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# THE LIMITS AND POSSIBILITIES OF THE CRIMINAL LAW

*Frank J. Remington\**

## I. Introduction

This article discusses the application, or misapplication, of the criminal process to certain socio-legal problems. I will start with a fairly basic assertion about what the criminal law is today and then explore briefly what I think are some of the implications of this. An important reason for raising the question of the "limits and possibilities of the criminal law" is to enable us to respond in some consistent and hopefully intelligent way to questions that arise quite often in the administration of the judicial system. The principal question usually is whether the scope of the criminal law should, in the future, be drastically limited.

## II. The Criminal Process Today

The criminal law today is, and it historically has been, relied upon when other less drastic methods of social control either fail or are too expensive. The drunk is a responsibility of the police and, to a lesser extent, prosecutors, courts, and correctional agencies, not because these agencies want the business, but rather because no other agency at the municipal, state, or federal level is willing or has demonstrated an ability to take the drunk and deal with him in an effective way. The prostitute is a responsibility of the criminal law, not because law enforcement could not get along well without having to deal with the prostitute, but rather because there has been no other agency that has demonstrated either a willingness or an ability to take the prostitute and to deal with her in a way more effective than she is now dealt with by the criminal process. The husband and wife fight, which occupies as much as fifty percent of the calls of the patrol officer in a high crime area, is a responsibility of the police rather than the social worker, not because the police want this responsibility or feel that they have discharged it with the kind of effectiveness one might desire, but rather because most social agencies are open only for limited times during limited days of the week, and most husband-wife quarrels occur at a time when social agencies are closed. By default the police are left with this responsibility of major importance. The responsibility is large whether it is measured by the danger to the parties or to the police officer or by the impact of the police response to these calls for service on the community's attitude toward the legal process.

The prosecutor and court do a lot of things for the same reason. Non-support is given a great deal of attention by the prosecutor solely because it is the community's feeling that husbands ought to support their families and should be threatened with a severe sanction if they do not do so. If put to the test, the community is required to either do something effective or allow the evil to exist. The usual response is reliance on the criminal law, an unhappy alternative,

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but the only one that exists. In the bad check case, reliance on the prosecutor is not a result of a philosophical decision that it is desirable to subject to criminal liability the person who writes a bad check. Rather, it is because the ability of most of us to cash a check with ease is dependent upon a workable system of enforcement against those who write checks and have insufficient funds in their accounts. To date the alternative to the criminal process is a different credit system, a price we have been unwilling to pay.

So when we talk about the limits or the philosophy of the criminal law, it is sort of like talking about the philosophy of a wastebasket. It is the place where all things go that are not wanted. To analyze its content is difficult because it is filled with all kinds of stuff that has been rejected by other less drastic methods of social control whether governmental, family, or religious.

### III. Reasons for Limiting the Scope of the Criminal Law

We increasingly hear expressions of discontent about the broad scope of the criminal law and suggestions, like that of the President's Commission on Law Enforcement and Administration of Justice, that conduct such as drunkenness be removed from the criminal process.<sup>1</sup> There are several reasons given in support of such changes. The first is that the criminal law does an ineffective job in dealing with the drunk, the prostitute, the husband-wife dispute, the non-supporting husband, and the writer of bad checks. The criminal process is said to be a poor way of rendering a social service to a person such as the drunk or of insuring the integrity of commercial transactions. This is a fair comment. The difficulty, however, is not so much with finding fault with the effectiveness of the criminal process but rather in finding more effective alternatives. It is much easier to point out the weaknesses of the criminal processes than to point to an alternative that will work better. In the Report of the President's Commission, more emphasis is put on the disadvantages of the criminal process dealing with the drunk than upon the advantages of a detoxication center or other alternative.<sup>2</sup> In asserting this, I would not want to be understood as saying we ought not to use better alternatives to the criminal process if they can be devised or that I think the handling of these problems by the criminal process should not be improved. There is an obvious and urgent need to do all we can to improve the handling of social problems that exist in our communities. But it is not an effective argument against reliance on the criminal law to point out that it is not a happy solution, when the conduct is left to the criminal process in the first place precisely because of our lack of ability or desire to devise a better alternative.

A second reason for drastically limiting the scope of the criminal law is that the drunk, the prostitute, and the domestic disturbance clog the criminal justice system and thus consume far too much time of the police, prosecutors,

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1 THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 4 (1967).

2 *Id.* at 3.

courts, and, to a lesser extent, correctional agencies. There is no question that police spend a great deal more time dealing with drunks, prostitutes, and fighting husbands and wives than they do with murderers, armed robbers, and burglars. But again the real need is to produce a better alternative. Even in proposals to deal with the drunk in the detoxication center, police will still have the responsibility to pick up the down-and-out drunk. From the point of view of the police, detoxication is a great advantage only when it means a cure, since only then will the down-and-out drunk not have to be picked up again. It has yet to be demonstrated that this is an objective that can be achieved. Mental health experts have doubts, I understand, about the desirability of detoxication centers because they say that this is to treat the symptom rather than the causes and is likely to drain resources from more productive approaches to community mental health problems. Certainly we ought to try to develop better alternatives to the criminal process. But the basic problem of public order and safety and sensibility will be left in the hands of police, and it is misleading to urge that behavior like drunkenness be taken out of criminal law so that the police will no longer have to deal with the problem. I don't think any of us will see the day when the police do not have major responsibility for dealing with the wide variety of deviant behavior that occurs twenty-four hours a day, seven days a week.

A third reason for narrowing the scope of the criminal law is that the use of the criminal process for the drunk, the prostitute, and the domestic disturbance degrades the process. I understand what this means, although I do not think murderers are uncomfortable being in the same category as drunks. Probably it reflects a feeling that judges lack effective ways of dealing with drunks, and as a consequence they tend to handle the cases very quickly and this adds to the crowding, the confusion, and the degrading atmosphere of the lower criminal court. If removing the drunk and the prostitute would improve the lower criminal court, this would be a great gain, but the ills of the lower trial court are so great that most will look just about as bad as they do now even though the drunks were gone.

A final reason for limiting reliance upon the criminal process is that an overly broad criminal law gives too much power to police. This is often what is meant when people decry the fact that adultery is a crime, that gambling is as broadly defined as it is, and that the possession of marijuana or consensual homosexuality is criminal. The average legislative response to the suggestion that these ought to be repealed goes something like this: "What's the problem with having these statutes on the books? We have always had them and from the legislative point of view they seem to do no harm even though they may not do a great deal of good." One response has been that having overly broad criminal proscriptions that are not going to be fully enforced creates an undue risk of public corruption or private blackmail. The assumption seems to be that if conduct, like homosexual behavior, were not criminal, the homosexual would be less likely to be a victim of blackmail. Yet, this seems questionable. So long as the conduct remains socially disapproved, there is risk that the corrupt individual or public officer can victimize the person who desires to keep his con-

duct from public view. The idea that the corrupt public officer can be eliminated by repeal of some criminal statutes seems naive.

The issue of how much discretion ought to be left to police is, in its own right, one of the most important, and very debatable, issues that presently confronts the criminal system of justice. So complex is the issue that it cannot be dealt with adequately in this article except to assert that there probably must be a balance between an inflexible rule and unlimited discretion. Where the optimum point is on the continuum between rule and discretion is properly subject to debate. But it certainly does not seem realistic to conclude that the discretion of police or prosecutors can be significantly reduced by repealing some criminal statutes. If the drunk is to be taken to a detoxication unit rather than a jail, the police officer still must make the choice and what he decides will still be important to the individual involved and to the community. We have learned that changing the name from criminal to juvenile, the objective from punishment to "the best interests of the child," does not make the exercise of discretionary power any less important or lessen the need for subjecting discretion to adequate control.<sup>3</sup> Concern about the way public officials exercise discretionary power in dealing with social problems is vitally important today and will remain so whether the conduct is or is not criminal.

#### IV. Solutions

It has always been popular to urge that the scope of the criminal law be narrowed so that the police, prosecutor, judge, and correctional agency will only have to worry about the "real criminal." The famous Wickersham Commission Report had an article by August Volmer, the great early police leader, who said that police should not be burdened with the responsibility for dealing with vice.<sup>4</sup> His reason was an obvious one: If police could deal only with criminal conduct like armed robbery and burglary, no one would have any difficulty in identifying the good from the bad. Police would have total community support in their fight against serious crime and they would not have to face the very complexing problems that law enforcement agencies have to confront in dealing with borderline criminal behavior. Today we have that kind of police unit in the detective division of most police departments. Volmer's proposal would make detectives of all police and presumably leave to some other governmental agency the responsibility for dealing with much of the work, like mediating the husband-wife fight, now performed by the patrolman. The difficulty is that, to date at least, there have been singularly few volunteers for that kind of duty. The logical candidate is the social worker. If someone other than police is going to deal with drunks, prostitutes, and embattled husbands and wives, it ought to be the social worker. The social workers would have to go on a twenty-four hour basis seven days a week and be located in places where they could respond promptly to calls for service. Because they probably would be concerned about

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<sup>3</sup> *E.g., In re Gault*, 387 U.S. 1 (1967).

<sup>4</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 22-33 (1931).

the personal danger involved, they might have to be armed and before long social workers might well become very much like the good patrolmen ought to be today.

If it is neither desirable nor realistic just to repeal a lot of criminal statutes, then what ought to be done? A few solutions can be briefly discussed. First, it is important to recognize the complexity of the task presently confronting the criminal system of justice. Once this is accomplished, society must take the steps that are necessary to equip it to do the best possible job. Second, it is important that the police themselves scrutinize very carefully the quality of their responses to calls for service. A large amount of the patrolman's time is spent in responding to calls for help; police have more contact, particularly with members of the ghetto community, than any other governmental agency. Hence, they have the maximum opportunity either to aggravate the situation, if their response to calls for service is poor, or to make a significant contribution to improvement if their response to calls for services is of high quality. By high quality I mean the same kind of response they would make in a more affluent neighborhood. This would include treating people with respect, attempting to effectively mediate the husband-wife dispute, making referrals to other social agencies if they are available and willing to accept referrals, and taking a leadership role in calling the attention of the community to the need for the development of new social services where they are currently inadequate.

Third, there is a need to re-evaluate the traditional process of criminal justice. For example, correctional agencies have not made as effective a contribution as they might. Too often correctional services are thought of as something that is not needed until after conviction. Yet it seems apparent that there are many social problems existing today to which the entire process of arrest, prosecution, and conviction is unnecessary. The President's Commission on Law Enforcement and Administration of Justice recommends a maximum use of alternatives to prosecution and conviction.<sup>5</sup> If this is to be achieved, it will require a basic rethinking of the correctional role. What is needed is a closer working relationship between correctional agencies and the police in the early stages of the criminal process so that some social problems can be dealt with without having to go through the process of prosecution and conviction.

The last point, a very major point, is that we ought to recognize that law enforcement agencies in this country have a great deal of discretionary power and that they will continue to have a great deal of power, responsibility, and discretion even if we repeal criminal laws dealing with adultery, marijuana, gambling, prostitution, and other related problems. It is important that we do not merely object to this fact and then simply wait for the day when the criminal law can somehow be so narrowly drafted that it can be mechanically applied by the policeman without ability, without training, and without education. It is much better to recognize our system as one that puts a very heavy responsibility on the police officer and then to take an active role in making the changes that are necessary to equip the police officer with the training and education necessary

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5 THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 18-20 (1967).

to deal with the major social problems that he confronts. It is in this frame of reference that we ought to discuss the need for improved education, training, pay, organization, and other matters concerning the police profession.

## V. Conclusion

I want to conclude by repeating what I said at the outset. The criminal law has had, and will continue to have, the job of dealing with a wide variety of antisocial conduct which cannot be, at least has not been, dealt with effectively by other less drastic means. Thus it is not productive, in my view, to merely urge the removal of conduct, like drunkenness, from the criminal process and stop there. The need is to develop better alternatives and, in the meantime, to make very substantial improvements in the administration of criminal justice. It is necessary to equip the police, prosecutors, courts, and correctional agencies with the tools necessary to deal effectively not only with traditional crime, but also with a wide range of social problems that are increasingly important, particularly in our urban communities.

Even with the best efforts of all of us, the day is far off when we will have developed a really effective way of dealing with the very perplexing behavioral problems that are manifested by the drunk, the prostitute, and the husband and wife who cannot get along. But this is no excuse for inhumane or otherwise offensive treatment of persons who have those problems. It is possible to have a system of criminal justice that is sensitive to these kinds of behavioral problems and deals with them much more fairly and effectively than we do today. And, in the process of rendering more adequate service, we may narrow the gulf between the police and the community, particularly the ghetto community. There is reason to believe that today the poor and disadvantaged can gain a great deal if only the police and the entire criminal system will view the major objective to be a more adequate, effective, and respectful response to the many calls for service that come from the part of the community where the socially deprived live. The criminal justice system may not be the ideal way to respond to these behavioral problems, but it is the only system we now have and it can be greatly improved while waiting for better alternatives to be devised.