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CRIMINAL LAW AND CRIMINOLOGY*

ALBERT COATES**

I

ATTITUDES

My first attendance of a meeting of this Association acquainted me with two sharply defined attitudes toward the usefulness of sociological materials in law school work.

One attitude is: that the law school's business is to teach law; that law is found in the cases, statutes, constitutions; that these are, therefore, the sole materials with which the law schools are concerned. This attitude is fairly illustrated in a classroom colloquy in a great law school. The teacher asked a student a question. The student introduced sociological considerations and answered in terms of a balance of interests. To this the teacher in great disgust retorted: "Oh, I asked you what the *Law* was!"

The other attitude is: that the application of the traditional legal materials and methods have hopelessly failed to solve the problem of crime; that the materials and methods of criminology constitute our only hope; that the cases and statutes should, therefore, be scrapped and criminological studies put in their place. This attitude is illustrated by the scattered individuals who were prophesying that shortly all law courts would be turned into medical clinics, all jails into hospitals, all policemen into vocational guidance experts.

In some bewilderment I began an investigation of these criminological materials which has thrown considerable light on problems I have puzzled over in criminal law and procedure.

II

SOME THINGS CRIMINOLOGY OFFERS TO CRIMINAL LAW

"The strength of the common law," we have been told, "is in its treatment of concrete controversies . . . in its application to the cause in hand of the judicial experience of the past."¹ The proper

* Address delivered before the round table section on "Wrongs" at the meeting of the Association of American Law Schools in Chicago on December 28, 1928. The topic under discussion was whether the principles of Criminology should be taught in the Law School.

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¹ POUND, *THE SPIRIT OF THE COMMON LAW*, 203.

functioning of the common law, then, requires a thorough knowledge both (1) of the judicial experience of the past, and (2) of the cause in hand.

For more than six hundred years the courts and legislatures of common law jurisdictions have been turning out decisions and statutes concerning crime and criminals. They are recorded and available for use. Thanks to the labors of Bishop, Beale, Mikell, Sayre, Keedy and others these decisions and statutes have been woven through text-books and case-books into a teachable legal tradition. They have been the sole materials of our traditional law school courses on criminal law and procedure. Through these courses law schools have transmitted to law students a knowledge of the "judicial experience of the past."

But: (1) The judicial and legislative experience of the past as transmitted through our law school courses do not give a knowledge of the cause in hand in itself and in its setting: the legal process, beginning with full investigation by the lawyers, proceeding with the presentation through parties and witnesses of selected facts to the trial court, going to the appellate court in an abbreviated statement of these selected facts in a printed record accompanied by lawyers alone—finally comes into the hands of the law student and the law teacher in the still further abbreviated form of a court opinion containing a minimum of fact and a maximum of law, unattended by parties, witnesses, counsel, or court. (2) They do not give a knowledge of the working of the rules of law laid down in the cause in hand, nor (3) a knowledge of the functioning of the legal system through which these rules are administered. (4) They do not consider the efficacy of the ideas on which that legal system and its rules are based, nor (5) the necessity of continuous, conscious adaptation of any rules and any system to any constantly changing society. (6) They have stopped at verdict and judgment, oblivious to the fact that every step in the legal process to that point might be rendered worse than futile by the steps which followed.

There are materials which throw light on these things. (1) Investigations into the fact of crime and its analysis into various types of offences and their frequency, the age, race, sex, characteristics of offenders, have helped to bring discussion down to earth and reveal crime as a social phenomenon coming through the operation of natural rather than supernatural forces and therefore a problem to

be coped with by men and not left to the angels.² (2) Investigations into the concepts of crime and punishment have traced the ideas on which our present criminal law is based to purely terrestrial origins and by robbing them of the odor of sanctity lent them by a supposititious divinity which made them too sacred for human tampering, have cleared the way for conscious, constructive adaptation to our own needs.³ Investigations have been made throwing light on the origin and growth of particular crimes, such as Mr. Sayre's on Criminal Conspiracy⁴ and Criminal Attempts;⁵ into the actual working of particular rules, such as Mr. Miller's Study of the Compromise of Criminal Cases in California,⁶ and Mr. Tulin's study of the Role of Penalties in the Criminal Law;⁷ into the efficacy of various types of punishments, and methods of dealing with criminals: execution, imprisonment, fine, suspended judgment, indeterminate sentence, pardon, probation and parole,⁸ and the reaction of different individuals to them; into the functioning of our legal system such as the surveys in Cleveland, Missouri, Boston. (4) Investigations into the causes of crime, particularly the case studies by Healy, Adler, Bronner, are steadily tracking out the interrelations and the interactions of various hereditary factors, of various environmental factors, and the influence of hereditary and environmental factors on each other,⁹ thereby creating information which will enable authorities the better to control the causative factors of crime and the better to fix penalties to persons.

² SUTHERLAND, *CRIMINOLOGY*, Ch. II "Statistics of Crime," Ch. V "Composition of the Criminal Population"; GILLIN, *CRIMINOLOGY AND PENOLOGY*, Ch. III "The Extent and Cost of Crime", Ch. IV "The Physiognomy of Crime", Statistical Study of Crime for North Carolina, Institute for Social Research, Chapel Hill, N. C.

³ SUTHERLAND, *supra*, Ch. XIV "Origin and Evolution of Punishment"; GILLIN, *supra*, Part III "History of Punishment"; BARNES, *THE REPRESSION OF CRIME*, Ch. III "The History of the Punishment of Crimes."

⁴ 35 HARV. L. REV. 393.

⁵ 41 HARV. L. REV. 821.

⁶ 1 SOU. CAL. L. REV. 1.

⁷ 37 YALE L. J. 1048.

⁸ SUTHERLAND, *supra*, Ch. XXII "Parole," Ch. XXIII "Probation," Ch. XVII "Prisons: History, Organization, and Control," Ch. XVI "Miscellaneous Methods of Punishment"; GILLIN, *supra*, Ch. XVI "Capital Punishment," Ch. XVIII "The Prison System," Ch. XIV "Parole and the Indeterminate Sentence," Ch. XXXII "Pardons," Ch. XXXIV and Ch. XXXV "Probation."

⁹ SUTHERLAND, *supra*, Chs. V, VI, VII, VIII "The Causes of Crime"; GILLIN, *supra*, Part II, "The Making of Criminals."

Knowledge of these things will not only pave the way for the ultimate reconstruction of our criminal law and procedure—it will help in the administration of criminal justice immediately. (a) It will enable lawyers more surely to hunt out the crucial factors in a client's case for presentation to court and jury. (b) It will reveal between facts relations not heretofore appreciated and by showing new pertinences enlarge the range of admissible evidence. (c) It will furnish the trial judge with a basis for an intelligent rather than a whimsical use of his tremendous power of discretion as to types of punishment and severities of penalty and thus lift the appeals to his discretion above the sort of sentimentality in which they are now too often steeped. (d) It will aid the appellate judge in determining, in cases where he has a choice, whether given principles or precedents should be extended, restricted or overruled.¹⁰

III

WHERE SHOULD THESE THINGS BE STUDIED?

Law students going into law practice to deal with problems presented by crime and criminals ought to have the light this knowledge gives. For if we are to credit the now famous statement of Chief Justice Taft that "the administration of criminal law in the United States is a disgrace to civilization,"¹¹ or the statement of Chief Justice Cardozo to the Medical Society of New York the other day, that "in the not far distant future a transformation of the punishment for crime may be brought about by the teachings of the biochemists, behaviorists, psychiatrists, and penologists,"¹² and realize that these opinions are largely shared by the profession and the public, we must admit that a knowledge of the legislative and judicial experience of the past is not and is not likely to be an adequate equipment for an effective administration of criminal justice. And though courses in criminal law and procedure have been given in the past as "the proper accomplishment of gentlemen and scholars . . . part of a liberal and polite education,"¹³ and though in later days it appears, according to report, that they have been given to men who are neither gentlemen nor scholars to be used for purely private profit and for purely selfish ends, the great majority of modern law schools

¹⁰ CARDOZO, *THE GROWTH OF THE LAW*, Ch. III "The Methods of Judging."

¹¹ *The Law*, Pub. 1926 by Harvard Law School Endowment Fund, 5.

¹² *The New Republic*, 337 (November 14, 1928).

¹³ *BLACKSTONE'S COMMENTARIES*, Bk. I, 5.

are coming to a sense of responsibility for criminal law administration. If a knowledge of the materials and methods of criminology is essential to the accomplishment of this purpose our question is: Shall it be entrusted to the college of liberal arts to be given in (1) an elective, or (2) a required course, or shall it be brought into the law school to be given (3) in a separate course or (4) interwoven with the traditional legal materials of our present courses in criminal law and procedure?

I do not think we can leave it as a subject to be elected in our colleges of liberal arts. At the present time many still cherish the traditional hostility which in the thirteenth and fourteenth centuries caused the schoolmen to stand at the doors of the universities and deny a place in the curriculum to the classics, rediscovered in the Renaissance; which in the eighteenth and nineteenth centuries caused the victorious classics to stand on the same threshold and deny a place to the natural sciences; which in these early years of the twentieth century causes the natural sciences and their predecessors to scoff at the claims of the social sciences for university recognition.¹⁴ The very mention of sociology in the faculty meetings of many of our institutions today raises something of the polite horror exhibited at the appearance of an illegitimate child among people whose chief claim to respectability is that they were born within the holy bonds of wedlock. With this attitude largely dominating the registration machinery of these institutions the atmosphere will not be conducive to student election of criminology as an undergraduate course.

I do not think we can make it a prerequisite to the study of law, because (1) in many institutions it is taught by weak sisters, (2) many students do not know until the end of their college course that they are going to study law or what law school they will attend or whether that law school requires it, (3) most of the law schools, even in this Association, require only two years of college work for

¹⁴ The best short statement of this case is found in an address by Frank P. Graham at the Newspaper Institute at Chapel Hill, N. C., 1926: "The University and the Colleges also, have, throughout their history, had their vested interests against the scrapping of old ways and old attitudes. It is not so much that they have sold the truth to serve the hour as that they have been caught in the preconceptions of the age. The medieval university as the stronghold of the old scholasticism, opposed the coming in of the humanism of the Renaissance, but humanism broke into the universities and is part of their glory to this day. Then the universities as the stronghold of the victorious humanism closed their doors to the coming in of the new science. But the new science won its way into the universities and is one of the ways of truth and life today. As strongholds of the natural sciences today some of the colleges look askance at the coming to power of the new social sciences."

entrance. There is just as much reason for requiring the study of banks and banking as a prerequisite to the law of bills and notes, and of corporate organization as a prerequisite to the law of corporations, as there is for requiring criminology as a prerequisite to criminal law and procedure, and so *ad infinitum*. This would lead to an impasse.

I do not think we can bring it as a separate course into the law school because (1) the curriculum is already overcrowded and contracts, property, torts, and the other first year courses are not getting any less important; (2) there is as much reason for bringing in such courses as banks and banking, corporate organization, and the like until the whole undergraduate curriculum is brought in to swamp the law school; (3) to teach criminology and criminal law and procedure in separate courses in the law school along parallel lines which will never meet even at infinity because they will never be carried that far, is to continue the compartmental teaching which put blinders on most of us and gave us such a mental set in such a straight-forward direction that teachers in the same institution in allied fields have not glanced to the right or to the left to get acquainted with each other or each other's work. It explains why teachers of criminal law and procedure have remained so long ignorant or heedless of the fact that from the speculations of Beccaria in 1764, to the investigations of Lombrosa in 1876, to the experimentations of Healy, Adler, Bronner today, a new technique has been creating a new body of materials concerning crime and criminals of the greatest significance to criminal law and procedure. If that intellectual experience has taught us anything it is the futility of the mere mechanical juxtaposition of bodies of knowledge.

I think the pertinent criminological materials should be fused with the traditional legal materials in the courses on criminal law and procedure and that each should be studied and taught in the light of the other. The selection of cases by Sayre and Keedy not only permit but invite the interweaving of the pertinent materials of criminology. If these materials can be put into footnotes they can be lifted to the main text. And if they can be woven together with cases and statutes into treatises to their mutual advantage, as Glueck has woven them together in his *Mental Disorder and the Criminal Law*, they can be blended with equal effectiveness in casebooks for student use. Experimentations of a number of teachers along these lines would pave the way for the casebooks of the future.

The small amount of additional time required for the fusion might be gained by a new deal to criminal law and procedure on the theory advanced by Dean Pound two years ago¹⁶ that the law schools have not given them their due. The dean of my school has done that for me. But even when it is not done, I feel that it is better to attempt the fusion in the time now allotted than to continue along traditional lines. No number of hours likely to be allotted will permit a teacher to cover minutely every part of the field; the standard of thoroughness is relative, not absolute. And it is more important to give the student an adequate and solid foundation on which he can build and grow than it is to take one part of the foundation and carry it to a conclusion which in the end is incomplete.

Before the materials of criminology can be properly woven into the courses on criminal law and procedure, before each can be taught in the light of the other, they must be fused in the brain of one teacher. For different teachers to teach them, whether in different schools, in the same school, or in the same course, is for the teacher of criminal law and procedure to miss the value of criminology. For the same teacher to teach them in different courses is to establish an artificial dividing line and thereby emphasize the very gap to be eliminated. For the same teacher to carry them in different compartments of his brain and sandwich twenty-five or fifty pages of criminology here and there is to adopt a purely mechanical approach which misses fire. For the same teacher to make a synthesis of them in his own brain is not only to bring to himself and to his teaching a new and powerful stimulus—it is to bring to bear upon the problem of teaching criminal law and procedure a method of approach which there are good reasons for believing will help law schools to meet their responsibility to equip men for an effective administration of criminal justice.

IV

THE METHOD OF APPROACH

I do not mean the method of approach so thoroughly mastered by many criminologists and so beautifully followed by one of them in my state not long ago when he said that criminal courts and juries, police officers and prison officials, are cancerous excrescences on society and ought to be sunk in hell before morning. That arouses

¹⁶ POUND, *What Can Law Schools Do for Criminal Justice*, 12 IOWA L. REV. 105 (1927).

the antagonism of and destroys the basis for coöperation with the very people whom we can help and whose help we need. I do not mean the method of approach which in one behavioristic moment kicks overboard the experience of centuries on the theory that nothing is valid until it is re-discovered by a new technique. This is of the same cloth as the refusal of a Superior Court judge the other day to consider the evidence of psychological lie detectors on the ground that he could tell all he wanted to know about whether a witness was lying by the movement of his Adams' apple. I do not mean the scientific dogmatism which calls people credulous if they believe anything that they cannot prove, or intolerant if they do not accept every conclusion of science which they cannot disprove: such as the theory that an individual is nothing but an economic urge, an hereditary trait, a white sheet of paper for environment to write upon, a series of physico-chemical reactions, a magnified endocrine gland. That has its counterpart in the attitude of a citizen of my home town, expressed on the completion of the new county courthouse: "Many a criminal coming into Smithfield will look at that magnificent temple of justice and tremble." They all smack too much of the medieval notion that somewhere in the body was an indestructable bone which would furnish a nucleus for the resurrection.

I mean the method of approach involved in the statement made to me years ago by Frank Graham of the History Department of the University of North Carolina that he was going away to study how religion, science, philosophy, psychology, economics, politics, etc., all fused in the making of history. It is the method of approach expressed by Sutherland.¹⁶ "Criminology," he says, "is concerned with crime as a personal and group phenomenon. It draws information from a great variety of specialized investigations—psychological, physiological, legal, chemical, economic, statistical, educational, and sociological." As I interpret these statements they mean that whereas the traditional educational technique, on which most of us were brought up, placed the emphasis on *subjects*, the emphasis may also be placed on *situations*; that whereas the traditional technique called on students to pursue courses: biology, chemistry, philosophy, psychology, physics, economics, law, running along parallel lines through a field of knowledge which had been divided between various teachers and departments—on the boundaries of which academic courtesy had hung out "No trespass" signs for the advantage

¹⁶ SUTHERLAND, *supra* 11.

and convenience of instructors—another technique brings these parallel lines to focus, throwing the varied lights of many courses on existing situations in the effort to see and to solve the problems they present.

This technique is not foreign to the lawyer. Clients do not bring him neat questions solely of property, torts, contracts or any other one compartment of the law. As often as not they bring him problems calling for a focus of the light from half a dozen different subjects of the law. And thus he is eternally having to make new fusions, new syntheses, new intergrations of law and equity, of property, torts, procedure and the rest.

The adoption of this method of approach by the teachers of criminal law and procedure means a transition from sole reliance on the traditional law school materials of cases and statutes to acceptance of them merely as two of the factors to be studied alongside of and integrated with all other pertinent data; from a theory of salvation by precedent and doctrine to a theory of salvation by investigation and experiment; from a passive study of printed words to an active study of existing conditions; from a "series of propositions to be absorbed to a series of problems to be solved."¹⁷

V

SOME IMPLICATIONS OF THIS METHOD

The implications of this approach are far-reaching and significant. The traditional legal approach through a study of subjects apart from situations, through a study of "law in books" apart from "law in action," buttressed by the idea that law is something handed down by divinity from on high rather than something struggling up from humanity here below, has had, along with its advantages for legal education in the smaller schools, certain unfortunate consequences. It has permitted and promoted in the bush leagues a slavish acceptance of the lawbooks handed down from one or two great schools and a uniform imposition of these books on their classes regardless of whether they were adapted or adaptable to them—so easy has it been to substitute high Harvard for high heaven, and the Harvard law for common law of the jurisdiction these schools were set up to serve! It has made easier for them the path of least resistance, which they have walked in to the point that many of them advertise

¹⁷ CHAFEE, *THE ENQUIRING MIND*, 31.

periodically in their catalogues and in the press that they have swallowed whole, even if they have not digested, big school books, big school methods, big school aims, and judge other little schools by whether they have swallowed likewise and with like wisdom—so much easier has it been to follow another's pattern than to cut one's own!

I do not mean to suggest that the influence of these big schools has been hurtful to modern legal education; they have made it what it is. I do not mean to suggest that their books and methods and aims have been hurtful to the schools which have adopted them; God knows that the schools which have ignored them are in a sorry plight. I mean to suggest that the sort of reverential submission to authority which makes one proud to wear a badge of servitude, the sort of breathless expectancy with which so many around the country, and right here in the meetings of this Association, are *waiting* to see what Harvard, Yale, and Columbia have got up the proverbial sleeve, the sort of curiously proud and satisfied complacency with which they will go home from Chicago to make speeches in which they will talk about "legal theology" and "non-legal materials" and "sociological attitudes" and "functional approach" as glibly as their masters, and move around among their people, like young fellows in the old days riding home from the legislature on a railroad pass would walk down the single street of a little town wearing a jim-swingler coat with streaked breeches, hands in pockets, and head in air, speaking to few white folks and to no niggers.

The folks who are coining these phrases are doing something—while the listeners yelp, purr, or remain serene according to their natures. While the bush leagues are waiting, the big schools are working! I mean to suggest that this sort of attitude in the bush leagues is harmful to themselves and to legal education, and that one of the factors in this attitude is the traditional technique which, relying solely on "law in books," has made it easier for some schools to rely on others to the point that they have forfeited their own individuality.

But a technique which calls for a study of *subjects* not apart from but in connection with situations, for a study of the "law in action" not apart from but in connection with "law in books," which makes it a part of the teacher's business to know about the workings of the legal principles he teaches, about the functioning of the legal

machinery through which these principles operate, makes it a little less easy for one to accept another's labors in lieu of his own, makes it a little more likely that he will labor in his own vineyard, not in lieu of but in league with his reading of the labors of others in vineyards afar off.

I think this is more than the expression of a hope. The acceptance of this technique has forced the criminologists into just this sort of activity. It is already leading some law schools, some law teachers, and some lawyers into it. It is not difficult to see why. According to the traditional law teaching technique the sources of law were the court decisions and the legislative enactments—the law teacher's business was to take them and teach them as handed down, and it was no part of his responsibility if they didn't work properly or if they didn't work at all. But the law teacher is beginning to realize that this latter factor *is* part of his responsibility and he is beginning to make it part of his business. If, in the smaller schools, he hasn't had the library to run the gamut of accepted legal scholarship, at least now he has at his door a laboratory as good as the best. So long as a teacher's duty ended with the investigation of the "law in books" he could rely in his classroom on a decision from Ohio, Missouri, Massachusetts, or Illinois and stop with that. For there was a persuasive authority in the decision of a court which had before it the same question that was raised in his classroom. But if he undertakes to study the operation of legal rules in his own jurisdiction and the functioning of his own jurisdiction's legal machinery, the surveys of Cleveland, Missouri, Boston, and Illinois cannot settle his questions for him even by the greater weight of authority. For the men who made the surveys did not have before them the same situation he has before him and they do not come to him with the same persuasive authority. They are his starting point, not his stopping point. And if they do not lead him beside the still waters, at least they lead him into green pastures. And precisely because they are green pastures their problems never will be settled once for all, because the growing life within them, the conclusions reached from day to day, must be forever tentative.

These studies, then, this technique, have for us the power of example, not of precedent. They call to the teachers of criminal law and procedure to examine their own vine and figtree, to grapple with the problems of the administration of criminal justice in their

own jurisdictions. And this is an opportunity which the teachers of criminal law and procedure in American law schools should welcome. Through the study of their own local rules and of the local machinery through which they function and of the officers in charge of it, by working with these officials on the eternal problem of adapting these rules and this machinery to constantly changing conditions, they will create new and significant materials which will throw on old problems new light which will never come from the reflected glow of two or three great beacon lights shining in two or three great national centers. And, in the process of these coöperative studies and investigations they will build up a group of men with a knowledge of the local problems to be dealt with and an accumulating experience in dealing with them which will be of infinitely more value to the administration of criminal justice in their own jurisdictions than the printed reports of outside experts ever could be. These efforts of schools in their own soil, releasing and harnessing local energies, developing and focussing local viewpoints from a thousand different angles and under a thousand different conditions will constitute another step toward the individualization of criminal justice.¹⁸

If "the strength of the common law is in its treatment of concrete controversies—in the application to the cause in hand of the judicial experience of the past"; if the proper functioning of the common law requires a knowledge of both; if our courses in criminal law and procedure, while giving a knowledge of the judicial experience of the past, have neglected to give a knowledge of the cause in hand—then in so far as the materials and methods of criminology contribute to this end they should be incorporated into the courses on criminal law and procedure in order to enable a lawyer the better to do a lawyer's duty. It is not the lure of false gods but the genius of the common law itself which calls us to it—to the realization that law is not only law but a social science and a liberal art. Maybe the differing viewpoints focussing upon this whole problem, viewpoints so clearly seen and so earnestly expressed in the meetings of this Association, will, in the hot and ardent clashings attendant on the processes of fusion, throw off a spark which will light up for one enduring second in the field of criminal law the perhaps divinely darkened countenance of justice.¹⁹

¹⁸ POUND, *The Need of a Sociological Jurisprudence*, 19 Green Bag, 607 (1907).

¹⁹ W. T. Polk, a review of *Teetfallow* (Stribling), *Greensboro Daily News*.