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Purposeful Reforms in Criminal Law

Judge Lee E. Skeel*

WHAT IS THE RELATION of the Office of the County Prosecutor or District Attorney to the job of public law enforcement?

It is true that the county prosecutor's office has much to do with the civil practice of the law as the legal representative of the county Government, including public boards and commissions. Undoubtedly this part of the duty of many prosecutors, particularly in the larger counties, in some respects transcends in importance the other work of this office. There is, however, no universal basis on which such a comparison can be made. Yet, may it ever be remembered, the proper enforcement of the public or criminal law is a matter of great importance to every resident of the community. It is important not only to protect the safety of the community from unlawful disturbances and aggressions against the peace and quiet of the people, but also to see to it, insofar as is humanly possible, that the rigor of the law will be exerted only against the guilty, and that even in that event that it is limited to the extent necessary in order to protect the innocent. There is no place in human relations where there is greater divergence of opinion on, first, the purpose of law enforcement of the criminal law,¹ and second, on how and why the guilty should be punished.² The historical background, however,

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[*Editors' Note:* This is the substance of an address recently delivered to The Prosecuting Attorneys Association of Ohio.]

¹ "For the most part the purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses. And whether it brings those conditions to pass immediately by the use of force, as when it protects a house from a mob by soldiers, or appropriates private property to public use, or hangs a man in pursuance of a judicial sentence, or whether it brings them about mediately through men's fears, its object is equally an external result. In directing itself against robbery or murder, for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men. If those things are not done, the law forbidding them is equally satisfied, whatever the motive." Holmes, *The Common Law*, 49 (1881).

² Theories in justification of punishment brought forward by ethicists may be described as: (1) *Retributive Theory*, whereby through punishment
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leaves no doubt but that suffering imposed as punishment for causing injury to the person of another originally was founded on the idea of vengeance.³

It would serve no useful purpose here to deal at length with the laborious evolution of the blood feud of the 10th Century into the criminal prosecution now conducted in the name of the state. These historical facts are known and understood by every lawyer. What today is in dispute is just how to find a purposeful explanation for, and just what is to be accomplished by, the imposition of penalties upon those who have been found guilty of what has been defined as criminal conduct.

As to what constitutes a public wrong punishable at the instance of the state, we as lawyers look with pride and satisfaction to the development of the common law.⁴ No civilization has ever created, in its development, a system of law which so clearly administers justice according to rules founded on experience, and which is administered so precisely by courts in judicial proceedings. Not very much has been decided at any one time.⁵ Each

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the offender expiates his offense, suffers retribution for the evil which has been done, and thus is vindicated the principle of justice which has been violated. (2) *Deterrent Theory*, according to which punishments are inflicted in order that other would-be law breakers may be dissuaded from crime. (3) *Preventative Theory*, the aim of which is to prevent the repetition of the offense by the surveillance, imprisonment, or execution of the criminal. (4) *Reformation Theory*, the object of which is the moral reformation of the delinquent. Willoughby, W. W., *Social Justice*, 322-380 (1900).

³ Some writers frankly recognize that the criminal law had its origin in a situation in which vengeance and material reimbursement were of prime importance and that one of the major purposes of criminal law is still to satisfy these elemental human emotions. cf., Stephen, *General View of the Criminal Law of England*, 99 (1883).

⁴ In large part the criminal law of the United States has been inherited from the common law of England. The common law is universal in its application to all human relations and to all of the interests of society. The common law, in the sense in which it is here used, is a body of law which derives its authority, not from express enactment of the legislative power like the statute law, but from the fact that it has existed and been accepted as the law from time immemorial. It is preserved and evidenced by judgments of the courts applying it to particular cases as they arise. Holmes, *The Common Law*, C. 2 (1881).

⁵ "It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country that conception of it is gaining ground very slowly. An earlier, and to some extent a still prevailing view of it is more like an art or science, the principles of which are at first vaguely enunciated and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be

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forward step has been guided by our experience in the trial of actual disputes. Justice under law, guided by the will of free people who accept the rules developed as a true expression of what is just—that is our heritage, rightly described as *liberty under law*.

But what we do about those who carry non-conformity to the extent of violating public law is another matter. Until we reach common agreement as to the purposes of punishment⁶ imposed for criminal conduct, and as to what is thereby to be accomplished, this part of our criminal procedure must be held to be “unfinished business.”

What *ultimately* results from the efforts of prosecutors (and defense counsel) in criminal cases is a matter of the utmost public importance. If the punishment prescribed in a criminal case has the effect only of taking the offender out of circulation for the period of imprisonment, whereupon he is returned as a seasoned criminal, then not only has the first effort in protecting society failed, but greater dangers have been created. These problems cannot be solved except by law. To this solution every lawyer must contribute his part. The medical profession also may be able to contribute to the methods best to be used, but the law must ultimately be the guide to, and make final provision for, the final solution of this pressing problem.

In one of the casebooks on criminal law,⁷ Walter Lippmann's celebrated editorial is reprinted from a New York newspaper. It discussed in a very critical way the case of “The Bobbed Haired Bandit.”⁸ Her exploits before capture created a “movie-like”

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made, certain principles come to be accepted as the law of the land.” Sir James Stephen, *Stephen's Criminal Law*, Introduction, viii (1883).

⁶ Punishment has no purpose except as it works out a larger purpose of the criminal law itself. Perhaps it may be said that whatever purpose is served by punishment is a purpose of criminal law, for example, the compelling of persons to cease or refrain from committing crime, by forcing or persuading them to conform to established rules of conduct designed for the protection of life, of government, of property or of other rights, privileges and immunities guaranteed by law. Miller, J., *Handbook of Criminal Law*, 18 (1934).

⁷ Sayre, F. B., *A Selection of Cases on Criminal Law* (1930).

⁸ Lippmann, in this dramatic editorial, gave the sordid and pathetic background of the life of Cecilia Cooney, the bobbed-haired bandit. After describing the failures of every social and governmental agency to successfully cope with the problems presented by Cecilia Cooney, he concluded that the crimes attributed to her were not hers alone, but also rested upon the heads of society in general. Lippmann, W., Editorial in the *New York World*, May 8, 1924.

sensation. Once she was in jail, however, stripped of all the glamour created by newswriters' imaginations ("manufactured sensationalism"), the case demonstrated the almost complete failure of every agency, governmental and social, that had come in contact with her from the time of her first acts of delinquency to the date of her final acts as a "sensational girl bandit." The mistake of imprisonment was the final act wherein she probably now languishes, forgotten and alone.

Lippmann's editorial was followed by a philosophical discussion by Willoughby⁹ on the reasons for punishment inflicted upon violators of the criminal law by the state. Here, in great detail, the writer suggested that the public generally is concerned in seeking public vengeance. This purpose, he said, if consistently applied to guilty offenders, should not only satisfy the public desire to avenge the wrong done, but also deter others from engaging in like conduct.

However, it is evident that while present-day methods are ill-suited to the real purpose of punishment, administrators of modern penal institutions, and courts and probation departments dealing with law violators who are granted probation, consider their efforts to be aimed chiefly at attempts to reform or educate the prisoner to the use of proper conduct as a member of society. This must, in fact, be the real purpose of all proceedings in a criminal case. If in fact deterrence of others is accomplished, which is probably true of borderline cases, the public is beneficially affected. But purposely to punish one person merely as an example to others can have no legal foundation. It must, therefore, be hoped that where thought is given to the subject, the theory of reformation will, as far as possible, replace the demand for vengeance as the public purpose of imposition of penalties for crime. The point to be brought out here, however, in resolving this conflict of purpose, is that if any agency of government is to protect society in a permanent fashion, from damage inflicted by violations of criminal law, then if at all possible, that agency should be the one best informed and suited to give help in the solution of what to do after a judgment of guilty. That agency is the one which is experienced in dealing with criminal prosecutions.

The prosecutor himself should lead the way. Nowhere are there any with better understanding of the problem, in direct

⁹ Willoughby, W. W., *supra*, note 2.

contact with all necessary factual information, and possessing a staff capable of rendering so great a public service in defending society against crime—by seeing to it that conviction is only the first step in guarding society against depredation caused by the criminal-minded. It is my belief that the prosecutors of Ohio should join hands with the many public and private agencies and institutions that are trying to deal with this question and that are so desperately in need of help.

Quite apart from this suggestion is another in which the force of the great office of the county prosecutor should, in my opinion, give help in protecting society against injuries caused to the public safety by criminal law violators. That help should be in the legislative field. Ohio is a state which, for better or for worse, has, in defining the substantive law of criminal conduct, abandoned the common law to the extent at least that it is authoritatively held that there are “no common law crimes in Ohio.”¹⁰ That is to say that while most if not all common law crimes are, at least in name, included in our criminal code, yet unless a common law crime is so defined (that is, conduct prohibited by statute, and a penalty provided), there can be no prosecution therefor in this state. This statement, although in a sense academic, is the background of seeking active interest in supporting needed legislation to include fundamental common law rules that have stood the test of time in common acceptance in all jurisdictions ruled by the common law, and to modernize obsolete rules where necessary, as has been done in many other jurisdictions. I will refer only to two crimes among many others which need legislative help. They are murder in the first and second degree as defined by Sections 2901.01 and 2901.05 of the Revised Code,¹¹ and larceny and related crimes against property.

¹⁰ In Ohio, we have no common law offenses. No act, however atrocious, can be punished criminally, except in pursuance of a statute or ordinance lawfully enacted. *Mitchell v. State*, 42 O. S. 383 (1884).

¹¹ Section 2901.01 Ohio Revised Code now provides in part: “No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kill another.” The words “purposely, and either of deliberate and premeditated malice” are held to apply in killings by any of the means named thereafter, since these words appear to be directed to the described crimes.

Section 2901.05, Ohio Revised Code, the crime of murder in the second degree is defined as “purposely and maliciously” killing another. The difference between murder in the second degree and murder in the first degree, is that in the crime of murder in the first degree, such purposeful killing must be of deliberate or premeditated malice or in the use of poison or in the perpetration of rape, arson, robbery or burglary or in the killing of a police officer purposefully while in the discharge of his duty. Thirteenth Report of The Judicial Council of Ohio, pp. 24, 25 (1957).

A complete report and the proposed amendments will be found in the Thirteenth Annual Report of the Judicial Council of Ohio.¹²

There is, of course, but one degree of unlawful homicide at common law, which is defined as the unlawful killing of a human being with malice aforethought. As defined in the common law states, in England, and by the recognized authorities, malice aforethought "exists where the person doing the act which causes death has an intention to cause death or grievous bodily harm to some person, although he does not desire it, or even wishes it may not cause death."¹³ It is to be noticed that a specific purpose to kill is not a necessary element of unlawful homicide at common law.¹⁴ Under the Ohio statutes, above cited, one cannot be held guilty of first or second degree murder unless the state can show beyond a reasonable doubt that the defendant entertained a specific purpose to kill at the time he caused the death of his unfortunate victim. This is true even if the defendant is attempting to commit or is committing robbery, arson,

¹² Proposed Amendment to Section 2901.01 O. R. C.: "No person shall purposely, and either of deliberate and premeditated malice or by means of poison kill another, and no person shall, without purpose to kill another while perpetrating or attempting to perpetrate rape, arson, armed robbery, robbery, or burglary, kill another."

In this suggested amendment "purpose to kill" is retained as one of the elements of the crime of murder in the first degree except that where death is the direct and proximate result of perpetrating or attempting to perpetrate the four dangerous and heinous felonies of rape, arson, armed robbery, and burglary.

Proposed Amendment to Section 2901.05, Ohio Revised Code: "No person shall with malice aforethought kill another." This proposed amendment eliminates "purposely and maliciously" and substitutes "with malice aforethought." Murder in the second degree will include the causing of death in resisting lawful arrest, causing death by the commission of an act which would in all reasonable probability cause such death, and death resulting from the purposeful attempt to cause great bodily harm. Thirteenth Report of the Judicial Council of Ohio, pp. 24, 25, 55 (1957).

¹³ Black's Law Dictionary, 1110 (4th ed., 1951).

¹⁴ As early as 1536 it was held that if a person was killed accidentally by one of the members of a band engaged in a felonious act, all could be found guilty of murder. Mansell & Herbert's Case, 2 Dyer 128 b (1536). Coke's statement went further, declaring that death resulting from any unlawful act was murder. 6 Hobbes, English Works, Dialogue of the Common Laws, pp. 86, 87 (Molesworth Ed. 1840). But it is from Blackstone's statement of the rule that the felony murder doctrine has become most widely known: "When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter." 4 Blackstone Commentaries, 192, 193 (1897).

burglary or rape. I cite the *Turk* case, which has never been overruled.¹⁵ There the defendant set fire to his store in order to collect insurance. The store was on the first floor, while at the time there were over thirty people asleep on the second and third floors of the building, many of whom died as a result of the defendant's unlawful act. These facts, without question, would have made out a case of murder at common law.¹⁶ It was held to be manslaughter, by the Ohio Courts. The same principle was held to be controlling in the *Freeman* case,¹⁷ where the defendant claimed that the killing of an officer was accidental in resisting lawful arrest.

The amendment proposed provides that a purpose to kill be retained, and that it must be shown in most cases; yet that it need not be shown when death is caused while perpetrating or attempting to perpetrate one of the four dangerous felonies.^{18, 19}

¹⁵ *Turk v. State*, 48 Oh. App. 489, affd. 129 O. S. 245, 194 N. E. 453 (1935). "It was the common law rule that any act known to be dangerous to life, and likely in itself to cause death, done with the purpose of committing a felony, which caused death was murder. This is not the law of the state of Ohio. The statute is clear and explicit, and the provision is 'whoever, purposely . . . kills.' In other words, there must be a purpose and intent to kill before the crime of murder is complete."

¹⁶ Under the amendment proposed by the Judicial Council of Ohio these facts would also make out a case of murder. Note 12, supra. Under a statute similarly worded (except that felony murder in Wisconsin is third degree murder) a Wisconsin court refused to consider the felony murder rule in connection with the death of a family in a fire alleged to have been caused by defendant while attempting rape declaring that "the felony committed must have some intimate and close relation with the killing and must not be separate, distinct, and independent from it." *Pliemling v. State*, 46 Wis. 516, 1 N. W. 278 (1879).

¹⁷ *Freeman v. State*, 119 O. S. 250, 163 N. E. 202 (1928). "If the killing was unintentional and not 'purposely or wilfully' done, if the trigger was pulled by Officer Horn without any causal intention on the part of the defendant, it would not have been murder in the first degree." Under the proposed amendment of Section 2901.05, Ohio R. C., murder in the second degree would include the causing of death in resisting of lawful arrest. See note 12, supra.

¹⁸ Most American jurisdictions reserve their severest punishments for killings perpetrated in the commission of certain specified felonies, leaving those perpetrated in the course of lesser felonies to fall under the designation of murder in the second or third degree or manslaughter. Usually the felonies of arson, rape, robbery, and burglary are specified. Several states add mayhem to this list. Maryland, New Jersey and North Dakota add sodomy, Pennsylvania adds kidnapping, and Arkansas, Tennessee, and Washington add larceny. Note, 20 Cornell L. Q., 294 (1934-35).

¹⁹ In New York, a statute makes the killing of a human being by a person engaged in the commission of or in an attempt to commit, any felony the crime of murder in the first degree. In *People v. La Marca*, the Court of Appeals in affirming a judgment of the County court of Nassau upon a

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The amendment also defines second degree murder, except as otherwise provided in defining first degree murder, to be the unlawful killing of a human being with malice aforethought. If penalties are to mean anything, the above suggested changes are justified on the record.

The highly technical elements of the several crimes involving the taking of the personal property of another have caused no end of confusion in the cases. Larceny, larceny by trick, embezzlement, obtaining property by false pretenses, and conversion by a bailee, have presented troublesome technical questions for many years. It is proposed to consolidate all crimes of this character under one statute.²⁰ This purpose has been accomplished in a number of states, including New York, Massachusetts, and California. In the *New York Law Journal* of May, 1942, the new larceny law was discussed by Judge Fuld, as reported in the *Judicial Council's Report*, as follows:²¹

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verdict convicting defendant of the crimes of kidnapping and murder in the first degree of the infant Peter Weinberger, said: "Unlike certain other jurisdictions which reserve their severest punishments for killing perpetrated in the commission of certain specified felonies, our state, through the legislature has decreed that a homicide constitutes felony murder, punishable by death, if it be perpetrated 'by a person engaged in the commission of or in an attempt to commit a felony.'"

"One necessary qualification has been engrafted onto our felony murder rule and that is that the underlying felony must be independent of the homicide; for otherwise every homicide, not justifiable or excusable, would occur in the commission of a felony—namely the assault which ended in death—with the result that premeditation, deliberation, and intent to kill would never have to be established to convict an accused of murder in the first degree." *People v. La Marca*, 165 N. Y. S. 2d 753, 3 N. Y. 2d 452 (1957).

²⁰ In Ohio, larceny, embezzlement, and obtaining property by false pretenses, are different offenses. Larceny takes many forms and numerous statutes have been enacted, each of which directs the punishment of the larceny of a particular item, or committed in a particular way. The following list is an example of such special larceny statutes: Larceny by trick (§ 2907.21 R. C.); Horse stealing or concealing stolen horse (§ 2907.22 R. C.); pocket picking (§ 2907.29); stealing or destroying a will (§ 2907.32 R. C.); embezzlement (§ 2907.34 R. C.); embezzlement of school books (§ 2907.38 R. C.); etc.

The Judicial Council in the Twelfth Report proposed that the statutes be consolidated and that the distinction between larceny, false pretense, conversion and embezzlement be eliminated so that prosecutions of each of these offenses may be had under a single statute. This is not a new idea in the prosecution of larceny cases. Other states have been forced to enact similar statutes because of the complications which arise in the identification of the offense committed. The boundaries between the crimes of larceny, embezzlement and obtaining property by false pretenses has always been difficult to define. Thirteenth Report of Judicial Council of Ohio, pp. 23, 24 (1957).

²¹ 107 N. Y. L. J., 2124 (May 19, 1942).

"After stating that the new law did not broaden the scope of the crime of larceny nor designate as criminal that which had formerly been innocent and not criminal, Judge Fuld went on to relate that in the past in New York (the same is now generally true in Ohio), larceny, embezzlement and obtaining property by false pretenses each had to be prosecuted by a different indictment (or by separate counts of the same indictment) and '* * * a vast amount of confusion accompanied the attempt to preserve the identity of each of these crimes.'"

"As a result of having these distinctions engrafted upon the law, the persons who concededly stole property were able to escape conviction merely because the theory of the prosecution proved erroneous when considered upon appeal."

At the close of his article, Judge Fuld went on to say:

"The Legislature has left no doubt as to its purpose in passing the new statute, and the language employed is sufficiently clear and explicit to require its application in the manner intended. The Act assures full protection to a defendant charged with theft, and yet—as was said in a Columbia Law Review note²² pertaining to a Massachusetts larceny statute, 'It does away with wasting the time of the court in deciding subtleties of law, which, far from being of any practical law use, are a positive impediment to justice.'"

"In short, if construed in accordance with the intention of the law's proponents, new Section 1290 of the Penal Law will unquestionably promote the administration of criminal justice in this state."

These two amendments, which have been presented to the legislature by the Judicial Council, with others of equal importance, have received little consideration at their hands in its last two sessions. I am confident that the Ohio prosecutors can, with good conscience, bring about successful consideration of these and many other needed changes in the Criminal Law of Ohio, so that our Criminal Code will be equal to that of any other state in protecting the rights of the people as well as of those charged with crime.

²² 20 Columbia L. R. 318 (1920).