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CRIME AND PROHIBITION

Hoyt E. Ray

The author is a member of the California and Idaho bar associations, and has practiced law in Idaho during the last thirty years. He is a graduate of Cornell University (A. B. 1913) and Stanford University (J. D. 1915). He was U. S. Attorney for Idaho, 1925-1933. Eight years given to prosecution of violations of the N. P. A., and other federal crimes, led the author to a study of criminology, particularly of the difficult social adjustment of youth who often seek escape in acts that society denounces as criminal. His observations impressed him with the futility of jail punishment as a deterrent or preventive of juvenile delinquency. The author now resides in San Diego, California.—EDITOR.

Crime is legally any act or omission to act which is prohibited by law, and which involves a penalty. It is simply a violation of the expressed will of the State to which a designated penalty applies. But this definition in no wise shows why any particular act is designated a crime. It does not explain why vagrancy and arson are both crimes. Why must society designate certain conduct as a crime and prescribe a penalty therefor, when it leaves other conduct to be redressed through the civil branch of the law? A concept of crime is first necessary to afford a yardstick of measurement and to give content to any real definition.

Much has been said about crime without any concept of crime. From Lombroso on we find definitions giving causes of crime; their surveys too comprehensively introduce the elements of crime, rather than a statement of what is their concept of crime. Most writers agree that crime is an injury to the collective interests; to understand the nature of collective interests and why affronts to them are dealt with by criminal law, one must have an understanding of the nature and purpose of the social organization.

Man's control of nature for his own purposes has developed through human cooperation, and no matter how far short of an ideal man has come in perfecting a social organization, its purpose is, and must be, the development of the capacities of human beings; man's material and cultural satisfactions have come about through human cooperation, but great and rapid as they have been they have not equalled the growth of individual desires. Today in this country we live in the midst of plenty while starvation stalks the streets. We have learned the art of production by cooperative efforts, but many lack the bare necessities to live above the economic margin of existence. Our social organization is faced with the problem of preserving the group against the claims of individuals. Human cooperation begets

social interests as opposed to individual interests, and it is a function of law to define the limits thus created. Herein lies the differentiation between civil and criminal law. The civil law defines the individual and social interests and provides a means of maintenance of both, while in criminal law, the state definitely announces its claim in the interests mentioned, and inflicts punishment on any violator.

Development of Social Interests

The crime of murder well illustrates how the social interest developed, and how as the collective interest increased, society more and more took control of its punishment. Blood revenge was the earliest reaction to the taking of human life. If one member of a clan was killed by a member of another clan, it became the duty of the kin of the victim to take revenge upon a member of the offending clan. With the limiting of blood revenge arose the system of the talion, in which an injury called for a like injury—the age old claim of an eye for an eye; but gradually as the social interests grew this system gave way to a monetary compensation and at this stage in the development of society the king, representing the collective interests, participated in the compensation paid to the kin of the injured member. Gradually as the value of human life increased in importance, the state took over the protection thereof to the exclusion of the individual members and this is the Continental view of crime today, while England clings to the earlier view of individual initiation of prosecution, except for major offenses against the collective interests.

Students have been unable to find any acts that have been denominated crimes at all times everywhere, save only treason. This has been supposed by some to be a lead to a definition of crime. It seems quite plain that treason is the one natural crime because by this act the social group may be destroyed, hence the immediate statal reaction towards the member committing the act. This being true, it would seem that criminal law in its essence is an instrumentality employed by the social organization in promoting and protecting the collective existence, and directed against those individuals whose acts may endanger or destroy the group existence. But conceding treason to be a natural crime, investigation has failed to show what other acts are universally and at all times considered crimes.

Even today it is noticeable how the different cultures, different economic systems, different relations of state and theology,

and different social ambitions among different social groups of society affect what is in different places designated as crime. How political and social organizations vitally emphasize what interests are primarily protected is illustrated by Russia. Lack of conformity by the individual to the prevailing political and social organization receives swift and violent punishment, while ordinary crimes are ignored or lightly punished. This is a sharp departure from the accepted continental conception that crime against person and property should be more severely punished than political offenses. Nevertheless, the soviet well illustrates a purpose of criminal law and shows how new social ideas, translated into social interests paves the way for making crimes of acts calculated to injure the new order. So, as society has by experiment through the ages tried new systems, we find the criminal law as a hand maid to further and protect the development and security of the new social interests. These different conceptions of social interests at different times and in different places among different groups determine how different groups will treat certain acts of individuals.

On the Instruments for Control of Conduct

While different groups agree that a particular act is injurious to the social organization, they disagree among themselves as to the manner of reacting to the conduct. France and America equally recognize the deleterious effects of prostitution, but the older country through bitter experience has become philosophical and, knowing that the practice will continue regardless of laws, seeks to regulate it to protect society; the younger country, true to its enthusiasms, has made prostitution a statutory crime. To the French, the social problem of prostitution is one for the police, who subject the prostitutes to periodical health examinations the better to avoid the spread of venereal disease. In this country, disease is ignored and the problem is dismissed by sporadic police court fines. So it is that wherever any particular conduct widely satisfies human desires and may also be a source of social injury, we find varying methods of handling the problem; for example gambling, in Latin countries, is generally recognized by state lotteries, while in America it is made a crime. The method of approach to dealing with the conflict between satisfying the desires of individuals composing the group and the welfare of the social organization as such, reaches the tap roots of the different cultures, races and economic systems.

The eternal conflict between satisfaction of the desires of the individual and the welfare of the social organization requires a constant inquiring into the rights and duties of the state in relation to individuals. What is the nature of the social compact? Otherwise expressed, what is the understanding between individuals and the organization they combine to set up for regulation of themselves? Social experience has shown that some interests must be brought under the control of the state. The individuals' right to life, hold property, and freedom to act within the definition of the group are of vital concern to the state, and their protection the primary function of the criminal law. Conduct of individuals in accord with the prevailing morality are proper concern of the family, the church, schools and community, and where individual conduct may be deemed to trespass upon the best interests of the group or have harmful social consequences it still remains to determine whether the criminal law is the best instrument for meeting or controlling such behaviour. The experience of family life and religious institutions has shown that they are better adapted to successfully contend with the underlying causes of evil and, although there are deficiencies and shortcomings, it is a deep question as to how much the group should interfere under the claim of the general welfare and security.

From the springs of human desires flow good and evil acts and the complexity of modern social groups increases the difficulty of banishing the evil. It is becoming increasingly apparent that some evil must be suffered because of the complex conditions. While this is true of some evils, other acts conflict with social interests that are of such vital importance to the group that the entire force of the state must be exercised to eradicate the evils and protect the group. We reach here the core of the causation of crime when we inquire into the denounced conduct of the individual in relation to the social and environmental influences upon his personality, for this permits a study of the normality of the individual as compared with the norm of the social group.

An American Experiment in Control by Law

The conception of the relation of law and morals in the social group of America and Continental Europe contrasts sharply. It is commonplace that Americans are given to the habit of standardizing by law the lives of their fellow citizens. The tendency in America is to prohibit by law what is morally reprehensible.

sible. The instrumentality of the criminal law is the commonly accepted manner of eliminating acts which are deemed by enthusiasts to be detrimental to the welfare of the group. The result frequently is that a substantial portion of the social group is out of sympathy with the law because it tends to thwart satisfaction of their individual desires, which for the existing time are, by the state, denounced as crime. Society in its progress through the centuries to increasing complexity has at different times and places experimented with different means of combatting those acts deemed to be injurious to the social organization. At times the acts have been surrounded by moral or theological discussions—for example gambling and use of alcoholic beverages.

To America was given the distinction among the various social groups of seeking to meet the use of alcoholic beverages by prohibitory laws. Social welfare students and the best medical opinion, as well as the moral forces of society, agree that the world would be a better place in which to live without the human consumption of alcoholic beverages. It was generally recognized that the untrammelled use of intoxicating liquors has an injurious effect upon the social organization, that its effects are positively dangerous to the welfare of the individuals who indulge excessively and also to the social groups.

With that enthusiasm characteristic of the people of the United States, they enacted into their organic law the social fiat that the manufacture, sale, or transportation of intoxicating liquors within the United States, the importation thereof, or the exportation thereof from the United States for beverage purposes, was prohibited. This constitutional provision was adopted as the social group determination after some one hundred years of agitation against the liquor traffic in different localities of the country, and was adopted during a time when the individuals composing the social group were living under unusual emotional and patriotic reactions, due to the group's participation in armed conflict with other groups involving most of the peoples of the world; under the stresses then obtaining sober consideration was not given to the question whether such a large social group, with all its varying shades of customs, economic conditions, and moral standards, should as a unit so sweepingly interfere under the claim of the general welfare. The accumulated forces of patriotic fervor, moral indignation, and military effort produced a mental condition of the social group that impatiently demanded subordination of everything then deemed to interfere with the welfare of the embattled organization.

With this sumptuary act the group passed on to other con-

cerns, and those organizations within the group theretofore devoted to constant conflict with the evils resulting from the use of alcoholic beverages, measurably rested from their labors and contented themselves with having accomplished the adoption by the state of the instrumentality of the criminal law to cure those evils the family, the church, and the school had theretofore fought.

Some Results of the Experiment

The experience of the social group, under statutory prohibition revealed a mushroom growth of other evils. New desires of individuals grew out of thwarted impulses, and we had in the decade of the 1920's, on the one hand, the anomaly of legal prohibition of intoxicating liquor, and on the other hand, social conventions requiring the indulgence of intoxicating liquors over large areas of the country, especially in centers of congested population. Beneath the mask of legalized asceticism was revealed the practice of indulgence.

The statal reaction to the conduct of individuals in the traffic and indulgence in alcoholic beverages was different in different parts of the United States, depending on different backgrounds of the various sections of the country. Some states of the Union refused to accept the responsibility of concurrently enforcing the constitutional mandate, and this conduct of portions of the social group resulted in a departure in this country from local self government to bureaucratic federal enforcement. But this growth of the European system of policing, ran counter to the view that criminal laws cannot be enforced unless substantially all the individuals in the group are in accord with the law denouncing particular conduct as a crime. The refusal of a large portion of the social group to accept the social standard produced parasites that fed upon the social body. This opportunity of catering to the satisfaction of the desire for alcoholic beverage by such large numbers in turn produced an unparalleled commercialization of the criminal law. The efforts of those to furnish alcoholic beverages to satisfy the requirements of social conventions in defiance of the criminal law introduced into the speech of the social group many new words, descriptive of, or derived from conduct of individuals who commercialized the criminal laws. The bootleggers banded together into gangs and became gangsters, setting up extra-legal codes of conduct for the better operation of their rackets. From this effort sprang also the ever widening scope of the gangsters' activity into other fields of endeavor not deemed criminal, as for illustration,

organizing or muscling in labor unions and various lines of business. By organization, the gangster meant compulsory monetary contribution to the gang, for protection by the gang, and by protection, he meant, not the protection such as the police of the state normally afford, but an extra-legal undertaking that anyone not paying protection to the racket shall not carry on business in competition with those paying protection. Pay offs, or periodical contributions to the gang were compelled, not by recognized legal action, but by force and murder.

Thus in the wake of compulsory dryness or prohibition came a swarm of individuals who made a career of pandering to the appetites of individuals in the social group, the satisfaction of which was considered detrimental to the best interests of the social organization.

The progeny of prohibition startled students of sociology and disrupted the tenor of many lines of business endeavor. The refusal of individuals in vast numbers, to adapt themselves to the abstinence required by prohibition, also had a marked social effect in lowering the respect for the expressed will of the state, not only for prohibitory laws, but for all rules of conduct, compliance with which was enforced through the instrumentality of the criminal law. This spirit of defiance of a large portion of the social group caused an earnest inquiry into the wisdom of the social enactment; had the American theory of curing an evil by criminal law proven beneficial to the best interests of the group? The lowering of the tone of the home by introducing into it the manufacture and consumption of alcoholic beverages, when prohibited, produced upon the minds of the children in the family a lessened respect for the conduct of those whom they naturally expected to be exemplary. They passed from astonishment to realism, and stripped the mask of hypocrisy from pretense to display of the actuality. They very naturally asked themselves why the conduct of their elders and parents does not square with what they were told was the law. So, we had from youth contempt, and from maturity defiance of the expressed standard of the social organization.

That the home, the church, the school and welfare organization under the beguiling influence of legalized prohibition relaxed in their educational and spiritual labor, was a tragedy from the viewpoint of the student of social welfare. That they later reasserted themselves and strove again to further group ideals was socially desirable.

The refusal of large numbers of individual in different sections of the country, to refrain from satisfying their desire

for alcoholic beverages, illustrated the difficulty of attempting to standardize conduct by criminal law. That a majority of the social group, constituting the United States, was not in accord with the standard of prohibition was demonstrated. Those officials charged with the responsibility of enforcing the prohibitory criminal law acknowledged the detrimental conditions that had grown up in the social group since the Eighteenth Constitutional Amendment, and urged some change be made to cure the attending evils.

Conclusion

The ever renewing social standards, as society progresses from age to age, require constant re-examination of conduct. That which at one period is looked upon as moral and among the social values, is later condemned as inimical to the best interests of society and morally wrong. The institution of slavery through the ages experienced this reaction. However, conduct which may only be at the time deemed morally wrong does not arouse group action until that conduct also interferes with or hampers the economic development of the group. As illustrative of this necessity of union of ideas, slavery received strong moral condemnation long before the economic phase of slavery became serious, and not until the moral and economic beliefs met on common ground did this country grapple in death conflict with the institution of slavery. True to its yesterdays, this country bestirred itself politically to meet the social problem of alcoholic beverages.

The Eighteenth Amendment was rather abruptly repealed by a disillusioned society after a little more than a decade of restless experiment. The group reverted to regulatory laws to replace sumptuary legislation, and this was a reversal unique in the annals of the society of America. Society, under the emotional strains and urges of World War I, took group action which it a little more than a decade later repented. Today, after World War II, the same but more intense emotions disturb the social group, but there appears little evidence that society will again write into its organic law the prohibition of alcoholic beverages. The turmoil and attendant social evils of the attempt of prohibition by the social group remain vividly impressed on the collective memory of the people.

The student views the present only as a phase in the life of the group, realizing that a people, as an individual, changes on its way to destiny. Realization that the use of alcoholic beverages vitally affecting millions of individuals cannot be finally

settled by statutory enactment of supposed group will, is beneficial because it stimulates to renewed activity the moral forces of the people. Compromise as we will, violate the existing standards as we do, the economic needs of a solid citizenry and the dictates of moral aspirations will agitate the factory and the home until this people by common consent reach a solution of the liquor problem acceptable to the needs and desires of the nation.
