

Modern Tendencies in Habitual Criminal Legislation

J. A. Royce McCuaig

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

J. A. Royce McCuaig, *Modern Tendencies in Habitual Criminal Legislation*, 15 Cornell L. Rev. 62 (1929)
Available at: <http://scholarship.law.cornell.edu/clr/vol15/iss1/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

MODERN TENDENCIES IN HABITUAL CRIMINAL LEGISLATION

J. A. ROYCE McCUAIG*

My object all sublime
I shall achieve in time
To let the punishment fit the crime,
The punishment fit the crime;
And make each prisoner pent
Unwillingly represent
A source of innocent merriment,
Of innocent merriment!

—*The Mikado.*

What is more compelling than well-directed satire? The songs from the delightful and familiar Gilbert and Sullivan operas satirized conditions in England when vast changes were being sought. It is interesting to observe the accuracy with which the thing criticized is illustrated. A sounder doctrine than fitting punishment to crime cannot be found in jurisprudence. Yet at no time in any country have punishment and crime so been harmonized as to achieve the really sublime object of any true system of law and order.

I purpose in these pages to speak about the abuse of legislative authority in criminal matters from the standpoint of jurisprudence; and I have selected as my text the maxim, "Let the punishment fit the crime."

In the modernistic struggle to keep up with the evolutionary advances of science, it sometimes requires courage to profess a predilection for "old-fashioned" principles. In the science of law, however, we cannot turn away lightly from the postulates of the early law-givers. For after all, law is the only possible sanction for social well-being. In writing of the reconstruction of Russia, Trotsky said: "A critical examination of custom and habit has become a necessity, so that life, which is conservative by its traditions of a thousand years, shall not lag behind the progressive possibilities which are opening up."¹ The behaviour of the individual does not change. It is only the stimuli from which his reactions spring that change. So that while we are living in an age which knows of radio-activity, aeronautics, and insulin, we are ourselves no different in the fundamentals from our forbears. Law, therefore, which is an emanation of our cultural development, cannot be wilfully maladjusted in principle to give expression to every untried proposal for so-called advancement.

*Barrister-at-Law, Toronto, Ontario.

¹TROTSKY, PROBLEMS OF LIFE (1924) 32.

It is, perhaps, a moot question in jurisprudence whether the history of law is an aid to the determination of the scope of modern principles of law.² I respectfully follow the reasoning of Chief Judge Cardozo, who has dealt with the point in his work on *The Nature of the Judicial Process*, illustrating the importance of a knowledge of the historical, traditional, and sociological phases of law in the equipment of the judge.

An effusive worship of tradition is the mark of the dilettante. But an utter disregard for it on the part of a law maker is inexcusable. The jurist, in the true sense, must be reactionary, so far as the retention of principles of law is concerned; while in their adaptation to modern conditions, it is not only permissible but obligatory on him to be progressive. In other words, there must be due recognition of the vitality of the ancient dogma from which our present system has emerged, such as is implied in the phrase "the liberty of the subject." If the liberty of the subject be in jeopardy, he may invoke the sovereignty of the state for extraordinary relief. In theory of law, all barriers fall away before the majesty of that invocation. And why? Because, the liberty of the subject is a very real thing, a wrongful deprivation of which—whether temporary or absolute—can never

²HOLLAND, ELEMENTS OF JURISPRUDENCE (13th ed. 1924) 378-380: "Perhaps the most important of the functions of the State is that which it discharges as the guardian of order; preventing and punishing all injuries to itself, and all disobedience to the rules which it has laid down for the common welfare. In defining the orbit of its rights in this respect, the State usually proceeds by an enumeration of the acts which infringe upon them, coupled with an intimation of the penalty to which any one committing such acts will be liable. The branch of law which contains the rules upon this subject is accordingly described as 'Criminal law,' 'Droit pénal,' 'Strafrecht.'

"It is comparatively modern. The early tendency was to punish offences against the sovereign power by an exceptional executive or legislative act, and to treat offences against individuals, even when, like theft and homicide, they were a serious menace to the general welfare, as merely civil injuries to be compensated for by damages. The law of Rome continued to the last to treat as civil delicts acts which would now be regarded exclusively as crimes, although, by a long course of unsystematic legislation, it had also attached penal consequences to some of them. The merely practical and disorderly character of the criminal law which is preserved, for instance, in the ninth books of the Codes of Theodosius and Justinian is readily explicable. The prerogative of punishment, exercised in early times by the king and the 'comitia centuriata' and in later times shared by the senate, was usually delegated in each case to a magistrate or body of commissioners. The series of statutes by which standing delegacies, 'quaestiones perpetuae,' were instituted for the trial of offences of particular kinds, whenever they might be committed, commences with the lex Calpurnia, B.C. 149, and was continued till a number of courses of conduct had been from time to time branded as criminal. The legislation of the emperors, though it superseded the 'quaes-

be repaired. You can be compensated for property of which you are deprived, but no power on earth can give you back the day during which you have been denied the right to live as a free man. This is not idle cant, for the liberty of the subject is the *sine qua non* of our English jurisprudence. Let us consider, then, what is happening to it in these days of enlightenment.

My subject is one of those which are forever troubling the consciences of the upholders of the old jurisprudence. At the words "modern tendencies" they hold up their hands in horror. And have they not cause?

The term "habitual criminal" is not new to English law, and it has more recently found its way into that stream of legislation called the Prevention of Crimes Acts. The doctrine of habitual criminality proceeds on the theory that a person *sui juris* may, by a repetition of offences against the state, render himself amenable to a statutory prohibition whereby he is prevented from giving further expression to his susceptibility of crime. It will be noted that the application of the statute turns on the finding by a court of record that the accused is an habitual criminal. Habitual criminality is, therefore, regarded as an offense *per se* known to the law.

The *indicia* by which habitual criminality is to be determined are fixed by law. If a man exhibit a tendency over a period of years to commit offences of a similar character every time the opportunity presents itself, it is not unreasonable to say of *that* individual that

tiones' by the simpler procedure of the 'iudicia extraordinaria,' followed the lines of the old criminal statutes, and produced a body of rules large indeed but formless, and owing hardly anything to the great men whose wisdom had interpenetrated every doctrine of private law. The Teutonic view of even violent wrongs resembled the early Roman, in regarding them as concerning almost exclusively the person injured, to whom therefore atonement was to be made by way of damages, 'compositio.' When the idea began to be clearly grasped by the Germans that wrong-doing might injure not merely the individual, but also the State itself, they found little assistance towards formulating it in the legal system to which they were most accustomed to turn for guidance. The criminal law of Rome, deeply tinged as it was with national idiosyncrasies, had never been prepared by juristic exposition for more general usefulness. Original legislation was therefore necessary, and the first essay was made in the 'Constitutio Criminalis Carolina,' of the Emperor Charles V. This attempt to provide a criminal law for the whole Empire lost much of its importance from the compilation of national codes for Bavaria, Austria, and many other German States during the latter half of the eighteenth century, but was the forerunner of the penal code for all Germany, 'Strafgesetzbuch für das Deutsche Reich,' which came into operation in 1872. Of the other great criminal codes now in force, the 'Code Pénal' became law for France in 1810, and has been imitated by the Latin races of the continent; while the penal code for British India which was drafted in 1834 by

he has a susceptibility in that direction. Perhaps the nature of the crime which he is repeatedly committing suggests the wisdom of placing him in a psychiatric ward for observation. If, however, our recidivist, by all present known tests of insanity,³ turns out to be sane according to the law,⁴ then the duty arises of dealing with him as an habitual criminal, not in any mere statutory sense, but from a medico-legal standpoint. He is of a type requiring special treatment—recognition of which by law is a stage not as yet attained.

THE NEW YORK HABITUAL CRIMINAL LEGISLATION

The man, therefore, that such legislation as the Baumes Laws of the State of New York is chiefly concerned with is the man whom the law regards, not as insane, not as belonging to a new type of habitual criminals, but as one who, by mathematical calculation of his previous offences, has rendered himself open to a sentence of imprisonment for the term of his natural life.

Throughout the United States, wherever the proposal to adopt similar legislation was made, the commentaries on the subject eulogized the wave of crime prevention that was sweeping the country. While acknowledging the severity of the Baumes Laws,

Lord Macaulay was promulgated in 1860. In the meantime the whole theory of punishment and of the classification of offences has been thoroughly discussed by such men as Beccaria, Bentham, Feuerbach, Mittermaier, and Sir J. F. Stephen; and the criminal branch of public law may now be said to be divided upon recognised principles, and to possess a terminology, though a somewhat loose one, of its own."

³EAST, AN INTRODUCTION TO FORENSIC PSYCHIATRY IN THE CRIMINAL COURTS (1927) 155: "The association of crime with this form of insanity [moral insanity] is infrequent in prison practice, and this is probably because the form of insanity itself is uncommon. Indeed, some modern writers make no mention of it whatever, or do not distinguish between moral insanity and moral imbecility. Other authorities, however, have recognized for many years a disease of the mind which shows itself by unmoral acts distinguishable from criminal conduct, but perhaps with difficulty, and occurring in persons who previously possessed ethical perception, who exercised control over their desires and who observed their social obligations."

⁴EAST, *op. cit. supra* note 3, at 159: "At times the medical man may only suspect that an accused person is suffering from this form of insanity [moral insanity]. On other occasions he may go further and consider that the subject is so suffering, but he may lack sufficient evidence to enable him to certify the individual as insane. He will usually be unable to say that the accused is insane according to law, for the offenders know what they are doing, and usually that their criminal acts are wrong and punishable by the law. It will rest with the judicial authority, or the jury, whether or no the accused be dealt with as insane at court. This is, of course, of no concern to the witness, who is not responsible, as they are, for the protection of the public."

they pointed to their efficacy in reducing crime. All this information was very interesting and unquestionably assisted many legislatures in deciding the wisdom of following the lead of New York. The error which crept in was, I submit, a failure to realize the cause behind the cause. The ascendancy of crime was due to certain conditions,⁵ which were not alone attributable to the wrongdoer. The great cancer in criminal administration—*delay*—had worked its evil: delay in bringing the accused to trial; delay in empanelling a jury; delay in permitting a dozen abortive motions to be argued to prolong the proceedings (as occurred in the tragic Sacco and Vanzetti trial^{5a}); and delay or uncertainty in the carrying out of the sentence. The conditions became alarming and the fact that crime was on the increase and was getting out of bounds so filled the minds of those charged with the protection of the public that they resolved to take drastic measures to stem the tide. Instead of finding the causes or contributing causes, however, they selected a palliative—and that palliative is to be found in the provisions of the Baumes Laws.

With these observations by way of preliminary, I turn now to the text of these laws. The essential elements appear in sections 1942 and 1943:

A person who, after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits a felony within this state, shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for the term of his natural life.

If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney of the county in which such

⁵See Merrill, J., in *People v. Gowasky*, 219 App. Div. 19, 25, 219 N. Y. Supp. 373, 380 (1st Dept. 1926): “. . . Present-day laxity in the enforcement of our criminal and penal laws is, in our opinion, largely responsible for the wave of crime which seems to have engulfed the country. It was to check the increasing prevalence of crime that the so called ‘Baumes Laws’ were enacted by the Legislature in 1926. While these statutes may not be in all respects perfect, we regard them as within the police power of the Legislature and deserving of a fair trial where their efficacy may be proved or disproved. Unquestionably defects may be discovered in the new statutes which must be remedied by legislative action. . . . We call attention to such apparent inconsistency in the provisions of the Penal Law, not that it has any bearing upon the questions presented upon this appeal, but that remedial action may be taken by the Legislature in reference thereto.”

^{5a}ED.—Book Review (1929) 15 CORNELL LAW QUARTERLY 155.

conviction was had to file an information accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had shall cause the said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. . .

The full text of the statute appears below.⁶

Although there have been a number of decisions by way of interpretation, there has been no statutory amendment altering the language of the sections. So that by reason of a disparity in case law on the subject, we are left virtually to the text itself for a determination of its scope and constitutionality. Without the aid of explicit judicial interpretation, it is difficult accurately to express an opinion regarding its entire meaning and operation. It is even more difficult to go behind the statute to enquire into the full intention of the legislature. Added to these difficulties is the personal one of the writer that he is not trained in the jurisprudence of the United States. It is, therefore, with the utmost deference to abler commentators and particularly those learned in the law of the United States,

⁶N. Y. Laws 1926, c. 457:

Section 1. Section nineteen hundred and forty-one of the penal law, as last amended by chapter five hundred and seventy-one of the laws of nineteen hundred and twenty, is hereby amended to read as follows:

§ 1941. Punishment for second offence of felony. A person, who after having been convicted within the state, of a felony, or an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this State, is punishable upon conviction of such second offense, as follows:

If the subsequent felony is such that, upon the first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction.

§ 2. Section nineteen hundred and forty-two of the penal law is hereby amended to read as follows:

§ 1942. Punishment for fourth conviction of felony. A person who, after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonies commits a felony within this state, shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for the term of his natural life. A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section:

§ 3. The said penal law is hereby further amended by adding thereto a new section to be known as section nineteen hundred and forty-three thereof and to follow section nineteen hundred and forty-two and to read as follows:

§ 1943. Procedure relating to resentencing. If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony

that my observations are submitted. I venture to hope, however, that it may not be without some value if an opinion is hazarded by one whose training has been in another country having a jurisprudence of common origin to that obtaining in most of the United States.

I cannot profess an exact knowledge of the very important field of constitutional law or statutory construction which would necessarily engage counsel in arguing a stated case on these sections before an appellate tribunal. Nor do I propose to enter into any technical argument or indulge in close reasoning regarding the refinements of any specific case within the purview of these sections.

The popular conception of the Baumes Laws is really sufficient for my purposes, as it illustrates the sociological questions involved. From an academic ground my contention is, to put it succinctly, that the intendment of the statute is not in harmony with ruling principles of jurisprudence.

has previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney of the county in which such conviction was had to file an information accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had shall cause the said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person or refuses to answer, or remains silent, his plea, or the fact of his silence, shall be entered of record and a jury shall be empanelled to inquire whether the offender is the same person mentioned in the several records as set forth in such information. If the jury finds that he is the same person or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he is the same person, the court shall sentence him to the punishment prescribed in said sections nineteen hundred and forty-one and nineteen hundred and forty-two, as the case may be, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated. Whenever it shall become known to any warden or prison, probation, parole, or police officer or other peace officer that any person charged with or convicted of a felony has been previously convicted within the meaning of said sections nineteen hundred and forty-one, or nineteen hundred and forty-two, it shall become his duty forthwith to report the facts to the district attorney of the county.

§ 4. This act shall take effect July first, nineteen hundred and twenty-six.
N. Y. Laws 1926, c. 705:

Section 1. The penal law is hereby amended by adding thereto a new section, to be known as section nineteen hundred and forty-four, and to read as follows:

§ 1944. Committing felony while armed. If any person while in the act of committing a felony, or attempting to commit a felony, shall be armed with a pistol or any of the weapons or instruments specified in sections eighteen hundred and ninety-six, eighteen hundred and ninety-seven or eighteen hundred and ninety-seven-a, the punishment elsewhere prescribed in this law for the felony of which he is convicted shall be increased by imprisonment in state's prison for not less than five nor more than ten years. Upon a second conviction for a felony so committed such period of imprisonment shall be increased by not less than ten years nor more than

With these angles of approach in mind, therefore, what I may term a lay analysis of the text suggests a number of salient features for consideration:

1. The caption of section 1943 is "Procedure relating to re-sentencing," while the section is to be found in the Penal Law and not in the Code of Criminal Procedure.

2. The theory of the sections is that "the defendant has not reformed since his first offence, but has persisted in breaking the law." A fourth conviction would seem to be the limitation against possible reformation by the prescription of the life penalty.

3. Prior convictions—within the meaning of the text—may be matters of record in any other state, government or country.

4. No prior conviction as a previous offender or habitual criminal *per se* is required to bring the accused within the operation of the text.

5. Upon mere proof of prior convictions, as a matter of record, the accused—if convicted of a fourth offence—shall be sentenced to life imprisonment, the question of identity only being material.

6. Neither the court nor the district attorney has any discretion regarding the punishment which is fixed by statute, not by the court.⁷

fifteen years; and upon a third conviction for a felony so committed such period of imprisonment shall be increased by not less than fifteen nor more than twenty-five years. Upon a fourth or subsequent conviction for a felony so committed the person so convicted shall be imprisoned for life or for a term not less than twenty-five years in the discretion of the court. In no case shall any person punishable as above provided be put upon probation or have the execution of his sentence suspended, notwithstanding the provisions of section twenty-one hundred and eighty-eight, for the increased term of his punishment imposed as above.

§ 2. This act shall take effect July first nineteen hundred and twenty-six.

See O'Malley, J., in *People v. Kevlon*, 221 App. Div. 224, 227, 222 N. Y. Supp. 311, 313 (1st Dept. 1927): "Section 1944 deals simply with the subject of *increased punishment* for one who commits a crime in a certain manner. It does not purport to define a crime. Section 2 (*supra*), on the other hand, defines who is a principal in the *commission of a crime*. As an additional deterrent to crimes of violence and the use of dangerous weapons in their commission. . . it was but logical that the extra punishment provided should be visited only upon those in possession of such dangerous weapons."

⁷Possibly it still remains an arguable question as to whether or not the court has any discretion whatsoever in awarding the life penalty to fourth offenders. The Appellate Division of the New York Supreme Court has said that "Judicial discretion in imposing punishment for crime has long been a recognized principle of our criminal jurisprudence. In theory its exercise is quite unassailable. Such discretion, however, is subject to abuse, and recent instances are not rare where it has been improperly exercised. There comes a time when discretion should end, and the Legislature, by the statute here under consideration, placed a fourth conviction of a felony as beyond the pale of judicial discretion." See *People v. Gowasky*, *supra* note 5, at 24, 219 N. Y. Supp. at 379. The last word on the matter of discretion, however, has yet to be said.

The result of this legislation is that if *A* commits four offences amounting to felonies within the meaning of the Penal Law of the State of New York, after conviction for the fourth offence, forthwith and upon mere proof as a matter of record of three such prior convictions (the onus of which said proof shall be mandatory upon the district attorney or other officer) the court, shorn of all discretion in the matter, shall sentence such accused to imprisonment for the term of his natural life; subject only, however, to a trial of the issue as to identity in respect of prior convictions.

Having in mind that "the grade of an offence, that is whether it is a felony or misdemeanor, is determined by the kind and extent of the punishment which may be inflicted,"⁸ a further resolution of the proposition may be made: The Legislature of the State of New York, by sections 1942 and 1943 of the Penal Law, has seen fit to require its courts to award the penalty of life imprisonment in the cases of those who commit four offences (arbitrarily regarded as felonies by the sovereign power of the state), without discretion to the court to alter such penalty, and rendering it obligatory upon officers of the court to produce existing evidence of such prior convictions—reserving to the accused only the right to a trial of the issue as to identity.

Observe that the offence is a felony only if it has been so characterized by statute; that in giving effect to sections 1942 and 1943, the court and its officers act only in a ministerial capacity, and not in a judicial capacity; and that the life penalty remains fixed irrespective of the aggregate penalties which might have been awarded severally for each of the offences.

Has not the legislature in effect created a new offence consisting of an accumulation of previous offences? For this "metaphysical offence," the law fixes a penalty which shall be awarded willy-nilly, not upon trial of the issue of such offence—for it can scarcely be said to be founded in substantive law—but merely after submission of a record of prior offences by an officer of the court.

A CRITIQUE OF THE NEW YORK EXPERIMENT

Having briefly outlined the field of my discussion, let us examine it in more detail under the headings of "crime," "the criminal," and "the penalty" respectively.

⁸39 MCKINNEY, N. Y. CONS. LAWS (1909) 14, annotating § 2 of the Penal Code.

Crime

First, then, as to crime. "No external conduct, however serious or even fatal its consequences may have been, is ever punished unless it has been produced by some form or other of *mens rea*. It is not, however, necessary that the offender should have intended to commit the particular crime which he has committed; (indeed not even that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed as consisting simply in 'intending to do what you know to be illegal' ".⁹ While proof of "*mens rea*" is essential to establish criminal liability at law, yet in practice, the presumption of "*mens rea*" as imported by commission of an offence (a presumption which may well be employed in proper cases) is assuming a prominence which perhaps its most ardent endorsers never anticipated. If, therefore, the substantive element of *mens rea* can be established by reason of a presumption which can be raised with little difficulty—that is, upon proof of the commission of the offence—then, a natural sequence in criminal procedure is the fixing of criminal liability as a ministerial act, without regard to *any* theory of crime. That in effect is the result of the Baumes Laws. The general application of this reasoning can only lead to bureaucracy.

In the field of criminal law proper the intrusion of bureaucratic doctrines and practice is abhorrent.¹⁰ At the same time, it must be recognized that there is a multiplicity of cases of minor infractions of municipal statutes which, by reason of their number and frequency, should be dealt with collectively. Proper economy in the

⁹KENNY, OUTLINES OF CRIMINAL LAW (6th ed. 1914) 39.

¹⁰See Brewer, J., dissenting in *Budd v. New York*, 143 U. S. 517, 550, 12 Sup. Ct. 468, 478 (1891): ". . . Men are endowed by their Creator with certain unalienable rights, 'life, liberty and the pursuit of happiness'; and to 'secure', not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit. . .

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government.

". . . I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the erection of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use."

administration of public affairs demands some such system. No great wrong is done any one individual, and the balance of convenience is a benefit to the public at large. In such circumstances, therefore, there can be no serious quarrel with the introduction of even bureaucratic methods. But the iniquity of bureaucracy can be seen when similar methods begin to find their way into our courts of criminal jurisdiction, which have to deal with cases of substantive criminality where individual responsibility for criminal conduct can be ascertained properly only by investigation along accepted lines of procedure, so ordered as to protect to the utmost the sanctity of the liberty of the subject.

So prodigious a mass of writing has appeared in the last few years on "crime and insanity" and "prevention of crime" and "what is wrong with our criminal administration and criminal law?" and kindred topics, that one must be very brave in venturing into the field at all. I had hoped to be able to point to the position taken by recognized authorities on at least some phases of the subject—to illustrate the present-day attitude; but my researches have led me to the conclusion that we are going through a period of transition. There is little, if any, uniform scholarship to guide us. Without a few constants held in tow by that sense of security which hovers around the names of leading criminologists, psychiatrists, and jurists, the novice is sailing not on uncharted seas, but on seas charted with a hundred courses from which to choose whither chance leads him. The only absolutely dominating demand of all writers on the subject is that we must reexamine our whole system of criminal jurisprudence, our conception of crime and criminal liability and responsibility, and our classifications thereof. From what starting point? Well, from the starting point which happens to be the logical sequence of the particular premise adopted by any given commentator.

In current periodicals of a technical nature, which I have consulted with considerable profit to myself, I have found many striking statements and much data of an informative character, but I have closed each volume in turn with an impression of vague uncertainty as to what the author would have us do. His pages constitute, perhaps, a philippic of considerable vitality against the present state of affairs, but apart from suggestions along general lines—chiefly consisting of the need for further scientific research—there is little constructive material to aid us.

A statement of Dean Pound¹¹ which appeared recently gives expression to the problem with his usual clarity:

¹¹(1929) 42 HARV. L. REV. 297.

Not the least interesting of present-day movements in jurisprudence is the renewed quest for certainty after the reaction from the formal certainty of nineteenth-century law. In the last century we had looked at the general security from the standpoint of security against the arbitrary action of magistrates and abuse of prosecuting machinery by officials, rather than from the standpoint of security of society against the conduct of offenders. In effect we had sought to put the social interest in the individual life in terms of the general security. It is the task of the criminal law to discover and mark out the lines of a wise adjustment or practical compromise between the general security and the individual life. In the humanitarian thinking of the eighteenth century, stress was put upon the individual life, and until recently that interest in effect had preponderant recognition. The whole apparatus of criminal justice was shaped by the quest for means of insuring an abstractly uniform, outwardly mechanical administration. The superseding of the common-law principle as to misdemeanors by a doctrine of *nulla poena sine lege*, minutely defined degrees of crime, and exact statutory penalties, worked out in detail for minutely differentiated offenses, tied tribunals down rigidly in appearance, while all sorts of mitigating devices parallel with them and running through the whole course of the prosecution tempered them in action.

Inevitably there was a reaction from the futile, cast-iron prescribed penal treatment characteristic of the last century. A movement for individualization on every side of the law took in criminal justice the form of a development of individualized penal treatment which was to make the penal treatment fit the criminal rather than the punishment fit the crime. But this movement for individualization and for preventive justice has itself brought about a reaction. On the one hand it has seemed to threaten the general security. Men have come to fear that in our zeal to secure the individual life we may relax the hold of society upon the anti-social, impair the fear of the legal order as a deterrent upon anti-social conduct, and release habitual offenders prematurely to resume their warfare upon society. On the other hand, it has seemed to threaten the security of the individual life by committing too much to the discretion of administrative officers.

It is not difficult, then, to realize the pitfalls which beset the reformer. Indeed, there is something to be said for that sort of overzealous person who urges us to secure new legislation which, if unsatisfactory, can be amended. The only good, however, that can be said of him is that he really wants to take some definite action. His method, of course, is horrible in the extreme. Legislation—expressing the sovereign will of the people—is fast becoming as prolific and variable as journalistic editorials. No, much has to be

done before the legislature is asked to enact further laws. Perhaps much time might profitably be spent in abolishing a lot of dead wood which has been cluttering up the books for years past. At any rate, rash legislation is not the remedy.

Upon looking into the authorities available, it seems impossible to reconcile the views of the dogmatic legal thinker, the empirical medico-legal thinker, and the sociological thinker. Much of value is to be drawn from each; but too often are they prejudiced in favour of their own particular school of thinking, denying to other modes of thought sufficient breadth of scope to deal with the matter. Take, for example, the statement of the medical writer, "It will rest with the judicial authority, or the jury, whether or not the accused be dealt with as insane at court. This is, of course, of no concern to the witness [the medical expert] who is not responsible, as they are, for the protection of the public."¹²

Such detachment is characteristic of the scientific man who regards all matters submitted to him in the light of laboratory tests. But the time has come when closer coordination among the learned professions must be established in the creation of a politically responsible class of trained persons who not only may be charged with the protection of the public but also held responsible, within the measure of their professional skill and the ambit of their public offices, for its accomplishment.

Returning, then, to the examination of the prevailing conceptions of crime, it will be seen that one lays himself open to the charge of scholasticism when he enunciates a dogmatic definition of crime. I quoted Dr. Kenny at the outset because his language is in keeping with that which falls upon the ears of the unsuspecting law student when first he is introduced to the subject of crime, and quite properly so. The theory of *mens rea* is capable of a wider application than any concise legal definition. It involves the element—describable with infinite variety—essential to the determination of all criminal liability, whether the accused be a person free from pronounced traces of the various classes of insanity, whether he be a moron or a moral imbecile or one suffering from moral insanity. *Mens rea* is, like the "*cogito ergo sum*" of Descartes, a starting point in our reasoning from which may be raised a workable superstructure. Let it be conceded that *mens rea* is to-day an expression wider in meaning than when it first came into use. It is a term of convenience, let us say, to suggest all those multifarious tests by which in varying degrees of criminal responsibility the accused may properly be

¹²EAST *loc. cit.* *supra* note 4.

subjected to punishment—of some kind. Then let us read for the word “punishment,” “*treatment*.”

Having in mind “the task of the criminal law to discover and mark out the lines of a wise adjustment or practical compromise between the general security and the individual life,” the futility of any arbitrary classifications will be seen. Yet, it would be utterly impossible to eliminate all standardization from our penal system. Offences have to be described and offenders have to be dealt with, if law and order are to be preserved. So the definition of an offence must be fixed by law, as it is at present in every criminal code. Moreover, the accused is entitled to know with what he is charged. But after conviction there should be instituted a searching inquiry as to the cause which actuated him in committing the crime.¹³ Upon determination of the cause, the convicted person can then be further dealt with as the circumstances warrant. That he has committed a statutory offence is certain; why he committed it is a matter for careful investigation, the findings from which will enable the proper authority intelligently to deal with him. A *crime*, then, may be the subject of statutory definition, while *crime generically* must be regarded as something more than simply commission of the offences described by statute. It involves a recognition of a condition inherent in the individual, rendering the commission of the offence a necessary result of that condition—if unrestrained or unhampered.

Appreciation of this dual nature of crime will strengthen the usefulness of accepted formulae in criminal jurisprudence. The negative and positive sides of crime are “cause” and “result”; the subjective and objective are “proclivity to commit” and “the actual commission of” the offence. So that if the penal system provides for both the subjective and objective nature of crime, each in its appropriate

¹³EAST, *op. cit.* *supra* note 3, at 137: “The habitual criminal . . . may have had an even more prolonged career of crime. It does not, however, usually begin in childhood, but about puberty, adolescence, or even later. Their criminal acts tend to become specialized, the offender usually concentrates on attaining proficiency in one class of crime, and, moreover, contempt is often felt and expressed for crimes of a different character practised by others. Temptation may be resisted although resistance ultimately fails; detection is avoided, if possible by precautions; the risks run are not outrageously disproportionate to the possible gains; and the profits obtained are enjoyed and not disregarded.

* * * * *

“The habitual criminal, at least at the commencement of his career, has some conception of his social obligations to others, and some appreciation of right and wrong. . . . He may even give up his criminal practices if his surroundings become favourable and free from temptation, unless the habit of crime has become too firmly fixed.”

field, that is to say, if all crimes are adequately described and the treatment of convicted persons is determined after due investigation of the cause, the law *will* fulfil its function in providing both for "the general security and the individual life."¹⁴

The Criminal

The second matter for consideration is the criminal himself. If terminology means anything, everyone who commits a crime is a criminal. And I venture to suggest that, as a crime is a statutory offence, he who commits one is a criminal, primarily within the meaning of the statute only. His criminality is something imputed to him *ab extra*, its real nature not being ascertainable without proper investigation.

Something has been said on the subject of *mens rea*, as the essential of every crime, but a criminal liability which arises from negligence *per se* must not be overlooked. A negligent act or omission may result in extremely serious consequences which in the awareness of the individual was not anticipated; while the initiate negligent act or omission fixes on him the reasonable consequences of his negligence. This doctrine, which forms an important part in our criminal law, is founded on the presumption that a sane man intends the natural consequences of his acts. In theory the only available rebuttal, other things being equal, is remoteness of consequence.

How do we regard that class of individuals who are convicted of offences arising out of negligence? As for example, the bank director who signs a balance sheet which he has not read, or having read, either does not understand or has no actuarial basis for belief in its accuracy; the motorist who by reason of faulty brakes—which he believed had been properly adjusted—runs down and kills a pedestrian; or, the mother who through ignorance of her child's condition, fails to call in medical aid and suffers the child to die.

These are not the ordinary anti-social acts. Yet they constitute statutory criminal offences. In the instances cited, what, if any, degree of moral turpitude is present? Public opinion is not highly incensed against the accused in such cases, unless perhaps in that of the bank director, by whose negligent act the last drama of insolvency is brought home to unfortunate depositors among whom are always widows whose mite is lost, and orphans whose patrimony is thrown into hotchpot for the general benefit of creditors.

John Galsworthy in his play *Escape* has given us a vivid study of the normal reactions of "decent" people to the problem of lending

¹⁴See Appendix, *infra* p. 81.

assistance to an escaped convict. A cultured young Englishman, who held a commission during the war, is by mere chance brought into conflict with an officer of the law, occasioned by his resentment at the officer's treatment of a young adventuress in arresting her in Hyde Park for accosting. The young Englishman, simply on the spur of the moment, gives expression to his innate sense of chivalry, developed at Eton and Cambridge, and not stifled by his experiences in the war. He protests against the rough handling of the woman, and an altercation between him and the policeman ensues, in the course of which the officer is knocked down and, hitting his head on an iron railing, is killed. The young chap is arrested and sentenced to four years at Dartmoor, from which he makes a phenomenal escape shortly after his incarceration. The episodes of the play are scenes with divers persons in various walks of life from whom he seeks refuge in the course of his flight. The closing lines of the play, somewhat abridged, read thus:

EPISODE X¹⁵

In the vestry of a village church. . .

* * *

MATT. Well, Padre, how does it look to you? Giving me up?

PARSON. Padre! . . . As man to man—who am I to give you up? One poor fellow to another! . . . I can't help you to escape, but if you want rest, take it.

MATT. Wonder what Christ would have done!

PARSON. That, Captain Denant, is the hardest question in the world. Nobody ever knows. You may answer this or that, but nobody ever knows. The more you read those writings, the more you realize that He was incalculable. You see—He was a genius! It makes it hard for us who try to follow Him. . . .

* * *

Did anyone see you come in here?

MATT. Can't have—they'd have been in on my heels.

PARSON. Who's after you?

MATT. Villagers—and a constable.

PARSON. My villagers—and here am I—

MATT. By George, yes, Padre! It's too bad. I'll clear out.

PARSON. No, No! Rest while you can. You've asked for sanctuary. I don't know that I've the right to turn you out of here. I don't know—anyway I can't. . . .

* * *

(Enter the CONSTABLE, the FARMER, the TWO LABOURERS and the BELLRINGER.)

PARSON. What's all this, Constable?

* * *

¹⁵Part II.

FARMER. Jest a minute, Vicar. Yu'll pardon me askin', but are yo zartun zure as yu'n not zeen this joker?

PARSON. What is it you are asking me?

FARMER. I'm askin' yu on yure honour as a Christian gentleman, whether or no yu've zeen the escaped convict?

PARSON. I—

MATT. [*Stepping out from where he has been concealed.*] Certainly he's not. Sorry, Sir, I was hidden there. I surrender, Constable.

* * *

Forgive me, Sir! Oughtn't to have come in here. It wasn't playing cricket.

PARSON. No, No! That you *have* done—that you *have* done.

MATT. Its one's decent *self* one can't escape.

PARSON. Ah! that's it! God keep you!

* * *

Is this a case of moral turpitude? I think most of us would hesitate to say so. Galsworthy's notion is that the normal person considers he is only "playing cricket" in giving the under-dog a sporting chance. Yet, in so doing he may himself be committing a crime. The worthy padre in doing what he did, had he lived in Canada, would have committed an indictable offence under section 192 of the Criminal Code!

Unquestionably, there are many breaches of law which emanate from the best motives. Where such acts constitute offences against the criminal law, the offender upon conviction is regarded as a criminal. But in our treatment of criminal responsibility, we cannot ignore the human side.

On the other hand, there is that large number of persons who have been described as "professional criminals" or "predatory outlaws." The dockets, full as they are of the records of their trials, do not begin to cover the number of cases which would exist if all such offenders were apprehended. This class of offender comprises those who conform to a type of habitual criminal *possibly* recognizable. They are difficult to handle and probably merit severe treatment. But, serious as is their warfare against society, they are a relatively small class in the broad field of crime; and in making laws adequate only to their requirement, in point of severity, without regard for other kinds of offenders, is only to perfect the mechanics of punishment and to close the door against possible reclamation.

The Penalty

It is impossible to speak at much length in these pages on the nature of penalty.

I said at the commencement that my text was, "Let the punishment fit the crime," and that such a maxim was a sound proposition in

jurisprudence. If by "punishment" we mean "treatment," as I have endeavoured to indicate, and if by "crime" we mean not only its manifestation gauged by statutory definition, but also, and perhaps chiefly, its essential nature as an inherent condition in the individual—then, and then only, can we succeed in finding "the lines of a wise adjustment or practical compromise between the general security and the individual life." If, on the other hand, "preventive justice," so-called, seeks only the destruction of the wrongdoer with no thought of his possible usefulness to the community resulting from proper treatment in the first instance, then, in letting the punishment fit the crime, it will be quite proper to devise all manner of severities with which to annihilate the "decent self" of the individual which may still remain. With the *Mikado*, we might also decree that:

The billiard sharp whom anyone catches,
 His doom's extremely hard
 He's made to dwell
 In a dungeon cell
 On a spot that's always barr'd:
 And there he plays extravagant matches
 In fitless finger stalls
 On a cloth untrue
 With a twisted cue,
 And elliptical billiard balls!

In the index to the Criminal Code of Canada, the term "habitual criminal" does not appear. The distinction between felony and misdemeanour (as known to the common law) is by section 14 abolished. Penalties have been provided in accordance with the seriousness of the offences so far as it has been possible to assess them. And while there is no degree of certainty that these penalties are in the last analysis the appropriate ones, yet, in my view, the absence of cumulative penalties for successive differentiated offences in the Code, is not only not a deficiency, but is a factor contributing to practical coordination of the wrongdoer and the wrongdoing in terms of the general welfare.

Aggravated crime in Canada is not rampant. Save only in the very large centres are the criminal courts overtaxed with work. And even then, it is surprising the celerity with which a man is brought to trial after his arrest. Three things characterize the administration of criminal justice in Canada—speedy trial, conducted with the utmost decorum; speedy removal to the place of incarceration upon sentence after conviction; and sure infliction of penalties, just and

adequate according to the lights of those whose duty it is to award them.

It is abundantly clear to anyone familiar with criminal statistics in the metropolitan areas, that the sequel of laxity in administration is the increase of crimes of violence. To determine the adequacy of any penal law it is imperative that its enforcement be certain. Altering a penal law without a knowledge of its efficacy under the best type of administration is an error sometimes difficult to resist, but to secure the most ideal conditions we must not be content with mere panaceas.

Our judicial officers appreciate only too well the difficulties of the state's officers in protecting the public against the antisocial members of the community. But they are bound by the law as it stands on the statute books, and although they may in private advocate abolition, amendment, or substitution, their judicial function requires of them adherence to existing law.

The treatment of the offender after conviction is a problem requiring the combined wisdom of those who are qualified to contribute to the general knowledge. It is not too much to say that the state has the right to expect them in a spirit of cooperation to lend their best endeavours in the interests of preventive justice. The judiciary, and the members of the bar for many, many years have borne this high responsibility. Their keen sense of ethics has gone far to cure patent defects in the system of criminal administration. But the time has now come when the lawyer, the medical man, and the lawmaker must combine their resources of knowledge and share equally the responsibility of safeguarding the liberty of the subject in all its ramifications.

In conclusion, may I say that in commending these random observations to the reader, I am fully aware of their limitations. The subject is one of infinite difficulty and tremendous scope.

To compass a discussion of it in a few pages necessitates the abandonment of many important and complicated issues, which in the present instance was done with reluctance. Much has been sacrificed that special emphasis might be given to those phases of the problem which in my view are of paramount consideration.

It is not possible intelligently to treat of crime as long as we are fettered by procedure of a purely definitive character. And in solving the momentous problem, let it not be forgotten that it is a human problem, crying out for the protection of "life, liberty and the pursuit of happiness."

APPENDIX

Some Medical Studies of Persistent Criminality

KENNETH GRAY†

The first medical studies in criminology were those of the Italian, Cesare Lombroso, in 1870. His efforts were of an anthropological nature, consisting in the measurement of physical deviations of the criminal from a normal or average type. The data and theories of this scientist are not important, but his work has important value in that, for the first time, investigation was centered on the criminal himself.

Lombroso directed attention to the individual delinquent. Subsequent criminologists have commented on the primary importance of his principle. Compare what Devon says:¹⁶ "There is only one principle in penology that is worth any consideration: it is to find out why a man does wrong and make it not worth his while." White says:¹⁷ "It is now proposed to discuss the growing tendency to a consideration of the criminal as an individual. . ." and again, "the principles of criminology dictate that the criminal and not the crime should be the matter of prime consideration." See Healy:¹⁸ "Certainly the facts we have to show clearly indicate that from knowledge of the springs of conduct in the offender we may hope a thousand times more reasonably for a wise adjustment of his case than from the application of artificial legal rules and punishments." Hoag and Williams add:¹⁹ ". . . the new method seeks to understand the whole history of the individual, the factors of his heredity and environment, and especially the early experiences of his childhood, before any real solution of the problems of abnormal behavior is attempted." K. Subrahmaniam Pillai says:²⁰ "The principle has been established that the criminal rather than the crime should be the object of investigation necessary for social defence on a right basis."

There is unanimity of opinion that the causation and adequate treatment of crime are best studied in the individual delinquent. What has been found about the motivation of criminal behavior? Can one speak of a criminal type, in the sense of a specific deviation from the normal, recognizable by defined criteria? Lombroso had thought to find physical stigmata pathognomonic of the criminal, a view not borne out by the facts. Later and contemporary studies make clear that there is no such thing as a criminal type, in the sense of an individual capable of description or having a common etiology. Criminal behavior differs in no way from any other type of behavior, in that its sources must be sought in a complex interweaving of heredity and environment.

†Research Fellow, Department of Medicine, University of Toronto.

¹⁶HEALY, *THE INDIVIDUAL DELINQUENT* (1927) title page.

¹⁷WHITE, *INSANITY AND THE CRIMINAL LAW* (1923) 30, 149.

¹⁸HEALY, *op. cit. supra* note 16, at 8.

¹⁹HOAG AND WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* (1923) Introd. at 17.

²⁰PILLAI, *PRINCIPLES OF CRIMINOLOGY* (1924) 110.

The comments of White²¹ on this point are as follows: ". . . Is the concept criminal definable in the sense that the individual who is guilty of criminal conduct belongs to a sufficiently definite type to permit of reasonably accurate description? The answer to this question must obviously be a negative one. The whole concept of crime has grown up from the point of view of the social group and the criminal law undertakes only to define those acts which shall be considered as criminal. Any one found guilty of those acts becomes by definition a criminal. Stated in this way, it would seem quite obvious from a survey of the multiplicity of criminal acts that it would be impossible to reason from them to the nature of the person committing them. There has, however, been a well defined belief in the past which largely dominates the thoughts of the present, that the criminal is a special type of individual capable of an accurate description as a species, or a form of mental disease. . . .

"While it is in general true that criminal conduct is relatively more primitive in type, that statement does not necessarily disclose anything of the type of individual who may have reacted in that particular way at some particular time. An unprejudiced survey of a group of criminals, all convicted of the same statutory offense, will show quite the contrary. The immediate situation back of the criminal act of stealing may in one case be poverty; in another a kleptomaniacal obsession (neurosis); in another the disintegration of the personality wrought by alcohol (alcoholism) or syphilis (paresis); in another it may be the expression of a maniacal lack of restraint (mania-depressive psychosis); in another the failure of development of the social instincts (mental defectiveness); while in another it may be due to lack of education and the influence of dominating and evilly disposed associates; conditions which are as widely different as can easily be imagined but which all issue in an act capable of the same statutory description. Some of these individuals may be highly endowed, such as the neurotic, others fundamentally defective; in some the act may be the expression of a well-defined personality make-up (the moron), while in others it is the expression of a well defined mental disease (mania); in some the disease may be chronic and incurable (paresis), in others essentially transient and recoverable (mania); in some, treatment may remove the difficulty (the neuroses), in others, treatment may be of no avail (paresis). All of these conditions, therefore, and not only mental defectiveness, are of a nature to make difficult or impossible those reactions demanded by a highly complex society and, therefore, tend to unloose simpler ways of reacting which may be criminal. The possibilities are infinite but as they unfold, the definiteness of the conventional and formal concept of the criminal recedes further and further into the background until finally it is no longer in the field of vision at all.

"From the psychiatric point of view, therefore, the criminal as such has ceased to exist and in his place are the individual offenders of the criminal law. . . ."

²¹WHITE, *op. cit. supra* note 17, at 23-26.

Agreement is found in Hoag and Williams:²² "For purposes of convenience in studying the individual delinquent we may establish groups or types, but in an exact sense there is no true criminal or delinquent type."

From what has been said of the complexity of the causes of criminal actions, it follows that the term, habitual criminal, will include a variety of offenders, whose antisocial behavior is the outcome of a diversity of motivation. Healy²³ discriminates two classes of habitual offenders: the professional, and the non-professional. His criteria of professionalism are: their criminalism is deliberate, premeditated and repeated. Several factors in the genetics of recidivism are uncovered. Certain innate personal characteristics as motor dexterity, smallness of size, abnormal social suggestibility, and many others are suggested. Many economic and environmental factors, including neglect, poverty, lack of opportunity, criminalistic teachings play a part. The factor of deliberate choice is considered: the opportunities for learning the arts of criminalism are sometimes sought out by the individual, rather than thrust upon him.

The term, habitual criminal, does not imply one of a group characterized by consistent motivation. Study of the individual case is essential to treatment, and is the only method of estimating the outcome.

²²HOAG AND WILLIAMS, *op. cit. supra* note 19, Introd. at 19.

²³HEALY, *op. cit. supra* note 16, c. 8, *passim*.