Journal of Criminal Law and Criminology

Volume 2 | Issue 5 Article 2

1912

Editorial

EDITORIAL.

ANNOUNCEMENT.

The report of *Committee F* of the Institute on *Indeterminate Sentence and Release on Parole* which should appear in the present number, has been delayed. It may be expected in the March issue. —[Eds.]

THE CONGRESS FOR CRIMINAL ANTHROPOLOGY.

The most important event of recent occurrence in the field of criminology was the meeting of the Seventh International Congress for Criminal Anthropology at Cologne, October 9th to 13th inclusive.

The session was timely if for no other reason than that several European states are at this time revising their penal codes. Interest in every scientific problem, therefore, that bears either immediately or remotely upon our understanding of the criminal and consequently upon the proper treatment of the anti-social classes is on a high level of intensity. In his discussion of the preliminary draft of the penal codes of Germany, Austria, and Switzerland, M. Enrico Ferri called especial attention to the latitude that is allowed to the judge in the trial of one who is accused of crime. The judges in these foreign states already enjoy liberties in investigating and expressing themselves with respect to the accused which are altogether unknown in American courts. Not only must the judge be a jurist, says Professor Ferri, but he ought to be, above all, a psychologist and sociologist as well.

A free discussion on the first day of certain anthropological data and of inheritance as a factor in the causation of crime, by Professors Klaatch of Breslau and Rosenfeld of Münster, was followed by reports and debates on the merits of probation and the indeterminate sentence. These discussions supplied by far the most distinctive features of the congress. Mme. Lombroso-Ferrero presented a report upon the utility of the probation system among children and its danger in the case of adults. In this connection M. Holtgreven called attention to the increase in the number of crimes in Germany which is in advance of the increase in population. This he attributed particularly to the defects in education. It is necessary to dam up the tide of juvenile criminality by having recourse to the conditional sentence, by protective education, and by other means. At this point Professor Ferri declared that the means by which

we to-day attempt to reclaim the juvenile delinquent will be employed by our posterity in the treatment of adult criminals. In the course of the discussion it was recommended again and again that the child, preferably before he enters school, should be submitted to a mental examination, the results of which should be carefully inscribed in a special register. It seems to us that at such an early age a careful examination of the individual's physical development might be of greater significance, from the point of view of probable degeneracy at any rate, than an examination of the mental status. The idea in the minds of those who suggested it seems to have been that with such data at hand teachers would be more able than otherwise to adjust the means at their disposal to the end of developing desirable forms of conduct.

The indeterminate sentence received a large share of attention. M. Gleispach, professor of penal law in the University of Prague, was its great protagonist on the third day of the conference. Professor Thyrén said that he considered the indeterminate sentence impracticable in dealing with the normal criminal. The question may be different, however, as regards the criminal who is on the border line of irresponsibility, for in his case whatever measure of control may be taken cannot be regarded as punishment. At this point emphasis was properly brought to bear by M. Friedman of Budapest upon the idea that the principle of the indeterminate sentence has nothing in common with the idea of expiation. The principle rests simply upon the protection of the group. No doubt the popular mind to-day holds strongly to the idea of expiation and it would, therefore, be a considerable risk to introduce, wholesale, into actual practice our scientific knowledge pertaining to this subject without first transforming public sentiment, or at any rate without transforming it slowly as one progresses with the application. Friedman thinks that for the present we must hold to the rule—determinate punishment and indeterminate measures for the ultimate liberty of the culprit. Furthermore, in the course of this discussion, M. Aschaffenburg contended that in no case should the administration of the indeterminate sentence permit one who has not overcome his anti-social instincts to leave his place of imprisonment behind him. In some cases it is possible that a prisoner should never be released. M. Engelen, M. Van Hamel, and M. Von Hessert continued the discussion, in the course of which Professor Engelen, alluding to Aschaffenburg's contention, said that the experience of the Americans should bring about the rejection of the proposed reform, for in numerous cases he says, with ample justification, a prisoner is released who is not adapted to normal life and who is, therefore, incorrigible. To this criticism, the obvious counter reply was apparently wanting at the moment, viz.: that this indicates only the need for more complete

administrative care. In this connection M. Von Hamel recommended a conservative position: the adoption of the principle of conditional liberation as a preparation for the possible future establishment of the indeterminate sentence. By means of conditional liberation we may be able to determine in a particular case whether the amendment of the delinquent has been attained, provided, of course, that the individual so liberated be not thrown upon the street, but placed in an environment of such a simple character that he may be able to adapt himself to it. In all of this Attorney-General Von Hessert of Darmstadt concurred.

At its conclusion the congress by vote adopted the following theses:

First: "Hardened and professional criminals, recidivists, who present a grave danger to society, must be deprived of their liberty for as long a time as they are dangerous to the mass. Their liberty should be as a general rule conditional."

Second: "In the case of criminals whose crimes issue from a lack of social adaptability, strictly determined punishment should be replaced by an indeterminate penalty which should be executed according to the progressive system. The liberty of the criminal should be protected (a) by the establishment of the maximum penalty; (b) by the composition of the commission of liberation, the majority of which should be composed of independent judges."

Finally, acting on the proposition of M. Aschaffenburg, the congress decided to address to the commission charged with the revision of the penal code the view that "in the next German penal code conditional liberation should be treated not by the judicial administration but by a special commission, of which a physician who has studied psychiatry, and at least one judge should form a part, and that this commission should at the same time make tests to the end of determining the possibility of introducing the indeterminate sentence."

One is impressed with the paucity of discussion of strictly anthropological problems in this congress. The report of Professor Klaatsch upon the results of his investigations of primitive Australian races, and that of Rosenfeld on the connection of race and criminality, aroused relatively little discussion. This is, perhaps, to be expected, inasmuch as these are relatively highly specialized fields of research.

ROBERT H. GAULT.

THE LIMITS OF COUNSEL'S LEGITIMATE DEFENSE.

Out of the many issues and sensations concentrated in the McNamara dynamite murder case there arises one emphatic question which dominates all others for the thoughtful student of our criminal

procedure. It is this: What are the limits of legitimate defense which counsel may use for an accused?

If we can answer this we put our finger on one of the marked excesses of our present practice. Theoretically, the accused's counsel acts to secure a fair trial for his client, and therefore to free the latter if he is innocent. Practically we know that the regular criminal practitioner fights to free his client, guilty or innocent. There is here no discrimination between the rich or the poor offender, the hitherto respectable or the hitherto under-world man—the Hines and Walshes, or the McNamaras and Ruefs. Their counsel fights to the last ditch. Can the law and the community afford to permit this? Is there no way of putting a limit on it? For it is surely breaking down our system of criminal justice. It tends to foster the technicality so much censured. It forces the State prosecutor to fight equally without scruple. It drives almost all honorable lawyers out of a field where duty calls them and the community needs them. It is one of the most repulsive features of our present system.

Is there no relief? Must we wait for a new generation slowly to bring a radical change of thought and custom? Will the institution of a State defender (to oppose the State prosecutor) furnish a speedier solution? These are troublesome questions which must be answered before long.

But the McNamara case has brought out in an emphatic way the extreme unmorality of the system. It has shown us that even the atrocity and cold inhumanity of a brutal crime may make no recoil in this class of criminal defenders. In many classes of crime it is easy to see that there is some sort of a way for the defender to persuade himself that he is defending a meritorious cause, even if not a law-abiding man. This is obvious enough in the everyday cases of weak tempted lads or of ambitious magnates of finance; a high-minded counsel, for example, in the Standard Oil case of three years ago was heard by the writer to express in the most passionate terms his sense of the outrage of that persecution. But here in the McNamara case we have crossed the line of honest differences of sympathy and prejudice. Whoever did dynamite the Los Angeles Times building, crowded with human beings, did a brutal murder, did he not? He deliberately killed a score of defenseless beings, under circumstances which have never been regarded as anything but plain murder outside of the tenets of Machiavelli or the Hindu thugs or Stevenson's dynamiters. Now we know who did it. But *Clarence Darrow knew it from the first.* His interview published in the dispatches of December 5 says: "When I took this case last March I foresaw this plea of guilt." And yet HE SPENT ONE HUNDRED AND

NINETY THOUSAND DOLLARS of laboring men's innocent money TO SECURE AT ANY COST THE ESCAPE OF MEN WHOM HE KNEW TO BE GUILTY OF THIS COARSE, BRUTAL MURDER—a murder which has been universally condemned by labor unions and all other classes from the Atlantic to the Pacific as placing its perpetrators beyond the limit of sympathy or protection.

Is this what the right of defense by counsel means? If so, then there is something rotten in the principle. It is useless to befog the issue by asking: May not a counsel act for a client whom he believes to be guilty? Of course he may; the best professional traditions agree to that, and no argument for or against it matters here. Nor do we assume here that Clarence Darrow was privy to the $4,000 bribe to a juryman; that part would look dark for him if he had the spending of the money in detail, which perhaps he did not. We do not assume that the hundred and ninety thousand dollars was used to bribe anybody. But we do ask whether the counsel's duty and right of securing a fair trial justifies him in setting himself as systematically and persistently as the expenditure of two hundred thousand dollars signifies to secure the acquittal of clients whom he knew from the beginning to be guilty of the worst crime recognized in law and morality alike. That is our question.

We might ask a similar question of the defenders of some of the trust-law accused—the Standard Oil Company or the Packers, for example, because they, too, are spending hundreds of thousands of dollars on their defense. But, in the first place, we do not *know* that their clients are guilty and that counsel knew it. And, in the second place, there is at least a section of public opinion which sees no moral or legal wrong in the class of acts charged against them. And that is why the McNamara case brings out the issue beyond cavil. *"Murder is Murder,"* in Theodore Roosevelt's words. And, as the American people are neither Thugs nor Machiavellis, and therefore all agree with Theodore Roosevelt on that point (if no other), we come back to our proposition: That Clarence Darrow, acting as counsel under the law, systematically spent one hundred and ninety thousand dollars to extricate from justice men whom he knew to be guilty of the most atrocious crime in the calendar.

Does our system allow this? How can he defend it? How can he defend *himself?* As we figure it, he *must* defend himself—or be recognized no longer in the ranks of an honorable profession.

We think the issue had better be threshed out. He is already on record, voluntarily, in his pamphlet, "Resist Not Evil," with principles which need defending. And in his published interview of December

6 we find its echoes. "The boys," he said, "are *not murderers at heart;* they thought they were just fighting a battle between capital and labor." There you have it, the doctrine of the Hindu thugs revived; that murder is not murder at heart, if you do it on behalf of some cause you believe in. What the public now needs to know plainly is, whether there is any lawyer or class of lawyers, now allowed in our courts, who sympathize sincerely with this thug doctrine and will do anything to save its followers. Let us air this whole issue before public opinion. Let Clarence Darrow, or any one else who believes it, avow it and defend it. If our criminal system is being administered today by an appreciable number of able and intelligent lawyers who hold that view, let us all know it. Public opinion will then take a hand and settle the issue. If it can stand that doctrine, so be it. If the public verdict repudiates it, then let some measure be taken for eliminating its adherents from the ranks of the bar, and for making the defense of accused persons an occupation consistent with self-respect and the service of justice.

JOHN H. WIGMORE.

JUDICIAL DISCRETION VERSUS LEGISLATION IN DETERMINING DEFENDANTS SUITABLE FOR PROBATION.

The Illinois adult probation law, which went into effect this summer, limits the scope of the system to a relatively small number of offenses. It does not apply to larceny, embezzlement, burglary or attempted burglary in any place of habitation, violations of municipal ordinances which are not also violations of state laws, and various other offenses. A number of states, especially in their original enactments, have restricted probationary treatment in cases of adults to so-called first offenders and those convicted of minor offenses. Certain states have authorized the placing of felons on probation, but have specially exempted from its benefits those convicted of particular felonies like rape. The laws of other states, on the other hand, leave the classes of offenders to whom probation may be allowed, almost wholly to judicial discretion.

Thus far only a few over twenty states have passed adult probation laws—fewer than half the number that have authorized the use of probation for children. During the next few years a number of states, and Congress, too, it is hoped, will enact statutes for probation in adult cases. It is pertinent, therefore, to inquire what should be the policy of future legislation with reference to restricting the field of probation in cases of adult offenders.

It is only natural and proper that the legislators of any state, espe-

cially in passing their first law for adult probation, should wish to move cautiously. Efforts at reformation of criminals must not lose sight of the necessity of social defense. Unless an adequate number of properly qualified probation officers is appointed, the general use of the probation system may make probation only another name for leniency. It is important that the granting of probation by the courts should not go faster than the organization of an efficient machinery for dealing with those put on probation. After the system is well organized, extreme care must still be exercised lest harm be done by putting on probation, persons unfit for such treatment. Yet, while conservatism in the use of probation is essential, it is questionable how far the classes of defendants permitted to be placed on probation should be determined by statute.

In some of the states where the range of offenders eligible for probation is left largely, if not entirely, to judicial discretion, there has been an extended and successful experience with adult probation. In these jurisdictions, the determination as to what person shall be put under probationary oversight is decided by the courts on the basis not only of the charges against defendants and their records, but also of their character and circumstances. (These latter are ascertained for the court, in advance, through a special investigation of each case by a probation officer.) The experience in these states proves that probation is especially adapted for "first offenders," who are mentally normal and whose manner of life and environment are not too negative. It seems also to show that persons who have been convicted more than once are often equally as satisfactory subjects for probation, and in some cases more so, than are "first offenders"; and, furthermore, that felons frequently succeed under probation better than do misdemeanants. In other words, the propriety and wisdom of dealing with offenders through probation is found to depend only in part upon the nature of their particular offense and upon their criminal record. Other equally important factors are their habits, family history, other individual characteristics and surroundings. All these facts can be learned and weighed much better by the local court than by a state legislature.

The above conclusions are what we might expect if we pause to consider how uncertain as an index of a person's character his offense or criminal record is. While, from a legal point, there is a distinction between a person convicted only once and a person convicted more than once, there may be little or no difference between them morally. As has often been remarked, the chief difference may be that the one has been less successful than the other in escaping arrest. It hardly seems consonant with social justice or wisdom that a man found guilty for the first time of an offense, say, drunkenness or petit larceny, may

receive the advantages of probation, while another man convicted of a similar offense for the second time must in every case be fined or sent to jail, although it may happen that of the two men the latter is the more industrious and less dangerous member of society. As for those convicted of a felony, it may be said that many crimes classed as felonies differ only slightly, and perhaps only in a technical way, from misdemeanors. A person guilty of a felony, in some instances, may be less anti-social and easier to deal with than a person addicted to the habitual commission of petty offenses. In other words, the specific offense and to some extent the record, taken alone, are an insufficient criterion for judging the fitness of persons for probationary treatment.

In saying the foregoing it is recognized that in some parts of the country local conditions may make it advisable, at least during the near future, to limit the field of probation by statute. As a general principle, however, it would seem desirable for the legislatures of the different states to allow pretty free play to judicial discretion in the matter of selecting persons to be dealt with by probation.

ARTHUR W. TOWNE.

TRIAL BY PUBLICATION.

The exploitation of the McNamara case, before legal trial, in the press of all sorts calls attention to the dangers involved to justice in such methods. The American people have got into a bad way of condoning such things. Public opinion must learn to repudiate it. The referendum applied to a criminal trial will lead us to the worst mockeries of justice which Athens or Paris ever exhibited for our scorn. When Pilate hesitated he took Christ out on the Temple steps and asked the mob: "Shall I crucify him?" And the mob shouted back: "Crucify him!" That is what it will come to at this pace. The spectacle of the chief detective himself trying the case in a popular magazine last summer was the most extreme instance of misguided zeal. But it merely typified the national habit that is forming.

We indorse the sentiments of the following editorial from the Chicago Record-Herald:

"One lesson of the McNamara cases for the press and people of the United States is that trial by publication in advance of legal trials operates against the obtaining of justice. The Record-Herald can speak frankly on this subject, for it studiously avoids trying to convict or to acquit anyone accused of crime.

"In many published interviews and articles the McNamaras were virtually declared guilty or innocent long before the selection of jurors

at Los Angeles began. Detective Burns convicted them in a magazine; intemperate defenders of unionism pronounced their arrest and trial the result of a conspiracy to crush the unions and asserted that they would be innocent in the eyes of labor even though convicted in court.

"If we are to have civilization we must try cases in the courts, not in public print. Why did the selection of jurors at Los Angeles drag along insufferably to anyone desirous that the law should act promptly as well as justly? Largely because public opinion had been prejudiced for or against the accused men. Freedom of the press in all essential respects must be upheld, but it must not become perverted to excuse such arguments as were made to the public before and during the legal trial of the McNamaras. In England such practices are forbidden. Discussion of a case pending in court is punished at once as contempt."

JOHN H. WIGMORE.

AMERICAN DISRESPECT FOR LAW.

In a recent interview in the New York World, Andrew D. White is reported as saying, "Ten years ago there were only one hundred and seventeen murders to the million (in the United States), to-day there are one hundred and twenty-six. Ten years ago one in every seventy-four cases was punished, to-day only one in eighty-six meets the penalty prescribed by law." The article then goes on to point out that in Canada—across an imaginary line—there are only seven murders to the million annually. Many writers in the pages of this JOURNAL and elsewhere have in similar manner compared our enforcement of the criminal law to that of England, and generally to our great disadvantage. The Honorable John L. Griffiths, consul-general of the United States to London, in an article written for the Indianapolis Star last fall made the same comparison and suggested some remedies with special reference to increasing the dignity of our courts. There seems to be little doubt that England accomplishes results that we do not.

The pages of magazines and newspapers are full of criticisms and suggestions for reform. It is the temptation of the critic to ascribe the whole difficulty to the one weak point which at the particular time occupies his attention. Realizing fully that the preceding statement may be applied to the argument which follows, the writer, nevertheless, wishes to argue that in the multitude of diverse criticisms there is danger of placing too little stress upon one of our greatest weaknesses.

It is not the intention here to deny the force of the criticisms aimed at our criminal procedure, at the quality of many of our judges, at the lack of activity of our poorly trained prosecuting officers, at the

qualifications of our lawyers, or at our cumbersome and rigid system of courts. In fact it is believed that many of these criticisms are wholly just. It is desired only to call more particular attention to a defect which is less tangible, but for that reason none the less important—which is, indeed, for that very reason all the more difficult to remedy. It is a defect which legislation cannot reach.

Let us imagine, if we can, that by legislation all the good features of the English, or any other system suitable to our conditions, were to be suddenly inaugurated here. In other words, suppose that the machinery of administering the criminal law were made as perfect as possible. That of itself would not change the temper and spirit of the people back of the system. Such a change would aid the prosecuting officer who wished to enforce the law, but it would scarcely affect the prosecuting officer who did not care to enforce certain laws, either for personal or political reasons or because many influential voters did not wish the particular law enforced. Nor would a perfect system of procedure cause a jury, which deliberately wished to bring in a verdict against the law, to bring in a correct verdict. In other words, in seeking to reform the law we cannot justly overlook the fact that in too many cases the police do not want to arrest, the prosecutor does not want to prosecute, nor the jury to convict. Changes in legal forms will not cause a change in the heart of the citizen who deliberately disregards the law.

In an article written sometime ago for the Indianapolis Star, C. C. Hadley, former judge of the Indiana Appellate Court, argued that a large portion of the difference between American and British enforcement of the criminal law is to be attributed to the American citizen's lack of respect for the law. He says, "We are a nation of law-breakers, petty in most cases it may be true, but, nevertheless, violators of the law. * * * In some cases these violations are committed unknowingly, some designedly, some thoughtlessly, but all are traceable to our indifference and irreverence for enacted rules of conduct." In view of facts known to any alert observer, can it be denied that the average American citizen deliberately disregards many laws because they interfere with his desires, or his business, or with his idea of what is morally right? He does not seem to feel that law is entitled to obedience merely because it is law. It is an undeniable fact that laws passed for an entire state are almost completely disregarded in certain communities, because the people there do not wish these particular laws to be enforced. In homicide cases it is clear that many defendants are acquitted in spite of the fact that evidence of the killing is clear and that the law says the act is murder. They are acquitted by the jury because the jury, representing

often the sentiment of the community, believes that a killing is justifiable in cases where the law says it is not. Much of our mob violence is seemingly due, not to the fact that the mob fears that the prisoner will not be prosecuted, but to the fact that the mob wishes to gratify its feelings by taking the enforcement of the law into its own hands, or to the fact that it feels that a legal hanging is too mild a punishment for certain offenses.

To many it seems a national menace that so many of our citizens should be so lacking in respect for constituted authority. The member of the mob who violates the law, the business man who disregards laws regulating the sale or manufacture of products in which he deals, the juryman who violates his oath and frees a defendant for reasons not recognized by the law, the saloonkeeper of many communities who seems to have forgotten that any law concerns him, the political worker, who for the sake of victory winks at all sorts of illegal practices—all these are responsible for fostering a growing spirit of defiance to any law which interferes with the desire of the moment. This feeling among the people influences the elected officer whose duty it is to enforce the law. In short, this feeling if allowed to grow will make unworkable any system of law, no matter how perfect in form, which depends for its enforcement upon elective prosecutors and judges and upon juries chosen from the citizenship.

It is not intended here to take up the question of how this evil can be combatted. Since it is an evil which neither legislation nor education in the ordinary sense can reach, it can easily be seen that the question of remedy is no easy one. However, it can be remedied, and forces are already at work which will in time, if encouraged, largely overcome this great weakness of our citizenship. At any rate it would seem to be a problem of sufficient importance to demand the serious thought of any citizen who wishes our institutions to endure.

CHESTER G. VERNIER.