

Spring 2010

A Century of Criminal Law and Criminology

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Recommended Citation

Amy DeLine, A Century of Criminal Law and Criminology, 100 J. Crim. L. & Criminology 309 (2010)

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CENTENNIAL VOLUME

A CENTURY OF CRIMINAL LAW AND CRIMINOLOGY

Amy DeLine*

Those who don't know history are destined to repeat it.

—Edmund Burke

This section of the centennial volume's second issue is devoted to republishing articles from the early pages of the *Journal of Criminal Law and Criminology* (*JCLC* or *Journal*) that speak to the history of the *Journal* and its perennial commitment to leading scholarship. These five pieces attempt to achieve the second half of this dual aim by showing how, nearly a century ago, our authors considered issues that dominate recent public discourse. These articles confront today's most controversial and important matters, from immigration to corporate responsibility, and contemporary debate echoes the concerns and themes of these historic writings. In addition, the historic writings are illustrative of the core debates of our society and the value they have for addressing those debates that continue to the present. Moreover, the authors whose works are reprinted herein very much embody the *Journal's* institutional aims and evolution.

1. Some Lessons for Civilian Justice to be Learned from Military Justice

John Henry Wigmore, former dean of Northwestern University School of Law, is the author of the first article, *Some Lessons for Civilian Justice to Be Learned from Military Justice*.¹ More than the head of the law school,

* J.D., Northwestern University School of Law, 2010; Centennial Editor, *Journal of Criminal Law and Criminology*, vol. 100.

¹ John H. Wigmore, *Some Lessons for Civilian Justice to Be Learned from Military Justice*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 170 (1919).

Wigmore was instrumental in founding *JCLC* and a frequent contributor to its pages;² *Lessons for Civilian Justice* is just one of the many articles he published in the *Journal* over the years. The appearance of his portrait at the beginning of every volume is a testament to his unparalleled importance to this periodical.

Lessons for Civilian Justice was selected for republication here not only because of Wigmore's legacy, but because of its account of the differences between the American civilian and military justice systems. In this article, Wigmore suggested that in some ways the military system is fairer—affords more due process—than are civilian courts. While he conceded that “[j]ustice is always secondary” to the goal of victory within military courts, Wigmore nevertheless argued that civilian courts can learn from their military counterparts.³

Wigmore's candor and even-handedness is largely absent in post-September 11th America and, particularly, in the current debate about the appropriate forum—military or civilian—for prosecuting alleged terrorists. The two sides of the modern debate have grown increasingly dogmatic since President Obama and Attorney General Holder reaffirmed their commitment in January 2010 to prosecute in civilian court five conspirators believed responsible for the attacks of September 11, 2001.⁴ Supporters applaud the administration's commitment to due process and its willingness to move the accused out of the notorious military commissions.⁵ On the other side, detractors, beyond arguing that terrorists do not deserve access to federal courts, worry about the security risk of a civilian trial and the

² Dean Wigmore came up with the idea to use the fiftieth anniversary of Northwestern University School of Law as an opportunity to hold a national conference of criminal law scholars, practitioners, and criminologists. At that conference, *JCLC* was born. For more information on the founding of the *Journal*, see Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7 (2010); Amy DeLine & Adair Crosley, Foreword, *A Century of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 1 (2010).

³ Wigmore, *supra* note 1, at 170.

⁴ Kenneth R. Bazinet et al., *So Long, Terror Thug. White House Abandons Plan to Hold Khalid Trial in Manhattan*, N.Y. DAILY NEWS, Jan. 30, 2010, at 5. The Attorney General and Department of Justice originally announced that the alleged terrorists would be tried in a federal civilian court in November, 2009. Press Release, U.S. Dep't of Justice & U.S. Dep't of Def., Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees (Nov. 13, 2009), <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>. For information on the suspects themselves and the process leading-up to Attorney General Holder's announcement, see Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, at 52.

⁵ See Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

potential exposure of state secrets;⁶ they further question the rationale for a civilian trial given Attorney General Holder's public acknowledgement that if the defendants are acquitted, the government might transfer them back to military detention.⁷ Rather than acknowledge the validity of the counterpoints, both sides dig their heels in further.⁸

Dean Wigmore wrote about the court martial system, not the military commissions that are at issue today, and terrorists were not at the center of his inquiry. Even so, the current deadlocked debate and the government's choice to hold the "trial of the century" in a civilian court would benefit from the kind of honest balancing Wigmore puts forth.⁹

2. *Crime and Immigration* and *The Treatment of Aliens in Criminal Courts*

Counsel to the Italian Consulate and the head of the Immigrants' Protective League at Jane Addam's historic Hull House authored the second and third historical articles, respectively, republished in this issue.¹⁰ Together, the two authors, Gino C. Speranza and Grace Abbott, served on the crime and immigration committee (Committee G) of the American Institute of Criminal Law and Criminology, the organization that formed at the same time as the *Journal* itself and oversaw the *Journal's* publication early-on.¹¹ Through these roles, these two embody *JCLC's* origins. They also exemplify the *Journal's* longstanding commitment to practitioner-authors. Abbott, a social worker and political scientist, represents the *JCLC's* interdisciplinary focus, and, in 1911, she was one of the *Journal's* first female authors.

Abbott's *Treatment of Aliens in the Criminal Courts* and Speranza's *Crime and Immigration* both speak to the inequities faced by immigrants within the criminal justice system.¹² While *Crime and Immigration* focuses on the discriminatory laws themselves, *Treatment of Aliens* draws on

⁶ *Id.*; Bazinet et al., *supra* note 4.

⁷ See Warren Richey, *Holder: 'Failure Not an Option' in New York 9/11 Terror Trial*, CHRISTIAN SCI. MONITOR, Nov. 19, 2009, at 4.

⁸ Mayer, *supra* note 4 (describing protests held in New York City by both supporters and opponents of the decision to give the avowed terrorists civilian criminal trials).

⁹ When he first announced the civilian trial, Attorney General Holder referred to it as "the trial of the century." *Id.*

¹⁰ See Henry B. Leonard, *The Immigrants' Protective League of Chicago 1908-1921*, 66 J. ILL. ST. HIST. SOC'Y 271, 271-74 (1973) (describing the Protective League and Grace Abbott's role in chairing it).

¹¹ For more information on the history of the American Institute and its oversight of the *Journal*, see Devroye, *supra* note 2.

¹² Grace Abbott, *The Treatment of Aliens in the Criminal Courts*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 554 (1911); Gino C. Speranza, *Crime and Immigration*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 546 (1911).

Abbott's experiences as an advocate for immigrants' rights as a source of anecdotal accounts of unjust treatment. These accounts eloquently convey the increasing criminalization of alien status—immigrants arrested for being immigrants.

Abbott explained that most immigrants at the time were arrested for vague “public policy” violations, and others were often arrested for no crime at all. This is not to say that immigrants did not commit genuine crimes—of course some did—and, indeed, Speranza closed his article with this very observation. However, he went on to clarify that the crimes of some do not warrant the maltreatment of the entire immigrant population and that discrimination within the justice system only exacerbates criminality among immigrants by fostering a disrespect for American law. “In the end,” Speranza wrote, “the best of us would rebel against a judicial system which did not furnish a substantially effective defense against palpable recurring injustice.”¹³

The immigrants from Eastern Europe of Speranza and Abbott's time have been replaced today largely by immigrants from Mexico, but the authors' sentiments are nevertheless relevant to the immigration issues that have long divided modern lawmakers. When Arizona passed a controversial immigration bill in early 2010,¹⁴ these early-twentieth century authors' words became all the more salient. Arizona's new law, which permits police officers to detain anyone they suspect may be in the country illegally, has sparked unprecedented controversy.¹⁵ Critics, including President Obama, have deemed the law unfair and labeled it an “open invitation for harassment and discrimination against Hispanics regardless of their citizenship status.”¹⁶ Much like the laws Abbott wrote about, Arizona's law has been harshly condemned as permitting arrests based solely on ethnicity or perceived ethnicity.¹⁷

Arizona Governor Jan Brewer, on the other hand, has maintained that the new law is necessary in a state plagued by illegal immigration.¹⁸ According to Brewer, the law was designed to strengthen the “porous”

¹³ Speranza, *supra* note 12, at 547 (quoting himself).

¹⁴ See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Stephanie Nebehay, *U.N. Experts Join Criticism of Arizona Immigration Law*, REUTERS.COM, May 11, 2010, <http://www.reuters.com/article/idUSTRE64A42Z20100511>.

¹⁸ See Archibold, *supra* note 14.

border with Mexico and not to facilitate racial profiling.¹⁹ Ostensibly, many of her constituents agree: Arizonans overwhelmingly support the law.²⁰

The influx of illegal immigrants to Arizona is undeniable. Perhaps Governor Brewer is right, and the law will curb illegal border-crossing and do so without the intense discrimination President Obama and others fear. The law may very well become the prototype for other state laws and even federal legislation. But while this remains to be seen, it is worth questioning now—as Speranza did nearly one hundred years ago—the wisdom of a law that ostensibly targets both legal and illegal immigrants alike. Or asking—as Abbott did early last century—whether criminalization is the best response to immigration. As a country, we must contemplate the best comprehensive course of action to address immigration because “[e]ven if we think it wisdom to shut the gates to further invasion,” as Speranza wrote, “there is still the problem of those already within.”²¹

3. Children in Our Prisons

Thorsten Sellin was a criminologist at the University of Pennsylvania, where the Center for Studies in Criminology and Criminal Law now bears his name.²² He was president of the International Society of Criminology, secretary general of the International Penal and Penitentiary Commission, and the editor of the *Annals of American Academy of Political and Social Science* for nearly four decades.²³ Sellin often advised the FBI and the Census Bureau on criminal statistics, and he headed various UN panels on criminology matters.²⁴ In short, he personifies both the scholar-practitioner intersection that *JCLC* strives for and the criminology half of the *Journal*.

Sellin’s piece that is reprinted here, *Children in Our Prisons*, is a short two pages.²⁵ The article succinctly gives then-current data regarding juvenile imprisonment in adult penitentiaries. In his brief introduction to the statistics, Sellin discusses the belief within the American criminal justice system that children should be treated differently than adults. “In

¹⁹ Craig Harris et al., *Arizona Governor Signs Immigration Law; Foes Promise Fight*, ARIZ. REPUBLIC, Apr. 24, 2010, <http://www.azcentral.com/news/articles/2010/04/23/20100423arizona-immigration-law-passed.html>.

²⁰ *Id.*

²¹ Speranza, *supra* note 12, at 547.

²² Eric Pace, *Thorsten Sellin, Criminology Expert, Dies at 97*, N.Y. TIMES, Sept. 20, 1994, at D22.

²³ *Id.*

²⁴ *Id.*

²⁵ Thorsten Sellin, *Children in Our Prisons*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 839 (1933).

spite of these professed beliefs,” Sellin admonished, “we constantly fall short of our ideals.”²⁶

On May 17, 2010, the Supreme Court of the United States issued an opinion that reflected the beliefs referred to by Sellin.²⁷ In a 5-4 decision, the Court held that juveniles cannot be imprisoned for life without the possibility of parole for non-homicide crimes; such a sentence constitutes cruel and unusual punishment under the Eighth Amendment.²⁸ Writing for the majority in *Graham v. Florida*, Justice Kennedy concluded that juveniles are less morally culpable than adults and therefore less deserving of harsh sentences.²⁹ Juvenile sentences of life imprisonment without parole fail to account for this distinction in culpability by inflicting more severe sentences on youths than adults.³⁰ Kennedy warns against ignoring the fact that “a juvenile offender [sentenced to life in prison] will on average serve more years and a greater percentage of his life in prison than an adult offender [sentenced to life in prison].”³¹ In the eyes of the Court, then, the sentence of life without the possibility of parole cannot be justified or tolerated any longer.³²

Three quarters of a century after his writing, the Court’s opinion does exactly what Sellin called for: it enacts the ideal that children are deserving of different treatment within the criminal justice system.

4. *Criminal Liability for Life-Endangering Corporate Conduct*

The fifth and final historic article reprinted here was selected to represent the law student role in producing the *Journal*. Terence P. Fagan served on *JCLC*’s student editorial board for two years, first as a staff editor and subsequently as a Note and Comment Editor.³³ Moreover, during his second year with *JCLC*—his third year of law school—Fagan authored and published *Criminal Liability for Life-Endangering Corporate Conduct* alongside W. Allen Spurgeon.³⁴

²⁶ *Id.* at 839.

²⁷ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

²⁸ *Id.* at 2030.

²⁹ *Id.* at 2026-27.

³⁰ *Id.* at 2028.

³¹ *Id.*

³² *Id.* at 2030.

³³ In his latter capacity, Fagan helped his fellow students prepare articles for publication—a role fitting for a student whose own work was chosen for print.

³⁴ W. Allen Spurgeon & Terence P. Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400 (1981). Spurgeon, like Abbott, Speranza, and Sellin, was a practitioner-author. At the time of writing, he was a litigator in private practice in Colorado. *Id.*

Criminal Liability, published in 1981, does not date back to the beginning of the *Journal* like the other articles republished in this issue. Less than thirty years old, Fagan and Spurgeon's piece is nevertheless included here because it was written just as corporate criminal liability began to dominate public policy discourse. The authors wrote the article in response to a bill Senator Edward Kennedy introduced in 1979 that made it a crime for companies to knowingly imperil the lives of their employees, consumers, or the public at large.³⁵ Fagan and Spurgeon, in contemplating the "endangerment offense" legislation, grappled not only with the legitimacy of the crime but, more specifically, with the moral blameworthiness of corporate conduct; the appropriate punishment; and most crucially, society's desire to encourage corporate innovation and productivity while protecting public health and safety.

Thirty years later, the exact kind of life-endangering incident Spurgeon and Fagan wrote about, and which Senator Kennedy introduced legislation to address, occurred. On April 20, 2010, a BP oil-rig off the coast of Louisiana exploded and continued to spill oil into the Gulf of Mexico until July 15, 2010.³⁶ Dubbed the "worst environmental disaster America has ever faced,"³⁷ it claimed the lives of eleven workers in the initial fire and devastated the Gulf, its wildlife, and the economies that lie along its shores.³⁸ Lawmakers and citizens alike are calling for criminal charges for BP and its top executives.³⁹

³⁵ The provision for the "endangerment offense," as Spurgeon and Fagan labeled it, was included in Kennedy's broader Federal Criminal Code Reform Act, which in addition to including various corporate crimes, sought to reform criminal sentencing and streamline the U.S. Criminal Code. Edward M. Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979).

³⁶ *Plug in Gulf Well Is Declared a Success*, N.Y. TIMES, Aug. 9, 2010, at A12.

³⁷ President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

³⁸ Robertson & Kaufman, *supra* note 36; Amy Schoenfeld, *Where BP's Money Is Landing*, N.Y. TIMES, July 4, 2010, at BU1. Estimates suggest more than 60,000 barrels of oil (i.e., 2.5 million gallons) leaked into the Gulf on a daily basis. Justin Gillis, *Estimates of Oil Flow Jump Higher*, N.Y. TIMES, June 15, 2010, available at http://www.nytimes.com/2010/06/16/us/16spill.html?ref=gulf_of_mexico_2010. If these estimates are correct, an amount of oil equivalent to the *Exxon Valdez* oil spill in 1989 escaped into the Gulf of Mexico every four days before the well was capped. *Id.*

³⁹ Steven Mufson & Theresa Vargas, *As Outcry Grows, Investors Batter BP; Firm's Value Plunges \$21 Billion in a Day as Criminal Probe Begins*, WASH. POST, June 2, 2010, at A1. BP also faces civil liability for its actions. *Id.* Congress is acting swiftly to remove the current statutory cap that would limit BP's liability to \$75 million in damages to individuals impacted by the spill. Scott Neuman, *Extent of BP's Liability Still Murky*, NPR.COM, June 9, 2010, <http://www.npr.org/templates/story/story.php?storyId=127561028>. Likewise, the President demanded BP pay for the damage it caused, called for tighter regulations of the oil

The Department of Justice responded to these outcries in early June, 2010 when it announced the onset of a criminal investigation of BP.⁴⁰ It remains unclear, however, exactly what charges the company might face. Some speculate that the government will simply pursue criminal sanctions under the Clean Water Act,⁴¹ while others suggest that the government will pursue racketeering charges for the company's continued, willful violation of government regulations,⁴² and still others have gone as far as proposing involuntary manslaughter charges for the loss of the eleven victims.⁴³ Whatever course the government pursues, the popular consensus is that criminal prosecution is inevitable and that BP deserves to be punished for endangering the lives of so many.

While BP's culpability may be obvious to (at least some segments of) the public, choosing an appropriate course of action will likely not be simple for the Department of Justice. Prosecutors will inevitably struggle with the very issues Fagan and Spurgeon addressed. And much like *Criminal Liability* concludes, the type of case the government pursues is likely to require the government to strike a balance, calculating how to punish BP's morally culpable behavior and deter other incidents of life-endangering conduct without unduly stifling an American industry and capitalism, generally.

industry, and imposed a plenary ban on deepwater drilling. President Barack Obama, *supra* note 37.

⁴⁰ Mufson & Vargas, *supra* note 39.

⁴¹ John Schwartz, *Costs to BP Would Soar Under Criminal Charges* N.Y. TIMES, June 17, 2010, at A18.

⁴² Paul M. Bartlett & Justin Blum, *The Oil Spill: Will BP Face Criminal Charges?*, BUSINESSWEEK.COM, July 1, 2010, http://www.businessweek.com/magazine/content/10_28/b4186024400208.htm.

⁴³ Paul Abrams, *Precedent for BP Criminal Responsibility: The Cocanut Grove Fire (1942)*, HUFFINGTON POST, May 26, 2010, available at http://www.huffingtonpost.com/paul-abrams/precedent-for-bp-criminal_b_590426.html.