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**SOME SIGNIFICANT DEVELOPMENTS IN CRIMINAL LAW
AND PROCEDURE IN THE LAST CENTURY**

Albert J. Harno†

The following article by the Dean of the College of Law in the University of Illinois is one of several "request" contributions which recognize and honor Northwestern University on the completion of her first century. We have published in number one of the present volume of this *Journal* (May-June, 1951) a brief review of the action of the late John Henry Wigmore, Dean of the Northwestern University School of Law, and other members of the University, in calling the Conference on Criminal Law and Criminology in 1909, in organizing and promoting the American Institute of Criminal Law and Criminology, and in launching this *Journal*. It is generally conceded that these events have had a profound and enduring effect upon the development of Criminal Law and Criminology, especially in the United States.

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"All theories on the subject of punishment have more or less broken down," observed Sir Henry Maine in 1864 in a speech before the Council of the Governor General of India. "We are again," said he, "at sea as to first principles."¹ This was an apt description of the situation in Sir Henry's time. It is equally apropos today. We live, think and act as prisoners of our environment. Now and then some reflective mind stops to question and to appraise. At intervals someone rearranges traditional procedures into a new pattern. But only on very rare occasions does anyone plant a new idea that takes root and grows. We have waited long for that idea in the criminal law.

While it is true that there have been no epochal events in the criminal law during the last century, it must not be taken that this period has been sterile of change. Procedural modifications, some of which rate as reforms, have occurred frequently, and there have been jurisdictional extensions. Traditional concepts have had interpretative expansions which have carried ideological implications and changes. There have

†The writer received helpful suggestions from the following individuals: Alfred L. Gausewitz, Milton D. Green, Jerome Hall, Livingston Hall, W. H. Hitchler, Pendleton Howard, Hiram H. Lesar, Roy Moreland, Charles B. Nutting, Lester B. Orfield, Rollin M. Perkins, E. W. Puttkammer, Louis B. Schwartz, J. W. C. Turner, John B. Waite and Herbert Wechsler. He wishes to acknowledge substantial assistance from Burton R. Rissman, a recent graduate of the College of Law of the University of Illinois.

1. LIFE AND SPEECHES OF SIR HENRY MAINE, 125 (1892).

been shifts in emphasis touching basic principles. The criminal law today is less an abstraction than formerly, and more an instrumentality for dealing with human beings and human problems. There are evidences of more flexibility in it. There is less strict adherence to legal formulas, more stress upon administration; less emphasis on rules of law, more on human motivation and behavior; less deference to absolutes, more willingness to accept the findings of research; less assurance as to the infallibility of law, more humility and more emphasis on social consequences. The writer has sought to single out some of these trends. He is deeply sensitive to the fact that this is a subject on which judgments may vary profoundly, and that it is one which requires much more extensive analysis and description than can be given it within the confines of a magazine article.

EVOLUTION OF THE *Mens Rea*

Deeply rooted in the history of the criminal law is the concept of *mens rea*. An essential element of a crime lay in the intent with which the act was done. Stephen contended that the maxim *actus non facit reum nisi mens sit rea* was an unfortunate one since "there is no one such state of mind."² Stephen's problem was one of nominalism. The *mens rea* concept is a general one, and as such it has performed a salutary part in the development of the criminal law. What Stephen, perhaps, did not foresee was that his statement had a broader implication than that toward which his criticism was directed. Under the impact of the evolving mores, the maxim has proved to be too sweeping. The *mens rea* concept, while still a major factor in the establishment of criminal guilt,³ has, in the last century, undergone substantial modification.

A deeper insight into physiological and psychological factors with respect to their bearing on human behavior has worked some change in the meaning of *mens rea*. Traditional rules, even when both harsh and unreasonable, have a tenacity about them. The common-law view as to responsibility for acts committed while drunk still holds but some courts are showing an awareness of the findings of experts in this field and are seeking to soften the strictness of the common law.⁴ There is enlightened discernment in dealing with behavior problems of children and

2. II STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, 95 (1883).

3. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500, 71 S. Ct. 857, 862 (1951).

4. CROTHERS, *Criminality From Alcoholism*, 4 J. CRIM. L. AND CRIMINOL. 859 (1914); Haggard and Jellinek, *ALCOHOL EXPLORED* (1942); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 427 (1947).

mentally immature adults, and this has stimulated legislation, some of major import; for example, the Juvenile Court Acts and the Youth Correction Authority Acts. Inquiry into motivation, too, is becoming a factor of increasing significance.⁵ This has been most evident in the administration of the criminal law, into which there has been introduced a liberal measure of individualization, particularly in the granting of probation and parole.⁶ Individualization in a limited sense can also be exercised by the courts, under a wide discretion resting in them as to some crimes, in the fixing of penalties.

The expression, "malice aforethought," while still in common usage by the courts and in legislation, has been critically analyzed and, except as to murder in the first degree where the words "deliberate and premeditated malice" have significance,⁷ has been found to mean no more than intending wrongfully to do an act dangerous to life.⁸ This analysis has also brought into relief a fallacy in the doctrine of "constructive" crime, and has resulted in limiting its application. The doctrine had bearing principally in homicide. If an accused killed another in the course of the commission of *any* felony, he was guilty of murder, though the killing was not intended. This raised an apparent discrepancy between legal and moral guilt. While there is today no clear consistency in court decisions on this issue, the tendency is, in sustaining a murder charge, to require an act known to be dangerous to life.⁹

The status of *mens rea* in criminal negligence is somewhat obscure. The conception of negligence developed tardily in the law. It has had its principal application in the law of torts, and criminal cases based on negligence were, a century ago, comparatively rare. Now with the advent of the automobile and other dangerous instrumentalities, criminal actions founded in negligence and involving charges of assault and battery, assault with intent to kill, assault with a dangerous weapon, manslaughter, and even murder, are common. Criminal charges are being employed to control and discourage the reckless use of these instru-

5. *Rex v. Steane* (1947) 1 All E. R. 813. And see particularly the comment on this case, UNGER, *Motive and Intent in Criminal Law*, 14 SOL. 151 (1947).

6. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 163 (1947).

7. *People v. Caruso*, 246 N.Y. 437, 159 N.E. 390 (1927); *Bullock v. U.S.*, 122 F.2d 213 (1941); WECHSLER AND MICHAEL, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 1261 (1937).

8. HOLMES, *THE COMMON LAW*, 52-54 (1881); REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES, 23-24 (1879); *Turner v. Com.*, 167 Ky. 365, 180 S.W. 768 (1915).

9. *Some Points in the Law of Murder*, 67 JUST. P. 519, 531 (1903); L. HALL, *The Substantive Law of Crimes — 1887-1936*, 50 HARV. L. REV. 616, 642 (1937); *Wellar v. People*, 30 Mich. 16 (1874); *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924); *Reg. v. Serné*, 16 Cox C.C. 311 (1887). Cf. reasoning in *Director of Public Prosecutions v. Beard* (1920) App. Cas. 479, 12 A.L.R. 846.

mentalities. Since *mens rea* was an essential element in crime, the courts were forced into an extended process of rationalization to find it. Was mere negligent conduct to be the equivalent of *mens rea*? What was to be the standard of care? Was that standard the same in the criminal law as in tort? The answer was that criminal negligence had to be distinguished. It had to appear that the accused's act amounted to a crime.¹⁰ To sustain a criminal charge his conduct had to be culpable.¹¹ Holmes gave the answer that made sense. "An act causing death," said he, "may be murder, manslaughter, or misadventure according to the degree of danger attending it by common experience in the circumstances known to the actor." If a man should kill another, he went on to say, "by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. If he did no more than drive negligently through a street he might get off with manslaughter or less." The criterion in such cases "is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct."¹²

What merits emphasis is that the objectives in criminal law administration are in a process of evolution, and that this is entailing a modification in the meaning of *mens rea*. The trend is away from punishment as an institution and toward punishment as a means to an end, as a means of social protection.¹³ This trend has had its most striking manifestation in the growth of strict-liability or public-welfare offenses. The beginnings of this development were inconspicuous. Today it is having a mighty impact on law administration. It is a doctrine which in various areas of human activity subjects the individual to criminal penalties for the doing of an act without regard to what his intent may have been. Mistake of fact, though reasonable, is not a defense. The doctrine does not have general application, but as to particular acts it baldly announces "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance."¹⁴

10. *Rex v. Bateman*, 19 Cr. App. R. 8 (1925).

11. *People v. Angelo*, 246 N.Y. 451, 159 N.E. 394 (1927).

12. Holmes in *Com. v. Pierce*, 138 Mass. 165, 178, 52 Am. Rep. 264 (1884), and in *Nash v. U.S.*, 229 U.S. 373, 377, 33 S.Ct. 780 (1912). This may be an over-simplification of what is really a confusing subject. He who explores it will encounter in court decisions and legislation a plethora of terms, e.g.: "negligence," "gross negligence," "culpable negligence," "reckless and wanton conduct," "reckless disregard of human life," and various others. What do they mean? For criminal liability the term "recklessness" with a connotation of moral culpability is preferable. In recklessness "the actor is conscious of a forbidden harm, he realizes that his conduct increases the risk of its occurrence. It is thus a form of intentional harm-doing in that it is volitional in a wrong direction." J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 217 (1947); MORELAND, *A RATIONALE OF CRIMINAL NEGLIGENCE* (1944).

13. SAYRE, *Mens Rea*, 45 HARV. L. REV. 974, 1017 (1932).

14. *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70, 30 S.Ct. 663 (1910).

Before the middle of the last century the courts had adhered strictly to the view, even in minor offenses, that no one was to be punished for crime without proof of *mens rea*. A defection from that position occurred in *Regina v. Woodrow*¹⁵ decided in England in 1846. In that case a dealer was held liable to pay a penalty, imposed by a statute, for having in his possession adulterated tobacco, although he had purchased it as genuine and had had no knowledge or cause to suspect that it was not genuine. A similar view was recognized in the United States in 1849 in *Barnes v. State*,¹⁶ and apparently without awareness of the English decision. From these early cases this doctrine has spread to a wide variety of areas. It is founded in statutory regulations that impose penalties for the doing of acts which the statutes have prohibited, or for a failure to perform duties which they have created. A characteristic of these statutes is that they make no mention of *mens rea* as a requisite to liability. With their enactment the courts were troubled over a momentous question: Were these statutes to be enforced as directed under a strict reading of their language, or was the element of *mens rea* to be implied? The decisions on this issue have not been uniform, but strict interpretation is gaining the day.¹⁷

The application of this doctrine was, at first, confined to minor offenses involving slight punitive sanctions. In the early stages of its development it moved into the areas of buyer-seller relations: the sale of adulterated foods, of narcotics, intoxicating liquor, drugs, misbranded articles, etc.¹⁸ The rationale for it was persuasive. The seller was in a better position to know the genuineness or the purity of the article sold than the buyer; hence he must sell at his peril. But it was not confined to these areas. A new and potent weapon for control had been discovered. If it was an effective measure as to minor offenses and simple relations, why not have it apply also to more serious crimes and more complex and obscure legal situations? It was resorted to in statutory rape cases and other sex offenses¹⁹ and in the control of motor vehicle thefts. It moved into areas of administrative law as an instrument for rent control and price administration.²⁰ It was of no avail to an accused who ran afoul

15. 15 M. and W. 404 (1846). The development of this doctrine is traced in SAYRE, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

16. 19 Conn. 398 (1849).

17. L. HALL, *The Substantive Law of Crimes—1887-1936*, 50 HARV. L. REV. 616, 644-645 (1937).

18. Discerning analyses of the import and scope of the doctrine can be found in SAYRE, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) and in J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 279 (1947).

19. Cf., PERKINS, *Ignorance and Mistake in Criminal Law*, 88 U. OF PA. L. REV. 35, 63-64 (1939).

20. *Gilbert v. Thierry*, 58 F. Supp. 235 (1944).

of this doctrine that the actual violation of the statute was by another, even though the accused was innocent of wrongdoing and the other intentionally violated, so long as the accused was the principal in the transaction.²¹ The rule and the *raison d'être* for it is stated in a recent opinion²² by Mr. Justice Frankfurter: "The offense is committed * * * by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

It is difficult to appraise the import of this development. That it is having a significant impact on the social and legal context of our time there can be no doubt. As to objectives, it is reasonably clear that the stress of the movement is less on punishment for wrongdoing, and more on social control and protection. It is a movement, typical of others in our day, in which the public interests are in the ascendancy over those of the individual. For the individual it has grim forebodings. He is reconciled to, if, indeed, he does not approve, the application of the doctrine to police and other minor regulations, but when employed in more serious measures, it strikes him as arbitrary and unjust. In its wider social implications the movement is tinged with capriciousness and appears not to have adequate brakes to stop it or to slow it down, unless, perhaps, they are to be applied through the due process clause of the Constitution. The development calls for an early and thorough evaluation by our legislative bodies and the courts as to its impact upon human integrity and welfare.

MENTAL DISEASE

The subject of mental disease or insanity does not, perhaps, qualify as a topic for discussion under the title of this article. Many will agree, if not insist, that there has been no significant development in this field of the criminal law during the last century. The significant event was in 1843 when the Lord Justices in *M'Naghten's Case*²³ gave their an-

21. U.S. v. Parfait Powder Puff Co., Inc., 163 F.2d 1008 (1947).

22. U.S. v. Dotterweich, 320 U.S. 277, 284-285, 64 S.Ct. 134 (1943).

23. 10 Clark and Fin. 200 (1843).

swers to the questions addressed to them by the House of Lords. The famous rules they laid down in that case were not an innovation as is sometimes thought. They were the issue of an evolution of thought and expression on this subject by writers and judges of that time.²⁴ A verdict of not guilty on the ground of insanity had been rendered in a sensational murder case. The verdict having been made the subject of debate in the House of Lords, it was resolved by that body to take the opinion of the Judges on the *law* governing such cases. The rules or tests laid down by the Judges in their opinion are a landmark in the criminal law. They, and particularly the "right and wrong" test announced in that case, have served as points of departure for discussions, and, indeed, for explosive criticisms from the time that opinion was written to the present day. Very rarely, if ever, has any rule of law been so extravagantly and caustically censured as the "right and wrong" test of *M'Naghten's Case*. The weight of the criticism has come from scientific experts²⁵—psychologists and psychiatrists—but lawyers and judges too have stated their disapproval of these rules.²⁶ Notwithstanding, the "right and wrong" test of *M'Naghten's Case* has tenaciously withstood these onslaughts for over a century. It is the test that the courts use today in instructing juries in nearly all Anglo-American jurisdictions whenever the issue of insanity is raised as a defense in a criminal case. A few of the United States have added the irresistible impulse test.²⁷

How has it been possible for these rules to survive? The criticisms of them have substance. The rules are based on what is now an untenable view that the brain is divisible into compartments. More enlightened understanding of this subject takes the position that there is unity in the mental process. If an individual's mind is in disorder, he no longer thinks and acts as he formerly did; his motivations are changed and are unpredictable; his desires, perceptions and volitions are altered; he is a changed being. Delusions, hallucinations and "disorders of the impulse or of the inhibitory function" are not the mental disease, but are evidences of the disease.²⁸ This conception of mental disorder should, it would seem, have profound implications as to criminal responsibility.

24. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*, 161-162 (1925).

25. These criticisms are discussed in J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 477 (1947).

26. *Parsons v. State*, 31 Ala. 577 (1886); *State v. Pike*, 49 N.H. 399 (1869).

27. WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW*, 15-16 (1933). New Hampshire has rejected both the "right and wrong" and the irresistible impulse test.

28. GLUECK, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 175-177 (1928). MERCIER, *CRIMINAL RESPONSIBILITY*, 103-104 (1926); *The McNaughton Rules*, 10 SOL. 53 (1943).

Why then have these rules, and particularly the "right and wrong" test, been retained?

An attempt to answer this question must, of course, be a matter of conjecture and as such it may be off the mark. The conservatism inherent in the evolution of the law has probably been a factor. The circumstances that gave rise to and the rendering of the opinion in the *M'Naghten Case* may be another factor. This was no mere opinion in a legal controversy. The rules were formulated by distinguished judges in answer to questions submitted to them by the House of Lords. They were a crystallization of the opinions of judges and writers of that day. With a judicial landmark of so great authority and import to guide them, it is not to be wondered that future generations of judges clung to it as a precedent. Also, the "right and wrong" test, which is the focal one of the rules, has a core of validity that has never been dispelled. What may be a very cogent reason for the survival of the rules has its root in the nature and totality of the criticisms directed at them. The plain fact is that the scientific experts on this subject speak a discordant language. They do not agree among themselves. Their words often are vague and confusing. The processes of the law move slowly, but when science has blazed a clear trail, enlightened judges will travel it, and where they go, others will follow, hesitatingly and falteringly perhaps, but follow they will. And so eventually the trail becomes a beaten path of the law. But the law will not move in where the trail blazers are in disagreement on the route to be followed.

But while *M'Naghten's Case* has withstood the storms of a century, this field of the criminal law has not been wholly devoid of change. Procedural measures have been established which alleviate to some extent the irrational administration of the *M'Naghten* rules. These measures include: (1) the appointment of impartial expert witnesses by the court, (2) the commitment of the accused, when insanity is in issue, to a hospital for observation, and (3) the Briggs Law type of examination.

One of the objectionable features of a trial relates to practices in the admission of expert testimony. Each litigant in a trial has the legal privilege of calling his own witnesses. This is a precept of the law, and one that is basic to a fair trial. But when hired experts are called by each side, this procedure is often debased and resolves itself into a battle of mercenaries. It is under clashes such as this that the issue of insanity is often litigated. The situation calls for impartial experts. Approximately twenty states have in recent years enacted salutary legis-

lation authorizing the trial court to appoint experts.²⁹ Illustrative of this movement is Rule 28 of the new Federal Rules of Criminal Procedure. Under this rule the court may order the parties to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court may appoint any witness agreed upon by the parties, and it may appoint witnesses of its own selection. After appointing a witness, the court is directed, at a conference in which the parties may participate, to inform him of his duties. The witness so appointed is to advise the parties of his findings and he may thereafter be called by the court or any party to testify. The parties may also call expert witnesses of their own choosing.

A number of states have enacted statutes which authorize the court, when insanity is in issue, to commit an accused to a state hospital for observation. These statutes vary in language and in scope. In some the accused may be committed for observation on the issue either of insanity at the time of the alleged criminal act, or at the time of the trial; in others commitment may take place only when the issue relates to the accused's mental capacity to stand trial.³⁰ The New York statute,³¹ for example, provides that when it shall appear that an accused indicted for felony or misdemeanor, because of idiocy, imbecility or insanity, is "incapable of understanding the charge * * * or of making his defense, or if the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity." The examination in cases arising outside of New York City are made by two qualified psychiatrists designated by the superintendent of the hospital. In New York City the director of the division of psychiatry designates the psychiatrists. Following the examination a report is made on whether or not the accused is at the time of the examination capable of "understanding the charge against him * * * or of making his defense." This report is filed with the clerk of the court. It is subject to inspection on order of the court, but is not received in evidence at the trial.

The celebrated Briggs Law³² is broader in scope and implications

29. WEIHOFEN, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 963 (1950). There are numerous other good articles. An impetus to the movement of appointment of experts by the court was the Uniform Expert Testimony Act drafted by the National Conference of Commissioners on Uniform State Laws.

30. WEIHOFEN, *supra*, note 29, 965-971.

31. N. Y. Code of Crim. Proc. secs. 658, 659, 662 (1950).

32. Laws of Mass. c. 123, sec. 100A. For appraisals of the Briggs Law see OVERHOLSER, *The Briggs Law of Massachusetts: A Review and an Appraisal*, 25 J. CRIM. L. AND CRIMINOLOGY 859 (1935); WEIHOFEN, *supra*, note 29, 971-974; GAULT, CRIMINOLOGY, 402 (1932).

than the above. It projects a program of discovery. It provides that whenever a person is indicted for a "capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted * * * or bound over for trial * * *, the clerk of the court * * * shall give notice to" the State Department of Mental Diseases, "which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." The statute directs the department to file a report of its investigation with the clerk of the court in which the trial is to be held. This report is made accessible to the court, the probation officer thereof, the prosecuting attorney and the attorney for the accused. The aim of the statute, it is to be observed, is to set up a routine of psychiatric examination. This law is, perhaps, the most significant step yet undertaken toward setting up a working arrangement between the criminal law and psychiatry.³³

CRIMINAL RESPONSIBILITY OF CORPORATIONS

The view was long held that a corporation could not commit a crime. The situation posed was paradoxical. The corporation was a creature of the law; it existed only by sufferance of law but the law, once having established it, could not touch it on matters involving criminal responsibility. This artificial being could perform many acts a natural person could do, and some he was incapable of doing, but since it did not have a mind it could not have the *mens rea* for crime. Said Lord Holt in 1701, "A corporation is not indictable, but the particular members of it are."³⁴ As late as 1922 the English Court of Criminal Appeal held that a corporation could not be "committed for trial."³⁵ But in 1944 the Court of Criminal Appeal held that an indictment for a common-law conspiracy would lie against a corporation. The court took the broad view, subject only to exceptions "arising from the limitations which must inevitably attach to an artificial entity," that corporations

33. For other developments in the area of mental disease, see WEIHOFEN and OVERHOLSER, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959 (1947); WOODBRIDGE, *Physical and Mental Infancy in the Criminal Law*, 87 U. OF PA. L. REV. 426 (1939).

34. Anonymous, 12 Mod. 559, 88 Eng. Rep. R. 1518.

35. *Rex v. Daily Mirror Newspapers* (1922) 2 K.B. 530, 541. The point was a subtle one. The company was indicted for corrupt practices. It was found guilty and fined. The question turned on the expression "committed for trial" used in the Grand Juries (Suspension) Act. The defense argued that a corporation could not be "committed for trial." Counsel for the prosecution described this as an "attractive technicality." Lord Hewart, while recognizing that the question raised was not one of substance, said: "It is nevertheless a valid point of law." This was clarified by the Criminal Justice Act of 1948, which authorized prosecution of corporations by indictment.

are indictable for crime.³⁶ In another English case, decided the same year, the Court of Appeal held that a corporation could be indicted and convicted of a crime which involved an intent to deceive.³⁷

In the United States the evolution of the law on this subject parallels that of England. Wholehearted acceptance of the view that corporations are fully amenable to criminal prosecution is, to be sure, a recent development—so recent, indeed, that counsel are still raising the issue in defense of their clients. It is perhaps surprising, in view of the prominent place the corporation has occupied in the economic affairs of a great industrial era, that this change has occurred without fanfare. Be that as it may, the transition is very nearly universal, subject only to occasional defections as to crimes requiring a showing of specific intent.³⁸

CONSPIRACY

The modern crime of conspiracy had its origin in the English court of Star Chamber. It was a potent creation, and one that has been viewed with apprehension from its beginning to the present day.³⁹ Not only did the Star Chamber fashion the crime; it gave the offense vitality and injected into it an ominous element that ever since has characterized it. The Star Chamber was a fitting agency for this enterprise. Hudson, a friendly critic, wrote of it that in the Star Chamber "all offences may be here examined and punished, if it be the king's pleasure,"⁴⁰ and that "by the arm of sovereignty, [it] punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or [it] giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea although no positive law or continued custom of common

36. *Rex v. I. C. R. Haulage, Ltd.* (1944) 1 K.B. 551, 554. The court mentioned among the exceptions, at p. 554: "perjury, an offence which cannot be vicariously committed," bigamy, and "offences of which murder is an example, where the only punishment the court can impose is corporal, the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of Guilty is returned, no effective order by way of sentence can be made."

37. *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.* (1944) 1 K.B. 146.

38. This trend is particularly significant in view of the numerous federal statutes imposing criminal liability on corporations. Good discussions of the subject can be found in the following: EDGERTON, *Corporate Criminal Responsibility*, 36 YALE L. J. 827 (1927); LEE, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928); W. J. D., *The Criminal Responsibility of Corporations*, 62 SCOT. L. REV. 212 (1946); New York Central R. R. v. U.S., 212 U.S. 481, 29 S. Ct. 304 (1909); *State v. Salisbury Ice and Fuel Co.*, 166 N.C. 366, 81 S.E. 737 (1914); *People v. Canadian Fur Trappers' Corp.*, 248 N.Y. 159, 161 N.E. 455 (1928); *Golden Guernsey Farms v. State*, 223 Ind. 606, 63 N.E.2d 699 (1945).

39. II STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, 227-229 (1883); 8 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, 378-384 (1926); SAYRE, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); HARNO, *Intent in Criminal Conspiracy*, 89 U. OF PA. L. REV. 624 (1941).

40. *A Treatise on the Court of Star Chamber*, 2 HARGRAVE, *COLLECTIANEA JURIDICA*, 62 (1792).

law giveth warrant to it.”⁴¹ In another passage he characterizes the court as acting as the “curious eye of the state and king’s council prying into the inconveniencies and mischiefs which abound in the Commonwealth.”⁴² It would appear that the modern crime of conspiracy is proving itself worthy of its creator.

The principal development in this field in recent years has had to do with the nebulous expansion of the crime through legislation and judicial decisions, and the increasing resort to conspiracy charges on the part of prosecutors and particularly by attorneys for the United States. The growing dangers incident to conspiracy indictments were stressed in 1925 by the Senior United States Circuit Judges in their recommendations to the district judges. “We note,” said they, “the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.” They expressed concern over the general impression “that this method of prosecution is used arbitrarily and harshly,” and over the fact that the “rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.”⁴³ Directing his remarks to another phase of the growing hazards for individuals accused of criminal conspiracy, Judge Learned Hand emphasized the fact that “many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders.” That there are, he pointed out, “opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.”⁴⁴ Notwithstanding these admonitions by respected senior judges, the objectionable practices attendant upon conspiracy prosecutions have not abated, but, indeed, have increased.

In the last decade much public attention has centered upon conspiracy indictments in relation to anti-trust cases, war-crime trials, and the use of these indictments as a device for reaching the members of disloyal or subversive organizations. Public interest in cases of this sort should not, however, divert attention from the pervasiveness of this doctrine. Mr. Justice Jackson, in a very able concurring opinion in *Krulewitch v. United States*,⁴⁵ has marshalled the dangers and pitfalls

41. *Id.*, 107.

42. *Id.*, 126.

43. Rep. of the Atty. Gen. (1925) 5-6.

44. *U. S. v. Falcone*, 109 F.2d 579, 581 (1940).

45. 366 U. S. 440, 445, 69 S. Ct. 716 (1949).

that lurk for the accused in a conspiracy case. He prefaced his opinion by stating that the *Krulewitch* case, which involved a prosecution for inducing a woman to go from one state to another for the purpose of prostitution, "illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense."⁴⁶ He traced its history to the crime fashioned by the court of Star Chamber. "Conspiracy in federal law," he pointed out, "aggravates the degree of crime" over that of the unconcerted offense; it fosters a doctrine which "will incriminate persons on the fringe of offending."⁴⁷ A co-defendant in a conspiracy trial "occupies an uneasy seat." There generally is evidence of wrongdoing by someone but it is difficult for the co-defendant "to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."⁴⁸ There is a steady expansion in conspiracy trials of the doctrine under which the acts and intentions of one person are imputed to another. There seems to be no logical limit, Justice Jackson believes, "to the 'implied conspiracy,' either as to duration or means, * * *. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court."⁴⁹

Another highly disturbing feature for an accused in this elastic crime relates to its venue. Under the Sixth Amendment to the Constitution he has the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." A conspiracy charge eludes the confines of this Amendment. Its leverage lifts the limitation of the Amendment "from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object."⁵⁰

It would seem that prosecution for criminal conspiracy, ever with implications of evil for the individual from the time the ingredients of the offense were brewed in the Star Chamber, is today a serious threat to the liberty of the individual, and, by that token, a factor unwholesome to the general welfare. Mr. Justice Jackson has ably summarized the issues for us:⁵¹

46. *Id.*, 336 U.S. 445.

47. *Id.*, 449, 450.

48. *Id.*, 454.

49. *Id.*, 456.

50. *Id.*, 452.

51. *Id.*, 457.

There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.⁵²

IMPACT OF SCIENTIFIC RESEARCH

The criminal law is the dominant factor in crime repression. The assumption is that crime control is a question of law. This is an assumption that should be re-evaluated. The why of criminal behavior is a question of fact. The mission of the criminal law is to establish sanctions. But law does not, or at least should not, operate *in vacuo*. It should be grounded in fact, and the facts of crime are exceedingly complex. They touch the etiology of crime; they involve the physiological and mental make-up of the individual; his environment, etc. These factors are all interrelated. If we are to know about crime we must know about the totality of influences that make the criminal. Hodgepodge, unorganized factors are useless. "Scientists strive to organize their knowledge in interrelated general propositions, to which no exceptions can be found."⁵³ Thus we may learn what made the individual behave as he did. The next question is to find out what to do about it. This involves the application of prophylactic measures and this process must be as painstaking as the diagnosis. Here we may encounter a need for legislation. But if legislation is indicated, there first is the question, what is to be the nature of the legislation? What legislative measures promise to be beneficial? This is a question of policy. That factor having been established, the state (organized society) should then and then only express itself authoritatively through law. It should be the aim of the law, thus conceived in an understanding of the facts, to enact measures for crime repression. The law is an applied science. Its mission is to coordinate and sanction the forces for social control.⁵⁴ An essential factor in this conception is that measures designed for the control of human behavior through law must be founded in research.

52. The following discussions are helpful: O'BRIAN, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948); *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948).

53. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY*, 4th Ed., 3 (1947). Also, TAFT, *CRIMINOLOGY*, 43-53 (1950).

54. RADZINOWICZ AND TURNER, *THE MEANING AND SCOPE OF CRIMINAL SCIENCE, IN THE MODERN APPROACH TO CRIMINAL LAW*, 12-15 (1945).

The subject of scientific research is one that merits much more detailed discussion than can be given to it in these pages, for research is the great potential on which improvement in the criminal law and its administration must be based. To be sure, much of the research in this area up to now has been fumbling and inept,⁵⁵ but some that has been done holds forth much promise of things to come. So much, indeed, that the introduction of research on questions of criminal behavior can be rated as one of the major developments in this field in recent years. Too, it can be said in defense of the clumsiness which has characterized many of these research attempts that the scientific approach to the study of the criminal is a comparatively new undertaking. Beccaria published his famous little treatise on *Crimes and Punishments* in 1764. This was not a work of research; it was perceptive and reformative, and as such had a far-reaching influence. Beccaria advocated the prevention of crime rather than punishment—a wholesome approach, the importance of which has not even to this day been wholly realized. What was, perhaps, the first scientific approach to the study of criminal behavior was a pamphlet by Lombroso, *The Criminal in Relation to Anthropological Jurisprudence and Psychiatry*, published in 1876.⁵⁶ This pamphlet also marked the advent of the Positivist school of thought in which Lombroso, Garafalo and Ferri were the principal figures.

The encouraging fact today is that research on crime and criminal behavior is beginning to produce reliable data. One bewildering factor for the lawmaker persists. The researches of the scientists still disclose “a tendency to emphasize a particular approach or explanation: Proponents of various theories of causation still too often insist that the truth is to be found only in their own special fields of study, and that, *ex hypothesi*, researches made by those working in other disciplines can contribute very little to the understanding and management of the crime problem.”⁵⁷ But this narrowness of attitude is tending to disappear. There is a widening appreciation on the part of the researchers of the fact that each “discipline concerned with the explanation of human behavior may be able to contribute knowledge that is valuable now or in the future,” and a growing conviction that “debate on the superiority of this or that discipline should be closed.”⁵⁸ And well it should, for each of the respective disciplines is making contribu-

55. MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933).

56. ABRAHAMSEN, *CRIME AND THE HUMAN MIND*, 5-6 (1944).

57. S. AND E. GLUECK, *UNRAVELING JUVENILE DELINQUENCY*, 4 (1950).

58. SELLIN, *Sociological Study of Criminality*, 41 J. CRIM. L. AND CRIMINOL. 406, 409 (1950).

tions. The period of greatest productivity has been during the last thirty-five years. Beginning with Healy's pioneering work, *The Individual Delinquent*, published in 1915, and continuing to Sheldon and Eleanor Glueck's studies, *Unraveling Juvenile Delinquency*, published in 1950, a wealth of facts and information has been placed at the disposal of lawmakers and others charged with the planning of programs of crime repression and control.⁵⁹ These materials are uncoordinated but that is a task for those who must mold the policy of measures for crime control. The significant observation is that the administration of the criminal law has entered into an era of research.

CRIME SURVEYS

The 1920's are distinguished for the number of crime surveys that were made during that period. These surveys are representative of the way our society occasionally gives tangible expression to the gnawing pains of the crime problem. Witness the recent Kefauver investigation. Some of the surveys of the '20's were confined to cities; several were state-wide; they culminated in a sweeping national survey by the National Commission on Law Observance and Enforcement, commonly known as the "Wickersham Commission." The Cleveland Foundation, in 1922, sponsored the first of these surveys. It was "a study of the administration of criminal justice in the city of Cleveland. Detailed examinations were made of the police administration, of the activities of the courts, judges and prosecutors, of penal and correctional treatment, of the relation of psychiatry and medicine to crime, of the bar and its training, and of the relation of the press to crime."⁶⁰ It was followed by "Crime and the Georgia Courts," in 1924; "Report of the Minnesota Crime Commission," in 1926; "The Missouri Crime Survey," in 1926; "A Study of Crime in Memphis," in 1928; "The Illinois Crime Survey," in 1929; "Report of the Crime Commission of the State of New York," in 1929; "Preliminary Report of the Survey of the Administration of Justice in Oregon," in 1931, and several

59. Typical of the studies published are: BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (1916); BURGESS, *The Study of the Delinquent as a Person*, 28 AM. J. SOCIOLOGY 657 (1923); SHAW, *DELINQUENCY AREAS* (1929); S. AND E. GLUECK, *FIVE HUNDRED CRIMINAL CAREERS* (1930); ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1931); ALEXANDER AND HEALY, *ROOTS OF CRIME* (1935); J. HALL, *THEFT, LAW AND SOCIETY* (1935); KARPMAN, *THE INDIVIDUAL CRIMINAL: STUDIES OF THE PSYCHOGENETICS OF CRIME* (1935); TAFT, *Nationality and Crime*, 1 AM. SOCIOLOGY REV. 724 (1936); SELLIN, *Culture Conflict and Crime*, Social Science Research Council, Bull. 41 (1938); ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Vol. V, PRISONS (1940); CLINARD, *Rural Criminal Offenders*, 50 AM. J. SOCIOLOGY 38 (1944).

60. MORSE AND MOLEY, *Crime Commissions as Aids in the Legal-Social Field*, 145 ANNALS 68, 71 (1929).

others.⁶¹ The most extensive of them, from the point of view both of scope and man hours of labor, was the report of the National Commission. These were no small studies hurriedly dashed off; they were serious undertakings. The report of the Illinois Crime Survey covers over eleven hundred pages, and that of the National Commission fills nearly a bookshelf.

These studies are not primarily works of research, although much of the labor that went into them qualifies under that designation. They are descriptive. They were "the first attempts to study and describe the administration of the criminal law as a whole, that is, as a series of integrated processes conducted by a number of related institutions, and it is in this that their importance chiefly lies."⁶² Each of the surveys contains recommendations and advice, but they do not set up integrated programs for action. On the whole their results are perhaps disappointing. To some it must appear that a mountain was in labor and brought forth a mouse. But this is not a fair appraisal. Their tangible results, to be sure, are not many, but the conjectural ones are substantial. Prior to the surveys, "we knew much of what they have revealed, but our knowledge often lacked precision."⁶³ Bettman lists a substantial number of "major findings and recommendations" which he has derived from his analysis of these studies.⁶⁴ The surveys, he states, "have sown many seeds which have already taken root."⁶⁵ They opened the eyes of the people to the complexity of the crime problem, and they provided researchers with excellent data which can be used as starting points for further research. Also, they served the salutary purpose of an emotional exhaust for public indignation over the inept administration of the criminal law, and this, indeed, is a function not to be underrated.

SUBSTANTIVE REFORMS

The last century was marked by the introduction of a number of reforms touching criminal law administration and more specifically touching the individualized treatment of the criminal. Several of these reforms had their beginnings before the opening of the century, but all came to fruition in that period. They involved probation, parole, the indeterminate sentence laws, the habitual criminal statutes, public

61. BETTMAN, REPORT ON PROSECUTION, NAT'L COM. ON LAW OBS. AND ENF., No. 4, 48-49 (1931).

62. MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE, 268 (1933).

63. MICHAEL AND ADLER, *id.*, 314.

64. BETTMAN, REPORT ON PROSECUTION, NAT'L COM. ON LAW OBS. AND ENF., No. 4, 179-182 (1931).

65. *Id.*, 184.

enemy acts, sexual psychopath laws, the juvenile court acts, the Borstal system in England and extensive changes in penology in England, the English dominions and the United States, the Youth Correction Authority Act in the United States, and the English Criminal Justice Act.

Probation had its seeds in the common-law authority of the judges to suspend sentence. Attention was centered on it as a means of treatment for offenders through the work of John Augustus, a Boston shoemaker,⁶⁶ who in 1841 became a volunteer probation officer, working with drunkards confined to the city's jail. Massachusetts passed the first probation law in 1878. By 1940, forty-two states, "the District of Columbia, Alaska, Hawaii and Puerto Rico, and the United States Congress, had provided for the use of probation. * * * All states have established some form of probation treatment or specialized procedures for juvenile offenders."⁶⁷

It is difficult to evaluate the impact of probation. Clearly, it is not a cure-all for crime. A high standard of administration for it is essential. In all probability it would have a greater potential as a crime preventative if its administration were more adequate. The theory of it is sound. Imprisonment should be avoided whenever that is consonant with the public safety; probation makes that possible and, while the offender retains his liberty, it offers an approach for special care and individualized treatment.⁶⁸

The theory and practices relating to parole are similar to those governing probation, with this difference: Parole is granted by the parole authority after the individual concerned has served part of his sentence in a penal or reformatory institution, while in probation the execution of sentence to confinement is suspended by the trial court. Parole dates back to the last quarter of the eighteenth century. Early parole had to do with good prison conduct which resulted in a shortened sentence. Good-time allowances are still employed, principally as incentives to good prison behavior.⁶⁹ Conditional release probably was first employed in Australia in 1790 under the British "ticket-of-leave" system. The first parole law, as we know it today in its developed form, was enacted in New York in 1869, in a law authorizing the Elmira Reformatory. Its provisions were extended to state prisons by Ohio in

66. CHUTE, *THE DEVELOPMENT OF PROBATION IN THE UNITED STATES*, in GLUECK (Editor), *PROBATION AND CRIMINAL JUSTICE*, 225 (1933).

67. HALPERN, *PROBATION*, *ENCYC. OF CRIMINOLOGY*, 388, 389 (1949).

68. GLUECK, *The Significance and Promise of Probation*, in *PROBATION AND CRIMINAL JUSTICE*, 3-20 (1933).

69. BRUCE, HARNO AND BURGESS, *PAROLE AND THE INDETERMINATE SENTENCE*, 35 (1928).

1884. Since then the development has been rapid. All states now have parole laws.⁷⁰

The indeterminate sentence in the penal system is complementary to parole. Originally all penalties for crime were fixed. The indeterminate sentence is an innovation. Sutherland reminds us, however, that as early as the Inquisition these sentences were used, "for criminals were sometimes sentenced to prison 'for such time as seems expedient to the Church.'"⁷¹ In the United States the indeterminate sentence was written into the law authorizing the Elmira Reformatory in 1869. In 1889 New York passed a general indeterminate sentence law. By 1937 indeterminate sentence acts of varying scope had been passed in thirty-nine jurisdictions. In each of these jurisdictions the maximum period of imprisonment under an indeterminate sentence is the maximum term fixed by law for the offense. The minimum terms vary. Some jurisdictions authorize the judge, and one the jury, to fix the minimum and maximum terms within the limits prescribed for the offense. Others have adopted a more desirable feature and have given the power to parole boards to fix the period of imprisonment between the statutory limits.⁷² Indeterminate sentence laws apply only to some offenses, and in some jurisdictions only to some classes of offenders.⁷³ The whole movement is quite irrational. A favorable estimate of it is that it represents a trend toward greater administrative control of releases. No one can say in advance how long a prisoner should be confined. The decisive factor should be his fitness for release, and that can be determined only through a knowledge of the prisoner and scientific prediction based on that knowledge.

The purpose back of the habitual criminal and the public enemy acts, while it had a semblance of design for individualization, was quite distinct from that which stimulated measures initiating probation, parole and the indeterminate sentence. These acts for the most part were projected in periods of public revulsion against crime and the criminal. New York had a "second offense" statute as early as 1797, and Massachusetts enacted a habitual criminal statute in 1817. By 1900 nine states had passed similar statutes, and by 1920 seven more had enacted statutes of that sort. The wave of habitual criminal statutes reached its crest in the 1920's, after World War I, and as a result of the pressure of the crime commissions' reports. The New York Baumes

70. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY*, 4th Ed., 534-536 (1947); GIARDINI, *Parole*, *ENCYC. OF CRIMINOLOGY*, 285 (1949).

71. *Id.*, 516.

72. *Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation*, 50 HARV. L. REV. 677 (1937).

73. SUTHERLAND, *op cit.*, 517-518.

Law of 1926 was highly publicized. This act made mandatory life sentences for those who had been convicted of felony a third or fourth time. In the 1930's the trend was the other way. Connecticut repealed its law on this subject, and New York modified its law to make life imprisonment discretionary.⁷⁴

A wave of public enemy acts also reached its crest in the 1920's. They were passed in an effort to reach gangsters and organized crime. Association with known criminals was made a crime in New York; Michigan sought to make bearing a reputation as a criminal a crime; and New Jersey enacted a "Gangster Act" aimed at persons found in the possession of machine guns, and at members of a gang, or at persons who had been thrice convicted of being disorderly, or who had formerly been convicted of crime. Most of these acts were invalidated by the courts.⁷⁵

The sexual psychopath laws are of recent origin. They are a product of a growing understanding of the fact that sex offenders, although they may be legally sane, may, nevertheless, require special treatment. On the other hand, legislation may have been stimulated, as some believe, by a wave of public hysteria incited by irresponsible journalism.⁷⁶ Michigan enacted a sex offender law in 1937, which was declared unconstitutional. A valid act was passed in Illinois in 1938. Similar laws have been adopted in California, Massachusetts, Michigan, Minnesota, Ohio and Wisconsin. These laws were drawn to emphasize the civil nature of the proceedings, and to avoid the implications of criminal actions. The procedures under them are comparatively simple. They provide that when a person charged with an offense is suspected of being a sexual psychopath by an officer designated in the law,⁷⁷ the court, on representations made to it, may appoint two qualified psychiatrists to examine the offender. The examination is to determine whether the person is a criminal sexual psychopath. A report is filed with the court by the psychiatrists. This is followed by a hearing, which is held before trial on the criminal offense. If at this hearing it is found that the person is a criminal sexual psychopath, he is committed to an institution until cured. By the end of 1950 approximately one-third of the

74. BROWN, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640 (1945); SUTHERLAND, *op. cit.*, 531.

75. BROWN, *op. cit.*

76. SUTHERLAND, *The Sexual Psychopath Laws*, 40 J. CRIM. L. AND CRIMINOL. 543 (1950).

77. The official may be the state's attorney (Illinois), the attorney general (Illinois, Michigan), the district attorney (Massachusetts, Minnesota, Wisconsin), county attorney (Michigan), or the court (Ohio). In California any person may initiate proceedings.

states had enacted legislation for the detention and treatment of sex offenders or aggressive sexual deviates.⁷⁸

The common-law methods of dealing with children were harsh and extremely harmful.⁷⁹ A child under seven was incapable of having the *mens rea* for crime; between seven and fourteen there was a presumption that it was incapable of crime; otherwise, the child offender was given the same treatment, under the law, as an adult. It was not until near the middle of the nineteenth century that the public conscience began to bestir itself over this problem.⁸⁰ In 1870 Massachusetts passed a law requiring separate hearings for children in Suffolk County. In 1892 New York made provision for separate trials, dockets, and records for children under sixteen. Rhode Island set up a similar requirement in 1898. In 1899 Illinois passed the first Juvenile Court Act.⁸¹ The Illinois Act at once became a model for similar laws in other states. By 1904 juvenile court acts had been passed in twelve states, by 1912 there were twenty-two, and in 1945 all states had enacted this legislation.⁸² While the juvenile court is substantially an American institution, attention was given to it, during the period of legislative activity on this subject in the United States, through legislation in various other countries—in England, Switzerland, Canada, and Australia.⁸³

Opinions vary on the import of the juvenile court movement. One writer intimates that many of the changes have had little significance. Because of the necessity of preserving the juvenile's constitutional rights in the course of a hearing, he is of the opinion that most of the "alleged and apparent differences" in procedure "are merely superficial ones," and that the "changed nomenclature of the juvenile court represents no very significant departure from older methods."⁸⁴ He recognizes, however, that there have been improvements, the extent and degree of which depend heavily on the attitude and enlightenment

78. *Sex Offenders—Civil Commitment for Psychiatric Treatment*, 39 COLUM. L. REV. 534 (1939); *The Legal Disposition of the Sexual Psychopath*, 96 U. OF PA. L. REV. 872 (1948). A recent informative study on this subject is, REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER, State of Michigan (1951). "Illinois has two types of sex offender laws, a 1938 law providing special commitment proceedings in the case of individuals charged with a sex offense under the criminal law and a 1947 law applying to persons convicted of certain sex offenses, which permits their detention for further treatment upon expiration of their regular sentence." COMMITMENT AND RELEASE OF SEXUAL DEVIATES, Report prepared by Illinois Legislative Council, Pub. 103, 2 (1951). This is an excellent report.

79. EUGENE SMITH, *Criminal Law in the United States*, in PRISON REFORM AND CRIMINAL LAW (Russ. Sage Found.), 77-78 (1910).

80. LOU, JUVENILE COURTS IN THE UNITED STATES, 14 (1927).

81. TAPPAN, JUVENILE DELINQUENCY, 172 (1949).

82. TAPPAN, *op. cit.*

83. LOU, *op. cit.*

84. TAPPAN, *op. cit.*, 178-180.

of the respective judges who hear the cases. There is, of course, merit in this appraisal. Lou's appraisal is broader in perspective and is eminently fair.⁸⁵ The juvenile court, he believes, "is conspicuously a response to the modern spirit of social justice. It is perhaps," he goes on to say, "the first legal tribunal where law and science, especially the science of medicine and those sciences which deal with human behavior, such as biology, sociology, and psychology, work side by side. It recognizes the fact that the law unaided is incompetent to decide what is adequate treatment of delinquency and crime. It undertakes to define and readjust social situations without the sentiment of prejudice. Its approach to the problem which the child presents is scientific, objective, and dispassionate. The methods which it uses are those of social case work, in which every child is studied and treated as an individual."

The juvenile court development became the precedent for other movements. It soon was apparent that there was a class of offenders, too old for the juvenile courts, who also required treatment separate from that of the adult criminal. In response to this deepening discernment, England established in 1908 the famous Borstal system designed for offenders between the ages of sixteen and twenty-one.⁸⁶ The Borstal system is a "highly individualized form of institutional training and treatment followed by a closely supervised period of parole."⁸⁷ It now embraces thirteen institutions. "Some are walled. Others are completely open. Each institution has its own particular specialty."⁸⁸ This system deserves much more than cursory mention. It represents individualized treatment and care at its best. It is indicative of what can be accomplished through insight into the problems of youth and through enlightened and painstaking administration. By February 1, 1936, 13,294 individuals had graduated from Borstal training. From a "total English male prison population of 8,464, only 688, or 8.1 percent, of ex-Borstal lads were serving sentences of imprisonment, penal servitude, or preventative detention. By 1942, over 15,000 men in England, most of them married and owning their homes, had passed through a Borstal institution."⁸⁹

In the United States the first substantial plan aimed to deal with

85. *Op. cit.*, 2.

86. In 1936 the upper age limit was raised to twenty-three. Juvenile courts were established in England in 1908 by the Children Act. The Borstal system was established by the Prevention of Crime Act: RADZINOWICZ, *Present Trends of English Criminal Policy*, in *THE MODERN APPROACH TO CRIMINAL LAW*, 27, 30 (1945).

87. HEALY AND ALPER, *CRIMINAL YOUTH AND THE BORSTAL SYSTEM*, 57 (1941).

88. PHILLIPS, *The Federal Youth Corrections Act*, 15 *FED. PROB.* 3, 9 (March, 1951).

89. PHILLIPS, *id.*, 10; FRY, *The Borstal System*, in *PENAL REFORM IN ENGLAND*, ENG. STUDIES IN CRIMINAL SCIENCE, Vol. I (1946).

youth offenders in this age group was drafted by a committee of the American Law Institute. A model bill bearing the title, "Youth Correction Authority Act," was approved by the Institute in 1940.⁹⁰ The Act sets up a Youth Correction Authority, an administrative agency. It provides that the court, subject to some exceptions, shall commit to the Authority all persons under the age of twenty-one who have been convicted of crime. This Act, with some modifications, was enacted in California in 1941, in Wisconsin and Michigan in 1947, in Massachusetts in 1948, and by the Congress in 1950.

The Federal Youth Corrections Act was approved after ten years of work on it by the Judicial Conference of the United States. It creates, in the Department of Justice, a Board of Parole, and within that Board, a Youth Correction Division. The important features of the plan, as described by Judge Phillips,⁹¹ are "integration of correctional measures under a single body, segregation of youth offenders from adult offenders and segregation of classes of youth offenders, power to develop variety of treatment facilities, flexibility of operations in adapting particular forms of treatment to individual youths in accordance with their favorable or unfavorable responses, adequate supervision during conditional release, and focusing of effort on the important youth crime problem."

Prison administration is in a period of transition. In the United States there still are many prisons that are extremely backward. On the other hand, there are some that are being administered in accord with most advanced principles. Modern theory in penology stresses the rehabilitation of the prisoner through individualized and special treatment. The English Borstal institutions and, in the United States, those that are set up under the Youth Correction Authority Acts are examples of the most progressive types. The trend is toward specialization with emphasis on educational and work programs for the prisoners. Changes are being made in prison architecture from gloomy-walled enclosures to cottage-type structures for some of the inmates. Stress in administration is placed on a core of trained workers who have tenure in their positions. Prisoners are classified according to type in an effort to prevent one type from having harmful effects on another. Clinard points out that, "The development of classification is probably the most significant recent trend in prison work." In prison systems

90. ULMAN, *The Youth Correction Authority Act*, YEARBOOK, NAT'L PROB. ASS'N, 227 (1941); SELLIN, *THE CRIMINALITY OF YOUTH* (1940).

91. *The Federal Youth Corrections Act*, 15 FED. PROB. 3, 6 (March 1951). Judge Phillips was a member of the committee on Punishment for Crime of the Judicial Conference and chairman of a subcommittee that made the studies for and reported on this act.

complying with advanced practices, "Classification of prisoners, according to detailed sociological, psychiatric, psychological, educational, and medical examinations, has become a recognized part"⁹² of prison routine. In America classification of individuals and by institution has reached a high development in the federal prison system.⁹³

In England the forward-looking plan projected through the recent Criminal Justice Act deserves mention. Reforms in penology both in England and in the United States have been striking. In our impatience with current shortcomings, we must not lose sight of the progress that has been made. In identifying the principles that have governed these developments during the last century, Radzinowicz makes a discerning appraisal. As he views the situation, the following two principles emerge:

- (a) The system of punishment cannot be based exclusively on the nature of the crimes committed, but must also be conditioned by the personality of the offenders. The same kind of crime may be committed by entirely different types of criminals. Punishment must therefore be suited to different categories of criminals.
- (b) Punishment must not only be a reaction against the crime itself, but must also aim at preventing the offender from committing further crimes. It is therefore obvious, that if in certain cases the traditional punishment does not fulfil this latter function, it must be replaced by some other measure.⁹⁴

PROCEDURAL REFORMS

A number of changes, most of them in the last half-century, have been introduced which have tended to liberalize the formal and artificial criminal procedures of the common law. Some of the more significant of these involve: a marked decline in the role of the grand jury; a trend toward the simplification of indictments; the advent of and recourse to waiver of jury; the simplification, in some jurisdictions, of appeals and the broadening of the issues reviewable on appeal; the creation of the office of public defender; and, in a wider coverage, in part through legislation, in part through rules of court, revision and systemization of the whole field of criminal procedure through comprehensive undertakings such as the American Law Institute's Code of Criminal Procedure and the new Federal Rules of Criminal Procedure.

The grand jury, long a protective institution for the accused and a symbol of Anglo-American justice, has, with the evolutionary changes

92. CLINARD, *Prison Systems*, ENCYC. OF CRIMINOLOGY, 369, 381 (1949).

93. CLINARD, *id.*, 375; RADZINOWICZ, *English Prison System*, in *THE MODERN APPROACH TO CRIMINAL LAW*, 123 (1945); CRAVEN, *The Trend of Criminal Legislation*, in *PENAL REFORM IN ENGLAND*, 18 (1946); WEIHOFEN AND OVERHOLSER, *Commitment of the Mentally Ill*, 24 *TEX. L. REV.* 307 (1946); MORRIS, *Penal Reform*, ENCYC. OF CRIMINOLOGY, 290 (1949).

94. *Present Trends of English Criminal Policy*, in *THE MODERN APPROACH TO CRIMINAL LAW*, 27, 29-30 (1945).

of the passing years, become a cumbersome, and for most purposes an unnecessary, bit of machinery. It was abolished in England in 1933. It is on the decline in the United States, but here we have a complex situation. Under constitutional provisions in a number of states, indictment by a grand jury is required. In a few states constitutional provisions retain the grand jury but provide that it may be abolished by legislative action. A substantial number of states have eliminated the grand jury as a requirement and have made permissive prosecution by information in place of indictment. The statutes that have abolished the grand jury commonly have a provision for its retention for special situations. Under the Constitution of the United States, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Some states have similar constitutional provisions. The Federal Rules of Criminal Procedure⁹⁵ require indictment by a grand jury when the offense "may be punished by death," but permit waiver of indictment and prosecution by information for "an offense which may be punished by imprisonment for a term exceeding one year or at hard labor."⁹⁶

What are the factors that are effecting the decline of the grand jury? Over the years other safeguards have been created and these have caused its recession as a protective institution. What is perhaps the most important of these has been the introduction of a new procedure—the preliminary examination. The preliminary examination affords, at least potentially, a greater protection for the accused than the grand jury. Also, from the point of view of law enforcement, the preliminary examination is less expensive than the grand jury and much more expeditious. Even so, the grand jury has positive merits that must not be ignored. What is called for is a readjustment of its functions, not its complete elimination. The grand jury should be retained, as it has been in some jurisdictions, for special assignments. As an investigatory body searching into matters of public corruption and immorality, its performances are unexcelled.⁹⁷

A movement to simplify indictments became discernible seventy years

95. Rule 7 (a), 7 (b).

96. Much has been written about the grand jury. The following discussions are helpful: 1 HOLDSWORTH, *HISTORY OF THE ENGLISH LAW*, 321 (1922); MOLEY, *POLITICS AND CRIMINAL PROSECUTION*, 134 (1929); MORSE, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931); NAT'L COM. ON LAW OBS. AND ENF., *REPORT ON PROSECUTION*, No. 4, 34 (1931); DESSON AND COHEN, *The Inquisitorial Functions of Grand Juries*, 41 YALE L. J. 687 (1932); WARNER AND CABOT, *Changes in the Administration of Criminal Justice during the Past Fifty Years*, 50 HARV. L. REV. 583 (1937); Elliff, *Notes on the Abolition of the Grand Jury in England*, 29 J. CRIM. L. AND CRIMINOL. 3 (1938); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 135 (1947).

97. ORFIELD, *id.*, 191; *Reform in Criminal Procedure*, 50 YALE L. J. 107 (1940).

ago. New York passed a statute in 1881 providing that an indictment should contain only "a plain and concise statement of the act constituting the crime."⁹⁸ The same year Texas adopted its "Common Sense Indictment Act."⁹⁹ Massachusetts enacted a statute on this subject in 1899. The English Indictments Act of 1915 provided that an indictment is sufficient which states "with reasonable clearness" the circumstances of the offense.¹⁰⁰ Most states now have similar statutory provisions. The Federal Rules of Criminal Procedure state, "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."¹⁰¹ Procedures on amending informations are now fairly liberal, but amendments as to substance of indictments are not permitted since indictments must originate with the grand jury. For the clarification of indictments and to obtain additional facts, defense attorneys may now move for bills of particulars. The Federal Rules provide: "The court for cause may direct the filing of a bill of particulars."¹⁰² It must not be taken, however, that criminal pleadings are entirely simplified. Courts often still cling to old procedures. What is clear is that the general trend in criminal procedure is away from the cabala of the common law.

The jury has been the object of criticism for many years and various procedural changes have centered on it. The principal criticisms have involved the capriciousness of jury verdicts and the delays and expense incident to jury trials. Some reforms relating to the jury were introduced by statute in England as early as 1847. This statute permitted waiver of jury in some juvenile cases. The scope of this act was gradually extended by subsequent legislation until trial by jury in criminal cases has almost disappeared in England. In 1926 approximately ninety percent of the defendants charged with indictable offenses were dealt with in courts of summary jurisdiction.¹⁰³

In the United States such far-reaching changes have been impossible, if for no other reason, because of constitutional restrictions. There has, however, been an increasing extension of waiver of jury trials. Waiver of jury has been common in Maryland for many years. One writer states it has been permitted in that state for over two hundred years.¹⁰⁴ This practice has also been followed for some time in Connecticut and

98. N. Y. Code of Crim. Proc., §275.

99. JOHNSON, *Waiver of Indictment in Texas*, 1 TEX. LAW AND LEGIS. 22, 25 (1947).

100. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 202 (1947).

101. Rule 7 (c).

102. Rule 7 (f).

103. HOWARD, *CRIMINAL JUSTICE IN ENGLAND*, 307-310 (1931).

104. HANDLEY, *Some Observations on Waiver of Jury Trial in Criminal Cases*, 1 TEX. LAW AND LEGIS. 45 (1947).

West Virginia. Until 1930 the federal courts had construed the constitutional provision on trial by jury as a mandatory requirement for a jury in indictable offenses. That year the Supreme Court, in *Patton v. United States*¹⁰⁵ held that an accused in the exercise of free and intelligent choice and with the approval of the court may waive trial by jury. The Federal Rules of Criminal Procedure now provide: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."¹⁰⁶ The *Patton* decision gave a marked impetus to waiver of jury trials throughout the country. The practice varies from state to state. For instance, "in 1934 in the courts of general jurisdiction in Connecticut, New Jersey, and Wisconsin, there were more trials to the court than before a jury; in Wisconsin, seven times as many. But in Ohio jury trials were more numerous, and in California and Michigan they were twice, and in Pennsylvania four times as common as trials to the court."¹⁰⁷

While some misgivings have been expressed over the fact that the "criminal jury is smoldering to extinction,"¹⁰⁸ there can be little doubt that this trend is a salutary one. It has resulted "in speedier, cheaper, and more efficient trials and the elimination of unwholesome publicity in certain classes of cases."¹⁰⁹

Review of the judgments and sentences of the trial courts in criminal cases was, under the common law, extremely restricted. There was no appeal, properly so called. The trial judge could "reserve" a question for consideration by the whole body of judges. Writ of error was a matter of discretion and was for errors of law only. It was not until 1907 that an act was passed in England giving an effective right of appeal from conviction and sentence to a specially constituted Court of Criminal Appeal. An appeal can now be taken, under the English system, "by a simple notice, and without cost. The Court has amply justified its existence."¹¹⁰ The appeal is on the whole case. In the United States the question of review is in a stage of transition. On the whole, the situation is quite unsatisfactory, and there is urgent need in most states for a broadening and simplification of review procedures. A number of states permit a review of the evidence to ascertain whether

105. 281 U.S. 276, 50 S.Ct. 253 (1930).

106. Rule 23 (a).

107. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 391 (1947).

108. Quoted in HOWARD, CRIMINAL JUSTICE IN ENGLAND, 310 (1931).

109. ORFIELD, *id.*, 361; HOWARD, *id.*, 319; BETTMAN, REPORT ON PROSECUTION, NAT'L COM. ON LAW OBS. AND ENF., No. 4, 127 (1931); LIECK, *The Administration of Criminal Justice*, in PENAL REFORM IN ENGLAND, 33, 58 (1946).

110. LIECK, *id.*, 53.

it is sufficient to support the indictment or information and the verdict. Some follow a procedure of review upon exceptions.¹¹¹ The new federal rules are an example of the best practices in this country. "Petitions for allowance of appeal, citations and assignments of error" are abolished. The notice of appeal requires only the specification of some simple facts, the title of the case, the name and address of the appellant and his attorney, a concise statement of the offense, of the judgment or order and of the sentence imposed, a statement of the place of confinement if the defendant is in custody, "and a statement that the appellant appeals from the judgment or order."¹¹²

Indigent defendants who are without legal assistance are assigned counsel by the court. This is the practice that prevails generally throughout the United States. A public defender system, of a sort, had existed in a number of countries for some years, but it was not until 1914 that an office of public defender was created in America, in Los Angeles, California. Almost immediately it was carrying on a thriving business. The movement soon spread to other areas. Nebraska adopted a law in 1915 authorizing a public defender for cities of 150,000 or more. A more satisfactory program was set up in Connecticut. It covers the state and leaves to the counties no option to approve or reject the plan, as did the California act.¹¹³ Since then this movement has spread to other states, but its coverage is still very limited. It is a development aimed to provide equal justice for the poor and is in accord with the public spirit of our times. One of its supporters has made this brief but good appraisal of it: "The public defender plan is a progressive, logical adjunct to modernized criminal law administration. Emphasis thrown on prosecution should not be to the prejudice of the defendant without money. Through public defenders, many of the scandals of private defense will be abolished. Equal justice must come *by law*—not by favor or charity or by volunteer unpaid counsel, having no definite duty or responsibility to defend."¹¹⁴

LEGISLATION AND MOVES TO CODIFY

The American public has a naive faith in the efficacy of legislation. During the last half-century, the tide of legislation creating new statutory offenses and working procedural changes has been on the in-

111. NAT'L COM. ON LAW OBS. AND ENF., REPORT ON CRIMINAL PROCEDURE, No. 8, 18 (1931).

112. Rule 37 (a).

113. POTTS, *Right to Counsel in Criminal Cases: Legal Aid or Public Defender*, 28 TEX. L. REV. 491, 510-513 (1950).

114. GOLDMAN, *Public Defenders in Criminal Cases*, 205 ANNALS 16, 22 (1939). NAT'L COM. ON LAW OBS. AND ENF., REPORT ON PROSECUTION, No. 4, 32-33 (1931).

crease.¹¹⁵ The pressure upon the legislatures for the enactment of criminal statutes has been phenomenal. "A welter of special interests, specific abuses, publicized evils, and vague policies have dictated" the direction of this legislation. "One result of this has been to make everyone a criminal. * * * Such an indiscriminate use of the criminal law weakens its hold as the arbiter of respectable conduct."¹¹⁶ The general picture is one of patchwork and confusion. It must not be taken, however, that all this legislation has been haphazard. Some has been highly constructive. Witness the English Criminal Justice Act of 1948, the American Law Institute's Code of Criminal Procedure,¹¹⁷ the juvenile court acts, the various uniform acts aimed to bring law and order to the no-man's land between the jurisdictions of the separate states, and, through rules of court, the Federal Rules of Criminal Procedure. The Criminal Justice Act is "one of the great penological statutes of the century."¹¹⁸

In the offing is codification. Codification has been accomplished in all the leading continental countries of Europe, in some of the British colonies, in India,¹¹⁹ and, in 1950, the Philippines. Major attempts to codify the criminal law in England and the United States have been abortive. We have what are called criminal codes in this country, but most of these are no more than a compilation of statutory law on that subject. The penal codes of California and New York are examples of the more complete type of compilation.¹²⁰ The so-called Criminal Code of Illinois is an example of the more fragmentary type. The major efforts to codify the criminal law in this country and in England were the Livingston Code, proposed for adoption in Louisiana in 1824,¹²¹ and the Criminal Code Bill, commonly called the Draft Criminal Code of the Royal Commissioners, first introduced in England in 1878. The English Code Bill was drafted by Sir James Fitzjames Stephen. Both of these draft codes were exceptionally able executions, but both failed adoption.

In 1837 a commission proposed a code in Massachusetts but it, too, was not adopted. In 1865 a commission in New York submitted a

115. DEAN, *Organized Crime and Our Changing Criminal Law*, 37 COM. L. J. 379 (1932).

116. L. HALL, *The Substantive Law of Crimes—1887-1936*, 50 HARV. L. REV. 616, 622-623 (1937); LINDSEY, *Legislation on Crime in Twenty-Five Years*, 24 J. CRIM. L. AND CRIMINOL., 109 (1933); BAKER, *Legislative Crimes*, 23 MINN. L. REV. 135 (1939).

117. The Institute has recently submitted this Code to the National Conference of Commissioners on Uniform State Laws for study and revision.

118. *Magistrates' Notebook*, 15 SOL. 205 (1948).

119. KENNY, *OUTLINES OF CRIMINAL LAW*, 620-621 (15th ed. 1947).

120. DESSON, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER*, 393-394 (1948).

121. "There are some works and deeds which echo and reverberate from generation to generation and from age to age. Such is the work of Edward Livingston." MOORE, *The Livingston Code*, 19 J. CRIM. L. AND CRIMINOL. 344, 357 (1928).

draft code, the Field Code. This was at once adopted in the Dakota Territory, and in New York in 1881 "substantially in its original form."¹²² In the 1930's a draft code was submitted to the Illinois Legislature, but was not adopted.¹²³ Louisiana enacted a new Code in 1942.¹²⁴ A draft code was submitted to the 1951 session of the Wisconsin Legislature but failed adoption. The 1950 Code of Crimes of the Philippines, from the point of view both of draftsmanship and its basic philosophy, has promise of rating as a major accomplishment.¹²⁵

There are many indications that we are at the beginning of a period of revision and systemization of statutes and of codification, not only of the criminal law but of law generally. A number of states now have revisors of statutes, code commissions, and legislative councils or equivalent agencies. There is a clear public reaction against the plethora of laws. The risks of codification are real. The danger is that we shall freeze the status quo, and much is yet to be learned about human behavior. But reasons for codification also are real and they are urgent. Anglo-American criminal law has nowhere in it evidence of plan or design. That is its outstanding weakness. A great mass of judge-made law containing a mingling of ancient precedents, outgrown formulas, traditional beliefs, and some forward-looking expressions, supplemented by a large number of statutory provisions, constitutes the framework of the criminal law. A unity of aim is needed, and codification, when it comes, should be erected on that foundation. The emphasis in the criminal law still is on punishment for the deed. That should not be the main end. There are many factors to be considered, among them the individual and the public security. Punishment should be viewed as a procedure subordinate to social ends, and should be appraised along with other factors as to its effectiveness as an instrument for crime repression and control.

EXPANSION OF FEDERAL JURISDICTION

Federal jurisdiction over crime has been steadily expanding ever since the founding of our national government. The expansion has been most marked in the last half-century. Under the Constitution the federal government has restricted direct criminal jurisdiction, and in the early

122. DESSON, *op. cit.*

123. HARNO, *The Plan of the Criminal Code*, 24 ILL. B. J. 144 (1936).

124. MORROW, *The Proposed Louisiana Criminal Code—An Opportunity and a Challenge*, 15 TUL. L. REV. 415 (1941); MORROW, *The Louisiana Criminal Code of 1942*, 17 TUL. L. REV. 1 (1942); SMITH, *The Louisiana Criminal Code*, 5 LA. L. REV. 1 (1942).

125. "In its fundamental part (Book I), the draft leans toward the positivist school, which considers the man rather than the act itself." CODE OF CRIMES (Philippines), Prepared and Submitted by the Code Commission, 111 (1950).

period of the country federal criminal statutes were limited and simple. They bore the "imprint of the controversies or conditions of the time."¹²⁶ They were designed to punish those who interfered with the governmental processes, and were limited principally to crimes of treason, piracy, counterfeiting, perjury in the federal courts, bribery of federal officials, and to those common-law crimes which occurred in territory over which the federal government had exclusive jurisdiction. That the federal government moved cautiously at first into the domain of the criminal law was in no small part owing to the widely held suspicion that the new government had designs to increase the powers of the central government at the expense of those reserved to the states. In the delicately poised federal system under which our affairs of government, federal and state, are carried on, the problem of balance of power is a constant and major concern. In the early history this acted as a powerful restraint on the federal government. It is an issue today, but with the ever-increasing complexity of our affairs, which has exposed weaknesses in state and local government, the public conscience has become reconciled, albeit with well-grounded apprehensions, to expansions in federal authority.

What were the factors that caused this expansion in federal jurisdiction, and which influenced the change in public opinion? The federal criminal jurisdiction, according to Professor Schwartz, "is being employed in three different ways: (1) to punish anti-social conduct of distinctively, if not exclusively, federal concern; (2) to punish conduct of local concern, with which local enforcement authorities are unable or unwilling to cope; and (3) to secure compliance with federal administrative regulations."¹²⁷ It was necessary first of all for the government to protect itself against conduct that was harmful to the programs which it was conducting. For example, as the amount of mail carried by the government grew, it became necessary to set up criminal statutes aimed to prevent mail frauds and mail pilfering. But federal legislation did not stop with matters that involved distinctive federal assignments. As the complexity of our affairs increased and business and other transactions extended across state lines, it became apparent, if the public was to have protection against harmful practices associated with some of these transactions, that control measures would have to be set up by the Congress.¹²⁸ The expansion of this type of legislation was

126. CONBOY, *Federal Criminal Law*, in *LAW: A CENTURY OF PROGRESS*, 295, 300-301 (1937).

127. *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *LAW AND CONTEMP. PROB.* 64, 66 (1948).

128. The sanctions that were imposed are significant in still another way since they

rapid. It involved, for example, the Food, Drug and Cosmetic Act, the Fair Labor Standards Act, the Emergency Price Control Act, the laws relating to the control of the sale of securities, the revenue laws and so on.¹²⁹

The vantage of federal legislation having become apparent, there came pressures for further expansion of federal law and into new areas. Basically crime is a matter of local concern, but the states were not equipped to deal with organized crime. Organized crime operates on a national scale. Because of the impediment of jurisdictional restrictions, the states were helpless, and crossing from one state to another became a refuge for the criminal. Rapid transportation added to his facilities to play a game of hide-and-seek. It was impossible for the states to enforce laws against prostitution when prostitutes moved quickly from state to state; a state could not readily apprehend thieves who could rapidly transport themselves and the stolen goods from its jurisdiction;¹³⁰ the states were relatively helpless to arrest kidnappers so long as they were able to move themselves and their victims to another state;¹³¹ it was impossible for the states to control racketeering when hoodlums could operate in a different state each successive day.¹³² The states were able to extradite fleeing felons, but extradition was slow and uncertain.¹³³

That this situation would produce widespread public dissatisfaction and despair was inevitable. Federal action seemed the only way to cope with the problem, but it was not immediately apparent how the central government could intervene, since under the Constitution its direct jurisdiction over crimes was limited. Recourse was found by the Congress through its implied powers—through the commerce clause of the Constitution, through the postal power, and through the taxing power.¹³⁴ The significance of these developments and the forces that produced them were not lost on the Supreme Court. "Our dual form of govern-

paved the way for the "white collar crimes," and for the enactment of various criminal statutes that eliminated the necessity of proof of the *mens rea*, the "public welfare crimes."

129. MILLSPAUGH, *CRIME CONTROL BY THE NATIONAL GOVERNMENT* (1937).

130. J. HALL, *Federal Anti-Theft Legislation*, 1 *LAW AND CONTEMP. PROB.* 424 (1934).

131. BOMAR, *The Lindbergh Law*, 1 *LAW AND CONTEMP. PROB.* 435 (1934).

132. *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 *LAW AND CONTEMP. PROB.* 445 (1934).

133. TOY AND SHEPHERD, *The Problem of Fugitive Felons and Witnesses*, 1 *LAW AND CONTEMP. PROB.* 415 (1934).

134. FELLMAN, *Some Consequences of Increased Federal Activity in Law Enforcement*, 35 *J. CRIM. L. AND CRIMINOL.* 16, 19-20 (1944). The commerce clause has been used to prohibit interstate shipment of the following: lottery tickets, obscene literature, adulterated and misbranded foods and drugs, women for immoral purposes, prize fight films, stolen property, kidnapped persons, etc. The postal power has been used to prevent the sending of obscene literature, lottery tickets, threatening communications, etc. The taxing power has been extended to prohibit the sale of narcotics and firearms.

ment," said Mr. Justice McKenna, in sustaining the validity of the Mann Act.¹³⁵

has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

Whether or not these extensions are tending to unbalance our theory of a poised system of state and national powers, and, in the light of that theory, whether or not they are salutary is a debatable question. However that may be, it is apparent that a new and vigorous approach to crime control has opened up. The wave of kidnapping was abated because a federal act created a presumption, if the person seized had not been released within seven days, that he had been transported in interstate commerce. This statute made it possible for the F.B.I. to go into action. Al Capone was imprisoned for violation of the revenue laws, and federal agents were enabled to apprehend Roger Touhy, after his escape from prison, because a federal act raised a presumption that he had crossed state boundaries. The Kefauver Committee has recently recommended additional measures of this type aimed to tighten criminal law controls.¹³⁶

Beyond its immediate impact on crime problems, federal expansion of criminal jurisdiction has had the effect of spurring "the states and local units to increase efficiency in many phases of the administration of criminal justice."¹³⁷ The federal laws have tended to make the states more alert to the jurisdictional handicaps with which they have to cope. This has resulted in speeding up the passage of uniform state laws by the states, and of stimulating reciprocal agreements among the states, aimed to overcome these jurisdictional impediments. The federal programs have also tended to increase police efficiency and to restore public confidence in our police. Concurrent with the expansion of its criminal jurisdiction, the federal government built up exceptionally

135. *Hoke v. U.S.*, 227 U.S. 308, 322, 33 S.Ct. 281, 284 (1913). A history of the Mann Act is contained in Justice McKenna's dissenting opinion in *Caminetti v. U.S.*, 242 U.S. 471, 496, 37 S.Ct. 192, 199 (1917). The White Slave Traffic Act, commonly called the Mann Act, was passed in 1910.

136. U.S. NEWS AND WORLD REPORT, Apr. 20, 1951, p. 26, 31; N.Y. TIMES, May 2, 1951, p. 22; HALLEY, *The Kefauver Committee*, CONF. ON CRIM. LAW. ENF., U. Chi., Conf. Series 7, p. 34 (1951). "The investigation by the Senate Committee to Investigate Crime in Interstate Commerce was the most extensive inquiry into organized crime ever undertaken in this country." Report, AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME, 3 (Sept. 1951). This is a report by the Commission to the Association. The Report envisages a program involving state and federal action on organized crime and recommends specific measures of legislation.

137. DEAN, *Recent Extensions of Federal Criminal Law*, HANDBOOK ON INTERSTATE CRIME CONTROL, 143, 144 (1942).

efficient investigatory and police units. As these worked side-by-side with local police they introduced, in cooperation with local law enforcement agencies, informational services dealing with modern police methods and procedures. These contacts and programs have acted as catalytics upon local police administrations.¹³⁸

DUE PROCESS AND THE SUPREME COURT

Ever since the adoption of the Fourteenth Amendment there has been a constant flow of decisions by the Supreme Court giving scope to and defining due process. These decisions have had a marked effect on the criminal law and its administration. In *Barron v. Baltimore*,¹³⁹ decided in 1833, the Supreme Court held that the first eight amendments did not impose restraint upon state action, but were limitations only upon federal authority. With the adoption of the Fourteenth Amendment a controversy was started that still is not resolved, as to the extent to which the first eight amendments to the Constitution are incorporated in the Fourteenth. It also marked the beginning of the Supreme Court's role in state law enforcement. Two separate statements, taken from the opinions of two of the Justices of the Supreme Court, give perspective on this issue. "Although the Constitution puts protection against the crime predominately in the keeping of the States," said Mr. Justice Frankfurter,¹⁴⁰

the Fourteenth Amendment severely restricted the States in their administration of criminal justice. Thus, while the State courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this Court. Power of such delicacy and import must, of course, be exercised with the greatest forbearance. When, however, appeal is made to it, there is no escape.

The other is by Mr. Justice Black. "The scope and operation of the Fourteenth Amendment," he maintained,¹⁴¹

have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority.

The freighted question is, to what extent does the reviewing power of the Supreme Court "hang over" the state courts? Have the decisions

138. FELLMAN, *Some Consequences of Increased Federal Activity in Law Enforcement*, 35 J. CRIM. LAW AND CRIMINOL. 16, 24, 31-32 (1944).

139. 7 Pet. 243 (1833).

140. *Watts v. Indiana*, 338 U.S. 49, 49-50, 69 S.Ct. 1347, 1348 (1949).

141. *Chambers v. Florida*, 309 U.S. 227, 235, 60 S.Ct. 472, 476 (1940).

of the Supreme Court moved in their course so far that the guarantees of the first eight amendments, first erected against "those in positions of power and authority" in the federal orbit, are now also guarantees against those in positions of power and authority in the state orbit? This is difficult to answer. It would appear, though, while the line bounding the area of restraints on state action is wavering, that the two areas, federal and state, are today nearly conterminous. Mr. Justice Cardozo has reasoned ably that the due process provision does not embrace all of the first eight amendments, but only those liberties that are "of the very essence of a scheme of ordered liberty,"¹⁴² which to abolish or deny would be to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁴³ In the *Palko* case he enumerated much of what he thought was implicit in the "scheme of ordered liberty." That opinion was written in 1937. The position of the Supreme Court, as more recently defined, is that there are no set lines; that what the due process provision encompasses must vary as our conceptions of what is right change. In *Wolf v. Colorado*,¹⁴⁴ Mr. Justice Frankfurter, while stressing that the Court has rejected the notion that "'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments," went on to say that due process of law "conveys neither formal nor fixed nor narrow requirements," and that it is "of the very nature of a free society to advance in its standards of what is deemed reasonable and right." Representing as it does a living principle, he emphasized, "due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."¹⁴⁵

142. *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937).

143. *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934).

144. 338 U.S. 25, 26-27, 69 S.Ct. 1359, 1360-1361 (1949).

145. An analysis of the application of the due process provision to each of the first eight amendments would involve extensive treatment that cannot be covered in this article. The following are some of the more important decisions of the Supreme Court bearing on this subject. *Searches and Seizures*: *Boyd v. U.S.*, 116 U.S. 616, 6 S.Ct. 524 (1886); *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341 (1914), the *Weeks* case had a profound effect on decisions by state courts; *Olmstead v. U.S.*, 277 U.S. 438, 48 S.Ct. 564 (1928), holding wire-tapping not illegal search; *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494 (1946); *Shapiro v. U.S.*, 335 U.S. 1, 68 S.Ct. 1375 (1948); *U.S. v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430 (1950), search incident to arrest; *Nardone v. U.S.*, 302 U.S. 379, 58 S.Ct. 275 (1937), wire-tapping illegal under communications act; *PLUMB, Illegal Enforcement of the Law*, 24 CORN. L. Q. 337 (1939); *WAITE, Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944). *Self-Incrimination*: *Boyd v. U.S.*, 116 U.S. 616, 6 S.Ct. 524 (1886); *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195 (1892); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908); *CORWIN, The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930). *Confessions*: *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936); *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472 (1940); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944), 36 hours of interrogation "inherently coercive"; *McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608 (1943),

There is a variance in views as to the import of this development. Concern has been expressed that the restraints imposed by the Supreme Court have resulted, not in the improvement of the procedures and methods of the police, but in more serious police misbehavior. Apprehensions over the trend of the Court's decisions have been expressed not only by law enforcement officers, but, in dissenting opinions, by some of the justices of the Court. What is, perhaps, a more significant misgiving relates to the effectiveness of the impact of the decisions on law administration. Are the holdings of the Court in reality a deterrent on actions of over-zealous officers? Do they tend to create better police methods and behavior? The doubt centers in the fact that of the great number of criminal cases, only on rare occasions is one appealed to the Supreme or even to an appellate court. This argument actually brings into review the effectiveness of all appellate procedure. It has some merit. Even so, what is the alternative? Is the Bill of Rights to be ignored as meaningless, or at best, to be regarded as a mere collection of pious expressions? If the Bill of Rights is to have meaning and substance in our scheme of government, its guarantees must be made to speak with authority. The decisions of the Supreme Court give them vitality, and the weight of these decisions is felt. It may be debatable whether the first eight amendments should be made restraints on state agencies by the indirect route of the due process provision. But are we not one people? And if the amendments are a bulwark against the misuse of federal power, then should they not also be a bulwark against the misuse of power, whatever its source?¹⁴⁶

THE WAR-CRIME TRIALS

In many respects the war-crime trials have constituted, at least in the aims that prompted them and in their potentials, the most significant development in the criminal law during the last century. World War II,

if an accused who has made a confession was not taken promptly before a magistrate the confession is not admissible; *Upshaw v. U.S.*, 335 U.S. 410, 69 S.Ct. 170 (1948); INBAU, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); DESSON, *The New Federal Rules of Criminal Procedure*, 55 YALE L. J. 694, 712 (1946). *Habeas Corpus and Post-Conviction Hearing*: *Young v. Ragen*, 337 U.S. 235, 69 S.Ct. 1073 (1949); JENNER, *The Illinois Post-Conviction Hearing Act*, 9 Fed. R. D. 347 (1949). *Right to Counsel*: *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932); *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252 (1942); *Marino v. Ragen*, 332 U.S. 561, 68 S.Ct. 240 (1947). *Right to Public Trial*: *In Re Oliver*, 333 U.S. 257, 68 S.Ct. 499 (1948). *Jury Trial and Equal Protection*: *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579 (1935); *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947). *Confrontation*: *In Re Oliver*, 333 U.S. 257, 68 S.Ct. 499 (1948); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949). A helpful list of constitutional limitations may be found in ORFIELD, *What Constitutes Fair Criminal Procedure under Municipal and International Law*, 12 U. PITTSBURGH L. REV. 35 (1950).

146. BOSKEY AND PICKERING, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266, 298 (1946).

which in scope, ferocity and in its implications for humanity had surpassed all other wars in history, had been brought to a successful conclusion by the Allied Powers. Now came the reactions and the expressions of convictions from thinking people about war. Leaders in the field of international relations had long advocated the establishment of measures that would tend to restrain nations from going to war, and, over the years, various steps had been taken, aimed to reduce the causes of war. Now high-minded men everywhere sought a formula which would make impossible a recurrence of a holocaust such as the peoples of the world had just endured. Among the measures proposed was that the major war criminals be tried and punished. On August 8, 1945, an agreement, commonly called the London Agreement, was signed by the United States, Great Britain, France and the Soviet Union, to which nineteen other nations later adhered, which set up an International Military Tribunal to conduct these trials. This Agreement, said Mr. Justice Jackson, "marks a transition in international law. * * * Three broad categories of acts," he went on to say,

are defined as criminal in this code. The first, *crimes against peace*, consists of planning, preparing, initiating or waging a war of aggression or a war in violation of international undertakings, or participating in a common plan or conspiracy to accomplish any of the foregoing acts. The second category, *war crimes*, embraces violations of the laws and customs of land and sea warfare, including plunder, wanton destruction, and all forms of mistreatment of inhabitants of occupied territories and prisoners of war. The third class of offenses, *crimes against humanity*, consists of murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with crimes against peace or war crimes, whether or not in violation of domestic law of the country where perpetrated. * * * The charter also enacts the principle that individuals rather than states are responsible for criminal violations of international law and applies to such lawbreakers the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan. In prohibiting the plea of "acts of state" as freeing defendants from legal responsibility, the charter refuses to recognize the immunity once enjoyed by criminal statesmanship. Finally, the charter provides that orders of a superior authority shall not free a defendant from responsibility, though they may be considered in mitigation of punishment if justice so requires.¹⁴⁷

Under the authority of this Agreement a number of "war criminals" have been tried, convicted and sentenced. The most famous of the trials, the Nuremberg Trial, began on November 20, 1945, and ended on October 1, 1946. It resulted in the sentencing of twelve of the defendants to death by hanging; seven defendants were given prison sentences ranging from ten years to life, and three were acquitted.

147. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, viii-x (1945).

"The judgment," in the opinion of Quincy Wright,

gives precision to the principles of international law which have been developed during the past generation in the effort to "outlaw war." The meaning of "aggressive war," both as an international delinquency and as an individual criminal offense, and the international law concerning superior orders, acts of state, criminal conspiracy and criminal organization were clarified.¹⁴⁸

There are high hopes relative to this development. There also are gloomy apprehensions. "The verdict of history will not be rendered for a long time."¹⁴⁹ What emerges for the purpose of this discussion is that we are dealing with a new concept of crime—one arising from instituting a war. We are particularly concerned with the principle announced in the London Agreement that individuals "rather than states are responsible for criminal violations of international law." Sheldon Glueck finds precedent for this law in the Briand-Kellogg Pact of 1928.¹⁵⁰ Others insist that it was first made a crime through the London Agreement.¹⁵¹ If it came into being with the London Agreement in 1945, the objection based on its being an *ex post facto* law, as applied to acts done before 1945, has some validity. The rule against retroactive legislation is well-grounded in national law, and definitely in Anglo-American law. However, it is not valid in international law.

The more weighty criticisms relate to the fact that the International Military Tribunal, which tried the defendants in the Nuremberg Trial, was composed exclusively of representatives of the victorious states; that the London Agreement establishes a principle of individual responsibility for war crimes under a sweeping provision which recognizes the doctrine of "guilt by association;" and that the program projected is one of retrogression in the criminal law because of the stress laid on the retributive and deterrent theories of punishment.

Apprehensions are being expressed that through the London Agreement the signatory powers may have created a Frankenstein. Kelsen points out that the tribunal set up by the Agreement not only excluded representatives of the vanquished states but those of neutral states as well. The bench was composed exclusively of representatives of the victorious states. We should remember that the right does not always prevail in war. What is more, one of the states, whose representatives

148. *The Nuernberg Trial*, 37 J. CRIM. L. AND CRIMINOL. 477, 478 (1947); PARKER, *The Nuernberg Trial*, 30 J. AM. J. SOC. 109 (1946); RADIN, *International Crimes*, 32 IOWA L. REV. 33 (1946).

149. WECHSLER, *The Issues of the Nuremberg Trial*, 62 POL. SC. Q. 11 (1947).

150. *THE NUREMBERG TRIAL AND AGGRESSIVE WAR*, 14-45 (1946).

151. SCHICK, *International Criminal Law—Facts and Illusions*, 11 MODERN L. REV. 290 (1948); KELSEN, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT. L. Q. 153, 155-161 (1947).

were judges and prosecutors at the Trial, had shared with Germany the booty of the war waged against Poland, a war which was declared by the Tribunal that tried the defendants to have been a war against peace. "If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent," Kelsen concludes,

then, after the next war, the governments of the victorious States would try the members of the governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope that there is no such precedent.¹⁵²

The London Agreement established the meritorious principle of individual responsibility for violations of international law. But it did not stop there. It put into force the doctrine that an individual can be found guilty, not because he had the *mens rea* to commit a crime—not, indeed, because he had committed a crime—but because he belonged to an association that had been declared to be criminal. This means collective responsibility; it means guilt by association. Mr. Justice Douglas has made a clear presentation of the implications of this doctrine in his concurring opinion in the case of *Anti-Fascist Committee v. McGrath*.¹⁵³ In discussing the issues of that case he said:

The technique is one of guilt by association—one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.

The sanctions established in the London Agreement are also open to question. They emphasize the retributive and deterrent theories of punishment. It may well be, in this area, that no other avenues were open. Notwithstanding, the point must be stressed that if the long years of experience with criminal punishment, from primitive to present-day law, have established any firm conviction, it is that retributive punishment is irrational and futile. Less irrational and futile, but nevertheless open to serious question, is the theory that punishment will deter the wrong-doer. It is doubtful whether the sanctions set up in the Agreement will have a deterrent effect on those who plan

152. *Op. cit.*, 170-171. For a more recent statement bearing on the status of the charter and judgment of the Nuremberg Tribunal, see, YUEN-LI LIANG, *Notes on Legal Questions Concerning the United Nations*, 45 AM. J. INT. LAW 509 (1951).

153. 341 U.S. 123, 178-179, 71 S.Ct. 624, 652 (1951).

wars. "One should not forget, in this connection, that wars are planned and commenced in the hope of victory, and not in fear of possible defeat."¹⁵⁴

What is the import of this development? We are at present too involved in a clash of views over the implications of a new legal concept to make any reliable appraisal of it. That will have to await the verdict of the future. We should recognize that the misgivings expressed as to some phases of the London Agreement have merit. If there are defects in that Agreement, they should be remedied as soon as possible. Definitely, risks were taken when the program was initiated. From a wider perspective, however, the view is majestic. The new charter has given recognition to the principle that the behavior of individuals in relation to acts of war is subject to control by law. With the approval of that principle, a new and potent factor, aimed to restrain aggressive war and inhumane acts associated with war, has been introduced into the domain of international law.

SOME GENERAL OBSERVATIONS

The reflective observer who seeks perspective on the criminal law as an instrument for social control must be struck with the realization that he is viewing a vast area that is ruled by traditional but untested assumptions and administered through numerous uncoordinated regulations and practices. A major criticism of the criminal law is that it lacks a unity of aim.¹⁵⁵ This comment could, of course, be made about most of our social institutions. It is particularly valid when applied to the criminal law. The source of greatest public discontent with the criminal law is its administration. Interestingly enough, however, much of the progress that has been made in this general area has been in administration. The difficulty has been that administrative reforms have not been in accord with the basic assumptions of the law.

The criminal law is saturated with concepts that should be appraised—that should be re-evaluated in the light of present-day knowledge and understanding. It is founded on the doctrine of good and evil—on the doctrine that the individual is a free moral agent. It assumes that conduct can be measured and that human behavior can be controlled through the assessment of homeopathic penalties. In this scheme of things punishment becomes an end. Punishment is the *bête noire* of

154. SCHICK, *International Criminal Law—Facts and Illusions*, 11 MODERN L. REV. 290, 299 (1948).

155. GLUECK, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928); GAUSEWITZ, *Considerations Basic to a New Penal Code*, 11 WIS. L. REV. 346, 480 (1936); HARNO, *Rationale of a Criminal Code*, 85 U. OF PA. L. REV. 549 (1937).

the criminal law. It should not be ignored; it has a place in this scheme but only as a part of a pattern of social control. The behavior sciences stress treatment of offenders and some salutary moves involving such measures as probation, parole, the establishment of juvenile courts, the introduction of prison reforms, etc., have been initiated under their stimulation. But these measures are restricted in their development because of conditions that are imposed when penalties against offenders are assessed. What is needed is that punishment and treatment be coordinated.

In most of our states there is a great mass of discordant judge-made law and legislation touching crimes. These materials are not consistent as to what behavior should be made criminal. The severity of penalties as to separate crimes is uneven and often irrational. Many acts that are declared criminal would, in a rational scheme, give rise to no more than civil actions. Legislation relative to crimes often is overly verbose and detailed in its definitions and specifications. The result is that discretionary action on the part of judges and administrative agencies is unduly restricted and flexibility in the treatment of offenders is limited. It is, of course, essential that the definitions of crimes be clear and certain, but beyond that much weight should be given to judicial discretion and to the need for the after-conviction treatment of offenders.

That there has been evolution in the criminal law and its administration in the last century cannot be doubted. The crime problem has not been solved; it never will be. Some of the changes that have been brought about are questionable. The total picture, however, is one of substantial progress. Progress has been made toward the simplification and liberalization of criminal procedure, in the understanding of human beings and their behavior which has softened the harshness of the law, and in the acceptance of the findings of research. The findings of research, to an increasing extent, are guiding the policy of legislation and the actions of judges, prosecuting officers and administrative agencies. We are passing from a long era of a priori assumptions in the criminal law to one in which the premises of the law are founded in research. The transition is gradual and is accompanied with great travail, but its direction is unmistakable.