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Herbert Wechsler

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A CAVEAT ON CRIME CONTROL

HERBERT WECHSLER¹

Public interest in the prevention of crime has increased tremendously in the last two years, but no substantial progress has been made in bringing the American public closer to an understanding of the problems that such prevention involves. The Attorney-General of the United States called a conference on crime followed by similar conferences in various states including New York. Governor Lehman presented a legislative program emanating from his conference which purported to cover the field. A special prosecutor has been investigating "racketeering" in New York City and has obtained convictions. There has been ample publicity for all these activities. But none of the dilemmas which lie at the root of any effort to deal with crime by law has been exposed to public view. On the contrary, the crime conferences fostered the belief that because they were attended by "scientists" and "experts" any proposals made by them proceeded from a fund of knowledge adequate, or nearly adequate, to solve the practical problems of crime control. In addition, there has been an impressive series of newspaper and motion picture glorifications of the police work of Mr. J. Edgar Hoover and his Bureau and of the integrity and ability as prosecutors of men like Mr. Dewey in New York. As a result, the faith that crime programs of the Lehman type, police work of the Hoover type, and prosecution of the Dewey type will substantially eliminate crime is almost as widely held as the belief that the Bureau of Investigation fulfills the principal function of the Department of Justice of the United States.

To attack this popular faith is a task which is unpleasant for several obvious reasons. The criminal law shares with the rest of our law the need of a careful and critical reevaluation; the crime conferences were, potentially at least, a step in that direction and the crime programs, including Governor Lehman's, contain some useful measures which have often been insincerely criticized. Police organization and personnel in the major part of the United States are incredibly poor and the organization and personnel of the Bureau of Investigation constitute a genuine improvement. Prosecu-

¹ Assistant Professor of Law, Columbia University, New York City.

tion in this country has long suffered from the twin diseases of inefficiency and corruption, and we sorely need the kind of corrective that able special prosecutors from time to time supply. Finally, we have all used bitter words about the public's apathy towards the crime problem and it seems somewhat ungenerous to complain when that apathy suddenly turns into vociferous enthusiasm for getting something done.

It is nevertheless important, for much weightier reasons, that the popular faith to which I alluded be attacked and that students of the crime problem devote some time to attacking it. It is important because oversimplification of the problems of crime and of the criminal law has led the public to expect results that the criminal law machine will never produce, may lead to the uncritical acceptance in the name of crime control of measures that are profoundly unwise and will make it progressively more difficult to direct popular enthusiasm along the most productive channels. A brief reconsideration of the ultimate dilemmas of criminal justice may therefore not be without value. At the least, it may serve to make clear that crime conference law reform, more successful police, and more capable prosecution cannot cut as deeply into the tough tissues of crime as the public has been led to suppose. At the most, it may provoke thought as to the most profitable area of practical activity, for, as Tawney remarked, "the practical thing for a traveler who is uncertain of his path is not to proceed with the utmost rapidity in the wrong direction: it is to consider how to find the right one." In any case, it may assist in drafting the message which can with least danger be heralded abroad.

I.

The two major problems of the substantive law are those of determining what behavior should be declared to be criminal and what to do with persons who are convicted of engaging in such behavior. Since the end to be achieved is the protection of the public against human behavior that has undesirable consequences, the determination of what behavior to make criminal presents three issues: (1) what consequences of behavior is it desirable to prevent; (2) what behavior tends to produce these consequences, directly or indirectly, or serves to identify persons who are likely to engage in such behavior; (3) which of these forms of behavior can be prevented by the methods of the criminal law, without causing more harmful consequences than the prevention achieved is worth?

The criminal law can achieve results only by the treatment of actual offenders, but methods of treatment vary and they may operate to prevent crimes in different ways. They may operate upon the offender himself by incapacitating, intimidating or reforming him and they may operate on potential offenders in the remainder of the population, deterring them by the force of example. The determination of what to do with persons who are convicted of crime therefore presents three issues: (1) what methods of treatment best serve the various possible ends of treatment; (2) to what extent are the various ends of treatment in harmony or in conflict with one another; (3) where they are in conflict, what is their relative importance. That there is an intimate relationship between the behavior and treatment problems is obvious since the disadvantages as well as the advantages of making behavior criminal will turn very largely on the character of the treatment prescribed,² and the choice of treatment methods is affected, at least in part, by the reasons for making the behavior criminal.³

In its broadest aspect, the determination of what behavior to make criminal is a somewhat larger problem than that of determining what sort of social order we desire to have, for it includes the determination of the extent to which the criminal law is a desirable and effective method of achieving it. It is not surprising therefore that we do not suffer from an over-production of wise solutions. It is also quite startling to reflect that these issues cannot be avoided in any genuine revision of the penal law, that, to paraphrase another remark of Tawney's, its revisors will make a decision even if they refuse to decide. Revision accordingly faces the paradoxes of all law reform which must for political reasons be subservient to the social and economic *status quo* though its purpose is to build for a changing society in a troubled world.⁴

² Assume that it is desirable to prevent the labor of children in industry and that it is therefore proposed to make the employment of children criminal. Compare the relative *disadvantages* which such action is likely to entail if the treatment prescribed for the offending employer is a fine commensurate with the profits derived from such employment and if it is a long term of imprisonment.

³ Thus if we make gambling criminal because we hope to deter the general population from gambling (naive idea!) it is foolish to think about treating gamblers as dangerous persons. On the other hand, if we are convinced that only dangerous persons engage in particular behavior, such as possessing machine guns, or associating with men of ill-repute, and make the behavior criminal for that reason, it is equally foolish to think about treating such persons for the sake of deterring others rather than for the sake of their own incapacitation and reformation.

⁴ The problem is not limited to the reconsideration of particular crimes involving behavior like labor union activity or the payment of inadequate wages, which is the center of social controversy. It includes all legal devices and in-

Many students of the criminal law seek to avoid these paradoxes by confining their thinking to the existing catalogue of major crimes, on the theory that the behavior comprehended within the legal categories of homicide, serious bodily injury, arson, kidnapping, burglary, robbery, larceny and perhaps extortion and embezzlement would be offensive in any society. They are concerned with preventing this behavior and particularly with the elimination of the professional criminal. But not even this seemingly safe ground escapes major dilemmas. If the law is to achieve its maximum efficacy in preventing, for example, physical violence, it is not sufficient merely to make it criminal to cause such violence intentionally, or even negligently. Behavior must be singled out which makes violence probable in the long run or identifies individuals who are dangerously likely to cause it; and it must be made criminal regardless of the results in the particular case. Thus reckless driving is criminal, and, on the same theory, so are attempts, solicitation, conspiracies and various kinds of assembly and disorderly conduct. Not even this, however, is deemed to be sufficient to reach the professional criminal and, again on the same theory, public enemy laws, elaborate vagrancy statutes and catch-all anti-racketeering measures are advanced. It is at this point that the dilemma sets in, for the broader and more effective such measures are as weapons against the professional criminal, the greater also is the danger that they will be employed against strikers, labor organizers, political reformers and others who may incur the displeasure of the police. The danger here, be it noted, is not only that of corruption and abuse; it is the far more fundamental one, which criminologists often fail to note, that not all behavior which threatens violence or destruction of property is equally undesirable and some may not be undesirable at all. Labor unions make strikes probable and strikes involve a danger of violence, but this evil is totally incommensurate with the evil of abolishing labor unions or prohibiting strikes. A demonstration of unemployed may create a danger of riot but it may also be the efficient cause of a grant of relief that will prevent starvation. A similar point holds with regard to "racketeering," for a capitalist economy often posits difficulties in distinguishing "racketeering" activity from clever financing, the exploitation of new opportunities, shrewd competition or even aggressive labor leadership. Not all of these difficulties are overcome

strumentalities which, once created, may be utilized to tilt the scales of social controversy one way or the other.

by Mr. Dewey's definition of racketeering as "the systematic extortion of money through intimidation by an organization conducted for that purpose"⁵ for the whole problem resides in the question what is "intimidation" and what is permissible pressure or persuasion? Since laws must be drafted in general terms, difficulties such as these can be met only by conferring upon administrative officers a discretion which involves dangers, well marked in our times, to which many crime experts remain remarkably insensitive, although these dangers are at least as serious as those of crime itself.⁶

These difficulties are slight and narrowly restricted, however, compared to the dilemmas of the treatment problem arising throughout the entire field of the criminal law. Punishment is necessarily uncertain and men fear it to an indeterminate and inconstant degree, which no one can measure or hope to measure. There is an indefinite and unascertainable limit to the severity of the penalties which complainants, prosecutors, judges and juries will be willing to enforce and when that limit is crossed, nullification is reached. Undue bloodshed and cruelty inflicted in the name of the law have the same deleterious effect upon public morals as undue bloodshed and cruelty inflicted in the name of anything else, and, in addition, stimulate hatred of the law. But in what scale are bloodshed and cruelty to be weighed to determine if they are undue? Men who are brutally treated in prison tend to an unknown extent to risk their promising careers after release in satisfying an understandable thirst for revenge. Inadequate penalties, on the other hand, discourage enforcement and provoke, to an incalculable and varying extent, lynching and self-help. Some men are dangerous and others are not; some are corrigible and others are not, but how can those who are corrigible be separated from those who are not with reasonable confidence? And how are we to set about with some assurance reforming those who are corrigible until someone tells us what Plato could not; how virtue is taught? And even if they are reformed, how are jobs to be found for them without encouraging the unemployed to commit crimes? The doubts created

⁵ Governor's Conference on Crime, the Criminal and Society, p. 721.

⁶ I heartily agree with those who argue that genuine progress towards a more rigorous criminal law machinery must come through the instrumentality of more and more extended judicial and administrative discretion. My point is the traditional one that such progress may not be worth the price, particularly in our own time and place. I am not at all impressed in this regard by the course of foreign development. If we are to avoid dictatorship, we must be content to face problems that are of trivial importance to a dictator.

by these reflections may be intensified when one recognizes that the best methods of terrifying potential offenders are likely to be the worst means for reforming actual offenders; that no one knows, in spite of recent pronouncements on the subject, whether more crime can be prevented in the one way or in the other. In any event, prisons are both few in number and expensive to maintain and any marked increase in the death penalty would not be politically feasible even if it were practically wise.

That these dilemmas are genuine is indicated clearly enough in current debate. Policemen argue for stern penalties and shout down parole. Humanitarians and social workers plead for light or indeterminate sentences and efforts to reform. Psychiatrists seriously maintain that they know how to separate the harmless from the dangerous and the corrigible from the incorrigible and to reform the corrigible. At the same time that they deny that morality can be distinguished from the mores, they denounce the moral pre-occupations of the law as unjust, preach the theological virtue of charity in scientific disguise and urge that the criminal courts be turned into psychiatric clinics. In spite of much profession of co-operation and mutual esteem, one group does not really understand any of the others and this for the excellent reason that they all overstate their knowledge and take only a partial view of the problem. The unwelcome truth may be that there is no genuine solution to the ultimate dilemmas of treatment, because there is no knowledge sufficient to guide a rational choice. Bentham's insight that the only choices to be made are choices among evils carries with it the conclusion that none can be made with conviction or satisfaction.

II.

The two major procedural problems are those of apprehension and trial of suspected persons. The problem of apprehension involves two questions: (1) what methods of keeping tabs on the population, conducting investigations and making arrests are likely to be most effective; (2) of these methods which should the police be permitted to employ? The first question is easier to answer than the second because it involves only a selection of means to a single end and knowledge is adequate for the choice. But the second question is one of ends as well as means since the apprehension of suspected persons is not the only end of government. Police practices which are effective means of apprehension may

seriously disserve such other ends as the preservation of general security. This is a point which peculiarly escapes those students of crime who constantly contrast the modernity of the methods of the criminal and the antiquity of the "legal obstacles" with which we surround those whom we expect to catch him. The criminal's job is a less responsible one than the policeman's and he can afford to take more chances. Most of the "legal obstacles" are designed to keep policemen responsible to their complex allegiances as officers of the state and the law, recognizing the sad facts that they may make errors of judgment, moral slips and may even become the tools of those whose primary concern is not the common good. Thus proposals for universal finger-printing, more extensive powers of arrest, search and examination, simpler extradition procedure, broader extradition rules or the total abolition of extradition formalities raise dilemmas as serious as those presented by the substantive law. Such measures may make it easier to catch criminals; they may also achieve other results ranging from the industrial blacklist and the shooting of wrongly suspected persons to the facilitation of a fascist coup d'etat.

Similar dilemmas are presented by some at least of the proposals designed to make it easier to obtain convictions by the creation of presumptions to relieve the prosecution of the burden of proving a *prima facie* case and the abolition of such legal protections as are granted the accused by the presumption of innocence, the requirement of a unanimous verdict, the rule forbidding comment on the defendant's failure to testify, the privilege against self-incrimination and the limitations on proof of defendant's character. Efficiency in prosecution must be measured by the success with which the guilty are convicted *and* the innocent acquitted. But such is the nature of judicial proof that guilt and innocence can never be certainly known by the tribunal and any devices which make it easier to convict the guilty also make it easier to convict the innocent. On which side is it better that the balance be weighted? The prosecutor's stock answer is that we have worried sufficiently long about fairness to persons accused of crime and should now begin to worry about the people who are injured by crime. But the question somehow survives the answer. The difficulty magnifies when one ruminates on the problem of prosecution as only one step in the many processes of the criminal law. We are uncertain what to try to do with convicted persons and still more uncertain that we can succeed in doing what we decide to try to do. With all the

present difficulties of prosecution the number of persons convicted of crime annually is tremendously large as it is. How likely is it then that a somewhat increased conviction rate will substantially alter the crime budget?

These dilemmas are avoided by measures that are designed merely to improve the organization, personnel and technique of police and prosecution. They are also avoided by efforts to improve the calibre of jury service. They would be avoided too by steps to improve the caliber of judges and to eliminate official dishonesty at all stages of the proceedings. It may be questioned indeed whether this is not the focal point of the whole complex of problems subsumed under the term "racketeering." Unless private groups, like the Mayor's Committee recently formed in New York City, state their problem in this way there is no reason to believe that good may come of their activities. Even if they do, however, it is well to remember that citizens' committees find it easier to talk about the link between crime and politics than to do anything to break it. This much at least the age of the link attests. Reforms such as these are worth seeking, however, for their own sake, and the improvement to be anticipated if they ever are made lies much more largely in the general satisfactions of better government than in the particular satisfaction of a reduction of the amount of crime. Moreover, even if the crime rate should be somewhat reduced the world would remain much the same. The New York prostitutes whom Mr. Dewey may have freed from wage slavery are likely to remain slaves to their profession.⁷

III.

The dilemmas are also avoided, of course, by crime prevention through instrumentalities other than the criminal law. Man becomes good socially by being good individually and the general means to individual goodness are education, freedom from economic and physical handicaps, and the opportunity to function and be of service. This much follows from an understanding of man as a rational animal and it is unnecessary to point for corroboration to the findings of empirical research that most criminals are the underprivileged offspring of underprivileged parents. It is, with

⁷ I hope that the context makes clear that I do not intend to deny that there is immediate value in incapacitating the men whose conviction Mr. Dewey has thus far secured. My remark is addressed to the more remote consequences of such convictions.

relatively minor exceptions, all that we know of the ultimate causes of crime. Hence the most satisfactory method of crime prevention is the solution of the basic problems of government—the production and distribution of external goods, education and recreation. Not even education and recreation alone will do, as any social worker will testify. The educated and recreated pauper asks why he is a pauper and may not be satisfied with the answer. Even Lord Coke conceded the essentials of the point, at the end of the “Third Institute.” Provide for the “good education of youth” and prevent idleness by “teaching honest trades” he admonished in what is perhaps the only one of his dicta that American lawyers might hesitate to cite.

That the problems of social reform present dilemmas of their own, I do not pretend to deny. I argue only that one can say for social reform as a means to the end of improved crime control what can also be said for better personnel but cannot be said for drastic tightening of the processes of the criminal law—that even if the end should not be achieved, the means is desirable for its own sake. I argue, finally, that this should have been the primary message of the crime conferences and that this is the story which the newspapers should have carried.