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# THE NOTRE DAME LAWYER

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*"Law is the perfection of human reason"*

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## CRIME—A COMPLEX OR A CRISIS

By FRANK H. WARREN

### I. AN ANALYSIS OF PRESENT CONDITIONS

#### Measuring Crime.

Charles Mercier said that with the exception of logic, more nonsense had been written about criminality and the criminal than about any other subject. This may be true, and be due in part to the meagerness of criminal statistics and the unreliability of such as there are for purposes of some generalizations. It has so far been impossible to lay out any thoroughly dependable scheme for accumulating exact data as to the volume of crime, and to put in operation such a system when found would be still another difficulty. Much crime is now concealed and probably much always will be concealed. The police department of Philadelphia reported<sup>1</sup> the recovery in five years of \$1,750,000 worth of unreported stolen property, as contrasted with the recovery of \$1,688,000 worth reported as stolen. In so far as the volume of crime is concerned, the problem is to find a measurable element which bears a constant ratio to the total volume of crime. The variables affecting this ratio are numerous and have important statistical effects.

The basis receiving most favorable mention by students of the subject is the English system of "crimes known to the police", now used in Canada also and in some American cities. One of the variables in this system is the attitude of police departments of trying to make this ratio of arrests to crimes known, as high as possible. Another basis is arrests, but it is not considered fa-

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<sup>1</sup> Criminology, Sutherland, P. 35.

vorably. Changing policies from time to time in the same locality and widely varying policies of law-enforcement in different localities are variables of such weight that arrests are generally considered very unreliable evidence of crime totals. Other bases are crimes known to other public officials such as the coroner, crimes known to the newspapers, the records of private organizations such as the Chicago Crime Commission, judicial statistics, and the population and population movements of and commitments to prisons, reformatories, jails and work-houses. All of these have incalculable variables that minimize their value in estimating the volume of crime and its increase or decrease.

This weakness of statistical compilations is no justification for the abandonment of all such data in crime studies, but it does provoke caution in generalizations. Some statistics are used in this paper. The most frequent reference will be to the report of the Census Bureau on "Prisoners" for the year 1923. This volume is based on reports for the first six months of the year and estimates for the full year. References will be made also to another volume by the Census Bureau, "Children under Institutional Care" likewise for the year 1923. Some figures have been taken from various other sources.

Have we a crime problem of unusual dimensions today? I don't know; either answer can be proven. Ask almost any citizen today and you will get a vigorous affirmative. He does not have much data except that afforded by the newspaper columns and casual observation, but he will tell you he does not need a weather report to know whether a cyclone has hit him. One writer in a woman's magazine<sup>2</sup> says there are 1½ million persons in this country engaged in purely criminal pursuits and that the cost is 30 to 40 billions a year. Mr. Burns, of detective fame, puts the price much lower, but still running into the billions. Another expert says there are 10,000 professional criminals in Chicago alone. Frederick L. Hoffman says<sup>3</sup> we are the most murderous country in the world. In 1922 our homicide rate per 100,000 population was 7.9, while the rate in England and Wales was .5, Japan .8, Ontario 1.6. Our national rate is now up to 10

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<sup>2</sup> Good Housekeeping, March, 1927.

<sup>3</sup> The Homicide Problem, P. 2.

or 12 with the city of Memphis topping the list. In 1924 this big town of less than 200,000 people had a homicide rate of 70!<sup>4</sup>

The combined reports of forty insurance companies show an increase in embezzlements from 1910 to 1923 of 640% and in burglary of 1096%. In 1910 both crimes combined cost them over 2¼ millions, in 1919 over 10¼ millions and in 1923 nearly 21 millions. Increases in the amount of insurance carried must have been quite a factor in these increases. I do not consider them conclusive as to the amount of increase.

CRIME IN INDIANA<sup>5</sup>

Prison population (average daily attendance).

	1910	1923	% inc. or decrease
State Prison .....	1112.92	1464.14	+31.5%
Reformatory .....	1106.23	910.23	-17.7%
Penal Farm (1915).....	439.95	523.42	+31.5%
Woman's Prison .....	110.51	120.34	+ 8.9%
Boy's School .....	681.81	482.64	-29.2%
Girl's School .....	318.65	337.32	+ 5.8%
<b>Total</b> .....	<b>3770.07</b>	<b>3838.09</b>	<b>+ 1.8%</b>
	<b>Costs</b>		<b>% inc. or decrease</b>
	1910	1923	
State Prison .....	\$264,912.39	\$370,109.20	+43.4%
Reformatory (Jeffersonville) ..	229,408.15	292,419.51	+55.9%
Reformatory (Pendleton) .....		65,249.68	
Penal Farm (1915).....	104,328.18	102,923.17	- 1.3%
Woman's Prison .....	27,990.88	38,248.79	+36.6%
Boy's School .....	126,734.43	163,252.97	+28.8%
Girl's School .....	103,824.19	153,447.20	+47.8%
<b>Total</b> .....	<b>\$857,198.22</b>	<b>\$1,185,650.52</b>	<b>+38.3%</b>

In addition to this cost was the sum of \$1,333,560.98 for permanent improvements at Pendleton in 1923, and the expense of county jails amounting to \$443,460.46. The population increase in Indiana from 1910 to 1923 was 11.1%.<sup>6</sup>

<sup>4</sup> The Homicide Problem, Hoffman, P. 105.

<sup>5</sup> Indiana Bulletin of Charities and Correction, June, 1926, Pp. 218-223.

<sup>6</sup> Statement's Year Book, 1926.

The Census report on "Prisoners" shows<sup>7</sup> an actual national decrease of crime in 1923 as compared with 1910. The total commitments for 1923 were 25.5% lower than for 1910. Also prison population in proportion to total population decreased substantially. Nationally the decrease was from 107.9 per 100,000 to 94.6<sup>8</sup> which is actually a little lower than the rate for 1880. In Indiana the decrease was from 106.3 to 97.0.<sup>9</sup> Judging from those figures alone, crime generally decreased during the thirteen years covered; but particular crimes increased. The census report<sup>10</sup> shows decreases in commitments for drunkenness, disorderly conduct, vagrancy, larceny, assault, burglary, carrying concealed weapons, fornication and prostitution, fraud, malicious mischief and trespass. It shows increases in liquor and drug law violations, violating city ordinances, forgery, homicide, robbery, non-support and rape. The increases range all the way from 10% for non-support to 2066.7% for drug law violations.

These figures are not convincing that there have been actual decreases where decreases are shown. If the unknown ratio of commitments to the total number of crimes perpetrated is a fairly constant one, then the decreases shown are actual. But this ratio is influenced not only by the amount of crime but also by the factors of detection and arrest and our practices and policies of judicial procedure and sentences. Probation in its varied forms is increasing and is reducing the actual number of commitments; and to the extent to which it is doing this, the ratio of commitments to total crimes is lowered. Popular opinion is that the police are less efficient and also that convictions after arrest are more difficult to secure, both of which facts, if true, would lower the ratio.

### The Criminal Age.

Now it is evident that the actual numbers of persons living at given ages would be a factor in determining the amount of criminality at given age periods. Assuming that the strictly juvenile age is below 15 years, the population and crime ratios above that age are as follows:

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<sup>7</sup> Prisoners, P. 19.

<sup>8</sup> Prisoners, P. 7 Table 1.

<sup>9</sup> Prisoners, P. 10 Table 3.

<sup>10</sup> Prisoners, P. 31 Table 12.

Population Ratio <sup>11</sup>	Age	Comparison	Crime Ratio
7.9%	15 to 18 years	-5.9%	2.0%
18.0%	18 to 24 years	+5.6%	23.6%
23.8%	25 to 34 years	+4.2%	28.0%
19.6%	35 to 44 years	+2.9%	22.5%
14.6%	45 to 54 years	-2.3%	12.3%
9.1%	55 to 64 years	-4.5%	4.6%
6.8%	65 and over	-5.4%	1.4%
.2%	Unknown	+5.3%	5.5%

If the criminal age can be fairly defined as that age which contributes to crime in a higher ratio than it contributes to population, we may say the criminal age is 18 to 44 years, that 18 to 24 where the crime ratio exceeds the population ratio by 5.6% is the most criminal, that 25 to 34 where the same excess is 4.2% is the second in the criminal ranks, and 35 to 44 where the excess is 2.9% ranks third. Considering particular crimes we find that the second criminal stage 25 to 34 years exceeds its population ratio in every crime listed except drunkenness where it is .1% under. The first criminal stage exceeds its population ratio in every listed crime except drunkenness, liquor law violations, non-support and keeping house of ill-fame, and the third criminal stage, 35 to 44, exceeds in only  $\frac{1}{3}$  of the listed crimes—drunkenness, disorderly conduct, liquor and drug law violations, assault, homicide, non-support and keeping house of ill-fame.

The first period constituting 18.0% of the population commits 53.4% of all robberies.<sup>12</sup> This is at the rate of one robbery to every 14,000 of population approximately while the second stage robs at the rate of one to every 31,000 of population, and the third stage at the rate of one to every 106,000. In other words, the 18 to 24 youth robs more than twice as often as the 25 to 34 man and eight times as often as the 35 to 44 man. Robbery is a crime of youth.

There is also a wide-spread opinion that there is a larger proportion of youthful criminals than formerly, and to some extent the figures bear this out. Comparing again the years 1923 and 1910, while prison commitments show a decrease<sup>13</sup> in actual

<sup>11</sup> A compiled table based in part on Prisoners, P. 81 Table 47.

<sup>12</sup> Prisoners, P. 81 Table 47.

<sup>13</sup> Prisoners, P. 71 Table 39.

numbers in favor of 1923 at every age, they also show that the 18 to 24 youth contributed 23.5% of the commitments in 1923 as compared with 20.7% in 1910.<sup>14</sup> The Indiana Board of State Charities shows<sup>15</sup> that during the fiscal year ending September 30, 1925, 1474 men were committed to the Reformatory and State Prison with an average age of 27.3 years. Going back to the years 1903-4-5, the Board found that the average age of an equal number of committed men was 27.8 years. This is a lowering of the average age by 6 months in about 20 years. I am not sure that average age is a proper basis of settling this question. These figures indicate some increase of youthfulness of our criminals. The actual increase may be greater than indicated because the figures give no weight to the effect of suspended sentences and probation which I believe are extended to young men with greater freedom than to adult men.

### The Negro.

According to the Census report prison commitments for 1923 show the negro to be the largest racial element in crime.<sup>16</sup> The commitment rates per 100,000 population of 18 years and over were: negro 1305; foreign born white 517.5 and native white 404.1. The ratio has decreased in all race classes and in both sexes.<sup>17</sup> The decrease among foreign born whites was greatest with 34.9%, and was least with the negro 28.4%. The native white rate was 33.7%.

The criminality of the negro is further demonstrated by the fact that his crime ratio exceeds his population ratio in every listed crime. He reaches his highest crime ratio in the crimes of gambling, carrying concealed weapons, assault, fornication and prostitution,<sup>18</sup> and he makes his best showing in drunkenness, violating traffic laws and non-support. On the other hand the native whites fall below their population ratio in every crime except forgery and make their best showing in gambling. The foreign born whites exceed their population ratio in the crimes of drunkenness, disorderly conduct, violating liquor laws, violating city ordinances and non-support. Their worst showing on

<sup>14</sup> Prisoners, P. 73.

<sup>15</sup> Indiana Bulletin of Charities and Correction, June, 1926, P. 132.

<sup>16</sup> Prisoners, P. 64 Table 33.

<sup>17</sup> Prisoners, P. 63.

<sup>18</sup> Prisoners, P. 68 Table 36.

this basis is non-support and their best is gambling. The negro, although outnumbered by the native born whites nearly 8 to 1 comes within 2% of them in the percentage of homicides.

### The Foreign Born.

The average commitment ratio per 100,000 population for all foreign born whites was 226.5.<sup>19</sup> Eleven countries exceeded this rate—Finland, Mexico, Ireland, Austria, Greece, Norway, Sweden, Poland, Scotland, Russia and Hungary. Czechoslovakia had the lowest ratio (a) with 65.0 per 100,000. Other low countries were Germany 79.8, Switzerland 87.6, Netherlands 100.9, Denmark 101.5, and England and Wales 106.7. In point of actual numbers committed, the Irish lead all others, with the Russians, Italians, and Polish following in the order named. Except two nationalities, the foreign born whites like the native whites major in drunkenness. The exceptions are the Greeks and the Italians. Yet Italians<sup>20</sup> committed more than three times as many homicides as their nearest foreign-born competitor, the Mexicans. They also led the foreign-born field in rape, assault, robbery and liquor law violations. Other prominent liquor law violators were the Polish, the Russians, the Austrians, the Mexicans and the Germans. These six nationalities comprised over 68% of all commitments of foreign born whites for liquor law violations. More than 82% of all Irish commitments were for drunkenness and disorderly conduct. Their homicide rate was very low. In fact only three of these foreign born people even approximated the United States ratio for homicide. These three were the Greeks, Mexicans and Italians.

### The Persistence of National Traits.

Some questions are provoked by a comparison of the homicide rates in certain foreign countries with the homicide rates of the same nationalities when transplanted to the United States. The difficulties in the way of accurate comparisons of this kind are great and the following figures are not to be taken as more than broad approximations.

<sup>19</sup> Prisoners, Pp. 93-94.

(a) Political reorganization in Europe may have influenced the size of this figure.

<sup>20</sup> Prisoners, P. 97 Table 58.



## HOMICIDE RATIO PER 100,000 POPULATION

Nationality	At Home	In United States
Italians	7.8	6.0
Irish	.9	.7
English	.8	.5

In general it seems possible that those peoples which have a high homicide rate on their native soils have a high rate in this country and those with a low rate in their own countries have a low rate in the United States.

What does this fact, if it is a fact, mean? Is it of no significance that the un-homicidal Englishman, transplanted to this country and subject to all the crime-producing elements including tax law enforcement alleged to be responsible for the highest homicide rate on earth—is it without significance that this Englishman continues to be non-homicidal in his new environment? Is environment after all only a negligible factor in crime? Or is it important only in childhood? Or does the new-comer seek and find an environment so like the one he has left behind that environment influence is an unchanged factor? Is it possible that Aristotle stated the full truth when he said that men obey law by force of habit and that frequent changes in the law break this habit and breed disrespect for all law?

Prof. Sutherland says this is an interesting and important question upon which no real research work has yet been done. He says there are national patterns of crime which tend to persist.

"The similarity of crime rankings among members of a particular nation at home and in the United States," he writes, "is due primarily to the persistence of traits existing in them before migration, with a general tendency for all immigrant groups to a greater criminality (though not much greater) in this country than in their home country because of the mobility, which means a change of environments. It is true that immigrants do seek and secure an environment which is socially, though not industrially, somewhat similar to their home country."

If the roots of crime lie enshrouded in the mysteries of temperament and social customs, have we not a hazier objective than is now set up for us in the thousand and one alleged causes of crime? And may we not expect that the stabilization of social conditions that seems to accompany advancing national age may of itself provide some solution of the problem?

### The Material Basis of Crime Control.

I acknowledge here a certain materialistic attitude toward the whole question of crime control. Every move which makes it physically more difficult to commit crimes seems to me valuable. Life imprisonment or capital punishment for the professional criminal somewhat regardless of the offense, more policemen, better locks on our doors, bank vaults for valuables and countless similar devices which make crime difficult or impossible appear to me to be the effective restraints. Supplementing these devices but inferior to them in effectiveness are the mental restraints, fear of punishment, social ostracism, and conscience. It is not necessary to adopt a mechanistic theory of conduct to believe that in every sizable human group there will be some rebels against the social order who commits a crime has a peculiar mental complex, a defective gland or a particular type of blood. Crimes are the products of civilization; and civilization isn't very old. It would be strange indeed if there were no reversions. Social conduct is more the result of habits and inhibitions than to innate goodness. Perhaps no man would care to admit his own contemplation of crimes beyond the melon patch, or care to acknowledge what deterred him from a criminal act.

In 1910 more than 57% of homicides were due to fire arms<sup>21</sup> and in 1921 the percentage had risen to nearly 75. In 1924 in Memphis fire arms were responsible for more than 79% of the total of 120 homicides recorded<sup>22</sup> and among the male whites the rate exceeded 94%.

Restriction of the sale of fire arms was one of the earliest objectives of the National Crime Commission and in May, 1927, the Federal fire arms act became effective, so that the ease with which fire arms may be secured is lessened. This is an example on a large scale of attempting to limit opportunity for crime. The American Bankers Association issued a very practical set of rules about depositors making out and handling checks. Almost every suggestion made was a limiting of opportunity for fraud—do not write checks with lead pencil, do not sign blank checks, do not make checks payable to bearer, etc. A crude mathematical-like

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<sup>21</sup> Homicide Problem, Hoffman P. 70.

<sup>22</sup> Homicide Problem, Hoffman P. 105.

this: Crime results when Incentive plus Opportunity is greater than Habit plus Fear plus Conscience.

In so far as the crimes of gain are concerned, value is an important factor of opportunity. While it may be denied that opportunity is the most efficient element in crime generally, it seems fairly certain that it is a very important factor. In point of actual number of prison commitments, liquor law violations have risen<sup>28</sup> from ninth position in the total in 1910 to third in 1923 and drug law violations have risen from nineteenth in 1910 to tenth in 1923. Robbery has risen in the scale but not so far. Mr. Bennet Mead, who analyzed the census reports quoted, says, "Several of the gainful offenses against property showed a decrease, . . . and a turning aside from this whole class of offenses to liquor and drug selling, as the enactment of prohibitory legislation, especially the Federal laws, made the latter pursuits increasingly profitable."

In opportunity lies the very root of the prohibition problem. When liquor can be made from anything from potatoes to pop corn, when every cellar from coast to coast can be turned over night into a distillery, when there's a hungry market in every village and city in the country, there will be liquor law violations because there is the widest sort of opportunity. Prohibitionists tried to use this very principle of control. They thought to limit the opportunity to drink by destroying the source of supply. They failed in a fundamental aspect of the problem and now seek to effect a remedy for that failure by stringency of legislation. No law can be severe enough and no enforcement agencies efficient enough to bring within reasonable control this situation or any other where opportunity is so unlimited.

I offer the suggestion generally that if there is one thing which more than any other is inducing us to relax our heretofore careful attention to this important problem of restricting opportunity for theft, it is the rapidly spreading practice of covering such losses with insurance.

#### **The Control of Crime.**

Society has for ages past turned to law and law enforcement as the most available and the most effective means of crime con-

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<sup>28</sup> Prisoners, P. 31 Table 12.

trol. In recent years the efficiency of this agency of control has been vigorously challenged from two standpoints. The sociologist, the criminologist, the psychologist, the psychiatrist, and the social worker on the one hand have questioned the correctness of the theory of punishment as an agency of control, while society generally, still supporting the correctness of the theory, charges a practical breakdown of the law-enforcement machinery. The first named group insist that effectual control will be secured only through segregation, marriage control and eugenics, the improvement of economic conditions through child labor and wage regulations, various forms of insurance, education and provision for leisure time, all tending to reduce poverty and make life more enjoyable to those of moderate means, and through the elevating of ethical standards. Society as a whole does not deny the value of these efforts but cannot agree to the necessity or practicability of waiting for the slow consummation of these reformations. It demands an immediate control and looks to law-enforcement because it knows no other quick means of control. Society is not convinced that reasonable control cannot be effected through this agency.

The theory of crime control by law therefore demands consideration. Its deterrent force is alleged to lie in three things. First, in the restriction of individual criminal activity by imprisonment or death. Second, in the restraining effect of fear upon those who have not committed crimes. And third, in the restraining effect upon those punished of the fear of further punishment and by their reformation. Mr. Darrow says that vengeance is the moving purpose of punishment and that the direct result of scaring a man is not to keep him from the commission of a crime but to make him use precautions. F. Trubee Davison, former chairman of the National Crime Commission, declares that modern society accepts it as axiomatic that one of the important factors in the prevention of crime is swift and sure justice. Franz von Liszt makes the following interesting assertions:

"The probability that anyone will commit a crime is greater if he has already been punished than if he has never been punished. The probability that anyone will commit a crime increases with the number of punishments which he has already undergone. The probability that a man who is released from punishment will commit a new crime in the shortest possible time increases with the length of the sentence which he has un-

dergone. . . . Our punishments do not work reformation nor do they have deterrent power, nor do they have preventive force . . . . that is, they do not keep men from crime."

A question of fact is involved but the fact cannot be convincingly revealed. There can be no difference of opinion about one feature. When the law puts a man to death or while it isolates him in prison, society at large does not suffer from his criminal activities. Yet it is easy to give this undue weight as to the general magnitude of crime. The prison population of the United States<sup>24</sup> on January 1, 1923, was 109,619. Out of an estimated criminal population of over 2,000,000, this prison total was a very small part whose absence would be felt but slightly in the crime totals. It is apparent that unless there is deterrent force in the other features of punishment, our whole prison system has only a minimum of value.

The feature which we characterize as the "force of example" cannot be measured directly because its results are negative. We believe or disbelieve in its deterrent value as a result of reasoning, observation and introspection. All these when limited to individual experience are unreliable methods of reaching correct generalizations. Yet probably the majority of our opinions are determined in just this way. For the present at least there is no other way to generalize as to the restraining effect on crime of this "force of example." Personally, I believe it has value and much value. Theoretically I can distinguish between fear and conscience, but practically I find the two inextricably intermingled.

I believe that of the 98% of us who are non-criminal a substantial part are good because they are afraid to be bad. It is not an exalted view of human nature but its truthfulness cannot be disproven by merely charging that it is a low view of man. And whoever holds a contrary opinion will be driven to abandon largely his support of our whole criminal procedure.

#### **The Repeater.**

The third feature was described as restraint of the individual prisoner or convict through his fear of repeated punishment or by his reformation. In other words it is the question of recidivism. It has dictated largely the character of punishment. It is

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<sup>24</sup> Prisoners, P. 7 Table 1.

largely responsible for the whipping post, the pillory, mutilation and torture; for prison sanitation, Osborne's Mutual Welfare League and the indeterminate sentence. About it here are many opinions and some data.

Of those committed to jails and workhouses<sup>25</sup> from January 1 to June 30, 1923, some 94,000 were reported as to prior commitments. Of these 46.8% were recidivists, with the female offenders running a higher percentage than the male. The 1923 census figures for prisons have not been published. Penal institutions of Massachusetts showed 55.1% repeaters,<sup>26</sup> Wisconsin's State Prison 45% and the Milwaukee House of Correction 53%. Of 497 prisoners<sup>27</sup> committed to the Indiana State Prison in 1926, 42% were repeaters.<sup>28</sup> West Virginia showed 51% and the Georgia State Prison 42%. In Detroit the percentage was 55.4 in 1800 misdemeanants and in 1916 the workhouse of New York City revealed 47%.

It seems to be fairly established that the probability of reformation or restraint diminishes with the number of sentences served. Criminologists make much of the recidivist ratio and consider it a severe reflection upon our methods of crime control. But crime control is more than reformation; it is fundamentally preventive in character. If the recidivist ratio were to be lowered to 5% without any diminution of total commitments we might very well "view with alarm" the fact that so large a percentage were first offenders. With a low crime rate, is it not a more hopeful position for society to have the prison records show 95% repeaters and 5% first offenders than 5% repeaters and 95% first offenders? It seems to me the important fact shown by recidivist figures is the increasing improbability of reformation or restraint according to the number of sentences served. That fact, fully established, would go far toward justifying such legislation as the Baumes Laws of New York and similar statutes.

#### The Indeterminate Sentence.

In 1880 and 1890 prison population<sup>29</sup> showed no prisoners present under an indeterminate sentence. In 1904, 15.2% of prisoners were serving an indeterminate sentence. In 1910 the

<sup>25</sup> Prisoners, P. 150 Table 102.

<sup>26</sup> Criminology and Penology, Gillin, P. 41.

<sup>27</sup> Indiana State Prison Report, 1926, P. 47.

<sup>28</sup> The Indiana Reformatory reported 34.8% for 1926.

<sup>29</sup> Prisoners, P. 111 Table 70.

ratio had risen to 21.3% and in 1923 to 42.6%. Commitments for the year 1923 under an indeterminate sentence<sup>30</sup> in the whole country made up 55.4% of all prison and reformatory commitments. The Southern states keep the general average down. In some Northern states<sup>31</sup> the ratio runs as high as 95%. In Indiana the ratio was just under 80%. New England alone reduced its proportion of indeterminate sentences between 1910 and 1923.

This type of sentence is directed at personal reformation and assists with prison discipline. There is also an economic force behind this, leading as it does to our parole policy. We parole<sup>32</sup> or pardon 79.8% of those serving an indeterminate sentence and 30.8% of those serving a definite term of years. Considered upon the basis of the minimum number of years, the indeterminate sentence of 10 to ---- years is a lighter sentence<sup>33</sup> than a definite term of 10 years. Out of 284 men sentenced to a definite term of 10 years, 7 served the full time, while out of 383 sentenced to an indeterminate period of 10 years or more, 2 served 10 years. Whether it is a difference in law, in men, or in prison administration I do not know, but the fact remains. Its character may be further revealed by the fact that we give fewer indeterminate sentences for drug law violations than for any other offense. The bootlegger of drugs gets little mercy or sympathy anywhere along the line. I call the attention of the reformers to this situation as one worthy of some idle female's tears.

### Probation.

The extensive use of paroles and pardons, and the amelioration of the rigors of prison life are direct attacks upon our long-accepted faith in the efficacy of suffering and punishment as deterrents of crime. In the same class in this respect is probation. There are no satisfactory statistics showing the workings of the parole system particularly as to the amount of repeating after the parole period is ended. More attention has been given to the results of probation but there are still no comprehensive figures. Probation officers are generally and naturally enthusiastic, and in addition the measure of their success depends largely upon the number of successes among their probationers. Both these facts

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<sup>30</sup> Prisoners, P. 115 Table 74.

<sup>31</sup> Prisoners, P. 219 Table 75.

<sup>32</sup> Prisoners, P. 158 Table 108.

<sup>33</sup> Prisoners, Pp. 349-350.

would naturally incline us to discount to some extent their claims for probation.

White juvenile delinquency<sup>34</sup> increased from 138.6 per 100,000 population in 1910 to 140 in 1923. There was a decrease<sup>35</sup> among the boys but an increase among the girls. The female has been considered by some authorities to be less susceptible to reformation than the male; others deny this. In Indiana 51.5% of commitments of juvenile delinquents<sup>36</sup> had a previous probation record. Of 294 juvenile probationers in Massachusetts, a little better than 56% "made good". In Detroit out of 1151 adult probationers charged with felonies, less than 3% broke probation.<sup>37</sup> Among 2825 misdemeanants above the age of 17 years, less than 3½% broke probation. A study of 100,000 adult probationers in 14 years in New York State shows 77% of successes. Of 200 probationers in Erie County, New York, 81% made good during probation and 2½ years after discharge 72% were still making good. The general results in Massachusetts showed that 78% of adult probationers made good during the probation period and 65% continued to go straight after discharge. Out of 18,487 paroles in Indiana 75% are reported<sup>38</sup> to have made good and out of 4208 suspended sentences in felony cases more than 73% are said to have made good.

Notwithstanding these apparently good individual results of probation, the system is nevertheless subjected to serious charges. It has been charged<sup>39</sup> (1) that it often results in more regard for the delinquent than for the injured party and that one bad effect of this is to induce an anti-social or indifferent attitude in the latter; (2) that when applied to all first offenders without regard to mentality, personality and previous history it results in recidivism; (3) that it is difficult to ascertain whether the delinquent is a first offender and therefore repeaters often are admitted to probation to the injury of both the criminal and society; and (4) that probation officers are so inefficient that probation is a farce. There is a decided tendency for administration of a probation law to become mechanical. Untrained probation officers

34 Covering ages 10-17 years.

35 Children under Institutional Care, P. 304 Table 48.

36 Children under Institutional Care, P. 326 Table 64.

37 Criminology and Penology, Gillin, P. 821.

38 Indiana Bulletin of Charities and Correction, June, 1926, Pp. 227-230.

39 Criminology and Penology, Gillin, P. 827.



may have simple pet standards of conduct which do not meet the requirements of society. Guilty persons, even children, come to demand probation as a right regardless of their own conduct or mental attitude.

Such are the charges generally made against probation. Personally I am wondering just how much credit probation deserves for the alleged showing. Of children turned back to parents by courts and penal institutions and of adults returned to society on suspended sentences or after punishment, all prior to probation, some certainly made good. It is somewhat like the Weather Bureau claims of 85% of successful weather predictions. The average adult could probably predict 36 hours ahead with 40 to 50% accuracy and particular classes with a considerably higher percentage. The Weather Bureau can fairly claim credit only for the excess. That children and adults have never reformed prior to official probation is of course not true, and probation is entitled to credit for only a certain excess over former successes. I do not mean to oppose probation. It is a valuable addition to our system of criminal restraints, but it is not a cure-all and the somewhat extravagant claims made for it are hardly justified by its accomplishments. (b) It needs to be used with especially careful judgment in the adult field, where the probability that it is really dealing with a first offender is less than in the juvenile cases.

#### Paroles and Pardons.

Those who pin some faith to length of the term of imprisonment as a crime deterrent may well be disturbed at the disparity between sentences imposed and time served. If the length of sentence imposed by the statute is intended to scare people into being good, that purpose is being defeated by the practical operation of the statute. If long sentences are for the purpose of removing criminals from the scene of action till age has tempered

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(b) A most interesting study has been made by the Baltimore Criminal Justice Commission of two groups of persons, the one consisting of 305 persons placed on probation in 1923, and the other of a like number of convicts who were released from the Maryland Penitentiary at or about the same time. Mr. James M. Hepburn, Director of the Commission, says that the subsequent conduct of the probation group was little, if any, better than that of the penal group, and this despite the fact that the penal group, as a group, represents a more hopeless type of offender. The report was published privately by the Commission in June, 1927, and is reviewed by Mr. Hepburn in the *Journal of Criminal Law and Criminology* of May, 1928, pp. 64-74.

their criminal inclinations, that purpose is being defeated. The difference between sentence and time served is great. Out of every class some escape, some die, others are transferred and some leave for other reasons. The big majority leave prison due to expiration of sentence, parole or pardon. Consider these facts. From January 1st, 1923 to June 30th, 1923, 239 male life prisoners<sup>40</sup> left the prisons for the freedom of the wide world. Of these 46 escaped, 12 were released for unnamed reasons and 180 were pardoned or paroled. Of these pardoned or paroled men 7 had served twenty years or over, but 115 had served ten years or less. Nine of them served only one year or less. Forty-two lifers died in prison thereby serving out their sentences—less than 15% of those leaving if we omit the 82 who were transferred. Life imprisonment is largely a fiction of the statute. In the same period<sup>41</sup> 284 of the ten year group left prison, of whom 223 went back into civil life and freedom. Of these 18 escaped, 14 left for unnamed or unknown reasons, 92 served their time out and 99 were paroled or pardoned. Of the 92 credited to expiration of sentence, 30 served five years or less, 55 served from six to nine years and just 7 of the lot actually served 10 years. Of the 99 paroled or pardoned, 86 had served five years or less, and 52 (more than 52% of them) had served three years or less. Ten years doesn't mean ten years by a long time. Herein lies one explanation of how the recidivist can repeat so often in one brief life time, and to some extent substantiates the charge that prison has lost much of its terror to the criminal.

## II. CRIME AND THE LAW

For a nation committed to the theory that punishment lessens crime, our legislation and criminal practise are an odd mass of contradictions. With one hand we put teeth into the law and then with the other hand, often at the same session of the legislature, we carefully extract said teeth. We are either in a stage of transition from one theory to another or we are uncertain about the whole matter. We are therefore wobbly. This situation was not badly described by one police chief, quoted by Mr. Child. "The law," he said, "is like a fat old parent who has just enough

<sup>40</sup> Prisoners, P. 348 Table 172.

<sup>41</sup> Definite term group.

energy to take a child into its lap and forbid a lot and scold a little, and then cry a little and pet a lot, but not enough energy to give a spanking."

#### Public Opinion.

It is not enough to say that there is discontent with the administration of the criminal law; there is large distrust. This distrust touches everything connected with our criminal procedure, even to personnel. As long ago as 1906, Dean Pound was sufficiently impressed with this situation that he made an elaborate analysis of its causes and his address in connection therewith is said to have made a profound impression on many leaders in the profession. Yet 15 years later the same eminent legal scholar said the criminal law had stood still for 50 years. In the popular mind the legal profession is held responsible not only for the present status of matters but also for the failure to improve that status. And this opinion is probably not without foundation, since active, concerted effort of the various bar associations could do much to secure necessary legislation, and some lawyers think much could be done without legislation. So long as the situation is favorable to the practice of law as a business we may expect some indifference and opposition from lawyers to any modifications. There is some probability, recognized in the profession as well as outside, that the greater part of the criminal practise will eventually be taken from the lawyers. It is possible that their attitude as a body toward the present discontent and distrust may hasten that day. I am trying to express an opinion here in a polite restrained way. What I really mean is if our legal brothers do not watch their p's and q's, they will themselves kill the goose that lays the golden eggs long before she necessarily need to pass away. And in support of this I call their attention to the fact that the office of public defender, with all it may ultimately mean to the criminal business of lawyers, is only just around the corner.

Prof. Sutherland says that "no law school employs a professor who gives full time to the study of the criminal law." There is little study given anywhere to the operation of the criminal law. That means that public opinion is based on casual observations, usually of spectacular cases. It is possible that adequate statistics would put the criminal law in better repute than it now

is, but the investigations made do not encourage that hope. The Cleveland Survey<sup>42</sup> in 1920 listed 13 avenues of escape for an offender who has a capable industrious lawyer. They all seem to be available in Indiana. They found that out of 4499 persons arrested on charges of felony in 1919 only 11.8% came to trial; that the average time between arrest and final disposition in the common pleas court was 69.3 days; and that the probability of conviction lessened with every delay. Out of 2924 Massachusetts grand jury indictments 1765 were dismissed before trial. Grand jury action alone caused from one to three month's delay in each case submitted to it. In Detroit in 1920 before the unified court system went into effect there were 2200 untried felony cases pending. In the trial of a wealthy man in 1920 it took two months to get a jury and 1200 prospective jurors were examined; those jurors selected early were kept in confinement although the defendant was out on bail. It took 91 days to get the Calhoun jury in San Francisco. In the Shea case 4821 jurymen were examined and the jury fees alone amounted to \$13,000. In the course of 10 years in Cleveland 5489 names were drawn for jury service of which 388 were drawn a total of 1932, times—35% of the total.

Contrasted with these facts is a statement of Justice Biddle of the Supreme Court of Ontario quoted by Judge Manton of the United States Circuit Court of Appeals. He said<sup>43</sup> that in over 30 years service at the bar he had never seen more than half an hour used to get a jury in a criminal case and never knew of one to take more than four days in trial. Personally he had never known one that took over two days. He said that on one occasion when his court at London, Ontario, and a Detroit court opened on the same day, his court tried a murder case, a manslaughter and two fraud cases before juries, and seven civil cases without a jury, finished his term of court after four prisoners were convicted and lodged in the penitentiary, during which time the Detroit court, two hours distant, had selected six jurymen in a famous criminal case.

The courts of last resort come in too for their share of discredit and distrust due in part to some types of decisions, which

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<sup>42</sup> Criminology, Sutherland P. 256, et. seq.

<sup>43</sup> Report of American Bar Association Vol. 50, P. 752.

while they may satisfy the lawyer, strike the layman as preposterous. Considerable compilations have been made, from which I select a few samples. A conviction of stealing \$100 lawful money was reversed because the indictment didn't read lawful money of the United States. Conviction of stealing a Smith and Weston revolver was reversed because proof showed it was a Smith and Wesson revolver. Conviction of stealing \$59 was reversed because the jury verdict did not show the amount stolen. Indicted for stealing a hog with a slit out of its right ear and a clip out of its left, a Georgia defendant was given a new trial because the evidence showed it was a hog with a slit out of its left ear and a clip out of its right. Convicted of stealing a pair of boots, defendant secured a new trial when the evidence showed he had stolen two rights. The word "storeroom" for "storehouse" afforded ground for another reversal. In another the indictment charged stealing a cow. The evidence was that defendant stole a bull and conviction was set aside.

Not all the legal acumen and oratory since the world began would convince the average man that such facts do not indicate an intolerable situation. Nor is the legal profession entirely blind to the situation.

#### The Attitude of the Bar.

There is first the oft-quoted statement of ExPresident Taft in 1909 that "the administration of the criminal law is a disgrace to our civilization." Back in 1895 Justice Holmes<sup>44</sup> expressed himself as follows:

"An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition or a vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. Who here can give reasons of any different kind for believing that half the criminal law does not do more harm than good?"

Unnamed judge quoted by Mr. Child:<sup>45</sup>

"We are in active danger in America of making a national sport of criminal trials. The determination of guilt or punishment becomes secondary to the forward passes and Third-base put-outs and the big scene in the third act of a sensational court case. The extent to which we have allowed our court procedure to become thus debased would not be tolerated in any other civilized country."

<sup>44</sup> Quoted by Sutherland, P. 253.

<sup>45</sup> Battling the Criminal, Child P. 221.

## Journal of the American Judicature Society:

"Lawyers yawp about the dangers inherent in the English system of making up a jury in a few minutes and assume that there is no alternative between that expedition and the senseless practice into which we have drifted in many states. There is, of course, a mean course that fully protects the accused in securing a fair trial and yet avoids the scandal common to hard fought criminal trials."

Chancellor Hadley:<sup>46</sup>

"The demoralizing influences of such a high percentage of reversals by appellate courts extend . . . far beyond the cases directly affected. It emphasizes the element of technical procedure and the necessity of conforming thereto as the important consideration of criminal trials. And we shall never reach a satisfactory administration of criminal justice in this country until our courts come to place the substance above the form and to regard the question as to whether justice has been done as more important than whether some technical rule of procedure has been violated."

And last:<sup>47</sup>

"But so far from it (the sporting theory of judicial procedure) being a fundamental fact of juris-prudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel presents it, to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to get error into the record, rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses into partisans pure and simple. It leads to sensational cross-examinations 'to affect credit,' which have made the witness stand 'the slaughter house of reputations.' It prevents the trial court from restraining the bullying of witnesses, and creates a general dislike, if not fear, of the witness-function, which impairs the administration of justice. It grants new trials just to give the parties a chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, what do substantive law and justice require? Instead, the inquiry is, have the rules of the game been carried out strictly? If any material infraction is discovered just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses

<sup>46</sup> Missouri Crime Survey, P. 370.

<sup>47</sup> Quoted by Gillin, P. 760.

judgments, or sustains demurrers in the interest of regular play. The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors, in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it."

This most forceful arraignment of our criminal procedure, I will remind you lest twenty years have faded your memories, is an extract from the address of Roscoe Pound to the American Bar Association at St. Louis in 1906.

### The Psychiatrist.

In most of the problems of life, we turn to the expert in that field for competent advice. We have several self-admitted experts in the crime field, generally scratching and clawing at each other, each denying the other's expertness and asserting himself to be the only true blood article. From any point of view this is a layman's paper and the writer has a perfect right to get a chuckle out of some of the diatribes the experts serve on each other. For instance Prof. Harry Barnes, one of the sociological experts, says of the lawyer expert: "Modern criminal science makes it clear that a lawyer is a wholly improper person to have any dealings whatever with criminals. He is as much out of place in the criminal courtroom as he would be in the hospital or the chemical laboratory—we have taken the practice of medicine from shamans and surgery from barbers, and in time we shall take criminology from the legal profession—for it is probably true that the average contemporary barber is better equipped to perform a major surgical operation than the average lawyer is to deal scientifically and efficiently with criminals."

Thus would the sociologist and his allies the medical man and the psychiatrist blot the lawyer out of the picture. These earnest gentlemen are doubtless entitled to a more important place in the criminal field than the one they now occupy but considerably less exclusive than the one they demand. They charge that criminal procedure, regardless of its efficiency or the severity of its punishments, has never prevented crime and try to sustain the charge by proving that there is as much crime now as ever. It is claimed and supported upon good authority that

there is now and has always been about 2% of the population criminal. It is just as good argument to say that criminal treatment has succeeded in holding crime to this figure as to say it has failed to reduce the percentage.

One certain thing about crime is that it is a very complex problem, which the psychiatrist has by no means solved either as to its cause or its cure. Nowhere have I found him shedding light on the criminal who is normal, notwithstanding the fact that he finds many a one. Dr. Glueck examined carefully 608 admissions to Sing Sing. He found<sup>48</sup> that the life history of 66.8% of them showed a variance from normal behavior, that 59% deviated from average normal mental health, that 28.1% had an intelligence quotient of 12 years or under, and that 12% were mentally diseased. This sounds bad but let the same conclusions be stated otherwise. Of the 608 admissions the life history of 33.2% showed no variance from normal behavior, 41% did not deviate from average normal mental health, 71.9% had an intelligence quotient over 12 years and 88% were not mentally diseased. Out of 25 Germans in the lot there was only about half the deviation from normal mentality, not one had less than seven years schooling, and nearly all were employed at the time of committing the crime, yet they had a higher recidivist ratio than any other group. Dr. Glueck could not pass this entirely by but said:

"Findings such as these certainly impress one very strongly with the conviction that outside of the factors of mental equipment and mental health, there is something else which may have a determining influence upon the behavior of an individual."

Psychiatry and its sister profession could be a strong ally in the fields of suspended sentences, probation, parole and pardon if permitted to act there. They charge that hundreds of criminals in one or the other of these ways are returned to freedom among social conditions in which they have not a chance to make good. There should be an official psychiatrist at every prison and probably in every county. Dr. Weeks of the Indiana State Prison says that important as this work is, it has been sadly neglected at Michigan City because his time is entirely taken up with other duties owing to the lack of a medical assistant.

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<sup>48</sup> *Mental Hygiene*, January, 1918.



The medical profession has brought itself into ill-repute by appearing as a partisan witness. Exhibitions such as we saw in the Leopold-Loeb case make a bad and lasting impression. Public opinion, perhaps unjustly, sees the profession as a thwarter of justice. California proposes that a plea of insanity shall operate as a confession of guilt of the act. A judgment of insanity ought to be made less desirable than a prison sentence: it would then not be so readily adopted as a defense. The medical profession would help to bring this about if permitted a voice in the sentence. "Given free rein, modern psychiatry would segregate permanently more people with criminal tendencies than legal procedure does at present."<sup>49</sup> A suggestion worth consideration is that the province of the jury in criminal cases be limited solely to the question of guilt and that the penalty be left in other and more expert hands.

#### Remedies.

That we as a nation are disproportionately criminal in some crime fields can hardly be denied; that we are facing a crisis in the matter is by no means certain. Some features of our attitude may be more nearly hysterical than real. We do need to do some things and we need to quit doing some things. We ought to set ourselves resolutely against all "goose-stepping" legislation. We need a public opinion that sets up and enforces common sense standards and social conduct. We have gone to seed on the idea of tolerance. Tolerance is a destructive and not constructive attitude. It never built a great religion, a great nation, a great political party or a great moral character. Unless used in moderation it becomes a vice instead instead of a virtue; it breeds weakness not strength. The strongest and most cohesive organizations today are the most intolerant in the things they consider to be fundamental. We need an open, healthy intolerance of a lot of things—of the anti-salooner, the anti-spooner, the anti-tobacco-er, the anti-prize-fighter and the whole brood of legislative personal conduct reformers, of bootleggers and the whole gang of money-making law violators. I am not sure which class is doing the more harm.

And we need to "jack-up" our law enforcement agencies. Modify the jury system. At present it is considered a disgrace

<sup>49</sup> Crime Abnormal Minds and the Law, Hoag and Williams.

to sit on the jury and few people except loafers can afford to do so. Why not let the judge select the jury? Abolish the grand jury except perhaps in cases involving capital punishment. And why keep the venerable office of the coroner any longer? The only official thing that I ever heard a coroner brag about was that he alone could arrest the sheriff. And why not modernize the language of indictments? An indictment or information ought to be so simple that a twelve year old boy could write a good one. They are now so complicated that in Missouri one in every twelve criminal reversals was due to defects in the indictment or information.

Put this carefully nurtured hot-house plant, the defendant on the witness stand. Any innocent man will be willing and anxious to testify; only the guilty shun the ordeal. If he won't talk, let the jury consider his silence and let the lawyers argue it. The time never was and never will be when the refusal of an accused man to deny his guilt and tell his story won't lead to a presumption of guilt; and there is no good reason why men should be taught that their correct and natural reaction to such silence is legally wrong. Furthermore lay bare the man's past life in any respect that the court or jury want to see. A juvenile judge would not think of acting without such information but the jury in an adult case must go it blind. A striking contrast.

Nothing about a trial reveals more clearly the professional attitude than does the giving of instructions. The important thing is, "Are they worded with strict legal accuracy?" If so, all is well, whether the jury understands a tenth of them or not. Nowhere does the lawyer pay the layman a higher compliment; nor, I might add, a more inconsistent one. A man who out of the jury box is incapable of understanding the most elementary legal principle, once in the jury box becomes a very Solomon of the law, capable of understanding and remembering 179 intricate instructions about some of which two or more lawyers and one judge had conflicting opinions after four years in a law school and twenty years in practice. Truly a wonderful accomplishment. It is this giving up of the substance for the form and a certain smug self-satisfaction with the result that irritates many outside the profession. When judges are permitted to instruct juries for the purpose of getting ideas across to them whether they use

American slang or Oxford English, we may at least have better instructed juries. Whether juries pay any attention to the instructions is another matter. It is a constantly irritating fact that appellate procedure today is not in substance a review of the guilt or innocence of the convicted but is merely a review of the legal acumen and professional skill of the lawyers. Over 35% of reversed criminal appeals in Missouri were decided on the instructions.

The judge should be made a force in the trial, with the right not only to instruct the jury in language they can understand, but also to question witnesses, to guide or control examinations and cross examinations, and to sum up the evidence for the jury. Restore a substantial part of his common law rights and duties. Make the prosecutor an executive in control of his deputies and the police forces. Let him be responsible for catching them as well as for hanging them. Give him the opportunity and the duty to see that evidence is secured and in the right way, and that prosecuting witnesses are at hand when needed.

The courts need more speed; not less consideration, but less lost motion. The average time for appealed criminal cases during ten years in Missouri from the commission of the crime to final disposition was 24 months and 27 days, of which 21 months were consumed in the courts. The percentage of reversals was 44%—about 50% of burglary and embezzlement cases and 43% of murders and rapes. It is hard to weigh these figures and not believe that our appellate courts deserve all the censure they get for reversals that defeat justice and make our courts a laughing stock. Read the Wallace case;<sup>50</sup> read the whole 27 pages of it and decide for yourself how far the rights and welfare of the law-abiding citizen are preserved by it. Wallace was guilty; he was caught red-handed, and he was practically released by the Supreme Court of this state because apparently they considered a further refinement of the technicalities of search and seizure which amounted to a reversal of the established procedure of this state, a more important thing than the punishment of this guilty man. No evidence against a guilty man ought to be suppressed, no matter how it is secured. The Wallace case is a beautiful piece of legal theorizing with scant or no apparent regard for its

<sup>50</sup> 157 Northeastern Reporter 657.

practical effect upon the very practical problem of protecting society by punishing law violators. We are proceeding upon a theory that became obsolescent with the signing of the treaty of Paris 145 years ago—that it is the primary duty of the criminal law to protect the individual against the oppression of the State. We need to about-face and recognize the need of modern conditions—that the primary use for criminal law must be the protection of society from the depredations of rebellious individuals. I am not in sympathy with the 18th Amendment but I am violently opposed to the indirect nullification of statutes by judicial construction whether they be prohibition statutes or others.

Then read the Shumaker decision<sup>51</sup> and consider whether we should permit any court to send a man to jail for an indirect contempt without the intervention of a jury. There has hardly been in all history a more autocratic, more arbitrary authority than that today exercised by the courts in contempt cases.

The matter of bail needs attention. Wherever it has been investigated unsatisfactory conditions have been found. The sureties are insufficient, forfeitures are uncollected, stolen property is put up as collateral, and there is the general laxity of either a loose or a corrupt system. In St. Louis<sup>52</sup> they found a bondsman having property assessed at \$18,000 and encumbered to the extent of \$22,000 with surety liabilities of \$670,295. Nor was this the only case of the kind. Out of \$292,400 of forfeited bail in the state, there was collected just \$1,572.80—about  $\frac{1}{2}$  of 1%. In St. Louis not a dollar was collected. New York State in 1926 tried to correct a similar situation by drastic amendments to its criminal code in regard to bail. Among other changes bail is now denied to persons charged with felonies and certain misdemeanors until they can be fingerprinted and an investigation made to determine whether they are repeaters. Whether the Court of Appeals has applied its microscopic eye to this act I do not know.

If there is a crime crisis today, it is due in part to a conservatism complex, originated by fear, in the mind of the legal profession. Stalking grimly through the 150 years of American liberties is the shadow of George III and English tyranny. The bar like a modern Don Quixote valiantly fights these ghostly wind-

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<sup>51</sup> 157 *Northeastern Reporter* 769.

<sup>52</sup> *Missouri Crime Survey*, Pp. 198-199.

mills. And the net result is that instead of American citizens finding themselves safer in the enjoyment of their liberties, they are less so, and modern society finds itself more and more helpless to protect itself against organized crime. It is idle chatter to lay the blame on constitutional conventions and legislatures. The lawyers have long dominated both and the courts themselves have written 90% of the law now in force. It is this court-made law that so strenuously resists change.

The court in the Wallace case uses the words "certain settled principles of law". I object to the word "settled" for its finality of meaning. There are no settled principles of law in that sense. Law is not a science with certain data and immutable laws as are the natural sciences. There is not a principle of law that is not an artificial, man-made principle, subject to exchange for another artificial, man-made principle. But in the minds of lawyers there exists the working theory that there is a vast amount of "settled" law. It is a point of view little appreciated by the layman, but so rigid and so firmly rooted is this theory among lawyers that I seriously question whether with the courts retaining their present standing, it is practically possible to write any constitution or enact any statutes that would reduce this "settled" law by so much as 10%. There is a portion of the field—10%, 25%, I don't know its exact extent—in which citizens may through proper agencies make changes as they like, but there is a larger field that is endowed in the legal mind with all the finality of fixed scientific data. There is probably a tendency to enlarge this latter field. It is when modern progress attacks this broad field of "Settled Law" that it meets with resistance as stubborn as the rocks, no matter how obsolete is the particular principle attacked.

The preservation of law is not an end in itself; it is only the means to an end and that end is the welfare of society. When the preservation of law becomes subversive of the real purpose of law and courts, it has become a handicap to society instead of an asset. And this reverential feeling toward much law is exactly the professional attitude of the bar. "Layman twaddle", I hear the lawyer say. It may be, but the sooner the courts and the legal profession generally, abandon the attitude that layman criticism of court procedure is an unwarranted impertinence, the sooner will some improvements be made and the less will be the

professional mental distress accompanying this inevitable reform. The layman doesn't operate the machine but he furnishes the fodder. His opinions are entitled to the same superior weight that those of the consumer have over the producer. And they ultimately prevail in both instances. If justice and the operation of the law are so profoundly mysterious that those subject to the action thereof can have no intelligent opinion in the matter, there is something radically and fundamentally wrong with justice and the *modus operandi*.

Through many conflicting theories and facts the writer has come with the firm conviction that the law, at least for a long time and possibly always, will be an important factor in the control of crime and that it is not now fulfilling this social function as efficiently as it ought to do. He believes that some changes in criminal procedure are necessary to the proper satisfaction of this social obligation, that the bar is the most capable instrument, by education, experience and strategic position, to effect these necessary changes; but he seriously doubts that it can be entrusted with the job. It is the most conservative of all professions, and a portion of its membership believe their financial prosperity is preserved by the maintenance of the *status quo*. Moreover (and this is perhaps the most important reason of all), while the profession may be in no small degree responsible for present abuses due to its influential position in the formation of constitutions, in legislative enactments and in judicial constructions, it is nevertheless quite unable to effect unaided any considerable program of reform. The writer therefore further believes that strong layman pressure in several directions will be necessary to secure action.

"We need a new creative era of constructive thought and action on governmental and public forms and methods," said Alfred Bettman of the Cincinnati bar to the criminal law section of the American Bar Association in 1925, "to make our public services fit the conditions created by the new mobilities and distributions of persons and things. It is to be hoped that the lawyers of America will lead in this constructive work and thought, as they led in the great formative and progressive era of the early part of the nineteenth century. If they do not, they will surrender their leadership in American life, and the conservatism of the American bar will justifiably bear much of the blame for the failure of our institutions to solve the problem of crime."