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## Legislative Crimes

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## LEGISLATIVE CRIMES†

By NEWMAN F. BAKER\*

### INTRODUCTION

“THE same habit of passing laws to meet special cases, and to obviate present inconveniences, which obtained at first, through necessity, has never been wholly shaken off; and one cannot but feel surprised at the great number of acts which are forced through at every session, at the suggestion of individual interests, or to subserve purposes of temporary expediency, without reference to and often to the sacrifice of, the public good.”

The above quotation is too long to use at the beginning of an article, but it happened to be the paragraph which served as the stimulus for this study. It is included in its entirety with the hope that it will invite a responsive interest in the reader as he explores the uncharted seas of state criminal codes.

It was written by Mr. Mason Brayman, and may be found in the Preface to the Revised Statutes of Illinois for the year 1845, almost a hundred years ago. It is interesting to read Mr. Brayman's querulous remarks, made as he presented his modest volume of the 1845 revision. Legislatures passed “laws to meet

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†Except in a few instances where the incredulity of the reader may lead him to demand immediate verification, citations of the statutes have been omitted. This is in part because of lack of space, in part because the statutes have no importance in themselves, and it is difficult to imagine any use for such citations. In most cases the statute may be found without difficulty by reference to the index of the current volume of the particular jurisdiction. The writer offers his assurance that he has checked each act referred to, and that all of them can be found. No reference is made to the vast field of ordinances (such, for example, as Pulling's Minneapolis Ordinances, p. 1129, enacted Dec. 1, 1914, providing a fine or imprisonment for any person who shall impersonate Santa Claus on the streets of Minneapolis). Nor, except for one instance, has any repealed law been considered.

special cases and to obviate present inconveniences," "individual interests" forced statutes through, and laws were passed for "temporary expediency"—then as now. What would Mr. Brayman say if he examined today's statute book?

Old statute books have a peculiar fascination. Yellowed, brittle paper is stamped with the rules of conduct which governed our forebears long, long ago. If one thumbs idly through a copy of these 1845 statutes, the pages open at a law which reads as follows:

"All persons working saltpetre caves in this State, for the purpose of manufacturing saltpetre shall, previous to commencing the manufacture of saltpetre, inclose such caves with a good and lawful fence, and keep the same at all times in good repair, so as to prevent cattle and other stock from gaining access thereto."

A fine, which might be as high as fifty dollars, was provided to make this law penal in character.

Therein was a vague glimpse of a frontier state. The Black Hawk War was only thirteen years in the past, and the Mexican War had not yet begun. Powder was still a prime necessity to fire the lead mined in the Galena mines and dropped from shot towers. Home-made powder was prepared from sulphur, charcoal and saltpetre, and saltpetre-mining was a common industry. Fences in 1845 were found only around the scattered farms. Grazing lands across the vast prairies were as yet unfenced. There was an evil to be corrected by legislation, and the penal statute dealt with the problem by requiring the miners to put up fences to keep the cattle out. It was doubtless an important matter, in 1845.

Today we have cartridges, not powder and shot, and Illinois saltpetre is of no value; there are common grazing lands, and cattle are not out roaming the prairies and falling into saltpetre caves. But here on the desk is an enormous volume of 3,695 pages, with double columns and fine print. It is a copy of the current statutes of Illinois. On page 1198 we find that the 1845 saltpetre cave fence statute is still enshrined as a law of a sovereign people. The possible fine is now \$100.

This is but one small illustration of the evil which Mr. Brayman recognized in 1845—"the same habit of passing laws to meet special cases, and to obviate *present* inconveniences." And that evil is matched by the equally great one of leaving such laws in the books for many years after they are no longer necessary or desir-

able. It is still a felony in Michigan, punishable by five years in the penitentiary, to incite hostile Indians to violate a treaty.<sup>1</sup>

Legislation, quite useful in one age, may become foolish in another. This is apparent in all fields of law, but it is easier to secure corrective legislation in respect to business—banking, insurance, property rights, foreclosures, negotiable instruments and the like—than it is to keep our social legislation up to date. Especially is this true of our so-called penal codes. Our penal legislation, to use the words of Edward Livingston a century ago, seems to be a

“fret-work exhibiting the passions of its several authors, their fears, their caprices, or the carelessness and inattention with which legislators in all ages and in every country have, at times, endangered the lives, the liberties and fortunes of the people, by inconsistent provisions, cruel or disproportioned punishments, and a legislation, weak and wavering, because guided by no principle, or by one that was continually changing, and therefore could seldom be right.”

#### UNMAKING LAWS

The thoughtful citizen will find the Illinois definition of “sound mind,” which is the basis of insanity-defense trials, both amusing and irritating. It may be traced to the year 1829, but it still reads the same in the current statute book:

“A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil.”

We are forced to use that law today, in our insanity cases in Illinois. Of course it means—nothing. It was badly drawn, more than a hundred years ago, when there was not a single asylum in the state, “psychiatry” was not to appear for fifty years or more, and the medical profession as a whole took little notice of mental diseases. But try to get it off of the books, and see how far a “social theorist” would get in his campaign!

It seems to be much easier to make laws than to unmake them. Common examples of prudish laws which slipped by without question are Indiana’s law against advertising medicine for female complaints, and Iowa’s declaration that it is criminal to advertise medicine for the cure of private or venereal diseases. But what legislator would dare to lead a movement for their repeal? Political capital is made in the enacting of new laws, but seldom does

<sup>1</sup>Michigan, Comp. Laws 1929, sec. 16606.

anyone worry about the outworn and useless laws which clutter up the books.

The result is that many laws are not enforced because they are no longer of any protective value. The policeman in Chicago probably never has heard of the Illinois law making it a criminal offense to allow a Canada thistle to "mature its seed" on one's premises, once a useful provision. But, if he has heard of it, he would never dream of enforcing it. Nor is the legislator interested in the Canada thistle law, any more than in Indian warfare, so he lets it alone to waste away from lack of nourishment.

How can this ignoring of a substantial number of our laws fail to breed contempt for laws generally, and make for "individualistic" interpretation by policeman, prosecutor, and judge? The police are bewildered when they read their criminal codes; citizens learn that some laws may be disobeyed with impunity; erratic and inconsistent policies alienate public cooperation. The bad apples in the barrel spoil the good ones. It is not easy to condone the growing practice of enforcing only part of our laws. And who is to decide which are the good ones and which are bad?

#### HOW LAWS ARE MADE

Probably most of our "freak" laws are passed at the vehement insistence of an outraged lawmaker who controls an adequate number of votes and has a voice sufficiently loud to make his ideas audible. If he wants his law badly enough, and it really is not very important, he will usually get it.

For example, some legislator on his way to the capitol drops by the office of a dentist. Later in the day, with his jaw still aching, he will introduce a bill—such as the present Georgia law—making it a crime if a dentist is guilty of "cruelty or unskilfulness" toward his patients. Or he may have been tricked by a fortune teller. The next volume of session laws will declare, as in Indiana, that it is highly criminal for fortune tellers to "pretend to predict future events by cards, tokens, trances, or inspection of the hands of any person, mind-reading, so-called, or by consulting the movements of heavenly bodies." (The Hoosiers courteously except ministers of the gospel and missionaries from the rigors of this proscription.)

Every now and then Peeping-Tom laws are passed, possibly because some trespasser came sneaking upon the premises of a legislator, or his neighbor, when daughter forgot to lower her

shades. The Indiana law is unique because under it the Tom lays himself open to sixty days in jail or a \$50 fine, whether he sees anything or not. The statute declares that peeping or *attempting* to peep into another's residence is unlawful, and the word "peep" is defined as "any looking of a clandestine, surreptitious, prying or secretive nature." One might hazard a guess that the reason that Wisconsin's legislature frowns upon archery as a sport, and forbids the shooting of an arrow from a bow within forty rods of a public park, is that some legislator was pinked by one of the fair archers so common in parks today. But only an expert in innuendo can explain why Michigan, which is so proud of its jails that the involuntary guest is made to pay for board and room while he serves his term,<sup>2</sup> declares it a crime for one person to "taunt another of having been an inmate of any jail, prison or reformatory."

Of course when the strong-voiced Solon arises in the House or Senate and demands a law against "cruel" dentistry or some other special evil, his fellow legislators are almost forced to comply. They may consider it in this fashion:

"Solon wants this law. I do not care one way or the other, but Solon is excited about it. Now if I vote for Solon's bill I will get an agreement out of him to vote for my bill to consolidate the Skunk Hollow and Hog Creek School Districts back home. And if I do not vote for Solon's bill, he will be angry with me, and the folks back home will not understand why I would not favor a law to prevent cruelty in dentistry. They might think I favor such cruelty if I vote against it."

Such reasoning may explain why Wisconsin has the unique law of all laws ever passed by an American legislature. Wisconsin has made "log-rolling" by members of the legislature a felony. Was there ever a legislature which functioned without "log-rolling?" The greatest log-roller ever born was our immortal Lincoln, and the cleverest bit of log-rolling ever staged was just a hundred years ago when the "Long Nine," the Springfield delegation, carried the state capital away from Vandalia back home to Springfield. But no matter—Wisconsin has abolished it, and politics will henceforth be drab and dull in that state. The members voted for that law to show their constituents that they did not approve of log-rolling. Some vociferous Solon wanted it, and he got it.<sup>3</sup>

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<sup>2</sup>See (1936) 26 J. Crim. Law 629.

<sup>3</sup>If the unbelieving reader wants the text of the law, let him see Wis. Stats., sec. 346.30.

## SEX OFFENSES

Sex offenses, of course, offer a fertile field for legislation. No other type of crime provokes so much hysterical indignation in the individual case, or places such obstacles in the path of anyone who seeks to deal rationally with the criminal. No one who has any acquaintance with the problem denies that most of our sex legislation is psychologically, medically, and practically unsound.

Nearly all states have adultery laws, but some attempt to enforce them and some do not. The penalty for adultery in Maryland is a ten dollar fine, while Iowa and Michigan display their horror of the offense by making adultery a felony, and providing corresponding punishment by prison terms up to three and five years respectively. Fornicators are fined not to exceed ten dollars in Rhode Island, but some of the states consider some fornication offenses to be felonies, along with adultery. Needless to say, in such states the severity of the punishment means that seldom, if ever, is there any prosecution for the crime. This may explain, perhaps, why many of the "younger generation" are not in jail.

But fornicators must everywhere beware of the age of consent. If a "man" of seventeen years "has carnal knowledge of any female person under the age of sixteen years and not his wife, either with or without her consent," in Illinois, he is declared guilty of rape, and may be imprisoned for life. It makes no difference that the girl is a prostitute, and solicited the boy to intercourse. In Montana, the imprisonment may be for ninety-nine years and the age of consent is eighteen. A Florida law, typical of those in other southern states, declares that any person who "carnally knows or abuses a female child under the age of ten years shall be punished by death or by imprisonment in the state prison for life."

Such cases should be covered by the ordinary contributing-to-delinquency statutes, and rape should be limited to cases of actual attack and injury to the person of the victim. As a matter of fact, most prosecutors treat the rape provisions in this manner. Any medical man who has studied sex offenses would declare that the attempt to prevent such crimes by such threats of drastic penalties is utterly futile. The offender is more often than not a pathological case. Statutory rape laws do little to protect children or to guard virgins from the wiles of lustful men, but they do serve

as the basis of numerous blackmail schemes. A man who visits a house of prostitution may be informed as he leaves that his entertainer is below the age of consent. If he should be prosecuted, there is no defense whatever; so now it is the man who pays, and pays.

The same possibility of blackmail is inherent, of course, in the seduction statutes. Ohio stands alone with its provision of two to ten years for any instructor in roller skating who seduces a female pupil—and one may well speculate at length upon the nature of the particular incident which gave that statute birth. But seduction in Chicago, which, from what one hears, is not precisely uncommon, may cost a year in the county jail plus five thousand dollars, and in over half the states the penalty is a penitentiary term, ranging up to twenty years. The penalty usually depends upon the age of the woman, although everyone knows that age and sexual experience are by no means the same, and juvenile prostitutes are not altogether rare. Usually, but not always, the statute requires that the person seduced be of previous chaste character. Under ordinary rules of law, "previous chaste character" should be proved by the prosecution beyond a reasonable doubt, along with proof of the intercourse, and proof of the age. But not in Illinois, where the supreme court has declared<sup>4</sup> that there is a presumption of chastity among us:

"Fortunately, in our country, an unchaste female is comparatively a rare exception to the general rule, and whoever relies upon the existence of the exception in a particular case should be required to prove it."

In an age when everyone deplores the decay of sex morals, the persistence of this assertion of social experience on the part of a court which sat while Victoria was Queen needs no comment.

In many states the legislatures have quite frankly recognized the real use to which these statutes are put, by authorizing "shot-gun" weddings as a means of resurrecting the honor of erring daughters. Prosecution quite commonly is suspended, or barred, if the boy marries the girl. Arkansas declares quite pointedly that if the husband later "abandons such female" his legal difficulties shall be resumed where they left off. In other words, he must not only restore the girl to respectability, but must be saddled with an incompatible wife for the rest of his life.

Little need be said of the many laws concerning the "infamous

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<sup>4</sup>Bradshaw v. People, (1894) 153 Ill. 156, 160, 38 N. E. 652.



crime against nature," except that our legislators are singularly uninformed as to the causes and medical treatment of homosexuality. Everywhere we find tremendous punishments, ranging up to life imprisonment in Georgia, meted out to these unfortunates, who certainly are not cured of their glandular disorder by being locked up in a penitentiary full of sex-starved inmates.

Incest shocks the moral senses of lawmakers everywhere, and the father-daughter offense receives severe punishment. But the reader may be surprised to learn that in more than half our states the marriage of first cousins is incestuous, and the parties may spend their honeymoon behind bars—that is, if some personal enemy wants to make trouble for them. In North Carolina cousin marriages are incest only if the parties are double cousins; and in Wisconsin no offense is committed if the female is over fifty years of age—surely a most extraordinary bit of moral legislation.

Prostitution, of course, receives great attention. The laws are of wide variety, and punishments run up and down in a bewildering way. In Illinois the keeper of a boat or other water craft for the purposes of prostitution is guilty of a felony, and may receive a three year term, whereas the keeper of the ordinary establishment on firm dry land is treated as a mere misdemeanor. One wonders what there may be about the aquatic element which adds a greater social danger. And on the prairies of South Dakota, we find the citizens of that state appropriately blanketed by a law which reads

"Any person who shall knowingly own, keep control, have charge of, or manage any prairie schooner, covered wagon or other vehicle which is used in whole or in part for the purposes of prostitution, and all the inmates of such prairie schooner, covered wagon, or vehicle, which is used for the purposes aforesaid, shall be guilty of a felony. . . ."

Abortion laws may be found in all states. Abortion is legal or illegal, dependent upon whether it is necessary to save the mother's life. If a pregnant woman is so ill that the unborn child endangers her life, the abortion is quite proper; otherwise the party causing the abortion usually receives a prison term for felony. But Mississippi has an interesting statute which declares:

"Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever or shall use or employ any instrument or other means with intent thereby to destroy such child, and shall thereby destroy it, shall be

guilty of manslaughter, *unless the same shall have been advised by a physician to be necessary for such purpose.*"<sup>5</sup>

It may be supposed that the manslaughter is of the "quick" child; but note that the lawmakers say nothing about saving the mother's life. "To be necessary for such purpose" simply nullifies or stultifies the statute. Probably the Mississippi prosecutors are still hunting for the true meaning of this statute.

So far as birth control is concerned, it is of course a subject of violent controversy, bitterly condemned by our largest church, and opposed in principle, if not in practice, by the majority of our citizens. It cannot be denied that the statutes directed against it represent the present state of public opinion. But surely any such law as that of Minnesota can only be regarded as a survival from the dark ages. Obviously no one can enforce it; but what chance would there be of getting it altered or repealed?

"Every person who shall sell, lend, or give away, or in any manner exhibit, or offer to sell, lend or give away, or have in his possession with intent to sell, lend, give away, or advertise or offer for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception . . . or shall write or print, or cause to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, *or shall give oral information, stating when, where, how, of whom, or by what means such article or medicine can be obtained or who manufactures it*—shall be guilty of a gross misdemeanor, and *punished by imprisonment in the county jail for not more than one year, or a fine of not more than five hundred dollars, or by both.*

" . . . But the provisions of this section shall not be construed to apply to an article or instrument used by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease."<sup>6</sup>

Can this statute be construed to mean anything save that not only any Birth Control League which might conceivably exist in such a place as Minneapolis, but also the telephone company which might perhaps publish its name and address in the directory, as well as the writer of this article if he should mention the forbidden name, and the editors of the learned journal which gives it publication, are to be classed as major criminals? And does anyone doubt that the final paragraph quoted above has pulled all of the statute's teeth, or that the entire act is more honored, in Minnesota drug-stores and elsewhere, in the breach than the observance?

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<sup>5</sup>Mississippi, Ann. Code 1930, ch. 20, sec. 993. Italics added.

<sup>6</sup>Mason's 1927 Minn. Stats., secs. 10188, 10189. Italics added.

## GOOD MORALS AND GENTLE MANNERS

*Speak No Evil.* Few of the statutes against profanity are enforced these days. If they were, golfers would be particularly vulnerable; the letting off steam after a few bad shots would cost more than the bets on the holes. In Kentucky, "every oath shall be deemed a separate offense," and for each offense the fine is one dollar. I have known individuals who could run up quite a fine in one sentence.

A number of states, such as Alabama, make the offense of using profanity applicable to cursing in the home before members of the family. Quite often swearing at the school teacher is specially condemned. This tender regard for particular classes of persons is carried to quite an extreme in Maryland, where the law declares that

"Every person who shall profanely swear or curse in the presence and hearing of any justice of the peace, sheriff, coroner, county clerk, or constable . . . shall for the first oath or curse be fined twenty-five cents, and for every oath or curse after the first, fifty cents."

In Pennsylvania the rate is sixty-seven cents each. It may be desirable to have a flat rate, as the settling up of the bill will be much easier, but what is one to do about the common hyphenated words?

Ordinary swearing is quite unlike the much graver offense of blasphemy. In Rhode Island the fine for profanity is five dollars (with unlimited use of words on any one occasion); but for the blasphemer, the scale of punishment may go up to two hundred dollars. Michigan exacts ninety days in jail and a hundred dollar fine from the foul-mouthed criminal "who has arrived at the age of discretion [not stated] who shall profanely curse or damn or swear by the name of God, Jesus Christ, or the Holy Ghost." In a similar law Pennsylvania sets the age of discretion at sixteen years.

Maine has added a field of its own for legislation. Its statutes condemn by pretty severe punishment the use of a "phonograph or other contrivance, instrument or device which utters or gives forth any profane, obscene or impure language." But South Carolina has perhaps encroached upon the field by protecting female telephone operators from persons using "lewd or profane words, or any words of vulgarity, or any indecent language."

*See No Evil.* Obscenity statutes are found in great detail in

all states, but rarely are the lawmakers willing to consider the vital problem of censorship. Seldom is any attempt made to create the administrative machinery necessary to separate obscene literature, pictures and drama from the legitimate. No standards are set up for enforcement; it is easy to pass a law punishing obscenity, but "Who's obscene?" At the same time that Mayor Kelly of Chicago ordered the police to close up "Tobacco Road," the burlesque shows of the city reached a new and extreme low without interference. The Illinois obscenity laws have proved useful to producers, reporters and press agents, because a foolish obscenity trial is a means of gaining publicity; it will be remembered that Sally Rand, of World's Fair fan dance fame, got her start in the Chicago municipal court. They seem to be of little use to anyone else.

We may safely say that in all states almost every conceivable kind of indecency is forbidden by law. There is little point in dwelling on these statutes, which are remarkable only for their all-inclusiveness. There are anti-nudist statutes which, taken literally, forbid members of the same family from undressing for bed in the same room, or a mother from giving birth to male children. And Alabama provides that "any person, firm, or corporation who shall display nude pictures of a man, woman or girl in any public place except art galleries, shall be guilty of a misdemeanor." One statute deserving special mention is that of Kentucky, which makes it unlawful for "any person or persons to appear on any highway or upon any street of any town or village, *having no police protection* [italics ours], when such person or persons are clothed only in ordinary bathing garb." Again the old speculation, not likely ever to be answered—why was that statute passed; whose bathing suit was it, and of what kind (or was it the village) which must have protection from the police?

*Remember the Sabbath.* Most of the old "blue laws" happily are forgotten, but many states still punish Sunday hunters and fishers. Legislation against Sunday shows and baseball games is quite common, and in Texas all places must refrain from vending refreshments on Sunday. A famous trial of a food seller in Texas a few years ago turned on the question whether a milk chocolate was sold as a "beverage" or as a "food." The purchaser gallantly testified for the harassed merchant, saying that he always got up late on Sundays, and positively ordered the drink as a

breakfast, and not as a refresher. Acquittal was ordered by the supreme court. Public dancing, bathing in view of a road leading to or from a house of worship, and firing guns or pistols ("except in defense of person or property") are misdemeanors in Georgia; and Louisiana makes it a misdemeanor to hitch "a stallion or any noisy animal within 800 feet of any place of public worship." But it has remained for Illinois to deal with "any noise or amusement on Sunday, whereby the peace of any private family shall be disturbed"—or in other words, the neighbor's radio.

*Behave Yourself.* "A person who secretly loiters about a building with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor." So speaks New York. In Missouri a person becomes a misdemeanant by opening sealed letters not addressed to himself. Arizona offers further protection, under a similar law, against publication of any of the contents of a letter unlawfully opened. The Arizona legislature has found it necessary further to provide for the public welfare by making a felon of any erring citizen who "intentionally breaks down, pulls down, or otherwise destroys" the public jail.

Beware the stealing of a neighbor's cook or butler in Alabama, for a person who entices, decoys, or persuades any Alabama servant to leave his employment lays himself open to a fine, and also three months at hard labor. Surely an astonishing way to meet an undeniable social evil! Alabama also forbids the publication of the biographies of outlaws in the form of a book, pamphlet or tract, although a saving clause might exempt "Robin Hood" and "Les Miserables." "This section does not apply to standard works." It is not improbable that no one applies it to any works at all.

New Jersey frowns upon the pretended use of witchcraft, sorcery or enchantment to discover lost goods and chattels, and declares that it is criminal to insult another person's "honor, delicacy, or reputation." Washington makes it a misdemeanor for a judge, while holding trial, and no one else, to address any person in his presence in unfit, unseemly, or improper language. In Connecticut, the sensitive element are protected by a law condemning the advertisement of a person's ridicule or contempt for others on account of creed, religion, color, denomination, nationality, or race.

And Kentucky forbids the arrest of any minister or priest "while he is publicly preaching or performing religious worship in any religious assembly." Again the question arises—who was arrested, for what, and by whom? And why did the hounds of the law not wait until after the benediction?

One might multiply illustrations endlessly, but there are limitations of space.

*Blessed are the Merciful.* Legislators all seem anxious to suppress cruelty in any form, to man or beast.<sup>7</sup> Of course cock-fighting, bear baiting and bull fights are universally condemned, and the variations of these laws need no comment. Nearly all of the states retain the criminal offense of docking a horse's tail, although evil consequences may be avoided in Michigan by obtaining a certificate from a veterinary surgeon declaring that it is necessary "for the health and safety of such horse." Many of these laws are longer and more detailed than the murder statutes in the same books. Of course a companion law often is found making it a criminal offense to crop a dog's ears, "except where performed by a registered veterinary surgeon while the dog is under an anaesthetic."

Most states have laws like that of Alabama, which punishes any person who "over rides, over drives, over torments, beats, mutilates," or tortures any animal, or fails to provide proper food, drink or protection from the weather. The purpose of these statutes can only be commended. But in one of the earliest cases arising under such a statute, reported in 1822, a teamster was prosecuted for beating his horses. The defense was that the nags were lazy and balky, that it was common to use whips, and how could a man conduct his business without laying on leather occasionally, especially when going up a hill? Nevertheless, he was convicted, and humanitarianism won a signal victory. It is only the good sense of prosecuting attorneys that prevents the average farmer from being hauled into court a dozen times a year.

Maine, shocked at such barbarity, prohibits the exhibition of bears, a discrimination which might well be resented by the rest of the animals in Barnum and Bailey's circus; and the law provides that the court may declare a forfeiture of the bear and order that it be killed—a method of preventing cruelty that is scarcely

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<sup>7</sup>But not always. The famous title of Pierce's Washington Code, 1905: "When a Bull May be Castrated Three Times"—has fortunately not been preserved in later revisions.

likely to appeal to the bear. And the warmheartedness of North Carolina legislators is displayed by a law making it a misdemeanor for owners to allow roving dogs "to worry or harass any squirrel or other wild animal" kept on the Capitol Square at Raleigh.

Further "cruelty to animals" is disapproved in the form of endurance contests—specifically walkathons, dance marathons, chair sitting, flag pole sitting, and long kissing contests, along with collegiate hazing, have received official condemnation. At the time of the Century of Progress Fair, Illinois had a law prohibiting the exhibition for gain of "persons whose deformity is such as to attract public curiosity." Perhaps Ripley's "Believe It or Not" show was considered to be primarily for purposes of education?

A Michigan statute may, or may not, be intended to prevent cruelty. In that state it is a crime, punishable by fine and imprisonment, for an architect to *neglect* to insert a clause in building specifications providing for suitable temporary water closets for the workmen "when they need them."

Woman's inhumanity to man is dealt with in two states, widely separated in location—Maine and Louisiana—which prohibit the wearing in public of a hat pin which protrudes or projects more than one-half inch from any side of the crown of the hat. But Louisiana, realizing that exceptions must always be made when the law conflicts with fashion, has reluctantly ruled that

"the wearer of hat pins may wear hat pins of any length, provided same shall have the points thereof protected by a rounded or blunted shield or sheath protecting the sharp or pointed end of the pin."

And the cruelty associated with women's hats has received notice in Ohio, where they punish theatre owners for permitting a "person attending such performance to wear a hat, bonnet or other covering for the head, which may obstruct the view of another during such performance."

But it remains for Maryland to discover the way to deal with cruelty in the form of beating one's wife. There the husband may be punished with a jail term up to one year, or he may be whipped, not exceeding forty lashes, *or both*. This is, of course, intended as an object lesson in being kind to others.

#### AS THE TWIG IS BENT

Most of the states have some kind of legislation dealing with child labor. A classic example is Maryland's law, which declares:

“No child under sixteen years of age shall be employed in laboring more than ten hours a day in any manufacturing business or factory established in any part of the state, or in any mercantile business in the city of Baltimore.”

And the good people of Maryland drop the age limit down to *eight* if the child is employed on the streets.

In dealing with minors we run across a great variety of prohibitions—things deemed injurious in some states are not frowned upon in others. An example is a Georgia law which condemns the practice of permitting minors to bowl in tenpin alleys unless the parents or guardians consent. Connecticut children under fourteen must be kept out of “dance houses, concert saloons, roller skating rinks, theatres, moving picture shows, phonograph halls, and museums with variety shows attached;” but, after six o’clock in the evening, boys under fourteen and girls under sixteen may slip by if a parent, guardian, or authorized chaperon goes with them. California has a queer arrangement in dealing with children who yearn to attend prize-fights or cock-fights. Children under *sixteen* years are forbidden to attend, but those who stage the fights are punished only if they admit children under *eighteen* years.

Florida merchants are expressly forbidden to sell pistols, bowie knives, dirks or brass knuckles to minors. Alabama prohibits newspaper or handbill distribution by boys under twelve; then the law declares that boys of ten years of age or over may distribute newspapers and periodicals on fixed routes in the residence districts, “and boys twelve years of age or over may be bootblacks.”

A Connecticut law is hard to explain. It reads:

“Any person who shall give credit to a minor student of any college or university in this State, without the written consent of his parent or guardian, or of an authorized officer of such institution, shall be fined not more than three hundred dollars.”

Why? Does not the ordinary contract law, covering business deals with minors, make merchants sufficiently wary of accounts with schoolboys? But this is nothing in comparison with Alabama, where an adult who bets with a minor not only risks his wager but a possible five hundred dollar fine or six months *at hard labor*.

The Journal of Criminal Law and Criminology could not lawfully be sold by Illinois news stands, because the law forbids



the selling or showing or exhibiting "within view of a minor" any publication principally made up of "criminal news, police reports, or accounts of criminal deeds." This sounds as if it might have been directed at the *Police Gazette* of the gay days gone by; but it comes dangerously close to covering some of our daily newspapers; and of course most of the "pulp" occupying this field of literature would be banned—if the law ever were enforced.

Big bullies and little bullies should know the law in Nevada. If the second-graders gang a group of first-graders, they may fall within this prohibition:

"It shall be a misdemeanor for any person or persons to detain, beat, whip, or otherwise interfere with any pupil or pupils attending any public school on his, her or their way to or from such school against the will of such pupil or pupils."

And many of the states have statutes making the abuse of school teachers in the presence of the astonished little ones a criminal offense. Indignant fathers and mothers would do well to keep that in mind before calling at the schoolhouse to give the teacher a piece of their minds.

#### MY LADY NICOTINE

One of the writer's clearest recollections from childhood days concerns a lecture delivered by an ancient aunt who lived down on the old family farm. The admirable traits of grandpa were the central theme, although minor pious and social digressions colored the thread of the discourse.

"And one thing I want to tell you about grandpa was his attitude toward tobacco. He never touched it, and utterly abhorred it. He knew that the makers of cigarettes put drugs in the papers to develop a craving for them. He would not permit a man to come into his home or office if he smoked anything at all. He would have been horrified to see men, young men, and even women smoking cigarettes. Of course he chewed some, but that was only to preserve his teeth."

Perhaps this goes far to explain the Illinois law punishing any person "who shall sell, manufacture or give away any cigarette containing any substance deleterious to health, including tobacco." Or why some of the states definitely have outlawed the sale of cigarettes or cigarette papers—for example Arkansas—while North Dakota and others have ruled against snuff in any form. Why these forms of the weed are so commonly condemned, while chewing tobacco and cigars seem to be approved, can be explained only by the men who made the laws. Arkansas makes the selling

of cigarettes to any minor under *twenty-one* years of age punishable by a fine of from \$100 to \$200. The furnishing of chewing tobacco or cigars to children under the age of *fifteen years* is condemned and punished, but only to the tune of from \$10 to \$50. This is a nice application of the principle that the social danger from cigarettes is greater than from chewing.

Some states allow cigarettes to be sold, but curtail the places where they may be smoked. They do not go to the extreme limit of behind-the-barn regulations, but laws like the following are typical: Nebraska does not allow smoking of cigarettes in public eating places; Kentucky frowns upon it on school premises while the children are "assembled there for lawful purposes." Cigarette smoking by children "under the age of eighteen years, and over the age of seven years" in any public place is made a misdemeanor by Illinois, although the seven year provision is inconsistent with a general law that children under ten years of age cannot be convicted of any crime. Minnesota, by the way, seems to be the one state which discriminates against agriculture; it is criminal to sell cigarettes within one mile of the University of Minnesota farm school, but the prohibition does not apply to the rest of the state university.

Alabama would go so far as to imprison at hard labor any person who barter or exchanges cigarette tobacco or papers to minors under twenty-one—or "any substitute for either." Usually the laws punish those who sell the forbidden stuff to children under some fixed age limit—such as sixteen in Colorado and many other states—although Florida would punish any evildoer who advises a child to smoke a cigarette.

Kentucky will prosecute a person under the age of eighteen if he has about his person, or premises, any paper "prepared to be filled with smoking tobacco for cigarette use." Forgiveness is offered and the fine is to be remitted if the young criminal will disclose the "name of the person, firm or corporation" from whom he got the articles. But Nebraska's tobacco delinquents, minors under the age of eighteen who use the weed in any form, do not achieve immunity merely by tale-bearing; they must produce evidence to convict the persons who furnished the tobacco to them, in order to escape a criminal's doom.

The shameful conditions in Garrett County, Maryland, so aroused the legislature that it passed a law which declares that

when a minor is caught possessed of cigarettes or paper, and refuses to divulge where he got such contraband, he may be taken before an alderman, magistrate, or justice of the peace, fined, and upon failure to pay the fine and costs, reformed by being "sentenced to be confined in the jail of the proper county for a period of not less than ten days nor more than thirty days." But the conclusion of the statute indicates that such drastic action is not needed elsewhere in the state: ". . . provided, however, that nothing contained in this or the preceding section shall apply to Baltimore City or any county in the state of Maryland except Garrett County."

It might be mentioned that Garrett County is in the western mountains, and not on the Eastern Shore.

#### THE WINE WHEN IT IS RED

In this field a tremendous mass of legislation has been produced, including a certain experiment noble in purpose, of recent memory; and a treatise upon the subject might be written. Only a few typical laws will be presented, not by way of exhausting the subject, but to keep from exhausting the reader.

A not unusual provision is found in the Nevada laws:

"It shall be unlawful for any person or persons to sell by wholesale or retail any spirituous or malt liquors, wine or cider, within one-half mile of the State prison, and no license shall be granted authorizing the sale of any spirituous or malt liquors, wine or cider, within one-half mile of said State prison."

New York is not so much interested in its convicts, but is much concerned with the sobriety of its courts:

"Strong spirituous or fermented liquor or wine shall not, on any pretense whatever, be sold within a building established as a court-house for holding courts of record, while such court is sitting therein."

Of course selling liquor near camp meetings, churches, schools and undertaking establishments is condemned in almost all states, and precise distances in feet are often prescribed for the interpretation of "near." Illinois considers that it means 100 feet. South Carolina clamps a brake upon indulgence by enacting that

"It shall be unlawful for any common carrier to deliver any package containing intoxicating liquors in the nighttime, which may be construed to mean from sunset to sunrise."

Illinois seeks to save men from themselves by forbidding the friendly barkeeper to

"furnish alcoholic liquor at retail to any person on credit, or

on a pass book, or order on a store, or in exchange for any goods, wares or merchandise, or in payment for any services rendered," and adds perhaps the "prize" liquor law by prohibiting the political activities of barkeepers, or dram-shop licensees, as they are properly designated:

"It is unlawful for any licensee or any officer, associate, representative, agent or employee of such licensee to become liable for, pay or make any contribution directly or indirectly toward the campaign fund or expenses of any political party, or candidate for public office or for the nomination of any candidate for public office."

A thousand dollar fine plus a year in jail and the revocation of the license is to follow the violation of this law. In view of the saloonkeeper's known penchant for politics, the present rigid enforcement of this law undoubtedly works a great hardship, particularly in Chicago.

#### THE GODDESS OF CHANCE

Just a few lines about gambling, although the subject deserves earnest consideration.

A noted chief of police was talking at a luncheon. He discussed the success of several innovations in his department; he listed arrests made and convictions obtained; he took some credit for a general decrease in crime in his community; laws were being enforced. Then someone asked the embarrassing question: What do you do about gambling?

The chief halted, turned red, and after some hesitation replied:

"Well, you have me there. Of course I don't enforce the gambling laws one hundred per cent. Suppose I walked in on the boys at the Elks Club on a Saturday night and broke up their poker game? Why, I'd be fired the next minute; the mayor always plays there.

"We just try to control gambling. If I hear of any syndicates being formed I go after them. When any professional gambling is started and our citizens are losing too much I chase the professionals out. But amateur gambling is all right with the police, because the people of my city seem to want it!"

The statutes of the various states are filled with gaming provisions. A fair sample is the Maine law, which presumably attempts to keep gambling down to "chicken-feed" stakes:

"Whoever is convicted, by indictment found within six months, of winning, at one time or sitting, by gambling or betting on persons gambling, money or goods of the value of \$3.00 or more, and

of receiving or taking security therefor, forfeits to the town where the offense is committed double the value of the property so won and received."

Although it is not of great importance, since gaming laws are seldom enforced, we note that there is a wide variation in punishment for this offense. Illinois provides a fine of \$10 to \$100, while other states, notably Michigan and Iowa, set the maximum at \$500 and a year in jail. Wisconsin's punishment is to demand of the gambler five times the value of the gain or loss. The one fascinating discovery resulting from a study of these laws is their extraordinary completeness. They cover every kind of play which possibly can be conceived. More than twice as many lines in the statutes of Illinois are devoted to anti-gaming laws as are devoted to homicide in every form.

Since such laws are honored more by non-enforcement than by strict application, one may wonder why they are retained and added to constantly. Is it to make possible the collection of periodic "protection" money? A law which is not used to suppress or regulate gambling may still be used to impress gamblers with the advisability of purchasing immunity. When we read of such affairs as Huey Long's use of the militia to raid gambling spots in New Orleans, or handbook raids by Chicago police, is the net result of these sporadic attempts at enforcement anything more than to compel those annoyed to get in line with their contributions?

Thoughtful sociologists, notably Burgess of the University of Chicago, have advocated open, licensed gambling, as in Nevada, where the games may be supervised so that the "sucker" may have some chance of winning, and the payoff would go directly into the official treasury, and not to the dominant political party to be used to perpetuate its control. At least it seems clear that here, as elsewhere, drastic penalties add nothing to the effectiveness of the law.

#### FOR THE SAKE OF ARTEMIS

Many of the laws for the preservation of animals and fish are quite legitimate measures for conservation. But in this field, as in all others, we find an interesting variety in legislation. Can it be the spirit of conservation behind a Wyoming law which declares:

"It shall be unlawful for any person or persons to photograph any of the game animals or birds of this State during the months of January, February, March and April"

—except when armed with the necessary license?

South Carolina makes it a criminal offense if an aviator intentionally kills or attempts to kill any birds or animals. Idaho has attacked the same evil, but does much more, by protecting its fowls and game from shooters riding along on power boats, sail boats, automobiles, airplanes, railroad trains, or interurban cars. Idaho likewise ordains that "it shall be a misdemeanor for any person to fish for trout from the back of any animal, or to travel up and down in any stream while fishing for trout." Indiana, on the other hand, objects merely to "shooting any fish of any kind." But Vermont makes a frontal attack upon the evil of hunting with a machine gun, or automatic rifle of military type, with a sweeping prohibition and the threat of a \$500 fine.

Legislatures often have sought to reserve their wild life for native sons. Laws such as that of California, which denies California fish to aliens, usually are found to be unconstitutional. But it is a different thing if special privileges are conferred; witness the devotion of South Carolina to a glorious past:

"Every Confederate veteran may hunt and fish within any county of this state without obtaining a license so to do: Provided, that while so doing each of said veterans shall wear his cross of honor."

#### YOUR GOOD HEALTH

Health laws would require a volume for any critical examination. Milk must be kept pure at the source, and at all times until it is consumed; poisons must be labeled, and certain drugs sold on permits only; common towels and drinking cups must be outlawed; the things we eat must be wholesome and unadulterated; our food should not be prepared by filthy or diseased people, and our water must be uncontaminated. There are minute regulations for the preparation and sale of milk, cream, lard, vinegar, process butter, cheese, commercial feeds, and many other products; and in addition, there are many enactments dealing with the sanitary inspection of food producing premises. And all of these seem to be wise and reasonable regulations.

The more our population concentrates in metropolitan centers, the more we must take the stuff that is sold to us on faith alone, and the more we depend upon state regulation. So successful has been the legislative drive for health that now city foods usually are safer than country foods. There is little fun to be poked at health laws; but here and there about the edges one finds a few which

are worth a moment's notice. At least they are surprising in character.

California, for instance, has a law which forbids any person to sleep in any room of a bake-shop, public dining room, *hotel* or restaurant, kitchen, confectionery, or other place where food is prepared, produced, manufactured, served or sold. Illinois, on the other hand, allows people to sleep in food shops, provided "all foods therein handled are at all times in hermetically sealed packages."

It is unlawful for Illinois restaurant employees to "expectorate on the food or on the utensils." Anti-spitting laws are so common that they need no elaboration. Cuspidors must be provided for employees and clerks in most states, and the legislators usually require them to be washed and emptied daily, and to contain "five ounces of disinfectant solution for each."

There is no point in setting out ad nauseam the great variety of toilet regulations. Many states, such as Alabama, lay down minute rules for their location, inspection, cleaning and scrubbing, separation for the sexes, and painting "Ladies" and "Gents" signs on the outside. Fancy conveniences are required in California. There must be cement, tile, or other non-absorbent floors, which must be "scoured" daily; there must be separate ventilating pipes or flues; adjacent washrooms must be supplied with "soap, running water and towels, and shall be maintained in a clean and sanitary condition." And both California and Illinois add the requirement that food workers, after visiting a toilet, "shall wash their hands thoroughly in clean water." How far is such a statute ever likely to be enforced, and what will it accomplish that the pressure of an indignant public opinion could not?

Hotels receive a large share of regulation. There must be giants in these days, at least in Oregon, which has a law to the effect that "All beds in hotels and lodging houses shall be provided with sheets not less than nine feet in length." One wonders, also, what could have motivated the North Carolina lawmakers to rule that in hotels, "there shall always be space in each room, and the arrangement of each room shall be such that there may be a space of two feet between any beds in the room?" But Georgia leaves all others far behind, by requiring beach hotels to furnish lifeboats and the protection of an expert swimmer, "attired in a bathing suit" with a leather harness arrangement, to which shall be attached two hundred feet of good stout rope; and

"in default of complying with the provision of this section, such proprietor or keeper shall be guilty of a misdemeanor and in addition to the penalty for such offense, he shall not have the right to collect any charge or debt from any guest of such house, the consideration of which is board, lodging, or other services rendered such guest during the bathing season by the proprietor or keeper."

#### PUBLIC EXHIBITIONS

The living skeleton and the fat lady of sideshow fame cannot ply their occupation in Florida, because physically distorted, malformed or disfigured persons cannot be exhibited in any circus, show, or other place where admission is charged. The erring exhibitor may be confined in the state prison for a year, and be fined a thousand dollars. The penalty for the exhibition of deformed animals is exactly half as great.

Many a time, perhaps, the Illinois citizen, who has finished his Chicago newspaper, glutted with crime news and headlines screaming "Love Nest Slaying" (pictures on back page), wonders about section 406 of the criminal code, which says that it is unlawful to exhibit for pecuniary gain the pictures of a person who has become conspicuous through some criminal act. Would circulation managers admit that crime pictures are not for pecuniary gain?

Maryland pronounces that it shall be unlawful for any proprietor of any variety entertainment or concert hall to "allow any female sitters (or by whatever other name they may be called) in or about said entertainment or concert hall, building or premises." And who are female sitters? Why, they are tavern "hostesses" or come-on girls, who get a commission on drinks. Kansas condemns the

"Public Exhibition of Reptile Eating: It shall be unlawful for any person to exhibit in a public way, within the state of Kansas, any sort of an exhibition that consists of the eating, or pretending to eat, of snakes, lizards, scorpions, centipedes, tarantulas, or other reptiles."

The game which amuses county fair crowds, "ball dodging," in which a properly aimed baseball causes a negro to fall into a barrel of water, is made criminal in New York. The statute calls it a "degrading practice offending health and decency." Of course a great variety of public exhibitions are forbidden upon the grounds of indelicacy or immorality. States which condemn prize fights usually forbid prize fight pictures from being shown, and Iowa



goes so far as to proscribe pictures of any "glove contest, or other match between men or animals that is prohibited by the laws of this state."

An interesting law dealing with public entertainment was framed by Kansas legislators, who may have had some personal interest in protection:

"... any person or persons that shall be guilty of interfering with any person making a public speech or addressing a public audience within this state, or who shall interrupt such person while speaking, by use of insulting or offensive epithets applied to such speaker, or who shall attempt to interrupt or injure such speaker by throwing eggs or missiles of any kind at him, shall be deemed guilty of a high misdemeanor."

One wonders, on what topic was the author of that act speaking, and whether the egg went home?

#### PROTECTION OF PROPERTY

One primary purpose of the criminal laws is the protection of property. There is, for example, a Kentucky statute:<sup>8</sup>

"... If any person shall steal a hog of the value of four dollars or more he shall be confined in the penitentiary not less than one nor more than five years."

A felony! And for a four dollar hog! And, upon turning the page, one finds that the legislature, in all its wisdom, doubles the penalty if any person steals "a horse, mule, jack or jennet," and not even the value of four dollars is required in this provision. But if one looks at the section on "Assault With Deadly Weapon," the punishment is a fine ranging from fifty to one hundred dollars, or ten to fifty days in jail. An attempt with a gun to kill a human being results in a petty fine or short jail term, but the theft of a decrepit horse may mean several years in prison, loss of civil rights, the breaking up of a home, destitute dependents, and a ruined reputation. Such is the social value of horses and men in old Kentucky.

Larceny, or theft, is the most expanded and intricate criminal offense. Many of the larceny laws now in the books show legislative zeal to correct judicial decisions inherited from a time when judge, prosecutor, and jury entered into a pious conspiracy to save some poor thief's neck from being stretched. Thus Illinois in 1865 felt it advisable to expand the offense of horse stealing by declaring:

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<sup>8</sup>Kentucky, Stats. 1930, sec. 1196.

“Whoever feloniously takes or steals any horse, mule or ass, shall be imprisoned in the penitentiary not less than three nor more than twenty years. The words ‘horse,’ ‘mule,’ ‘ass,’ shall include animals of both sexes and all ages.”

Larceny and related offenses have grown “like Topsy” through the years. Embezzlement was invented to meet the defense, “I didn’t take the goods; he handed them to me;” larceny by bailee prevented the culprit from saying, “I didn’t steal the stuff; he loaned or hired it out to me;” receiving-stolen-property laws avoided the common excuse, “John stole them, and I was just keeping them for him;” the offenses of confidence games and false pretenses were developed to avoid freeing some trickster who pleaded, “I didn’t steal; I just fooled the nit-wit into handing the stuff over.” But there is no space to go into this field without becoming too deeply involved. Larceny statutes are a bewildering jungle in most states; let it go at that. Around the fringe we may find a few bits of legislation which fit the present purpose.

What property is protected depends upon where you are. An interesting law of California punishes by fine up to five hundred dollars, or a term of two years in jail, “every person who is guilty of the theft of one hundred pounds or more of avocados or citrus or deciduous fruit.” New Hampshire deals roughly with the person who carries away “seaweed or rockweed from the seashore below the high water mark between daylight in the evening and daylight in the morning.”

This New Hampshire law represents a type of anti-night-time business regulation which covers the country. Down in Alabama persons, not grocers or market men, who sell or buy domestic animals or fowls between sunset and sunrise may get a term at hard labor. In Tennessee it is unlawful to “buy or sell, barter or exchange, or receive on deposit any cotton in the seed, or ginned but not baled, between the hours of sunset of any one day and sunrise of another.”

(Note the interesting definition of nighttime.) Mississippi has an identical law, and Louisiana’s regulation includes “cotton in the lint, unbaled, and other farm products.” North Carolina is another state holding to the belief that all trading should be done in the broad daylight. It makes it a misdemeanor to receive a price for “any corn in the ear or shelled in a less amount than five bushels, between the hours of sunset and sunrise.”

Offenses against our sacred property rights are too severely

punished, and the unreasoning distinctions between grand and petit larceny based on value are useless as protective measures, although convenient for "horse-trading" and bargaining with prosecuting attorneys. Wisconsin, for instance, sets a punishment up to twenty-five years if the property embezzled exceeds \$25,000 in value, and provides decreasing terms for lesser amounts. Michigan allows a private employee embezzler to be punished by a prison term as high as fifty years if the value of the articles taken, purloined, secreted or appropriated is two thousand dollars or more; and in addition to such imprisonment he shall be fined not less than one thousand dollars and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. A silly law! Silly in its savagery—the heinousness of such an offense does not all depend upon the value. Consider the sneak who steals the precious savings in dimes and nickels hoarded in the old sugar bowl!

The effectiveness of habitual criminal acts—Baumes Laws, or life-for-a-pint laws—is a debatable question. Florida pronounces that a two-time thief "shall be deemed a common and notorious thief, and shall be punished by imprisonment in the state prison not exceeding twenty years." Whether that will ever do any good is more or less moot. But surely a state which has an habitual criminal law would not limit it to offenses against property? Many states do so. Witness this masterpiece of penology enacted in Victorian 1883, but still with us in Illinois:

"Whenever any person having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, shall thereafter be convicted of any one of such crimes. . . ."

he shall be punished by the maximum term for the second offense, and not *less* than fifteen years for the third, with no top stated.

#### • DEADLY WEAPONS

"The right of the people to keep and bear arms shall not be infringed," declares the constitution of the United States, seconded by many state constitutions. But such provisions do not forestall a great amount of legislation on the subject of deadly weapons. Typical is the Illinois law outlawing possession of

"any black-jack, slung shot, sand-club, sand-bag, metal knuckles, bludgeon, or to carry or possess, with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife,

razor, stiletto, or any other dangerous or deadly weapon or instrument of like character.”

In Colorado such a law (except that it refers to “sling-shot” in the present tense) makes the first offense a misdemeanor and the second a felony.

The old time country charivari is handicapped in Pennsylvania, where the law frowns upon the use of “any cannon, gun, revolver, or other explosive device at any serenade of any wedding.” Florida condemns the shooting of guns in roads or villages unless permission is obtained; Louisiana legislates against indiscriminate shooting in public squares, streets and alleys. Pennsylvania has forgiven and forgotten Valley Forge, or perhaps finds Englishmen in special danger. At any rate, the law which prohibits the firing of “any hand gun, pistol or firearms, squibs, rockets, or other fireworks, without reasonable occasion” to celebrate the New Year, is limited to acts which are “to the disturbance of any of *His Majesty's subjects*.”<sup>9</sup>

Carrying concealed weapons is condemned everywhere, with exceptions provided for persons who have reason to go armed. Out west, we find New Mexico expressly allowing weary travelers to carry arms for their protection. They may “pass through the settlements without disarming, but if such travelers shall stop at any settlement for a longer time than fifteen minutes, they shall remove all arms from their person or persons, and not resume the same until the eve of departure.” But, if the western frontier is retreating farther and farther, it must somehow have returned in Vermont, where carrying “a fire-arm, dirk, bowie-knife, dagger, or other dangerous or deadly weapon to school” is forbidden.

Nebraska, with a minimum of alien stock, for some strange reason, perhaps based on a wartime scare, has made it unlawful for any alien to own, keep, or have in his possession firearms “of any character or for any purpose whatsoever.” Shotgun hunting by aliens is expressly prohibited in Colorado by a similar law. Mississippi has found it necessary to legislate against possession of firearms by college students within two miles of a campus. Social conditions in Mississippi are also indirectly mirrored in the law which makes it a ten year felony to cowhide a scoundrel while the avenger is armed with a deadly weapon.

As to duelling, all of the states seem to have sweeping prohibitions against the “affair of honor,” the work of the seconds,

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<sup>9</sup>Purdon's Pa. Stats. 1930, vol. 18, ch. 3, sec. 481.

and the sending of challenges either within or without the state. And to prevent any social pressure, the old practice of publishing a man as a coward often is made a criminal offense. These laws never did very much to wipe out duelling. In spite of harsh punishments, including loss of citizenship, duelists feared social ostracism more than criminal prosecution; and juries, also believers in the manly technique of settling "honor" disputes, seldom would convict. Duelling only declined as public disapproval increased. Now it is gone with the age and the ox-cart; but the statutes, like Tennyson's well-known brook, go on forever.

Some of the states are beginning to awaken to the really great danger to children who shoot off various kinds of fireworks on Independence Day. Iowa, Colorado and Illinois have provided some limitations. But generally the abolition of fireworks is not considered a state matter, and is left up to the cities. The result is the mayor's proclamation "No Fireworks," while just outside the city limits there will be a swarm of roadside stands where "bootleg" fireworks may be purchased. The abundance of duelling laws, and the paucity of fireworks laws, is but a small illustration of the fact that our penal legislation does not jibe with social needs.

#### TRANSPORTATION

There are no limits to legislation for the general welfare, and our lawmakers dip into the strangest things as worthy of regulation for the health, safety and comfort of their people. A fine example of superfluous effort is the Delaware law, which declares that "Aircraft flying over large bodies of water shall be provided with an adequate supply of food and potable water." Why not? But then, why? Will not aviators attend to this without any suggestion from the wise men of Dover?

Washington sets up a worthy rule of conduct which outlaws the driving of a motor vehicle upon the state's highways "when such person has in his or her embrace another person who prevents the free, unhampered operation of the car."

As might be expected, there are hundreds of recent laws governing the driving of busses and private motor vehicles on the highways. Quite often they go as far into detail as the law adopted in Florida, which requires all drivers, at points designated by the state road department as dangerous crossings, to come to a full stop, "at a distance of not less than ten feet nor more than

fifty feet from the nearest rail," to look in both directions, and to listen for the approach of any locomotive. It is doubtful whether this will ever be enforced, but it will none the less have an important effect upon tort cases. Traffic laws are becoming more detailed day by day, and if the slaughter on the roads and streets continues, we may expect constant legislative regulation in the future.

Railroad laws still are passed, notwithstanding the motor vehicle's competition for attention. North Dakota has an interesting law which forbids "children under fifteen years of age to come closer than ten feet to any engine or car, unless accompanied by parent or guardian, not having business with the railroad requiring them to do so." Although Minnesota is not noted as a state of illiterates, it has officially forbidden locomotive engineers to run their engines if they cannot read the timetable and ordinary handwriting—surely a commendable bit of legislation! And Florida has provided a possible thousand dollar fine for any railroad conductor who refuses to stop his train at a regular or flag station upon the request of a physician who has been summoned to attend a patient.

All honor to Louisiana, whose law makes misdemeanants of all taxi drivers "who shall wilfully overcharge any passenger in an amount above the regular or specified rates." And there is Massachusetts, which preserves its winter joys and romance by declaring that "no person shall travel on a highway with a sleigh or sled drawn by a horse unless there are at least three bells attached to some part of the harness."

While the following may not be a transportation law, it has been so classified because it may cause some travelling. Nebraska has declared that it is unlawful for any person "to camp at two places within a radius of five miles upon any public highway within a period of thirty days." Nebraska belongs to the keep-'em-moving school of criminology.

#### THE STAR-SPANGLED BANNER

Many of our laws are devoted to the task of increasing our patriotic fervor, and probably they are useful to that end. Some things are and should be sacred, and it may be quite desirable to have laws which may be used against irreverent persons.

A chapter in the Illinois statutes is entitled "flags," and therein is one of the most sweeping prohibitions against the desecration,

mutilation, or improper use of our National emblem. In order to see that the law is enforced, the legislators racked their brains for two provisions to stimulate prosecution: (a) It is made "the duty of State's Attorneys to see that the provisions of this act are enforced" (why should that be necessary?); (b) all public officers are required to smell out offenders and inform against them; and these informants are to be rewarded by fifty per cent of the fines recovered.

The California laws make it a felony for any person to display

"a red flag, banner, or badge or any flag, badge, banner or device of any color or form whatever . . . as a sign, symbol, or emblem of forceful or violent opposition to organized government. . . ." This took the place of an older law, condemned by the Supreme Court, which forbade the display of a flag as "a sign, symbol, or emblem of opposition to organized government."

Legislative zeal includes the National Anthem as well as the flag. Minnesota prohibits "playing, singing, or rendering of the hymn commonly known and designated as the Star Spangled Banner in any public place . . . for dancing or as an exit march." Sousa's grandest march may not be played in Michigan, because "The Star Spangled Banner or any part of it shall not be played as a part or selection of any medley of any kind." A large fine and a lengthy term in jail shows that the legislature means business—although it is not clear that the whole band, from drums to piccolos, would go to jail; it might be merely the leader.

The legislatures are prone to see that some places are kept sacred, and quite naturally they safeguard their own halls and chambers. In South Carolina it is unlawful to walk upon the roof of the State House without obtaining the consent of the commission on state house and grounds. A state-house-roof-walker may be fined up to \$100 or put out to labor for not more than thirty days on the public works of Richland County for each offense. Mississippi has anticipated the "sit-down" strikes that have occurred elsewhere, for it has had upon its books for years a law which reads:

"If any person shall occupy any of the offices, apartments, halls or other portion of the capitol building at Jackson as a lodging or sleeping room, he shall be guilty of a misdemeanor, and upon conviction be fined not less than \$10 nor more than \$100, and be imprisoned in the county jail not exceeding 30 days."

Rural Kentucky makes it a penal offense for any person to

graze livestock upon any of the grounds surrounding the state capitol and owned by the state. Non-legislative drunks and loafers receive vigorous attention from Kentucky as well:

"If any person shall lie [drunk] or asleep on the pavements or grounds in or around the enclosure in which the State House is situated, or on the floors in the halls, doorsills, doorsteps, portico floor or steps of the State House or other buildings on the capitol square, or in any temporary structure in said enclosure, he shall be immediately arrested, and fined not less than five nor more than ten dollars."

In the category of stimulating patriotism belongs the famed "teachers' oath" law of Massachusetts. Teachers are required to swear:

"I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the Commonwealth of Massachusetts, and that I will faithfully discharge the duties of my position of (insert name of position) according to the best of my ability."

Mr. F. W. Grinnell points out<sup>10</sup> that the law requires that the oaths be subscribed "in duplicate," one copy to be transmitted to the Commissioner of Education and the other delivered to the "board, institution or person employing" the teacher. He says, "The files of the state house and of each educational institution must, therefore, be loaded up with all these oaths and somebody must be employed to arrange them and look after them at an additional cost to the public or somebody. Somebody recently remarked that life was becoming 'one . . . . . oath after another.'"

Oaths really are stupid requirements. The sensitive, conscientious objector seldom needs to be under oath, and the carefree teacher who has his "conscience under control" will sign the oath "with his fingers crossed." Grinnell was reminded of the old story of Theodore Hooke, who is said to have scandalized the university authorities when asked to sign the thirty-nine articles at the time of his matriculation at Oxford. He volunteered to sign forty articles, if anybody wanted him to!

We must not leave this topic without a hearty recommendation that the patriotic reader examine "title 106—Patriotism and the Flag," found in the latest gigantic volume of the Texas statutes. Far more space is given to a description and illustration of the Texas State Flag than to the crime of homicide.

Did you know that when the Texas flag is displayed on a

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<sup>10</sup>Grinnell, *Oaths, Oaths, Oaths*, (1935) 20 Mass. L. Q., No. 4, p. 6.



motor car, "the staff should be fastened firmly to the chassis of the car, or clamped firmly to the radiator cap"? That the Texas flag should not be used as a covering for a ceiling, or as any portion of a costume? That the Texas flag should not be embroidered upon cushions or handkerchiefs, or printed on paper napkins or boxes? Many other *penal* minutiae are found, and then alas—

"When the Texas flag is in such condition of repair that it is no longer a suitable emblem for displaying, it should be totally destroyed, preferably by burning, and that privately; or this should be done by some other method in keeping with the spirit of respect and reverence which all Texans owe the emblem which represents the Lone Star State of Texas."

Do not for a moment suppose that the writer disfavours such laws. These comments are made only because it was a little startling to discover them during a general research into the depths of penal legislation.

More illumination comes from the great Texas law book. The State Motto is "Friendship," a truly beautiful word, and the State Tree is the fruitful pecan. The State Song is "Texas, Our Texas, by William J. Marsh and Gladys Yoakum Wright." Similar legislation, of course, exists in other states. But the way Texas settled the problem of choosing a State Bird may be very significant:<sup>11</sup>

"Resolved, by the Senate of the State of Texas, the House of Representatives concurring:

"That the recommendations of the Texas Federation of Women's Clubs be and are hereby adopted and that the mocking bird be and the same is hereby declared to be the State Bird of Texas."

#### SOME PENAL DON'TS

Don't bathe in that portion of the waters of the Elizabeth River, west of a line drawn across the Elizabeth River in the projection of the eastern line of Willoughby Avenue of the city of Norfolk, Virginia, and south of a line drawn across Elizabeth River in the projection of the northern line of Fifty-First Street of the city of Norfolk.

Don't stage a "sham or fake wrestling match" in Utah.

Don't let your little boy wear the button, badge, pin or other emblem of a lodge or secret society in Tennessee.

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<sup>11</sup>Texas, Acts 1927, 40th Leg., p. 486, S. C. R. No. 8.

Don't make the mistake of building a barbed wire fence around any schoolhouse yard in the state of Vermont.

Don't ever stoop so low as to have in your possession Wisconsin frogs taken from lands owned by another without the consent of the owner of such lands.

Don't juggle your family budget items, or make any wilful or malicious false entry in any book of account in the state of Washington.

Don't drive your sulky, chair, chaise, phaeton, cart, wagon, sleigh or sled through private gates with the fell purpose of defrauding turnpike or plank-road companies of Pennsylvania. There seems to be no objection if you do it in an automobile.

Don't take by snatch hooks New York suckers, mullet, carp, bullheads and eels, except five miles below the source of the stream in which you are fishing, and never resort to blind snatching.

Don't leave cottonseed unprotected or in such manner as to be "accessible to swine running at large" up and down the state of Arkansas.

Don't plan upon maiming yourself to avoid performing a legal duty in Alabama.

Don't sleep in a room wherein any of the "branches or practices of cosmetology are conducted, or practiced, or taught" in California.

Don't resort to the illegal act of removing or dislodging, or attempting to remove or dislodge, any undomesticated raccoon in any manner from any hole, den, pocket, cavity, or hollow of any tree in Indiana.

Don't, if you are an Arizona physician, make the mistake of practicing your profession while intoxicated.

Don't keep out an overdue book from any Delaware public library.

Don't "harbor, entertain or encourage" any child who has "absconded or run away from the Georgia Industrial Home, or any other child-saving institution."

Don't forget that business men of Colorado cannot discriminate in retail prices between the various sections or communities of the state.

Don't ignore the fact that it is a serious matter to conceal from fellow Idahoans the fact that one's bees are being treated for foul brood.

Don't even consider wilfully depositing or assisting in deposit-

ing any starfish or periwinkle in any of the navigable waters of beautiful Connecticut.

Don't "get up or set on foot" or promote a masked ball in law-abiding Massachusetts.

Don't participate in any cattle-roping exhibition in New Jersey.

Don't neglect to take up and clean thoroughly all hotel rugs in Minnesota, "at least once a year, except where vacuum cleaners are used."

Don't orally declare in Nevada, either truthfully or falsely, in the presence of two or more persons, of good general reputation, that you "have had carnal knowledge of any certain female" other than your lawful wife, "except when under oath in a court of justice."

Don't misunderstand the Louisiana laws which regulate the "retail business in green cow hides." It may be that the legislators meant cowhides.

Hundreds more could be set out for your entertainment, but for no other good purpose. It is sufficient to say that our penal legislation, upon which our personal conduct is based, and because of which we may all of us be mulcted with fines or languish in duration vile, seems to be of extraordinary variety, temporary expediency, long endured senility, and often passed without much "reference to the public good."

#### THE LACK OF PLAN

Our limited space does not permit any thorough discussion of the many overlapping and inconsistent laws which appeared during this study. A few typical illustrations taken from the state of Illinois must suffice. Mayhem, although the maximum penalty is set at twenty years in the penitentiary, may be treated as a misdemeanor, and punished by fine and not more than one year in jail. But assault with intent to commit mayhem is declared a felony, punished by one to fourteen years in the penitentiary. It is quite possible that one who merely assaults another with such an intent may be punished more severely than if he had completed the offense.

In Illinois, juries fix a definite punishment for rape, while attempted rape draws an indeterminate sentence with release by the parole board. A comparison of the time served by both classes of offenders shows that the attempted crime draws heavier penal-

ties than the completed one. It is current gossip at the penitentiary: "If you decide to commit a sex crime, you'd better go through with it. The punishment is less!"

Our burglary statute has been constantly amended and broadened through the years, and now the crime may be committed in the daytime as well as at night. But the companion "attempt" statute still retains the old common law idea of burglary as a breaking and entering in the nighttime. There is no such thing as an attempt to burglarize in the daytime. Such anomalies indicate that statutes should not be changed without careful study of all the other sections which might be affected. They present an eloquent argument for complete revisions at stated intervals.

Note also how the states vary in their judgments as to the necessary severity of punishment. Extortion does not seem to be regarded as highly criminal in Wisconsin, but certainly it is so considered in Illinois and Michigan, and is punished harshly. But conspiracy in Michigan is a mere misdemeanor, while Indiana assesses a punishment of two to fourteen years (one may suppose that the average probably is from six to seven). Kidnapping for ransom in Wisconsin has not yet been raised to the class of most heinous offenses, but larceny or embezzlement in Wisconsin may be punished up to twenty-five years, depending on the value of the property—a highly unjust and artificial measure of the length of the term. Most states punish embezzlement and grand larceny with equal severity, but a fifty year term is possible in Indiana for certain embezzlers, while a ten year sentence is the limit for larceny. Not, also, that the value division between grand and petit larceny ranges in the various states from fifteen to two hundred dollars.

All of the states suffer from too severe penalties. For example perjury, often treated as the telling of a "friendly lie" by the jury, is a felony in most states, involving a sentence to the state prison. Hence juries usually will hesitate to convict, whereas a prosecution for the misdemeanor of false swearing may be successful. Abortion, in Wisconsin, is only a misdemeanor, but other states retain this offense in the felony classification. A jury which sympathizes with the distressed female is not likely to convict at all. Many states endeavor to treat "attempts" as substantive offenses in themselves, while others do not. Such penalties often defeat their own ends; if horse stealing and bank robbery carry

the same penalty as murder, what are the odds on the life of the horse owner or the bank teller who sees the face of the thief?

When we come to common misdemeanors, we have even more variation, both in definitions and in punishments. In Illinois pandering is not considered very heinous, but in many other states it is taken quite seriously, with punishment up to twenty years in Michigan and Wisconsin—where perhaps the legislators read deeply in the “white slave” thrillers scattered far and wide by itinerant book agents. Wisconsin’s fine of five times the gain or loss for gambling is quite interesting, and so is the jail term of 364 days for carrying concealed weapons—why 364 days and not 365, or one year? Fines for misdemeanors range all the way from a trifling sum up to \$10,000, a figure set in Illinois as partial punishment for grafting public officers.

The operation of lotteries in Michigan is punished by a heavy fine and a prison term, while Indiana provides only a fine, of much less severity. Vagrants are only fined in Indiana, but may be given six months of hard labor in Iowa. Likewise those guilty of carrying concealed weapons in Indiana are fined, but in Iowa they may be sent to the state prison for as much as five years, in addition to a heavy fine.

Maryland sets up the death penalty for arson; Idaho punishes robbery much more severely than kidnapping; Florida is noted for punishing those who *plan to become burglars* and supply themselves with “burglarious tools” more severely than those who *break and enter* with intent to commit a misdemeanor.

Finally, remember that at common law there were no “degrees” of crimes. But our legislative mania for setting up specific and exact punishments is shown by the creation of many exact degrees of crimes, such as three degrees of murder, and three or four degrees of manslaughter. Almost invariably there follows endless confusion in the courts as to how these degrees are to be distinguished. Kansas leads the field along this line by creating four degrees of forgery—for example those who chip coins are adjudged to be guilty of forgery in the fourth degree. Perhaps some member of the Kansas legislature has on occasion been led to sing a few bars from *The Mikado*:

“My object all sublime  
I shall achieve in time,  
To make the punishment fit the crime,  
The punishment fit the crime.”

## WHITHER ARE WE DRIFTING?

It was Mr. Kipling who said it was the American's "cynic devil in his blood:"

"That bids him flout the Law he makes,  
That bids him make the Law he flouts,  
Till, dazed by many doubts, he wakes  
The drumming guns that—have no doubts."

Perhaps nothing short of a complete change in our national character ever will reduce our penal legislation to a basis of common sense. But surely this study has demonstrated that there are ways in which a small beginning might be made.

There is no state in this country whose statute books, with respect to penal legislation as well as many other fields, are not desperately in need of a thorough housecleaning. There are antique laws which long since have outlived their purpose, but remain to arouse laughter, or to be invoked at very long intervals by the malicious. There are laws directed against offenses that no one ever commits. There are laws that were passed because someone lost his temper. There are an infinite number of laws penalizing minute details of daily conduct, and creating all manner of petty offenses which are beneath the dignity and the notice of a sovereign state, and would serve no really useful purpose in the police regulations of a small town. There are countless duplications, under which the same act may amount to two or more crimes with different penalties. For these laws the only remedy is revision, and repeal.

Among the laws that are still worth preserving, there are inconsistencies and split hairs and senseless distinctions. Above all there are savage punishments, out of all proportion to the offense, which defeat their own purpose because juries refuse to inflict them. And there is an utter lack of relation between the penalties for different crimes, as well as the discretion of the judge in imposing sentence, and the possibility of parole. Crime commissions in different states have pointed out these things many times, and have concluded that the only remedy is a complete overhauling of the statutes, on a wholesale scale. But no legislature has yet sat down to draw a criminal code upon a rational plan, with due consideration of the objects to be accomplished by each criminal provision, the proportionate punishment to be inflicted, and the proper method of enforcement of the law.

Code revisions are infrequent because they cost money. They

are well worth the expense. But general code revision committees, working against time, have been too much inclined to let well enough alone so far as the criminal law is concerned. Much more could be accomplished by a special committee to revise the criminal code alone, or by a permanent statute revisor, constantly at work. One of his first tasks might well be the repeal of a substantial part of the criminal law, and the reconstruction of the rest.

If we have disrespect for law in this country, it is in no small part because the criminal law, about which the ordinary citizen hears most, and with which he comes most often in contact, is not worthy of respect. If we have laxity in law enforcement, it is in some degree because of the character of some of the laws which the bewildered police are expected to enforce. With our penal legislation what it is, we have no reason to expect that the officer, the criminal, or the man in the street will regard it with reverence.

“‘If the law supposes that,’ said Mr. Bumble, . . . ‘the law is a ass, a idiot. If that’s the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience.’”<sup>12</sup>

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<sup>12</sup>Dickens, *Oliver Twist*.