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Letter From Canada

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A LETTER FROM CANADA

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Over-simplification is often the price paid for clarity and vigor. The social reformer of today has come to realize this truth so strongly that he hesitates to express any opinions unless supported by carefully considered statistical investigation and checked by the methods of scientific sociology. This is a healthy attitude. Sometimes it may result in paralysis of effort, partly because we distrust statistics, partly because we are not sure that scientific sociology is truly scientific. Probably for a long time to come, possibly always, we shall be compelled to proceed by the method of trial and error, pushing forward on one path only to discover that we have gone too far or that the path was chosen erroneously, then trying another path with similar results. This is a discouraging thought; but reformers have something in their blood that won't let them stop reforming, so there is little danger that too great care to know we are right before we go ahead will lead to stagnation.

These observations are suggested by an interesting letter that came recently to the editorial office of this Journal from a Canadian police magistrate. Mr. R. B. Graham, K. C., writing from Winnipeg, was inspired by Professor Wechsler's unusually thoughtful article in our issue of January-February, 1937;[2] the salient parts of his letter are as follows:

> Having read Prof. Wechsler's scholarly article on Crime Control in your issue of January-February, 1937, I would like to express the impression made by that article upon one who has had over thirty years experience in the administration of the criminal law in Canada; over twenty-five years as a prosecutor and eight as a trial magistrate, trying serious as well as trivial offenses.
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> Prof. Wechsler goes far beyond a mere discussion of the federal organization under Mr. Hoover, the legislative program presented by Governor Lehman and the prosecutions by Mr. Dewey and enters the field of crime prevention by the elimination of the causes of crime.
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> With his statements and deductions in that latter regard, I have no fault to find beyond stating that they constitute a counsel of perfecion, the attainment of the ends of which, if possible at all, will require many

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[2] "A Caveat on Crime Control," by Herbert Wechsler, Assistant Professor of Law, Columbia University, New York.

years of education and steady progress and that they offer no cure or palliative for the present conditions.

Apparently the organization under Mr. Hoover, the legislative program presented by Governor Lehman and the prosecutions by Mr. Dewey are all results of the failure of the ordinary state courts and enforcement bodies in the United States to cope with a situation with regard to crime that has become appalling and which has made the administration of justice in that country appear farcical to the outsider.

That situation appears to the onlooker, who must gather his information from the press to be this—

Any criminal, no matter how serious or widely known his offenses may be, who possesses wealth and/or political influence has little or nothing to fear from prosecution in the state courts; but does have cause to fear prosecution in the Federal courts.

In the state courts it seems that, no matter how conclusive of guilt the evidence may be, the ends of justice are frequently defeated, either by the invocation of technical rules which were abolished in Britain and Canada at least fifty years ago, or by political or other influence. Even a plea of guilty does not necessarily result in the offender receiving the punishment provided by law for his offense. Witness the Loeb and Leopold case, the result of which is still incomprehensible to a Canadian lawyer.

On the obverse side it seems that prosecuting officers, in order to make a show of efficiency, try to secure convictions against uninfluential persons by very questionable methods.

These defects in the administration of justice do not appear to exist in the federal courts.

We in Canada have gone no farther than, if as far as have the people of the United States in the study of the causes of crime and the means of their elimination, yet the conditions that I have mentioned as existing in the United States do not exist in Canada, a country in race, language and origins of law almost identical with that of the United States and separated therefrom by only an imaginary line.

Might it not then be well for those concerned with the administration of the criminal law in the United States to seek out the causes of this difference in conditions and to state those causes concretely and not in mere generalities.

Prof. Wechsler frankly states, "Police organization and personnel in the major part of the United States are incredibly poor." Why is this so? That is one of the questions that is capable of a concrete answer. It is because those police forces are a part and under the control of a political machine.

Prof. Wechsler states, "Punishment is necessarily uncertain." Admitting that it is uncertain in the United States, but not that it is necessarily so, the question arises, Why is it uncertain? The answer is, because the courts and enforcement officers, like the police, are parts and under the control of a political machine.

This answer to those two simple questions constitutes the shame of

the United States to as great a degree as do the results flowing therefrom.

But you cannot rest content with asking these two questions and accepting my answers. You must seek the cause behind the cause I have mentioned and remove it. This, in my opinion, is not nearly so difficult as the elimination of all the causes of crime and will result in at least some improvement in the existing conditions.

The tenure of office of state judges and law enforcement officers is brief and dependent upon political considerations. The inevitable result of a judiciary and law enforcement officers who are not absolutely independent is the condition of affairs that exists in the United States today.

Criminal trials in the United States do not disclose any real effort to decide the guilt or innocence of the accused. They seem to be shows staged for the benefit of the press and a rather vulgar public and for the advertisement of the counsel engaged. The reprehensible publicity given to criminal cases, even before trial, is only one of the inevitable results of a system of elected law enforcement officers. Publicity such as distinguished the Hauptmann case would, in Canada have resulted in the dismissal of the prosecuting officers and the heavy punishment of the journals concerned. This, not because we are one whit more intelligent or less vulgar but because our courts, having no political ends to serve are solely concerned in administering justice "duly impartially and with reference solely to the facts judicially brought before it."

This traditional system is however not the only cause of the conditions complained of. Many of your states have neglected the simplification of criminal procedure. In those states even the most honest and independent law enforcement body finds itself fighting crime with weapons forged in the days of Good Queen Anne and discarded by us long and long ago.

The activities of the federal organization under Mr. Hoover are merely a desperate remedy sought for a desperate disease. By a legal fiction, created by a statute of Congress, some fugitive offenders are pronounced illegal commercial travellers. If taken alive, as a few may be, they are tried in federal courts for a breach of the interstate commerce laws, not for their criminal offenses. Those that resist arrest are shot down in cold blood. While perhaps they deserve no sympathy, one can scarcely admire a system that not only permits execution without trial, but seems to impel it. Were your federal judges elected, the same state of affairs would obtain with regard to offenses against Federal laws.

Just what is your state with regard to the enforcement of the criminal law? It is, with regard to state law, really non-enforcement and, with regard to federal laws, largely legalized lynch law.

Sincerely yours,

/s/ R. B. GRAHAM.

In the remainder of his letter, Mr. Graham argues persuasively for the appointment of judges and for tenure of judicial office for life or during good behavior. He points to the superiority of the administration of criminal justice both in our Federal courts and

in the courts of Canada as proof of the greater wisdom of this system; and he expresses the belief, not uncommon among the laity, that election of state judges is the universal rule in the United States. Moreover, Mr. Graham offers an interesting explanation of our practice in this regard as growing out of the historical swing away from the prerogatives of the Crown that characterized the American Revolution.

Of course every student of the American judicial system knows that Mr. Graham's historical assumption is incorrect. Popular election of judges for relatively short terms of office did not appear on the American scene until about 1820; and even today it is the rule in only thirty-seven of our forty-eight states. In the remainder judges are appointed, either by the executive or by the legislature (or by the executive with the consent of the legislature); and though limited tenure is the rule, tenure for life still prevails in Massachusetts, Delaware, New Hampshire, and Rhode Island. While there are still many important states in which the term of judicial office is only six years, and some where it is but four, the average term is from eight to fifteen years[3]

This mistaken historical assumption is more important than a mere error of fact. If it were true, as Mr. Graham thought, that throughout our national history all the states had followed one method for the selection and retention of judges and the Federal Government another; and if it were true that the administration of criminal justice in the federal courts had been uniformly better than in the state courts, then it would follow almost inevitably that the method of judicial selection and retention prevailing in the states is a major cause for the inferior quality of the work in their criminal courts. But the question is by no means so simple. In the first place, I am aware of no thorough-going analysis of judicial behavior throughout our innumerable state and Federal courts that either sustains or disproves Mr. Graham's major assumption that our Federal judges uniformly administer the criminal law better than our state judges. I am inclined to guess that he is right; yet I know of so many honorable exceptions among state judges that I should require a careful investigation and proof founded upon statistical data before accepting this premise.

Such an investigation would not be easy to make. So many factors enter into it that only a corps of investigators trained in the

[3] See "Judicial Tenure in the United States," by William S. Carpenter. Yale University Press, 1918.

disciplines of both law and social science would be capable of making the study with that thoroughness requisite to throw helpful light upon the precise question whose answer Mr. Graham so lightly assumes. The scope of the criminal law administered in the Federal courts differs radically from that dealt with by the state courts; the administration of the criminal law is one thing in large American cities, quite a different thing in smaller cities, and different again in our rural communities; large foreign-born and Negro groups create special problems in certain parts of our country that are relatively negligible elsewhere—these are a few of the many puzzling factors that would have to be considered in any comparative evaluation. When to these we add that in one part or another of the United States can be found practically every variant in the mode of selecting state judges, from election for so short a term as four years to appointment for life, it becomes apparent that it is not safe to jump to conclusions.

And yet, as I said above, I incline to guess that Mr. Graham may be right. It does not seem unreasonable to assume *a priori* that judges appointed for life can be more independent of politics than judges elected for a short term of years. In fact, a recent historical study of the bench in Chicago seems to demonstrate that the short-term elective system is certain to bring about an unholy alliance between judges and professional politicians that fully justifies Mr. Graham's condemnatory letter.[4] However, it would be properly prudent to confine acceptance of the conclusions reached in this study to the city of Chicago. In spite of the external sameness of our American cities, in spite of the fact that a traveller in the United States is likely to lodge in a series of standardized hotels that give him an impression of monotonous uniformity, one must never lose sight of the great size and the radical complexities of this country. Our large cities seem to the casual observer distressingly alike. But even among these, a closer view will disclose differences of subtle yet profound social significance; and a system which has caused a political stench in Chicago will be found to have worked surprisingly well in another city that looks like another Chicago of different size. And the same system may have produced well-nigh perfect results in some rural sections, while it has led to shocking debauchery in others.

Therefore, I repeat, the cautious social reformer will insist upon

[4] "The Rôle of the Bar in Electing the Bench in Chicago," by Edward M. Martin, University of Chicago Press, 1936.

a far-reaching investigation and a thorough comparative analysis before he hitches his wagon to any particular star. He has learned by sad experience that any other course is liable to carry him only from known evils to others that he knows not of. To this I hear Mr. Graham reply that he has not attempted to pose a panacea, that he has merely pointed out two or three obvious steps, not for the cure of all crime, but for the amelioration of some of the worst phases of our efforts to curb crime in the United States. And though it is entirely possible that he is right, that his suggestions have all the merit he claims for them, still it may be quite impracticable to adopt them.

In his letter Mr. Graham speaks of the "imaginary line" that separates Canada from the United States. Does it not occur to him that the very subject of his discussion points to the fact that these two great democracies are separated by something much more substantial? States of mind, habits of thought, traditional modes of behavior, historical backgrounds, differing degrees of racial homogeneity or complexity—these are some of the imponderables that go to make up a national character which determines forms of government. No doubt it would be correct to add that forms of government are among the forces that go into the formation of national character. Life is not the simple biological process alone, it is a congeries of forces so complex, so confused, that I fear no nation can learn very much from the experience of any other nation. Each must work out its own destiny in its own way; and each finds it hard to understand what the others have done or failed to do.

Lest this sound too hopeless, let me hasten to add that in the United States we believe we are on the way toward an improvement in our method of selecting judges that will overcome the evils Mr. Graham has condemned, but will do so in a manner consistent with our own peculiar ideas of government. A movement is on foot to combine what we have come to look upon as the advantages of the elective system with those inhering in appointment by a qualified executive. In brief, this plan provides for appointment "by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens who hold no other office."[5] The judge so appointed is, under this system, required to submit his name to the electorate periodically for retention in office or for rejection; but

[5] Page 244, Journal of the American Judicature Society, Vol. 20, No. 6, April, 1937.

he does not run for election against competing candidates. Instead, he "runs on his record," without party designation and presumably without "political" backing or opposition.

This newly devised system has been termed by competent students "a major invention in politics." It is on trial in California and is under consideration as a proposed constitutional amendment in Iowa. The organized bar of the United States has begun to back it vigorously; there is reason to believe it will meet with favor in many states and may in a relatively short time become the normal pattern throughout the country.[6] Precisely why this plan appeals more strongly to our national predilections than another would be hard to explain to any foreigner; and, ungracious though it is to refer to our Canadian cousins as "foreigners," I hope I have made clear to Mr. Graham that I use the word without invidious intent.

Thus far I have confined my comments to those parts of Mr. Graham's letter dealing with our methods of selecting judges in our state courts. What he says about other law enforcement agencies is, of course, equally important. Graft-ridden police departments, prosecuting officers dependent for selection and continuance in office upon their political activities, committing magistrates chosen in the same shocking manner—all these are essential parts of our ugly picture.[7] Furthermore, Mr. Graham's strictures upon our substantive law of crime and our out-moded rules of evidence and procedure are all too just. The simple truth is that we need a political house-cleaning. We need, above all things, a systematic study and a comparative evaluation of the myriad systems that have grown up in our forty-eight states and the hundreds of cities within those states. And then we need a statement of objectives and a plan of campaign—probably several plans of campaign—to be developed and carried forward along many fronts simultaneously by leaders who must be fully familiar with the peculiar American scene.

Perhaps we shall find, as Professor Wechsler intimates, that real progress is dependent upon "the solution of the basic problems of government—the production and distribution of external goods, education and recreation."[8] But it is only fair to note that Professor Wechsler also recognizes the importance of the same *ad interim* measures urged by Mr. Graham. He says:

"These dilemmas are avoided by measures that are designed merely

[6] Journal of the American Judicature Society. *Ibid.*
[7] See "Crime and Justice," by Sheldon Glueck, Little, Brown and Co., 1936.
[8] Herbert Wechsler, *op. cit.*, p. 637.

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 calibre of judges and to eliminate official dishonesty at all stages of the proceedings."[9]

In conclusion, let me say a word of thanks and appreciation for Mr. Graham's letter. To see ourselves as others see us is not always pleasant; it ought always be helpful. Perhaps the thing most striking to an American reader is that Mr. Graham, a King's Counsellor, describes himself as a man with over twenty-five years experience as a prosecutor and eight as a trial magistrate. The fact that in Canada a trial magistrate is capable of writing such a letter, is convincing proof that we are separated from Canada by much more than an "imaginary line." Everything that Mr. Graham has said about our politically minded state judges applies with even greater force to our committing magistrates and prosecuting officers. The latter, especially, are almost without exception men with ill-concealed political ambitions. Throughout the United States the office of state's attorney is looked upon as a stepping-stone to political preferment. The concept of this office as quasi-judicial in character and as a career in itself is almost unheard of. We must come to it, however, if we are ever to divorce politics from prosecution and to develop effective methods of crime control in this country.

[9] Herbert Wechsler, *op. cit.*, p. 636.