1915

Classification and Definition of Crimes

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Recommended Citation

Ernst Freund, Classification and Definition of Crimes, 5 J. Am. Inst. Crim. L. & Criminology 807 (May 1914 to March 1915)

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CLASSIFICATION AND DEFINITION OF CRIMES.

(Report of Committee D of the Institute.)

ERNST FREUND.

I. The codification of the criminal law.—The statutory definition of offenses is a fundamental principle of criminalistic policy. In continental jurisprudence it is expressed by the maxim “no punishment without a statute,” which was made part of the French Declaration of Rights of 1789.

In Anglo-American jurisprudence the principle is less uniformly as such (Tucker’s Blackstone I, p. 438); in nearly all states the criminal law is in part at least unwritten. But as early as the Fourteenth Century the demand for the certainty of written law gave rise to the statute of treason (25 Ed. III, 1352); the objection to an unwritten common law of crimes was largely responsible for the refusal to recognize a federal common law for the United States as such (Tucker’s Blackstone I, p. 438); in nearly all states the criminal law has been codified, leaving to the common law at most a subsidiary force; and in a number of states no act can be punished as a crime unless its constituent elements are specifically set forth in a statute.2

II. Specific offenses.—The prevailing system of defining offenses can be best understood by comparing it with the rule of civil liability for torts.

It is a general common law principle that an act or other form of conduct, generically characterized as violating a legal duty, or in addition also causing loss or damage, constitutes an actionable civil

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1The entire Committee was as follows: Ernst Freund, Chairman; Judge John B. Winslow, Judge Orrin N. Carter, Adelbert Moot, Hon. Stephen H. Allen, Prof. W. W. Hitchler, Wm. M. Ivins, R. H. Marr, N. W. MacChesney, A. Bullard, Dr. Wm. Healy, Joel D. Hunter.

There was hardly any opportunity for joint deliberation or for consultation. An outline of the plan of the report was submitted to the members and approved by a majority of them. The report was thereupon drawn up by the Chairman and again submitted to the members, receiving the approval of Messrs. Healy, Hunter and MacChesney.

Under these circumstances the report can hardly be said to represent the opinions or the conclusions of the entire committee. Since, however, the report is in no sense final, this fact is perhaps not of controlling importance. If the work of the Committee is continued the material and the suggestions contained in the report may be used for what they are worth.

2Rev. Stat. Indiana, 1852, ch. 87. Sec. 2: “Crimes and misdemeanors shall be defined, and punishment thereafter fixed, by statutes of this state, and not otherwise.”


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injury, and the German Code provides in even more general manner that whoever intentionally injures another in a manner contrary to the common standards of right conduct, is bound to indemnify him.

There is no corresponding common law principle or code provision, to the effect that conduct involving a culpable state of mind and causing danger or injury to public interests can be prosecuted as a punishable offense; but certain types of acts designated by readily ascertained objective criteria of objects or interests attacked and of method or manner of injury, are specified as distinctive offenses, and certain kinds and grades of penalties fixed for their punishment.

Thus we have the offenses of levying war against the state; killing a person; forging an instrument; counterfeiting money; bribing an official; swearing a false oath in a judicial or other official proceeding, etc.

The result of this system of specialization of offenses is that if a misdeed does not fit into one of the specified categories, the wrong doer is not criminally liable, however morally culpable he may be, or however dangerous or detrimental his act.

III. Generic offenses.—The system of specialization is necessarily a matter of degree, and there are a few offenses in which the constituent elements are indicated in such a general manner, that the characteristic features of the system are almost lost. The common law offenses of nuisance and conspiracy are the most conspicuous instances in point, but illustrations are also to be found in modern codes.

In the New York Penal Law (Sec. 530) coercion is defined merely by reference to the means used (intimidation by threat or force); any legal right may be the object attacked; and in the German Code the offense is almost equally general. In the Indian Penal Code fraud is defined almost as widely as coercion is in New York, for the protection extends to body, mind, reputation or property, i.e. practically any legal right. Under the German Code the definition of fraud, while likewise very general, at least requires injury to property rights and intent of unlawful gain (or under the new draft Sec. 291, malice); whereas the American codes have no generic offense of fraud, but punish merely specified forms, particularly the use of false pretences for the purpose of obtaining property, or the signature to some instrument, and certain designated swindling tricks (New York Penal Law, Sec. 920-940).

On the other hand, the American codes, following the common law, treat official misfeasance as a generic offense, while the German
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codifiers believe that without more concrete specification this would be too far reaching, and that there is no need for abandoning in this case the principle of specialization.

IV. Divisions and classification.—With a view of covering the entire range of possible offenses adequately, many criminal codes adopt a plan of establishing certain main divisions, regularly on the basis of the interests requiring protection, under which the various specific offenses are classified: offenses against the state or government, administration of justice, morals, order, property, person, and perhaps others.

Except in so far as this plan compels or induces more careful consideration and definition of each offense, it is of secondary importance, and in America the slight estimate entertained of such a system is often manifested by discarding it altogether, and arranging the several offenses alphabetically. This is e. g. the plan of the Illinois Code. Unless one knows in advance the denomination chosen for each offense, the alphabetic arrangement adds nothing to the facility of reference; it looks cheap and mechanical, and generally goes hand in hand with inferior care and skill in definition.

The German Penal Code arranges offenses systematically, but without dividing up the entire field into a few main heads. In its second part ("The several offenses") it deals successively with the various protected interests or species of punishable wrongdoing, forming altogether twenty-nine subdivisions. Where the subdivision represents some one protected interest it means that specific forms of attacking it are mingled out as different offenses; where the subdivision represents some one species of wrongdoing, there is one general offense, and certain modalities of it are merely dealt with by reason of mitigating or aggravating circumstances as subspecies of the same offense. Thus there are subdivisions of offenses against civic rights, against public order, against religion, against life, etc., which represent the former type, while other subdivisions deal with perjury, treason, libel, assault, larceny, etc. It is obvious that this arrangement represents no special theory of classification but is merely a matter of convenience.

V. Relation of specific offenses to scientific classification.—While penal codes differ in their divisions, there is considerable similarity between them as regards the specific offenses dealt with. This similarity indicates that the selection of certain forms of delinquency as punishable offenses must to a great extent be based upon inherent and permanent elements. Criminal conduct, like lawful business,
proceeds along a limited number of rather well defined lines, and—although to a less extent—this uniformity extends even to the incidental or secondary features of crime.

Moreover, there is often a distinct correspondence between a specific offense and a specific degree or type of criminality; thus forgery and counterfeiting represent different grades of danger; larceny and embezzlement different grades of guilt; stealing from the person a distinctive class of offenders. If this is so, it is a legislative mistake to obliterate the distinction, as is done in those American states in which embezzlement is made larceny. Cases in which distinct types of offenses do not present marked or different types of criminality (as e.g. robbery and burglary) are the exception rather than the rule.

So far as there exists such a correspondence between distinctiveness of statutory crime and distinctiveness of type, the system of specific offenses answers the requirements of criminalistic science. It falls short, where some specific crime is not adequately differentiated, and where proper weight is not given to the more subtle varieties of incident, motive and state of mind which constitute distinguishable types in the commission of criminal acts.

VI. Illustrations of the shortcomings of specific definitions.—

(1) Homicide.—The most conspicuous of all forms of crime—homicide—presents the shortcomings to a marked degree. It also illustrates well the difference between criminal codes in this respect.

Most systems (the South Latin countries form an exception) grade the offense of homicide into two main denominations corresponding to our murder and manslaughter. The German law does this according to the presence or absence of premeditation and adheres to this distinction.

The express malice of the common law is probably the equivalent of premeditation (New York: "deliberate and premeditated design"); but the term malice is misleading and in many cases quite inappropriate. Moreover the common law recognizes also an implied malice which is no clear and scientific criterion at all, but the meaning of which can be grasped only by a study of decided cases. Illinois attempts to define implied malice as existing "when no considerable provocation appears or when all the circumstances of the killing show an abandoned and malignant heart." This appears to have been suggested by the statement of an old text writer (Foster) which speaks of "plain indications of a heart regardless of social duty and
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fatally bent upon mischief.” Of this a modern text writer (McClain, Sec. 522) says that it is too general to be of any value. If killing was incidental to the commission of a felony, the common law implied malice, although the killing was unintended.

Under the term “manslaughter” again two entirely different species of offenses are included, namely killing with design (upon sudden impulse, on provocation, etc.), and killing without design (by carelessness,—unless implied malice makes it murder).

Illinois, while making a verbal distinction between voluntary and involuntary manslaughter, does not differentiate between the two in the matter of punishment.

New York has a more elaborate classification of homicide, distinguishing two degrees of murder and two degrees of manslaughter. The common element is the result: the loss of human life; otherwise murder in the first degree throws together premeditation and other specified circumstances of aggravation; murder in the second degree is characterized by design without premeditation. Characteristic of manslaughter is the absence of design to effect death, and the two degrees are differentiated by specified circumstances, abortion being also designated as manslaughter.

The German Code, further, deals specifically and more leniently with three types of homicide: duel, infanticide, and killing at the request of the person killed; the penalties are a great deal milder than in case of murder, and a penitentiary sentence is allowed (not required) only in the case of the killing of the newborn illegitimate child by the mother.

No American jurisdiction makes any allowance for any of these three forms: New York deals with dueling rather by way of aggravation, for killing in a duel fought out of the state by appointment, made within the state is made murder in the second degree, leaving it to be inferred that killing in a duel in the state is murder in the first degree.

On the other hand, the German law, in the case of murder, departs from a policy observed with regard to most other crimes, by failing to provide for the admission of mitigating circumstances; and by fixing the death penalty for murder exclusively, it shut out any individual consideration except through the exercise of the pardoning power or through the irresponsibility of jury verdicts.

Neither the German nor the American law recognizes motive as a relevant element in homicide, so that killing to punish a grievous
wrong (the betrayer of a woman's or a husband's honor—the latter made allowance for in some Latin codes—), killing to save from dishonor, killing to place beyond suffering (—the suggestion of a special provision was recently rejected by the German Criminal Code Commission 3) and killing in a civil strife, are all undifferentiated forms of one crime,—a policy which ignores profound differences of ethical and popular estimation, and which in its turn is practically nullified in the administration of criminal justice.

(2) Larceny.—Turning to the most common form of crime, stealing or larceny, it appears that the main line of division in the Anglo-American law is drawn according to the value of the property stolen (grand and petty larceny). Fixing the line of decision at a definite value is so mechanical that it would be intolerable if the correction were not applied by the findings of juries. Intrinsically, the notion of petty larceny is sound enough, and the total absence of its distinct recognition in the German law was found to be a defect, although the penal code punished ordinary theft only by jail sentence with a minimum of one day. It is now proposed by the new German draft to provide for petty larceny in two distinct forms: where articles of consumption are taken under the impulse of need or of a strong physical desire, and where things of insignificant value are taken from members of the same household. Under these circumstances special private prosecution is required, and in the case of articles of consumption there may be merely fines or detention, and in specially light cases the penalty may be remitted altogether. No particular account is taken of misappropriation out of pure mischief or upon a sudden impulse in the face of special temptation. However, the German Code grades embezzlement lower in the scale of criminality than larceny, while American codes put it in the same class, and sometimes even use the same designation for both offenses.

Special forms of larceny are often differentiated by circumstances of aggravations: stealing from a person, stealing at night, or from a house, etc. The German code recognizes aggravations according to the kind of place from which taken, the manner of entry, the use of false keys, the use of weapons, stealing in gangs, at night time, etc. The new draft code adds as aggravating elements habitual or professional stealing. Other aggravations constitute according to most systems distinct specific offenses (robbery, burglary).

VII. Subdifferentiating specific offenses.—A comparison of the German with the American law shows a much larger number of cases

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in the former, in which elements or circumstances indicative of greater or less guilt are specifically set forth as affecting the grade of the offense or the measure of punishment.

The new German draft code of 1909 is particularly instructive in this respect, as will appear by reference to the following examples:

Illegally obtaining official secrets: aggravated by intent to use to the prejudice of the state; aggravated to a less degree by a knowledge of the danger of publicity. (Sec. 108, 110.)

Resistance to officer: aggravated by exposing the latter to considerable danger (Sec. 126); further aggravated by joining forces with others, and by acting as ringleader (Sec. 127).

Passing of false or clipped coin: mitigated by fact of it having been received as genuine (Sec. 160, 161).

Voluntary manslaughter: aggravated by connection with other crime (Sec. 214); involuntary manslaughter, aggravated by neglect of special duty of attention (Sec. 219).

Duel: aggravated by absence of second (hence seconds are not punished), by culpable provocation, by violation of customary rules; mitigated by precautions against danger to life (Sec. 220-226).

Assault: aggravated by use of dangerous instrument (Sec. 226), by intent to inflict serious injury (Sec. 229), by several joining (Sec. 231); mitigated where the result of an affray (Sec. 233).

Kidnapping: aggravated by purpose of gain or immoral purpose (Sec. 235).

Abduction of female: differentiated according as purpose is marriage or immorality (Sec. 236).

Seduction: punished only if brought about by deception (Sec. 246).

Lascivious acts: punished only if committed in connection with abuse of position of authority (Sec. 247).

Crime against nature: aggravated likewise by abuse of authority (Sec. 250).

Pandering: aggravated by connection with abuse of authority (Sec. 252), also by use of deception, and by making it a means of livelihood (Sec. 253).

Fraud: aggravated by habitual practice or by making it a means of livelihood (Sec. 276); same in case of receiving stolen goods (Sec. 281); election fraud: aggravated if committed by one having official duties (Sec. 280).

Official peculation: aggravated by false bookkeeping (Sec. 209).

Engaging upon a criminal course of conduct as a matter of habit
or means of livelihood aggravates the following offenses: receiving stolen goods, usury, gambling, coin clipping, pandering, living on the earnings of a prostitute.

It should be noted that the system in practically all those cases is first to give an inclusive definition of an offense which covers all its subspecies, and then to allow the consideration of specified accompanying elements.

This is preferable to the method of creating separate offenses characterized by the presence or absence of specified elements, which would enhance difficulties of proof and of interpretation and enlarge the channels of escape on technical grounds.

The careful sense of justice manifested in these discriminations stands in marked contrast to the readiness with which in American codes offenses of very different characteristics are thrown together under a common denomination and grade of punishment; making not merely embezzlement, but the receipt of deposits by an insolvent banker larceny; making intercourse with a girl under the age of sixteen or even eighteen equivalent to rape (statutory larceny; statutory rape; compare the provision of the New South Wales Crimes [Girls' Protection] Act of 1910 raising the age of consent from fourteen to sixteen, but making an exception for intercourse with common prostitutes reasonably believed to be over sixteen); covering under one common provision simple sexual immorality and the commercial exploitation of vice, as is done by the Federal White Slave Act; failing to distinguish between acts of harmless though forbidden use and acts of defilement and contempt, as in the new acts regarding the use of national flag,—all instances which it would be difficult to parallel in the criminal legislation of Germany which, generally speaking, takes great care not to include in the same provision radically different types of guilt.

VIII. Reasons for the shortcomings in differentiation of crimes.

—Defects of classification and definition may be due to one or more of the following causes or circumstances:

(1) To mere inadvertence of carelessness in thinking out or formulating the constituent elements of an offense.

The remedy lies in the improvement of methods of drafting statutes and can be most readily applied in the definition of newly created offenses.

(2) To conservatism in following bad or antiquated models and precedents.
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The possibility of reform depends upon the ability to demonstrate that the change will not involve a loss in certainty.

In a number of cases it can be shown that the pretended certainty of the established definition is illusory.

It might be worth while to inquire carefully whether the substitution by the Penal Code of New York of the idea of premeditation for that of malice aforethought as the characteristic element of murder embarrassed to any extent the administration of criminal justice. A cursory examination of the Reports fails to indicate any such result.

(3) To popular feeling which being aroused against some type of offense insists on having the circumstances which have made it odious set forth in the definition without regard to their scientific value, and which also sometimes insists upon having the offense graded more severely than it deserves (criminal anarchy; violation of anti-trust act a felony, etc.).

(4) To a deliberate attitude of non-compromise with regard to certain types of offenses (murder, duel, statutory rape, embezzlement, perjury).

There are important differences in this respect between Anglo-American and continental codes; but in practically all systems we find the same refusal to recognize certain motives for homicide which in the practical administration of justice lead to non-prosecution, acquittal or pardon. The refusal of juries to convict shows that the pardoning power is felt not to be an adequate remedy.

It is true that homicide, in a sense, is not a typical offense. Like perjury it is a crime, the reaction against which appeals to sentiments and instincts of a religious and therefore incommensurable order.

(5) To the difficulty of finding an adequate formula of definition owing to vagueness of concepts or to inadequate knowledge. (Definition of monopoly or of unfair competition).

This may indicate that the subject matter is not ripe for criminal legislation.

(6) To the practical impossibility of admitting into a criminal code such a minute differentiation of specific offenses as would do perfect justice to all relevant consideration of guilt.

This raises the question whether the universally established policy of specialization of offenses should either be superseded or supplemented by a system of more generic or abstract differentiation.

IX. The relative advantages of specialization and generic differentiation.—A purely abstract system of differentiation would pro-
ceed upon the theory that the criminality of an act is determined by the value of interests destroyed, attacked or jeopardized, by the motives actuating the offender, and by the circumstances from which the degree of fixity or intensity of criminal purpose may be inferred; such a system would assign relative grades in the scale of criminality to these various elements, and judge any given act according to the manner in which the elements of guilt and danger were found to be combined in it.

The system of specialization, on the other hand, is founded in the theory that the point of aggravation at which misconduct becomes punishable depends upon a public sentiment for which there is no absolute or scientific criterion; that guilt, injury or danger may be not sufficiently aggravated to merit the social stigma of criminal punishment; or that the difficulties of discovering or punishing misconduct may be such as to make prosecution more harmful than impunity. The definition of crime is thus determined by variable considerations of policy, and becomes positive, conventional, to a slight extent even arbitrary.

Undoubtedly from the point of view of perfect and ideal justice a system of specialization leaves much to be desired. Judged not only by purely ethical standards, but in its social aspect and effect, conduct which the criminal law does not reach may be far more culpable and dangerous than many a punishable offense; and it cannot be denied that these defects and anomalies produce a sense of wrong in individual cases as well as generally among serious thinkers, which has to be reckoned with in estimating the practical effects of criminal law.

The advantage of the system is that it informs the public of the province of criminality, indicates clearly the line between distinct specific offenses to which different grades or limits of penalties are attached, and removes the excuse for harassing or blackmailing prosecutions which a system of undefined offenses invites.

The ready made categories of specific offenses furnish, so to speak, a familiar currency, the various denominations of which have been accepted by, and in their turn have shaped, the public sense of right and wrong. For this reason perfection of definition in criminal law depends as much upon intelligibility as upon abstract refinement.

Conversely in an abstract system of differentiation a valuable checking and educative influence of our present criminal legislation would be lost, for such a system of determining offenses would not impress the popular mind so strongly as definition of specific crimes.
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And not only would public opinion have to be educated up to the new standards, but the critical judgment of acts on the basis of a considerable number of objective and subjective elements of rather abstract or general description would make considerably greater demands upon the analysis of phenomena and psychological discrimination than does the present system, and in untrained and unskillful hands there would be the possibility and certainly the suspicion of arbitrary decision. With a jury system this objection weighs particularly.

The considerations pointed out preclude the idea of abandoning absolutely our present system of specific offenses; and the path of reform lies clearly in the direction of merely supplementing it by allowing in a fuller measure the consideration of the various elements that enter into the commission of crime.

And in carrying out such a policy, methods should be adopted by preference, which merely develop ideas already recognized in the existing criminal law and accepted by it on the basis of experience and practice.

As regards the definition of crimes the most promising lines of reform would therefore seem to be a more perfect consideration of relevant elements of criminality in connection with specific crimes, and a system of generic differentiation for supplemental use in specified departments of criminology.

As regards classification of crimes, a new scheme of division is suggested which has for its main purpose a better differentiation of administrative or procedural methods and the definite segregation of common crimes from other offenses which do not present the same criminological problems.

X. A more perfect consideration of relevant elements of criminality in connection with specific crimes.—Some illustrations have been given of the superiority of German over American codes in sub-differentiating offenses by reference to circumstances affecting guilt or danger in particular offenses.

It has also been pointed out that perfectly adequate provision of this kind by further sub-differentiation of specific offenses would unduly strain the principle of specialization.

The German code concedes the inadequacy of its plan by adopting in addition a system of mitigating or extenuating circumstances, which is also found in the other continental codes; and the new German draft code of 1909 has besides some very noteworthy provisions
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regarding the effect of certain conditions attending the commission of crime upon the grade or scale or penalties.

(1) Mitigating circumstances—the system of mitigating circumstances originated with the French Penal Code. France, Belgium and Italy allow mitigating circumstances to be given effect in all crimes by reducing the minimum normal penalty; Germany excludes them in certain offenses (e.g., perjury). The codes do not specify what constitutes such circumstances. There is no equally general provision for aggravating circumstances.

(2) Provisions permitting the normal scale of penalties to be departed from in the presence of specific elements bearing on guilt are much rarer.

The German code provides in Sec. 20: “Where the law leaves the choice between penitentiary and fortress, the sentence may not be for penitentiary unless it is found that the act proceeded from a dishonorable state of mind.”

The draft of a new penal code (1909) has the following provisions:

Sec. 18. If the act manifests special atrocity, malice or infamy (abandoned mind), the court may order special measures of aggravation in connection with imprisonment.

Sec. 81 directs that in admeasuring penalties regard be had to the general character evinced by the deed, motives, object, impulse or temptation, personal and property relations, degree of intelligence, consequences of act and the offender’s attitude with regard to them, especially repentance and the effort at reparation.

Sec. 83 authorizes the court to reduce the penalty below the minimum (and, where specially provided, to remit it) in especially light cases, as where the consequences of the act are insignificant, or the criminal intent slight, or, in view of the circumstances, excusable, so that the regular penalty seems unduly harsh.

Sec. 84. Circumstances of special aggravation exist where the consequences are exceptionally grave and the criminal intent appears abnormally strong and wicked. Such circumstances shall, however, alter the penalty only where the law expressly so provides.

Sec. 85 extends Section 20 of the present code (see above) to all cases of choice between penitentiary and other deprivation of liberty.

Secs. 67, 68 make special provision for relapse into crime or recidivism.

Sec. 89 contains a provision for professional and habitual criminals.
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The Norwegian Code provides (Sec. 24) that where the penalty is imprisonment, detention may be substituted if it may be inferred from particular circumstances that the act did not spring from a corrupt mind.

(3) The America codes have neither any provisions like these nor any system of mitigating circumstances. A very liberal range of minimum and maximum penalties serves in the case of many crimes to some extent as a substitute, particularly under the theory if not under the practice of modern indeterminate sentence laws, but it must be observed that there is very commonly a minimum penalty of one year, and in many cases that there is provision only for penitentiary sentence, so that there is no possibility of substituting the very much lighter form of imprisonment in jail—a very common German provision in case of mitigating circumstances.

XI. A system of generic differentiation for supplemental use.—The most satisfactory solution of the problem would seem to lie in the further expansion of the system of mitigating circumstances and of provisions for altering penalties.

The expansion should take the form of a careful elaboration of a complete system of relevant elements of criminality, and a general provision that in adjudging specific offenses, they should in some way be taken into account.

While the usual definitions of specific offenses confine themselves to stating the object attacked and the method of attacking it, and do not in the majority of cases, give any place in the definition to the incidents which individualize crime, the proposed system would attempt to do full justice to the latter, and utilize them for a more adequate classification of offenses. Motive and circumstance would play as important a part as subject matter and form of a delinquency.

Sec. 81-89 of the New German Code of 1909 (above referred to) indicate the general scope of such a system. The problem would be to bring together, as far as can be done, all relevant elements bearing on guilt, and evaluate them in a satisfactory manner; so that it could no longer happen that owing to lack of provision in the criminal code the law in dealing with a crime obliterates the most vital differences bearing upon its true nature.

Under such a system the infinite varieties of the crime of murder would for the first time find some legal recognition, and cognizance might also be taken of the fact—important as regards reform measures, etc.—that the problem presented by the crime of murder differs radically from that of theft, robbery or burglary. It might be possi-
ble to avoid the unfortunate alternative between excessive, inappropriate and futile punishment, and absolute acquittal.

Applying such a system, it would make a difference in the crime of perjury whether its object and effect was simply to shield a guilty person, or to procure an unlawful gain, or the conviction of one who is innocent. Since our laws permit the defendant in a criminal case to testify under oath, it is manifestly unreasonable not to allow the temptation to count in his favor, for the requirement of an oath under such circumstances is almost a direct invitation to perjury.

Again, if bigamy is committed with the knowledge and consent of the three parties concerned, it is not the same offense as if the other party to the legal marriage is not a consenting party, still less if the other party to the illegal marriage is ignorant and deceived; and this difference seems to be recognized in a few codes (Holland, Hungary, Norway).

Surely the differences thus pointed out by way of illustration are relevant; yet the prevailing system of criminal law ignores them; and if they are taken into account as mitigating circumstances, or in fixing the penalty at its legal minimum, there is nothing of record to show that this was not due to favor or sympathy. The offender stands convicted with all the possible implications which the statutory definition of the offense permits, and the differential circumstances of the commission of the offense neither entitle nor expose him to differential treatment after conviction.

If it is proposed to supplement the prevailing system of specific offenses by a collateral system of more generic differentiating elements, the question must also be approached what concrete legislative form such a system is to take.

The three points to be considered would be: the elements to be specified as relevant in differentiation; the relative value to be attributed to them; and the manner of their application to particular offenses.

The first two points would present a problem of criminology, the last one a problem of criminal law and procedure.

Assuming the possibility of reaching satisfactory results with regard to the first two points, should the offender have a legal right to have all elements submitted to the jury with appropriate instructions? It is easy to see that strong objection would be made to such a complication of the criminal law, and that with such consequences in view, an agreement upon the elements to be recognized and their effect would be most difficult to obtain.
It would therefore be wiser and more conservative, for the beginning at least, to operate such a system without altering legal rights. This could be done in all cases where at present measures are permitted with regard to offenders, in respect of which technical claims of illegality or unconstitutionality cannot be raised, or can be disposed of without difficulty and without injustice to substantial rights.

More particularly such a system might be applied:

1. First and foremost, for the purpose of keeping criminal statistics. Here the administrative obstacles to reform would be least. On the other hand, it is here that there is the most urgent demand for scientific definition and classification. In view of the desirability of uniformity for scientific purposes, it would be legitimate to aim at national, or even international agreement for such a scheme of classification.

2. For the purpose of dealing with juvenile delinquents; since here there is already a tendency to supersede the ordinary categories of offenses by the more subjective circumstances and motives of the individual act.

3. For determining methods of treatment after conviction, i.e. after the system of specific offenses has fully accomplished its purpose of protecting the liberty of the individual against an undue or arbitrary extension of punishable acts.

It is true that the convict as well as the accused, is entitled to the guarantees of due process and therefore no circumstances should be allowed to count in aggravation of punishment that have not been charged and established in accordance with established rules of criminal procedure. But there is no reason why the fullest effect should not be given to mitigating circumstances irrespective of any technicalities of indictment, trial or evidence.

Certainly there could be no objection to applying the proposed scheme of differentiation to the administration of indeterminate sentence laws, or to the exercise of the pardoning power.

Combined within limits so conservative, even a radical plan of reform need not arouse any strong opposition. In any event, the details of such a plan would be necessarily matter of further thought, suggestion and criticism. The primary question to be determined is whether something like the scheme here proposed would secure better consideration for phases and incidents of criminality now ignored or insufficiently recognized by our codes.
TENTATIVE CLASSIFICATION OF CONSTITUENT ELEMENTS
OF CRIME RECOGNIZED IN MODERN CRIMINAL CODES.

A. Interest attacked or endangered.
   1. Safety of the State.
   2. Ordinary safety of person or property.
   3. Purity of justice and administration.
   5. Common peace, order and decency.
   6. Purity of sex relation.
   7. Conformity to legislative policy.

B. Forms of delinquency.
   1. Disorderly conduct.
   2. Omission of duty.
   3. Disobedience.
   4. Abuse of authority.
   5. Corruption or seduction.
   6. Betrayal or breach of trust.
   7. Coercion.
   8. Threat.
  10. Stealth.
  11. Fraud or falsehood.

C. Circumstances mitigating or aggravating guilt.
   (a.) Objective.
      1. Value of object, extent of danger or injury.
      2. Remoteness or proximity of danger.
      3. Specific relation to object or victim.
      4. Numbers.
      5. Openness or secrecy.
      6. Special contrivances.
      7. Atrocity, cruelty, helplessness of victim.
   (b.) Subjective.
      1. Motive (gain, malice, fear, distress, altruistic motive).
      2. Abnormal state of mind.
      3. Vagueness of intensity of purpose.
      4. Temptation or provocation.
      5. Repentance and reparation.
      6. Habit.
      7. Profession.

XII. A more perfect classification of crimes.—It is suggested that crimes be classified according to the great categories of the interest attacked or violated, viz.: the safety of the state and maintenance of the authority of the government;—the conformity to legislative policy;—the purity of justice and administration;—the maintenance of peace, security and good order;—the purity of sex relation;—the ordinary or common safety of person and property; making the following great classes:

(1.) Political offenses.
(2.) Statute violations.
(3.) Administrative crimes.
(4.) Police offenses.
(5.) Crimes against morality.
(6.) Common or ordinary crimes.
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(1.) Political offenses present a problem to be dealt with by the supreme organs of the government; for they are indicative of a state of disturbance of the political and social equilibrium, to cope with which the ordinary machinery of criminal justice may be ill adapted or powerless, and the ordinary penalties of the law singularly inappropriate and futile. Offenders of this class will be more effectually proceeded against if the consequence of a conviction will not be to stamp them as ordinary criminals.

We have a precedent for the distinctive treatment of political offenders in the proceeding by impeachment. This, however, is unsatisfactory and objectionable because the guaranties of impartiality are absent. Trial of such offenses by the supreme court with a jury (for which a constitutional amendment would be necessary) would be more appropriate.

These observations would not apply to offenses which, while directed against the safety of the state, would proceed from other than political or similar motives. The person who betrays the interests of his country for a money consideration is a common criminal and should be treated as such.

(2.) The term "statute violations" is chosen as a convenient designation for the offenses against the penal classes which are found in every one of the many regulative statutes which annually emanate from our legislative halls.

Frequently these statutes represent a controverted, if not dubious, policy imposed by a majority upon a resisting minority, sometimes worked out without due care or deliberation; the interests opposing them, if not legitimate, have the adhesion of large and not necessarily lawless classes;—not uncommonly in the past these interests represented liberty and progress, and occasionally they do now.

Experience has demonstrated the futility of attempting to deal with offenders against such statutes as common criminals, and the general policy of legislation is to rely upon relatively mild penalties, and in many cases to create special organs for their enforcement. Even as a matter of outward arrangement in the statute book, the great mass of penal provisions accompanying economic and social legislation does not appear as part of the criminal law.¹

It is very probable that the system of enforcement through injunction will occupy an increasingly large place in this kind of legislation; and even if the violation of these injunctions will ultimately

¹In New York they are to a considerable extent incorporated in the Penal Law.
come to be adjudged by juries, there will be in this method of enforce-
ment a definite separation from ordinary crimes.

(3.) A general category of administrative crimes is at present
not generally recognized. It deserves, however, consideration whether
a separate place should not be assigned to them in a criminal or puni-
tive system.

Taking perjury and tax defraudations as types of this class (it
being assumed that the object of the crime is not to jeopardize other
private interests), the distinctive feature of these offenses is that they
are more readily committed than offenses against person and property.

Unfortunately, public sentiment is laxer in defense of public
than of private interests; and where loose practices have become
entrenched, the policy of severe and dishonoring penalties, so far
from aiding law enforcement, makes convictions difficult and rare.

It might therefore be advisable to develop further with regard
to this class of offenses a system of repression that has the sanction
of traditional practice in connection with the public revenue; namely,
the system of summary administrative penalties. In the case of
perjury and bribery this would have to take the form of contempt
process. In certain British colonies perjury is already dealt with on
this basis; and the adoption of a similar system in this country would
present no difficulties in case of perjury committed in court. A more
general extension of contempt process may offer constitutional diffi-
culties. It is, however, believed that these can be avoided by giving
an unrestricted right of appeal to the courts.

(4.) Police offenses are both in legislation and administration
often distinguished from common crimes. Either the interest affected
or the guilt involved, or both, are less serious or urgent. The power
or even policy of repression is to a considerable degree delegated to
local authorities, and summary powers of abatement may be appro-
priate. While there are cases on the boundary line of other cate-
gories (obscenity, immorality; illegal sale of liquor, disorderly saloon
or drunkenness), the province of this division can be marked out
with tolerable certainty.

(5.) Crimes against morality differ from common crimes in
various respects:

(a) They may be committed without invading any right, and
without touching directly any public interest.

(b) They are more frequently than other crimes the product
of morbid impulse or abnormal instinct.
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(c) The prosecution is peculiarly liable to be attended by undesirable practices of blackmail, etc.

(d) Owing to the difficulties of evidence the vast majority of crimes of this class remain unpunished.

For these reasons there is not entire unanimity of opinion whether these crimes should be prosecuted where private rights, public order or public institutions are not at least in some degree involved, i.e., where the only parties concerned are consenting, above the age of discretion, and no outside interest is at stake (incest, crime against nature, fornication, perhaps adultery, as contrasted with rape, crimes against children, and bigamy). Italy punishes only where there is some element of publicity or scandal.

Unless these considerations are deemed to be of controlling influence there is no particular reason for placing crimes against morality in a separate class from other common crimes.

(6.) There remains the class of common or ordinary crimes which constitute the main preoccupation of criminal legislation and criminal justice. But for them, there would be no social problem of crime, no elaborate machinery of prosecution and punishment. To prevent and repress them is the primary function of the organized community.

It is also an important fact that there is practically no division of opinion regarding the necessity of repressing these common crimes; for this fact raises a question of an administrative nature which may be worthy of serious consideration:

The enforcement of laws enacted to carry out some policy that is controversial in the sense that large classes of the population are hostile or passively resistant to it, necessarily exposes the prosecuting office to intrigue and devious influence, and, in a popular system of government, throws it into politics. Any amount of well meaning effort at reform will not alter this situation.

From this results a weakness and time serving tendency of the prosecution and, especially also of the police, and this in turn reacts unfavorably upon the repression of ordinary crime.

Were offenses clearly differentiated on the basis here proposed, the repression of the common crimes against person and property might be placed in the hands of officials absolutely divorced from the enforcement of widely controverted or resisted policies, and put on a professional and scientific basis.

It may be suggested that the task of classification does not end with the establishment of the category of common crimes, but really
begins there. Indeed the attempts which criminologists have made to classify crimes have practically confined themselves to the ordinary crimes against persons and property, and against morals. The basis of classification has usually been the type and character of the offender (American Journal Criminal Law 1, 906: born, habitual, occasional;—Motive Vorentwurf, 1909, 1, 338: occasional, capable of reform, incapable of reform).

If such a classification is to be utilized for procedural or punitive differentiation, it must not be too controversial for ready application in any particular case; and if any basis of classification will ever become scientifically established, it will speedily impose itself upon the administration of justice.

This particular problem of classification is therefore primarily psychological, and not juristic; and no adequate justice can be done to it in this report.

CONCLUSION

It is fully recognized that the proposed reclassification of crimes is too far reaching and presents too many controversial problems to constitute for the immediate future a practical legislative program; it is offered merely as a suggestion for consideration and criticism.

Unless it can serve some practical purpose, by way of administrative differentiation or otherwise, a logically perfect classification is not a matter of supreme importance.

A complete system of the relevant elements of guilt is, on the other hand, a prime desideratum of criminal law reform. As pointed out before, the problem of defining the elements to be specified as relevant in differentiation and of assigning to each its relative value in determining guilt and punishment is one for the solution of which the legislator must look to the trained criminologist.

If the general idea here suggested is a sound one, it should be pursued by working out some such scheme as is indicated in the note to No. 11. Only further detailed work can show, whether, to what extent, and in what form the plan is practicable.