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COMMITTEE ON SURVEY OF CRIME, CRIMINAL LAW AND CRIMINAL PROCEDURE¹

JEROME HALL²

The difficulties encountered by this Committee in the past have arisen largely (1) from the breadth and vagueness of the tasks suggested by its title and (2) from the fact that these suggested assignments seemed to include duties not ordinarily carried on by Association Committees.

This Committee has therefore sought to define its functions definitely. For while it was recognized that limitation of space required general treatment of the problems surveyed, yet it was sought to chart a specific course which would provide a basis for evaluation of the work done by this Committee and also guide future committees. To that end it was decided to investigate two important teaching problems by questionnaire, and to survey developments in penal legislation, administration, judicial decision, and professional literature during the period October 15, 1937, to October 15, 1938 (the dates being chosen with reference to the annual meetings of the Association).

In addition to the definite charting of a program, the Committee thinks that the particular questions investigated are important ones. While far from being entirely satisfied with its results, the Committee believes it has shown the possibilities of surveying important problems in reports which may eventually become of very special significance as annual inventories, particularly after a number of them have been published. As to the subjects undertaken, there was of course no question as to propriety with reference to teaching problems. With reference to the remaining surveys, however, there was some suggestion that other associations were pursuing them. To the extent that that is true, it is being done sporadically and then by scholars on the faculties of member schools. This Association includes by far the vast majority of persons who may fairly be re-

¹ This report by a Committee of the Association of American Law Schools will be presented at the Annual Meeting of the Association on December 28, 1938.

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garded as specialists in the Criminal Law field. Hence it seemed entirely fitting in light of the broad duties implied by its title (and despite the fact that the Association is primarily concerned with teaching) that the Committee undertake the broader surveys set forth.

I. Teaching Problems

In view of past discussions in the Criminal Law Round Table, and of the discussion on the use of local law at the 1936 annual meeting, it was decided to survey the ideas of the teachers of criminal law on three points: (1) The relative importance of stressing "general principles" rather than specific crimes; (2) The use of local law materials; and (3) The extent of instruction on the procedural side of the field. Accordingly, a questionnaire was sent to the teachers of Criminal Law in the member schools. Thirty-five answers were received, although not all the responses covered all of the questions asked.

This report attempts only to collate the answers received. What they mean, if anything, must be left to those who read the report. One general observation may be made: The field of Criminal Law cannot be covered in the time allotted to it in a three-year curriculum. Hence teachers are required to omit important segments of the field each year.

The questionnaire is here re-printed, each question being followed by a paragraph describing the substance of the answers. Due to the nature of the data involved, it was not possible to give numerical listings of categorical answers. The answers were evaluated by one member of the Committee, who framed general statements to include the various types of replies received.

I. Content of the Course:

1. In your opinion, should the major stress in a course in Criminal Law (as distinguished from Criminal Procedure) be laid on:
 - (a) The elements of particular crimes; or
 - (b) The general principles of criminal liability?

To these questions, 11 teachers answered that they stressed the first, 14 that they stressed the second, and 10 that they thought it impossible to give a satisfactory course without emphasizing both. Even among those who expressed a reasonably definite preference, there was considerable indication of a feeling that much consideration should be given to the portion of the field which they did not stress.

2. Insofar as stress is laid on specific crimes, to what extent, if at

all, should there be mention of modern statutory changes in the common law definitions?

To this question, all those replying, except one, thought that modern statutory changes should be considered to some extent. The amount of attention thought wise, however, varied greatly. The majority thought that considerable effort should be made to bring the student "down to date" on those modifications of the common law rules that had been made rather generally; a smaller group would attempt to cover the less widespread modifications, both for the purpose of contrast with the common law rules and by way of acquainting the students with possible reforms. To some extent, the answers to this question were influenced by the views held on the "local law" problem—those believing in teaching local law, of course, stressed the statutory changes in the local jurisdictions; a few teachers seemed to think that *only* local statutory changes should be considered.

3. Insofar as stress is laid on specific crimes, what crimes should be selected for coverage?

Here, again, there was fair agreement. Most teachers would cover: homicide in its various forms; larceny (including its variants, such as false pretenses, embezzlement, trick and device, etc., and many also mentioned receiving stolen goods); rape; assault and battery; burglary; and robbery. A smaller number included arson, while there was scattering mention of such crimes as perjury, bribery, forgery, false imprisonment and mayhem. Only a few teachers referred specifically to conspiracy, attempt, and solicitation. However, since every standard case book does deal with these problems, it is probable that these topics are, in fact, covered in all the courses. It is significant that several teachers indicated that they stressed the modern statutory "business" offenses such as bad check laws and securities acts, apparently at the expense of the more traditional crimes.

4. What percentage of the time in the course (if any) should be devoted to a study of Criminal Procedure (as distinguished from substantive Criminal Law)?

Here problems of local curricular arrangements were evidenced in the answers. Also, the "local law" problem undoubtedly had an effect here. In general, those who disbelieved in teaching local law also disbelieved in teaching criminal procedure. Several teachers thought that the main procedural problems were better covered in a third year course on procedure in general. Of those who did deal with criminal procedure, the percentage of time used varied from 10 per cent to 66⅔ per cent, with the mean being about 30 per cent of the total time.

5. To what extent, if at all, should attention be given to such topics as:

- (a) Double jeopardy.
- (b) Geographical jurisdiction over crimes.
- (c) Procedural problems in insanity cases.
- (d) Interpretation of criminal statutes.

- (e) Right to jury trial.
- (f) Comment on evidence.
- (g) The rules of pleading in criminal cases.

Here the answers were definitely colored by the views of the importance of criminal procedure and on "local law." Of the topics covered in the questionnaire, rules of pleading, double jeopardy, geographical jurisdiction and interpretation of statutes were stressed in the order just given. Most of the teachers seemed to feel that the topics of jury trial and comment on the evidence were better covered in the courses in Constitutional Law and Evidence, respectively, although about 50 per cent of the teachers reported at least some attention to them. It is to be noted that several teachers who doubted the wisdom of covering procedure in general were of the opinion that the peculiar procedural problems in insanity cases merited attention as a means of explaining some substantive law rules.

II. *The Use of So-Called Local Law:*

1. Should there be any attempt to teach the rules of law as existing in the jurisdiction in which the law school is situated?

As phrased, this question met with almost complete approval—30 out of 35 answers being affirmative. The comments of the teachers, however, disclosed considerable variance on the extent of the attempt made. As a general rule, teachers in State universities and in other law schools which draw the bulk of their students from a single state, thought that instruction in local law was a major part of their task; teachers in the so-called "national" schools were less sure. This divergence of emphasis becomes more apparent when the answers to the next questions are considered.

2. If so, should these rules be taught by:

- (a) The use of a "supplement" containing local cases and statutes, this material to be assigned and recited on as is the material in the main case book;
- (b) Assignment of cases and statutes to be read in the original reports, but to be recited on as though reprinted in the Case Book;
- (c) Assignment of local cases, statutes and law review material, to be read as collateral reading, not recited on but subject to examination;
- (d) Citation of local cases, statutes and law review material, without requirement that this be read;
- (e) Lecture.

This question was designed to measure, in some manner, the extent of local law instruction. As was to be expected, since the methods are not mutually exclusive, there was some overlapping; this will account for the fact that the figures used below add up to more than the questionnaires received. Of the five methods, the choice ran: (a) 5; (b) 12; (c) 12; (d) 13; (e) 11. In other words, a little over one-half of the teachers *require* that their students learn something of local law; and of these, 17 place the local material on the same basis as foreign material

—i. e., they require that it be presented and discussed in the regular class-room technique.

3. Roughly, what proportion of time should be devoted to instruction in local rules?

As might be expected, this question was not easy to answer; and many omitted it entirely. This was particularly true of those using methods c, d and e—since the time used in mere citation or oral reference is not easy to estimate and is probably not great. The answers actually given ranged from 5 per cent to 60 per cent, with a mean at about 10 per cent.

III. *Please State in Detail What Use You Now Make of Local Materials in Teaching Criminal Procedure.*

As has been seen under Questions 1, 4, above, some schools do not attempt to consider the procedural aspects of the field. Of those that do, there was a more general agreement on the use of local materials than when dealing with the substantive rules—15 out of 23 teachers answering, saying that they used local materials in great part. The commonest device seems to be to assign the local procedural code as part of the required reading; but some teachers use a method similar to (a) or (b) under II, (2), above.

II. *Research in Progress*

It has often been stated that improvements in our Criminal Law and its administration will come only when more interest, more time, and more thought is devoted to research. An examination of the information collected by Sellin and Shalloo indicates that the law schools are lagging behind the departments of sociology and other divisions of the universities in this regard. It might be added that we have consulted the information collected by Sellin and Shalloo, the Institute of Criminal Science, and others, as well as the law periodicals and their indexes, but since such information is already available to law teachers we have refrained from carrying over such information except in so far as revealed in our survey of research by law professors.

Last May a brief questionnaire was mailed to 130 teachers of Criminal Law and Procedure and to other law teachers who have worked in or shown an interest in the field of Criminal Law and its administration. A total of 79 replies were received. Since the questionnaire was simple in form and because a stamped return envelope was inclosed, it is believed that those who failed to return the questionnaire, with possibly a few exceptions, are not doing research in this field. If the 51 who did not reply (30 per cent of the total), be added to the 36 (28 per cent) who reported no work

being done, we have 87, or 67 per cent of the total, who are not undertaking any research in the field of Criminal Law, or related subjects. The replies to our questionnaire indicate, therefore, that approximately one-third of the law teachers in this field have since January 1, 1937, performed some special work in this field. Although much of the work reported upon is not pure research, this showing, owing to the fact that teachers of Criminal Law Procedure in most instances are compelled to devote their time to other fields of law, is encouraging. In many replies we found statements indicating that the teacher is now engaged in a project in some other branch of law, but that he plans to pursue some named project on some special phase of Criminal Law or related fields as soon as the other undertaking is completed.

Teachers seem to differ widely as to just what constitutes a survey or research project. The replies indicated that the questionnaire did not adequately state what we meant to have included as "surveys" or "research projects." It was intended to include "library" research as well as "field" research. However, some replies included only "field" surveys and research, excluding such work as examining cases and other authorities in connection with the preparation of law review articles, etc. Because of this, the data on "Articles, Addresses, and Special Lectures" do not include all work of that nature being undertaken.

If the survey or research received the major emphasis, the project has been classified as "pure research," although the results have been or are to be published in a book or article. All "field" research and surveys have been classed as pure research. If the main purpose seemed to be the preparation of a book, article, or penal code, and the research appeared to be only ancillary, we have listed the project under one of the last three headings. It does not follow from such listing that the project does not involve research. It only means this report approaches the matter from the point of view of the time and effort devoted to research. The listings throughout the report refer to the number of teachers reported as taking part in projects, and each person is listed as many times as there are projects on which he worked.

A total of 43 replied that they were doing some special work in our field, or had completed during the preceding seventeen months (January, 1937, to May, 1938, inclusive), or were contemplating undertaking by May, 1938, such work. These also reported special work being done on projects in our field by ten others

not reached by the questionnaire. Thus, fifty-three were reported, directly or indirectly, as having recently worked, are now working, or are about to start work in research of some form or other. Of the forty-three reporting, twenty-two were each concerned with a single undertaking, fourteen with two projects, three with three each, one with four, one with five, one with six, and one with seven. Of the ten reported upon indirectly, nine were concerned with one project each and one with three projects.

By arranging the figures stated above so as to indicate the type of work being undertaken by different individuals as revealed in our questionnaire, we get the following results.

PURE RESEARCH, BOTH "FIELD" AND "LIBRARY"

<i>Completed</i>	<i>In Progress</i>	<i>Postponed</i>	<i>Contemplated</i>	<i>Total</i>
3	28	3	6	40

PREPARATION OF CASEBOOKS, TEXTS, OR OTHER BOOKS ON SOME PHASE OF CRIMINAL LAW

<i>Completed</i>	<i>In Progress</i>	<i>Postponed</i>	<i>Contemplated</i>	<i>Total</i>
6	11	0	2	19

PREPARATION OF ARTICLES, ADDRESSES, SPECIAL LECTURES, ETC.

<i>Completed</i>	<i>In Progress</i>	<i>Postponed</i>	<i>Contemplated</i>	<i>Total</i>
9	4	0	3	16

DRAFTING AND REVISING CRIMINAL STATUTES

<i>Completed</i>	<i>In Progress</i>	<i>Postponed</i>	<i>Contemplated</i>	<i>Total</i>
3	13	0	2	18

This makes a grand total of ninety-three. There are, however, three duplications, since three who have been working on projects during 1937 and 1938 reported such work postponed and at the same time reported that they contemplated resuming work before the close of next May. Therefore, these three are listed under both postponed projects and contemplated projects. This leaves a net total of ninety. Many reported that the projects would be completed during the summer or fall, but we treated those as in progress. This report does not, therefore, reflect the status at the present time, but rather as of the summer of 1938.

The Committee believes that the data set forth in the above table is quite incomplete, but in this regard it was, of course, dependent solely upon the information given it. The Committee recog-

nizes, also, that detailed description of the various projects would be helpful, and perhaps something can be done in that direction in future reports.

By classifying the data gathered so as to indicate under whose auspices or direction the survey or research projects are carried on, we get the following results:

I. Under Federal Direction.....	3
II. Under State Direction.....	11
III. Under Direction of Bar Associations.....	6
1. American Bar Association.....	1
2. State Bar Associations.....	5
IV. Under Law School Sponsorship.....	12
V. Under Direction of Private Societies or Bureaus	9
VI. Projects of Individuals.....	49
	—
Total	90

III. Federal and State Legislation

The period covered by the Report, October 15, 1937, to October 15, 1938, is an off-year so far as most legislatures are concerned. Legislative bodies in regular session have included the Congress of the United States, and the state legislatures of Kentucky, Louisiana, Massachusetts, Mississippi, New Jersey, New York, Rhode Island, South Carolina and Virginia. States having special legislative sessions in 1938 were: Arizona, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, New Mexico, North Carolina and Pennsylvania. Session laws which have been published in book form at the time of this Report are: Kentucky, regular session and special session; Louisiana, regular session; South Carolina, regular session; and Virginia, regular session. Special sessions acts have been published by California, Georgia, Indiana and Kansas.

In the field of criminal procedure, Congress passed an act (H. R. 6178) which abolishes appeals in habeas corpus proceedings brought to test the validity of orders of removal. This legislation was recommended by the Attorney General in his annual report, 1937. (House Document No. 378.) The statute will serve to end what has been regarded as a serious abuse of the right of habeas corpus. Extensive improvements in criminal procedure were proposed in New York, but the report on the enactments must be deferred until they are available.

The sentencing power of the trial judge was extended by the

Georgia legislature. (Georgia Laws, Extra Session, 1937-38, p. 326.) The statute provides that sentence shall be determined not by the jury but by the trial judge. It provides that the judge shall investigate case histories in imposing sentence, and he is given wide powers of suspending sentence and of granting probation. There is a strong belief among lawyers and judges that there are distinct advantages in having the jury fix the penalty, especially in misdemeanor cases. On a balance, however, of all of the considerations which are involved, it seems clear that this sentencing power should be placed in the judge rather than in the jury. Among the arguments for the Georgia statute are the likelihood that there will be less confusion of the issues, less inequality and more discrimination in the sentences imposed. The statute may be considered as typical of a tendency to take away from the jury the determination of matters which it, as presently constituted, is essentially unfit to determine. Massachusetts enacted (Acts 1938, c. 145) that judges must ascertain the prior convictions for driving while under the influence of liquor before sentencing a defendant for that offense. It is surprising that the above acts were needed. New York attempted to solve the problem of the witness who refuses to testify on the ground that his answer may incriminate him by enacting that he must answer but cannot be prosecuted for the crimes disclosed by his answer. (N. Y. Laws, 1938, c. 108.) Query whether the cure will not prove worse than the disease. Virginia added to the predicament of families whose children are kidnapped by making it a crime to pay ransom or withhold information from the police. (Va. Acts 1938, c. 220. See Reader's Digest, Sept., 1938, pp. 71-4.)

The creation of criminal offenses was very extensive in Louisiana. Both Louisiana and Kansas enacted statutes to deal with homicide resulting from the operation of automobiles. Thirteen states already had enacted such statutes. The Louisiana act (Acts, 1938, p. 799) is commendable for its wide range of penalties, starting with a moderate minimum penalty, for leaving out the word "negligence" which has caused so much confusion in these cases, and for its liberal provision for alternative verdicts. The statute is not sufficiently clear in stating its actual effect with respect to prosecutions for manslaughter. The Kansas act on reckless driving of automobiles, like the Louisiana Act, directs special attention to the driver who is under the influence of intoxicating liquor. It is to be commended for the wide range and the moderate minimum of its penalties, and for the brevity of its definition of reckless

driving. The statute is objectionable, however, in using the term "negligent" in naming the type of criminal homicide. The absolute provision for the revocation of the license of the driver might well be more limited in its scope, if the experience and the amendments of other states are to be respected. The automobile continues to be a source of extensive legislation in most of the states. South Carolina is one of the most recent states to recodify a large part of its law for the regulation of motor vehicles. (Acts, 1938, c. 1719.)

Penal regulations enacted to promote the "general public welfare" continue to receive a great deal of legislative attention. California created several new misdemeanors in support of its "agricultural prorate" act. (Statutes, 1938, p. 39.) Labor legislation continues to receive extensive attention. To protect employees against discharge for political reasons, Louisiana enacted a statute "to protect the political right and freedom" of employees. (Acts, 1938, p. 457.) Employers of twenty or more persons are subject to fine and imprisonment for interfering with employees on account of political affiliation or activity. It expressly supplements the right of the injured employees to recover damages for the wrongful discharge.

Congress amended the Act of 1936, forbidding the interstate transportation of "strike breakers" or of those seeking to interfere with collective bargaining. (S. 2403.) In various states there has been some agitation for a bill to prevent mass movements across state lines in the promotion of labor disturbances. No legislation has been observed to result from this sort of public sentiment.

Interstate compacts and uniform acts received favorable consideration by the Virginia legislature. It enacted the uniform act to provide that the state may enter into a compact with other states "for helpfulness" in the administration of parole or probation. (Acts, 1938, p. 1001.) The uniform act to secure witnesses from outside of the state likewise became a law of Virginia. (Ibid, p. 746.)

Research and revision directed to the drafting of a criminal code is dealt with by Louisiana. (Acts, 1938, c. 257.) The act amends an act of 1936. It provides that the governor is to submit a draft to the 1940 legislature and that if the legislature adopts the code, the members of the commission are to be paid both compensation and their expenses. If the legislature does not adopt the code, the members, it seems, will be out their actual expenses.

It is recommended that efforts required to keep in touch with legislation in criminal law and procedure should be definitely or-

ganized. A central clearinghouse might be the Journal of Criminal Law and Criminology. To this central point could be sent, by the teachers of criminal law in each state, the legislative drafts of statutes which have been enacted, promptly after their enactment. This arrangement would make it possible to call the attention of teachers of criminal law to new legislation without waiting indefinitely for the official publication of session laws in book form. The burden of collecting new legislation from the officers of the various secretaries of state would thereby be shared by many rather than attempted by one, and the interest of criminal law teachers in the very active and rapidly expanding field of criminal legislation would thereby be increased and served.

IV. Administration and Judicial Decision

Among the most important decisions are *Palko v. Connecticut* (302 U. S. 319 (1937)), in which the United States Supreme Court held constitutional the Connecticut statute allowing the state to appeal from a verdict of not guilty, and *State v. Gaynor* (119 N. J. L. 582, 197 A. 360 (1938)), in which the New Jersey Court of Errors and Appeals upheld the state Gangster Act. *People v. Kenny* (3 N. Y. S. (2d) 348 (1938), ably criticized in 29 J. Crim. L. 287-91), a lower New York case, is notable as the first in which the result of an examination by a lie detector was admitted in evidence. The defendant tendered the evidence as proof of his innocence. In *State v. Owen* (133 Ohio St. 96, 12 N. E. (2d) 144 (1937), discussed in 4 Ohio State L. J. 356), the attorney for a fugitive from justice employed a most ingenious device to defeat extradition. He petitioned to have his client declared insane and then argued that the extradition proceedings should be held in abeyance pending the disposition of his petition below and on appeal.

Three interesting developments, which will be discussed, are the banning of wire-tapping by the Supreme Court, the continued uncertainty regarding the proper procedure on revocation of probation and the increasing statutory punishments of recidivists.

The Ban on Wire-Tapping. On December 20, 1937, the United States Supreme Court decided in *Nardone v. United States* (302 U. S. 379. See notes: 29 J. Crim. L. 134-6, 51 Harv. L. R. 1107-8, and 86 U. of Pa. L. R. 436-7) that the provision in §605 of the Federal Communications Act that no person not authorized by the sender shall divulge any intercepted interstate communication in-

cludes federal officers and prevents their testifying in a criminal case to information secured by wire-tapping.

Mr. Justice Roberts meets the argument that speed laws are equally inclusive, but do not apply to policemen and firemen, by saying that to so interpret them would be absurd. "For years," he continues, "controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." The conclusion that if the officer had no right to divulge the information, then the defendant could get his conviction reversed if the officer did so, is assumed.

There was general agreement among the Committee that the Nardone decision might have gone the other way—simply on the basis of the principles of statutory interpretation involved.

But on the broader question of wire-tapping, the Committee was divided in its opinion. Some members believed the police should be permitted to wire-tap and, of course, to testify accordingly. Wire tapping is deemed necessary especially in the detection of gangs of criminals operating in large cities. Also, there is reason to believe that if wire-tapping is barred, police will resort to more objectionable methods.

Other Committee members are opposed to these views. They accept, instead, the views expressed by the dissenting judges in the *Olmstead* case. In this position, they are influenced not so much by the search and seizure aspect of wire-tapping as by the sanctioning of confessed criminal behavior on the part of police officials by courts of law. It is possible that the opposition described above might diminish greatly if the laws making wire-tapping a crime were modified.

Procedure for Revocation of Probation. Three recent cases, *Varela v. Merrill* (74 P. (2d) 569 (Ariz. 1937)), *People v. Hill* (300 N. Y. S. 532, 164 Misc. 370 (1937)) and *Spears v. State* (194 Ark. 836, 109 S. W. (2d) 926 (1937)), raise once more the question of the proper procedure for revocation of probation. In *Varela v. Merrill* the court held, following the decision of the United States Supreme Court in *Escoe v. Zerbst* (295 U. S. 490 (1935)); see note

in 11 Wisc. L. R. 291-3 (1935-6)), and the weight of authority, that probation can be revoked without even giving the probationer an opportunity to be heard, unless that right is conferred by statute.

In *People v. Hill* judgment revoking probation and sentencing the defendant to prison was reversed because the record did not affirmatively show that the probationer was given an opportunity to be heard as required by the New York statute.

In *Spears v. State* the Supreme Court of Arkansas reviewed the evidence as set forth in the findings of the trial judge and decided that it was sufficient to justify him in revoking probation. The court stated that the judge had no right to act arbitrarily and mentioned the fact that the probationer was given an opportunity to be heard, but ignored the objection that the judge had based his decision on hearsay and neighborhood gossip, meaning probably the report of a probation officer.

Precedent seems the only justification for the holding in *Varela v. Merrill*, though it is probable that in fact the probationer was given an opportunity to be heard, as he was also in *People v. Hill*. Anybody familiar with the impossible load thrown upon a large proportion of probation officers realizes that many times they must act hastily and without proper investigation. Further, many of them are not sufficiently trained to properly evaluate complaints made to them. Hence the proper administration of probation requires that when it is sought to revoke probation, the probationer be given an opportunity to appear before the judge and speak in his defense. If the statute provides that the probationer "be taken before the court," the right to a hearing can easily be deduced from these words, as it was by the United States Supreme Court in *Escoe v. Zerbst*. In the absence of such a provision, it should be inferred from the nature of probation and the functions of a judge.

So many statutes grant the probationer, either in terms or by inference, the right to be brought before the court, that the difficult problem is not whether he shall have the right to be heard, but the kind of a hearing he shall have. Clearly he is not entitled to all the formalities of a trial. We may dismiss as absurd any claim to a jury trial or to confrontation by witnesses. In fact some statutes, as in California (Cal. Penal Code (1935) §1203.2) expressly provide that the judge may act on the report of the probation officer. In *Varela v. Merrill* the court by its silence assumed the propriety of hearsay evidence.

But is the probationer entitled to see the report of the proba-

tion officer? In *People v. Hill* it was read to him. Allowing him that right seems fundamental. Similarly he should be allowed to produce witnesses to deny accusations made in the report, but it is doubtful whether the judge should force the probation officer to disclose the source of statements made to him and to produce the informants for cross-examination. From the point of view of granting the probationer an opportunity to prove that he has not violated probation, this right should exist. Nevertheless, its existence might seriously embarrass probation officers just as a similar right has the police in search and seizure investigations.

Increasing the Punishment of Recidivists. The idea of additional punishments for the second and third offense was not new when in 1642 the General Court of the Colony of Massachusetts Bay in New England enacted that any person convicted of burglary or robbery "if he shall fall into the like offense the third time he shall be put to death, as being incorrigible." (Mass. Laws and Liberties, 1647, p. 4.) Nevertheless, statutes providing additional punishment for recidivists were comparatively rare until the advent of the famous Baumes Laws in New York in 1926. Since then both general repeated offender acts and those applying to specific offenses have been enacted in state after state. One of the latest is the recent Kentucky act (Ky. Acts, 1938, c. 30 & 33, pp. 220-1, 240-1. See also *idem.* c. 36, pp. 250-1) raising petit larceny to a felony on its third commission and chivalrously excepting females.

Legislators looking to the protection of society from the comparatively small group of repeated offenders who commit a large proportion of all major crimes wish to incarcerate these men for long periods both to prevent them from again committing crime and as an example to others. On the other hand, prosecutors, trial judges, prison administrators and parole boards try their best to defeat these provisions. The Illinois Appellate Court recently announced that trial judges must stop illegally placing defendants on probation. (*People v. Dubose*, 13 N. E. (2d) 90 (Ill App. 1938)). A check of 2400 robbers just released from penal institutions in Illinois, Massachusetts and New Jersey showed that in these states, at least, the robber who repeats is punished only slightly more severely than the first offender.

The check indicated that if a convicted robber were sent to a state prison, his prior criminal record was frequently almost immaterial. Whatever it was, he would on the average be released in from three to four years. If he were sent to a reformatory in New

Jersey, he would be paroled in one to two years regardless of his prior criminal record. In Illinois, he would have to stay on the average of from two to three years if he were a first offender, from three to four years if he had a prior criminal record, and much longer, probably six to seven years, if he had formerly done time in a state prison or reformatory. In Massachusetts former graduates of the reformatory had to wait three to four years for parole, but other offenders were ordinarily paroled from the reformatory in less than two years.

The length of the terms of imprisonment actually served in Illinois and Massachusetts were in sharp contrast with the maximum sentences permitted by the statutes. In Illinois, through a considerable number of robbers were sentenced to from 10 years to life, the longest period of imprisonment served was between eleven and twelve years. One of the two robbers incarcerated this long was a first offender. In Massachusetts any robber may be sentenced for life or any term of years. Though one of those studied actually was sentenced to life imprisonment, only two spent over eleven years in prison. In New Jersey the longest sentence served was between ten and eleven years, but then New Jersey has the lowest penalty for robbery of any state: only fifteen years unless the offender has formerly been sentenced to state prison.

One of the reasons why judges, prison administrators and parole boards try to hurry offenders out of prison is that the prisons of this country are hopelessly overcrowded. The recent investigation by the Board of Directors of the American Prison Association disclosed that in thirteen states 42,500 persons were jammed into quarters designed for 27,700 (29 J. Crim. L. 153-4 (1938)). Forty-one prisons with a population of 41,000 have only enough industrial production to employ 8,000 prisoners. Another objection to long terms of imprisonment is the deterioration which they frequently cause.

Thus there is little reason to believe that the growing revolt of those administering criminal justice at the demands of the public for longer and longer periods of imprisonment will soon be quelled. It is far more likely that they will be able to persuade the public that criminals should either be executed or imprisoned only for comparatively short periods. In England, in 1936, the last year for which figures are available, only 19 persons were sentenced to over five years imprisonment (Crim. Statistics: England and Wales, 1936,

p. 45) as compared with 270 in the same year in Massachusetts alone (Ann. Rep. Comm. Corr. (Mass. 1936) tables 14 and 15).

V. *Professional Literature*

The legal literature of the past year has not supplied a book on criminal law commensurate in accuracy and completeness with the treatises which we have on contracts, conflict of laws, evidence, sales, trusts, and real property, the need for which has been for many years so manifest and so greatly deplored.

A new book on criminal law, represented to be the fourth edition of a formerly well known book, has appeared. It furnishes cogent evidence of the ability of its authors, but the limitations of size and scope which were imposed upon them have prevented them from giving the profession the full benefit of their learning. The book is interesting and suggestive, but lacks precision and completeness.

The year has, however, been productive of some noteworthy books. One of the most important is "Felony and Misdemeanor" by Julius Goebel, which is the first of three volumes in which the author proposes to investigate the early stages of criminal procedure in England. The first volume has been declared by an eminent authority to be "one of the most notable contributions to European legal history which has been made anywhere in recent years." Certainly it is a book of great distinction.

The ninth edition of Salmond on Jurisprudence has been published. Edited by Mr. J. L. Parker of the Inner Temple, this is the second edition which has appeared since the death of Mr. Salmond, and is based upon the last edition prepared by him. But the editor has made many significant changes in the text and has added many valuable notes. Students of criminal law will be particularly interested in the chapters on Liability, Intention, and Negligence, and particularly in the discussion of the subjective nature of negligence, for which Salmond is famous.

A book which has stimulated considerable interest is "Later Criminal Careers" by Sheldon and Eleanor Glueck, which is a continuation of the study of the same group of criminals whose careers, for a period of five years after their paroles, were set forth in "Five Hundred Criminal Careers," a previous book by the same authors.

The increased interest in the federal criminal law is attested by the publication of two books dealing with the administration of

the federal criminal law. "Federal Justice," by Attorney General Cummings and his assistant, Carl MacFarland, is an interesting history of the federal Department of Justice, and describes the retarded development of the federal criminal law. The other book, "Crime Control by the National Government," by Arthur C. Mills-paugh, is a product of the Brookings Institution. It is a very readable history of the various federal agencies which are concerned with crime prevention, and gives particular attention to the division of powers and the overlapping of functions between the federal government and the governments of the various states. The author criticizes present methods of enforcement of the federal criminal law and makes recommendations as to its improvement.

Other books of some value to the profession are "Preventing Crime," a Symposium, edited by Sheldon and Eleanor Glueck, "American Prisons" by Blake McKelvie, "Crime and the Community" by Frank Tannenbaum, and "The Criminals We Deserve" by Henry Rhodes.

A notable contribution to the literature of the criminal law, which has not received the attention which it deserves, is "The Accused, An International Survey," a memorandum prepared by the Howard League of Penal Reform, which, together with the answers to a questionnaire sent to practically all civilized countries by the Howard League, has been presented to the Assembly of the League of Nations for its consideration. The memorandum deals with the treatment of the untried prisoner.

Limitation of space prevents discussion of the periodical literature but a few, general remarks may be noted. The Journal of Criminal Law and Criminology continues to be devoted almost exclusively to criminology, and deals only incidentally and casually with criminal law and procedure.

Four classes of articles which have appeared in the law reviews, are deserving of commendation: (1) Articles which indicate the history, background, nature and effect of the criminal statutes passed by the last legislature, and point out additional changes which should be made at future sessions: (2) Articles which set forth the nature and character of the work done by the Supreme Court at its last session; (3) Articles which discuss the rationale of an important crime; and (4) Articles which treat with completeness phases of the criminal law which previously have received only piecemeal treatment. The Committee hopes that a more complete

survey of the annual output of periodical literature may be provided in future reports.

One member of the Committee, who from the outset, believed the work of this Committee to be unnecessary duplication (but nevertheless contributed quite substantially to its work), thinks the Committee should be discontinued. The rest of the Committee believe it should be continued. Some of their reasons were stated at the beginning of the report. The question of the future need for and work of the Committee will be brought before the Round Table on Crimes at its next meeting, when a formal expression of opinion will be requested. At that time one other report will have been made available to serve as a definite basis for judgment. Accordingly, it is recommended that the Committee be continued. The Committee solicits comments upon its report and suggestions regarding problems of importance to be investigated. Suggestions are especially needed since the Round Table on Crimes does not meet this year.