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## A REFUGE FOR AMERICAN CRIMINALS

MICHAEL G. HEINTZ<sup>1</sup>

"These six cities shall be a refuge, both for the children of Israel, and for the stranger and for the sojourner among them; that every one that killeth any person unawares may flee thither."—*Numbers, Ch. 35, Verse 15.*

"And the congregation shall deliver the slayer out of the hand of the revenger of blood, and the congregation shall restore him to the city of his refuge, whither he was fled; and he shall abide in it unto the death of the high priest, which was anointed with the holy oil."—*Numbers, Ch. 35, Verse 25.*

By divine direction, Moses established six cities of refuge, three on the east side and three on the west side of the River Jordan. These cities were to be a refuge for those who took human life in the heat of passion, or unintentionally. But if the refugee were guilty of wilful murder it was the duty of the elders of the city "to fetch him thence and deliver him into the hand of the avenger of blood, that he may die." (Deut. Chap. 19, Verse 12.)

Thus, while the children of Israel were wandering in the wilderness in search of the promised land, there was promulgated a decree against lynch law, and for the extradition of fugitives from justice.

Though Moses was a great law giver, he was not a statistician. He did not maintain a census bureau. We therefore have no statistics of homicides, nor do we know how many fugitives found immunity in the cities of refuge, nor how many were delivered up by the elders of the city for trial and judgment. Whether the six cities of refuge established by Moses served to increase or diminish crime, or to impede or aid the administration of criminal justice in Israel, has not been discussed by any of the numerous crime commissions in their search for a panacea for American lawlessness.

It seems never to have occurred to our criminologists and reformers that the main difficulty in the punishment of crime is to arrest the criminal. Judge Kavanagh, of Chicago, says that a murderer has three chances to one that he will not be arrested. If this be true, it must be blamed either upon the police or some easy method of escape, or perhaps both. If there are forty-eight places of refuge in the United States to which the murderer may flee unimpeded and

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unpursued, perhaps we may find the reason why there is but one chance in three that a murderer will be arrested.

Because of our dual form of government in which powers of local government are given to each of the forty-eight states, the police of one state cannot as a matter of right pursue a fugitive into another and bring him back for trial. Unless the prisoner waive his rights and return without extradition proceedings, the officer must act under the provisions of Sec. 2, of Art. IV, of the Federal Constitution, which is as follows:

“A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.”

An act of Congress provides the method of enforcing this constitutional provision. While, however, it is made the duty of the State to which the fugitive has fled to deliver him up, there are no means given nor power vested in the government or the states to enforce the provision. If the executive authority of the State refuse to surrender the fugitive, that is the end of it. It has been held that the right of the governor to refuse to surrender the fugitive is the right of the State and not of the fugitive. Examples are not wanting where governors have for various reasons refused to recognize the demand of the State for the return of fugitives for trial. Perhaps the best known instance is that arising out of the killing of Gov. Goebel in Kentucky in 1900.

A contest was being heard by the Senate of Kentucky as to whether Goebel, Democrat, or Taylor, Republican, had been elected Governor. During the contest Gov. Goebel was assassinated in the grounds of the Executive Mansion. Taylor, after serving as governor for a few days, was indicted for murder. Before he could be arrested he, and others indicted with him, fled to Indiana. Beckham, who had been the candidate for Lieutenant-Governor on the Goebel ticket, became Governor, and as chief executive of the State of Kentucky, demanded of the State of Indiana the return of Taylor and others for trial. The Governor of Indiana refused the demand and the fugitives remained in the asylum of Indiana until April, 1909, when Governor A. E. Willson, a Republican, pardoned them. They then returned to Kentucky after an absence of nine years.

In many cases, governors as well as courts have refused to return fugitives because of the danger of the prisoner being lynched

on his return to the scene of the alleged crime. It is not uncommon for governors to refuse to return fugitives because the extradition is not in good faith, or is made for the purpose of collecting a debt. Most States have a provision that no demand will be made for the return of a fugitive unless the prosecuting attorney in the jurisdiction where the crime is charged certifies that the proceedings are made in good faith and are not for the purpose of collecting a debt.

By reason of the fact that a person charged with crime in one State in the Union may find an asylum in any one of the other forty-seven states and in the District of Columbia, and may not be returned to the jurisdiction for trial until the governor of that State has made a demand on the executive authority of the jurisdiction in which the fugitive has found an asylum, great difficulty is added to the apprehension of criminals. Police administration is nearly always local, and even in those States having State police, their power does not extend beyond State lines. A fugitive knows that upon escaping to another State, he drops out of sight of the police. If arrested, he cannot be taken back without extradition proceedings, which are expensive, cumbersome and uncertain.

It is the habit to praise the administration of criminal justice in Canada and England. There, arrest and punishment are swift and certain. The people and the government of Canada are very much like those of the United States. Canada has a federal government and is divided into provinces which exercise local government somewhat like our states. We praise the courts of Canada and blame those of this country. It is charged that defendants here are escaping just punishment because of technicalities of the law. There was a time when our criminal laws had all the technicalities of the common law of England, but we have gotten away from that. An examination of present-day procedure will disclose that very few defendants are escaping because of technicalities. Rather are they escaping arrest because of the new means of transportation afforded by the automobile, but more so because forty-seven states offer an asylum for fugitives from justice.

In Canada such a thing as extradition from one province to another is unknown. If a defendant flee from Ontario to Manitoba or Vancouver, he can be picked up there and returned to the jurisdiction of the offense without any formality except an indorsement by a magistrate in the province where the defendant is found that the warrant of arrest is legal. There is no demand on the executive authorities of the province where the defendant is found, nor is there

any hearing before a court. The fugitive is simply picked up by the constable on the indorsed warrant and returned to Ontario for trial just as he would be taken from one county to another in a State in the Union.

The so-called sovereignty of our several States likewise makes it impossible to subpoena a witness in one State to testify at a trial in another. A few states provide that depositions may be taken in criminal cases, but there is no way of securing the personal attendance of a non-resident witness if he will not voluntarily appear. The service of subpoenas is not limited by provincial boundaries in Canada. Just as a warrant may be executed in any place in the Dominion of Canada and in the Islands under her jurisdiction, so may a subpoena be served anywhere in the Dominion, requiring the appearance of the witness in any other province. He may be punished for contempt for failure to go from Vancouver to Newfoundland to testify there, just as if he disobeyed a subpoenae to go to the court house in the next block in his home town.

These provisions for the arrest of fugitives and the attendance of non-resident witnesses are the bases of all of the excellent qualities of Canadian criminal justice. There is little or no chance for the defendant to escape. He can find no asylum in any of the provinces in the Dominion. He will have little opportunity of losing himself. He will be sought by an unified police force, especially in the Northwest, where the mounted police cover a great area. He cannot escape to the United States because of our immigration laws. He would leave his tracks behind him at the port of entry. He well knows that even if the Government witnesses scatter to all parts of the Dominion, they can be brought back by subpoena to testify at his trial. Neither he nor his witnesses can flee to a city of refuge. Thus is conviction rendered sure and swift where it would be uncertain and laggard with us.

Those who are severest in criticising the administration of criminal law by the States invariably admit that the criminal laws of Congress are well enforced. The liquor laws may be an exception, but during the entire history of our lax administration of the State laws, there has been no let-up in the punishment of Federal offenses. The reason is that the United States recognizes no State lines in the pursuit and arrest of defendants, nor in the subpoenaing of witnesses.

The Government likewise has an unified secret service with a centralized control. If an offender against Federal law escape from one part of the country, the eyes of the Department follow him

wherever he goes. If he is picked up in another State, no demand by one governor on another is necessary for his return. No extradition proceeding is had in any State court. He may apply to a Federal judge for an inquiry as to the legality of his removal, but no State power can interfere. He cannot have the benefit of local sympathy or political influence. The judge before whom he appears upon the order of removal is himself an officer of the Department of Justice, which is asking the return of the fugitive. When the defendant is brought to trial in the jurisdiction of the offense, witnesses may be brought from every State in the Union to testify against him. When such witnesses are subpoenaed, they have no option as to what they will do. A refusal to obey the subpoena is contempt of court. It therefore happens that while the States with their large local police forces have failed in the pursuit of fugitives from justice, the Federal government with a very small number of inspectors and marshalls has enforced its criminal laws with dignity, dispatch and certainty. If agitators will say less about the courts for their failure to punish crime and will discover that the real weakness in the administration of criminal justice is in the boundary lines surrounding our forty-eight States, we shall be fairer to judges and juries. The more we talk about the failure of the courts to do their duty, the worse the situation will become. In many cases a jury can do nothing other than acquit the defendant because the State has not made out a case. This failure of the State may have been caused by the absence of a witness whose whereabouts were perfectly well known to the prosecuting attorney but whose attendance could not be secured because of an invisible State line separating the witness from the place of trial. This experience is familiar to every prosecuting attorney and every criminal court in the land. When the absence of material witnesses necessitates a verdict of not guilty, the thoughtless are given to extravagant charges against the administration of criminal justice, while the real cause of the miscarriage of justice may have been our dual form of government, with its forty-eight boundaries.

Canada has as democratic a government as ours. Disregard of provincial boundaries in the arrest of criminals or the service of process on witnesses has caused no tendency toward tyranny or autocracy. We frequently refer to England as a shining example of the observance of law and the punishment of crime. Nearly forty million people live in the United Kingdom. There is no such thing as extradition between England and Scotland or Wales. A defendant

fleeing from London cannot find asylum in Wales or Scotland. He may be picked up and returned to London for trial without the slightest formality. He cannot escape to the continent through the ports of debarkation without identifying and revealing himself. The consequence is that England is really the "tight little Isle" which it has been dubbed in history. It is true the time may come when criminals may escape from England by airplane and find refuge in foreign countries without going through the immigration offices. When that time does come, England's problem may be even more difficult than ours. But if that situation arises it will be no fault of the English courts.

It is very doubtful whether the many reforms proposed in the administration of criminal law will ever increase the chances of arrest if we must ever and always maintain our forty-eight places of refuge. If two out of every three murderers are now avoiding apprehension, that percentage will not be changed by reducing the number of challenges to jurors; nor by abolishing grand juries; nor by authorizing depositions to be taken by the State; nor by giving the prosecuting attorney the right to comment on the defendant's failure to take the witness stand in his own behalf; nor by giving to the judge the right to comment on the evidence and to express his opinion on the facts and upon the credibility of the witnesses; nor by authorizing a verdict by three-fourths of the jurors in all except capital cases; nor by empowering the trial judge to fix the penalty; nor by requiring the prosecuting attorney to state his reasons in writing for all nollies; nor by limiting the time for taking appeals; nor by keeping the defendant in jail pending his appeal. All these reforms are good and will improve the administration of justice. But forsooth, what value are they if the defendant cannot be found, or having been found, the witnesses cannot be compelled to appear against him? The homely recipe for rabbit stew is apropos. "To make rabbit stew, first catch your rabbit."