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THE JUDGES AND THE LEGISLATURE

NEWMAN LEVY¹

The crime wave that was supposed to be inundating the country a year or two ago seems to have subsided, leaving behind in its wake a residue of remedial and prophylactic legislation. The professional and amateur Canutes who rallied to their country's aid in its hour of distress stand along the shore and contemplate the receding wave of crime; they look upon their work and see that it is good.

About the shore lies the flotsam and jetsam of legislation enacted amid the stress of a supposed emergency, and abiding with us, now that the storm has more or less passed. Some of this legislation is wise and of permanent value, some is of doubtful wisdom, and some is ill-considered and bad, but all of it constitutes a glowing tribute to our childlike faith in the efficacy of statutory enactment. It may be questioned by some whether we Americans are inherently a law-abiding people, but no one will ever deny that we are emphatically a law-enacting people. "There ought to be a law," is a national slogan; legislation is our panacea for all the evils that afflict us. It is a sad political truism, however, that laws are easy to enact and difficult to remove. For better or for worse, these crime laws are with us for some time to come, stamping sharply their imprint upon the body of judicial thought.

I am not primarily concerned at the present moment with the potency of these anti-crime laws as weapons with which to combat crime. I am inclined to believe that as temporary palliatives they may be fairly effective, although their ultimate value is somewhat doubtful. Of far greater importance are the tendencies implicit in much of this legislation—tendencies which seem to reflect a prevalent lack of confidence in our courts and a popular distrust of judges. These statutes which tend to limit the discretionary power of the judiciary and to impose upon them a mandatory harshness, contrary to the trend of current penology, are deserving of serious thought.

Along with our ingenuous belief in the efficacy of laws exists a pervasive lack of confidence in Law—a popular distrust of courts, judges and judicial institutions generally. This cynicism toward those whom we place in public office is one of the curious phenomena of our national psychology. It may be that there is an adequate historical

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explanation for this state of mind; our recent political history certainly affords some justification for it. The strange system of checks and balances, which is our unique contribution to the science of government, is predicated upon a fear of official aggression. We place men in power and then do our best to render them powerless.

So long as this state of mind finds expression in restricting the scope of administrative activity, although it may be regrettable, it is not necessarily destructive. When it extends, however, to the judicial function it is fraught with more dangerous significance. It is trite to say that a fearless and untrammelled judiciary is the ultimate bulwark of our national liberty. A widespread distrust of the courts is a symptom of weakness in the most vital of our institutions; when this distrust is translated into legislative enactment it receives an official sanction that should not remain unchallenged.

The best known of all recent criminal legislation are the New York Baumes Laws. These laws have received more or less enthusiastic commendation from all parts of the country, and have been copied in several other states. They deal with many phases of criminal law and criminal procedure but they are best known for their provisions which increase the penalties for various crimes, and particularly for those provisions which make certain severe punishments mandatory.

For example, take the changes made by the Baumes Laws in the statutes referring to robbery and burglary. Prior to the 1926 amendment robbery in the first degree in New York was "punishable by imprisonment for a term not exceeding twenty years." This was changed to read "Robbery in the first degree is punishable by imprisonment for a term *not less than fifteen years*." The maximum is thereby increased to life imprisonment. Burglary in the first degree was formerly punishable by imprisonment for not less than ten years. This was amended to "*not less than fifteen years*."

The most widely discussed of all the Baumes Laws, in fact the one that in the popular mind is known as The Baumes Law, is Section 1942 of the Penal Law. This section formerly read:

Sec. 1942. PUNISHMENT FOR FOURTH CONVICTION OF FELONY. A person who, after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits a felony within this state, shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for the term of his natural life, *but after serving a period of time equal to the maximum penalty prescribed for the offense of which he is convicted, less the usual commutation for good conduct, shall become*

subject to the jurisdiction of the board of commissioners of paroled prisoners, and may be paroled upon such conditions as said board may prescribe, but said board shall not grant an absolute discharge to such prisoner.

This was amended by striking out the italicized portion, making it mandatory to send every fourth offender to prison for life.

It is unnecessary here to discuss the wisdom or the efficacy of increasing the penalties for crime. Volumes have been written on both sides of the subject. It may be questioned whether a criminal who would take a chance on ten years imprisonment would be deterred by the possibility of receiving fifteen. The apologists for the Baumes Laws have, undoubtedly statistics of a sort on their side.

The chief significance of these changes lies not in the fact that they have made greater severity possible, but in that they have virtually made justified leniency impossible. They not only increase the maximum penalties that a judge may impose, but they fix by rigid enactment mandatory minimum sentences. A judge is no longer permitted to render judgment in accordance with his conscience, his judicial experience and his appraisal of the human values involved; if the objective facts of a case coincide with a predetermined formula he has no choice but to render judgment in accordance with the apocalyptic pre-vision of Senator Baumes and his associates in the year nineteen twenty-six.

There were, of course, some prescribed minimum sentences before the Baumes Laws, but for many years past, there has been a trend toward greater flexibility in our penal statutes. If modern penology has learned anything it has learned that there is no common denominator of crime. Each offense is a synthesis of social, economic and biological factors, and intelligent treatment must depend, within practical limits, upon its peculiar circumstances. Thus there has been developing a scientific approach toward punishment which is evidenced by the working of the probation system in the Courts of General Sessions in New York. The probation department acts as an advisory and investigating adjunct to the judges of the criminal courts. It conducts a thorough investigation after conviction and *before sentence* into all aspects of a defendant's life. When a judge imposes sentence he has before him all possible data to enable him to arrive at a wise and just decision.

The maximum and minimum provisions of the penal laws, the indeterminate sentence, and last, and most important, the suspended sentence gives the sentencing judge an opportunity to arrive at as close an approximation of justice as is possible under a codified

penology. Stated in its simplest terms the theory of the law is that Judge Blank with all the facts before him is better fitted to decide at the time of sentence what should be done for or to John Doe up before him for robbery, than were the well meaning and undoubtedly competent legislators in Albany several years before the commission of the crime.

The new dispensation in penal legislation has, in a measure, destroyed this flexibility of the law and has substituted for it a mechanical rigidity. It has reverted to an archaic determinism that states in effect that an offense which may be committed ten years hence which conforms to a predetermined formula must be visited with a predetermined penalty regardless of the peculiar facts of the case.

It has been urged by the defenders of the Baumes Laws that these mandatory punishments apply to offenses which are by definition so heinous as to warrant extreme severity. Assuming this to be so, ample scope could be given by merely increasing the possible maximum penalties. But this would give criminal judges wide discretion in sentencing convicts, a discretion which the reformers of our criminal law evidently believe the judges are not fit to exercise.

This belief finds expression in the astounding dictum of the Appellate Division of the New York Supreme Court, First Department, in the recent case of *People v. Gowasky*, 219 App. Div. 19. In that case, which upheld the constitutionality of Section 1942 of the Penal Law (quoted above), the court said:

"During recent years the tendency has been toward leniency to those convicted of crime. Statutes have been enacted tending more and more to lighten the severity of punishment. Judicial discretion has been exercised in favor of criminals to a degree before unheard of, and those charged with the commission of crime and awaiting trial, often hardened criminals, have been admitted to bail and turned loose to continue their careers of crime. The furnishing of bail bonds has become a business, and until brought to trial, the accused, through easy bail, is but momentarily halted in his professional pursuits. We have no doubt that such conditions as these were largely responsible for taking away from judges all discretion in cases of the confirmed criminal who has been four times convicted of a felony, and in the interest of public safety to prevent in such a case the exercise of a discretion all too often abused. Judicial discretion in imposing punishment for crime has long been a recognized principle of our criminal jurisprudence. In theory its exercise is quite unassailable. Such discretion, however, is subject to abuse, and recent instances are not rare where it has been improperly exercised. There comes a time when discretion should end, and the Legislature by the statute here under consideration, placed a fourth conviction of a felony as beyond the pale of judicial discretion."

I have stated above that the crime laws have by implication given official sanction to the widespread distrust of the courts. This distrust now receives confirmation and support in the language of the courts themselves. The very judges who should most jealously guard the integrity of the judicial office bear witness to the frequent abuse of judicial discretion and give approval to these increasing limitations upon the judicial function. Is there any wonder that the critics of our judicial system feel that their criticisms are justified, and that the pervasive lack of confidence in the courts receives new strength?

Judge Joseph M. Proskauer of the New York Supreme Court in a brilliant address recently delivered before the Association of the Bar of the City of New York stated that one of the obstacles in the way of scientific legal reform was an "instinctive distrust of magistrates. The American psychology of distrust of the magistrate" he said, "must end. That is one reason why reform necessitates a change in the lay attitude toward the profession. We have got to see to it that we get good judges and let them function; and when I say 'we,' I mean not only the profession, but the lay public as well."

Judge Proskauer was speaking of civil procedure but his remarks have a pertinent application to criminal trials. How to "get good judges," assuming that we do not have them now, is not a simple problem. Certainly we shall not get them by divesting their office of the dignity that is attached to a position of power and trust.

It may be that I exaggerate the importance of these legislative tendencies. Included in the recent program for reform of criminal procedure have been measures that would permit the more active participation of the judge in criminal trials. The right of a judge to comment on the evidence, for example, one of the measures espoused by the Baumes Committee, might be pointed out as an attempt to enlarge the judicial power. Actually this and similar measures have been intended, not primarily to increase the judges' power, but to strengthen the prosecution—the judge already having the right under the existing procedure to make any comment favorable to the defendant. In other words, the range of judicial severity is extended, but not the range of discretion.

Our legal system today is on the defensive. The growth of private arbitration and the development of lay tribunals for the settlement of private controversies all point to a weakening faith in the efficacy of legal mechanism. For this reason the integrity of the judiciary should be jealously guarded and any attempt to encroach upon its prerogatives should be promptly challenged. The time may come when a more

scientific system will supplant the present one. Governor Smith's advocacy of a permanent sentencing commission seems to presage new and radical developments. But for the present we shall have to struggle along with the existing machinery. A legal system is as effective as its judges. If we have strong intelligent judges there is ample elasticity in our present system of laws to permit of quick and impartial justice, without the haphazard legislative tinkering with which we have been recently afflicted. And we cannot expect to have the kind of judges we need if every shift of popular opinion is seized as an excuse further to strip the judiciary of its necessary powers.