of state courts. One of the outstanding plans for such unification is that prepared by Roscoe Pound for the American Bar Association in 1909.⁴³ Under this plan, the existing system of independent uncorrelated courts would be supplanted by a single unified tribunal for the entire state. The whole judicial power of the state would be vested in one great Court of which all tribunals would be branches, departments or divisions. There

would be three main branches to this Court: (1) County Courts with exclusive jurisdiction over petty cases, (2) Superior Courts of first instance with a well-defined general, original jurisdiction in law, equity, etc., (3) a single ultimate Court of Appeal. Judges would be judges of the whole Court, assigned to some branch or division of the Court or to some locality, but eligible to sit in any other branch, division or locality when called upon to do so. General direction, supervision and control of the work of the Court would be vested in "some one high official of the Court who would be responsible for failure to utilize the judicial power of the state effectively." Each branch and each division of the Court would likewise have some judge charged with the general supervision of the branch or division and the efficient conduct of its business.

This notion of having a Chief Justice responsible for the functioning of the entire judicial system, and individual judges with responsibility for the functioning of particular courts is a familiar one in continental countries. In France, for example, each court has a chief who is charged with the administrative supervision of the work of the court. The chief judges of the Courts of Appeal are charged not alone with the supervision of their own court, but also with the supervision of all the inferior courts in their jurisdiction. They make frequent inspection visits to the inferior courts and receive routine reports from them. The chief justices of the appellate courts are in turn responsible to the Chief Justice of the Court of Cassation and the Ministry of Justice. In this country, this type of executive direction, supervision and control by a chief justice is to be found only in individual courts. The outstanding example is the Chicago Municipal Court, created

in 1905 to put an end to the jurisdiction of the justices of the peace, and to take over part of the work of the Circuit and Superior Courts. This court has a large civil jurisdiction as well as jurisdiction over misdemeanor cases, preliminary hearings in felony cases, bail, quasi-criminal actions, such as bastardy proceedings, etc. Its most striking feature was the creation of the office of chief justice charged with large powers in supervising the work of the court: he may assign the associate judges to duty in the branch courts and he controls the court calendars and may make any distribution of cases that he deems necessary. In addition he may require the individual judges to submit reports to him. The Chief Justice, therefore, because of these powers, may obtain, within limits, the most advantageous distribution of work and assignment of judicial personnel.

4. Deficiencies in Procedure

Courts are hampered in their efficiency not only by a defective organization, but frequently also by the rules of procedure which must be followed in the disposition of criminal cases. The general subject of procedure will be taken up in the next section, where extended discussion will be given to the role of the courts in the preliminary examination and the jury trial. Here we may profitably point out the defects in the procedure used to dispose of minor offenses which are dealt with for the most part in inferior criminal courts and are far more numerous than felony cases and major offenses. In 898 cities of 33,000,000 population in 1935, 1,577,596 persons were charged by the police with the violation of traffic and motor vehicle laws as compared with 159,754 who were charged with the eight offenses of murder, manslaughter, robbery, aggravated assault,

"other" assaults, burglary, larceny and auto theft." Minor offenses coming to the attention of criminal courts cover a wide variety of prohibited conduct. Nevertheless, they may be divided roughly into two categories. The first would consist of violations of regulatory statutes and municipal ordinances which are not inherently criminal or antisocial, such as illegal parking, failure to conform to licensing provisions, violations of tenement house laws, health laws, etc. These offenses do not present complex factual questions nor do they confront the court with serious problems of social maladjustments which it is necessary to take into account in dealing with offenders. Such offenses are generally punished by small fines. The second group of offenses consisting of such crimes as drunken driving, petty larceny, obtaining money or property by false pretenses, drunkenness, vagrancy, begging, prostitution, disorderly conduct, gambling, present problems of a different order. The issue of whether or not the offense is committed is more difficult to resolve, and problems of what to do with convicted offenders are more acute. Imprisonment is frequently used as a method of dealing with these offenses.

It is obvious that offenses in the first category can be dealt with by more summary methods than offenses in the second group. This is particularly true of the cases in which the defendants do not contest the charges against them. They should be able to pay the fine which has been fixed for the offense through some administrative procedure which would result in a minimum of inconvenience to them, to the policeman who detected the violation, and to the court. If courts could be relieved of the necessity of hearing these cases, they would have more time to give to the second group of offenses

which require more care and attention, but at the present time all offenses are treated in the same way and require the same formalities of disposition. The persons charged with these offenses are either arrested or summoned to court. They must wait around the court house for their case to be called. The police officer who made the arrest or detected the violation must take time from his duties or free time to come to court in order to testify. When the defendant's case is called, he is asked whether he pleads guilty or not guilty. If he pleads not guilty, the form of a trial is gone through even though the trial may only last thirty seconds.⁴⁵ If the defendant is found guilty or pleads guilty, a small fine is imposed. Not only does this procedure involve an incredible waste of time of everyone concerned, but under the pressure of disposing of large numbers of these cases, to which every large urban court is subject, little time can be given to the more antisocial types of conduct and offenses. The same superficial and casual methods which are used to dispose of violations of regulatory statutes and municipal ordinances are also used in offenses of the second class and, as we shall soon see, in the preliminary examination of major offenses.

A step toward the administrative disposition of minor offenses has been taken in Massachusetts, which provided in 1934 that defendants who had received notice that they had violated parking regulations could appear personally or through a representative before the Clerk of Court and pay the fine for the offense fixed by the judges. If the defendant does not appear, or if he has violated such regulations four times within one year, his case follows the procedure established for criminal cases. Other offenses besides parking violations, however, might

very profitably be included in this plan of administrative disposition of offenses.

5. Handicaps of Court Personnel

Much more serious than handicaps of organization and procedure in the functioning of the courts are the handicaps of personnel. Competent men can temper defects of organization and procedure so as to obtain a satisfactory social product; on the other hand, incompetent and dishonest men are either overwhelmed by them or take advantage of them to pursue their own antisocial ends.

Most of the complaints as to the quality of the judicial personnel in this country have been directed at the inferior courts. These courts are, as we have seen, of primary importance in criminal justice administration. As the Baltimore Crime Commission points out:

"Can there be any doubt that considered collectively the cases in the police courts are of the first importance in the effort to control and reduce crime. They are ten times as numerous as the cases in the criminal court. As a whole they create more public annoyance. They menace the security of a vastly great number of citizens. They involve largely the ignorant and uninformed, the poor and the friendless, the restless and discontented—in short, the group from which serious offenders for the most part come. The most learned, skilled, patient, efficient and experienced judges that the community can produce are needed properly to try these cases."⁴⁶

Not the best, but the poorest judges are apt to be found in these courts. Little can be expected of the untrained laymen, hardware merchants, fruit peddlers, grocers, filling station op-

erators, etc., who function as justices of the peace. They are the objects of universal condemnation. The New York Crime Commission stated that the Justice of the Peace Courts were "the most unsatisfactory feature of the administration of the criminal law remaining in this state today," and that "nothing but the expense of providing adequate, trained lawyers to man these minor courts has prevented remedying the situation."⁴⁷ A survey of county government in Virginia pointed out that "no subject concerned with the administration of rural justice in Virginia elicited such unfavorable comment from county officials as that of the justices of the peace. If the system as now operated has any supporters, the survey failed to discover them."⁴⁸ Dodd has clearly summarized the abuses in judicial administration which give rise to these opinions:

"In substantially all of the states, justices of the peace are elected in large numbers and must rely upon fees for their compensation. The fee system of compensating officers has almost disappeared; but here it holds undisputed sway, and has resulted in intolerable abuses. A justice of the peace who is honest and who merely exercises his office for the convenience of his neighbors, may still have an important place in the judicial system, but justices of the peace are numerous and many of them desire to make a profit from their office. With each justice of the peace exercising jurisdiction over a whole county, the system of that county is as bad as its worst justice. For this reason, justices of the peace have come to be regarded as always likely to render their judgment in favor of the plaintiff in civil cases. In criminal cases, justices must get business, and must find the accused guilty in order to obtain compensation from such business. This situation

has almost necessarily led in many cases to collusion between justices on the one hand and constables or other local police officers on the other. The widely extended use of the automobile has brought the defects of the justice system to the attention of an increasing number of people, and has shown its ineffectiveness as a means of just and efficient administration of traffic laws and regulations."⁴⁹

The mere fact that lawyers are selected for police, magistrates', recorders' and municipal courts, has by no means solved the problem of personnel in these courts. A lawyer merely has at his command, to a greater or less extent, one of the techniques and disciplines necessary for the administration of justice. Mere knowledge of the law however does not insure that a candidate for judicial office will possess the indispensable qualities of insight, impartiality, intelligence, freedom from political subserviency, necessary for dealing with the many human problems which come before the courts. It is evident from the following comments from Chicago, Cleveland and New York, that these qualities are often conspicuously absent in inferior court judges. As reported by the Illinois Crime Survey:

"The personnel of the municipal court of Chicago in its first years was good. In those days the court was full of men of promise and of no inconsiderable ability. The years have taken a heavy toll, however. The quality of the personnel has steadily declined. The majority of the judges now sitting are fitted neither by experience, education, nor what is more important, sufficient professional standards, to discharge with credit the great responsibilities and powers which they possess under the law. The court is full of incompetence, of political

influences, of lamentable laxness in meeting an unprecedented tide of crime. In the hands of such a staff, the court, technically well organized and full of possibilities for good, yields a sorry product."⁵⁰

The Cleveland Crime Survey found that four judges attached to the Municipal Court of Cleveland measured up to the requirements of the office, so far as their legal ability was concerned. "Two of the others are credited with fair ability, three are mediocre, and one has apparently no qualifications worth mentioning. The list includes two judges characterized as 'playing politics,' and two others designated as 'gallery players.' On the whole, the personnel of the municipal bench is inferior in quality and ineffectual in character. A close observer of the Cleveland Courts for years states that the present municipal court judges are not much superior to the old justices of the peace, and that whatever increased dignity they appear to possess arises entirely from the improved physical setting."⁵¹

The situation in the Magistrates' Courts of New York in 1932 is clearly brought out by the Seabury report:

"The reason why we are no better off today under the Inferior Criminal Courts Act than we were prior to its enactment is that the Inferior Criminal Courts Act left unimpaired and free to flourish the basic vice in the Magistrates' Courts, *i.e.*, their administration as part of the political spoils system. It left the Magistrates to be appointed by a political agency, the Mayor, upon the recommendation of the district leaders within his political party—and these men, as we know, have regarded the places to be filled as plums to be distributed as rewards for services ren-

dered by faithful party workers. The Courts are directed by these Magistrates in cooperation with the Court clerks, who are not civil service employees and who are appointed without the slightest regard to fitness or qualification, but solely through political agencies and because of political influences. The assistant clerks and attendants, though nominally taken from the Civil Service list, are still in almost all instances faithful party workers who, despite Civil Service provisions, have secured their places through political influence as a recompense for services performed for the party. The insidious auspices under which the Magistrates, the clerks and the assistant clerks, and the attendants are appointed are bad enough; the conditions under which they retain their appointments are infinitely worse, because they involve the subserviency in office to district leaders and other politicians. It is a byword in the corridors of the Magistrates' Courts of the City of New York that the intervention of a friend in the district political club is much more potent in the disposition of cases than the merits of the cause or the services of the best lawyer, and unfortunately the truth of the statement alone prevents it from being a slander upon the good name of the City."⁵²

In Philadelphia recently, the almost incredible event occurred of having 27 of 28 Magistrates indicted by the Grand Jury for malfeasance and misfeasance in office.⁵³

6. Methods of Selection of Judges

If corrupt, politically subservient and unintelligent judges are to be found in our courts, the fault is due to the methods of selection. In three-fourths of the states, judges are selected by

popular elections. In Delaware, Maine, Massachusetts, New Jersey and New Hampshire, judges are appointed to their positions by the governor. The legislature appoints the judges in Connecticut, Rhode Island, South Carolina, Vermont and Virginia.⁵⁴ Mayors are frequently the appointing authority to local inferior courts.

The choice of judges by popular elections inevitably puts the judiciary into politics. Where nominations are made by party conventions, service to the organization and the dominant political boss generally determines who will get the nomination in the first instance. But at least the convention system places the responsibility on the political parties to put forward candidates for judicial office of recognized ability. Under the primary system of nominating candidates for the judiciary, no organization has any responsibility for the quality of candidates for judicial office. Any lawyer who believes that he has sufficient vote-getting ability, may file a nominating petition. Whether judges are nominated by convention or primary, the election is essentially a scramble for votes. The judge must use the same campaign tactics as other candidates for office. This may involve doing things which lend no dignity to the judicial office, such as outlandish and unethical advertising, catering to racial, religious and professional groups and to petty political bosses.

The theory of the popular election is that the voters can make a rational choice between the merits of opposing candidates for the judiciary. Such a choice may be possible in rural and semi-urban communities where a considerable portion of the electorate is likely to be personally acquainted with the few candidates for judicial office. It is impossible in large urban centers where the electorate is very large and the candidates for judicial

office are numerous. Consider, for example, the judicial primaries and elections in Wayne County and Detroit in 1935, where 35 judges had to be elected, 18 in the Circuit Court and 17 in the three Detroit City Courts. There were 220 candidates for the Circuit Court judgeships and 88 candidates for the other positions at the primaries. One out of every ten lawyers in Detroit became a candidate for judicial office. Except for the 18 incumbent judges, who were candidates for reelection, there were not two dozen candidates in the lot who had any substantial reputation in the city or the county. The overwhelming majority of the candidates were unknown to 95 per cent of the electorate.⁵⁵ Rational distinction as to the merits of individual candidates was a manifest impossibility under these conditions.

At this election in Detroit, and at judicial elections generally throughout the country, Bar associations, civic organizations, Chambers of Commerce, etc., make some effort to determine the relative merits of individual candidates, and inform the voters as to their findings, yet such efforts are of doubtful value in deciding elections. None of these organizations has a wide popular appeal, and in few communities is there any general disposition on the part of the voters to be guided by these groups. The result is that success at judicial primaries and elections usually goes to the best vote-getters, but vote-getting ability and the qualities necessary to make a good judge do not usually go together.

The pressure of political considerations still continues after the candidate has achieved judicial office. The judge is usually elected for a short term. While in office his private practice is likely to suffer. He must go through another election campaign if he wishes to succeed himself. The

judge must, therefore, stay in the public eye and maintain his popularity with the voters and his strength with the political organization if he wishes reelection. In order to get attention from the newspapers, he may aid in the shameless traffic whereby official information on judicial matters, "inside stuff" as to the crime and the defendant to be tried, is traded for publicity, thus helping to bring about "that unique disgrace to our legal system," trial by newspaper.⁵⁶ He may do strange and bizarre things to get publicity, such as compelling habitual drunks who come before him to choose between castor oil and jail. He may become a professional "glad-hander" and good fellow and make it a point to be seen at every celebration, prize fight, banquet or other public gathering. What is even worse, is that in order to keep his strength with the organization he may not be able to resist the pressure of its demands. This is pointed out very clearly by the Illinois Crime Survey:

"As matters political now stand, a judge must either yield to influences of a very dangerous if not improper character or risk his official position. Some are able to keep their self-respect and because of their extraordinary strength with the voters, keep their jobs. Others refuse to yield, and find themselves thrust from office. Still others, not strong enough to withstand political pressure, and not courageous enough to face the consequences of loss of official position, yield unwillingly. A still different group, apparently growing larger every term, does not want to maintain high standards. The members of this latter group are themselves a part of the machine."⁵⁷

The patent evils of the elective judiciary has called forth a

strong movement for reform in the methods of selection. Most of the proposals for reform would replace the short term elective judiciary by a judiciary appointed by the executive authority for a long term or during good behavior. Some advocates of the appointive judiciary, however, lose sight of the fact that this method of selection will not necessarily eliminate politics from the choice of the judiciary. Where judges are appointed by Governors or mayors at the present time, service rendered to the appointing authority, rather than fitness, is apt to be the determining criterion in the appointment.

"There is no evidence," states the Seabury report, "which would justify criticism of some of the Magistrates and it is gratifying to be able to say of them that, as far as the investigation has shown, they came by their offices under circumstances suggesting no nefarious political connections. Of the other Magistrates, however, many testified that their appointment to judicial office was the form in which their political party expressed its 'recognition' for services previously rendered to the 'Organization.' In practically every such case, the evidence shows the applicant for judicial office standing abjectly and, figuratively, with his hat in his hand, before the political district leader, begging his recommendation to Tammany Hall which was recognized to be the *sine qua non*. This evidence presents a situation which is a scandal and a disgrace, as well as a menace to the city of New York."⁵⁸

To avoid this difficulty of a political selection by the appointing authority without regard to fitness, many reform proposals divide the responsibility for appointment between the executive and a nominating body. The latter is to be some organization

such as a Judicial Council, Bar association, committee of judges, lawyers and laymen, which presumably is acquainted with the qualifications of the various members of the Bar, and which has an incentive to nominate good judicial candidates. Its function will be to choose a number of names of suitable candidates for the judiciary from which the Governor may make appointments. If an active, intelligent and interested nominating body is provided, it is quite likely that good judicial material can be obtained by this method of selection.

Whether these proposals will be adopted, remains to be seen. The one state, California, which has made a change in its method of selecting judges, has chosen a somewhat different road. California has tried to retain popular control of the judiciary through the election of judges, but to eliminate the scramble for judicial office which is part of the elective system in other states.⁵⁹ Its recent constitutional amendment provides that Justices of the Supreme Court, District Court of Appeal, and Superior Court may file before the expiration of their terms a declaration of candidacy to succeed themselves. If this declaration is not filed, the Governor may nominate a suitable person for the office. The names of such candidates only, and no others, are to appear on the ballot at the general election. The voters are called upon to answer the simple question of whether John Jones shall be elected to the office for which he is a candidate. If the voters refuse to elect John Jones, it becomes the duty of the Governor to appoint a suitable person to the vacancy on the bench, left by Jones's failure to get elected. At this point California's constitutional amendment shows the influence of the proposals discussed above. Appointments by the Governor, in

cases where the candidate has not been elected, must be confirmed by a commission composed of the Chief Justice of the Supreme Court, the presiding justice of the District Court of Appeal and the Attorney General.

This method of selecting the judiciary is an undoubted improvement over the usual elective methods. It gives the people some control over the determination of who their judges shall be. At the same time it gives a judge who has made a good record a reasonable probability of being returned to office without the necessity of scrambling for votes in competition with many other candidates. Where the Governor makes an appointment, confirmation by the commission should operate as some check upon the appointment of unfit candidates.

(1) New York Crime Commission Report, 1927, 192.

(2) Missouri Crime Survey, p. 354; The figures on "offenses cleared by arrest" reported by police departments to the Federal Bureau of Investigation, indicate better results than is reported from New York and Missouri by the Crime Commissions. In 1934 the combined figures for all departments reporting was that robberies were cleared by arrest in 36.2 of the cases; burglaries in 28.9; larcenies in 25.6; and auto thefts in 14.4.

(3) Criminal Justice Surveys Analysis, National Commission on Law Observance and Enforcement Report on Prosecution,

55-56. The New York Crime Commission presents a similar picture of waste motion in New York City. "If we start with 100 per cent of arrests in felony cases, 98.03 per cent are left after the

police custody has been terminated; 41.12 per cent acted; 20.57 per cent after trial, and 15.42 per cent are actually imprisoned or fined. Our machinery for the apprehension and trial of persons accused of crime is beginning action against five persons whom it does not punish for every one whom it does punish. . . . Either we are arresting many innocent people, perhaps altogether too many, or we are permitting altogether too many guilty people to escape through the meshes of our criminal procedure.”— New York Crime Commission Report, 1927, 101.

(4) Chicago Police Problems, 4-5.

(5) “The Police and the Crime Problem,” *Annals of the American Academy of Political and Social Science*, 1929, Vol. 146.

(6) Commission of Inquiry on Public Service Personnel, Minutes of Evidence, 461.

(7) R. Fosdick, “American Police Systems,” 198.

(8) New York Crime Commission Report, 1927, 206.

(9) National Commission on Law Observance and Enforcement, Report on Police, 51.

(10) Portland Survey Commission, Survey of the Bureau of Police, 12-13.

(11) Report on Police, 31.

(12) Missouri Crime Survey, 31.

(13) Commission of Inquiry on Public Service Personnel, Minutes of Evidence, 461-2.

(14) New York Crime Commission Report, 1927, p. 208.

(15) Harrison, Police Administration in Boston, 73.

(16) Dissatisfaction with present methods of police training by individual cities and towns has led to a movement for the organization of police training on a wider basis. At the present time, every city and town determines for itself how much or how little training it will give to its police recruits. Cities are frequently deterred from setting up the

elaborate school necessary to teach properly the manifold elements of a policeman’s job by the expense involved. The expense of such a school per policeman trained would be considerably reduced if the city served not one city, but a number of different cities. This would also give all cities within the area served the benefit of adequate methods of police training. An approach to such an organization of police training has been made through the establishment of zone police training schools on a voluntary basis in New York. Police forces within the zone may send their recruits to the school to be trained. Some universities such as the University of Chicago, Northwestern, and San Jose Teachers’ College have also established police training courses. The Federal Bureau of Investigation has conducted a widely attended police school.

(17) Bruce Smith, “The Police and the Crime Problem,” *Annals of the American Academy of Political and Social Science*, 1929, Vol. 146, 23.

(18) New York Crime Commission Report, 1927, 218; Chicago Police Problems, 87.

(19) R. Fosdick, “American Police Systems,” 329.

(20) *State v. Reichman*, 188 S.W. 225, 228 (Tenn. 1916).

(21) Iowa Code, Ch. 259, Sec. 5181.

(22) Cited by Bruce Smith, “Rural Crime Control.” 56.

(23) Smith, *ibid.*, 83—84.

(24) O. T. Schultz and E. M. Morgan, “The Coroner System.”

(25) Schultz and Morgan, *ibid.*

(26) “Criminal Justice in Cleveland:” Reports of the Cleveland Foundation hereinafter referred to as the Cleveland Crime Survey, 467 (1922).

(27) Illinois Crime Survey, 386—387.

(28) Statement by District Attorney Elvin N. Edwards of Nassau County, N. Y., quoted in

Bruce Smith, *op. cit.*, 200.

(29) Missouri Crime Survey, 159.

(30) Illinois Revised Statutes, Ch. 14, Sec. 5

(31) *U.S. v. Woody*, 2 Fed. (2nd) 262 (1924).

(32) *Attorney-General v. Tufts*, 239 Mass. 458, 589, 131 N.E. 573, 17 A.L.R. 274 (1921).

(33) DeLong and Baker, “The Prosecuting Attorney,” 23 *Journal of Criminal Law* 923—973, 930—931 (1932—33).

(34) National Commission on Law Observance and Enforcement, *Report on Prosecution*, 98.

(35) *Ibid.*, p. 19.

(36) Missouri Crime Survey, 136.

(37) Illinois Crime Survey, 226.

(38) Cleveland Crime Survey, 169.

(39) Illinois Crime Survey, 470-471. *See also* 549. A humorous picture of this process of striking a bargain has been drawn by Frank Sullivan. Moley, “Politics and Criminal Prosecution,” 173-174.

(40) Massachusetts Special Crime Commission Report, pp. 31-32. (41) Judicial Council of New York, Tentative Suggestions Concerning Unification of Courts, 10

(42) Judicial Council of New Jersey, Second Annual Report, 1931, 24.

(43) Report of the Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 34 American Bar Association Reports.

(44) Uniform Crime Reports, VII, No. I., 1936, 25-6.

(45) The method of dealing with such minor offenses as traffic violations in a New York City court is clearly brought out in the following extract from *The New York Times*: 1,010 TRAFFIC CASES OVERFLOW COURT

“Handing down decisions at the rate of about two a minute, three city magistrates disposed of a top-heavy weekend calendar of

1,010 traffic offenses in Traffic Court, 301 Mott Street, yesterday, sending seven offenders to jail in default of fines levied, and collecting \$783 from others.

"Magistrates Louis B. Brodsky and Michael A. Ford were originally scheduled to hear the traffic calendar, but when the number of persons summoned mounted to better than 1,000, more than a hundred cases were directed to Homicide Court and heard there by Magistrate George B. D. Luca.

"More than half of the offenders -- 563 -- answered charges of illegal parking. Police officials denied that there was a general drive against overtime parking in the city. They said the division commanders were responsible for the great number of parking 'Tags' hung on automobiles, and that division activity against parkers came as a result of observations of parking conditions by the division commanders.

"The throng of offenders overflowed out of the traffic hearing rooms into the corridors of the old building, which runs through from 300 Mulberry to 301 Mott Street. The magistrates were generally lenient, court attaches said, levying fines of \$1 or \$2 for parking, and from \$1 to \$5 for other offenses, and in many cases suspending sentence."

(46) Baltimore Crime Commission, Report on the Police Courts of Baltimore, 5-6.

(47) New York Crime Commission Report, 1927, 44-45.

(48) Governor's Committee on Consolidation and Simplification of County Government in Virginia,

(49) W. F. Dodd, "State Government," 342—3.

(50) Illinois Crime Survey, 393.

(51) Cleveland Crime Survey, 252-3.

(52) Final Report of Samuel Seabury, Referee, in the Matter of the Investigation of the Magistrates' Courts of New York, 14-15.

(53) *The New York Times*, Aug. 1, 1935, 2.

(54) W. F. Willoughby, "Principles of Judicial Administration," 361 et. seq.

(55) See the description of the Wayne County and Detroit elections by Stuart H. Perry, "Shall We Appoint Our Judges," 19 *Journal of the Amer. Judic. Soc.* 78 et. seq. Oct. 1935.

(56) Stuart H. Perry, "Politics and Judicial Administration," *Annals of the American Academy of Political and Social Science*, Sept. 1933, Vol. 169, 82.

(57) Illinois Crime Survey, 418.

(58) Report of Samuel Seabury, 30-1.

(59) Art. VI., Sec. 26, Calif. Constitution adopted Nov. 6,

1934.



Problems in the Prosecution of Crime

1. Arrest

The first step in a criminal prosecution is to obtain jurisdiction over the person suspected of committing the crime. Jurisdiction may be had either through the service of a summons or through arrest. The summons is a direction to the accused to appear in court to answer the charge of crime on a specified date. Arrest on the other hand involves the actual taking of the person accused into custody by a police officer or by a private individual. Both the summons and the warrant of arrest may be obtained from a magistrate on complaint made to him of the commission of an offense. In England, it is completely within the discretion of the magistrate to use the summons or the warrant of arrest as a means of obtaining jurisdiction over the accused. In this country, the discretion of the magistrate to use summons rather than arrest, as a means of beginning a prosecution, is restricted within narrow limits. The Ohio law for example permits the magistrate to use the summons rather than the warrant of arrest only in misdemeanor

cases.¹ This provision of the Ohio law is much more liberal than that of other states, where the choice between summons and arrest is not even recognized for all misdemeanors.²

Offenders are not always obliging enough to wait until officers or private individuals obtain warrants to arrest them or summonses to bring them to court. Police officers are therefore given summonses in blank, which they can issue on the spot when they catch an individual committing certain minor offenses such as violations of the traffic laws. Private individuals and police officers also have certain rights of arrest without a warrant. They may arrest a man who commits a felony in their presence. The police may also arrest an individual without a warrant where the felony is committed outside their presence, if they have a reasonable suspicion that the person arrested has committed it. Even where a felony has not actually been committed, a police officer, but not a private individual, has the right to make an arrest without a warrant where he reasonably suspects that a felony has

been committed and that the person arrested has committed it. The police officer, then, may legally arrest an individual even though he is mistaken both as to the person and the character of the offense, provided his mistakes are reasonable. The private individual may reasonably make a mistake as to persons, but he must be sure that a felony has actually been committed before he can legally make an arrest without a warrant.

The requirement as to reasonableness of suspicion, as a prerequisite to the exercise of the power of arrest, is pushed to absurd limits by many courts. An arrest without a warrant cannot be legally made even though the arrested person is guilty of the offense charged, if the officer making the arrest did not act from reasonable suspicion. "Curiously enough," writes Waite, "the guilt of an arrested person has nothing to do with the lawfulness of an arrest. When the arrest is for felony, the innocence of the arrestee does not make it unlawful, if the officer had reasonable ground to believe him guilty. But if the officer acted on 'suspicion'

only, believing in guilt but without sufficient ground for such belief to satisfy his judges, the arrest is not lawful, no matter how guilty the arrested person may prove to be.”³

A man carrying concealed weapons, for example, may not legally be arrested without a warrant, even though the weapons are found on him, if the officer was not justified in his suspicion that the person arrested was carrying concealed weapons. This rule of law permits guilty offenders to escape punishment. In a state which has the rule that evidence illegally obtained cannot be used at the trial, the weapon found on the suspect could not be used to prove his guilt, since it was the product of an illegal search. If the policeman was killed while making the illegal search for concealed weapons, the killer might have his charge reduced from murder to manslaughter through the simple showing that the attempted arrest and search were illegal, or might even be acquitted in states which permit a man to kill if it is necessary to prevent an illegal arrest.

Arrests on reasonable suspicion are limited to felonies. Neither police officers nor private individuals can arrest a man on suspicion of having committed a misdemeanor. At common law, arrests without a warrant for misdemeanors were limited to breaches of the peace committed in the presence of the private individual or the peace officer making the arrest, but this rule has been extended by statutes and decisions of courts both in England and America. Most states now provide that a police officer may arrest any person who commits a misdemeanor in his presence, whether or not it is a breach of the peace.⁴ But the private individual cannot, in some States, make an arrest without a warrant for a misdemeanor committed in his presence, which is not a

breach of the peace. Thus a motorist who comes upon a man attempting to steal the spare tires of his car cannot legally take him into custody without a warrant under this rule. Nor could a policeman called by the motorist legally make the arrest since the misdemeanor, petty larceny, was not committed in his presence.⁵

Although the law of arrest may be unduly restrictive, arrest is in fact very extensively used in this country as a method of initiating criminal prosecutions. An arrest involves the physical taking of the accused in custody; he suffers a grievous interference with his personal affairs and is subjected to disagreeable contacts at the station house and a certain amount of public disgrace. These consequences are unavoidable where the accused is charged with a serious crime, and the possibilities are that he will take flight as soon as he learns that suspicion is directed against him. It is also necessary for the state to assure itself of the person of the accused, where he is without a domicile in the community and is bound to it by no business, social or family ties. But a large proportion of the individuals arrested do not fall into these categories. Most offenders are charged with relatively minor offenses. In Chicago from 1910 to 1921 for example, an average of 106,560 arrests were made annually by the police. Only 12.3 per cent of these arrests were for felonies. The balance were for misdemeanors.⁶ Many of those arrested for misdemeanors were permanent residents in the community. To arrest them when charged with crime is to inflict upon them a useless burden and annoyance, as has been brought out very well by the following comments in the Cleveland Crime Survey:

“The field of criminal justice in the modern American state or city

has come to include ... a large number of misdemeanors committed by persons who are permanent residents, engage regularly and habitually in a lawful occupation, have respectable friends in the city and a social status worth preserving, and for whom departure from the city would be a greater punishment than that provided by law for the offense. Sunday ordinances, violations of health, smoke, building, and nuisance ordinances, traffic cases ... license ordinances are examples of municipal misdemeanors of this type. Health, building and factory regulations, laws regarding minors, license laws, election laws, are examples of state misdemeanors. The use of the process of arrest in such cases is a waste of effort and an unnecessary drain on overburdened resources.”⁷

In part, the failure to use the summons more extensively, i.e., a notice to appear on a specific date, instead of the arrest as a method of initiating prosecutions, is owing to defects in the legal rules. The laws of many states, as we have seen above, restrict the magistrates' discretion in the summons too narrowly. The provisions of the law regarding arrest date from an earlier period, when regulatory statutes and minor offenses did not have the importance that they have in the complex civilization of today. The law has therefore continued to require the same mechanism for obtaining custody over offenders in minor cases as in the more serious crimes.

Ordinary police practices are even more responsible than defects in legal rules for a too extensive use of the power of arrest. Where the law allows the officer to choose between summons and arrest he will frequently use the latter, though this may not be justified by the circumstances. Even worse is the fact

that the police arrest large numbers of individuals against whom they cannot make any justifiable charges. "All police reporters know," writes Hopkins, "that night after night in virtually every city, scores of individuals are run in' without being charged with any concrete offense or even without being considered especially connected with any offense."⁸ Of 80,000 persons whose arrests were noted in the surveys of criminal justice, 47.7 per cent were released by the police or by a magistrate without being charged. Of 650,000 arrests compiled from a number of police department reports, 44 per cent were released without being charged.⁹ St. Louis, Chicago, and New York are the worst offenders.

2. The Third Degree.

The exercise of an extensive right of arrest without a warrant is not so serious in itself, if it is limited to a mere right of capture and is not made the basis of a prolonged detention. The law has therefore laid down the requirement that the individual arrested must be taken before a magistrate without delay in order to cut down to a minimum the inconvenience resulting from the arrest. Unfortunately, legal rules are not self-operating. Persons arrested by the police in American cities are not brought before a magistrate with a minimum of delay. There is a persistent and widespread practice of detaining prisoners two, three, four days and even longer, before bringing them before a magistrate or releasing them. As Beeley states, "A not uncommon practice is to detain a suspect or offender without booking him. Such a practice is, of course, illegal. It is often done in order to ward off counsel, service of the *habeas corpus* writ, newspaper reporters, etc., until after the police and the public prosecutor have had time to

collect the evidence in the case or to extort a confession. Accused persons and suspects are sometimes thus held incommunicado for days. In the process of losing them from lawyers, friends, bondsmen, etc., the police may take such persons to half a dozen different police stations."¹⁰ This practice is not confined to Chicago. It exists in other American cities. In Detroit, the practice known as "sending a man around the loop" is precisely the process described in Chicago of shifting a man around from one station house to another. Frequently, the individual is not even booked on the blotter of the station house as arrested.

As Waite clearly points out, this illegal detention of suspects by the police is not always -without "some modicum of social justification." As we shall see presently, it is the duty of the magistrate at the preliminary examination to determine whether the police have sufficient evidence of guilt to justify holding the accused for trial. The police, therefore, if they are to obey the law as to bringing an individual before a magistrate immediately after an arrest, should not arrest a suspect until they have enough evidence which if uncontradicted will prove his guilt. But it is frequently necessary to arrest a suspect before evidence of guilt has been gathered. In cases of gangster crimes, unless a suspect is arrested immediately, he may go into hiding and may never be taken. To bring him before a magistrate without sufficient evidence against him would cause his discharge. To hold him at the police station, without bringing him before the magistrate, would enable his lawyers to have him freed on a writ of *habeas corpus*. The police may therefore disregard the law and hide their suspect in a hotel room, until they have had a sufficient opportunity to test their suspicions.¹¹

When the suspect is completely within the power of the police, it is easy for them to apply the protracted questioning and violence for the purpose of extorting admissions and confessions, which have come to be known as the "Third Degree." This detention, questioning and violence are clearly illegal. The privilege against self-incrimination is a fundamental constitutional right. An accused person cannot be compelled to give testimony against himself. He may, if he chooses, remain silent from the moment of his arrest to the time of his trial, no matter how overwhelming the evidence is against him. So far does the law go in protecting an accused, that in most states, comment may not be made at a trial on the refusal of the accused to take the stand and to testify. Admissions and confessions may be admitted in evidence against an accused if freely given, but no admissions and confessions obtained by duress, force and violence may be used against an accused. Nevertheless, extorted admissions and confessions are advantageous to the police. The trial judge may not believe the accused when he objects to the admission of a confession on the ground that it was obtained by third-degree methods. The confession will, therefore, be used against the accused and may be the decisive factor in bringing about his conviction. Even if the admissions and confessions obtained by third-degree methods are excluded at the trial, they still are advantageous to the police, since they provide excellent leads for the collection of independent evidence of guilt.

The advantages to the police of compelling a prisoner to talk are such that the constitutional right of freedom from self-incrimination is looked upon as an impediment to a successful repression of crime. In actual police

practice, therefore, it is often cynically and frankly disregarded. As one chief of police whose department had a reputation for obtaining an exceptional number of confessions put it:

“If I have to violate the Constitution or my oath of office, I’ll violate the Constitution.... A policeman should be free as a fireman to protect his community. Nobody ever thinks of hedging the fireman about with a lot of laws that favor the fire.... Shysters have turned the Constitution into a refuge for the criminal. . . . I’m going to protect the community. If in so doing I make a mistake and trespass on somebody’s rights, let him sue.”¹²

Many cases in which third-degree methods have been used to obtain confessions have come before appellate courts.

One of the best known of these cases is that of *Wan v. United States*.¹³ The defendant, Wan, was suspected of the murder of three Chinamen, who had been found dead in Washington, D.C. He was arrested in New York, brought to Washington, held incommunicado in a hotel room for eight days, and questioned almost continuously night and day, despite the fact that he was sick in bed at the time of his arrest and remained sick during all the period of questioning. He was at last formally arrested and taken to a police station on the ninth day after his apprehension. The questioning continued until the thirteenth day, when Wan was visited for the first time by the chief medical officer of the jail. The latter found Wan so exhausted mentally, as not to know what he was signing. Prior to this visit, Wan had signed a stenographic report of an interrogation which contained a full confession. He had also made four oral statements admitting his guilt. These admissions and confessions had been admitted in evidence against Wan at his trial for murder. Wan was

convicted of murder, but the Supreme Court threw out the conviction on the ground that “the testimony given ... left no room for a contention that the statements of the defendant were, in fact, voluntary. The undisputed facts showed that compulsion was applied.”

In the recent case of *Brown v. Mississippi*, three negroes were convicted of murder. Aside from their confessions, there was no evidence sufficient to warrant the submission of the case to jury. The confession of one defendant was obtained by hanging him by the neck and whipping him until he made the necessary admission. The other two defendants had their backs cut to pieces by a leather strap with a buckle on it, until they confessed. The record of their treatment, stated the Court, read “more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to enlightened constitutional government.” Nevertheless, the highest court of Mississippi sustained the conviction of these negroes, two judges dissenting.¹⁴ The Supreme Court, however, reversed the conviction on the ground that due process of law guaranteed to these negroes by the 14th Amendment had been denied them. “It would be difficult,” states the Court, “to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”¹⁵

3. The Preliminary Hearing

The police must eventually bring the person arrested before a magistrate, if they wish any action on the charges against him. If the offense charged is one which the magistrate has jurisdic-

tion to try, he can proceed to hear and decide the case himself, but most offenses beyond the grade of misdemeanors are not usually tried in the inferior courts. In such offenses, the role of the magistrate is limited to holding a preliminary examination.

At this examination, or hearing, the magistrate must inform the accused of the nature of the charges against him and of his right to the assistance of counsel during the proceedings. He must allow the accused a reasonable time in which to send for counsel and has the power to summon witnesses either for the prosecution or for the defense.

The hearing begins with an examination of the witnesses for the prosecution. As the county prosecuting attorney usually has no representative in the inferior courts, this examination is conducted by the arresting officer, some other representative of the police department, by counsel for the complaining witness, or by the magistrate himself. The defendant or his counsel have the right to cross-examine these witnesses. When the examination and cross-examination of the witnesses for the prosecution are finished, the magistrate must inform the defendant that he has the right to make an unsworn statement concerning the charges against him. This statement is designed to enable the accused to answer the charges and to explain the facts alleged against him. He may however refuse to make such a statement. This refusal cannot be used against him at the trial. After the statement has been made or waived the accused may, in most states, if he so desires, be sworn and give testimony in his own behalf. Any witnesses produced by him must be sworn, examined and cross-examined. All the testimony of the witnesses for the prosecution and for the defense must be reduced to writing.

After the magistrate has heard all the evidence, it is his duty to discharge the defendant if it appears either that an offense has not been committed, or, if it has been committed, that there is no probable cause to suspect the accused. If it appears, however, that an offense has been committed and that the accused is the probable culprit, it is the duty of the magistrate to hold the accused to answer for the offense. The magistrate will then fix the amount of bail, if the offense is bailable, or commit him to jail to await trial. It is also the duty of the magistrate to take the necessary steps to insure the presence of material witnesses at later stages of the proceedings. All the papers resulting from the preliminary hearing are transmitted to the clerk of the court having jurisdiction over the offense.

This short description of the procedure at the preliminary hearing indicates that it is designed to achieve certain important objectives in criminal justice administration. In the first place, it is possible for the defendant to have the case against him dropped quickly and without much publicity at the preliminary hearing, if the charges against him are not well founded. This is advantageous to the state as well as to the defendant. The state avoids the necessity of holding an expensive trial where there is insufficient justification for it. If the magistrate finds probable cause and binds the accused over for trial, he can take the necessary steps to insure the presence of the accused at later stages of the procedure by fixing the amount of his bail. A permanent record is made of the testimony of witnesses before they have had a chance to forget or to be tampered with. The magistrate may also take the necessary steps to insure the presence of witnesses at the trial.¹⁶

Statistics indicate that a con-

siderable proportion of felony cases never get beyond the stage of the preliminary hearing, which shows the percentage of felony prosecutions eliminated by the courts of preliminary hearing in a number of jurisdictions. This is evident from the following table:¹⁷

PERCENTAGE OF CASES ELIMINATED AT THE PRELIMINARY HEARING

New York City (1926)	58.7%
4 large Pennsylvania cities	74.4%
Chicago and Cook County (1926)	48.5%
New York upstate cities over 100,000 population (1926)	58.1%
Cleveland (1919)	26.2%
St. Louis (1923—24)	28.0%
Baltimore (1927)	27.7%
Milwaukee (1926)	17.4%
Cincinnati (1925—26)	54.6%
Jackson County, Mo. (Kansas City)	50.6%

A Grand Jury indictment may still be obtained even though the case has been dismissed at a preliminary hearing. In practice, however, the dismissal of the prosecution at the preliminary hearing is usually final.

Since so large a proportion of felony cases are eliminated at the preliminary hearing, it is of the greatest significance to criminal justice administration that the preliminary hearing be conducted under conditions guaranteeing an efficient performance of duties, but descriptions of the inferior courts in action show that such guarantees are usually absent. The inferior courts are trial

courts for misdemeanor case; as well as courts of preliminary examination for felony cases, and in large urban centers are usually swamped under the necessity of disposing of large numbers of petty offenses. Under the pressure of business, all offenses tend to receive the same casual consideration precluding careful sifting of the facts or intelligent disposition. Order, decorum, and the general atmosphere of these courts leave much to be desired. The whole procedure in the preliminary hearing has been condemned as "a mockery of law administration."¹⁸ Descriptions of typical courts in action show that this sharp condemnation is justified. The operation of one of the branches of Chicago's Municipal Court, the Harrison Street court, is described as follows:

"This is, next to the Boy's Court, the most important branch of the criminal

"It is housed most inadequately, considering the business that it must dispose of. When the court is in session in the morning, the room is crowded almost to suffocation. The noise is very great. On one side of the room is a runway fenced in by wire which, in a very inadequate way, separates the prisoners coming from their cells from the people in the room. There is no reason why communication cannot be carried on between prisoners and visitors, and articles passed through from the latter to the former. The section before the bench is jammed with policemen, lawyers, bondsmen, reporter, detectives, visitors, curious and genuinely interested-men, women and children, young and old, rich and poor, vicious and innocent. The bailiffs during the entire session of the court go through the ineffective motions of seeking a better order. They are constantly rapping for order and pleading with the

mob to move back from the bench and open the way to the bull pen.

"Benches are provided for those who have legitimate business in court, but usually no one is sitting on them. For self-protection and in order to see and hear better, people prefer to stand. The smoke is always thick. There is much laughing, loud talking, whispering and expectoration. At times the noise rises to almost deafening proportions, due to the shuffling about and the loud shouts of the bailiff and the pounding of the gavel and the remarks of the bystanders and efforts of the judge to elicit information from reluctant witnesses. It is probable that many cases are dismissed for want of prosecution, because the complaining witness fails to hear the case called. In the anteroom and court room are posted many warning signs stating that no loitering will be permitted and that persons found guilty of this order will be prosecuted, but we have failed to see any indication of the actual enforcement of this rule."¹⁹

A long step forward has been taken in New York City in the direction of improving the preliminary hearing. In the three boroughs of Manhattan, Bronx and Brooklyn, specialized "felony courts" have been created in connection with the Magistrates' Court.²⁰ All defendants charged with felonies or certain misdemeanors, within these boroughs, must be brought before these courts for the preliminary examination, and not before the magistrate who had territorial jurisdiction over the offense. This makes possible an elimination of the confusion of petty offenses and major offenses, with each receiving the same superficial consideration, which is the vice of the inferior courts in the disposition of preliminary hear-

ings in other cities. At these specialized felony courts, the magistrate is not overwhelmed by the pressure of petty cases; he can, therefore, give to preliminary hearings the care and the attention which they ought to receive. The creation of specialized "felony courts" centralizes responsibility and makes a much more effective supervision of the preliminary hearing possible. It is much easier to secure the dismissal of cases through the use of improper influence when they come before a large number of magistrates holding court in different parts of a city than where all cases come before a single magistrate working in one court, under the continuous scrutiny of the newspapers.

4. Bail

When a man is charged with a crime, arrested and held for trial, he has in most states a constitutional right to release on bail pending trial. This right is granted to an accused person for all offenses, except capital crimes "when the proof is evident or the presumption great." Thus when a man is bound over at the preliminary examination, or when he is arrested and brought before a magistrate and not tried immediately, it is the duty of the magistrate to fix the amount of bail, which if produced will necessitate his release from custody. Bail is the security which guarantees the appearance of the accused to answer the charges against him and his submission to the orders and process of the court which will try his case. The amount of bail that may be required rests within the sound discretion of the magistrate. He may not, however, demand excessive bail. In fixing the amount of bail as a condition of release from custody, the court ought to consider "the nature of the offense, the penalty of the offense, the probability of the willing appearance of

the defendant or his flight to avoid punishment, the pecuniary and social condition of the defendant and his general reputation and character, and the apparent strength of the proof as bearing upon the probability of conviction."²¹

Bail does not necessarily have to be demanded as a condition of release from custody. A magistrate can release a man on his own recognizance, *i.e.*, on his unsecured promise to appear and to submit himself to the processes of the court. This mode of release from custody should be used in cases where the nature of the charge and the character of the defendant are such that there is little likelihood of the defendant's non-appearance at later stages of the proceeding.

Insufficient use is made of the process of release on one's own recognizance by American courts. As we have seen, most persons who are arrested are charged with relatively minor offenses. Most of them live in the jurisdiction in which the arrest was made and are not habitual or professional criminals. A large proportion have no criminal records. Few of them would run away rather than face the consequences of their arrest. They could safely be released on their unsecured promises to appear when wanted. Unfortunately, bail is usually exacted as a condition of release. In Chicago, for example, Beeley writes that about three-fourths of all persons accused of crime are first apprehended, then taken to the police station, and later are released on bail or detained in the lockup pending arraignment in court.²²

The insistence on bail as a condition of release from custody has resulted in two serious abuses. First, many defendants who are good risks so far as their appearance in court is concerned and who cannot raise the amount of security required are need-

lessly imprisoned pending trial. Beeley estimated that 28 per cent of the prisoners held in the Chicago jail were in this category.²³ Another by-product of the excessive insistence on bail is the professional bondsman. Many people arrested for crime do not have friends or relatives with the necessary property who are willing to act as sureties upon their bail undertakings. They can, however, usually find in every large urban court some professional bondsman who will willingly provide their bail for a consideration. The price is guided by the principle of what the traffic will bear. "It is not at all uncommon, writes Moley, "for a bondsman to exact twenty per cent or more of the amount of the bond as a fee. Cases are known where such exactions have been made from relatives of the accused who could ill afford such an excessive charge."²⁴

The Seabury Report points to similar abuses in New York. "The bail bond business, as it now exists, is a scandalous and unnecessary evil. Overcharging has been the rule rather than the exception. Not only has the independent bondsman ruthlessly extorted from unfortunate defendants rates far above that prescribed by law, but the field agents of these brokers or bonding companies under state supervision have, in many instances, overcharged."²⁵

The state does not usually gain any added security that the defendant will appear at his trial from the fact that a professional bondsman puts up his bail. Although many different courts and agencies can accept bail, they have failed to provide for an interchange of information on bail bonds and they usually do not make investigations into the value of property offered as security. This has made it possible for professional bondsmen to pledge property far in excess of

its value, to put up the same property as collateral for many different bonds, and even to pledge property which they do not own. One of the professional bondsmen whose record was examined by Moley in Missouri, for example, had real estate which was valued at \$24,100 with a mortgage on it of \$31,500. Yet he was permitted to become surety in one year on bonds aggregating \$670,295. His compensation on these bonds was estimated as between \$33,000 and \$100,000.²⁶ Even where good collateral is put up to guarantee the bail undertaking, it does not profit the state where the defendant "jumps bail," since little attempt is made to collect forfeited bail bonds. "Bail bonds are forfeited with great ease," writes Bettman, "but the forfeitures are set aside to an excessive degree. In only a comparatively small proportion of forfeited 'bonds is judgment entered. An absurdly small percentage of the judgments are collected."²⁷

One of the worst features of the constitutional guarantee of freedom on bail, as a matter of right for all except capital offenses, is its lack of selectivity. First offenders and professional criminals are equally entitled to claim this right. Even though a judge may know that a man will probably continue his criminal pursuits when released, he has no discretion but to order his release from jail, if the amount of bail demanded is furnished. Judges can of course make it difficult for professional criminals to secure their freedom, by demanding high bail and by rigorously scrutinizing the value of the property offered as security and the person of the surety, but lax administration even in this field, has frequently resulted in bail being merely a device to "spring" dangerous offenders from jail. A case in point is that of Charles Hoffman, noted by the Massachu-

setts Special Crime Commission.²⁸ Hoffman was arrested and indicted in Boston for armed robbery. He was also indicted in Cambridge for another robbery committed in that city. Hoffman had committed these crimes after his escape from the New Jersey prison farm, where he had been serving 10-15 years for robbery. Bail on the Boston indictment was fixed at \$40,000 and bail on the Cambridge indictment at \$20,000. When Hoffman left the Cambridge jail to stand trial on the Boston indictment, no record was sent to the Boston jail of the fact that he had been held for \$20,000 bail in Cambridge. Nor was a fugitive warrant lodged against him, although it had been sent by the New Jersey authorities to the Cambridge district attorney and to the Boston police. Only \$40,000 bail, therefore, stood between Hoffman and his release. This was provided by a notorious bondsman who put up as security premises which he did not own. The same bondsman was already in default on other matters, in substantial amounts. But no investigation was made of the property offered as collateral for Hoffman's bail, or of the status of his bondsman, and Hoffman obtained his release from jail. Five days after his release he hijacked a truck load of valuable merchandise. He did not appear when his case was called for trial in Boston, for he was apparently engaged on that day in the holdup and murder of an aged inventor in Cambridge.

Some years ago, the writer studied the administration of justice in France, Germany and Italy. None of these countries developed such evils in connection with the release of prisoners from jail pending trial as exist in this country. A difference in legal provisions is largely responsible for the better record of continental countries. A distinction is made between the first offender

charged with a minor offense and the habitual or professional criminal. Since it is not likely that the former will run away rather than face trial, the law provides that they are entitled to provisional release as a matter of right, without the necessity of putting up bail. Thus far, fewer bail bonds need to be written than in this country and there is much less need for the professional bondsman. Habitual and professional criminals are denied any right to release either with or without bail, and may be held in jail pending trial. This provision makes unlikely any European counterparts to the Hoffman case.

It is coming to be realized in this country, that dangerous offenders should not be released on bail to pursue their careers of crime. Thus the Model Code of the American Law Institute provides that where the accused is charged with murder, treason, arson, robbery, burglary, rape, kidnapping or offenses punishable by life imprisonment, bail is a matter of discretion and not a matter of right. It is also a matter of discretion where the accused has (a) previously been convicted of any of these offenses, and (b) when taken into custody, was out on bail charged with any of these offenses, and (c) if previously released for any of these offenses and there was a breach of the undertaking.²⁹ These provisions make it possible for a judge to refuse to release dangerous offenders, provisionally on bail. Similar rules, however, should be laid down for other types of offenders. A pickpocket, professional thief, professional swindler, is as bad a risk from the point of view of continuing his criminal career while on bail, as a holdup man or a burglar. It should therefore be possible to keep these types of offenders in jail pending trial, as is done by European countries. The latter give the judge full discretion to grant

or refuse provisional release in *all* serious crimes, or to prohibit it entirely for habitual and professional criminals.

5. The Indictment

In about half the states of this country, and in Federal prosecutions, a defendant cannot be brought to trial in a felony case unless the Grand Jury passes upon the accusation and votes an indictment. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury," reads the Federal Constitution. The Grand Jury usually consists of not more than twenty-three nor less than twelve laymen.³⁰ After it has been empaneled and sworn, it is charged by the court with respect to its duties. These involve an inquiry into all offenses committed within the territorial jurisdiction of the court. The prosecutor brings before this body those accusations which have already been heard by a magistrate in the preliminary hearing and in which the accused has been bound over. The prosecutor may also have the Grand Jury pass upon accusations which he makes directly, and the Grand Jury may, without waiting for action by the prosecutor, inquire into offenses on its own motion. The vast majority of cases, however, are brought before the Grand Jury by the prosecutor on his own initiative or after the prisoners have been bound over by the magistrate at the preliminary hearing. A recent study of 7,414 cases shows that only 353 or 5 per cent were initiated by the Grand Jury.³¹

In bind-over cases and cases initiated by the prosecutor, the charges against the accused are contained in an indictment, which will form the basis of his trial if it is voted by the Grand Jury. It is the duty of the Grand Jury to test the sufficiency of these charges.

For this purpose, an *ex parte*, secret hearing, is held. The only persons who have the right to be present are the prosecutor, the stenographer, the witness under examination, and an interpreter if necessary. No persons except the Grand Jurors may be present while they are deliberating and voting. The prosecutor, if he wishes the indictment voted, brings before the Grand Jury sufficient witnesses to convince this body that the accused is probably guilty of the charges against him. The Grand Jury has the right to hear witnesses for the defense, but rarely exercises its right to do so. After all the evidence is presented to the Grand Jury, it deliberates in secret as to whether it will vote or reject the indictment. It will "true bill" the indictment if it believes that there is probable cause to believe the defendant guilty of the charges against him; twelve votes out of twenty-three in favor of finding a true bill are sufficient to vote the indictment.³²

Many states have dispensed with the Grand Jury stage of the procedure, as described above, for the ordinary run of criminal cases. Defendants in these states are tried on informations, filed by the prosecutor, without prior action by the Grand Jury. There is an increasing body of opinion that favors the extension of this system to the states which still retain the Grand Jury with all its traditional powers, "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or by information," reads a provision of the Model Code of Criminal Procedure, of the American Law Institute.³³

Dispensing with the Grand Jury eliminates one of the sources of waste, duplication and inefficiency in the criminal process. In the first place, the Grand Jury has long ceased to perform its function of securing the inno-

cent against arbitrary, oppressive and malicious accusations. It is a little difficult to see where there is any protection for an accused in a secret procedure which brings only witnesses for the state before the Grand Jury. Moreover, authoritative commentators agree that the Grand Jury is largely a rubber stamp for the prosecutor. As Dean Morse, who made an excellent survey of the Grand Jury system, points out:

“There are undoubtedly some instances when Grand Jurors function independently and exercise initiative and freedom of judgment, but the writer has come to the conclusion, which he believes amply supported by the data presented in this survey, that Grand Juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval and often uncritically, the wishes of the prosecuting attorney.”³⁴ A similar opinion is expressed by Healy. “Every prosecutor knows, and every intelligent person who ever served on the Grand Jury knows, that the prosecuting officer almost invariably completely dominates the Grand Jury. He is accorded the right to interrogate the witnesses; he may to a large extent determine the witnesses who shall be summoned. This is a completely effective power, because when an indictment fails to be returned in a given case, it is usually because there is not sufficient evidence, and if the State’s attorney is not sufficiently diligent in producing the necessary witnesses, an indictment can scarcely be expected. Thus he may exercise a powerful and conclusive and irrevocable power of veto without anything to interfere at all, simply by failing to produce the witness necessary to convince the Grand Jury that an indictment should be returned. He can usually determine the order of the cases to be consid-

ered. He can by the phrasing of his questions elicit the type of information he wants the Grand Jury to hear. If a lay member of the Grand Jury attempts to explore the recesses of a case on his own account, the State’s attorney can easily, if he so desires, make the effort of such an amateur appear to the other members of the Jury fruitless and pointless. He can usually awe most of the members of the Grand Jury by his superior knowledge of the criminal law. His domination of the sessions is practically complete.”³⁵

Under these conditions, it is usually possible for the prosecutor to obtain any indictments that he wishes.

The prosecutor may, however, use his power over the Grand Jury to have indictments thrown out. In many cases the prosecutor may want to block the proceedings against a particular accused, but may not wish to take the responsibility for doing so. If the Grand Jury fails to vote a true bill, the onus for quashing the proceedings can be shifted to it. Since the prosecutor largely controls which witnesses are to be heard and the subjects on which they will be examined, it is not very difficult for him to obtain the desired result. In the notorious Drukman case, the District Attorney was accused of failing to show a check to the Grand Jury which allegedly established a motive for the murder. The three defendants in that case were practically caught in the act, arrested, brought before a magistrate, held for the Grand Jury and released on the latter body’s failure to find an indictment for murder. A special Grand Jury had to be empaneled and a special prosecutor appointed before the defendants were indicted and convicted of murder.³⁶ (See also page 54.) Charges were filed against the District Attorney because of his conduct of the case,

but he was exonerated by the Governor.

The requirement of action by the Grand Jury as preliminary to trial is one of the main causes of delay in the prosecution of crime. In urban centers, there are monthly sessions of the Grand Jury; in rural areas, the Grand Jury is called together much less frequently—two, three, or four times a year. A defendant bound over for action by the Grand Jury, between sessions, may have to wait a considerable length of time before a vote is taken on the indictment. In a study made in Oregon, the time between bind-over and Grand Jury disposition ranged from zero to 194 days, with the median, 20.17 days. In New York the median time interval ranged from 14 days in New York City to 59 days in other large cities of the State. In Illinois the interval was 13-37 days.³⁷ This delay militates against successful prosecutions. In the lapse of time between the preliminary examination and the Grand Jury hearing, witnesses disappear, suffer lapse of memory, or leave the state. These contingencies are especially likely to occur if the witnesses are hostile or reluctant to testify. The delay increases the opportunities for approaching witnesses and influencing them either by money or by threats. Even a complaining witness, in the interim between preliminary examination and trial, may be influenced by cash, or by fear, to change his testimony. While this delay may be highly favorable for a guilty defendant, it increases the burden of the poor but innocent accused. For the defendant who cannot raise bail, the requirement of a Grand Jury hearing merely increases the time he must spend in jail awaiting trial.

Delay is especially harmful where a man wishes to plead guilty. Frequently, a defendant knows that the case against him is so strong that it is better to

plead guilty in the hope that he will thereby win more favorable treatment as to the penalty, but indictment by the Grand Jury is still necessary, unless the state has special provisions for waiving the Grand Jury hearing. In the interval between the bind-over and the Grand Jury hearing, the defendant may change his mind about pleading guilty, in which case the state will be put to the necessity and the expense of trying him, whereas if the case could have been brought up for final disposition shortly after the preliminary examination, conviction could have been entered on a plea of guilty.

Prosecution by information avoids the duplication, delay, and evasion of responsibility which is inherent in the Grand Jury system. The accused is protected against malicious or unfounded accusations by his right to demand a preliminary examination of the charges before a magistrate. If the magistrate binds the accused over, he may be put down for trial as soon as the prosecutor files his information. If the prosecutor does not wish to go ahead, he will file no information. The responsibility for taking this action will then rest squarely on him. He will not be able to pass the responsibility to the Grand Jury.

6. Arraignment: Pleas of Guilty

The arraignment of the accused follows the voting of the indictment or the filing of the information by the prosecutor. This involves the reading of the charges to the accused by the clerk of court in the presence of the judge. The accused is asked whether he is guilty or not guilty of the charges alleged against him. A large proportion of the defendants enter a plea of guilty at this stage of the procedure. In fact, most convictions in criminal cases are on pleas of guilty. This is clearly demonstrated by the

following table of convictions in cases coming before courts of general criminal jurisdiction in the 25 states which reported statistics to the Census Bureau for 1934. Of all the defendants who were convicted in these states, 3 out of every 4 pleaded guilty. In 18 states, 8 or more of every 10 defendants convicted, pleaded guilty to the charges against them.

PLEAS OF GUILTY (1934)

(Compiled from Bureau of the Census Judicial Criminal Statistics 1934, Table 38, 32.)

	Number of Defendants Convicted of Offense Charged	Number of Defendants Who Pled Guilty	Per cent Pleaded Guilty
Connecticut	1,249	1,148	91.9
Iowa	2,404	2,208	91.8
New Hampshire	374	333	89.0
Minnesota	2,513	2,220	88.3
Oregon	876	768	87.7
North Dakota	780	681	87.3
Arizona	563	488	86.7
Wisconsin	17,035	14,661	86.1
South Dakota	773	663	85.8
Montana	469	402	85.7
Michigan	4,274	3,658	85.6
Washington	1,286	1,087	84.5
Wyoming	244	206	84.4
Kansas	1,999	1,656	82.8
Ohio	5,818	4,792	82.4
New Jersey	6,487	5,290	81.5
District of Columbia	1,196	971	81.2
New Mexico	702	562	80.1
Colorado	1,220	973	79.8
Idaho	277	218	78.7
California	7,570	5,858	77.4
Missouri	3,389	2,544	75.1
Nebraska	1,409	1,048	74.4
Utah	302	192	63.6
Pennsylvania	<u>29,702</u>	<u>18,064</u>	<u>60.8</u>
	92,911	70,691	76.1

It may come as a surprise to the layman that so large a proportion of defendants plead guilty. It would seem to be an obvious advantage for a defendant to test an accusation and take his chances of defeating it at the trial. The plea of guilty however has come to have definite advantages for the offender. Where there is a strong likelihood that he will be convicted, the experienced criminal attempts to strike a bargain with the prosecutor. He offers to plead guilty in return for a short sentence. Prosecutors favor pleas of guilty since the uncertainty, expense and work incidental to jury trials are avoided. A plea of guilty, moreover, is entered as a conviction and the efficiency of the prosecutor's office is usually judged by the number of convictions it has obtained. Technically, the prosecutor can give no assurances as to what sentence will be imposed by the judge, but judges depend upon prosecutors for information about cases coming before them. In urban centers, moreover, judges are aware that unless a

substantial proportion of the cases are disposed of through pleas of guilty, the judicial machine will be swamped under the pressure of cases to be tried. They are, therefore, inclined to ratify the agreement entered into between the prosecutor and the defendant.

Thus the sentence which is actually imposed as the result of a plea of guilty will depend upon such factors as the strength or weakness of the state's case, the ability with which it has been prepared, the congestion of the trial court docket and the bargaining abilities of the prosecutor and of defense counsel. Such variables permit manipulation, so that the sentence agreed to may bear no just relation to the gravity of the crime or the dangerousness of the offender.

"We found many cases in which the plea accepted, and punishment inflicted, seemed trivial in comparison to the magnitude of the crime committed," states the Illinois Crime Survey. In armed robbery cases, for example, where the penalty was 10 years to life, pleas of guilty were commonly found to ordinary robbery punishable by three to twenty years, to grand larceny with a penalty from one to ten years and even to petit larceny whose punishment was one year in the jail or workhouse and a fine of \$100.³⁸

7. The Jury Trial

Where a plea of not guilty is entered at the arraignment, the defendant is usually entitled to a trial by jury to decide the charges against him. Trial by jury is one of the most outstanding features of the Anglo-American legal system. It is one of the fundamental guarantees of the citizen and is inscribed in state and Federal Constitutions. "The trial of all crimes, except in cases of impeachment, shall be by jury," "In all criminal prosecutions the accused shall

enjoy the right to trial by jury," "The right to trial by jury shall remain inviolate," read some of these provisions. But absolute as these guarantees of jury trial appear, they were never intended to cover every violation of the criminal laws. Long before the American Revolution the English Parliament, faced with the practical problem of enforcing large numbers of regulatory acts, authorized trials before justices of the peace for such offenses. Similarly, in the Colonies, many petty offenses were not subject to jury trial. Constitutional provisions guaranteeing trial by jury must therefore be interpreted in the light of this English and Colonial experience. No right to a jury can be claimed in offenses which were tried summarily at the time the provisions were adopted. Thus vagrancy, disorderly conduct, drunkenness, violation of Sunday laws and municipal ordinances, and a wide variety of other petty misdemeanors, may be tried without a jury. Appellate courts have also permitted trial without jury for new offenses similar to those triable summarily.³⁹

Nevertheless, courts have guarded the privilege of trial by jury rather jealously. They have looked with suspicion upon legislative attempts to deprive defendants of jury trials. The United States Supreme Court, for example, would not permit a defendant charged under a District of Columbia statute with reckless driving and subject to a penalty of thirty days imprisonment and a hundred dollar fine, to be deprived of his right to a jury trial. "The act with which the accused was charged," stated the court, "was of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."⁴⁰ Other states have adopted a test for summary jurisdiction in terms of the penalty to be imposed rather

than the moral nature of the offense, but the limits of summary jurisdiction permitted by this test are not very wide and they vary from state to state. Offenses punishable by a short term of imprisonment or by a fine, or a fine below a certain amount, may be tried by a judge without a jury. In Massachusetts and a number of other states, a person accused of crime has the right to a jury trial for all offenses. Magistrates in these states may dispose of cases without a jury, but a defendant who feels that he has been aggrieved by the decision of the magistrate may claim his right to a jury trial on appeal.

Despite its wide jurisdiction, the jury trial has come to be the exceptional rather than the usual means of disposing of criminal cases. Writers have begun to speak in this country of the "vanishing" jury trial. In the 25 states whose courts reported to the Census Bureau in 1934, 97,365 defendants were convicted of the offense charged or of a lesser offense; 73,771 or 75.8 per cent as the result of a plea of guilty and only 14,768 or 15.2 per cent as the result of a jury trial. The remaining 8,826 or 9.1 per cent were convicted by the court alone in cases in which jury trial was waived. Of the defendants eliminated without conviction, 22,801 had their cases dropped through action for which the prosecuting attorney was primarily responsible, as against 9,628 acquitted by jury. Although these figures indicate that the jury is far from having reached the point of extinction, it is evident from the statistics that jury trial has less numerical importance than other methods of disposing of criminal cases.

The importance of the jury trial, however, cannot be measured by mere statistics. Defendants are less likely to plead guilty in serious offenses such as rape, aggravated assault, robbery

and manslaughter, in which a stiff penalty may be imposed, than in minor offenses. Such defendants must be tried by jury, unless the state law permits a waiver of jury trial and the defendant consents to such waiver. Most of the notions which the public has concerning criminal justice are obtained from accounts of jury trials in the newspapers. There is little drama in a plea of guilty or in a dismissal of a case in an inferior court, but there are usually plenty of fireworks in a jury trial where the accused is charged with a serious offense and where he has engaged a good lawyer to represent him. Of all the operations of criminal justice, therefore, the jury trial has the best public.

In the cases which come before the jury, it is the duty of this body to make the ultimate decision on the facts as to whether the accused is guilty or not guilty. This decision must be had by the unanimous vote of the twelve laymen composing the jury. In minor cases which turn on simple issues of fact, little difficulty is likely to be encountered by the jury in reaching a verdict, but in major crimes the task of a jury is apt to be an exceedingly complex one. In the *Insull* case, it was the duty of the jury to determine whether Insull and sixteen other defendants were guilty of using the mails to defraud the investing public of millions of dollars, in connection with the sale of securities of the Corporation Securities Company. The charges against the defendants were embodied in an indictment covering 120 pages, containing 25 different counts. The jury had to pass upon the interrelated dealings of two investment companies, one holding company, one stock selling company, a brokerage house, and four public utilities. Government accountants analyzed the transactions of these companies in elaborate detail to establish

the government's contention that the true income of the Corporation Securities Company had been misrepresented. The issue of fraud turned, to a considerable extent, on the legitimacy of certain stock-market practices and accounting methods used by the defendant, on which expert opinion at the trial was sharply divided. It took eight weeks of trial to present the enormous mass of testimony involved in this case. Two hundred witnesses were subpoenaed by the government. It took the jury but two hours to reach their verdict that the defendants were not guilty.⁴¹

Cases like this make it clear that unusual qualities are required in a jurymen. He must have ability to understand and appraise evidence which is generally conflicting and may be highly technical. He must be able to make sound intuitive judgments as to the credibility of witnesses. He must be able to reason logically from the premises that he has adopted. He must be able to divest himself of the passion and prejudices which have been stirred up against the accused, in or out of the court room, and render his verdict solely on the evidence given in open court. He must be able to resist the approaches of fixers who will offer money for his vote and of gangsters who may threaten him. It is one of the perennial sources of complaint against the jury system that individuals possessing such qualities are not to be found in the jury box in the trial of civil and criminal cases. In part, the difficulty is due to the fact that the number of individuals who could make competent jurymen in any community is necessarily limited and the demand for their services is very great. In New York County about 50,000 jurymen are drawn for service annually; in Philadelphia, about 7,000; and in Boston, about 5,000. Moreover, the field of choice in any community

is circumscribed. Individuals in certain occupations are exempted from jury duty though they may make competent jurymen. In Massachusetts, for example, many public officials, such as legislators, sheriffs, constables, clerks of court, justices, as well as attorneys, ministers of the Gospel, officers of colleges, preceptors and teachers of academies, practising physicians, teachers in public schools, members of the volunteer militia, officials of state hospitals and penal institutions, keepers of light-houses, conductors and engine drivers of railroad trains and members of fire departments, are exempt from jury duty.

The selective processes used to choose jurymen are defective, and the jury which tries the issue on which the life and liberty of an individual depends may be representative of the mediocrity of the community rather than its competence. The preparation of the jury list, from which jurors are drawn for service, is entrusted to a variety of authorities: jury commissioners, county commissioners, supervisors' and assessors' clerks, election commissioners, registrars and voters, city and township officials, etc. The jury list is compiled from voters' lists, assessment rolls, city directories, telephone books, personal knowledge, recommendations of friends and acquaintances, etc. The officials making the compilation are generally unequipped for adequate investigations into the character and abilities of prospective jurymen, and in many jurisdictions this is not even attempted. "Perhaps the most serious shortcoming in the administration of our jury system is in the selection by some local boards of the citizens whose names are placed on the jury lists," writes a Massachusetts Commission on Jury Service. "The boards have rarely been furnished by their municipalities with any

funds for carrying on investigations as to the fitness of prospective jurors; many members of the boards are so underpaid that it could hardly be expected that they would personally make any extensive investigations; and the result has been, especially in the cities and large towns, that the boards have from necessity but such meager information as might be gathered from directories or official records as to a man's age, occupation, place of residence and length of residence in the city or town and whether he is a registered voter or has a criminal record."⁴²

The panel of jurors for a particular session of the court is drawn, in the manner prescribed by the statutes, from this general jury list, but not all persons drawn will be available for jury duty. Many will prevail upon the judge to excuse them for reasons satisfactory to him. Those excused may be the most capable jurors on the panel. "The court has the right to excuse those (jurymen) who have been summoned, and theoretically this is only done where they have good excuses to offer," writes Lashly. "In practice this is not always true. Unfortunately, judges are nominated through the influence of political organizations which also assist in their election, and the members of these organizations and some public officials do not hesitate to use their influence to have competent and well-qualified citizens who have been summoned to serve as jurors excused from that service."⁴³

Counsel for the defense and for the prosecution have a large share in the determination of the trial jury through the exercise of their rights of challenge. They have a limited number of peremptory challenges which they can use to object to a particular individual serving on the trial jury. They need assign no reason for their objection. They also have an

unlimited right of challenge for cause, on the basis of a juror's lack of legal qualifications, physical or mental defects, bias, prejudice or hostility, relationship to the defendant or the complaining witness, etc. Such a challenge requires counsel to state the reasons on which it is based.⁴⁴

In order to determine whether a basis for a challenge exists, it is the custom of counsel in many states to examine and cross-examine the jurors. This examination may in serious cases be as searching as the indulgence of the court permits, into the life history of each individual juror, his friendships, affiliations, feelings, and predilections toward crime and criminals. Lawyers set much store by this examination of jurors, and resist efforts to place it in the hands of the court as is done in a number of states. It enables them not alone to eliminate unqualified and biased jurors, but also to pick a jury that is likely to be favorable to their contentions. Thus even in the final stage, in which the actual jury to try the case is selected, the selective methods may eliminate the most objective, most intelligent and capable of jurors.

The fact that the parties may examine individual jury-men to determine whether a basis for challenge exists has sometimes resulted in the rather ludicrous spectacle of spending days and months in the choice of a trial jury. Moley mentions a California case in which the selection of a jury took 91 days and a Chicago case in which 4,821 jurors were examined at a cost to the State of \$13,000. In another Chicago case a jury was obtained after exactly one month spent in questioning more than 1,000 veniremen.⁴⁵ These practises, however, are exceptional. They are not typical features of American jury trials. Callender states that the right of challenge is not generally exercised in Philadelphia. Most of

the minor offenses and indeed most of the serious offenses are tried by the first 12 jurors called into the box. Murder cases, however, form an exception to this rule.⁴⁶ It is probable that this is also true of other American communities.

After the jury has been chosen and sworn, the actual trial of a case begins. The trial is usually opened by a short statement made by the prosecuting attorney concerning the nature of the charges and the evidence which he expects to produce in support of them. Defense counsel may then reply, outlining the main lines of his defense. The prosecutor then follows with the introduction of his evidence and the examination of his witnesses. Witnesses are first questioned on direct examination by the prosecutor and may be cross-examined by the defendant's attorney. At the close of the prosecution's case, the attorney for the accused can move for a directed verdict of acquittal without introducing any evidence for the defense. It is incumbent upon the prosecuting attorney, if he wishes to obtain a conviction, to prove all the essential elements of his case beyond a reasonable doubt. If he has failed to do so, the motion for the directed verdict of acquittal may be granted. If such a motion is made and denied, or if it has not been made, it then becomes the duty of the defense attorney to present the evidence for the defense. The examination of witnesses for the defense proceeds as before except that defense counsel examines the witnesses upon direct examination and the prosecution conducts the cross-examination. Rebutting evidence may then be offered by the prosecution, with a counter-rebuttal by the defense. When the presentation of evidence has been concluded, defense counsel may again move for a directed verdict of acquit-

tal. If this motion is denied, counsel for the defense may then make his final plea to the jury, summarizing the evidence in favor of his client and presenting all the arguments in favor of acquittal. Defense counsel is followed in his peroration by the prosecuting attorney who emphasizes the evidence of guilt and argues as persuasively as possible for a conviction.

After counsel have concluded their arguments to the jury, it becomes the duty of the judge to instruct the jury as to the law applicable to all the essential issues involved in the criminal prosecution. The judge may summarize the evidence which has been presented by the prosecution and the defense to sustain their contentions. In most jurisdictions, the judge must limit himself to a factual summary. He can make no comments as to the value of the evidence offered, nor can he express any opinion which might influence the jury. After the case is submitted to the jury by the judge, the jury leaves the courtroom to deliberate on its verdict in secret. Verdicts of acquittal or conviction must be had by a unanimous vote.

Discussing trial by jury in the seventeenth century, Sir Matthew Hale states: "Another excellency of this trial is this; that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them, and *observing where the question and knot of the business lies*; and by showing them his opinion even in matter of fact which is a great advantage to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and

enlightening the matter of fact, whereof the jury are judges."⁴⁷

One of the weaknesses of trial by jury today is that this intimate collaboration between judge and jury has been broken in most states. Conflicts between bench and bar in colonial days and the early days of the republic, the leveling influences of Jeffersonian and Jacksonian democracy, the rise of an elective judiciary of inferior caliber, have all contributed to the exaltation of the province of the jury at the expense of that of the judge. The judge is no longer in most states the impartial guide of the jury, giving it the benefit of his specialized training and experience in weighing and appraising evidence and passing upon the credibility of witnesses. It has been felt in this country that for a judge to comment on the evidence or to give his opinion of the credibility of witnesses is to invade the function of the jury in the determination of the facts. Not only is the judge precluded from commenting directly; he must, according to the Ohio court, "so evenly balance the scales of justice as not to indicate by a wink, look, shake of the head or peculiar emphasis... which way the verdict should go."⁴⁸

The untrained laymen sitting on the jury must, therefore, find their way through the mass of conflicting and technical evidence as best they can. To whom they shall give credence, what they shall believe, is entirely up to them. They can receive no help from the one person in the trial who should be most interested in fair and impartial verdict: the trial judge. All that he can do is set aside a verdict of guilty if he believes that it is against the weight of the evidence. If a verdict of acquittal is returned, the jury's action is final. No further steps can be taken by the prosecution, even if the evidence undeniably indicated the guilt of the

accused.

The Federal courts and a small number of state courts have refused to accept this emasculation of the judicial function. Their judges may comment on the value of the evidence and the credibility of witnesses, so long as they make it clear to the jury that it is not bound by their opinion. Very strong statements on the facts are sometimes made by judges possessing this power. In the recent Peacher peonage trial in Arkansas, Federal Judge Martineau is reported to have charged the jury as follows: "Every circumstance in the case points to the guilt of this man in my opinion."⁴⁹ This comes very close to the classic English charge in the case of the pickpocket accused of stealing a watch: "Gentlemen of the Jury, the defendant stole the watch. Consider your verdict."

One of the most curious features of an American trial to one acquainted with European procedure is the right of the defendant to remain a passive spectator at the proceedings. One of the first steps in a French or German trial is a thorough interrogation by the trial judge of the person accused. The judge attempts to obtain from the accused as complete an account of his personal history, past delinquencies and connection with the present crime, as possible. In an American trial, on the other hand, the accused has a perfect right to stay off the stand. Nobody may question him if he chooses to exercise this right. In most states the prosecutor cannot even comment on the accused's refusal to testify. The accused may even obtain an express instruction from the judge, that no inference may be drawn by the jury from the fact that the accused has refused to take the stand and testify. Only when the accused waives his right to remain silent can he be questioned by the

prosecuting attorney. Such interrogation takes place in cross-examination, after the defendant has had a chance to tell his story under the direct examination of his attorney.

The right of the defendant to remain a passive spectator at his trial is derived from the guarantee of the privilege against self-incrimination. This guarantee arose as a reaction against the extensive use of torture and the brutal questioning of accused persons in state trials and in Star Chamber proceedings in 17th century England. In its present form the privilege seems to go far beyond the legitimate need of the accused for protection against unjust inquisitions. It shields him from all inquiry into the charges against him and not merely from an interrogation conducted by third-degree methods. European criminal procedure prohibits the use of torture and third-degree methods, but does not forbid the ordinary interrogation of the accused, either in preliminary proceedings or at the trial. The accused usually knows most about the truth or falsity of the charges against him, and continental prosecutors and judges do not hesitate to tap this knowledge. But under the American law the accused may withdraw himself from all scrutiny. Guilty persons usually take advantage of this right, since innocent individuals generally welcome the opportunity to present their side of the case. Thus the privilege against self-incrimination becomes a shield for the guilty. As one writer put it, 'Were the criminals to frame a code for their special protection, their first provision would be to protect themselves from all inquiry into their conduct.'⁵⁰

New Jersey and a number of American states have chosen an indirect means of compelling defendants to take the stand and submit themselves to interrogation. These states permit the

prosecutor specifically to call the attention of the jury to the defendant's failure to testify. This is probably an effective method of compelling testimony, since the argument that the accused might have taken the stand and denied his guilt, yet failed to do so because he was guilty, is apt to carry considerable weight with the jury.⁵¹

The unanimous verdict is an integral part of the jury trial in most states. In Idaho, Louisiana, Montana, Oklahoma and Texas, however, state constitutions authorize a departure from the common-law rule of a unanimous verdict. The Model Code of Criminal Procedure of the American Law Institute would extend the non-unanimous verdict in criminal cases to other states. It provides that a verdict of 10 jurors shall be sufficient in felony cases and 8 in misdemeanor cases. Only for capital offenses is the requirement of unanimity retained by the Code.⁵²

Many reasons justify this departure from traditional practices. In the first place, the rule as to unanimous verdict in criminal cases places too great an advantage in the hands of the criminal as against the state. The state has the burden of proving its case beyond a reasonable doubt, and of convincing every one of the twelve jurors that it has sustained the burden placed upon it. All the defendant has to do is to instill a persistent doubt in but one juror and the efforts of the state will not avail. Investigations into jury fixing in different parts of the country indicate that it is not very difficult for a defendant to obtain one juror to vote for him through thick and thin, irrespective of the evidence, if a consideration is furnished. Often the same result may be produced, where gangster defendants are on trial, through the intimidation of jurymen or members of their families. A disagreement involves

additional expense and additional delay, and delay almost always works in favor of the criminal. These disagreements often occur in important cases, in which there is a high degree of public interest. This is illustrated by the failure to obtain a verdict in the first trial of the Wendel kidnapers. One of the defendants in this prosecution pleaded guilty. The others elected to stand trial. The jury failed to agree as to whether they were guilty or not guilty after many days of trial and many hours of deliberation. Such disagreements undermine confidence in the administration of criminal justice.

The theory of the unanimity rule is that "twelve men may be found who take the same view of a disputed fact, that the balance of each juror's mind may be struck in the same direction, that all are able to feel the same cogency of proof and that no one can be drawn to a conclusion different from that to which his fellows have arrived." These conditions are rarely present in a jury of twelve men drawn at random from the community. They come from different walks of life. They are the products of different environmental influences. They differ in intelligence, education, strength of character, powers of observation, judgment of human nature, etc. The requirement of a unanimous verdict allows too little play for these differences. It enhances the power of one single, stubborn, perverse or ignorant juror by sheer power of endurance and obstinacy to compel a verdict or a disagreement, against the wishes of a majority of the jury.

**DEFENDANTS ACQUITTED IN
JURY CASES,
FOR SELECTED STATES: 1934**

	TOTAL DEFENDANTS
DEFENDANTS	
STATE	TRIED BY

ACQUITTED

	JURY	Number	Percent
South Dakota	135	66	48.9
New Jersey	955	455	47.6
Iowa	212	96	45.3
Pennsylvania	15,920	6,689	42.0
Wisconsin	371	153	41.2
Arizona	139	56	40.3
Oregon	142	57	40.1
Colorado	402	149	37.1
Nebraska	174	62	35.6
Missouri	637	221	34.7
New Mexico	179	62	34.6
Michigan	625	206	33.0
Kansas	488	160	32.8
Washington	219	68	31.1
California	1,723	523	30.4
Ohio	967	286	29.6
North Dakota	119	35	29.4
Minnesota	253	73	28.9
Utah	154	42	27.3
District of Columbia	300	73	24.3
Twenty States	24,114	9,532	39.5

Judged by the results of convictions and acquittals, the jury trial would seem to be very much in need of improvement in many jurisdictions. The preceding table indicates the percentage of acquittals in jury cases in twenty states in 1934. In seven of the 20 states represented in this table, two out of every five defendants tried by jury were acquitted.⁵⁴

State totals, however, conceal almost as much as they reveal. Courts within a state vary almost as much as the states themselves in their percentages of acquittals in jury trials. This is evident from the following table on New Jersey for the year 1934:

ACQUITTALS IN JURY CASES—BY COUNTIES-1934 *

COUNTY	TOTAL DEFENDANTS		TOTAL DEFENDANTS	PER CENT
	TRIED BY JURY	ACQUITTED		
Hudson	225	154		68.4
Monmouth	60	35		58.3
Atlantic	31	17	54.8	
Middlesex	46	24		52.2
Bergen	69	33		47.8
Camden	68	30		44.1
Mercer	87	37		42.5
Essex	111	42		37.8
Salem	35	13		37.1
Union	31	11		35.5
Cumberland	39	11		28.2



Passaic	<u>45</u>	<u>6</u>	<u>13.3</u>
Entire state	963	454	47.1

* Only counties with more than 25 jury cases were considered in this table.

More than half the defendants tried by jury in Hudson, Monmouth, Middlesex and Atlantic counties in 1934 were acquitted, as compared with only 13.3 per cent acquittals in Passaic County.⁵⁵

The percentage of acquittals in some of the states listed in the above table, and in some of the New Jersey counties, would seem to be very high. The police, the prosecutor, the magistrate, the preliminary hearing and the Grand Jury may all have sifted the evidence and may all have agreed that the defendant was probably guilty of the offense charged. Yet the trial jury disagreed with this judgment in far too many of the cases brought before it. Either the police, prosecutor, magistrate and Grand Jury are inefficient in the performance of their duties and are passing on for trial too many innocent defendants, or the jury is acquitting too many defendants who were guilty of the offense charged. It is highly probable from our review of the work of these agencies that both factors are operating. Ineffective gathering and sifting of evidence on the part of police, prosecutor, magistrate and Grand Jury results in the unjust accusation and trial of many defendants. On the other hand, these factors, plus the poor preparation and presentation of the case by the prosecuting attorney and the inefficiency in the composition and procedure of the jury, result in many guilty defendants being acquitted.

The laws of many states permit a defendant to waive jury trial and choose trial by the judge alone, sitting without a jury. In some states, such waiver is permitted only in misdemeanor cases. In others, as in Wisconsin, Connecticut, Indiana, Michigan, Ohio, etc., a defendant may choose to be tried by a judge, in felony as well as in misdemeanor cases. The Wisconsin statute, for example, reads:

"Issues of fact joined upon any complaint, indictment or information may be tried by the Court without a jury whenever the accused in writing or by a statement in open court . . . consents thereto."⁵⁶

Although the choice of trial by the judge or by jury rests completely within the discretion of the defendant, many defendants do not insist upon jury trial. In Wisconsin, for example in 1934, 2,745 defendants were tried by the court without a jury as against 371 who were tried by jury. In New Jersey the defendants in jury-waived cases numbered 1,160 as against 955 jury trials. In Ohio, 723 defendants were tried by the courts and 967 were tried by jury.

Jury-waived cases may be tried much more economically, expeditiously and efficiently than jury cases. The expense of jury fees is saved to the state. Such time-consuming formalities as choosing the jury, instructing the jury and deliberating upon a verdict, are dispensed with, permitting the judge to dispose of many more cases. More convictions are likely to be obtained where judges try cases than where they are tried by jury.

This is evident when the table of acquittals in jury-waived cases presented on p. 279 is compared with the table on acquittals in jury cases presented on p. 275.

Only 20.1 per cent of the defendants tried by the court alone were acquitted, as against 39.5 per cent of the defendants tried by jury. Of the 9 states shown in the above table, all but California had a lower percentage of acquittals in jury-waived cases than in jury cases.⁵⁷

**DEFENDANTS ACQUITTED IN JURY-WAIVED CASES,
FOR SELECTED STATES: 1934**

STATE	TOTAL DEFENDANTS TRIED BY JURY -	DEFENDANTS ACQUITTED	
		Number	Per cent
New Jersey	1,160	413	35.6
California	980	336	34.3
Nebraska	371	96	25.9
Ohio	723	167	23.1
Wisconsin	2,747	580	21.1
Michigan	295	59	20.0
Pennsylvania	3,425	409	11.9
Missouri	518	17	3.3
<u>Minnesota</u>	<u>135</u>	<u>3</u>	<u>2.2</u>
Nine States	10,354	2,080	20.1

Because of its evident advantages in criminal justice administration, the waiver of jury trial should be permitted under the laws of every state. It is recommended by the American Law Institute, whose Model Code of Criminal Procedure (Sec. 266) reads:

“In all cases except where a sentence of death may be imposed, trial by jury may be waived by the defendant.”

(1) Ohio Code, 1936, Sec. 13432-6.

(2) Commentary to Section 12, American Law Institute, Model Code of Criminal Procedure, 217 et. seq.

(3) John B. Waite, “Criminal Law in Action,” 44.

(4) Model Code of Criminal Procedure, 232-233.

(5) *Ibid.*, 239.

(6) Compiled from an article by Edith Abbot, “Recent Statistics Relating to Crime in Chicago,” 13 *Journal of Criminal Law and Criminology* 329—358 (1922—23).

(7) Cleveland Crime Survey, 203.

(8) Hopkins, “Our Lawless Police,” 70.

(9) *Ibid.*, 80, 84.

(10) A. L. Beeley, “The Bail System in Chicago,” 24.

(11) Waite, *op. cit.*, 51-54.

(12) Cited in National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement, 102.

(13) 266 US. 1, 69 L.Ed. 131, 45 Sup. Ct. Rep. 1 (1924).

(14) *Brown v. State*, 173 Miss. 542, 574, 161 So. 465 (1935).

(15) *Brown v. Mississippi*, 297 U.S. 278, 286, 56 Sup. Ct. Rep., 461 (1936).

(16) See R. Moley, “Our Criminal Courts,” 21.

(17) See Table II, of A. Bettman’s “Criminal Justice Surveys Analysis in National Commission on Law Observance and Enforcement Report on Prosecution, 190-191.

(18) Illinois Crime Survey, 308.

(19) Illinois Crime Survey, 405.

(20) New York Laws of 1936, ch. 309, Gilbert, “New York Penal Law,” 1936 ed., 694 d.

(21) *People ex. rel. Rothenses v. Searles*, 229 A.D. 603, 243 N.Y. Supp. 15.

(22) Beeley, *op. cit.*, 154.

(23) *Ibid.*, 159.

(24) Missouri Crime Survey, 209.

(25) Seabury Report, 115—116.

(26) Missouri Crime Survey, 212.

(27) Bettrnan, *op. cit.*, 90.

This is also clearly brought out by the following comment of Professor Moley: “Examination of bail records is laborious, but in two or three instances it has been done with rather startling results. The Missouri Crime Survey revealed that in St. Louis, Kansas City and in thirty-eight other counties of the state \$292,400 in bail was forfeited in a single year. Of this approximately \$20,500 was reduced to judgment and only \$1500 was collected. Collections were made in two rural counties where the obligation of bail is still seriously recognized, but in St. Louis and Kansas City, no one was able to remember when a collection had been made on a forfeited bail bond. Millions of dollars in forfeited bail have been outstanding in Chicago for years and the sum total is substantially augmented every year. The same thing is probably true in the majority of our other

large cities." Our Criminal Courts, 46-47.

(28) Report of the Special Crime Commission (Mass.) Senate Doc. 125, 1933, 155 *et seq.*

(29) Model Code of Criminal Procedure, Sec. 70.

(30) The maximum number of Grand Jurors is fixed at not less than 23 in many states. Smaller numbers are used in other states, varying from 21 in Arizona, to 6 in Indiana. Model Code of Criminal Procedure,

(31) R. Moley, "The Initiation of Criminal Prosecutions by Indictment or Information," 29 Mich. L.R., 403—31, 414 (Feb. 1931).

(32) This was the number necessary at common law, and in many states today. In a number of states, however, the number has been fixed below 12. It is 9 in Colorado, Kentucky, Louisiana, Missouri, Oklahoma, Texas, Virginia, Wyoming; 8 in New Mexico; and in Indiana, Iowa, Montana, Oregon, South Dakota and Utah.

(33) Model Code of Criminal Procedure, Sec. 113.

Wayne L. Morse, "A Survey of the Grand Jury System," 10 Oregon Law Review 328 *et seq.* (June 1931).

(35) Illinois Crime Survey, 299.

(36) *People v. Hull* 251 App. Div. 40, 290 N.Y.S. 16 (1937). On appeal, the judgment of conviction in the case of Hull was reversed and a new trial granted. However, on his new trial Hull was found guilty of murder in the first degree, 277 N.Y. 171 (1938). He was saved from the electric chair by a commutation from Governor Lehman.

(37) See 30 Mich. L. R. 928

(April 1932.).

(38) Illinois Crime Survey, 471.

(39) F. Frankfurter and T. G. Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury," 39 Harvard Law Review 917—1019.

(40) *District of Columbia v. Colts*, 282 U.S. 63, 73, 51 Sup Ct. Rep. 52 (1930). Compare *Latimer v. Wilson*, 103 N.J. L. 159, *State v. Rogers*, 91 N.J.L. 212.

(41) See Account of the Insull case in 25 Journal of Criminal Law 782 (1934-35). The indictment originally named 19 defendants. One died before the trial and the others could not be prosecuted.

(42) Report of the Commission on Jury Service, 9 Massachusetts Law Quarterly, No. 2, 18—19, (Jan. 1924).

(43) Missouri Crime Survey, 179.

(44) Challenges may also be made to the entire panel. This is known as a challenge to the array, and may be based on substantial irregularities in the selection and summoning of the panel or for bias in the selecting officer.

(45) Moley, "Our Criminal Courts," 117.

(46) Clarence N. Callender "The Selection of Jurors," 41.

(47) Sir Matthew Hale, "The History of the Common Law," 1794 5th ed., II, 147.

(48) *Metropolitan Life Insurance Co. v. Howle*, 68 Ohio St. 614, 622 (1903).

(49) *New York Times*, Nov. 26, 1936, 1.

(50) John Appleton, "The Rules of Evidence," 134' 1862 ed.

(51) In *Twining V. New Jersey*, 211 US. 78, 53 L.Ed. 97, 29 Sup. Ct. Rep. 14 (1908). This

provision of the New Jersey law was held not to conflict with the due process clause of the Federal Constitution.

(52) Model Code of Criminal Procedure, Sec. 355.

(53) W. F. Willoughby, "Principles of Judicial Administration," 506.

(54) Bureau of the Census, *Judicial Criminal Statistics*, 1934, 13.

(55) Sixth Report of the New Jersey Judicial Council, 1934, 24.

(56) Wisconsin Statutes, 1935, 357.01.

(57) Bureau of the Census, *loc. cit.*



Problems of Sentencing & Treatment

1. Types of Penalties

When a man is found guilty or pleads guilty to an offense, it is the duty of the judge to impose sentence. The law prescribes the type of sentence which may be imposed. For a small number of offenses such as first-degree murder, rape, kidnaping, armed robbery, the death penalty is prescribed by many states. The electric chair, the gallows and the lethal chamber are methods used to execute this penalty. Most offenses, however, are punishable by imprisonment or by lines of varying amounts. Imprisonment for a term of over one year is usually carried out in state prisons and penitentiaries. Younger offenders, however, particularly if they are first offenders, may be sentenced to reformatories rather than to prisons and penitentiaries. Sentences of one year or less are usually executed in county or local jails and work houses. The jail also serves as a place of detention for those awaiting trial. A defendant may be sentenced to imprisonment on a definite sentence or on an indeterminate sentence. In the definite sentence, the date of release

of the offender is specifically fixed by the judge within the limits laid down by law. The offender cannot be detained beyond that date. He may, however, be released earlier under the good-time laws, that is, laws allowing early release for good behavior. These require a deduction of a certain number of days per month for each month of sentence that the offender behaved satisfactorily in prison. In the indeterminate sentence, the precise date of release is not *fixed*. The judge usually has the power to impose sentence between minimum and maximum limits. The decision as to the precise time when the accused will be released is made by an authority independent of the judge, usually a parole board.

For many offenses, and particularly the less serious ones, the judge has a choice between imprisonment and fines. Fines may also be imposed in addition to imprisonment. Where a man is fined and is unable to pay all at once, he is permitted to pay in installments in many states. Imprisonment in the county or local jails is usual when fines are

unpaid, the prisoner serving a certain number of days for each dollar of the fine imposed. In most states the judge has, in addition to the power of fine or imprisonment, the power of suspending the imposition or the execution of sentence and putting the offender on probation. If the imposition of sentence is suspended, the convicted offender is released without any sentence of imprisonment being imposed. If the execution of sentence is suspended, the specific sentence of imprisonment is imposed but its execution is suspended and the sentence of imprisonment does not take effect at once. In both cases, where the offender is put on probation he is given "an opportunity to improve his conduct while living as a member of the community, subject to conditions which may be imposed by the court and under the supervision and friendly guidance of a probation officer."¹ If the offender does not improve his conduct, and commits a new offense or violates the terms of his probation, the suspension of sentence is revoked and the original sentence, if its execution has been

suspended, comes into effect. If no sentence has been imposed in the first instance, the probation violator may be sentenced to imprisonment on the old offense.

Probation must not be confused with parole. Parole is the release of a person who has actually been in prison, before the expiration of his maximum sentence, or before the date fixed for his release on a definite sentence conditioned upon his observing certain requirements as to behavior outside of prison. Probation on the other hand applies to the release of convicted offenders either before sentence or under suspended sentence, conditioned upon the maintenance of certain standards of behavior during a specific period.

The states vary widely from each other in the kind of sentences imposed. An offender convicted of a specific offense is much more likely to be imprisoned rather than fined or put on probation, in some states than in others. Over three-fifths of the offenders convicted of larceny in 1934 were sentenced to state prisons and reformatories in Kansas and Colorado, as compared with one-fifth or less in New Jersey, Pennsylvania, and Wisconsin. Over one-third of those convicted of larceny in Pennsylvania, North Dakota, Iowa, and Missouri were sentenced to local jails and work houses, but less than one-tenth of the delinquents received this punishment in the District of Columbia and New Mexico. Fines as a punishment for larceny are very common in Wisconsin, where they are used in one-third of the convictions. In sixteen other states however, fines were used for less than 8 per cent of those convicted. New Jersey, Ohio, and Michigan put 46.1 per cent, 40.4 per cent, and 40.3 per cent respectively of their convicted thieves on probation; Washington, Kansas, and North

Dakota only 12 per cent, 10.8 per cent, and 10.2 per cent respectively.²

As the states vary widely from each other in sentences imposed for the same type of offense, so courts vary in the same state, and even judges on the same bench. A New York Grime Commission study of 145 offenders states, for example: 'The wide diversity of sentences imposed upon offenders committed to state prisons technically guilty of the same offense is apparent For attempted burglary, third degree, the sentences vary from fifteen months to five years; for burglary third degree, from two to ten years, and sentences for robbery first degree vary from seven and a half years to natural life. There is no uniformity in the sentences imposed for any of the offenses to which these offenders pleaded guilty or were sentenced after trial and conviction.'³ In New Jersey in 1934, 58.3 per cent of the convicted offenders were put on probation in Middlesex County as compared with 8.5 per cent in Gloucester County. Of the offenders in Atlantic County during the same year, 37 per cent were sentenced to the State Prison and to the State Reformatories, as compared with 9.1 per cent in Middlesex County.⁴ When the sentencing records of six judges attached to the Essex County Common Pleas Court were examined, significant differences were disclosed in the use of imprisonment, suspended sentences, and probation. This is evident from the following table:⁵

PERCENTAGE OF EACH KIND OF SENTENCE GIVEN BY EACH JUDGE ATTACHED TO THE ESSEX COUNTY COURT

	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6
Imprisonment	35.6	33.6	53.3	57.7	45.0	50.0
Probation	28.5	30.4	20.2	19.5	28.1	32.4
Fined	2.5	2.2	1.6	3.1	1.9	1.9
Suspended	33.4	33.8	24.3	19.7	25.0	15.7
No. of Cases	1235	1693	1869	1489	480	676

Judge 4 in this Table sentenced 57.7 per cent of the offenders who came before him to imprisonment as compared with 33.6 per cent sentenced by Judge 2. The latter judge put 64.2 per cent of the offenders on probation or suspended sentence as compared with 39.2 per cent of the offenders who appeared before Judge 4. Experienced lawyers are well aware of the different peculiarities of judges with respect to sentence and use this knowledge for the benefit of their clients.

Not only is there variation in the imposition and determination of sentences, but there is also a wide degree of variation in their execution. Penal institutions in the same state or in different states are not run according to any uniform notions of penal philosophy. According to the report of the National Commission on Law Observance and Enforcement, the country's 3,000 penal institutions "represent 3,000 different examples of administrative arrangements, methods of control and of policy in dealing with the human material incarcerated in them. We have no uniform practices except in a few places. The whole stands as an unwieldy, unorganized, hit-or-miss system which has grown up over hundreds of years of local policy making, local tradition and local objective. Certain broad influences have made themselves felt, especially in the last hundred years, in the development of types of prison buildings, in the use of labor, in the scheme of disci-

pline. But, as a rule, even where general influences have appeared they have been so adapted, modified and absorbed into the older local pattern, as to leave our national penal system nearly as complex, varied and unstandardized as it was before these 'reforms.'"⁶

These variations in sentences and in penal practices are owing in the first instance to differences in state laws. Probation may be used for any offense, or for any offense except those punishable with death or life imprisonment, in such states as Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Utah, Vermont, Virginia, Arizona, Colorado, Delaware, and Maine. In Georgia, Kansas, West Virginia, and North Carolina, on the other hand, it may be used for misdemeanors and minor offenses only.⁷ This condition of the state laws makes it inevitable that more convicted offenders will be placed on probation in New Jersey than in Kansas.

Sentences for specific offenses vary considerably between states. The maximum term of imprisonment for rape is fifteen years in Pennsylvania, twenty years in New York, thirty-five in Wisconsin, fifty years in California, and life in Illinois, Massachusetts, Ohio and Washington. Burglary of dwelling houses in the nighttime is punishable by a minimum of one year imprisonment in Illinois; five years in California, Wisconsin, Missouri, Washington, and Texas; ten years in New York and Massachusetts; life imprisonment is prescribed in Ohio unless the jury recommends leniency, in which event the minimum sentence is thirty years. The maximum term for grand larceny is twenty-five years in Wisconsin; ten years in New York, California, Illinois, Texas and Virginia, and seven years in Ohio; live years in Florida, Massachusetts, and Missouri; and three years in Pennsyl-

vania. Armed robbery is punishable by a minimum sentence of one year in Illinois, three years in Wisconsin, five years in Texas, Washington and California, eight years in Virginia and ten years in New York, Ohio and Missouri. Maximum terms for armed robbery in these states vary from twenty years in Pennsylvania, to death in Missouri, Virginia, and Texas.

Where variations in sentences occur within a single state, they are owing to the fact that each judge is largely free to follow his own predilections in imposing sentence, within the limits laid down by the law of his state. The law gives few directions to guide his action. This is in direct contrast to the situation of an accused before conviction. The criminal procedure gives a person not yet convicted many different guarantees against unjust conviction, but once he is found guilty he is largely dependent upon the capacity, sense of duty, understanding, and interest of the judge. Each judge, however, may have a different version of what his duty requires in sentencing offenders. Each judge may pursue a different theory of punishment. The same judge may even pursue different theories of punishment at different times in sentencing offenders.

It is shocking that the mere accident of geography, or of assignment of a case to one judge rather than another, or the judge's feelings at the time of sentencing, should make a difference of five to ten years imprisonment in a man's sentence. Capricious variations in sentences between judges from these causes is one of the sources of friction and of difficulty in the prison system. "There is no factor more disturbing to institutional routine and discipline than the question of comparative justice," writes one report. "Prisoners themselves, convicted of

similar crimes, compare experiences and quickly make evaluations which lead to conclusions that they were unfairly punished. This feeling is frequently found to be the germ of much rioting and disorder, and the basis of many serious escapes and other crimes within institutions. Moreover, prisoners leaving our institutions embittered, and laboring under the feeling that they have been mistreated, return to the community and frequently pursue a career of crime with serious results to local communities."⁸

2. The Necessity for Differentiation in Penalty

It is not possible completely to remove such difficulties under the present penal system. There must be some difference in sentences for the same kinds of offenses, if account is to be taken of the various types of antisocial conduct for which the law provides the same general definition. A judge must distinguish between an offender convicted of having had intercourse with a girl just under 18 years of age, and the offender convicted of the brutal violation of a girl of eight, even though both types of offense are included in the legal definition of rape. The same consideration applies to the differences in character of the offenders before the courts. A professional criminal who has been steeped in crime from his early youth, and an offender who has taken the road to crime for the first time, should not be treated in the same way. The threat to the general security is not the same in each case, and the possibility of bringing back the first offender to paths of rectitude is much greater than that of persuading the professional to renounce his life of crime.

Even when differences are allowed in the quality of offenses and the character of offenders, we shall still have what seem to

be capricious variations between judges in their sentences and even between the sentences imposed by the same judge. Judges may follow any one of five different, inconsistent theories of punishment in sentencing offenders of similar types who have committed offenses of like gravity. A different sentence will be imposed, depending upon the theory followed. -No matter what theory he follows, the judge will be able to cite respectable authority to justify his action.

3. Theories of Punishment

The various choices which confront a judge in disposing of a convicted offender are illustrated by the following case of John Jones. John Jones was convicted of burglary in the third degree in New York. John is one of a family of five brothers and sisters. His father died when John was six years old. His mother had to go out to work to support the family. John was therefore left virtually unsupervised and ran about the streets. He fell in with a bad gang and went out stealing with it at the age of twelve. He has appeared three times before the Children's Court and has served one sentence in a juvenile institution. He was released from the institution at the age of seventeen, and has worked for one year in a radio factory. Becoming discouraged with his dead-end job, he was persuaded by two acquaintances from the juvenile institution to participate in an attempt to burglarize the factory. Together they stole and disposed of a thousand dollars' worth of radio parts and accessories. At the age of eighteen, John Jones is before the adult criminal court for the first time. John's intelligence rating is dull normal; he had left school at the end of the seventh grade, which he had difficulty in completing, and his psychiatric report indicates that he is somewhat weak-willed and eas-

ily suggestible, that he comes readily under the domination of a stronger personality.

Under the law the judge may sentence John Jones to a maximum of 10 years imprisonment for his offense. No minimum sentence is fixed. The judge has also the right to suspend sentence and try John out on probation. Shall the judge sentence John Jones to one year, five years or ten years? Shall he give Jones another chance outside of prison walls in the hope that he may become satisfactorily adjusted while out on probation? It is evident that the choice which the judge must make in the above run-of-the-mill case is difficult. The judge may feel that the act of John Jones in breaking into his employer's factory and stealing his goods and chattels is an outrage which he, as a representative of the community, is called upon to avenge. This judicial attitude has the weight of tradition behind it. Historically, the criminal law grew from the transference to state agencies of the right of private individuals to avenge injuries to their persons and property. Some outstanding commentators on the criminal law still believe that the rationale of punishment is community vengeance. Oppenheim, for example, asks the question: "Is not collective wrath the source as well as the soul of punishment? Is it not a fact that punishment is and always has been an expression of public indignation, the passionate reaction of a community against an act that stirs its corporate conscience? Philosophers, lawyers, and sociologists of the greatest eminence do not hesitate to answer these questions in the affirmative."⁹ Stephen, the great historian of the criminal law, believes that social vengeance is the proper function of punishment. The criminal law, according to this writer, "regulates, sanctions, and provides a legitimate satisfaction

for the passion of revenge."¹⁰ The infliction of punishment gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense. The criminal law thus proceeds on the principle that it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting, upon criminals, punishments which express it.

This attitude of hating criminals and wreaking vengeance upon them, may appear too harsh and brutal to a judge of philosophic temper. He may, however, be impressed with the reasoning of a long line of philosophers who justify punishment on the theory that he who does evil must suffer evil: The burglary of John Jones is, therefore, an evil act which must be expiated through punishment. Punishment is then inherent in the nature of the crime, it is the atonement for the wrong committed by the crime. The guilt of the crime is washed away by the suffering of the criminal who has been punished. The great name of Kant can be cited in favor of this conception of punishment. He stated that the punishment of offenders against the moral law was a moral necessity binding on all rational beings. "Even if civil society should dissolve with the consent of its members . . . the last murderers found in prison must first have been executed so that each may receive what his deeds are worth."

The average American judge, however, will probably not be impressed with the philosophic subtlety of making punishment atone for wrongs. He will be unable to visualize the moral scale which will enable him to mete out exact degrees of atonement to pickpockets, burglars, rapists and assaulters who come before him for sentence. He may agree with Thomas Mott Osborne who states:

"If we are to retaliate, it is essential that retaliation shall be just- 'An eye for an eye, a tooth for a tooth'; but it is manifestly impossible to determine the exact amount of blame to be attached to the criminal himself. How can we ascertain how much is due to inheritance, how much to early environment, how much to other matters over which the offender has no control whatever? If we can not ascertain these, how can we tell just how much retaliation the offender deserves? When a man does not get enough punishment, it is bad; it encourages him to think he can always escape with less than his deserts; and thus crime is encouraged. When a man gets too much punishment it is bad; it makes him bitter and revengeful; and thus crime is encouraged. Failure results in either case, and the community suffers."¹¹

The judge may, therefore, seek a more utilitarian basis for punishment and may decide that offenders must be punished so that others who may be tempted to emulate them will not follow their example. Although he may agree that environmental factors over which John Jones had no control were largely responsible for his downfall, he may feel that by making an example of John Jones, and inflicting a severe punishment upon him, he will deter other employees who might be tempted to steal their employer's goods. Under the influence of such ideas judges hand out sentences like those which are described as follows:

"In Auburn Prison there are two youths, aged 21 and 25, who are serving sentences of 47 years and six months, to life, for robbery. One of these will be 68 and one 72 years of age when released. One man 69 years 'of age is serving a sentence of 15 to 30 years for robbery. He will be 84

years of age when released.

"In Sing Sing Prison one youth, aged 20 years, is serving a sentence of 45 to 90 years for robbery. He will be 65 years of age if released at the expiration of his minimum term. Another youth, aged 19 years, is serving a sentence of 30 to 60 years for robbery. A third, aged 29 years, is serving a sentence of 25 to 50 years.

"In Clinton Prison a boy of 21 years is serving a sentence of 57 years and 6 months, to life. Another, aged 20 years, is serving 35 to 67 years. There are two, aged 19 years, who are serving sentences of 30 to 60 years, and a third of the same age doing 45 to 90 years. One youth, aged 23 years, is serving a sentence of 57 years and 6 months, to life."¹²

Without wishing to make an example of John Jones, the judge may feel that he is a dangerous offender and that he should be imprisoned, so that it will not be possible for him to commit more offenses. The longer Jones's sentence of imprisonment, the greater will be the period of his incapacitation. This theory of incapacitating criminals from doing further injury, or of taking them out of society altogether, was in part responsible for the large number of offenses which were punishable by death under the English criminal law of the 18th century. Many of the so-called "characteristic" punishments employed on the Continent during the Middle Ages were also designed to incapacitate the offender from repeating his crime. Blasphemers had their tongues torn out. Pickpockets had their hands cut off. Sex offenders were castrated.

Finally, the judge may decide that what John Jones needs is some kind of reformatory treatment, which would not incapacitate him, but which would be capable of reeducating him for a better way of living, for which his

previous experiences and upbringing have not fitted him. The judge may believe with Plato that "that form of legislation is best which through punishment also tends to arouse in the criminal himself inclinations in harmony with the law... The law shall make a man hate injustice and love, or not hate, the nature of the just, this is the noblest work of the law."¹³ Jones may therefore be sentenced to imprisonment, for the judge may agree that "It is the function of the prison to find the means so to reshape the interests, attitudes, habits, the total character of the individual, as to release him both competent and willing to find a way of adjusting himself to the community without further law violation."¹⁴

It is evident from this short review of theories of punishment that the fate of Jones will depend upon the theory of punishment followed by the judge. If the judge is interested in reforming Jones, the only type of sentence which he can hand down is one which takes his needs into account and which serves the fundamental object of changing his attitudes so that he will become a useful member of the community. For this purpose it is necessary that the judge have at his disposal an indeterminate sentence rather than a fixed sentence. No one can foretell in advance how long the rehabilitation of Jones will take. If Jones's sentence is based upon theories of social vengeance, expiation of evil, or intimidation of others who might be tempted to emulate him, his needs as an individual may be disregarded. He may be given a fixed sentence measured by the strength of the moral sentiment which he has outraged, the gravity of the evil inherent in his crime, or the quantum of imprisonment necessary to strike terror into the hearts of potential imitators.

Despite their inconsistencies, each one of the above theories

of punishment is sanctioned by the criminal law. At different times particular theories have been popular with lawmakers and have inspired specific provisions of the criminal law. The interest in the rehabilitation of the offender, for example, has dictated such individualizing agencies as the indeterminate sentence, probation, parole, the reformatory, etc. The habitual offenders' laws, of which the Baumes Law was the type, which prescribed imprisonment for life after the third or fourth felony, were based upon theories of incapacitating dangerous offenders from doing further social injury. The death penalty for murder in the first degree, irrespective of the circumstances of the murder or of the personality of the murderer, can be justified on theories of expiation, intimidation, or social vengeance. Where an individual is punished although he was not at fault when the crime was committed, such punishment can only be justified on the grounds of intimidation. The heavy penalties which are prescribed by law in rape cases are an expression of the public indignation aroused by this type of offense, and the desire for vengeance.

The influence of these contradictory penal theories may be seen in specific provisions of the criminal law, as well as in the system as a whole. Minimum periods of imprisonment are usually made part of indeterminate sentences. A man may, for example, be sentenced to serve five to twenty years. He is therefore not eligible for release till the five-year term has expired, although he may be completely reformed or rehabilitated at the end of one or two years, and although further incarceration may do him more harm than good. The law demands its pound of flesh in the shape of a five-year sentence, as vengeance, expiation, or intimidation, before the individualizing features of the

indeterminate sentence can come into operation. The fact that a maximum term is set for indeterminate sentences is another indication of the confusion of penal theory. Thus a man sentenced to serve from one to five years must be released at the end of five years, no matter how little reformed he is, or how certain the warden is that he will resume his criminal career. A logical indeterminate sentence law, based squarely on a philosophy of individualization of treatment, would have neither minimum nor maximum limits. This would permit the release of prisoners as soon as convincing evidence of rehabilitation is present, and the continued detention of offenders as long as their attitudes and habits threatened danger to the community.

Inconsistencies in penal theories set difficult problems for the wardens of our penal institutions. "The perplexing problem confronting the prison administrator of today," writes Mr. Bates, former head of the United States Bureau of Prisons, "is to devise a prison so as to preserve its role of a punitive agency, and still reform the individuals who have been sent there. If the prison, as was originally conceived, is to stand as the last milestone on the road to depravity, if it is to represent that ultimate of punishment which must follow a refusal to obey the rules of society, and if, as has been so generally contended, its principal object is to deter others from committing depredations which would bring them within its shadow, why must it not be made as disagreeable as may be? If punishment is effective to deter, it would seem as though the more punitive the prison was, the greater would be the effect of deterring others. If we execute men for murder, then why do we hide them away in the gray dawn of the morning and allow only a handful of witnesses?"¹⁵

4. Necessity for Reexamination of Penal Theories.

It seems that one of the primary needs of the criminal law today is a reexamination of its penal theories, and a reformulation of its provisions in the light of this reexamination. Granted that the end of the criminal law is the protection of individual and social interests, a decision will have to be made as to which theories of punishment serve this fundamental purpose. The conflict in penal theories comes down essentially to the problem of whether the basis for penal treatment shall be the crime committed or the moral needs and circumstances of the individual offender. Most of the advances in our penal system in the last half century have been based upon notions of individualized treatment of the offender. But progressive institutions like probation, parole, and the indeterminate sentence have been grafted on a traditional penal system which is essentially interested in punishment of acts, whether such punishment takes the form of social vengeance, expiation, or intimidation. The fundamental question which confronts legislators is whether this dualism of treatment based on criminal acts and the character of individual offenders is still necessary for the carrying out of modern criminal law.

It may not be very difficult to persuade the legislator that the lynch law conception of punishment as social vengeance, or the highly abstract notion of punishment as expiation for wrongs, has no place in a modern penal system. Criminological research has shaken the philosophical foundations of a system of punishment based upon these theories. Vengeance can be taken or expiation can be demanded of willing, sentient beings who were

free in their choice of good and evil. It is not rational to demand vengeance or expiation of men who have been constrained to do evil because of forces that they could not control. The making of the criminal, pictured by criminology, through the interplay of environmental forces and personality components, is charged with deterministic elements. This has led to the gradual abandonment, by European codifiers of the criminal law, of freedom of the will as a basis for criminal responsibility. Such a step logically results in the elimination of notions of punishment based on vengeance or expiation. The American legislator may be constrained to follow this example.

It will probably be much more difficult to persuade the legislator to give up the notion of using punishment as a means of deterring potential offenders. For centuries the deterrent effects of punishment have been debated, but the dispute has produced more heat than light. Convicted offenders may be counted, but there are no statistics on individuals who have remained law-abiding because of a fear of punishment. Thus it is impossible to determine in the present state of social psychology whether punishment does or does not deter. There are, however, many writers who, like Cuche, believe that punishment has deterrent effects which must be preserved. He points out that

“ . . . if society has not been submerged by crime ... it is because of the salutary terror inspired by past punishment. If it still subsists today, it is because the attenuation of the penalty has not completely brought about the elimination of intimidation. The influence of the penalty on crime is a latent influence like any preventive institution. One may not recognize it while it is in force, but one appreciates its just value,

the day it is lacking.”

This feeling that punishment should be inflicted because of its deterrent effects will prevent the complete realization of the goal of modern penology, the individualization of penal treatment based upon the needs and personalities of offenders. The present dualistic basis of punishment will therefore continue. Punishment, as a deterrent, should, however, be restricted within well-defined limits. Otherwise, the individual offender is apt to be sacrificed unduly every time judges become aroused over “crime waves. The savage sentences noted above, which were handed out to boys and young men now serving in Auburn Prison, are illustrations of this judicial tendency.

If the modern trend in favor of the individualization of treatment is to continue, a better record of performance will have to be demanded of existing individualizing agencies such as the reformatory, the Juvenile Court, probation and parole. There is a tremendous disparity between the results promised by the theories which led to the establishment of such agencies and the measure of what they actually accomplish. The Gluecks of Harvard have provided some of the most thoroughgoing documentation for this gap between theory and practice. In their book, “Five Hundred Criminal Careers,” they examine the parole and post-parole careers of 510 offenders who were inmates of the Massachusetts Reformatory. The purpose of the Reformatory as stated by Wine; one of its foremost advocates, was to achieve “reformation, which is the right of the convict and the duty of the state, through special treatment adapted to the weakness of the individual prisoner... .” The aim of the reformatory institution “is to send no man out who is not prepared to do something well

enough to be independent of the temptation to fraud or theft.” The Massachusetts Reformatory was one of the best institutions of this type in the country. Other institutions called reformatories “have degenerated into prisons of the worst type.” Yet even in this better Massachusetts institution, only 89, or 21 per cent, of the 422 men whose conduct could be traced after leaving “were not known to have committed any offenses.” Offenses officially recognized were committed by 307, or 72 per cent; and 26, or 6.2 per cent, committed various types of crimes for which they were not arrested. “Thus a total of 333, almost 80 per cent of the 422 men involved, committed offenses during the five-year period following the expiration of their parole. The estimates of 75 to 80 per cent “successes” contained in reports of reformatories are “so fallacious as to suggest a condition practically the reverse of that reported.”¹⁷

In their book, “One Thousand Juvenile Delinquents,” the Gluecks set forth equally devastating conclusions as to the working of the Boston Juvenile Court and the Clinic of the Judge Baker Foundation. Their study of the careers of 1,000 boys who passed through the Court and the Clinic during the years 1917—22, revealed the fact that 88 per cent continued their delinquencies in the five years following the treatment period. Nor were these delinquencies minor in character. Two-thirds of the entire group of boys whose post-treatment conduct was determinable committed serious offenses, largely felonies. These facts lead the Gluecks to observe that:

“The major and most disturbing finding of our investigation is the excessively high incidence of recidivism on the part of delinquents subjected to the treatment of a juvenile clinic and court

that enjoy a reputation throughout the country for their efficacy. The finding is likely to create a feeling of uncertainty regarding juvenile courts and clinics in general. It may well be that the success of other clinics and courts is not much higher. No one can say definitely that this is so, but the findings in this study justify an attitude of skepticism regarding the degree of effectiveness of the entire juvenile clinic and juvenile court movements."¹⁸

5. The Probation System

Similar skepticism is justified regarding the work of probation systems. Probation systems, at the present time, serve two fundamental purposes. First, they act as intelligence services for judges who are called upon to sentence offenders. It is to the probation officer that the judge looks for information as to the personality of the offender, his criminal record, the character of his family life and of his associates, the use to which he puts his leisure time, etc. A carefully compiled case history covering such factors as these is of inestimable value to the judge as a guide to the disposition of convicted offenders. Probation systems, however, have treatment functions as well as investigational duties. The theory underlying probation is that certain offenders do not require treatment within prison walls. Their conduct problems, as revealed in their offenses, are such that they can be successfully adjusted to community standards outside of prison walls. This is especially true of occasional and juvenile offenders. For such persons, prison contacts may be disastrous. They may serve to fix antisocial attitudes which heretofore have been merely in the process of formation. It is expected that the careful and friendly supervision and guidance of probation officers will speed the processes of social adjustment. It is

therefore necessary for the probation officer to keep in constant touch with the offender, to try to understand those factors of personality and environment which impelled him to crime, and to utilize all community resources in the attempt to offset them.

In few jurisdictions is either branch of the probation function adequately performed. Throughout the length and breadth of the country the development of probation is hampered by an insufficient, poorly trained, poorly paid and sometimes politically selected personnel, by inadequate stenographic and office facilities, and by case loads which are too large to permit efficient performance of duties.¹⁹ Probation surveys made in many different states attest the truth of these assertions. A New York report, for example, states that probation has developed unevenly throughout the state. There are good standards of probation work in only a few counties, in others it is handicapped by the factors mentioned above. Fourteen counties make no provision at all for the employment of probation officers and the work is done there by untrained volunteers.²⁰ A report on New Jersey observes that the standard of probation work in New Jersey varies from well-organized and well-conducted departments to work so inadequate that it defeats its own purpose of preventing crime and reforming the criminal. "It is not accurate to say that New Jersey has a probation system. Rather it should be said that New Jersey has twenty-one different probation systems, or as many as there are counties in the state. These systems function with widely varying effectiveness and are almost totally lacking in correlation and uniformity."²¹ A survey of New Hampshire points out that although the law makes it mandatory to appoint probation officers, the law is not observed.

Only about one-third of the New Hampshire cities and towns have even a nominal probation service for delinquent children. All probation officers, with a single exception, are part-time officers with a variety of regular occupations and receiving salaries which range from twenty-five dollars to seven hundred and fifty dollars per year.²²

As a result of these conditions, presentence investigations of the personality of offenders are not made. The Massachusetts Board of Probation maintains a record system which provides information on every delinquent who has passed through the Massachusetts courts. It should be expected that probation officers would make these records the point of departure for their inquiries into the personalities and past records of offenders, yet the probation officers of some courts virtually ignore the Board of Probation.²³ Similar conditions exist in New Jersey. "One of the most obvious defects in the present system is the lack of presentence investigations," states a report on this state. "With few exceptions, the several counties are failing to take real advantage of this procedure which is so important to secure for the judge a knowledge of the social factors involved in a case before him. In about one-half of the counties, there is no record of any presentence investigations by the probation officers."²⁴

Without investigations of the character of offenders, the granting or refusing of probation is pure guesswork. Frequently the personal appearance of the prisoner is the only guide which determines this disposition. It is then possible for offenders of vicious habits, or weak and twisted mentality to be given probation, although it is not likely that they will profit from it. This was pointed out by a Massachusetts investigation of the records of

eighty persistent offenders made by the writer.

“Another means whereby persistent offenders are escaping the penalties for their crimes is the too free use of probation and suspended sentence as methods of treatment. Of the 463 cases in which a conviction was obtained, the persistent offender received a suspended sentence or probation in 181 cases, or 39.1 per cent. What was intended to be a special type of disposition for first offenders and occasional criminals seems to have become a method of disposition for habitual criminals.”²⁵

Not only are investigational duties poorly performed, but supervision and treatment are pure formalities in many jurisdictions. A probation officer with a case load of 1,000 or 1,500 cases can hardly find the time to give his probationers much individual attention. An ex-barber, teamster, insurance salesman or cable splicer, who has been appointed probation officer, can hardly be expected to have at his command techniques necessary for the adjustment of the variegated conduct disorders exhibited by his probationers. A superficial compliance with rules as to reporting comes to be the sum total of probation supervision, and failure to learn of the misdoings of the probationer comes to be accepted as evidence of satisfactory adjustment.

“In almost two-thirds of the counties,” states a New Jersey report, “supervision consists of collecting fines or restitution payments, and reports from the probationers, either by mail or personal calls at the county probation office. In some counties this work is conducted in the most perfunctory manner. Some probationers do not report at all. In certain counties little or no effort is made to keep in touch with

probationers who reside outside of the immediate vicinity of the probation office. Scientific social service case work, except in a few counties, is unknown.”²⁶

6. The Parole System

The administration of parole reveals defects similar to those encountered in probation. Parole is at the present time the principal means of releasing prisoners from Our institutions. In 1933, 69,022 prisoners were set free from American prisons and reformatories. Of these Prisoners, 34,839, or 50.5 per cent, were released on parole; 25,950, or 37.6 per cent, had served to the expiration of their sentence; and 8,233, or 11.9 per cent were released through pardons, court orders or other methods.²⁷ The release of 34,839 prisoners in 1933 was not intended as leniency. According to parole theory, parole is the final stage in the penal process. Large numbers of offenders are sent to institutions under indeterminate sentences. At some stage in the execution of this sentence the question must be asked, whether they have so changed in attitudes and habits that they may safely be released from the institution. To keep a prisoner in an institution when he shows every desire to lead a law-abiding life is both expensive and unnecessary. It costs several hundred dollars a year to maintain a prisoner in an institution. A well-run parole system could supervise him for a fraction of this amount. The parole systems must therefore choose between prisoners who may be trusted outside a prison and those whose incarceration must continue because they would use their liberty to commit additional crimes. The selection of parolees must be based upon a careful study of many different factors which throw light upon the possibility of the prisoner’s going straight, such as his per-

sonality, past record, circumstance of his crime, and his behavior in the institution.

The selection of parolees is but the first step in the parole process. Parole is intended as a testing period to determine the strength of the prisoner’s professions of rehabilitation. If the parolee shows that he cannot lead a law-abiding life, his parole must be revoked and he must be sent back to the institution for a further period of incarceration. The parole officer, however, must be more than a mere detective, alert to the derelictions of the men under his charge. It is his duty actively to assist parolees in making the transition from life in the institution to life outside. He must help them find their place in a world which is none too friendly to released prisoners. As one report puts it:

“Good parole work should be a positively constructive process of social rehabilitation. It should aim to help the individual to find a place in the community, a place which will entitle him to respect himself and to be respected by others, a place which will enable him to make the most of himself and to discharge his responsibilities to those dependent upon him and to the community as a whole. The accomplishment of this purpose requires a continuous process of helpfulness, guidance and friendly assistance. The parolee must be encouraged to continue with the education which was begun within the institution. Contacts must be made for him which will bear within themselves the seeds of future regeneration. The prisoner must be protected against the community quite as much as the community against the prisoner. Each must be made to understand the other if the convict is to be reestablished within the society against which he has offended.”²⁸

Neither in the selection of parolees, nor in their supervision, do the facts of parole administration in this country measure up to its theories. This is evident from the following extracts which give a brief description of parole systems in operation:

“How are prisoners actually selected for parole in the American States today? The simplest thing, of course, is to release nobody or everybody. A few paroling authorities pursue the policy of refusing nearly all applications for parole. Such action is tantamount to a repeal of the parole statute and imperils social security by engendering ill-will among prisoners and then releasing them without supervision or the right of reincarceration. Other parole boards release everybody at the earliest possible moment. Here the parole law becomes an automatic reduction of all sentences, a thing which is even worse, perhaps, because it gives liberty without reference to fitness for liberty and reduces the period during which stone and steel guarantee society protection from those who endanger its peace. This policy is sometimes adopted because of the inadequacy of a State’s penal equipment. Parole is used as a means of turning men out of cells to make room for others who are crowding in from the courts. Where legislatures refuse to appropriate adequate funds for correctional institutions, penal officials can scarcely be criticized for attempting to meet their problem in this rather desperate way. The obvious remedy for the abuse here is not the revision of the parole law but rather the provision of a more nearly adequate penal plant

“Methods of supervision are similarly inadequate. Eighteen states attempt to keep in touch with paroled persons by corre-

spondence alone. Printed rules are announced but are not enforced. Written reports are required, but there is nobody to check on the accuracy of the replies. The parole officer becomes a mere clerk of record. Men who are on parole find it easy to beat the game. They are not watched and they know it. Parolees are seldom recommitted unless they are caught in a new crime. The whole paper system becomes a huge joke and parole comes to be nothing more than a speedy manner of emptying prison cells. This is unfortunately the case in the majority of the American States today.”²⁹

7. The Proposed Central Sentencing Board

The record of performance of individualizing agencies like probation, parole, the Juvenile Court, and the reformatory justify an attitude of skepticism toward the newest individualizing device, which has found an increasing number of advocates in recent years, the Central Disposition Tribunal or Sentencing Board. The advocates of this agency propose to strip judges of all power over sentences and to place the right of disposing of offenders after conviction into the hands of an expert tribunal. The late Judge Stevens writes:

“I think that juries are the best means yet found for the determination of guilt or innocence. But I am equally certain that when guilt or innocence has been determined, the responsibility of the trial judge should cease. From then on the convicted person should be dealt with by some body with power to ascertain the past record of the offender, to observe his progress from day to day, and with power to make the punishment fit the needs of each individual case in order to carry out the dual purpose of reforming the offender and of protect-

ing society.. . What I should like to see done is to have the trial judge relieved of this responsibility of determining what should be done with convicted persons. I should like to see these persons committed to some qualified board who would treat these convicted individuals as the doctor treats his patients.”³⁰

Ex-Governor Smith of New York has expressed himself in a similar vein:

“I believe that the power of sentence ought to be taken away from judges entirely, and I further believe that fixed and definite sentences should be made dependent upon the finding of a commission.... The jury ought to determine guilt or innocence without anything in their minds except did he commit this crime or did he not, and as soon as the verdict is rendered and he is found guilty, he ought to be turned over to the State of New York for such disposition as would be determined by a board of the highest salaried men that we probably have in our community. . . . A clearing house (after conviction and before sentence) ought to be provided where these men could be under close observation for a period that a psychiatrist suggests as necessary to make some diagnosis of his case, so as to determine all the factors. . . . After sentence a good many things are found out about a man that the judge does not have in mind when he is sentencing him .. There are no two criminals alike. There are no two crimes exactly alike. There is a different set of facts and circumstances that lead up to them all. A great many of them are accidental, and if you can have a board to study this thing, spend money for it; it is worth while spending it.”³¹

There are two principal advantages in a Central Disposition Tribunal. In the first place, it can lay down a consistent sentencing policy which will apply throughout the state. The Disposition Tribunal can therefore eliminate variations in sentences that are owing to accidents of geography, or to varying temperaments and predilections of individual judges for particular theories of punishment. Offenders of similar types can therefore expect to receive similar sentences, and some of the difficulties in institutions owing to differences in sentences can be eliminated. In the second place, the Disposition Tribunal makes it possible to bring expert knowledge to bear upon problems of sentencing. It is expected that adequately staffed clinics will be set up as adjuncts to the Tribunal, to study offenders before disposition, and that the Tribunal itself will be manned by individuals of sufficient capacity to give due weight to the clinic's findings. As things are at the present time, few judges are equipped by training or experience to sentence offenders. Most judges come to the Bench after many years of practice on the civil side of the law. This has taught them techniques which will be useful in the decision of will contests, breaches of contract, personal injury actions or problems of trusts, or future interests in real property, but these techniques are not very useful in deciding whether John Jones should receive a one-year, five-year or ten-year sentence of imprisonment. Yet it is quite as important to society that the sentence of John Jones be based on accumulated knowledge and experience as it is that the decision as to what constituted a valid contract between Smith and Brown be so based.

The proposal to establish a Disposition Tribunal has undoubtedly many advantages, but

it has some disadvantages too easily overlooked by its enthusiastic advocates. In the first place, it will be difficult to convince Governors or other officials with the power of appointment that they should choose for such tribunals the kind of experts needed to make the tribunals efficient instruments for law enforcement. A job is a job to the political machine that wins the state election, and its desirability as a reward for the faithful party-worker is measured in terms of salary and length of term. Knowledge of the techniques necessary to perform the functions which the job calls for is but a secondary consideration in making appointments. There is no reason to believe that this traditional attitude toward state administration will not be carried over to the appointment of members of the Disposition Tribunal. Laws creating Disposition Tribunals must ensure the appointment of adequately trained officials, for if this is not done, no real progress will be made in the administration of the criminal law.

Again the Tribunal must work within the confines of the present penal system. It will therefore be hampered as are judges and penal administrators by the fact that the law has not worked out any coherent system of punishment. Under the existing New York Penal Law, for example, a tribunal having before it a first offender convicted of armed robbery would be compelled to sentence him to a minimum of ten years imprisonment. The Tribunal may decide after studying his personality that he can be adequately rehabilitated in one year, or five years, or even while at liberty under the close supervision of a probation officer. But the law would leave the Tribunal no discretion. It prescribes ten years imprisonment, and the Tribunal, no matter what its views of punishment, would have to abide by its provisions. If the

work of a Disposition Tribunal is not to be marred by inconsistencies and cross-purposes, then a reformulation of the legal provisions relating to sentence and treatment appears to be necessary.

One is led to suspect that the advocates of the Central Disposition Tribunal may repeat the mistakes which have been made so frequently in agencies established for the individualized treatment of offenders. They may be so taken up with their reform that they will fail to see its relation to the rest of the legal structure or the rest of the administrative system. They will probably not wait upon the codification which is necessary to remove present inconsistencies and contradictions in the criminal law. Patience is not a virtue of reformers. Thus another agency, based on modern ideas of individualized treatment, will be established to administer a system of criminal law that still retains potent elements of social vengeance, expiation, and deterrence.

An even more serious difficulty is the fact that because of budgetary limitations, Disposition Tribunals may be set up without adequate facilities or personnel. Lack of facilities and personnel is what hampers the work of probation and parole systems, the Juvenile Court, the reformatory, and other individualizing agencies of the criminal law. Reformers, however, have a notorious faith in the wonderworking powers of mere legislation. Unfortunately, scientific, individualized services for convicted offenders do not result from "under-financed moral gestures."

The American public is becoming increasingly impatient with these gestures, and is becoming painfully aware of the disparities between promise and performance of the various individualizing agencies. Mr. J. Edgar Hoover has thundered from more than one forum "that the admin-

istration of parole systems in all too many of our states approaches a national scandal." Attacks upon probation, the Juvenile Court, and other agencies of penal treatment have been made. Thus a demand has arisen for the abolition of agencies making the individualized approach to the treatment of the offender, and for a return to the old, "hardboiled" methods of penal discipline, based on notions of social vengeance and deterrence. But the elimination of such agencies as probation and parole will not solve any problems. Without parole, men will have to be kept in prison until the expiration of their maximum sentences and more prisons will have to be built to hold them. If they are released before the expiration of their maximums, they will go out into the community without even the inadequate supervision of present parole systems. Without probation, the state will have to maintain a horde of minor offenders in institutions. The money spent in building new prisons could be more intelligently used to make present agencies of individualized treatment more effective. If the gains of the last half-century of American penology are to be conserved, improvement of agencies, rather than their abolition, must be the aim of the penal program.

(1) Fred R. Johnson, "Probation for Juveniles and Adults," 3.

(2) US. Bureau of the Census, *Judicial Criminal Statistics*, 1934.

(3) State of New York. Report of the Crime Commission, 1928. Legislative Document No. 23, p. 330-1 (1928).

(4) Sixth Report of the New Jersey Judicial Council, 1935, 33' 30.

(5) Gaudet, Harris and St. John. *Individual Differences in the Sentencing Tendencies of Judges*, 23 *Journal of Criminal*

Law 811, 816 (1932-33). Compare table on disposition of convicted offenders in District Court of Boston, Sam. B.

Warner and Henry B. Cabot, "Judges and Bar Reform," 166.

(6) National Commission on Law Observance and Enforcement, "Report on Penal Institutions, Probation and Parole," No. 9, June 23, 1931, p. 5.

(7) Francis H. Hiller, "Adult Probation Laws of the United States," 19-20.

(8) Sixth Report of the New Jersey Judicial Council, 1935, 43.

(9) Oppenheim, "Rationale of Punishment," 36.

(10) Stephen, "General View of Criminal Law," 1st ed., 99 (1863).

(11) Cited by Bettman in Report on Prosecution of the National Commission on Law Observance and Enforcement, 165.

(12) Progress Report and Proposals for Changes in the Penal and Correction Laws of the Commission to Investigate Prison Administration and Construction, Presented to the Legislature of the State of New York, Feb. 14, 1932, p. 36.

(13) Plato, *Laws*, IX, 862, Jowett, translation.

(14) National Commission on Law Observance and Enforcement, Report on Penal Institutions, Probation and Parole, 7.

(15) Sanford Bates, "Prisons and Beyond," 68—69.

(16) *Revue Penitentiare*, 1894, 790.

(17) Sheldon and Eleanor T. Glueck, "Five Hundred Criminal Careers," 23, 315, 184.

(18) Sheldon and Eleanor T. Glueck, "One Thousand Juvenile Delinquents," 2.33—4.

(19) Even where full-timed, salaried probation officers are provided for, officials possessing the requisite qualifications are not necessarily appointed to probation staffs. Probation officers are usually appointed by the judges of the courts to which they are attached. In only a small number of states does the law prescribe minimum qualifications for probation officers. In most states the judge is free to choose whatever person he wishes as a probation officer. Since his conceptions of probation as well as his conceptions of the needs of law enforcement may be quite rudimentary, it is not surprising that appointments of probation officers in many jurisdictions leave a great deal to be desired. Every oc-

cupation and every profession has been drawn on for probation officers. A survey of prior careers of probation officers in Massachusetts disclosed such occupations as barber, truck driver, cable splicer and janitor service. Politics also frequently prevent a choice of properly trained probation officers. This was clearly brought out by a report on the Cook County Probation Department. This department consisted of a chief and forty probation officers. According to the report, "some are faithful to their tasks, others are mere time-servers, who owe their appointment to some political personage.

(20) N. Y. Probation Report citation.

(21) W. S. Carpenter and P. T. Stafford, Report on a Survey of Probation in New Jersey 7.

(22) Nat. Probation Assoc. Juvenile Court and Probation in New Hampshire.

(23) Mass. Special Crime Commission Report, Senate Doc. No. 125, 33—34, Dec. 1933.

(24) Carpenter and Stafford, *op. cit.*, 11-12.

(25) Mass. Special Crime Commission Report, 30.

(26) Carpenter and Stafford, *op. cit.*, 12.

(27) US. Bureau of the Census, Prisoners in State and Federal Prisons and Reformatories, 1933, 38.

(28) Nat. Commission on Law Observance and Enforcement, "Report on Penal Institutions, Probation and Parole," 131.

(29) *Ibid.*, 133-5.

(30) Judge E. Ray Stevens, 21 Journal of Criminal Law and Criminology 325, 327 (1930-1).

(31) Sentencing Criminals by Tribunal separate from Trial Court. Remarks by Governor Smith at conference with Crime Commission of New York State, Dec. 7, 1927, cited by R. Molcy, "Our Criminal Courts," 176.

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