A COMPARATIVE STUDY OF THE PENAL CODES OF REPRESENTATIVE STATES IN THE AMERICAN UNION

BY

J ORIN POWERS

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Section I

JUSTIFICATION OF THE STUDY

One of the most evident characters of an advanced society is its need of social control. In primitive groups the social instincts largely suffice to maintain the necessary order. Whether we conceive of man in these groups as being a creature of egoistic appetites, passions, and desires, a brute, selfish and unsocial, quarrelsome and avaricious according to the theory of Hobbes, or according to the theories of Aristotle, Locke, or Rousseau think of him as by nature a social being, carefree, innocent, altruistic, and happy, by any conceivable theory he is free to act by his instinct or judgment. It is with the advent of organized society that his action must be controlled. An important restriction imposed by a highly developed society is the respect for property. Indeed, property has been conceived to be the basis of all social order. The "my" feeling develops early in children and the early appearance of the acquisitive instinct is reason to believe that the property concept was one of the early forces which produced a social order.

In the primitive society, according to Hobbes, man is entitled to all the property he can take and hold. Locke conceived that the nature man was entitled only to as much goods as he could comfortably consume before any of it spoiled. But organized society protects, through its various means of control, both the individual and his accumulation of property and the acquired property. Thus the individual and society are from an early stage interdependent, and the physical goods, property, an element about which the interests of each center.

To this simple basis of the beginning of society has been added
various complex coordinations recognized as valuable. We are not prepared to state that the property concept was first or fundamental. The physical well being is so important and self-evident that certain modes of behavior in regard to sacredness and inviolability of the person against attacks must have been characteristic of man's first associations. In fact, the concept of individual property was comparatively late of development and perhaps preceded by the concept of property in persons. Even when man stopped in one place long enough to cultivate a crop, the horde recognized his right only to share it with the other members. But the desire for individuality is innate and ornaments were used as distinctive marks. These by association came to be considered property. These shared protection with person and other forms of property came to enjoy the same protection.

Closely related to this development is the development of the family, an intricate process described in detail by Letourneau and Westermak. Here society has come to realize the value of certain modes of action and again it has, through the instrumentalities of social sanction and laws, stepped in to protect that type of family organization deemed by popular opinion to be best for the race. In a similar manner other institutions and policies, when once their value is decided upon, come to be protected by the agencies which we speak of as social controls. A breach of these social controls constitutes, in its elementary form, a crime. By this analysis crimes fall naturally into three classes: (1) against property, (2) against persons, and (3) against order.

It is one of the tasks of sociology to explain the mechanism by which these controls function. Various classifications of the social controls have been made and discussed at length. These discussions treat of habit, custom, tradition, religion, morality, public opinion, ceremony, and lastly law, which is the most tangible and clearly formulated of them all. The dictums of law
are intimately related to all the others. Criminal law is, in fact, an expression for the benefit of those unruly members who, through their lack of harmony with the existing situation, or by their natural unsocial traits, fail to conform without the artificial pressure.

It is interesting to note that much of the social control is unconscious on the part of the controlled and a less portion on the part of the controlling agencies. In normal times the individual pursues his usual round of activities assuming and believing his actions to be free. Society as a whole may also be quite unconscious that it controls the activities of this or that particular individual. Yet within the society there is an increasing tendency for certain individuals designedly and purposely to mold and form the social sanctions in order to further their own individual ends, or to promote social ends recognized as important by the ruling class. In these cases the degree to which the controlled individual remains unconscious of his condition is one of the measures of the possibility of success of such a control. In the instance of law, however, and perhaps religion, society has purposely and consciously asserted its will as to right or wrong conduct and purports to brook no opposition in the carrying out of its mandates.

On its administrative side, law prescribes a method by which the social consciousness is brought to bear upon the individual criminal. A complete study of the criminal law would involve besides penology, this matter of procedure, since it determines in part the amount and nature of the punishment actually prescribed. In this study, however, we confine ourselves to penology as such. These other considerations comprise the second part of penal codes commonly, which is not the particular concern of this thesis.

Theoretically, at least then, the criminal law represents a concensus of opinion of organized society as to specific acts or omissions harmful to
the social group. It is an expression in part of the social consciousness. Actually, however, there appears some doubt, part of which may readily be accounted for. In the first place the law incompletely represents the will of the group. That part of legislation about which legislatures are more or less undecided is illustrative of instances in which social approvals or disapprovals are not yet distinct. Instances are the anti-saloon legislation, the township high school legislation in Illinois during the past few years, various proposed (some accepted) sterilization laws, etc. It is only when a considerable degree of unanimity is backed by strong feelings of value that these new and radical changes are accepted. Secondly, the law looks backward instead of at present conditions. This is particularly true of judicial decisions by which judges are continually compelled to look backward to the records of previous cases for the principle which applies to a present case. In a similar manner law, in order to be effective, must express the collective convictions of the group after the conviction has been formulated. An instance is seen in the case of anti-alcoholic laws as applied to communities in which no well-defined conviction as to the advisability of refraining from the use of alcohol exists. Likewise, an expressed conviction no longer applicable is proverbially not enforced as seen in the various blue laws so common in our eastern states. These laws have so fallen into disuse that no pretense is made of enforcing them, unless by way of a threat to prevent the enforcement of other laws. This is said to have occurred in Boston when agitation was under way to enforce Sunday closing acts. This agitation was met by saloon men by the threat that they would enforce all the Sunday laws and make life quite inconvenient for their opposers. This practice of placing one blue law against another is quite pernicious and the repeal of such laws must be effected when once the public sentiment is aroused. Thirdly, law is only one of the agencies of control.
As an agent of control it is applied only in those instances so evident that practically all can agree and in which it is expedient or necessary to lay down certain expressed rules of conduct.

The discrepancy between law as it exists and the popular opinion is great enough to lead some to believe that there is little or no relation. In a conference with the Dean of the College of Law of the University of Illinois, in which he was asked point blank if the penal code of a state was an expression of the conscience codes of its people, he replied emphatically that it was not. The law seems to be such a complex and involved process that whatever may be the ideas, sentiments, and beliefs of the people, they fail oftentimes to get across. There is many a slip twixt what the majority of the people believe ought to be expressed in the law and what is actually expressed there. From peoples to political parties, from political parties to leaders, from leaders to representative, and from representatives to law is truly a complex process. But the aims and ideal of a representative government must be sadly perverted if by this process society is habitually failing to register its will.

Other authorities have not taken so decided a view. Small, in his General Sociology, page 293, says: "In point of fact, the law administered by the government is always an expression of the will of those interests which are for the time being dominant. Changes in the law and in the spirit of administration are consequently always affairs of readjustment of interests within the state."

While this may leave some doubt as to what these interests are and some question as to their identity with social consciousness, the matter is made somewhat clearer by E. A. Ross, Social Control, page 116: "The fountain of law is the immemorial notions and customs of the folk."

To follow his figure, the failures of law to express social
consciousness is the pollution of the fountain between its source and the point at which the people drink of it.

Parmele, discussing this point from a practical side says: "Law is based in large part upon custom, public opinion, moral ideas, religion, etc. But the state through its government has special means for enforcing its laws. As a matter of fact all forms of social control are eventually expressed to a considerable extent through the law and its enforcement. The most drastic and coercive part of the law is the criminal or penal law, and the acts prohibited by this branch of law are crimes." And again: "The society in which the criminal lives expresses its character in the penal code which changes as the social condition changes."

There is also historic and genetic reason for the above position. Originally the individual punished crimes against himself prompted by the motive of revenge. This idea occurs in the Mosaic law and exists also in political theory. Locke held that "the state of nature man was his own judge and executioner of the law of nature." But in an advanced society man has surrendered his right both to judge and execute the law to the agents of society. The motive of punishment remains the same, that of vengeance, which now becomes the righteous anger of society.

"Organized revenge became a social institution under the title of the 'blood feud.' In a rudimentary form, ever tending to become obsolete, this institution survives in our own country, at the South, where the vendetta is more dreaded than a pestilence."

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1 Parmele, Criminal Anthropology and Social Constraint, p. 29.
2 Ibid, p. 119.
3 Locke, Treatise on Government, Book III.
4 Wines, Punishment and Reformation, p. 33.
The next development consists in the method of composition by which the offender and his friends compound to pay a sum of money known as the wergeld. This custom was general in the early middle ages. The amount of the wergeld was arranged by the tribes which also enforced the payment. Next, the state, i.e., the king, compelled the offender to pay and the offended to accept. There were certain crimes for which the payment of money would not suffice. These were called "bootless" crimes. They came to be considered offenses against the king's peace, and the king might later be revenged by the payment of money. Thus originated the idea of a fine.

But the individual right to punish was not surrendered for all crimes at once. Until quite recently, and even yet in some societies, certain offenses of honor can be revenged only in personal combat, i.e., the duel. Another survival of this idea is the application made by the modern juries of the principle of unwritten law. Although this is not formally recognized by the statutes, the existence of the practice is quite commonly conceded, and since by common law juries are not required to give reasons for their decisions, it may be applied freely. A proposed reform in the jury system would require the jury to give a reason for its decision. This reform would not necessarily exclude unwritten law as a reason, since its existence is conceded, and the fact of its existence seems in no manner to run counter to well-established codes of justice. In general, however, public administration has so far encroached upon the operation of individual anger as to make its expression unlawful, and punishable, as we shall see, by very severe penalties. In the nursery and in the school, righteous anger has yet a great and proper part to play, probably since these are primitive groups.

The idea of revenge is so pertinent to human nature that it is not at all surprising to find its expression in penal codes. McDougal, Social
Psychology, pp. 232-3, says:

"These two emotions (revenge and moral indignation) have played leading parts in the growth and maintenance of every system of criminal law and every code of punishment, for, however widely authors may differ as to the spirit in which punishment should be administered, there can be no doubt that it was originally retribution, and that it still retains something of this character even in the most highly civilized societies. The administration of the criminal law is then the organized and regulated expression of the anger of society, modified and softened in various degrees by the desire that punishment may reform the wrong done and deter others from similar actions."

The expression of formulated codes of consciousness in law is discussed in its broader application by R. Von Thring, Struggles for Law, pp. 45-46.

"Every state punishes those crimes most severely which threaten its own peculiar condition of existence, while it allows a moderation to prevail in regard to other crimes, which, not infrequently, present a very striking contrast to its severity against the former. A theocracy brands blasphemy and idolatry as crimes deserving of death, while it looks upon a boundary violation as a mere dismeantor. (Mosaic law). The agricultural state, on the other hand, visits the latter with the severest punishment while it lets the blasphemer go with the lightest punishment. The commercial state punishes most severely the uttering of a false coin; the military state, insubordination and breach of official duty; the absolute state, high treason; the republic, the striving after regal power; and they all manifest a severity in these points which contrasts greatly with the manner in which they punish other crimes. In short, the reaction of the feelings of legal right, both of states and individuals, is most violent when they feel themselves threatened in the conditions of existence peculiar to them."
In our study we shall be able to point out instances of evident enraged public sentiment as well as differing concepts of the degree of criminality of certain acts arising from differences in the character of peoples represented in sections of the American Union. It is our purpose to discover as nearly as possible the extent to which marked differences in penal codes of representative states may thus be accounted for.
A crime is defined by the New York penal code, section 2, to be "an act or omission forbidden by law, and punishable upon conviction by 1. Death; or 2. Imprisonment; or 3. Fine; 4. Removal from office; or 5. Disqualification to hold any office of trust, honor, or profit under the state; or 6. Other penal discipline." This definition is identical with that of the code of Arizona while Oregon and California differ only in the omission of the sixth punishment. The New York definition seems to embody all of the essential elements of a legal definition. It is indeed hard to imagine any crime not punishable under one of the above categories, but evidently as a further precaution lest some act deserving of punishment should escape, the same code provides further (section 43) that "a person who willfully and wrongfully commits an act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is prescribed by this chapter, is guilty of a misdemeanor." Since New York includes misdemeanors in the category of crimes, as does the common law and also common usage, any act punishable under this provision is also a crime in that state.

The Georgia penal code attempts a definition of crime which is not without merit. "A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a joint union of operation of act and intention, or criminal negligence." This definition is slightly more descriptive and tends to identify crime as an objectively reality rather than a political abstraction.

The Louisiana code makes no effort at a concise statement to include all that is criminal. The compiler of the code makes the following interesting
"In recent years the Louisiana law maker has sought to make everything that is in heaven above, or that is in the earth beneath, or that is in the waters under the earth, the subject of penal legislation. Logically all 'thou shalt not' provisions of the law ought to be placed under the heading 'Crimes' but to have done that in this compilation would have made greater bulk rather than greater usefulness."

Not all penal codes attempt the general definition of crime. These depend, if indeed any legal utility is to be gained by the definition, upon the common law. While not all common law offense can be exactly defined, the principle has been adopted that any immoral act which tends to prejudice the community is per se a crime and punishable as such by the courts of justice. The courts have in various instances defined crime as "a crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to the whole community considered as a community in its social aggregate capacity, as distinguished from a civil injury."

Blackstone used the word "crime" to denote such offenses as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are called "misdemeanors." The terms evidently carry that meaning in common usage if used in contrast. Except for the more exacting demands of law or science, we see no need of further differentiation. Blackstone's distinction, however, is universally made in the codes by the terms "felony" and "misdemeanor" which are strictly technical terms that have come to carry a

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1 Mars Annotated code, p. 536.
2 U. S. 96 Fed. 837; 37 C. C. A. 568; 36 Neb. 564; 54 N. W. 547; 7 Conn. 185; 31 Wis. 386; 37 Ohio St. 78; 24 Mich. 163; 9 Am. Rep. 119; and 9 Wend (N.Y.) 212.
rather accurate connotation to common mind. A further distinction appropriate to this discussion is between crimes and torts. "The distinction between a crime and a tort or civil injury is that the former is a breach and violation of the public right, and of duties due to the whole community considered as such, and the latter is an infringement or privation of the civil rights of individuals only."

Sociologically the term crime should carry some further connotation. "Crime is the violation of the law," is the starting point from which the sociologist may analyze and characterize crime concretely. The above statement furnishes a clear line of cleavage. It separates crimes from other actions. Having separated and identified crime, it is the business of science to further characterize and analyze the separated mass, determining so far as possible, its intricate nature, causes, treatment, remedies, and means of prevention.

Two functional definitions of crime are worthy of consideration. The Venerable E. C. Wines in the Declaration of Principles, promulgated at Cincinnati, 1870, said: "Crime is an intentional violation of the duties imposed by law, which inflicts an injury upon others. Criminals are persons convicted of crimes by competent courts."

Parmele says: "A crime is an act forbidden and punished by law, which is almost always immoral, according to the prevailing ethical standard, which is usually harmful to society, which it is ordinarily feasible to repress by penal measures, and whose repression is necessary or supposed to be necessary to the preservation of the existing social order."

These definitions characterize as well as define crimes. They involve points of no concern to the legalist but of fundamental importance to the sociologist. From these and other definitions we may derive the following:

1. Brown. By common law a tort is an act or omission giving rise to a civil remedy which is not an action of contract.


characteristics of many crimes, some of which at least are suggestive as bases of treatment. The list does not purport to be complete. A practical criminologist might add to it indefinitely and thereby further clarify thinking and modes of action in this important field of endeavor.

1. All crimes are of sufficient importance to be recognized by law. Constitutions of state and nation are properly a part of the law.

2. A great majority are commissions. Commissions may be willful or involuntary. Most are willful.

3. They are generally immoral in the sense of being a violation of established social sentiment. The degree of immorality is in some measure an index to the degree of criminality.

4. They are intentional. Barring the consideration of free will and caused actions, it is assumed that the individual might have acted otherwise.

5. They are injurious to others and to society.

6. They are repressible or assumed to be so. In most cases the person offended is ready to aid in apprehending and convicting the offender.

7. They are usually destructive to social order.

8. Repression is supposed to be necessary for existence of social order or of society itself.

9. Their commission tends to prejudice the community.

10. They are often atrocious.

11. They may be due to criminal negligence. This applies to omissions. In a complex and evolving society an increasing number of crimes are thus committed.

12. Many crimes are accompanied by malice. Several crimes can only be proved when malice express or implied is established.

13. Their punishment gives satisfaction to the public.

14. They often arise from simple functioning of elementary instincts—sex, acquisition, pugnacity, or fear.

The term felony has its origin in feudal law and applied to offenses committed by a vassal which subjected him to the payment of a fee to his lord. In early English law the term applied to those crimes which carried
the punishment of forfeiture of lands and goods to the state. Such forfeiture was abolished by the Felony Act of 1870. The use of terms to denote the severer crimes usually punishable by death or imprisonment in the state prison has survived in common usage. All other crimes are misdemeanors. Misdemeanors are punishable by lesser fines or imprisonment in the county jail or both.

In practice the law determines which crimes shall be felonies and which misdemeanors by prescribing the character of the punishment. As a matter of convenience, most states prescribe a general penalty for misdemeanors for which no penalty is specifically imposed, to which class a general penalty is applied.

This general penalty we have found to vary, in the states chosen for this study, from a maximum fine of $100 in Illinois to a maximum fine of $1000 in Georgia, and from a maximum imprisonment of 3 months in New Mexico to one year in New York and Oregon. In New Mexico a felony is punishable by a fine not less than $50 and imprisonment in state penitentiary not less than 3 months. Nevada distinguishes between misdemeanors and gross misdemeanors, the punishment for the former being imprisonment not to exceed 6 months or fine not to exceed $500, or both; for the latter, imprisonment not less than 6 months nor more than one year or fine not less than $500 or more than $1000, or both.

In some states certain crimes are branded as infamous and carry the additional penalty of deprivation of the civil rights of holding any office of honor, trust, or profit, of voting at any election, or serving as a juror, unless the person again is restored to such rights according to the law.

The Georgia code further provides that: "All felonies, except treason, insurrection, murder, manslaughter, assault with intent to rape, rape, sodomy, foeticide, mayhem, seduction, arson, burning railroad bridges, train wrecking, destroying, injuring, or obstructing railroads, perjury, false swearing, shall be punishable by imprisonment and labor in the penitentiary.........but on recommendation of the jury approved by the judge said crimes shall be punishable as misdemeanors. If the judge trying the case sees proper, he may in his punishment, reduce such felonies to misdemeanors."
In Illinois these crimes are murder, rape, kidnapping, willful and corrupt perjury or subordination of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, forgery, counterfeiting, bigamy, or larceny, if the punishment for said larceny is imprisonment in the penitentiary. Georgia attaches the additional penalty of disfranchisement for treason against the state, embezzlement of public funds, malfeasance of office, bribery, larceny, and crimes involving moral turpitude punishable by imprisonment in the penitentiary. A like penalty is commonly applied to dueling and often for embezzlement of public funds, as appears below.

Responsibility, as we have seen, is commonly an essential to the commission of crime. On this basis, the Nevada code makes the following specific classification of persons capable of crime:

1. Children under 8 years of age.
2. Children 8 to 14 years of age in the absence of clear proof that they knew the wrongfulness of the act.
3. Idiots.
4. Lunatics and persons insane.
5. Persons ignorant or mistaken of fact where intent is required.
6. Persons whose act is unconscious.
7. Persons whose act was misfortune or accident without evil intent.
8. Married women, unless the crime is punishable by death, acting under commands, threats, or coercion of their husbands.
9. Persons, unless the crime be punishable with death, who committed the act, or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered or that they would suffer great bodily harm.

In Illinois the perpetration of a crime involves the joint operation of act and intention, or criminal negligence. The person must be sound of mind and must have arrived at the age of 14 years, or before that age if such person know the distinction between good and evil. Infants under the age of 10 years or idiots may not be found guilty of crime, but any person counseling, advising, or encouraging an infant, lunatic, or idiot to commit a crime is punishable as if he himself had committed the crime. Married women acting under threats
commands, or coercion of their husbands, and all persons committing crime under compulsion are likewise protected. Misfortune or accident are not deemed criminal unless there appears evil design or intention or culpable negligence. Drunkenness is not an excuse for crime unless occasioned by fraud, contrivance, or force of some other person who himself is punishable as principal.

Since crime, legally considered, is an abstraction, the nature of crimes committed vary from one age to another and in different states. The first offenses, says Seligman, were against society. "Treason, incest, and witchcraft are the three original crimes that are most universally found." These he observes to be crimes because they are "anti social." The earliest crimes, according to Oppenheimer, were:

1. Treason
2. Witchcraft
3. Sacrilege and the offenses against religion
4. Incest and the sexual offenses
5. Poisoning and allied offenses
6. Breaches of the hunting rules

Of these, treason, incest, and poisoning are common in our codes. Witchcraft is quite forgotten. Sacrilege and offenses against religion survive mainly in perverted forms. The Massachusetts code provides a penalty for blasphemy which shall not exceed two years imprisonment or a fine not to exceed $100, or both. It is doubtful if this is ever enforced. The provision merely remains on the statute book as one of the above-mentioned blue laws. In like manner many present-day crimes could not have occurred in colonial days, for no law existed prohibiting them. Examples are lobbying, bucket shops, and lotteries.

An interesting contrast may be noted by comparison of this with an early blasphemy law which was intended to be, and no doubt was, enforced.

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1 Seligman. Econ. Int. of Hist., p. 115.
2 H. Oppenheimer. The Rationale of Punishment, p. 71
The following is taken from Parkman's History of New France (earliest times to 19th century) quoted from record of proceedings council of Quebec:

"It is our will and pleasure that all persons convicted of profane swearing, or blaspheming the name of God, or the Most Holy Virgin, His mother, or of the saints, be condemned, for the first offense, to (pay) a fine, according to their possessions and the greatness and enormity of the oath and blasphemy. And if those thus punished repeat the said oaths, then for a second, third, and fourth time they shall be condemned to a double, triple, and quadruple fine. And the fifth time they shall be set in the pillory, on Sunday and other festal days, there to remain from eight in the morning until one in the afternoon, exposed to all sorts of opprobrium and abuse. And for the sixth time they shall be led to the pillory, and there have the upper lip cut with a hot iron; and for the seventh time they shall be led to the pillory and have the lower lip cut; and if by reason of obstinacy and inveterate habit, they continue after all these punishments to utter the same oaths and blasphemies, they shall have the tongue completely cut out, so that thereafter they cannot utter them again."

Penalties remain in our codes for "profane cursing and swearing" in public places. These may be indirectly related to the older punishments for sacrilege, but such an offense is now against public decency. In Wisconsin, profanity is not an offense unless on a train, nor in most states unless in the presence or hearing of a woman or child. In all of the eleven states used as a basis of this study, religious meetings as distinguished from other meetings are specifically protected by penalties, which distinction would signify a relation to these early crimes. The modern game laws can hardly be considered a variation of the breaches of the hunting rules for their purpose is so far

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1Brockway, in Char. and Cor., 1904.
removed from any that would apply to a stage in which survival depended upon
game.

Statistics show that present-day crimes are predominantly against
property or minor offenses against order, e.g., drunkenness and disorderly
conduct. In the recent agitation for a crime clean-up in Chicago, the Chicago
Tribune collected and published weekly a summary of the crimes committed with
the following results:
<table>
<thead>
<tr>
<th>Week ending</th>
<th>Murders</th>
<th>Hold-ups</th>
<th>Burglaries/larcenies</th>
<th>Confidence game cases</th>
<th>Bogus check swindle</th>
<th>Safe robberies</th>
<th>Pick-pocket cases</th>
<th>Automobiles stolen</th>
<th>Total property taken</th>
<th>Property taken in burglaries/larcenies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb. 17</td>
<td>5</td>
<td>35</td>
<td>175</td>
<td>2</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>15</td>
<td>$25,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>Feb. 24</td>
<td>0</td>
<td>19</td>
<td>150</td>
<td>5</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>16</td>
<td>20,000</td>
<td>15,000</td>
</tr>
<tr>
<td>Mar. 3</td>
<td>0</td>
<td>27</td>
<td>160</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>27</td>
<td>21,000</td>
<td>17,000</td>
</tr>
<tr>
<td>Mar. 10</td>
<td>0</td>
<td>23</td>
<td>155</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>32</td>
<td>18,000</td>
<td>15,000</td>
</tr>
<tr>
<td>Mar. 17</td>
<td>4</td>
<td>18</td>
<td>170</td>
<td>2</td>
<td>6</td>
<td>1</td>
<td>2</td>
<td>40</td>
<td>30,000</td>
<td>16,000</td>
</tr>
<tr>
<td>Mar. 24</td>
<td>2</td>
<td>23</td>
<td>175</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>45</td>
<td>25,000</td>
<td>22,000</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
<td>145</td>
<td>985</td>
<td>18</td>
<td>24</td>
<td>7</td>
<td>7</td>
<td>175</td>
<td>$139,000</td>
<td>$105,000</td>
</tr>
</tbody>
</table>
It seems evident at a glance that these results do not purport to include all crimes committed, probably only the more important, or at least those considered so by the Tribune. The existence of crime to the degree indicated here is a matter of no little concern and should not be dealt with lightly. If society intends to maintain property rights with the present high standards of security, such wholesale and continuous depredations must be repressed by severest methods.

Commitments to penitentiaries indicate that a large proportion of the serious crimes are directed against property. The distribution of 1156 commitments to Illinois penitentiaries in 1915, arranged in order of their frequency, is as follows:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Burglary</td>
<td>344</td>
</tr>
<tr>
<td>2. Larceny</td>
<td>182</td>
</tr>
<tr>
<td>3. Robbery</td>
<td>169</td>
</tr>
<tr>
<td>4. Murder</td>
<td>74</td>
</tr>
<tr>
<td>5. Forgery</td>
<td>59</td>
</tr>
<tr>
<td>6. Assault to kill</td>
<td>54</td>
</tr>
<tr>
<td>7. Manslaughter</td>
<td>45</td>
</tr>
<tr>
<td>8. Rape</td>
<td>43</td>
</tr>
<tr>
<td>9. Confidence game</td>
<td>37</td>
</tr>
<tr>
<td>10. Indecent liberties with children</td>
<td>17</td>
</tr>
<tr>
<td>11. Crime against nature</td>
<td>16</td>
</tr>
<tr>
<td>12. Robbery attempt</td>
<td>16</td>
</tr>
<tr>
<td>13. Burglary attempt</td>
<td>13</td>
</tr>
<tr>
<td>14. Bigamy</td>
<td>12</td>
</tr>
<tr>
<td>15. Rape attempt</td>
<td>11</td>
</tr>
<tr>
<td>16. Embezzlement</td>
<td>9</td>
</tr>
<tr>
<td>17. Receiving stolen property</td>
<td>8</td>
</tr>
<tr>
<td>18. Conspiracy</td>
<td>6</td>
</tr>
<tr>
<td>19. Incest</td>
<td>6</td>
</tr>
<tr>
<td>20. Having burglars tools</td>
<td>5</td>
</tr>
<tr>
<td>21. Arson</td>
<td>4</td>
</tr>
<tr>
<td>22. Confidence game attempt</td>
<td>4</td>
</tr>
<tr>
<td>23. Crime against child</td>
<td>3</td>
</tr>
<tr>
<td>24. Larceny attempt</td>
<td>3</td>
</tr>
<tr>
<td>25. Removing railroad journals</td>
<td>3</td>
</tr>
<tr>
<td>26. Escape</td>
<td>2</td>
</tr>
<tr>
<td>27. Harboring females under age</td>
<td>2</td>
</tr>
<tr>
<td>28. Malicious mischief</td>
<td>2</td>
</tr>
<tr>
<td>29. Perjury</td>
<td>2</td>
</tr>
<tr>
<td>30. Abandonment</td>
<td>1</td>
</tr>
<tr>
<td>31. Felony attempt</td>
<td>1</td>
</tr>
<tr>
<td>32. Having explosives</td>
<td>1</td>
</tr>
<tr>
<td>33. Kidnapping</td>
<td>1</td>
</tr>
<tr>
<td>34. Threats to extort</td>
<td>1</td>
</tr>
</tbody>
</table>

Grouping these into the threefold classification gives the following results:

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1 Institutional Quarterly, June 30, 1917.
Commitments to the Illinois State Reformatory indicate also that a large proportion are for crimes against property. The distribution of 475 commitments to this institution in 1915 is as follows:

1. Burglary 213
2. Larceny 81
3. Robbery 64
4. Forgery 22
5. Rape 18
6. Manslaughter 16
7. Assault to kill 12
8. Robbery attempt 9
9. Rape attempt 7
10. Confidence game 3
11. Burglary attempt 3
12. Crime against nature 3
13. Embezzlement 3
14. Indecent liberties with child 3
15. Receiving stolen property 3
16. Federal cases 3
17. Bigamy 2
18. Crime against child 2
19. Incest 2
20. Malicious mischief 2
21. Murder 2
22. Arson 1
23. Having burglar's tools 1

Grouping these gives the following results:

- Against property 403 84.8%
- Against order 9 1.9%
- Against persons 60 12.6%
- Federal cases 3 .6%
- Totals 475 100%

Since the nature of the crimes in the three federal cases does not appear in the report, these are omitted from the classification.

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1Number 31, the attempted felony, which from this name would be difficult to classify, is counted against order. 2Institutional Quarterly, p.114.
It is among misdemeanors that crimes against order appear predominantly.

The records of the Department of Police of the city of Chicago for misdemeanors shows a typical distribution of which is as follows:

| 1. Disorderly conduct | 54,400 |
| 2. Inmates of disorderly houses | 7,875 |
| 3. Violation of speed law | 6,932 |
| 4. Inmates of gaming houses | 2,768 |
| 5. Street walkers | 2,079 |
| 6. Vagrancy | 1,686 |
| 7. Abandonment of wife or children | 1,779 |
| 8. Assault with deadly weapon | 1,551 |
| 9. Carrying concealed weapons | 636 |
| 10. Obtaining money or goods by false pretenses | 725 |
| 11. Assault and battery | 661 |
| 12. Bastardy | 394 |
| 13. Resisting an officer | 354 |
| 14. Keepers of gaming houses | 306 |
| 15. Adultery and fornication | 298 |
| 16. Assault | 210 |
| 17. Use of motor vehicle without consent | 174 |
| 18. Cruelty to animals | 161 |
| 19. Inmates of house of ill fame | 155 |
| 20. Intimidation | 110 |
| 21. Keepers of houses of ill fame | 68 |
| 22. Selling liquor to minors or drunks | 63 |
| 23. Impersonating an officer | 54 |
| 24. Riot | 48 |
| 25. Driving away horse, etc. | 18 |
| 26. Extortion by threat | 16 |
| 27. Seduction | 12 |
| 28. Opium den, inmates or helpers | 11 |
| 29. Cruelty to children | 9 |
| 30. Rules of the road | 7 |
| 31. Compounding a felony | 3 |
| 32. Other misdemeanors | 22,666 |

Total 106,428

Statistics for the United States as a whole show a like distribution. Minor offenses are predominately against order. Major offenses are predominately against property. The following table gives the distribution of the 493,934 persons committed to penal institutions in 1910 in order by the offenses charged:

---

1 Institutional Quarterly, p. 148-149.
2 U. S. Census, 1910.
<table>
<thead>
<tr>
<th>Number of commitments</th>
<th>Per cent.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Drunkenness</td>
<td>170,977</td>
</tr>
<tr>
<td>2. Disorderly conduct</td>
<td>91,928</td>
</tr>
<tr>
<td>3. Vagrancy</td>
<td>49,302</td>
</tr>
<tr>
<td>4. Larceny</td>
<td>42,716</td>
</tr>
<tr>
<td>5. Assault</td>
<td>22,670</td>
</tr>
<tr>
<td>6. Fraud</td>
<td>8,566</td>
</tr>
<tr>
<td>7. Burglary</td>
<td>8,847</td>
</tr>
<tr>
<td>8. Trespassing</td>
<td>8,327</td>
</tr>
<tr>
<td>9. Violating liquor law</td>
<td>7,219</td>
</tr>
<tr>
<td>10. Gambling</td>
<td>6,834</td>
</tr>
<tr>
<td>11. Prostitution</td>
<td>3,155</td>
</tr>
<tr>
<td>12. Fornication</td>
<td>1,331</td>
</tr>
<tr>
<td>13. Incorrigibility</td>
<td>769</td>
</tr>
<tr>
<td>14. Keeping houses of ill fame</td>
<td>692</td>
</tr>
<tr>
<td>15. Violating city ordinances</td>
<td>656</td>
</tr>
<tr>
<td>16. All other offenses</td>
<td>68,735</td>
</tr>
<tr>
<td>Total</td>
<td>493,934</td>
</tr>
</tbody>
</table>

Drunkenness, disorderly conduct, and vagrancy account for 63.2% of the above commitments. 13.9% are unclassified; of the remaining 22.9%, 15.5% are clearly against property. The ratio of commitments per 100,000 of population was 537.0, or approximately one-half of one per cent.

Estimates as to the annual cost of crime for the whole country have been made, but these are of little value beyond the fact that it is an amount quite inconceivable to human mind. Eugene Smith placed the estimate at $600,000,000, which seems from estimate for smaller units to be fairly correct. In Illinois, outside of Chicago, each arrest costs $14. The total costs for arrests were nearly $10,000,000. The combined cost for two state prisons and the reformatory school at Pontiac was estimated at $800,000. "The most conservative estimate of expenditures for arrests and maintenance of prisoners in institutions is nearly $12,000,000."

A brief consideration of these figures would lead to the conclusion

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1 Institutional Quarterly, p. 75.
that the treatment of crime as a business proposition can be at best but a losing game to society. Any effort to turn such decided losses to an asset must indeed be futile. Some hopeful aspects appear, however, which from the viewpoint of cold business, deserve careful attention. The increasing number of arrests may be a sign of progress in that it is an index of the degree to which society is identifying and punishing breaches of its laws. It may be a helpful suggestion that too many people are sent to prison, thereby making of them a liability instead of an asset. Fines are too often imposed and never collected. Not only must prisoners be cared for and fed, but often their families become state charges. A suggested cure for this is probation which has been found to be successful if coupled with restitution to society and to person, family support, and installment fines. Adult probation is in force in 24 states and in 5 others limited to cities, making a total of 29 adult probation states. Aside from other virtues it has been made to pay financially in certain instances. In Massachusetts there were in 1907, 13,967 persons placed on probation and in 1916, 28,953. The amounts collected in suspended fines for the same years were respectively $49,067 and $418,315, which amounted to nearly double the cost of service\(^1\). During the year 1911 there were more than 10,000 offenders placed on probation and these paid in family support, restitution, and installment fines more than $100,000\(^2\).

In Indiana, Mr. J. A. Collins, former city judge for the city of Indianapolis, got good results with the suspended sentence law. This law was passed in 1907. During his administration he suspended judgment in 700 cases and withheld judgment in 7,559 cases. Fines paid in installments of a dollar a week in four years amounted to $34,014. The total number placed on probation

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\(^1\)N. Y. Journal of Criminal Law, Jan., 1918, p. 694.
to pay fines was 3,832, of which 3,220 paid in full. Part payment was received from 102 who were committed for the remainder. 205 were unable to pay anything and were committed to the jail or workhouse. 143 were released. In all cases in which this kind of punishment is used there are a surprisingly low number of recidivists as compared with the prison method of treatment. The whole matter of probation and parole we shall discuss in another connection. It is well to note here that the possibilities of the system from a business standpoint are not completely developed. Its success in this way must depend upon the business ingenuity of the persons who administer the law and will require a radical departure from the usual methods of confining punishment to fines and imprisonments. Some further suggestions for its application are:

1. The probationer might be compelled to work for the state if possible in those occupations, trades, or professions in which he has ability or training.

2. Probationers might be compelled to work the abandoned farms which are becoming a problem in eastern states. With food becoming a vital world problem as it is to-day, such a project on a large scale might be made not a losing proposition and at the same time the world's supply of food may be considerably augmented. This problem must be solved ultimately and it would seem a matter of good business sense to utilize in reclaiming these lands the efforts of those who should make restitution to society.

3. Unproductive prisoners might be compelled to enlist in the army. For every place thus filled in the military organization, a more productive individual is allowed to continue production.

Another point at which our treatment of crime has been short-sighted in the past is in reference to vagrancy. A typical case is a man whose family

1Journal of Charities and Correction, 1915, p. 28.
is in want, who has no visible means of support, yet who persists in idleness. This man is arrested, charged with vagrancy, and too often given a definite jail sentence to be supported at state cost without work. It is expected that in his idleness he will reflect upon his conduct, reform, and become a useful citizen. In the words of a Chicago judge, he has the laugh on the court which committed him, on his family who have claims upon him, and on society that must clothe and feed him. Vagrancy stands third in frequency in the list of crimes for the United States. The logical cure for idleness is productive work. For the vagrant it is both a punishment and a cure. If possible, the vagrant should be compelled to work on probation under the supervision of the probation officer. This plan has the advantage of allowing leeway for initiative. As soon as the vagrant has demonstrated his ability to meet his obligations of his own accord, he may be released from supervision. In the event of his failure to make good on probation, he may be transferred to a labor colony. It is suggested that much of the vagrancy could be prevented by proper education of the young between 10 and 20 years of age in industrial lines. Many vagrants are idle not through laziness as such, but because they have never been taught to work.

The labor or farm colony mentioned above is another hopeful project from a business standpoint in the treatment of prisoners. This has been made approximately self-supporting at the District of Columbia Workhouse at Occoquan, Virginia, with an average sentence of 35 days. This colony has 1,150 acres and 30 buildings, including a rest hall and library of 40,000 volumes.

The state of Texas has undertaken the farm colony plan on a large scale. Starting with the farms comprising 12,200 acres in 1906, the state now owns approximately 30,000 acres with improvements worth $2,000,000. C. S. Potts,

2Jour. Char. and Cor., 1914, p. 45.
Chairman of the School of Government of the University of Texas, states that it is impossible now to determine net gain or loss of Texas prison system since it was left so far in debt by the former penal system. In addition great losses were incurred by unwise legislative experiments.¹

In Oregon the honor system was championed by Governor West and approved by an initiative vote. It includes state farm work, road work, and care of prisons. Workers receive 25¢ per day and 15¢ additional for clothes. In this way the state pays out about $10,000 per year. It was stated in the Conference of Charities and Corrections in 1913 that the profits derived make the system self-supporting². If this were the best that could be said for the system, it is perhaps argument enough for its adoption. As a matter of fact, it seems ridiculous that any system or project that can command labor at forty cents per day should be no more than self-supporting. Absence of a profit from such a system signifies a remarkable degree of bad management.

To the objection that any of these proposals are soft, sentimental, lenient, or easy it may be answered that quite the contrary is the case. These projects meet the requirement both of punishment and reformation. It is well known among prison officials that the habitual criminal whom society might most wish to punish is best satisfied when he can sit in stupor and idleness to brood upon the wrongs he believes society has done him and projects of future depredations. To submit to the routine of labor and its demands for thought is irksome and corrective but not depressing. Estimates place our criminal population at approximately 2% of the whole, or about 2,000,000 people in the United States. We have seen the enormous losses caused by these offending members. We cannot be lenient, tolerant, considerate, or even gentle with

¹Jour. Char. and Cor., 1914, p. 54.
²Proceedings, p. 118.
such a group of persons who do us so great a damage. At best we can apply
a mediocum of business principles with a fair degree of mercy where mercy is
permissible or due.
Section III

PRESENT CONDITIONS VS CONDITIONS IN 1890

The most complete study in criminal statistics made in America is the report on Crime, Pauperism, and Benevolence in the United States at the Eleventh Census, 1890. The report was prepared by Dr. Frederick H. Wines. Part I comprises statistics of (1) Inmates of all institutions, (2) Prisoners, (3) Juvenile offenders, (4) Paupers in almshouses, (5) Inmates of Benevolent institutions, and the appendix. It is in the appendix that he treats of the criminal law under the heading "Possible and Actual Penalties for Crime." Here he has prepared a table of the possible penalties by state in states and territories, forty-eight in all, with reference to the following crimes:

1. Counterfeiting coin
2. Counterfeiting bills
3. Perjury and subordination in capital cases
4. Perjury and subordination in other cases
5. False swearing
6. Incest
7. Crime against nature
8. Bigamy
9. Adultery
10. Fornication
11. Indecent exposure
12. Keeping gaming house or gaming table
13. Gambling and betting
14. Setting up lottery
15. Selling lottery tickets
16. Carrying or drawing weapon
17. Vagrancy
18. Tramp
19. Rape
20. Abuse of female infant
21. Assault
22. Assault and battery
23. Assault with weapon
24. Assault to maim or do bodily injury
25. Mayhem
26. Assault to commit crime against nature
27. Assault to kill
28. Assault to rape
29. Assault to commit arson
30. Assault to commit burglary
31. Assault to steal
32. Assault to commit other felony
33. Poisoning food or medicine
34. Poisoning well, spring or reservoir
35. Horse whipping
36. Vitrol throwing
37. Prize fighting
38. Duelling
39. Sending challenge
40. Accepting challenge
41. Acting as surgeon or second
42. Posting as coward
43. Arson of occupied dwelling by night
44. Arson of occupied dwelling by day
45. Arson of unoccupied dwelling by night
46. Arson of unoccupied dwelling by day
47. Arson of buildings other than dwellings with the curtilage of a dwelling by night
48. Arson of buildings other than dwellings within the curtilage of a dwelling by day
49. Arson of buildings other than dwellings without the curtilage of a dwelling by night
50. Arson of buildings other than dwellings without the curtilage of a dwelling by day
51. Arson to defraud insurer
52. Arson of lumber, grain, etc.
53. Arson of woods, prairies, and crops
54. Breaking and entering a dwelling by night
55. Breaking and entering a dwelling by day
56. Breaking and entering other building by night
57. Breaking and entering other building by day
58. Breaking dwelling by night
59. Breaking dwelling by day
60. Breaking other building by night
61. Breaking other building by day
62. Entering dwelling by night
63. Entering dwelling by day
64. Entering other building by night
65. Entering other building by day
66. Robbery armed
67. Robbery unarmed
68. Grand larceny
69. Petit larceny
70. Larceny from person
71. Larceny from house by night
72. Larceny from house by day
73. Common thief
74. Larceny of horses
75. Receiving stolen property
76. Embezzlement
77. Embezzlement of public funds
78. Embezzlement of bank officers
79. Obtaining property by false pretense
80. Forgery

The difficulty with such a study as pointed out by Dr. Wines, and which is in fact quite evident, lies in the vast range of variation of a few factors involved in the administration of punishments. "Each state and territory has its own code. Each code has been borrowed in part from some one or more of the codes previously in force in other states, and modified to suit the views of the compilers. No two codes agree throughout, either in their definitions of crime or in the penalties prescribed for particular offenses."

The first great variation is in definition of crimes. These center about the common law, but modifications are made in each state which vary somewhat from the common law except in regard to certain well-defined acts, rape, dueling, adultery, etc. The next variation is in the penalty which "may assume either of five typical forms: (1) imprisonment only; (2) fine only; 

\(^1\)Appendix, p. 373.
(3) fine or imprisonment; (4) both fine and imprisonment; and (5) fine or imprisonment or both fine and imprisonment. Each of these varieties of sentence is divisible into three subvarieties: those with a maximum but no minimum penalty, those with a minimum but no maximum, and those with both a minimum and a maximum limit.

In his study, Dr. Wines discovered: (1) maximum terms with no minimum ranging from 10 days to life; (2) minimum terms with no maximum ranging from 20 days to 6 months; and (3) minimum and maximum terms ranging from 5 days to 20 days to 21 years or life.

Likewise, he found: (1) maximum fines with no minimum from $10 to $20,000; (2) minimum fines with no maximum from $10 to $10,000; and (3) minimum and maximum fines between $1 to $20 for the lowest and $8,000 to $10,000 for the highest.

"The subject thus presented offers to the consideration of mathematicians a somewhat formidable problem in permutations. Given 24 maximum and 3 minimum terms of imprisonment, with 64 variable terms with definite maximum and minimum limits; also 19 maximum and 8 minimum fines, with 42 variable fines, with definite maximum and minimum limits. Required to answer to the following questions: first, in how many ways might these be combined by the framers of criminal codes in the five typical forms above; and second, how many different individual sentences might be pronounced upon convicted prisoners under the thousands of paragraphs or sections which might be devised by the literary ingenuity of the aforesaid legal authors?"

Further variations arise from: (1) the substitution of imprisonment for a fine or part fine, (2) imprisonment in penitentiary or in county jail,

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1Appendix, p. 374
2Appendix, p. 374
(3) Sentences to hard labor in prison or out of prison, (4) disfranchisement and disqualification for office or as a witness, (5) loss of rights of property, or to the bond of matrimony, or civil rights, and (6) imprisonment may be in part or entirely in solitary.

The evident conclusion to be arrived at from all these considerations is that the criminal law is unequally applied. The degree of inequality Dr. Wines brings out by some striking contrasts made in concise statements which we quote here, followed by the changes that have been made in codes as now in force.

1. The maximum penalty for counterfeiting in Delaware is 3 years, in Maine, Massachusetts, New York, Florida, and Michigan it is imprisonment for life. The minimum penalty in Missouri is 5 years which is the maximum in Connecticut.

Counterfeiting. The maximum penalty is now imprisonment 2 to 3 years and fine 0 to $500. New York, imprisonment not more than 5 years and fine not more than $500, or both. In Missouri, the penalty is imprisonment 0 to 10 years, according to the degree, there being five degrees.

2. The maximum penalty for perjury in New Hampshire, Connecticut, and Kentucky is 5 years; in Maine, Mississippi, and Iowa it is imprisonment for life; and in Missouri it is death if the witness designs thereby to effect the execution of an innocent person. In Delaware, on the other hand, perjury is punishable by a fine, without imprisonment, not less than $500 nor more than $2000.

Perjury. The Connecticut penalty may now extend to life imprisonment. Delaware has added an imprisonment of 1 to 10 years and the perjurer may be whipped forty lashes at the discretion of the court.

3. The maximum penalty for incest in Virginia is 6 months; in
Louisiana the maximum penalty is imprisonment for life; and in Delaware the penalty is a simple fine of $100.

Incest. Louisiana has changed the maximum to 20 years. Delaware has added an imprisonment of 0 to 7 years.

4. The maximum penalty for bigamy ranges all the way from 1 year in Delaware to 21 years in Tennessee.

Bigamy. Delaware has increased the maximum imprisonment to 6 years and added a fine not more than $2000.

5. The maximum penalty for rape in New Jersey and Pennsylvania is 15 years; in Delaware, North Carolina, and Louisiana the penalty is absolute and in death.

Rape. New Jersey has changed the maximum to 20 years and added a fine not more than $5000. The rapist may also be sterilized by an act of 1911. The Delaware death sentence applies only in case the female is under 7 years. Otherwise, the penalty is a fine not less than $200 nor more than $500, whipped 30 lashes, and imprisonment not exceeding 10 years.

6. The maximum penalty for mayhem in Colorado is 3 years; in Vermont it is imprisonment for life. In Georgia the putting out of one eye or slitting or biting off the nose or lip is a misdemeanor, for which the punishment cannot exceed 6 months in jail, a year in the county chain gang, and a fine of $1000. On the other hand, the penalty in Georgia for castration is death, but may be commuted by the jury to imprisonment for life.

Mayhem. The Colorado maximum is increased to 20 years. Utah penalty is changed to imprisonment 1 to 10 years.

7. The maximum penalty for assault with intent to commit rape in Pennsylvania and Kansas is 5 years; in Massachusetts it is imprisonment for life.
Assault with intent to rape. Pennsylvania has a fine of 0 to $1000 in addition to the five-year maximum.


Arson of an occupied dwelling by night. Wyoming has increased the maximum to 21 years.

9. The maximum penalty for arson in the daytime of a building and not a dwelling and without the curtilage of any dwelling, in Kansas, is 4 years. In Maryland, South Carolina, and Georgia it is death.

Arson in the daytime of a building and not a dwelling and without the curtilage of any dwelling. All penalties are changed. In Kansas the penalty now is 5 to 7 years at hard labor. In Maryland the penalty is imprisonment 2 to 20 years. In South Carolina the death penalty was abolished in 1915 and all conflicting acts repealed. In Georgia the penalty is 1 to 3 years.

10. The maximum penalty for arson with intent to defraud the insurer in Alabama is 1 year; in Maine the minimum for the same offense is imprisonment for life.

Arson with intent to defraud the insurer. Alabama has also a fine not more than $2000.

11. The maximum penalty for breaking and entering a dwelling by night in Arkansas is 7 years; in North Carolina the penalty is absolute and is death. In Louisiana it is death if the burglar is armed and makes an assault; also in Delaware if the intent is to commit murder, rape, or arson.

Breaking and entering a dwelling by night. No change.
12. The maximum penalty for grand larceny varies from 2 years in Louisiana and New Mexico to 20 years in Connecticut. Grand larceny. Louisiana and New Mexico have increased the maximum imprisonment to 10 years.

13. The maximum penalty for forgery varies from 3 years in Delaware to imprisonment for life in New York and Missouri. Forgery. Delaware has a fine in addition of $500 to $2000. In New York the maximum is changed to 20 years.

If we compare in general the character of the present codes as indicated by the eleven states considered in this study with the codes as Dr. Wines found them, we find considerable changes, some of which are in the direction of uniformity. There remain a great many incongruous contrasts in penalties and some peculiar ratios of maximum penalties could be shown. Uniformity has been increased by the use of the indeterminate sentence, the wide range between minima and maxima, probation, parole, and commutation of sentence.
DEFINITIONS OF SPECIFIC CRIMES

We have seen from Dr. Wines' study the first point of variation in statutes is in the matter of definitions. An accurate definition is a difficult matter in all instances. In law, definitions have important bearing upon technique as evidenced by the care with which indictments are drawn so as to bring the description of the alleged act within the statutory definitions and by the scrutiny to which indictments are subjected by the lawyers of the defense.

Uniformity in the statutes as to certain essentials results from the rather loose adherence to the common law. Yet the number of different acts included under a specific name varies considerably. As persons will not always act by strict and definable modes in the normal life, so they vary in the manner in which they commit their crimes. For purposes of comparison it is necessary to agree upon certain crimes by names and attach to these names definite connotations. The crimes chosen for this study are in the main those which are most commonly named in the codes and the connotations attached to them are those which appear from observation to be most general. On the other hand, all inclusive names - public nuisance, lewdness, malicious mischief, vagrancy, etc. - are compared upon the basis of connotations that these names carry in the individual states. The definitions here presented may not meet the precise requirements of a legalist in any state. The purpose is to clarify the understanding as to the nature of the criminal acts compared in the table which follows.

Arson, at common law, is the burning of the house of another with malice. The use of the term has been extended by the statute to include any wilful burning of the property of another or the burning of one's own property if insured with intent to defraud the insurer. In Illinois the burning of one's
own house, whether insured or not, is arson. Special provisions are made in
the statutes for certain kinds of property burned. In regard to buildings,
distinctions occur as between buildings occupied or unoccupied, within or
without the curtilage of a building that is occupied, and between burning by
day and by night. Special provisions for arson of courthouses, county jails,
or other public buildings are not uncommon. Malicious burning is a caption
apparently added to cover all other forms of arson (considered in its broad
meaning) than those specifically provided for. Obviously it applies to the
burning of property of lesser value than in the instances above mentioned.

Malicious mischief is the wilful destruction, defacing, injuring,
or destroying of the property of another in the spirit of ill will or resentment
towards the owner. The statutes applying to this offense are quite detailed.
Some of the kinds of property commonly mentioned are: railroad property and
signals; vessels; telegraph, telephone, water, and electric systems; libraries;
and museums.

The term larceny has both a general and a specific meaning. In general
it applies to the fraudulent appropriation of the property of another by what­
ever means. It thus applies to all those crimes against property, not des­
truction, and has many forms. Specifically, larceny is the fraudulent taking,
carrying, leading, riding, or driving away of the property of another with the
intent to appropriate it to one's own use. It is divided into grand and petit
larceny on the basis of the value of the property taken. The division between
grand and petit larceny is 12 pence at common law. We have found this to vary
from $5 in Massachusetts to $100 in Illinois and Louisiana. A number of special
provisions occur for larceny, the more common of which appear to be larceny of
deeds and horse, cattle, and hog stealing.

Burglary is the breaking and entering of the house of another in the
night with intent to commit a felony therein. The meaning has been extended to include the day-time as well and other provisions have been added. In Illinois, "whoever wilfully and maliciously and forcibly breaks and enters, or wilfully and maliciously without force (the doors or windows being open) enters into any dwelling house, kitchen, office ......... and other buildings with intent to commit murder, robbery, rape, mayhem, or other felony or larceny shall be deemed guilty of burglary ........." The presence of a deadly weapon, drug, or anaesthetic upon the person is evidence of intent.

Embezzlement is the wilful and malicious appropriation of property entrusted. In Illinois the crime may be committed by an insolvent banker receiving deposits, a public officer or servant taking the public funds, or an executor, guardian, or trustee failing to give an account. Thus Illinois, in effect, recognizes the failure to give an account as sufficient evidence of misappropriation of funds^1.

Robbery is the violent and felonious taking of the property of another, from his person or in his presence, against his will and under constraint of fear or force. It has been decided that the snatching of a pocket book is not robbery but larceny^2.

Kidnapping for reward. See kidnapping below.

The term confidence game or swindle is the operation of robbing or cheating a person whose confidence has been gained. The phrase "commonly called a confidence game" occurs in the Illinois statutes, but is not defined. The Supreme Court, however, has defined a confidence game to be "the unlawful and malicious taking or obtaining of the goods, chattels, or effects of any person

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1See Illinois statutes, Chap. 38, Sect. 61a, Laws of Illinois, 1903, p. 156.
235 Ind., 460.
by the use of any trick, artifice, or fraudulent device."

Obtaining property by false pretenses is not always sharply differentiated from confidence game. It applies in general to wilful misrepresentations made to cheat or defraud. The statutes describe in some detail the various ways in which the misrepresentation may be made and include the game of three card monte, or any other game, device or slight of hand, fortune telling, trick, or other means by the use of cards or other implements.

Counterfeiting and forgery are commonly named together. Counterfeiting is an offense specifically against the currency while forgery applies to the falsely making or materially altering, with intent to defraud, any writing, which, if genuine, might be of legal efficacy or the foundation of legal liability. This meaning has been extended by various statutes.

Some types of assault mentioned in the statutes are: simple assault; battery; assault and battery; assault by life prisoner; assault to murder, rape, or maim; and assault to commit other felony. An assault is the unlawful attempt, coupled with present ability, to do a bodily injury to another, with force and violence. The assault may be complete without touching the persons as by lifting a cane, clenching the fist, or pointing a gun. The poisoning of food, or a spring or well may be punishable as an assault to commit murder. A battery is an unlawful beating or use of force by one person upon another, committed wilfully or from want of sufficient care. In Illinois a man indicted for assault and battery cannot be convicted of simple assault.

Manslaughter is the killing of a human being. It may be voluntary or involuntary, justifiable or unjustifiable. In Illinois it is the unlawful killing of a human being without malice expressed or implied and without any admixture of deliberation. It must be voluntary upon sudden heat of passion, caused by a provocation apparently sufficient to make the passion inevitable,
or involuntary in the commission of an unlawful act or a lawful act without
due caution or circumspection. The crime of abortion may be manslaughter in
some cases if the woman dies, and in others if the foetus only is killed.

Murder is the unlawful killing of a human being attended with
aggravated culpability. Degrees in murder were first introduced in 1531 in
the Laws of Henry the Eighth. First degree murder was the unlawful and malicious
killing of a human being with deliberation and premeditation; second degree was
the unlawful killing without deliberation and premeditation; and third degree
was the unlawful killing in the commission of a felony. First and second
degrees of murder persist in most statutes, but have been abolished in Illinois.
What was the first degree of murder is now murder, and what was second degree
is now manslaughter.

Mayhem was originally such an injury to the body of a person as
would render him less able in fighting to defend himself or to annoy his
adversary. It has been extended to include all injuries to the body. Some
states, (e.g., Georgia) define several kinds of mayhem for which the punishment
varies with the degree of injury done or the atrociousness with which the act
is committed.

Kidnapping, which was originally the carrying off or stealing either
of an adult or child for deportation to the American Colonies there to be
employed in servile capacity, has come to include the carrying off or sending,
or secretly confining of an adult against his will, or of a child against the
will of the parent or guardian, by force or fraud or intimidation.

Slander is either a tort or a crime, or both. It is a verbal de-
flamation of character and may be committed in various ways, some of which
are: charging with commission of a criminal offense, the imputation of a loath-
some or contagious disease, and imputations concerning the profession or trade
of a person or his conduct in office, if productive of damage. Georgia punishes for publishing the name of a female raped, Nevada the slander of a woman, and New Mexico slander in churches. Libel, which is written or printed slander, is more commonly the subject of penal legislation.

Blackmail is a threat for the purpose of exacting a payment of money, goods, or chattels. Threats may be to accuse of crime, to do injury to the person or his property, to publish a libel, or to expose or impute any deformity or disgrace, etc.

Abduction is used herein to include the taking or carrying away of an unmarried female of chaste life and conversation against her will or illegally for purposes of prostitution, concubinage, or marriage.

Lewdness is a very inclusive term intended to include indecent liberties intended to arouse lust, passion, appeal to or gratify sex desires, or the enticing to take such indecent liberties.

There is little variation as to what constitutes rape. It is the carnal knowledge of a female, forcibly and against her will, or upon her submission through fear, weakness, or stupor, or if she is unconscious of the act, an idiot, imbecile, or insane, or under the age of consent. The age of consent is the only point of variation noted in this study. It is thirteen years in Great Britain and in the United States varies from ten to twenty-one years. Any degree of penetration is sufficient to establish the crime of rape. In no case have we found that rape may be proved upon the evidence of the female unsupported by other evidence. A failure to cry out and call for help is not evidence of consent. Rape can be committed upon a prostitute.

The term disorderly house is applied to any house or place of public resort by which the decency, peace, or comfort of a neighborhood is disturbed. Some houses specifically mentioned are: houses of ill-fame or assignation, bawdy
houses, tipling houses, gambling houses, opium dens, etc.

A panderer is a go-between for a prostitute and her consort whether or not he or she shares in the earnings of the prostitute.

Abortion is the causing of a miscarriage in a pregnant woman, except when performed by a licensed physician and deemed by him necessary to preserve life. The term "procuring miscarriage" is used instead of the term "abortion" to apply to the act of a pregnant woman who secures the services of an abortionist or the means of producing her own miscarriage.

Fornication is sexual intercourse of an unmarried person. Adultery is the sexual intercourse of two persons either or both of whom is married to a third person. It may be double if both persons are married or single on the part of the person married if only one is married.

The terms bigamy and poligamy are used interchangeably in the statutes to apply to the marrying of any other person while having a living spouse. Exceptions are usually made when the husband or wife has been seven years abroad, or absent and unheard of. Massachusetts uses the term poligamy and Blackstone prefers this. In common usage, however, there is a distinction. The word bigamy always refers to a crime, while the word poligamy is used for the plural marriages which are sanctioned by some religions.

The crime against nature, or sodomy, sometimes called buggery, is not defined in the statutes of certain states but referred to as "the inhuman and dastardly crime which Christians refrain from mentioning." It is the carnal copulation between male persons or with beasts or birds, or with a female by the anus, or by the mouth, or with a dead body, or the submitting to any of these. According to tradition, this crime was prevalent in the biblical Sodom and Gomorrah and caused those cities to be destroyed by the wrath of the Lord, and hence the name.
Incest is the sexual intercourse between persons so closely related by consanguinity or affinity that marriage between them would be unlawful.

A public nuisance is any act which, though lawful within itself, is deliterious to health or demoralizing to character affecting the community generally.

A bribe is a gift, advantage, or emolument offered, given, asked, or accepted to influence conduct in office or in a judicial proceeding. Separate provision is frequently made for the crime of accepting bribes, and for the bribery of special officers, particularly jurors and witnesses.

Perjury is the wilful giving of false testimony under oath lawfully administered in a judicial proceeding. The Romans punished this crime by throwing the perjurer from the Tarpeian Rock; in England it formerly was punishable by the pillory. The penalty for false swearing often occurs in connection with that for perjury. The offense differs in that it has no reference to judicial proceedings.

Extortion is the obtaining of the property of another with his consent, induced by wrongful use of force or fear, or under color of official right. It is distinguished from blackmail in that the latter is consummated by the threat, whereas extortion involves the actual payment. In practice there seems to be no difficulty in making a distinction between extortion and robbery, but such a distinction is difficult in definition. Robbery appears to be an immediate demand for the turning over of property and can be committed in the immediate presence of the victim. Extortion extends over a range of time in which the victim may contemplate upon the advisability of releasing property and finally releases it as an enforced payment.

Barratry is the practice of exciting lawsuits, bringing of such
suits without consent of the supposed plaintiff, or stirring up quarrels.

The term "lobbying" applies to the solicitation in any manner of members of a legislative body in order to influence their vote upon a proposed measure in which the lobbyist is personally interested or paid to support. It is criminal in only a few of the states, in others it is made legal by registry of the lobbyists together with their employers names and the interest they represent; in still others the matter is left to the ruling of the individual legislature. If lobbying is made criminal, the nature of the acts which constitute it is made clear; if it is legalized, breaches of the rules are criminal.

A bucket shop is an establishment dealing in futures and making contracts with no intention of the delivery of goods. The distinction between a bucket shop and a legitimate board of trade is that in the instance of the latter some of the deliveries are made.

The term vagrancy is commonly quite inclusive, applied generally to wanderers, itinerant beggars, and those living without labor or visible means of support. It may include rogues, unlicensed peddlers, prostitutes, indecent persons, fortune tellers, those who refuse to support their families, tramps, truants, paupers, disorderly persons, etc.

Under the caption carrying concealed weapons is included any object which may be of an advantage offensively in a fight. Some weapons mentioned are: gun, revolver, pistol, silencer, blackjack, slung shot, billy, sand bag, knuckles, bludgeon, dagger, dirk, knife, razor, stiletto, bomb, bomb shell, explosive substance, etc. A weapon is not concealed so long as its identity and presence are evident. The degree of its accessibility for use is not pertinent.

Conspiracy, unlawful assembly, and riot are closely related crimes. The first is the combination between two or more persons to commit an act punishable by law, or to effect a legal purpose by unlawful means; the second is
synonymous except that there is separation without action. "A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel." The number of persons that can constitute a riot is commonly as low as two if force and violence is used or a tumultuous manner affected.

The three-fold classification of crimes referred to in Section I is sociological rather than legal. In practice the points of cleavage are not always distinct. In the broad sense, all crimes are against order, and crimes against order may be also against persons or property. The classification used herein is based upon the relative degrees to which the individual crime, judged in the light of its definition, offends property, persons, or order. Roughly, those crimes or classes of crimes not specifically against property or persons fall into the third class against order.

Crimes against property are divided by Blackstone into the two great divisions destruction and larceny. Larcenies fall naturally into two groups on the basis of the manner in which they are committed. Direct larcenies are cases of open and plain stealing. Indirect larcenies are those in which the act committed is used as a subterfuge by means of which property is obtained.

Crimes may be classified against the person on either of two bases, namely, the physical person and the personality. Thus we have: (1) acts by which the physical being is effected, and (2) acts which effect a particular individual with respect to his rights, reputation, or privacy. Crimes against the person by this second criterion include offenses against the life or physical well being of persons, against moral obligations to persons, against the reputations of persons, and crimes effecting persons arising from sex perversions.

Our general division of the crimes against order are illustrative of

1Blackstone, p. 146.
some of the ways in which the established modes of an organized society may be offended. In the first place, there are certain modes of action in regard to sexual relations which society has approved. Any departure from these modes is socially disapproved and criminal. Prostitution and the practices connected with it constitute the first class of these crimes. Secondly, society recognizes the rights of children to be born normally and makes interferances with this process criminal. Other standards of a well-established order are decency, justice (in the abstract sense), public policy, and peaceableness. Dueling is a protest against the socially established method of settling disputes and a recourse to a more primitive method. It seems logical to believe that the severe penalties attached to this crime have had an influence in the stamping out of the custom.

The two last headings in our table under crimes against order seem quite disproportionate. Grave robbery (legally termed sepulture) and other disturbance of cemeteries or funerals generally constitute a separate chapter of statutes. Logically they should be included under the heading of crimes against public decency. Treason, also, which ordinarily forms the subject of a separate chapter, has a logical connection with the crimes against public justice, for all those crimes, like treason, are against the organized life or activity of government and might be designated crimes against government or crimes against the state; that is to say directly and specifically against the state itself as contrasted with crimes against individuals or the property of individuals which the state undertakes to protect.

In the course of this study certain crimes have been noted which seem to be peculiar or unusual either in their nature or in the penalty attached. These are not necessarily illogical; in fact, they are often very logical although it seems it has not occurred to the law makers in other states to include them
in their codes. The list is as follows:

In Louisiana: untying a coal boat, hitching a noisy animal near a church during services, being drunk at a picnic, taking a seat in a theater after the curtain has gone up, wearing a high hat, using extra long hat pins, offering for sale a dressed hog without the head and ears, and "dead heads." The latter term applies to appointive state or county officers whose only or chief duty is to draw their pay.

In Georgia, hunting or fishing on Sunday, running a freight train on the sabbath, cock fighting, and publishing the name of a female raped are misdemeanors. Whipping one's wife is a felony punishable by imprisonment from six months to two years.

In New Mexico scandal mongers are fined $25 to $80 and slander in churches $25 to $50. Insulting another while armed is punishable by imprisonment from three months to one year, or a fine of $100 to $300, or both. Assaulting one's wife is punishable by imprisonment from 30 days to 3 years, or a fine of $25 to $1000, or both.

In Nevada conveying a venereal disease, selling liquor at a camp meeting, and not closing a gate are misdemeanors. "Bunco steering" is punishable by imprisonment not to exceed 10 years. This term applies to encouraging or inducing persons to visit gambling houses or houses of prostitution or assignation.

Alabama penalizes the disturbing of a female in a public place by imprisonment not exceeding six months or a fine not exceeding $200, or both.

Wisconsin provides a fine of $10 for failure to milk a cow. The maximum penalty for driving a nail into a log is 5 years' imprisonment and a fine of $100.

In New York the exhibition of a theatrical performance on Sunday is
a misdemeanor and the exhibitor must contribute $500 for the relief of the poor. Persons winning or losing $25 or upwards at gambling within twenty-four hours must contribute five times the amount for the benefit of the poor. Eavesdropping and horse racing near a court house are misdemeanors. Disguised or masked persons must obtain permission of the police or be subject to imprisonment for 1 year and a fine of $1000 to $5000. Hazing is punishable by imprisonment from 30 days to 1 year or a fine of $10 to $1000, but if the person hazed is tattooed or disfigured the penalty is imprisonment from 3 to 15 years.
Section V

The tables presented herewith show in as concise a form as possible the punishments for 110 crimes in eleven states chosen for this study. Not all the facts can be shown in tabular form; hence, it has been necessary to add many footnotes. A blank in the instance of both imprisonment and fine indicates that no punishment was found. Numbers occurring in the imprisonment columns indicate years unless followed by "m," which indicates months, or "d," which indicates days. The numbers occurring in the fine columns indicate dollars. Where both imprisonment and fine columns are filled, the interpretation is that the punishment may be imprisonment between the maximum and minimum, or both such imprisonment and fine. The letters "L" and "D" placed in the imprisonment column are used to signify life imprisonment and death respectively. If either occurs alone, it signifies that the penalty is absolute. The names used for crimes are as brief as possible to be consistent with accuracy.

Notes on Tables

1. Murder, rape, kidnapping, perjury, subordination of perjury, arson, burglary, robbery, sodomy, crime against nature, incest, forgery, counterfeiting, bigamy, larceny punishable by imprisonment in penitentiary are infamous crimes, conviction of which incapacitate to hold office of honor, trust or profit, to vote or serve as juror.

2. Felonies for which no punishment is prescribed in the code are punishable by 0 to 7 years, 0 to $1000, or both. Misdemeanor if no punishment is prescribed, by 0 to 1 year, 0 to $500, or both.

3. If penalty is not prescribed by law, a felony is punishable by 0 to 10 years, $500 to $5000; gross misdemeanor 6 months to 1 year, $500 to $1000; and misdemeanor 0 to 6 months, 0 to $500.

4. Or 0 to 1 year, 0 to $500.
5. If house, etc. is burned as a result.
6. Death, if person is maimed or killed.
7. Included in malicious mischief.
8. 0 to 10 years, if value of property is $15 or more, or is railroad property.
<table>
<thead>
<tr>
<th>Date</th>
<th>Nature of Property</th>
<th>Amount</th>
<th>Place</th>
<th>Name of Owner</th>
<th>Race</th>
<th>Description</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/01/2020</td>
<td>House</td>
<td>$500</td>
<td>New York</td>
<td>John Smith</td>
<td>White</td>
<td>3 bedrooms</td>
<td>None</td>
</tr>
<tr>
<td>02/02/2020</td>
<td>Car</td>
<td>$1000</td>
<td>Los Angeles</td>
<td>Jane Doe</td>
<td>Black</td>
<td>Sedan</td>
<td>None</td>
</tr>
<tr>
<td>03/03/2020</td>
<td>Jewelry</td>
<td>$5000</td>
<td>Chicago</td>
<td>John Doe</td>
<td>White</td>
<td>Diamond necklace</td>
<td>None</td>
</tr>
</tbody>
</table>

Note: The table above provides a summary of crimes against property, including the nature of the property, amount involved, place, name of the owner, race, and a brief description and remarks.
### Crimes Against Persons

#### Against Life or Physical Well-Being

<table>
<thead>
<tr>
<th>Crime</th>
<th>Factor</th>
<th>Sex</th>
<th>Life/Death</th>
<th>Obstruction to</th>
<th>Against Reputation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault</td>
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<td></td>
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<tr>
<td>Battery</td>
<td></td>
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</tr>
<tr>
<td>Assault by Life</td>
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<tr>
<td>Poisoning</td>
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<tr>
<td>Assault by Life</td>
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<tr>
<td>Poisoning</td>
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#### Against Mental Freedom

<table>
<thead>
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<th>Crime</th>
<th>Factor</th>
<th>Sex</th>
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**Note:** The table contains detailed information about various crimes and their public impact.
9. Or 3 months to 1 year, $50 to $1000.
10. 0 to 20 years, if life is endangered.
11. Malicious mischief to railroad.
12. At discretion of jury or of court on plea of guilty.
13. May be judged guilty of murder.
14. Considered burglary, if felonious intent is proved.
15. If the entry is at night.
16. Death, if armed.
17. $100 or more.
18. $20 up. Or 6 months to 1 year, 0 to $200.
19. $50 up.
20. $35 up.
21. $5 up.
22. Disqualified to vote or hold office.
23. $100 up.
24. Graded to value defrauded or stolen.
25. Disqualified to hold office.
26. Under $50, misdemeanor; over $50, felony.
27. Or 0 to 20 years, 0 to $1000.
28. If $50 or more is embezzled.
29. Or 3 months to 1 year, 0 to $200.
30. If intent was to kill when resisted.
31. 0 to 10 years, if by parent; 10 to 50 years if by other person.
32. Maximum fine is 3 times value of property obtained.
33. Or 0 to 2 years, 0 to $500.
34. Fine may be $500 if value is more than $50.
35. If less or greater than $50 value, misdemeanor – felony.
36. Fine goes to school fund.
37. This is simple assault without reference to intent. The punishments given for Massachusetts, New York, Wisconsin, and Oregon include also the various assaults with intent.
38. Or 0 to 3 years, 0 to $1000.
39. 3 degrees according as to intent. 1st degree, 0 to 10 years; 2d degree, 0 to 5 years, 0 to $1000, or both; 3d degree, 0 to 1 year, 0 to $500, or both.
40. If armed.
41. Not recognized.
42. If unarmed. Wife beating (assault and battery on wife) may be punished at the discretion of the court by 20 lashes administered by the sheriff within the prison walls.
43. If wound is inflicted.
44. Included under murder.
45. No special provision.
46. Any convict.
47. Applies to any convict, 5 additional years, or death.
48. 1 year, 0 to $1000 additional for each subsequent offense.
49. Failure to testify in trial not incriminating.
50. Excusable.
51. 2 degrees of manslaughter. 2d degree punishable by 0 to 15 years, 0 to $1000, or both.
52. Degrees of murder have been abolished.
53. No degrees in murder.
54. Death penalty applies only in case of castration. Forms of
mayhem described in detail.

55. 0 to 14 years, if an eye.

56. If person is 18 years of age or under. Person so imprisoned is compensated at a rate not to exceed $1500 per year, total not to exceed $5000.

57. Or 0 to 2 years, 0 to $1000.

58. Fine goes to dependent.

59. Made felony in 1917.

60. Fine goes to wife.

61. Of woman.

62. In churches.

63. Initiative measure in 1914.

64. Under 16 years.

65. Or 3 months to 1 year, $500 to $1000.

66. Or 0 to 6 months, 0 to $200. Female is 16 years, or under. Rape not included.

67. Under 14 years.

68. If 12 to 16 years of age - 2 to 10 years.

69. If female is under 16 years, rape is 2d degree, punishable by 0 to 10 years.

70. If female is a common prostitute. If female is 16 years or under, 1 to 30 years. If by person of 18 years on female 16 years or under, 1 to 35 years, 0 to $200. If by person under 18 years on female 16 years or under, 1 to 10 years, 0 to $200.

71. Age of consent 16 years. Jury may fix death penalty for assault to rape. Vasectomy may be prescribed for abuse of female under 10 years.

72. Age of consent 16 years.

73. On sister or daughter, 20 years to life.

74. Or 0 to 1 year, $50 to $1000.

75. If previously chaste.

76. Or 0 to 3 years, $100 to $500.

77. If house is leased, lease is void.

78. Or 6 months to 1 year, $200 to $500.

79. Prohibited only in certain locations.

80. Prohibited with 400 yards of school or church. Penalty applies if peace, comfort, or decency is habitually disturbed.

81. Municipal corporation councils are given power to control.

82. 16 years or under.

83. Second offense punishable by 1 to 10 years.

84. If child is quick, life imprisonment or death.

85. May be murder if death of woman results.

86. If female is over 16 years 0 to 6 months, 0 to $100. If under 21 years and previously chaste, 0 to 4 years, 0 to $200.

87. Provisions apply to certain inter-racial fornication only. Penalty 6 months to 1 year, $100 to $500.

88. By definition this applies to a male person over 18 years who carnally knows a female person of previous chaste and moral character, who is over 16 years and under 18 not his wife. Or 1 month to 1 year, $50 to $500.
89. For carnal knowledge of a girl 12 to 16 years of age, 2 to 10 years.
90. Included under bigamy.
91. Or 6 months to 1 year, $300 to $1000.
92. Double penalty for repeated offense.
93. Or 0 to 2 years, 0 to $300. Gross lewdness is specified in the statute.
94. Provision made for abatement and damages.
95. Applies only on a train.
96. Or 0 to 2 years, 0 to $5000.
97. Disqualified forever from holding office.
98. Or 0 to 1 year, 0 to $1000.
100. If on trial of indictment for felony, 0 to 20 years.
101. In capital cases. Other cases 0 to 20 years or 0 to 3 years, 0 to $1000.
102. Murder, if an innocent person is convicted and executed.
103. Death if person is executed as a result.
104. If prisoner was held for felony, rescuer is held for felony; if for misdemeanor, rescuer is held for misdemeanor.
105. If person rescued is acquitted. If not, same punishment as prisoner rescued.
106. In addition must be dismissed from office.
107. Disqualified to serve on the case. Second offense, 0 to 1 year, 0 to $500.
108. Second offense 2 to 5 years.
109. Running pool room is gambling.
110. 6 months for second offense. If a corporation, charter is forfeit.
111. Second offense 0 to 5 years.
112. Corporation may be fined $5000.
113. Varying with size of town in which shop is kept.
114. May be made to work out fine at $1.50 per day.
115. At hard labor in nearest penitentiary.
116. Includes 3 to 10 days in solitary.
117. Town boards empowered to make regulations.
118. Also compelled to pay any resulting damages.
119. Fine imposed on discretion of jury.
120. Specific conspiracy to monopolize.
121. Must be double for second offense.
122. May be licensed.
123. Punished for riot in case of refusal to disperse.
124. So in original law.
125. If jury recommends mercy, maximum is 20 years; otherwise, death.
126. Duelists are disqualified as electors of office holders by the constitution.
127. Disfranchisement.
128. If opponent is killed.
129. If murder results, all persons present are deemed guilty.
130. Punishable for accessory before fact.
131. Manslaughter, if either combatant is killed.
132. Accessor to murder.
133. May be first degree murder.
134. $20 or more.
135. If state officer 1 to 7 years.
136. Minor must be arrested and brought before judge, who shall dispose of child as provided for vagrants, truants, paupers, or disorderly persons.

137. Salt well specified.

138. Law of 1911 makes it a misdemeanor to have in one's possession firearm that may be concealed about the person, and a felony to carry them concealed.

139. Death penalty was abolished in 1915 by initiative amendment to the constitution.

140. This was amended by an Initiative Measure 1916, as follows:
   "Every person guilty of murder in the first degree shall suffer imprisonment for life, and every person guilty of murder in the second degree shall be confined in the state prison for not less than ten years. No person convicted of the crime of murder shall be recommended for pardon, commutation, or parole by the Board of Pardons and Paroles, except upon newly discovered evidence establishing to the satisfaction of all members of said Board his or her innocence of the crime for which conviction was secured.
   "All acts and parts of acts in conflict with this act are hereby repealed."

The vote on this measure was: for, 18,936, against, 18,784. It was accordingly proclaimed a law by the governor.
Section VI.

INDUCTIONS FROM TABLES

We have stated that in this study we have found some progress in the matter of increasing uniformity in present codes as compared with conditions in 1890, which progress has come about from the introduction of other factors than the shifting of punishment in the respective codes. These factors are the use of the indeterminate sentence, increasing the differences between minima and maxima, probation, parole, commutation of sentence, etc. The disparity of punishment which still remains as displayed in the three tables presented herewith is indicative of a wide range of disagreement as to the degree of punishment proper for crimes. Interesting comparison may be obtained in two ways: (1) by comparing the maximum punishments - imprisonment and fine - for the same crime in the respective states, and (2) by comparing the maximum penalties - imprisonment and fine - for different crimes in the same or different states. The first are self-evident and may be noted by any reader merely by comparing the columns of the tables vertically. The second are not so readily noted and the contrasts may appear more shocking to different readers in proportion to their own individual estimates of the guilt of different crimes. A few comparisons and contrasts are pointed out here rather as suggestive than exhaustive, leaving the reader to amuse himself at any length he may desire in carrying these comparisons farther by aid of the tables.

Comparison of Maximum and Minimum Punishments for Individual Crimes

1. The maximum imprisonment for arson offenses in Georgia is 40 times the maximum in Arizona.
2. The minimum imprisonment in Oregon for arson to defraud the insurer is three times the maximum in Alabama.

3. The maximum imprisonment for horse, cattle, or hog stealing in Illinois and Georgia is 20 times the maximum in Wisconsin.

4. The maximum imprisonment for embezzlement of public funds in Wisconsin is 25 times the maximum in Illinois, which is one-half the minimum in Georgia.

5. Gambling is punishable by a simple fine which can not exceed $50 in Alabama, but may be punishable in Oregon by imprisonment for 5 years.

6. The maximum penalty for drawing a weapon in Alabama is a simple fine of $100; in New York it is imprisonment for 7 years and a fine of $1000.

7. The maximum penalty for assault in Illinois is a fine of $100; in Oregon it is life imprisonment.

8. Poisoning food may be punished by life imprisonment in Massachusetts, Nevada, and New Mexico, but in Georgia the maximum imprisonment is 1 year.

9. First degree murder may be punished by death in all states studied except Wisconsin; Illinois allows a minimum imprisonment of 14 years; the only other alternative is life imprisonment.

10. Blackmail may be punished by life imprisonment in Massachusetts and by 20 years imprisonment in Louisiana; but the maximum imprisonment in Illinois and Georgia is 6 months.

11. Abduction is punishable by any imprisonment not less than 5 years (no maximum) in Nevada, but the maximum imprisonment in Illinois and New York is 1 year.

12. Rape may be punished by death in four of the states of this study, by life imprisonment in three. The lowest maximum is 7 years, in Wisconsin.

13. The maximum penalty for fornication in New York is 40 times the
imprisonment and approximately 30 times the fine in Massachusetts.

14. Profanity in a public place may be punished by a fine of $1000
and imprisonment for 6 months in Georgia, but the maximum in Massachusetts is
$5. Many states omit profanity from the list of crimes.

15. The minimum imprisonment for accepting a bribe in Oregon is ten
times the maximum in Nevada and Georgia.

16. Carrying a concealed weapon is punishable by a fine not to exceed
$200 in Illinois but may be punished by 7 years' imprisonment in addition to
a fine of $1000 in New York.

17. Prize fighting is a felony in several of the states studied, but
may be licensed in Nevada. Another view of this situation in Nevada may be that
it is punishable by a fine payable in advance.

Comparisons of the Degree of Guilt of Various Crimes Within a
State or Between Different States on the Basis of
Maximum Imprisonment

1. The guilt of arson of an unoccupied building in New York is
5 times the guilt of assault to rape, or bigamy.

2. Embezzlement in Wisconsin is 50 times as guilty as notorious
cohabitation in New York, Arizona, or Nevada.

3. Adultery in New Mexico is punishable by a fine of $25 to $80,
but bigamy, which is an aggravation of the same offense under the guise of
legality, may be punishable by imprisonment for 7 years.

4. Burglary, incest, and mayhem are equivalent crimes in Illinois,
but in Oregon mayhem is twice burglary and 6 2/3 times incest.

5. In Illinois the maximum imprisonment for fornication is one
year, but for adultery it may be imprisonment for life. In New York the maximum
imprisonment for fornication is 20 times that for adultery.

6. The maximum imprisonment for poisoning food in Georgia is 1 year, but for poisoning a well it is 20 years.

7. Counterfeiting in New York is 40 times adultery in the same state and in Alabama and Georgia, or 20 times adultery in Nevada and Louisiana.

8. Abduction in Georgia is 40 times bribery or one-half burglary with explosives in Wisconsin and Oregon.

There are indications that where punishments are unusually severe these are to be accounted for by a strong emotional background of public sentiment. This occurs in the case of crimes of a spectacular nature or crimes which are likely to be brought to public attention by their atrocity. When public sentiment is aroused, the statement is often heard that "there ought to be a law" and it seems such a sentiment is to a degree effective in the enactment of such laws. Burglary with explosives may be punished by 40 years' imprisonment in Wisconsin and Oregon and by imprisonment for life, or death, in Nevada. Train robbery is punishable by death without alternative in two of the states studied and may be punishable by death in two others. These punishments are above the punishments for other burglaries and robberies.

The maximum imprisonment of 99 years for kidnapping for reward in New Mexico is not unusual but a rather peculiar manner of saying that the maximum is life imprisonment. It is an indication that law makers as well as others may, at times, be whimsical in their manner of expression.

A great variation in fines appears from the tables which seem to indicate no consensus of opinion as to the extent to which the payment of money may counterbalance the commission of a wrongful act. We have found no case in which a fine may even partly pay the damages of first and second degree murder, burglary, perjury, train wrecking, or treason. Instances in which a fine alone
suffices are: (1) In Illinois for drawing a weapon, assault, assault and battery, barratry, setting up a lottery, selling a lottery ticket, bucket shop, disturbing peace, disturbing religious meeting, and unlawful assembly; (2) In Massachusetts for gambling and profanity in a public place; (3) In Wisconsin for gambling, blacklisting, selling a lottery ticket, lobbying, and disturbing a religious meeting; (4) In Nevada for arson to defraud the insurer; (5) In New Mexico for adultery, fornication, slander, public nuisance, setting up a lottery, selling lottery ticket, posting as coward, and acting as surgeon or second at a duel; (6) In Oregon for gambling, profanity in a public place, and disturbing peace; and (7) In Alabama for gambling, bucket shop, setting up a lottery, and selling a lottery ticket. The heaviest fine which occurs on the tables is $10,000. This may be exceeded, however, in cases in which no limit is placed on the fine, cases in which the fine equals the amount taken, double the amount taken, double the amount won, or five times the amount won. By appearances, Nevada has the highest fines in general. Fines for crimes against persons are much less common than for crimes against order, and slightly less than for major crimes against property.

Death as an absolute penalty occurs on our tables 21 times as follows: Illinois, 1; Massachusetts, 1; New York, 2; Arizona, 1; Nevada, 1; New Mexico, 2; Georgia, 2; and Louisiana, 11. The total number of crimes for which death may be the penalty in the respective states is as follows: Illinois, 4; Massachusetts, 1; New York, 2; Wisconsin, 0; Arizona, 4; Nevada, 8; New Mexico, 2; Alabama, 13; and Louisiana, 16.

The respective number of times life imprisonment occurs as a maximum penalty is as follows: Illinois, 7; Massachusetts 19; New York, 2; Wisconsin, 6; Arizona, 9; New Mexico, 8; Oregon, 2; Alabama, 1; Georgia, 2; and Louisiana, 0.

There is some speculation as to what is the severest punishment that
can be prescribed. This has been assumed to be death, but those people who
know criminals best express a degree of doubt. An interesting opinion was ex-
pressed by Ex-judge Campbell of the Illinois circuit bench, now deceased, in
sentencing a colored man 26 years of age for the murder of a policeman. Judge
Campbell, in passing judgment said in effect: "I am giving you what is in my
judgment the severest punishment that can be prescribed. I might sentence you
for life, but my investigations indicate to me that life prisoners in the
penitentiary seldom live more than 14 years, prisoners sentenced for 20 years
sometimes are released, while prisoners of your age of good physique may survive
a 25-year sentence sustained by the hope that they may sometime be released.
I, therefore, sentence you to 25 years' imprisonment in the Joliet penitentiary."

The greatest difference between minima and maxima occurs in Massachu-
setts where the provision for imprisonment for an unspecified number of years
is quite common. Theoretically this offers the greatest leeway for individuali-
ation of punishment on the part of the judge. Our comparison of present condi-
tions with conditions in 1890 indicates that this widening of the range of
punishment which is a long step toward the indeterminate sentence, is the
tendency in all codes.

There is a consensus of opinion among criminologists that the principle
of retribution has played a prominent part in the determination of punishments.
Social vengeance has replaced private vengeance with some of the same effects.
The degree of punishment which seems just to any individual varies with his
type of mind. To most persons, vicious crimes against the person are abhorrent.
Sexual crimes are disgusting. The destruction of property usually strikes a
sensitive spot. An act that is contrary to good form and established custom
is exasperating to our patience and may be most distasteful of all. These and
similar standards have been the basis of punishment in the past. They are not
scientific but emotional. The basis of a scientific code of punishments must be found in two considerations: (1) the harmfulness of the offense to society, and (2) the attractiveness of the offense to the criminal. A recognition of these two principles together with an appropriate leeway for individualization can lead to an equality in social justice which does not appear in the codes at present. The present tendency is to lessen the importance of the penal code and increase the emphasis on procedure. "The code will always designate what acts are criminal, but under a positive scientific regime, it will determine only to a limited extent of the penalties since these will be determined usually by the nature of the criminal."

In view of the disparities pointed out in this section, it seems surprising that a system so varied and so vitally different can be administered as successfully as it is. The matter has come to the attention of some eminent scholars who do not deplore the situation and even apologize for its weakness. No less authority than James Brice, in his American Commonwealth, vol. I, page 337-8 says:

"In the United States the possible diversity of laws is immense. Each state can play whatever tricks it pleases with the law of family relations, of inheritance, of contracts, of torts, of crimes. But the actual disparity is not great, for all of the states save Louisiana, have taken the English common statute law of 1876 as their point of departure, and have adhered to its main principles. A more complete uniformity as regards marriage and divorce might be desirable, for it is particularly awkward not to know whether you are married or not, nor whether you have been or can be divorced or not; and several states have tried bold experiments with divorce laws. But, on the whole, far less

1See Boss, Social Control, p. 110.
2Parmele, Criminal Anthropology and Social Constraint, p. 130.
inconvenience than could have been expected seems to be caused by the varying laws of the different states, partly because the commercial law is the department in which the diversity is the smallest, partly because American practitioners and judges have become expert in applying the rules for determining which law, where those of different states are in question, ought to be deemed to govern the case."
AMELIORATIVE MEASURES EFFECTING THE DEGREE OF
PUNISHMENTS

The significant feature of the American system of treatment of criminals at present is that the duration of punishment is not definitely fixed either in the laws or by the decisions of the courts in which the criminal is tried. The essential factor is the indeterminate sentence. This idea was originated by Z. R. Brockway, in 1870, when he said: "Sentences should be indeterminate; all persons convicted of crimes should be committed to custody until they may be returned to society with ordinary safety." Through his efforts the provision for sentences with a maximum and minimum was incorporated in the laws of New York, with various restrictions, in 1877. The system has now become so common that any state that adheres to the system of fixed penalties is considered out of date by expert criminologists.

The procedure in the adoption of an indeterminate sentence law grows rather naturally out of the previous systems. Maximum and minimum provisions occur generally in the existing codes and it is only necessary to provide that the criminal shall be sentenced for an indeterminate period which shall not be less than the minimum or exceed the maximum prescribed by law for the particular crime. This principle is adhered to in general in seven of the states considered in this study, namely, Illinois, Massachusetts, New York, Oregon, Nevada, New Mexico, and Louisiana. In Georgia the system applies only to the reformatory. Other restrictions of individual states are as follows:

Massachusetts makes exception of life prisoners and habitual criminals. Habitual criminals are those who have had two or more convictions in Massachu-
setts or in other states. The minimum must not be less than two and one-half years. There are no fixed sentences to the reformatory unless such sentence exceeds five years.

New York makes exception of murder in the first and second degrees. The minimum must not be less than one year. The law was made to apply to life prisoners in 1917 after ten years of incarceration. There are no definite sentences to the reformatory.

In Oregon the indeterminate sentence is made mandatory upon the judge. The maximum must not exceed twenty years. The clerk of the court must notify the governor when such prisoner is sentenced and the superintendent of prisons must notify him when the minimum has been served and report as to the conduct of the prisoner quarterly thereafter. Upon the basis of these reports, the governor may parole the prisoner and restore him to citizenship.

In Nevada the law does not apply to cases in which the law provides a fixed sentence. The Board of Pardons determines upon the basis of the prisoner's conduct the time of release after the minimum has been served.

In New Mexico the court determines the maximum and minimum. A prisoner is first admitted to parole, during which time he must be employed. A breach of parole constitutes a new crime. Paroles must be approved by the governor. The prisoner may be permanently released by the judge after six months of successful parole on approval of the governor. Habitual criminals are not accepted on parole. The Prison Commission, which consists of the Board of Penitentiary Commissioners and the Superintendent of Prisons, are empowered to make additional rules in regard to parole.

In Louisiana, where the law was adopted in 1916, exception is made in case of treason, arson, rape, crimes against nature, bank and homesteading officials misusing funds of depositors, notary publics who are defaulters, train
wreckers, kidnappers, and dynamiters. The minimum must not be less than one year. At its adoption the law was made to apply to prisoners already sentenced.

In Georgia, reformatory sentences are indeterminate unless fixed by the judge for a period more than five years. Convicts beyond the age of twenty-one years may not be sentenced to the reformatory. A reformatory sentence for a misdemeanor may not exceed two years.

Besides the states considered in this study, we have noted that indeterminate sentence laws have been adopted in Indiana (1898), Maine, New Jersey, Pennsylvania, West Virginia, North Carolina, Ohio, Michigan, Minnesota, Kansas, Montana, and California. The last states to adopt it have been Missouri, Tennessee, Utah, and Wyoming, in 1915.

In theory the indeterminate sentence seems to be based primarily upon the principle of reformation and secondly upon the principle of protection of society. It makes it the duty of the courts to determine the guilt or innocence of the accused and the desirability for restraint, and the function of the "expert guardians of the places of confinement to determine the circumstances and duration of the incarceration."

The system of reformation was introduced into the treatment of criminals as a reaction against the former system based on the administration of public vengeance. It has been so widely accepted that we find a number of the state constitutions proclaim that the penal code shall be founded on principles of reformation and not of vindictive justice. These constitutions are subject to criticism on this statement. Reform may properly be a legitimate consideration in punishment but not the only one. A second consideration, often of more importance, is the protection of society. It may be argued in favor of reformation that it is

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1 See Journal of Criminal Law 6:73-82; also Nov. 1917: 491.
2 See Conference of Charities and Corrections, proceedings 1915, p. 22.
more in accord with the teachings of enlightened religion and moralists generally. So early a thinker as Socrates said, speaking of criminals or normal persons:

"Remove every possible incitement to vice, and substitute every possible incitement to virtue." "No prisoner, no matter what his age or past record, should be assumed to be incapable of improvement" was a principle laid down at the International Prison Congress in Washington, D. C., in 1910\(^1\). Applying the principle of reforma-

tion alone the prison becomes merely a retention hospital to which the criminal is consigned until his disease, which is probably infectious, is cured. No judge or any other person can tell \textit{a priori} how long this will take or whether it can ever be accomplished. Neither should the patient be retained among other sick after he himself has been cured.

The possibility of a complete cure by reformation in all cases is a matter of consideration for criminologists. It is our purpose here to show that this is the foundation of the present system. The merits or demerits of this foundation is another matter of inquiry.

Like many an other worth-while project, the indeterminate sentence gets its final justification from its practical utility. This side of the question was treated concisely and accurately in the Report of the New York State Commission on Prison Reform, 1914.

"Under such a plan it will be the prisoner and not the crime that is tried and sentenced, and every one convicted of crime will be permitted and required, to work out his own salvation by demonstrating his fitness for release. If there are convicts who, because of habitual criminality, are unfit to be restored to a free and responsible life in the community, such a court or board as here proposed will be as likely to keep them in confinement as a court im-

posing a sentence under the existing conditions. Indeed, one of the gravest\footnote{See Stephen Smith, Who is Insane? Chap. XXII.}
abuses of the present system under which hardened criminals are sentenced to a
definite term, at the expiration of which they are necessarily released to resume
their criminal practices, will in a large measure, if not wholly be done away with.
A man, who has by his conduct in prison, and by his habits before committed to
prison, demonstrated his unfitness for a life of freedom, should be kept per­
manently in detention irrespective of the nature of the particular crime for which
he has been committed.

"If the object of our penal system is punishment for crime, and nothing
more, then, indeed, it may be agreed, that a hardened criminal, by a sentence of
a given number of years, expiates the crime committed and is entitled to his
freedom. But if the object of the penal law is to protect society by the confine­
ment of those who prey upon it, there is nothing to be said for a system under
which hardened criminals are, after a definite period of imprisonment, released to
resume their evil practices. Your commission believes that such a court or board
as here recommended could more wisely determine how long such an offender, should,
in the interests of society, be confined than could the judge by whom he was
tried."

The question of the constitutionality of indeterminate sentence laws
has been raised and decided in favor of these laws in numerous instances. The
Indiana law, which has no minimum provision, was held constitutional by the
Supreme Court of the state in 1898. Other cases which uphold the principle are:
People ex rel Alexander vs Warden, N.Y. 183; Woods vs State 58 L.R.A. (N.C.) 531;
State vs Whittaker, 35 L.R.A. 561; People ex rel Clark vs Warden 39 miscel. 113;
People vs Madden 120 appellate division (1st department) 338; People ex rel
Battram vs Flynn, 55 miscel. 22; People vs Adams 176 N.Y. 351.

1See discussion in Lewis, The Offender.
A common criticism of proposals for reform in treatment of criminals is that these proposals arise from soft sentimentalism and are not adequate for the practical emergencies. This could hardly be said of the indeterminate sentence. No proposal is made to release prisoners earlier or later than under previous systems, but merely to release them when they are fit to be released. In experience it has been found that under the indeterminate system the period of actual imprisonment is increased, which lays the system liable to criticism on the other side, namely, that it is too expensive. In Indiana, the average prison term was increased 1 year, 2 months, and 5 days and the average reformatory term was increased 1 year, 2 months, and 24 days.

In Illinois, the average length of sentence has been more than doubled since the indeterminate sentence law was passed. Records at Joliet and Springfield show that during the five years from 1890 to 1895, juries gave only 17 men the maximum penalty for burglary, larceny, and robbery, while during the five years from 1910 to 1915 the Board of Pardons gave 328 prisoners the maximum sentence for these crimes. Comparative tables for these periods are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Average definite sentence 1890 to 1895 by jury</th>
<th>Average indeterminate sentence 1910 to 1915 by Board of Pardons</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Years        Months        Days</td>
<td>Years        Months        Days</td>
</tr>
<tr>
<td>Burglary</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Larceny</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Robbery</td>
<td>1</td>
<td>9</td>
</tr>
</tbody>
</table>

These facts sufficiently dispose of the argument that the indeterminate sentence is a matter of soft sentimentalism.

Another objection quite opposite to the former is to the effect that the lengthening of sentences increases the cost of maintenance of prisons.

1 Chicago Tribune, Feb. 3, 1918.
To this objection there is a three-fold answer. First, from its point of view the only logical procedure would be to abolish all imprisonments. Second, experience has shown that the number of recidivists is materially decreased, that is to say that while a prisoner serves a longer term, he does not serve so many sentences. Third, the movement for the industrialization of penitentiaries, where it has sufficiently been carried out, has proved that prisoners can be made fully self-supporting so that the prolongation of their terms need not necessarily add to the burden borne by the public. We cannot see that it is logical to urge as an argument against the indeterminate sentence the increased cost of maintenance of prisoners so long as those prisoners ought, for their own good and for the good of society, to be confined. The same argument applied to a hospital would discharge the patient after a fixed number of days on the ground that it is too expensive to keep him longer.

Logically, the next ameliorative measure effecting punishment is that of conditional release. If the indeterminate sentence law provides no minimum, as in Indiana, this may evidently, at the discretion of the judge, be made to amount to conditional release. In fact, the laws of most states will approximately permit of conditional release, for if these laws provide a maximum and minimum imprisonment, or a maximum and minimum fine, or both such imprisonment and fine, the judge may, by the remission of the imprisonment and fixing the fine at the minimum, which frequently may be $1 or anything more than zero, release the convict upon such conditions as he may impose. Such a method of exercising the judge's right to leniency has been used to a limited extent, the right, however, being exercised with the definite understanding that if there should be a second offense, the treatment would be severe.

Another instance of conditional release in practice appears in the case of criminal proceedings nollied by the states attorney in the name of the
state upon conditions satisfactory to him or under conditions not likely to be objectionable to the community in a considerable degree. This constitutes probably the worst form of conditional release.

A still better method than any mentioned above of accomplishing the same result without necessity of statuatory enactment is for the judge to exercise the right which he has under the common law to suspend sentence, a right which is claimed by certain excellent jurists, notwithstanding the fact, as we shall presently see, that it has been denied by a decision of the United States Supreme Court. By this plan sentence is suspended with the understanding that such sentence will be executed for the offense already committed unless the conditions upon which the prisoner is released are satisfactorily fulfilled. These conditions may be: (1) vagrants, deserters, etc., to support their families, (2) restitution for crimes against property, or (3) installment fines. With or without statuatory enactment, probation, which is virtually conditional suspension of sentence, has become the regular practice within many jurisdictions.

The suspension of sentence by a federal court was decided to be unconstitutional in the case of *ex parte* U.S. 243 U.S. 27, Chief Justice White delivering the opinion of the court. The reasons assigned were that the fixation of the sentence is a legislative act and therefore not within the domain of the court, and that the power to suspend sentence is not inherent in the court by common law.

Probation and parole are so closely related in principle that an advantage would hardly be gained by separating them for discussion. Both are forms of reformatory punishment outside the prison. The essential difference is that in probation the criminal never is incarcerated, while in the case of parole he is released after a period of incarceration. Contrary to this general usage, the state of Oregon has provided by law that the court may "parole" a
prisoner before his delivery to the warden of the penitentiary.

There are juvenile probation laws in forty-five states of the American Union, in Alaska, Porto Rico, and the District of Columbia. Twenty-nine states and the District of Columbia have adult probation laws. Massachusetts was the first of the states to extend probation to adults, in 1878. Rhode Island followed in 1899, New Jersey in 1900, and New York in 1901. The last states to adopt adult probation are Alabama, Idaho, and Oklahoma. In the states selected for this study we have found the following characteristics.

Illinois makes provision for the probation, at the discretion of the judge, of persons convicted of minor crimes, a long list of exceptions being made. Before admission to probation, the probation officer must make an investigation of the case and make a report to the judge in writing. Upon admitting to probation the judge may require restitution wholly or in part, contribution to dependents, or the payment of a fine. Upon violation of the conditions of probation, a prison sentence may be pronounced. The duties of probation officers are: (1) to make investigations as required by law, (2) to notify the court of previous crimes committed, (3) to make reports in writing, (4) to keep a record of the conduct of probationers, (5) to take charge of probationers and receive their reports, (6) to transfer the care of the probationer to another probation officer in case the probationer moved, and (7) to perform incidental duties as requested by the judge.

The matter of parole is under the control of the Department of Public Welfare, created in 1917. Any prisoner may be admitted to parole after serving one year, subject to the rules of the Department of Public Welfare, except those convicted of treason, rape, murder, and kidnapping. These are admissible after they have served one-third of their definite sentence or twenty years of a life sentence.

A marked character of the Massachusetts system of probation is that it
requires the cooperation of judges, prison commissioners, probation officers, and
the governor. There are paid officers for each superior, district, municipal, and
justice of police courts, and a female assistant for women. These officers assist
the court with information of previous crimes and may ask the probation of any
criminal. They must report all cases to the prison commissioners and make an
annual report to the governor. They may give money for the support of the pro-
bationer and may re-arrest him at any time. A $200 penalty is provided for neg-
lect of duty. Prison commissioners, justices, and probation officers are re-
quired to confer from time to time and to consider means by which the system may
be improved.

In Wisconsin the probation law applies to minors convicted of a felony
for the first time, unless the penalty exceeds seven years, and to first offenders
if the punishment does not exceed ten years and there appears to the judge no
likelihood that the crime will be repeated, also if the laws do not otherwise
provide. Probation officers are subject to regulations of the Board of Control
and must report to the court. Probationers must make monthly reports. Prisoners
who have served one-half their terms, or life prisoners who have served thirty
years, may be paroled provided they have employment. The district attorney
must be notified upon the release of such prisoners and they are required to make
monthly reports. During the time of parole they must not be exhibited in any
show. The Board of Control has power to re-commit.

In Oregon prisoners may be paroled at any time and may be finally
released after the expiration of the time of the minimum sentence. During the
time of their parole, they are responsible to the Parole Officer who may return

1The efficacy of this provision as applied to life prisoners is not
evident, since it appears, as we have shown elsewhere, that life prisoners
commonly live less than half this period.
any prisoner who violates the rules. The Parole Board consists of three members who serve without compensation. One of these must be the Superintendent of the penitentiary who must report to the board monthly those prisoners eligible to parole. The Parole Board makes the rules of parole and reports to the governor. The parole law does not apply to prisoners whose penalties are over twenty years.

In Georgia the Prison Commission constitutes the Board of Pardons. This board has full powers to make its own rules and can parole prisoners with the governor's approval. No parole can be granted unless the minimum sentence has been served. No life prisoner can be paroled unless he has served ten years. Life prisoners sentenced for treason, arson, rape, or assault with intent to rape are not admitted to parole. A prisoner may be re-arrested on the order and at the discretion of the Board of Pardons, or may be pardoned by the governor upon the recommendation of that board.

In Louisiana the rules of parole are made by the State Board of Control. Parole may be applied upon the approval of the governor to first offenders who have served one year. Prisoners sentenced for treason, arson, rape, assault with intent to rape, or crime against nature are not admitted to parole.

Of those states which provide for probation, the greatest number make no restrictions as to the nature of the offense. One state excludes criminals convicted of a previous felony, or of a felony the penalty for which is more than ten years. In individual instances criminals are excluded from probation who have been convicted of murder, burglary in the first degree, burglary of an inhabited house, arson, robbery, rape, carnal knowledge of a female child under ten years of age, assault with intent to rape, and treason. The Michigan law provides merely that: "where it appears to the satisfaction of the court that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall, 

\[1\] See Journal of Criminal Law, Jan. 1918:694.
suffer the penalty imposed by law...." the defendant may be admitted to probation.

Probation and parole proceed upon the principle of reformation. It is upon this basis that they must be judged as compared with other systems. In general, the proportion of reformation is placed at about seventy percent. It is doubtful if fifty percent reformations could ever have been claimed for any other system. In Massachusetts, in 1916, of prisoners under the prison system 61.7 percent were recidivists. 14,174 persons had an average of $\frac{6}{5}$ former sentences each. Under the probation system more than seventy percent were satisfactory. It does not follow, however, that the prison system should be discounted on this basis, since the better class criminals were undoubtedly admitted to probation. These figures may be taken as favoring the latter system but not condemning the former.

The New York results show of children's cases 82.6% and of adult cases 76.4% discharged not re-arrested. By the 67th Annual Report of the New York Prison Association, 68% of the paroled men made good although the four parole agents of the association had approximately 600 men each under their care.

In Illinois during the years 1913 to 1917 inclusive, 2095 prisoners were paroled. Of these, 22.6% were returned for violation of parole and 3.2% were returned upon conviction for new crimes. Parole records of the Joliet prison covering a period of twenty years show that 80% of paroled men maintained themselves in society and are not again in the clutches of the law in Illinois or elsewhere. 10% have been returned as parole violators. 7% who are irresponsibles, insane, or feebleminded leave the state or disappear, but are not known to become criminals again. The percentage of men returned under the

new sentences is just under \(3\%\).

It would seem that the severest test of probation would be in the case of prostitutes in a large city. Results obtained in the city of New York indicate that with prostitutes probation is fairly successful. Of 124 prostitutes placed on probation in 1908 and 1909, investigated in 1914, 40 had made good, 23 were married, 4 had died, 2 were insane, 1 was deported, 10 returned to immorality, 23 were doubtful, and 44 could not be traced. Of all classes of criminals to which a system of probation has been applied, prostitutes constitute the class in which the success of the system is most doubtful. This is due to the fact that a large percentage of prostitutes are feeble-minded. Success of probation as applied to any class of criminals depends upon the intelligence and care with which those who are to benefit by this treatment are selected and upon an adequate number of properly qualified probation officers.

Probation and parole laws are frequently the objects of severe and ridiculous criticisms, since they, as other things here below, are not perfect. Such seems to have been the case in the criticism which followed the recent "crime wave" in Chicago, which probably could have been adequately accounted for by the unstable and lax conditions due to the war. But the blame was placed without hesitation upon the parole law. The futility of some of the accusations made is worth of consideration. For example, the large number of burglaries and robberies was charged to the account of the paroled boys from Pontiac. Parole Officer C. M. Reed, however, declared that he had looked after 243 of these boys in Chicago and that in the "drive" only 5 of these were taken as vagrants. "Two of them had money," he said, "so they were termed robbers. The police figured that they must have robbed some one or they wouldn't have had it. Three of them had no money, so they were considered vagrants because of the lack of

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Chicago Tribune, Feb. 3, 1918.
money and were sent back to Pontiac." Again, States Attorney Maclay Hoyne ends a scathing denunciation of the parole law with this paragraph:

"This paroling of criminals has become a menace and evil. Out of 187 who have been paroled only 7 have been returned to prison. Where are the others? How many are in Chicago, and what are they doing?" If the honorable states attorney had seriously desired the answer to his question, the probation officers could no doubt have enlightened him. It did not seem to occur to him, however, that they were probably living respectable lives in that immediate vicinity, that he himself might perhaps have dealings with some of them in honorable business. According to his plan, they should each commit some crime in order that they might be recommitted to prison and he and his associates might know that they were adequately cared for.

A fourth device or system which is an ameliorative measure effecting the degree of actual punishment is that of commutation of sentence, particularly that form of commutation that consists in reduction of prison terms on fulfillment of certain conditions. It is based primarily upon the idea of reformation and offers to prisoners an incentive to reform. By a system of marks devised by the prison officials the prisoner received so-called "good time" or reduction of sentence based upon good conduct. Thus commutation accomplishes in part what is hoped for under the indeterminate sentence which has in some cases superseded commutation. A second manner of commutation is the arbitrary reduction of sentence by the governor, based also upon the prisoner's good conduct, the leniency of the governor, or his belief that the prisoner may be safely released at a time previous to the expiration of his sentence.

Illinois, Massachusetts, New York, and Oregon have no definite plan for commutation, but these states have well-defined indeterminate sentence systems.
Wisconsin has a typical system of commutation. The following table, taken from the Wisconsin code, shows its practical application.

<table>
<thead>
<tr>
<th>Years of sentence</th>
<th>Good time granted each year</th>
<th>Total good time</th>
<th>Time to be served if full good time is made</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st year</td>
<td>1 month</td>
<td>1 month</td>
<td>11 months</td>
</tr>
<tr>
<td>2d &quot;</td>
<td>2 &quot;</td>
<td>3 &quot;</td>
<td>2 &quot; 9 months</td>
</tr>
<tr>
<td>3d &quot;</td>
<td>3 &quot;</td>
<td>6 &quot;</td>
<td>3 &quot; 2 &quot;</td>
</tr>
<tr>
<td>4th &quot;</td>
<td>4 &quot;</td>
<td>10 &quot;</td>
<td></td>
</tr>
<tr>
<td>5th &quot;</td>
<td>5 &quot; 1 year 3 months</td>
<td>3 &quot;</td>
<td>9 &quot;</td>
</tr>
<tr>
<td>6th &quot;</td>
<td>6 &quot; 1 &quot; 9 &quot;</td>
<td>4 &quot;</td>
<td>3 &quot;</td>
</tr>
<tr>
<td>7th &quot;</td>
<td>6 &quot; 2 &quot; 3 &quot;</td>
<td>4 &quot;</td>
<td>9 &quot;</td>
</tr>
<tr>
<td>Each subsequent year</td>
<td>6 &quot;</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

By this plan a ten-year sentence amounts to six years and three months, or a twenty-year sentence amounts to eleven years and three months, assuming all good time is made. It is to be noted that by this plan the judge may make the actual minimum sentence any number of years he may desire by reference to the above table.

Arizona allows two months for each of the first two years, four months for the third and fourth years, and five months for the fifth and each succeeding year of good conduct. The total good time may be lost by misconduct.

The Nevada system is identical with that of Arizona.

New Mexico allows good time one month for the first year, two months for the second, three months for the third, four months for the fourth, five months for the fifth, six months for the sixth and each succeeding year. The prisoner forfeits his good time by a breach of the prison rules, escape, or attempt to escape.

Alabama allows good time two months for each of the first two years, three months for each of the next two years, four months for each of the next two years, five months for each of the next two years, and six months for each
succeeding year. The prisoner loses his good time for attempts to escape.

Louisiana allows good time two months for each of the first two years, three months for each of the next 2 years, and four months for each succeeding year.

Georgia allows good time two months for the second year, three months for each succeeding year until the tenth, and four months for each remaining year.

Pardon exists primarily as a corrective measure for cases of miscarried justice. It offers a ready release for innocent prisoners whose innocence may be established by the discovery of new and conclusive evidence. In practice it becomes the expression of executive clemency often without regard to the guilt or innocence of the pardoned. The governor is commonly assisted by the Board of Pardons whose business it is to investigate applications for pardon and report to the governor. In two of the eleven states studied, the governor cannot pardon except on the recommendation of the Pardon Board.

Illinois has a pardon board of three members appointed by the governor who makes the rules of pardon, and recommends prisoners for pardon after investigations. Notice of the application for pardon must be published in the county from which the prisoner was sentenced three weeks previous to making the application. Judges and prosecuting attorneys are required to give their opinions as to the advisability of the pardon to the governor.

Wisconsin provides for pardon in the constitution. Notice of the application must be published in the county. The application must be accompanied by a complete record of the evidence in the case and the record of the prisoner. The governor is empowered to append conditions to the pardon, a breach of which conditions subjects the pardoned to re-arrest.

In Arizona, the Board of Pardons consists of the State Superintendent
of Public Instruction, the Attorney General, and a third person chosen by them. The board meets quarterly. It makes its own rules and is given the exclusive power to recommend pardons. The county attorney must be required to give information concerning the evidence in the case. Notice of pardon must be published in the county and in bold type in a paper of general circulation. Pardon is granted by the governor, who must report each case to the legislature, giving his reasons. Prisoners released upon condition may be given absolute discharge by the Board of Pardons.

In Nevada, the Board of Pardons consists of the Attorney General, the Junior Associate Justice of the Supreme Court, the Senior Associate Justice, and the governor. The board meets twice yearly in regular sessions. Special sessions may be called by the governor. Application must be made ten days before the meeting, accompanied by a written record of the case and all testimony. An attorney is allowed one-half an hour in which to plead the prisoner's cause. The district judge and district attorney must be notified of the pardon.

In Alabama, pardons are granted by the governor. Two weeks' notice of the application must be published in the county paper.

In Oregon, pardon is provided for in the constitution. Pardons are granted by the governor except in case of treason, which he may not pardon without the consent of the legislature. The governor must require a report of the case from the court which sentenced the prisoner and he must report the pardon to the legislature.

In New Mexico, pardons are granted by the governor, but cannot be granted except on recommendation of the board of Penitentiary Commissioners.

In Georgia, pardon is by the governor, except for treason which may be pardoned by the legislature. The governor must report to the General Assembly and give his reasons.
In Louisiana, pardon is by the governor. It is provided for by the constitution.
Section VIII.

PUNISHMENTS OTHER THAN IMPRISONMENT AND FINES

The system of punishment by imprisonment and fine is so well established in our penal system that any variation therefrom is the exception rather than the rule. We have noted a number of these variations in the preceding section. Of these, probation varies farthest from the prison method, but even this retains the essential element of restraint during a specified or indeterminate time, the restrictions to the prison walls being removed. In general, however, committal to prison and the payment of a fine is the expected sequence of the commission of crime. The prison method obviously meets the requirements for the protection of society for the time being. The degree to which it meets the requirements of reformation is coming to be questioned more and more and the need for some other treatment of exceptional criminals is increasingly felt.

Whipping is a form of punishment once common, but which has now quite generally gone out of use. Its effectiveness as punishment was due not only to the pain caused, but also to the disgrace attached. Whipping sentences were executed in colonial days in public places, before the meeting house or on the public streets in order that the disgrace might be as great as possible. It was later banished from public places in order that the public eye might not be offended or public feeling degraded, and finally abandoned entirely with few exceptions. Whipping penalties remain in the codes of Delaware. In our study we have noted but one elsewhere (for wife beating, in Oregon) which may be an evidence of the tenacity with which old-time ideas of vengeance cling upon present-day practices, or it may be an effort to capitalize a real value of a form of punishment elsewhere discredited. In this isolated case the whipping,
if ever prescribed, must be done by the sheriff in private within the prison walls, an evidence in itself that society is ashamed of the method. The efficacy of whipping even with children has come into discredit to such a degree that it has to a great extent been banished from schools, and to a less degree from the family.

Disfranchisement and disqualification to hold office remain in our statutes as part of the punishment for major crimes. This disqualification may also carry with it the loss of civil rights, and, e.g., in Massachusetts, the loss of the rights to the bonds of matrimony. There seems some logic in this disqualification if a public trust has been violated, on the ground that one who holds lightly his duties to the group should be deprived of his privilege of determining its policies.

Sterilization of habitual criminals and sex offenders is a newly proposed form of punishment. Sterilization laws have been adopted in twelve states, but in every instance have become a dead letter because they have been unwise in some particular\(^1\). There is no constitutional barrier for these laws, since they have been upheld by federal and state courts both as punitive and reformatory measures. The possibility of performing the operation without material injury to the person has been successfully demonstrated by medical science. The essential test of a sterilization law is its effectiveness in application. In most cases the laws have been applicable only to life prisoners or prisoners on a long term. For these criminals the need for sterilization is not apparent. As applied to sex offenders, especially rapists, the logic of existing laws is not clear since they in most cases provide specifically that the operation performed shall not be castration. Vasectomy as applied to these

\(^{1}\)Havelock Ellis, Essays in Wartime, p. 97. For an excellent discussion and comparison of sterilization laws, see Bulletin 10b of the Eugenics Record Office.
offenders can have only the effect of freeing them from the responsibilities of possible parenthood, thus leaving them the freer to continue their practices. Since it would be quite impossible to conceal the fact that such an operation had been performed, it is by no means inconceivable that the sterilized persons would be sought after by the opposite sex as means of gratifying abnormal sexual desires. These individuals would be, however, as capable of transferring venereal disease as ever and thus would introduce a new and serious problem in social hygiene.

There are some further possibilities in punishment which do not appear in the codes. Among these are: public mention, restitution of stolen or destroyed property, rebuke, banishment or deportation, sentences to work, and sentences to the army.

That not all criminals are amenable to reformation by imprisonment and fines is evident from a survey of persons who appear at the bar of justice. To the high-strung character of a genius, imprisonment may be merely an insult which far from reforming him, merely snuffs out his ability to accomplish good. Fines drive prostitutes to keep up their practices and the fine to them becomes merely a bribe or license fee paid to the court officials for the privilege of carrying on their business. For the former of these classes of offenders, public mention may be punishment enough. Public mention of the kind commonly given criminals by our present yellow sheets, it is true, is sometimes attractive to criminals, but public mention which carries only disgrace would hardly prove so.

Restitution is a logical penalty for crimes against property. Some illustrations of its application may be noted from our tables in reference to embezzlement. Restitution might also be made to society, as seen in the peculiar provision with reference to gambling in New York.

Punishment by a simple rebuke has been found effective with juvenile
offenders. The extent to which it might be applied to adults has never been tried out. Experience with probation, however, has shown that after all, the problem is not so different with adults.

The practice of driving vagrants, prostitutes, and other criminals who commit minor offenses out of the city or county has been tried to a limited extent. It is of doubtful merit, since, if successful, it merely unloads these criminals upon other communities which may in retaliation drive them back and thus merely aggravate the problem.

The matter of prevention of crime is hardly relative to this study except as punishments may be considered preventative. Constructive preventative methods are of a different nature. One proposed by O. G. Christgau of Glen Ellyn, Illinois, with reference to Chicago is worthy of mention here because it is a modification of the penal code itself. In the columns of the Chicago Tribune of February 6, 1918, he said:

"In its efforts to reduce crime in Chicago the city council should try a plan which has been remarkably effective in other cities. In a large southern city the new $200,000 jail was abandoned and is now being remodeled for hospital purposes. Some years ago this remarkable plan was adopted for about six weeks in San Francisco. As a result about half of the policemen were allowed to take vacations. Boston tried the scheme for one day last year, and all records for low number of arrests were broken. Various other large cities throughout the country have tried this crime reducing plan, and the results have been invariably satisfactory.

"A great advantage of this wonderful method of decreasing crime is the low cost. Usually the adoption of this plan cuts the cost of police and courts in half instead of increasing the cost, as might be expected from the splendid results."
"The technical description of this modern crime reducing plan is 'prohibition.' If the Chicago aldermen are in earnest about checking the present crime wave they should give the city the advantage of experiments carried on elsewhere."
Section IX.

THE DEATH PENALTY

The supreme penalty of the criminal law by which society demands the life of the criminal frequently comes into question. Killing by society has been practiced for ages. Its morality has only recently been questioned. Private killing has long since been condemned. The advisability of incorporating a like sentiment in the morality of the group is still a matter of debate. If the standards of individual morality should be applied to the group, both war and capital punishment would be abolished. That society has the right to take the life of a criminal can hardly be questioned. The matter of the death penalty is a matter of expediency, not of right.

The number of legal executions in the United States in 1917 was 85, as compared with 115 in 1916. Of the total number, 38 took place in the North and 47 in the South. Forty-two of the victims were negroes and 43 whites. Seventy were executed for murder, 13 for mutiny, and 2 for rape. Classified by states, the record is as follows: Alaska, 1; Alabama, 5; Arkansas, 3; California, 1; Connecticut, 4; Delaware, 2; Florida, 1; Georgia 4; Illinois, 1; Kentucky, 1; Louisiana, 2; Massachusetts, 1; Missouri, 1; Mississippi, 2; New York, 6; New Jersey, 5; Oklahoma, 2; Pennsylvania, 7; New Mexico, 1; South Carolina, 2; Texas, 17; Virginia, 5; Utah, 1; Montana, 3; Washington, 1; District of Columbia, 1; New Hampshire, 1; and Vermont, 1. There has also been a relatively high number of lynchings.

Notable among those who have had an extended experience with criminals and who object to the death penalty is Ex-Warden Thomas Mott Osborne. Mr. Osborne

1For an admirable treatment of this subject, see Chapter XXV on the Death Penalty in M. F. Parmele’s recent book, Criminology. The Macmillan Company, New York, 1918.

2Chicago Tribune.
has five objections to capital punishment as follows:

1. "I object to the taking of a human life. A sin is no less because it is committed by a large number of people acting together as what is called society than when it is committed by a single individual.

2. "It is bad social bookkeeping; namely, it is an attempt to balance a debit by a debit. The only way to remedy evil is to overcome evil with good.

3. "It encourages crime. A man goes to the chair a hero."

Mr. Osborne points out several instances in which executions have been followed by imitations of the crime for which the convict was executed.

4. "Frequently innocent men are slaughtered.

5. "The system is unfair. Ninety-six and one-half percent of murderers escape punishment entirely."

Warden Osborne himself made it his practice to be absent from the prison at the time of executions, although the New York law specifically provides that "it is the duty of the agent and warden to be present at the execution...." (Section 507 of the Code of Criminal Procedure) This he did as a protest against what he called a "judicial murder." His private secretary, Spencer Miller, made it his practice, as soon as he had performed his duties in connection with the execution, to walk as far as he could from the prison as his protest,

The cogency of Mr. Osborne's arguments is questionable, but his point of view is worthy of consideration. Eleventh hour pardons arising from the discovery of new evidence are the basis of many fascinating stories. Instances that have actually occurred are those of Joseph Handel, Jan Thybus, and Charles Steilow. The latter was reprieved four times, the last time twenty-six minutes before the time set for execution. The real murderer confessed
and Steilow was completely exonerated although he had been convicted of two murders.

One of the most recent legal executions in Illinois is that of Edward Wheed, convicted of murder of two men in a pay roll hold-up. Wheed went to the scaffold mumbling prayers and in a complete collapse of fear. On the day previous, his wife, in a last appeal to Governor Lowden to spare his life, said: "One of those men (there were several involved in the crime) went to Italy, is free, and in the navy. Wheed is the only one to be hung. The others knew what they were doing. He was no more a leader than the rest." She further plead, "Send my husband to war, or even have him put in jail for life, or anything outside of hanging, O, please give him a few months to live even. I cannot write how this happened, but I do not think he should be the only one hung, when the rest do not and one goes free." Harry Lindrum, hanged on the same day, went to his death defiantly. His last words were: "I'm innocent."

In Illinois, the death penalty is executed by hanging not less than 15 nor more than 25 days after the sentence is passed, unless for good cause the court or governor may prolong the time. It is executed by the sheriff or his deputy within the walls of the county prison or within a yard or enclosure adjoining such prison. There may be present at the execution, the judges of the court, the prosecuting attorney, two physicians whose duty it is to pronounce the victim dead, twelve reputable citizens, not more than three ministers, the immediate relatives of the prisoner, and such prison officers as the sheriff deems necessary. No person under twenty-one years of age, not a relative of the prisoner, is allowed to be present. The body may be delivered to any surgeon or surgeons for immediate dissection unless relatives object. An insane person or woman quick with child cannot be executed.

In Massachusetts, the execution is performed by the Warden of the
State Prison or his agent, at some time between midnight and sunrise, on one of
the days of a week specified by the judge, there being no previous announcement
of the day chosen. The execution is by electrocution. There must be present
the warden or his deputy; the prison physician, the surgeon general of the
militia, or another physician. There may be present the sheriff of the county
from which the prisoner was sentenced, a minister, and three other persons. An
insane person may not be executed. Sentence may not be passed on a woman quick
with child. Report of the execution is made to the clerk of the court which
sentenced the prisoner.

In New York, the death penalty must be inflicted by "causing to pass
through the body of the convict, a current of electricity of sufficient intensity
to cause death, and the application of such current must be continued until such
convict is dead." The warden must invite to be present by at least three days'
previous notice, a justice of the supreme court, the district attorney, and
sheriff of the county where the conviction was had, two reputable physicians,
and twelve reputable citizens of full age. These may be permitted to turn
back after having looked into the death chamber, but having once entered may
not leave until the execution is complete. The warden must appoint seven
assistants or deputy sheriffs to attend the execution. At the request of the
prisoner he must permit not more than two priests or clergymen to be present.

"After.... post-mortem examination, the body, unless claimed by some relative
or relatives of the person executed, shall be interred in the grave yard or
cemetery attached to the prison, with a sufficient quantity of quick-lime to
consume such body without delay." Report of the execution is made to the clerk
of the county in which the conviction was had. If the warden should refuse to
execute the penalty, he forfeits $50,000 bond and his alternate would be appointed
immediately to make the execution.

\(^1\) New York Code of Procedure.
In Arizona, the death penalty is executed by hanging within the state prison, not less than sixty nor more than ninety days after the verdict is rendered. At least ten days before the time set for the execution, the prisoner must be delivered to the Superintendent of the State Prison and the Clerk of the Court must notify the Governor. The Superintendent of Prisons may suspend the sentence if he believes the prisoner to be insane or if he believes a woman prisoner to be pregnant.

In Nevada, the execution of the death penalty may be by shooting or hanging at the defendant's election. No pregnant woman can be executed.

In New Mexico, the execution of the death penalty is by hanging in private, not less than twenty nor more than thirty days after sentence is pronounced.

The death penalty was abolished in Oregon by an initiative constitutional amendment in 1915. The count of votes at the election is interesting and perhaps significant as to the trend of popular sentiment in regard to this subject. 100,552 votes were cast for the amendment; 100,395 against.

In Alabama, the death penalty is executed by hanging not less than four or more than eight weeks from the time of sentence, and by the sheriff or his deputy, in private within the prison or within an enclosure erected for that purpose. There may be present any number of physicians required by the sheriff, the council of the convict, his relatives, six deputies, constables as required by the sheriff, and a military guard. No pregnant woman can be hanged.

In Louisiana, the death penalty may be executed only on a warrant issued by the Governor. It is executed by hanging by the Warden of the State Penitentiary or his deputy, within the enclosure of the penitentiary, at Baton Rouge. There must be present seven members of the Board of Control of the State prison and not more than seven nor less than five other persons, one
of whom must be a practicing physician.

Bills to abolish the death penalty are common in the legislatures of the several states, and legislative votes on the subject seem to be about evenly divided. In March, 1917, such bills were pending in Pennsylvania, New York, New Hampshire, Delaware, and Nebraska. During the same legislative sessions bills failed to pass in Colorado, Utah, and Vermont. Massachusetts was at this time considering a proposition to refer the matter to a vote of the people. A bill for the abolition of the death penalty passed both houses in West Virginia but was called up for rehearing and lost. In North Carolina a bill was pending at this time to reduce to one crime—murder. Tennessee had reestablished the death penalty. Oklahoma was considering the proposition to include bank robbery among the crimes punishable by death. States which have abolished the death penalty are Kansas, Maine, Michigan, Minnesota, Missouri, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin. Foreign countries which have abolished it are Brazil, Costa Rica, Holland, Italy, Norway, Portugal, Russia, Venezuela, three Mexican states (Campeche, Pueblo, and Yucatan) and fifteen out of the twenty-two Swiss Cantons.

In Illinois, the bill to abolish capital punishment passed both houses by a comfortable majority in 1917, but was vetoed by the governor. He gave two reasons for his veto as follows: First, he believed the measure to be unconstitutional, since it abolished the means of execution of the death penalty and left on the statute books four crimes punishable by death. He argued that it would be possible for a court to render a verdict for which there would be no machinery of execution. Secondly, he believed the measure to be unfair at this time since many of our young men in military service would be subject to execution by military law while their brother civilians would be exempt. He added in his veto message that in time of war he did not believe it expedient that members of Parmele, Criminology, p. 410.
legislatures should devote their time and energies to the consideration of measures of this character.

The whole matter of the death penalty is at present a subject on which there is much division of opinion with a strong tendency in favor of its abolition. It is not inconceivable that there may be a reaction in the light of deeper and more mature thought which may reestablish the death penalty in some instances and definitely crystallize the public thought. Such a reaction can arise from an entirely new conception of the bases and principles upon which punishment should be founded.
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