

Summer 1933

Legislation on Crime in Twenty-Five Years

Edward Lindsey

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Edward Lindsey, Legislation on Crime in Twenty-Five Years, 24 *Am. Inst. Crim. L. & Criminology* 109 (1933-1934)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

LEGISLATION ON CRIME IN TWENTY-FIVE YEARS

EDWARD LINDSEY¹

Legislation, in the sense now generally given to the word, is a modern and quite recent phenomenon. The conception of it as the command of the state or political sovereign and as equivalent to law or a source of it followed upon the growth of the idea of the national state which took place in the eighteenth century. Its employment to any great extent was a development of the nineteenth century while its volume has shown a marked and steady increase during the present one. Regarded as a source of law legislation has invaded the legal field in varying degree as to different parts of it but as relates to the definition, punishment and methods of dealing with crime the whole field has been taken over and the prevalent conception of a crime now is an act declared by the state to be an offense against it.

The growth of the absolute monarchies which preceded and prepared the way for the political revolutions in western Europe saw a multiplication of crimes and punishments of barbarous variety and severity. This has been well set forth by Dean Pound.² At the end of the seventeenth century in England, he says, all felonies and all thefts of more than the value of a shilling committed by those who could not read were capitally punishable and executions averaged eight hundred a year, while flogging, cutting off the ears, branding and the pillory were some of the punishments for minor offenses. In Blackstone's day the number of felonies without benefit of clergy was one hundred and sixty and the barbarous punishments remained although the use of imprisonment and transportation was increasing. The humanitarian movement sought to reform the criminal law through legislation based on the newer political ideas and the rationalist philosophy. The reformers such as Beccaria at the end of the eighteenth century and Bentham at the beginning of the nineteenth rationalized the concept of crime as an offense against the state and restated in legislation the definitions of offenses simplifying and reducing them to the basis of a minimum standard of conduct for persons regarded as autonomous individuals, equal before the law in rationality and accountability.

¹Formerly Justice of the Circuit Court, Warren, Pa.

²Criminal Justice in America, Chapter III.

Statutory Crimes

The expanding use of legislation in the early part of the nineteenth century was in effecting reforms in the penal law in accordance with the changing views as to crime and punishment and an advancing humanitarianism. It brought about a reduction in the number of offenses, amelioration in the punishments and a simplification of this branch of the law. But again soon after the commencement of the present century the creation of statutory offenses and legislation both as to crime and criminal procedure began to increase and in our period the rate of this increase has become accelerated. The number of new statutory crimes has never, so far as I know, been counted; there is in regard to this, as to many other matters relating to crime, no definite and accurate statistical material available. Some estimates have been made. The Report of the President's Research Committee on Social Trends states that there has been a growth of about forty per cent in the thirty years from 1900 to 1930 in selected states as measured by sections in their criminal codes.³ Professors Sutherland and Gehlke, in their chapter on "Crime and Punishment" in the same Report,⁴ say that "the number of sections in the penal code of the federal government increased from 264 in 1900 to 383 in 1930, or forty-five per cent, while the number of sections in the penal codes for fourteen states grew from 7,156 in 1900 to 9,609 in 1930, an increase of thirty-four per cent." They conclude that the average rate of increase of statutory crimes during the last thirty years has been from one to two per cent a year. In Rhode Island Dean Pound found that in 1822 the statutes defined fifty crimes, in 1872 one hundred and twenty-eight crimes and in 1923 the number had grown to two hundred and twelve.⁵ He also says that out of one hundred thousand persons arrested in Chicago in 1912 more than one-half were held for violation of legal precepts which did not exist twenty-five years before.⁶ In Pennsylvania about one hundred new statutes were passed in the eight legislative sessions from 1907 to 1933 but many of these statutes define more than one crime—often several. To state an average rate of increase would be misleading as the number in different sessions varies widely, forty-four having been passed in one session—that of 1923.

These statements do not give a complete picture however because there are in addition new crimes created in statutes relating to subjects

³Vol. I, p. lviii.

⁴Vol. II, Chap. XXII.

⁵Criminal Justice in America, p. 16.

⁶Ibid., p. 23.

such as Public Health, Sanitation, Fire Protection, Labor and Industry, Bills of Lading, Sales in Bulk, Liquors, Warehouse Receipts, Motor Vehicles, et cetera. Certainly there are a good many more crimes to commit now than there were twenty-five years ago. Of course some of these statutes are amendments to prior statutes, some are merely redefinitions, others only for the purpose of increasing the punishment for some offense and still others extend the concept of some crime to embrace perhaps new things or situations. Thus stealing seeds is made larceny by one statute and likewise growing crops by another. In addition to the general statute relating to cruelty to animals the Pennsylvania legislature of 1911 thought it necessary to define a separate misdemeanor of cruelty to a cow and the session of 1909 had already made it a misdemeanor to "lead a debilitated horse." A statute on the arson of motor vehicles seems natural in our period but it is somewhat surprising to find one creating the crime of "abuse of confidence of livery stable keepers." Bribery in connection with athletic contests is one of the most severely punished of misdemeanors in Pennsylvania though shooting a man by mistake for an animal carries the same term of imprisonment—five years.

Of course the more serious offenses remain practically as they were taken over from the common law and put in statutory form. These are the real crimes in the social consciousness as distinguished from the crimes solely by legislative fiat. It is perhaps true that the newer crimes are largely less serious types of offense from the social standpoint. There are among them new varieties of crime. Thus the pure food statutes added one new variety and the narcotic drug acts another. The automobile necessitated codes of traffic rules and the prohibition statutes are the outstanding indicators of new crimes. Altogether much reading in the statute books gives the impression of a shifting and changing, heterogeneous mass of rules, prohibitions and taboos thrown off in varying quantities from the sessions of our legislative bodies. Can we discern in this mass of pronouncements on crime any sustained purposes, any basis of theory or any trends whether conscious or not?

Trend Toward Individualism

The earlier part of our period saw the growth of several sorts of legislation based upon ideas of individualization rather than standardization in the treatment of the offender. The appearance of Juvenile Courts began in 1899 when the first Juvenile Court was created in Illinois. The plan was to consider the child offender not as a

criminal but as a delinquent needing care, correction and training applied so far as possible according to the circumstances of each individual. The notion made an immediate appeal and the Juvenile Court system spread by imitation from state to state and it now exists in some form in every state except Maine and Wyoming. Varying somewhat from state to state, many changes and modifications of detail have been and continue to be made in the Juvenile Court statutes nor are they, in spite of all this experimentation, by any means satisfactory today. There remain needless conflicts with legal theory and the jumbling of purely dependency problems with those of delinquency is inconsistent and detrimental; but the general scheme of dealing with the child offender separately and individually as a problem of his adjustment in the social structure has proven sound and is fully accepted. Indeed the Juvenile Court idea has extended itself over the whole family group and Courts of Domestic Relations have been established in many states especially in the larger cities. This has been a natural development as the problems of the children are generally dependent upon or the result of problems of the family itself.

The Juvenile Court in its dealing with delinquent children has made use of ideas in regard to the treatment of offenders which had been growing up during the latter half of the nineteenth century. They were translated into legislation as related to criminals increasingly during the present century. Suspended sentence had long been practiced by the courts and by statute the placing of a convicted adult upon probation was added. Provided chiefly in the cases of young and first offenders and those guilty of lesser offenses probation, especially when probation officers were provided to supervise and advise the person during the probationary period, affords an opportunity to rehabilitate the convict, save him from the stigma of imprisonment and perhaps restore him to his place in the community.

Perhaps the virtue most frequently claimed for probation is that it prevents the deterioration which only too commonly takes place in the prisoner as a result of prison life. Prison life must be an unnatural one at best especially when prolonged but the idea of providing a system of treatment of the convict during his term of imprisonment which would tend to reform and rehabilitate him grew up during the nineteenth century. It had a conspicuous development in the provision for reformatories for young, first offenders of which the first in this country was the celebrated Elmira reformatory in New York State. The extension of reformatory methods to the prisons for

older and more serious offenders to any extent at all was effected only in our period. This growth has been slow though steady, but only a moderate degree of progress has even yet been made.

In connection with the reformatory method of treatment the devices of parole and of the indeterminate sentence were availed of. The latter would make the sentence of imprisonment instead of a definite term one merely with a maximum limit or with a minimum and maximum widely apart. After the service of the minimum term, if there be one, the prisoner, if considered fit, may be paroled for a further period under the supervision of a parole officer until he is thought fit for discharge from parole or the maximum term has expired. Parole may of course be provided under a definite sentence. Originally provided only for the reformatories, parole spread to the state prisons and penitentiaries by imitation, and from state to state, and now is provided for in nearly all of them. The indeterminate sentence has had a similar though less extensive spread. These three elements: a reformatory training within the prison, possibility of detention for a sufficiently long period and a period of parole under aid and supervision are essential parts of the reformatory scheme. In connection with the latter element an independent and intelligent parole board to select the cases proper to parole and a sufficient number of capable parole officers to supervise the parolees are requisites. The statutes vary widely in the provision made for these essentials. Variations in details are legion and changes are frequently made from time to time. The inadequate way in which the essentials have been provided or often not provided sufficiently accounts for the fact that the value of the whole scheme or parts of it is frequently questioned. In many cases parole has been adopted because it improves discipline and, under some statutes, keeps down prison population rather than on account of its effect upon the prisoner.

All these classes of statutes which have been multiplying the last twenty-five years have underlying them a view of the criminal opposed to that of man as a moral agent capable of choosing whether or not he will obey the statute, whether he will do or refrain from any act denominated as criminal by statutory law. That view is that human conduct is the result of a man's inheritance, environment, training and experience and that the criminal has in fact little freedom of choice as to his conduct. There are other theories which enter into the ideas underlying these statutes but they may be fairly regarded as largely expressions on the theoretical side of the penal philosophy

known as positivist as opposed to the older and still more prevalent one known as classical.

A related view of the criminal is that of the psychiatrists who regard the criminal act merely as a symptom of an abnormal or mentally unhealthy condition of the patient (criminal). They regard the criminal as a sick man to be restored if possible or if not, isolated. While this extreme view has had little acceptance generally, it has to some extent modified the prevailing view as to responsibility and especially as to disposition of the offender. Statutes providing for psychiatric examination of persons charged with crime, of those convicted and in juvenile court cases have been passed in many of the states in recent years and are rapidly spreading.

The general trend manifested by these classes of statutes we might characterize as an expanding one in that it regards as important not just the criminal act but the individual actors and their characteristics and personalities.

Toward Classicism

In the latter part of our period on the contrary there may be discerned alongside the expanding what we might term a contracting trend looking toward the classical penal philosophy and based upon the still prevailing rationalist and moralist view of the criminal. First among the classes of statutes exhibiting this trend are those based on critical attitudes toward the various provisions we have been discussing; statutes limiting probation or parole, providing they may not apply to those convicted of certain offenses, raising the minimum term of indeterminate sentence and otherwise minimizing the statutes previously adopted. Then there are a mass of acts providing for more severe punishment for various offenses. For example in Pennsylvania a series of statutes in 1911 made pandering, acceptance of bawd money, detention of a female against her will and transporting a female for immoral purposes, felonies punishable by ten years imprisonment. Malicious injury to Railroad property was made a felony in 1913. In 1921 sedition was made a felony punishable with \$10,000 fine and twenty years imprisonment. Maliciously causing a forest fire was in 1923 made a felony with a fine of \$5,000 and ten years imprisonment. Every notorious kidnapping case is followed by a flock of statutes increasing the penalty for that crime.

Then there are the so-called habitual criminal acts; that is, those imposing an increasingly severe penalty on one convicted of a second or subsequent offense of the same grade. Habitual criminal acts

are by no means new but in very recent years they have been passed in many states in very drastic form. The so-called Baumes laws passed in New York in 1926 are the prototypes of this recent legislation. The main features of these statutes are that they provide much severer penalties for the more serious offenses. In the case of second and third convictions of felonies the convict must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction. Thus robbery and burglary having a maximum term of imprisonment of fifteen years a person convicted a second time of either of these offenses cannot be sentenced to less than fifteen nor more than thirty years. A person convicted a fourth time of any felony must be sentenced to life imprisonment. These statutes were widely discussed and were imitated in many states. In some the sentence to life imprisonment was left discretionary with the court instead of mandatory and in others the drastic provisions were applicable in the case of misdemeanors. Possibilities under these statutes are sufficiently illustrated by what is known as the Michigan case in which one Frederick Palm received a sentence of life imprisonment after having been found guilty, as a fourth offender, of illegally possessing a pint of liquor. These statutes are explained by their advocates as corrective of too lenient treatment, of what they consider the failure of probation and parole statutes, of what they describe in a sort of a slogan as "coddling the criminal." So far as they have any underlying penal theory it is that of deterrence though in the life imprisonment provisions there is a sub-current of the dangerous individual idea of the positivists.⁷

Sporadic Prohibitions

Thus we recognize opposing trends in certain classes of statutes which seem to rest upon conflicting theories of criminal law and of the function of punishment. There are however a great mass of enactments which are nothing but sporadic and arbitrary prohibitions formulated in statutory form with no more elaborate theoretical basis than a blind faith that all that is necessary to control human conduct is to issue an edict about it in the name of the State. The notion that legislation is the command of the State viewed as society in an organized capacity is too transparent a fiction nowadays. It is patent that statutes for the most part are not formulated by the theoretically

⁷A competent portrayal and interesting discussion of these different trends and conflicting theories is: "Conflicting Penal Theory in Statutory Law," by Mabel A. Elliott, Chicago, 1931.

omnipotent legislature but by groups of various sorts which press them upon the attention of the legislatures through lobbying. The force of the pressure exerted and not a judgment reached through deliberation of the desirability of the proposed act generally determines whether it shall be enacted. Only the belief in the possibility of accomplishing anything by statutory declaration can explain the multiplicity of such declarations. The attempt to control details of morals and habits by the criminal law clearly appears. It is sufficient merely to cite the prohibition experiment in this connection.

Criminal Procedure

We have space for but a brief mention of legislation as to criminal procedure. The court procedure in the trial of the criminal is public, is reported as news and consequently attention is focussed on it in any consideration of the problem of crime. Scores of popular articles denounce "our outgrown and archaic" criminal procedure and even some groups in the legal profession have promoted many so-called reforms in procedure. These take the forms of doing away with indictments, abolishing the grand jury, providing for waiver of jury trial, majority verdicts and so on. This seems to indicate a general movement away from the jury as an institution. The function of pleading as an essential element in the institution is ignored. Yet there are indications pointing in the opposite direction. Improved methods of selecting and impaneling juries and of making up jury lists; the formation of grand jury associations in some places, are some of these indications. Thus here too we seem to recognize opposing trends. The changes proposed have little to recommend them and the reasons given for them are not convincing. Certainly a system of procedure which could handle with little complaint the vast number of cases of totally new crimes that were dumped into the courts by the prohibition acts cannot be very sick and that the jury trial system can function after the mutilation made by some reforms shows considerable vitality. But in any event court procedure deals with a relatively small portion of the total criminal cases. The Criminal Justice Surveys made in several states disclosed that the chief failure of our machinery of criminal justice occurs at the very beginning. Of crimes reported to the police in a large percentage of cases there is never any arrest at all. At the time of a recent celebrated kidnapping case the popular reaction was that the punishment for kidnapping should be increased. But of what avail is that if the kidnapper cannot be discovered? Of prosecutions brought the num-

ber eliminated is due to dismissals before the trial is reached rather than to acquittals. Alfred Bettman in his *Criminal Justice Surveys Analysis in the Report on Prosecution to the National Commission on Law Enforcement* says: "The statistics point to the conclusion that in the attention given to the jury trial and to questions of trial procedure, there has been and still is a mistaken emphasis." It is rather the matter of administration that needs attention; the personnel, equipment and methods of the police, the prosecuting attorneys and court officials. These matters have largely hitherto escaped attention.

Conclusion

The strongest impression left upon the mind after surveying the legislation as to crime is one of nervous reaction of the social mass or of groups within it to impinging stimulæ. We have tried to see certain rational theories underlying the phenomena but the question arises whether after all these theories are more than rationalizations after the fact. The older traditional crimes such as murder, certain sexual offenses and certain offenses against property and the person remain about the same as they were taken over from the common law and indeed reappear much the same in all criminal legal systems. Beyond that the one unifying conception seems to be the democratic faith or dogma that the people, envisaged anthropomorphically as the "State," can accomplish anything by commanding it in a set form of words—the statute. To promulgate the statute is thought to effect the result desired. This rigid verbal formula is strangely like the spell of the magician, believed to operate by some potent but mysterious magic force. It appears little different from the taboo of the savage except that it is not effective to produce results. The faith of the savage in the sanction of magic and sacred social power behind the taboo has been lost and replaced only by a threat imperfectly and infrequently carried out. The dream of a reasoned and progressive control of social conduct by the formulations of governments is largely unrealized. Perhaps it awaits the development of a real political and legal science based strictly on objective observation and verification and not on subjective opinion.