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Opening Remarks

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OPENING REMARKS

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It is a great honor to be asked to make some opening remarks at this centennial celebration of the *Journal of Criminal Law and Criminology* (*JCLC*). On behalf of the *Journal*, I extend our greetings to all the distinguished participants and our thanks for coming. On behalf of the participants, I extend our thanks and admiration to the *Journal*'s Editorial Board, which has worked tirelessly to put this interesting conference together. To set the tone for the rest of the day, I was asked to give a bit of the history of the *Journal*, to highlight the important developments of the last century, to make predictions about the future, and to talk a little about one of my favorite topics, theorizing about theory—all in the remaining twenty-five minutes allocated for these remarks—and so I best move directly to the task.

I. A BRIEF HISTORY OF THE *JOURNAL*

In one sense, *JCLC* began as an outgrowth of the National Conference on Criminal Law and Criminology held at the school in June 1909 to celebrate the law school's fiftieth anniversary. That Conference in turn was a result of Roscoe Pound's famous address presented at the annual convention of the American Bar Association in 1906, "The Causes of Popular Dissatisfaction with the Administration of Justice." Building upon his address and its impact, Pound was the primary organizer of the 1909 Conference. The purpose of the Conference was to bring together scholars of both criminal law and criminology, practitioners, jurists, and public officials to set out a plan for criminal justice reform, and it was the first national conference in those fields. The participants comprised an astonishing collection of talent, largely selected by the supreme courts and governors of the various states, and it had equally astonishing results. Some of the highlights include:

- At the close of the conference, delegates voted into existence the American Institute of Criminal Law and Criminology, the first of its kind in the United States.

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- The conference led directly to the first forensics lab. There was some work done in the field of police science after 1909 conference. This led in 1929 to the establishment of a police laboratory by Colonel Calvin Goddard that was affiliated with the Northwestern School of Law. The next year, the *American Journal of Police Science* was created, which in 1932 became a section of the *Journal*, and the name was changed to the *Journal of Criminal Law, Criminology and Police Science*.

- The concern for practical legal education expressed during the 1909 conference led to the creation of legal clinics in law schools.

- Most pertinent to today's conference, the conference participants called for the creation of a journal by the American Institute of Criminal Law and Criminology, which would become the first English-language periodical "devoted to the scientific study of the criminal law and criminology." And it remained the only journal for a considerable period of time during which the *Journal* almost singlehandedly kept alive criminology in the United States. It was not until the decade of the 1960s when federal money began pouring into research into "causes of crimes" and related topics that the field built upon the foundations created by the Institute and the *Journal*.

Here are some interesting facts about the *Journal*:

- It had the same Editor-in-Chief for fifty years, Robert H. Gault, a professor of psychology at Northwestern, and finally transitioned to a fully student-run publication in 1971 (the sixty-second volume). However, the *Journal* retains a professional board of criminologists to oversee the criminology articles it publishes.

- The *Journal* published its first female author in its second volume 1911.

- Notable authors, in addition to essentially every single productive scholar in the fields of criminal law and criminology, include: Booker T. Washington, J. Edgar Hoover, Dean Wigmore, Roscoe Pound, Chief Justice Warren Burger, and Robert Kennedy.

- It likely has the record for name changes. Originally, it was the *Journal of the American Institute of Criminal Law and Criminology*. In 1941, it became the *Journal of Criminal Law and Criminology*. In 1951, it became the *Journal of Criminal Law, Criminology and Police Science*, and in 1973 when the

> separate section on police science was eliminated in the sixty-fourth volume it became the *Journal of Criminal Law and Criminology*.

Today it has the distinction of being the only leading journal in two different fields, criminal law and procedure and criminology. Even though it is a specialty law journal, and a complicated one because of the criminology section, it is consistently ranked among the most influential and cited law reviews in the country. And it actually pays for itself by its large subscription base—second largest among all law reviews—which is rarity among the nation's journals.

II. IMPORTANT TRENDS AND DEVELOPMENTS OF THE LAST CENTURY

Anything can be viewed through an infinite variety of lenses. Some might think that the Model Penal Code was the most important historical phenomenon of the past century pertinent to the fields of criminal law and criminology; others would focus on the rise and fall of the rehabilitative ideal, and the commensurate rise and fall of both psychoanalysis and behaviorism, with their implications for the meaning and treatment of "deviancy." And still others might focus on the federal interest in and the federalizing of criminal law represented by the two great Presidential commissions. The first of these was President Herbert Hoover's Wickersham Commission, the popular name for the National Commission on Law Observance and Enforcement, which published its work in 1929. This commission conducted the first comprehensive national study of crime and law enforcement in U.S. history. The second, of course, is The President's Crime Commission, which was created by President Lyndon Johnson in 1965 and finished its efforts in 1967. Still others might focus on the overuse of the criminal sanction in the middle of the twentieth century followed by the blurring of the lines between criminal and civil law through the use of civil sanctions and all their implications. And others would note either, or both, the sumptuary nature of much American criminal law or its overblown and archaic nature.

Each of the points above is critically important and a good case can be made for their preeminence, but I want to suggest a different perspective. I think much of what defines and has animated these fields can be organized over two prohibitions, the rise of two political movements, and two wars (or three depending on how you count).

The prohibitions were the related experiments with the legal suppression of alcohol and narcotics. Everyone knows of the Eighteenth Amendment to the Constitution, adopted in 1919, and not repealed until the Twenty-First Amendment was ratified in 1933. Less well known is the that the prohibition of hemp products and opiates was beginning at just about

the same time and, of course, has largely continued to today. I think lost in public awareness is that the secondary consequence of these prohibitions was to generate monopoly profits for those willing to take the risk, and this led directly to the rise of well-funded organized crime in the United States. This in turn led to the public perception of crime waves, contributed to political corruption, and put criminal justice on the map permanently. National political campaigns, beginning with the 1968 presidential elections, began to be organized around law and order themes, forever changing politics in the United States. In one of the most perverse but interesting of modern developments, these issues have now gone global, with the real risk of nation-states becoming narco-states, all in large measure driven by the astonishing amount of money that feeding people's illegal habits and desires can generate.

At the same time the consequences of prohibition were playing out, politics underwent a second transformation in the United States. The Eisenhower and post-Eisenhower years of optimism both gave rise to beliefs in perfectionism of various kinds and opened the door for the airing of grievances from both the repressed (racial minorities) and the disaffected (the young), all within the frame work of social toleration that did not have a clue as to what it had released. This directly led to the rebirth of conservatism, which traces back not to Reagan but to Nixon, and the politicization of criminal justice mentioned above. At the same time, the turmoil unleashed in the 1960s and 1970s shocked much of America, as it saw its children reject the very values that in their parents' eyes had led them to believe in the potential of society to advance, and to believe in the possibility of moral progress. How quaint that all now seems as it has become clear that the twentieth century is in some ways the counter-example to the possibility of moral progress, with human slaughter on an almost unimaginable scale. But that is not what people here in the United States were thinking then. It was time of optimism called into question by the very forces unleashed by that optimism. This in turn surely was part of the ground work for the Reagan revolution, which is very likely the most seismic political shift the country has ever seen. Even today, the argument is largely over how far to the right the modal voter is in this country.

Hovering over all of the social turmoil were two wars—the Vietnam War and the war on terrorism (however many wars that is—Iraq, Afghanistan, Al-Qaeda). The interaction of these phenomena is obvious. The Vietnam War fueled the anti-government bias of much of the youth of America, stimulated them to action, which in turn fueled the attack from the right of much of what was constructed in the '60s, from the Great Society to the Procedural Revolution. The present wars are blurring the distinctions between terrorism and war, and between both of those and crime. They are

also blurring the distinctions between the war powers of the President and his role as Commander-in-Chief with his obligation to faithfully discharge the duties of his office and to preserve and protect the Constitution of the United States.

III. THESE THINGS POINT TO THE FUTURE.

As everyone from Niels Bohr to Yogi Berra has said, predictions are difficult, especially about the future. Some of the things I think we will see are:

- The continuing dismantling of the procedural revolution of the Warren Court, leaving in place only right to counsel in death penalty cases as a definitive marker of what once was. Relatedly, we may have a reenergized originalist Supreme Court willing to generate enormous dislocations in the name of the rediscovered true meaning of constitutional language along the lines of *Apprendi* and *Crawford*.

- Great effort will be expended by both Congress and the courts on defining the power of the President, the implications of war, indeed the very meaning of the term in an era where the conventional markers of an army, and thus a war, are missing—standing armies, hierarchical command structure, and belligerent nation states.

- The continuing dismantling of the social consensus of the middle of the last century coupled with a world in which a single terrorist could unleash a dirty bomb or pollute waterways, or whatever, all overlaid with national borders where hundreds of millions of people a year cross both will lead to a reconsideration of the implications of privacy, autonomy, and dignity. In this regard, consider:
  - the ever-changing Fourth Amendment;
  - changing paradigms of policing from patrol to no-broken-windows to neighborhood;
  - emergence of new theories of criminal law such as its expressive function;
  - reconsideration of the meaning of equality whether directed to the meaning of racial profiling (Muslims?) or how social demands can and should affect different segments of society;
  - the globalization of crime and enforcement will continue, whether it is Al-Qaeda, or the mafia, or a polluting

corporation; tracking the money will become the single most significant global crime fighting strategy; and

  - as crime goes global, and as solutions to social problems come to be seen more and more as requiring the active involvement of the central government, the federal-state relationship will continue to evolve away from anything anticipated by any of the framers of the Constitution.

- And a predictions section would not be complete without something about the continuing scientification of criminal trials, whether as a result of enhanced DNA analysis, or what is less well known by surely of much greater significance, enhanced video surveillance that is emerging in part because of the continuing technological advances.

IV. THEORIZING ABOUT THEORY

It was kind of the Editors of the *Journal* to ask me to close with a few remarks on a research interest of mine, which relates to the limits of formal reasoning. Normally, I would jump at the chance to complain about the vacuousness of most "normative" legal scholarship, but that is complicated here because the *Journal* is so empirically bent. Its criminology section is peer-reviewed, and its selections for the criminal law section seem to me to be appropriately skeptical of unmoored musings passing as normative scholarship. So, I fear my standard sermon would be preaching to the choir, and thus rather than give it, I will close with two related by more discrete points.

The first point is that scholarship within the purview of the *Journal* has neglected to its detriment the bracing nature and cold precision of economics. Perhaps this is because of a belief that normative scholarship can simply neglect such things as quantifiable cost-benefit calculations, utility functions, and the like, and because even excellent empirical research in some fields can be done without regard to them as well. Whatever the cause, the consequence is regrettable. One simply cannot argue about rights in the abstract; there are always costs attached and reciprocal rights adversely affected. Plea bargaining is a good example. Any distribution at all between trial and non-trial dispositions could be socially optimal. Trials may have their unique values, but nonetheless those values compete with others. Surely one of the points of criminal dispositions is to affect primary behavior, and how that is most efficiently done is equally surely pertinent to how to spend resources. Maybe more trials would be a wonderful way to vindicate individual rights, but how much is that vindication worth? Trials

compete for resources with other uses that also impact the most cherished of values. How do the values here compete with greater funding for schools, roads, or medical research? This is an example of what Larry Laudan and I have referred to in a series of articles as the deadly dilemma of governing. Every governmental choice has life and death implications, not just trials—even where you build a road or how to distribute medical research funds—or whether to permit plea bargaining.

The second area that has been neglected is what increasingly dominates many areas of science and philosophy, and that is the implications of complexity. I will mention two of those implications. First, things are always more complicated than they appear. This is related to the point above, but let me give you another example. It is conventional that proof beyond reasonable doubt skews errors in favor of acquitting the guilty in order to protect innocent people, but in fact there is no necessary relationship between a burden of persuasion and outcomes. That relationship depends on base rates and assessments of probability. If no innocent people go to trial, no innocent person will be convicted, and vice versa; if no guilty people go to trial, no guilty person will be wrongfully acquitted. That means the common justification for things like proof beyond reasonable doubt—that it protects the innocent by sacrificing true convictions—makes almost literally no sense. Suppose, for example, that there are nine wrongful convictions out of every one hundred. To keep a 10 to 1 ratio of wrongful acquittals to wrongful convictions, one needs ninety wrongful acquittals, leaving one correct decision. Thus, a system with ninety-nine out of one hundred errors satisfies the ratio but seems quite perverse. Or suppose there is a 75% conviction rate, and a 5% error rate. In such a case, one needs thirty-seven wrongful acquittals to offset 3.75 wrongful convictions, but there are only twenty-five acquittals to go around (and all of them need to be guilty). Thus, the ratio, literally, cannot be satisfied leaving the conventional explanation of the requirement of proof beyond reasonable doubt quite incoherent.

My two points combine more generally as a vindication of what Oliver Wendell Holmes said over and over—to wit that no general theory is worth a damn—yet the law schools continue to pour out general theories. (I am back to my general lament!) One of the reasons they usually—indeed maybe universally—are not worth a damn is that the simple tools of top down theorizing—usually deductive in nature—are inadequate to capture the reality being theorized about, which is invariably dynamic. So, we have the spectacle of one bad theory after another of the Fourth Amendment or the Fifth Amendment or whatever, where "bad" means has no discernable relationship to reality except to be enlightening of the normative commitments of the writer. We need calculus, not just algebra, to make

progress, I think, whatever that might mean for research in criminal law and procedure and criminology.

Whether anyone in the room besides myself thinks in such terms, and I know definitely that at least one or two of you who shall go nameless do not, I cannot imagine a better collection of individuals than we have here today to apply calculus to the domain of criminal justice.