ARTHUR CHENEY TRAIN

THE PRISONER
AT THE BAR: SIDELIGHTS
ON THE ADMINISTRATION
OF CRIMINAL JUSTICE

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INTRODUCTION

By Prof. John H. Wigmore, Dean of the Law School of Northwestern University.

book, "The Prisoner at the Bar," as entertaining and vivid picture of the criminal procedure of to-day, and a repertory of practical experience and serious discussion of present-day problems in the administration of justice, is, in my opinion, both unique and invaluable. I know of no other book which so satisfyingly fills an important but empty place in a modern field. At one extreme stand the scientific psycho-criminologists, usefully investigating and reflecting, but commonly severed from the practical treatment of any branch of the subject until the prison doors are reached. At another extreme are the professional lawyers, skilled in the technique of present procedure, but too much tied by precedent to take anything but a narrow, backward-looking view. Off in a third corner are the economists, sociologists, physicians, and serious citizens in general, who notice that some things are going wrong, but have no accurate conception of what is actually seen and done every day in courts of justice; these good people run the risk of favoring impracticable fads or impossible theories.

Now comes Mr. Train's book, casting in the centre of the field an illumination useful to all parties. It enlightens the serious citizen as to the actual experiences of our criminal justice, and shows him the inexorable facts that must be reckoned with in any new proposals. The professional lawyer is stimulated to think over the large tendencies involved in his daily work, to realize that all is *not* necessarily for the best,

and to join and help with his skill. The scientific criminologist is warned against trusting too much to the cobwebs of his ideal theories, or adhering too implicitly to the Lombrosan school or other foreign propaganda, and is forced to keep in mind a living picture of the practical needs of American justice.

I do not hesitate to say that every thoughtful American citizen ought to know all the things that are told in this book; and if he did, and as soon as he did, we might then begin to work with encouragement to accomplish in a fashion truly practical as well as scientific the needed improvements in our criminal justice. Such effort is likely to be hopeless until people come to realize *what the facts are*. Judging by my own case, I feel that most people will never really know and appreciate the facts unless they read Mr. Train's book.

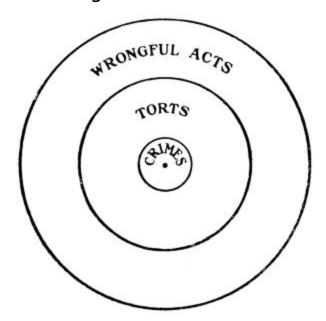
THE PRISONER AT THE BAR CHAPTER I

WHAT IS CRIME?

A crime is any act or omission to act punishable as such by law. It is difficult, if not impossible, to devise any closer definition. Speaking broadly, crimes are certain acts, usually wrongful, which are regarded as sufficiently dangerous or harmful to society to be forbidden under pain of punishment. The general relation of crimes to wrongs as a whole is sometimes illustrated by a circle having two much smaller circles within it. The outer circle represents wrongful acts in the aggregate; the second, wrongful acts held by law to be *torts*, that is to say, infractions of private rights for

which redress may be sought in the civil courts, and the smallest or inner circle, acts held to be so injurious to the public as to be punishable as crimes.

This does well enough for the purpose of illustrating the relative proportion of crimes to torts or wrongful acts in general, and, if a tiny dot be placed in the centre of the bull's-eye to represent those crimes which are actually punished, one gets an excellent idea of how infinitely small a number of these serve to keep the whole social fabric in order and sustain the majesty of the law. But the inference might naturally be drawn that whatever was a crime must also be a tort or at least a wrong, which, while true in the majority of instances, is not necessarily the case in all. In a certain sense crimes are always wrongs or, at least, wrong, but only in the sense of being infractions of law are they always wrongs or wrong.



The word wrong being the antithesis of the word right, and carrying with it generally some ethical or moral significance, will vary in its meaning according to the ideas of the individual who makes use of it. Indeed, it is conceivable that the only really right thing to do under certain circumstances would be to commit an act designated by law as a crime.

So, conversely, while a wrong viewed as an infraction of the laws of God is a sin, that which is universally held sinful is by no means always a crime. Speaking less broadly, a wrong is an infraction of a right belonging to another, which he derives from the law governing the society of which he is a member. Many wrongs are such that he may sue and obtain redress therefor in the courts. But it by no means follows that every crime involves the infraction of a private right or the commission of a tort. Thus "perjury" and most crimes against the State are not torts at all. It will thus be seen that no accurate definition of a crime can be given save that it is an act or omission which the State punishes as such, and that technically the word carries with it no imputation or implication of sin, vice, iniquity, or in a broad sense even of wrong. The act may or may not be repugnant to our ideas of right. Numerically considered, only a minority of crimes have any ethical significance whatever, the majority being designated by the law itself as mala prohibita, rather than mala in se.

It is the duty of a prosecutor to see that infractions of the criminal law are punished and to represent the public in all proceedings had for that purpose, but, in view of what has just been said, it will be observed that his duties do not necessarily involve familiarity with vice, violence or even sin. The crimes he is called upon to prosecute may be disgusting, depraved and wicked, or they may be, and frequently are, interesting, ingenious, amusing or, possibly (though not probably), commendable. For example, a man who chastises the foul slanderer of a young woman's character may have technically committed an assault of high degree, yet if he does so in the proper spirit, in a suitable place, and makes the offender smart sufficiently, he deserves the thanks and congratulations of all decent men and honest women. Yet, indubitably, he has committed a crime, although, thanks to our still lingering spirit of chivalry, he would never be stamped by any jury as a criminal.

A prosecutor is frequently asked if he does not find that his experience has a "hardening" effect.

"Why should it?" he might fairly reply. "I have to do with criminals, it is true, but the criminals as a rule are little or no worse than the classes of people outside from which they have been drawn. Their arrest and conviction are largely due to accidental causes, such as weak heads, warm hearts, quick temper, ignorance, foolishness or drunkenness. We see all of these characteristics in our immediate associates. A great many convicted persons have done acts which are not wrong at all, but are merely forbidden. Even where their acts are really wrong it is generally the stupid, the unfortunate, or the less skilful who are caught. For every roque in jail there are at least ten thousand at large. The ones who escape are wiser and very likely meaner. Last, but not least, a very great number of the most despicable, wicked, and harmful deeds that can be committed are not crimes at all. The fact that a man is a criminal argues nothing at all against his general decency, and when I meet a convict I assume, and generally assume correctly, that to most intents and purposes he is a gentleman. The code which puts one man in stripes and allows another to ride in an automobile is purely artificial, and strictly speaking proves not a whit which is the better man."

Now while such an answer might seem frivolous enough to the lay reader, it would nevertheless be substantially true. Your criminal, that is to say, strictly, the law-breaker who is brought to book for his offence, is very likely a pretty good sort of fellow as fellows go. If he has been guilty merely of an act which is prohibited, not because of its inherent wrong, but simply on grounds of public policy—malum prohibitum—he is probably as good as anybody. His offence

may be due to ignorance or accident. Assuming that his crime be one which would seem to involve moral turpitude— malum in se—there are very likely mitigating circumstances which render his offence, if not excusable, at least less reprehensible than would appear at first glance.

Crimes bear no absolute relation to one another. A murderer may or may not be worse than a thief—and either may be better than his accuser. The actual danger of any particular offender to the community lies not so much in the kind or degree of crime which he may have committed as in the state of his mind. Even the criminals who are really criminal, in the sense that they have a systematic intention of defying the law and preying upon society, are generally not criminal in all directions, but usually only in one, so that taken upon their unprofessional side they present the same characteristics as ordinary and, roughly speaking, lawabiding citizens. The bank robber usually is a bank robber and nothing more. He specializes in that one pursuit. It is his vocation and his joy. He prides himself on the artistic manner in which he does his work. He would scorn to steal your watch and is a man of honor outside of bank-breaking hours—"Honor among thieves." Often enough he is a model husband and father. So, too, may be your forger, gambler, swindler, burglar, highwayman, or thief—any in fact except the real moral pervert; and of course murder is entirely compatible on occasion with a noble, dignified and generous "There is character. nothing essentially incongruous between crime and culture." The prosecutor who begins by loathing and despising the man sitting at the bar may end by having a sincere admiration for his intellect, character or capabilities. This by way of defence to crime in general.

Our forefathers contented themselves with a rough distinction between crimes as *mala prohibita* and *mala in se*. When they sought to classify criminal acts under this arrangement they divided them accordingly as the offence

carried or did not carry with it a suggestion of moral turpitude. Broadly speaking, all felonies were and are regarded as *mala in se*. Murder, arson, burglary, theft, etc., in general indubitably imply a depraved mind, while infractions of Sunday observance laws or of statutes governing the trade in liquor do not. Yet it must be perfectly clear that any such distinction is inconclusive.

There can be no general rule based merely on the name or kind of crime committed which is going to tell us which offender is really the worst. A misdemeanor may be very much more heinous than a felony. The adulterator of drugs or the employer of illegal child labor may well be regarded as vastly more reprehensible than the tramp who steals part of the family wash. So far as that goes there are an alarming multitude of acts and omissions not forbidden by statute or classed as crimes which are to all intents and purposes fully as criminal as those designated as such by law. This is the inevitable result of the fact that crimes are not crimes merely because they are wrong, but because the State has enjoined them. For example, to push a blind man over the edge of a cliff so that he is killed upon the rocks below is murder, but to permit him to walk over it, although by stretching out your hand you might prevent him, is no crime at all. It is a crime to defame a woman's character if you write your accusation upon a slip of paper and pass it to another, but it is no crime in New York State to arise in a crowded lecture hall and ruin her forever by word of mouth. It is a crime to steal a banana off a fruit-stand, but it is no crime to borrow ten thousand dollars from a man whose entire fortune it is, although you have no expectation of returning it. You can be a swindler all your life—the meanest sort of a mean swindler, but there is no crime of being a swindler or of being a mean man. It is a crime to ruin a girl of seventeen years and eleven months, but not to ruin a girl of eighteen. The "age of consent" varies in the different States. It is a crime to obtain a dollar by means of a false statement as to a past or existing fact, but it is no crime to obtain as much money as you can by any other sort of a lie. Lying is not a crime, but lying under oath is a crime—provided it be done in a legal proceeding and relates to a material matter. The most learned jurists habitually disagree as to what is material and what is not.

Even when the acts to be contrasted are all crimes there is no way of actually discriminating between them except by carefully scrutinizing the circumstances of each. The so-called "degrees" mean little or nothing. If you steal four hundred and ninety-nine dollars out of a man's safe in the daytime it is grand larceny in the second degree. If you pick the same man's pocket of a subway ticket after sunset it is grand larceny in the first degree. You may get five years in the first instance and ten in the second. If you steal twenty-five dollars out of a bureau drawer you commit petty larceny and may be sent to prison for only one year.

If the degree of any particular crime of which a defendant is found guilty is no index to his real criminality or of his danger to society, still less is the name of the crime he has committed an index to his moral character, save in the case of certain offences which it is not necessary to enumerate. Most men charged with homicide are indicted for murder in the first degree. This may be a wise course for the grand jury to pursue in view of the additional evidence which often comes to light during a trial. But it frequently is discovered before the case goes to the jury that in point of fact the killing was in hot blood and under circumstances which evince no great moral turpitude in the slayer. For example, two drunken men become involved in an altercation and one strikes the other, who loses his equilibrium and falls, hitting his head against a curbstone and fracturing his skull. The striker is indicted and tried for murder. Now he is doubtless guilty of manslaughter, but he is less dangerous to the

community than a professional thief who preys upon the public by impersonating a gasman or telephone repairer and by thus gaining access to private dwellings steals the owner's property. One is an accidental, the other an intentional criminal. One is hostile to society as a whole and the other is probably not really hostile to anybody. Yet the less guilty is denominated a murderer, and the other is rarely held guilty of more than petty larceny. A fellow who bumps into you on the street, if he be accompanied by another, and grabs your cane, is guilty of robbery in the first degree—"highway" robbery—and may get twenty years for it, but the same man may publish a malicious libel about you, and by accusing you of the foulest practices rob you of your good name and be only guilty of a misdemeanor. Yet the reader should not infer that definitions and grades of crime capable of corresponding punishments are not proper, desirable, and necessary. Of course they are. The practical use of such statutes is to fix a maximum sentence of punishment. As a rule the minimum is anything the judge sees fit. Hence you may deduce a general principle to the effect that the charge against the prisoner, even assuming his guilt, indicates nothing definite as to his moral turpitude, danger to the community, or general undesirability.

But we may honestly go much further. Not only are the names and degrees of the crimes which a defendant may have committed of very little assistance in determining his real criminality, but the fact that he has committed them by no means signifies that he is morally any worse than some man who has committed no so-called crime at all. Many criminals, even those guilty of homicide, are as white as snow compared with others who have never transgressed the literal wording of a penal statute.

"We used to have So and So for our lawyer," remarked the president of a large street railway corporation. "He was always telling us what we *couldn't* do. Now we have Blank,

and pay him one hundred thousand dollars a year to tell us how we *can* do the same things." The thief who can have the advice of able counsel "how to do it" need never go to jail.

Many of the things most abhorrent to our sense of right do not come within the scope of the criminal law. *Omissions*, no matter how reprehensible, are usually not regarded as criminal, because in most cases there is no technical legal duty to perform the act omitted. Thus, not to remove your neighbor's baby from the railroad track in front of an onrushing train, although it would cause you very little trouble to do so, is no crime, even if the child's life be lost as a result of your neglect. You can let your mother-in-law choke to death without sending for a doctor, or permit a ruffian half your size to kill an old and helpless man, or allow your neighbor's house to burn down, he and his family peacefully sleeping inside it, while you play on the pianola and refuse to ring up the fire department, and never have to suffer for it—in this world.

Passing from felonies—mala in se—to misdemeanors—generally only mala prohibita—almost anything becomes a crime, depending upon the arbitrary act of the legislature.

It is a crime in New York State to run a horse race within a mile of where a court is sitting; to advertise as a divorce lawyer; to go fishing or "play" on the first day of the week; to set off fire-works or make a "disbursing noise"^[1] at a military funeral in a city on Sunday; to arrest or attach a corpse for payment of debt; to keep a "slot machine"; to do business under any name not actually your own full name without filing a certificate with the county clerk (as, for example, if, being a tailor, you call your shop "The P.D.Q. Tailoring Establishment"); to ride in a long-distance bicycle race more than twelve hours out of twenty-four; to shoe horses without complying with certain articles of the Labor

Law; to fail to supply seats for female employés in a mercantile establishment; to steal a ride in a freight car, or to board such a car or train while in motion; to set fire negligently to one's own woods, by means of which the property of another is endangered; to run a ferry without authority, or, having contracted to run one, to fail to do so; to neglect to post ferry rates (under certain conditions) in English; to induce the employé of a railroad company to leave its service because it requires him to wear a uniform: to wear a railroad uniform without authority; to fish with a net in any part of the Hudson River (except where permitted by statute); to secretly loiter about a building with intent to overhear discourse therein, and to repeat the same to vex others (eavesdropping); to sell skimmed milk without a label; to plant oysters (if you are a non-resident) inside the State without the consent of the owner of the water; to maintain an insane asylum without a license; to enter an agricultural fair without paying the entrance fee; assemble with two or more other persons "disguised by painted, discolored, having their faces colored concealed," save at a fancy-dress ball for which permission has been duly obtained from the police; or to wear the badge of the "Patrons of Husbandry," or of certain other orders without authority. These illustrations are selected at random from the New York Penal Code.

Where every business, profession, and sport is hedged around by such *chevaux-de-frise* of criminal statutes, he must be an extraordinarily careful as well as an exceptionally well-informed citizen who avoids sooner or later crossing the dead-line. It is to be deprecated that our law-makers can devise no other way of regulating our existences save by threatening us with the shaved head and striped shirt.

The actual effect of such a multitude of statutes making anything and everything crimes, punishable by

imprisonment, instead of increasing our respect for law, decreases it, unless they are intended to be and actually are enforced. Acts *mala in se* are lost in the shuffle among the acts *mala prohibita*, and we have to become students to avoid becoming criminals.

Year by year the legislature goes calmly on *creating* all sorts of new crimes, while failing to amplify or give effect to the various statutes governing existing offences which to a far greater degree are a menace to the community. For example, it is not a crime in New York State to procure money by false pretences provided the person defrauded parts with his money for an illegal purpose.^[2]

In the McCord^[3] case, in which the Court of Appeals established this extraordinary doctrine, the defendant had falsely pretended to the complainant, a man named Miller, that he was a police officer and held a warrant for his arrest. By these means he had induced Miller to give him a gold watch and a diamond ring as the price of his liberty. The conviction in this case was reversed on the ground that Miller parted with his property for an unlawful purpose; but there was a very strong dissenting opinion from Mr. Justice Peckham, now a member of the bench of the Supreme Court of the United States.

In a second case, that of Livingston,^[4] the complainant had been defrauded out of five hundred dollars by means of the "green-goods" game; but this conviction was reversed by the Appellate Division of the Second Department on the authority of the McCord case. The opinion was written by Mr. Justice Cullen, now Chief Judge of the New York Court of Appeals, who says in conclusion:

"We very much regret being compelled to reverse this conviction. Even if the prosecutor intended to deal in counterfeit money, it is no reason why the appellant should go unwhipped of justice. We venture to suggest that it might

be well for the legislature to alter the rule laid down in McCord vs. People."

Well might the judges regret being compelled to set a rogue at liberty simply because he had been ingenious enough to invent a fraud which involved the additional turpitude of seducing another into a criminal conspiracy. Livingston was turned loose upon the community, in spite of the fact that he had swindled a man out of five hundred dollars, because he had incidentally led the latter to believe that in return he was to receive counterfeit money or "green goods" which might be put into circulation. Yet, because, some years before, the judges of the Court of Appeals had, in the McCord matter, adopted the rule followed in civil cases, to wit, that as the complaining witness was himself in fault and did not come into court with clean hands he could have no standing before them, the Appellate Division in the next case felt obliged to follow them and to rule tantamount to saying that two wrongs could make a right and two knaves one honest man. It may seem a trifle unfair to put it in just this way, but when one realizes the iniquity of such a rule as applied to criminal cases, it is hard to speak softly. Thus the broad and general doctrine seemed to be established that so long as a thief could induce his victim to believe that it was to his advantage to enter into a dishonest transaction, he might defraud him to any extent in his power. Immediately there sprang into being hordes of swindlers, who, aided by adroit shyster lawyers, invented all sorts of schemes which involved some sort of dishonesty upon the part of the person to be defrauded. The "wire-tappers," of whom "Larry" Summerfield was the Napoleon, the "goldbrick" and "green-goods" men, and the "sick engineers" flocked to New York, which, under the unwitting protection of the Court of Appeals, became a veritable Mecca for persons of their ilk.

The "wire-tapping" game consisted in inducing the victim to put up money for the purpose of betting upon a "sure thing," knowledge of which the thief pretended to have secured by "tapping" a Western Union wire of advance news of the races. He usually had a "lay out" which included telegraph instruments connected with a dry battery in an adjoining closet, and would merrily steal the supposed news off an imaginary wire and then send his dupe to play his money upon the "winner" in a pretended pool-room which in reality was nothing but a den of thieves, who instantly absconded with the money.

In this way one John Felix was defrauded out of fifty thousand dollars on a single occasion. Now the simplest legislation could instantly remedy this evil and put all the "wire-tappers" and similar swindlers out of business, yet a bill framed and introduced in accordance with the suggestion of the highest court in the State was defeated. Instead the legislature passes scores of entirely innocuous and respectable acts like the following, which became a law in 1890:

An Act for the Prevention of Blindness.

Section 1. Should... *nurse having charge of an infant... notice* that one or both eyes of such infant are inflamed or reddened at any time within two weeks after its birth it shall be the duty of such nurse... to report the fact in writing within six hours to the health officer or some legally qualified practitioner of medicine...

Section 2. Any failure to comply with the provisions of this act shall be punished by a fine not to exceed one hundred dollars, or imprisonment not to exceed six months, or both.

The criminal law which had its origin when violence was rife is admirably adapted to the prevention, prosecuting and punishment of crude crimes, such as arson, rape, robbery, burglary, mayhem, assault, homicide, and "common-law" larceny—theft accompanied by a trespass. In old times everything was against the man charged with crime—at least that was the attitude of the court and jury. "Aha!" exclaims the judge as the evidence goes in. "You thought you were stealing only a horse! But you stole a halter as well!" And the spectators are convulsed with merriment.

We take honest pride in the protection which our law affords to the indicted prisoner. It is the natural expression of our disapproval of a system which at the time of our severance from England ignored the rights of the individual for those of the community. We touched the lips of the defendant and gave him the right to speak in his own behalf. We gave him an unlimited right of appeal on any imaginable technicality. [6] But while we have been making it harder and harder to convict our common criminals, we have to a very great extent failed to recognize the fact that all sorts of new and ingenious crimes have come into existence with which the law in its present state is utterly unable to cope. The evolution of the modern corporation has made possible larcenies to the punishment of which the law is entirely inadequate. "Acts for the prevention of blindness" are perhaps desirable, but how about a few statutes to prevent the officers of insurance companies from arbitrarily diverting the funds of that vague host commonly alluded to as "widows and orphans"? The careless nurse is a criminal and may be confined in a penitentiary; while perhaps a man who may be guilty of a great iniquity and known to be so drives nonchalantly off in his coach and four.

What is crime? We may well ask the question, only eventually to be confronted by that illuminating definition with which begins the Penal Code—"A crime is an act or

omission forbidden by law and punishable upon conviction by... penal discipline." Let us put on our glasses and find out what these acts or omissions are. When we have done that we may begin to look around for the criminals. But it will be of comparatively little assistance in finding the *sinners*.

So-called criminologists delight in measuring the width of the skulls between the eyes, the height of the foreheads, the length of the ears, and the angle of the noses of persons convicted of certain kinds of crimes, and prepare for the simple-minded of the public demonstrating that the burglar has this kind of a head, the pickpocket that sort of an ear, and the swindler such and such a variety of visage. Exhaustive treatises upon crime and criminals lay down general principles supposed to assist in determining the kind of crime for which any particular unfortunate may have a predilection. One variety of criminal looks this way and another looks that way. One has blue eyes, the other brown eyes.^[7] Some look up, others look down. My friend, if you examine into the guestion, you will probably discover that the clerk who sells you your glass of soda water at the corner drug store will qualify for some one of these classes, so will your host at dinner this evening, so, very likely, will the family doctor or the pastor of your church.

The writer is informed that there has recently been produced an elaborate work on political criminals in which an attempt is made to set forth the telltale characteristics of such. It is explained that the tendency to commit such crimes may be inherited. You are about as likely to inherit an inclination to commit a political crime as you are to derive from a maiden aunt a tendency to violate a speed ordinance or make a "disbursing" noise.

Let some one codify all the sins and meannesses of mankind, let the legislatures make them crimes and affix appropriate penalties, then those of us who still remain outside the bars may with more propriety indulge ourselves in reflections at the expense of those who are not.

FOOTNOTES:

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- [1] New York Penal Code, Section 276.
- [2] No longer the law of New York. After this book was published the Court of Appeals reversed the conviction of Tracy for his \$50,000 fraud upon Felix by means of the "wire-tapping" game and affirmed as law the doctrine of People *vs.* McCord. The author takes satisfaction in recording that the Legislature thereupon awoke to its duties and amended the penal code in such a fashion as to render such offences criminal.
- [3] 46 New York 470.
- [4] 47 App. Div. 283.
- [5] The operations of these swindlers recently became so notorious that the District Attorney of New York County determined to prosecute the perpetrators of the Felix swindle, in spite of the fact that the offence appeared to come within the language of the Court of Appeals in the McCord and Livingston cases. Accordingly Christopher Tracy, alias Charles Tompkins, alias Topping, etc., etc., was indicted (on the theory of "trick and device") for the "common-law" larceny of Felix's fifty thousand dollars.

The trial came on before Judge Warren W. Foster in Part III of the General Sessions on February 27, 1906. A special panel quickly supplied a jury, which, after hearing the evidence, returned a verdict of guilty in short order.

It now remains for the judges of the Court of Appeals to decide whether they will extend the doctrine of the McCord and Livingston cases to a fraud of this character, whether they will limit the doctrine strictly to cases of precisely similar facts, or whether they will frankly refuse to be bound by any such absurd and iniquitous theory and consign the McCord case to the dust-heap of discarded and mistaken doctrines, where it rightfully belongs. Their action will determine whether the perpetrators of the most ingenious, elaborate and successful bunco game in the history of New York County shall be punished for their offence or instead be turned loose to prey at will upon the community at large. (See "The Last of the Wire-Tappers" in the *American Magazine* for June, 1906; also incorporated in the author's "True Stories of Crime," pp. 103–121, published by Charles Scribner's Sons, 1908.)

- [6] Cf. in general, references given *infra*, p. 339.
- [7] The following appeared in the New York *Globe* for April 25, 1905: "Criminal eyes—It is well known," says Dr. Beddoe, F.R.S., "that brown eyes and dark hair are particularly common among the criminal classes. An American observer calls the brown the criminal eye, etc., etc."

CHAPTER II

WHO ARE THE REAL CRIMINALS?

Some reader of the preceding chapter may perhaps remark, "This is all very well so far as it goes. It doubtless is entirely true from a purely technical point of view. But that is only one side of the matter. How about the *real* criminals?" This is neither an unexpected nor an uninvited criticism. Who are the "real" criminals? Charles Dudley Warner says: "Speaking technically, we put in that [the criminal] class those whose sole occupation is crime, who live upon it as a profession and who have no other permanent industry. They prey upon society. They are by their acts at war upon it and are outlaws." Now the class of professional criminals to which Mr. Warner refers as contrasted with the great mass of criminal defendants as a whole is, in point of fact, relatively so small, and so easily recognized and handled, that it plays but an inconspicuous part in the administration of criminal justice.

The criminals who conform accurately to childhood's tradition are comparatively few in number. The masked highwayman, the safe-cracker and even the armed house burglar have, with a few exceptions, long since withdrawn from the actual pursuit of their romantic professions and exist practically only in the eagerly devoured pages of Sherlock Holmes and the "memoirs of great detectives."

New and almost more picturesque figures have taken their places—the polite and elegant swindler, the out-at-the-elbows but confidence-inspiring promoter of assetless corporations, the dealer in worthless securities, and the forger who drives in his own carriage to the bank he intends to defraud. In some cases the individuals are the same, the safe-cracker merely having doffed his mask in favor of the silk hat of Nassau Street. Of yore he stole valuable securities which he was compelled to dispose of at a tremendous discount; now he sells you worthless stocks and bonds at a slight premium. Mr. J. Holt Schorling, writing in *The Contemporary Review* for June, 1902, points out that while all crimes other than fraud decreased materially in England from 1885 to 1899, the crime of fraud itself materially increased during the same period.^[8]

The subject is a tempting one, but it is not essential to our thesis. The devil is not dead; he has merely changed his clothes. Criminal activity has not subsided; it has instead sought new ways to meet modern conditions, and so favorable are these that while polite crime may be said still to be in its infancy, it is nevertheless thriving lustily.

While the degenerate criminal class is the subject of much elaborate and minute analysis by our continental neighbors, its extent is constantly exaggerated and its relation to the other criminal classes not fully appreciated. To read some supposedly scientific works one would imagine that every court of criminal justice was or should be nothing but a sort of clinic. To these learned authors, civilization, it is true, owes a debt for their demonstration that some crime is due to insanity and should be prevented, and, where possible, cured in much the same manner. But they have created an impression that practically all crime is the result of abnormality.

Every great truth brings in its train a few falsehoods—every great reform a few abuses. The first penological movement was in the direction of prison reform. While perhaps the psychological problem was not entirely overlooked, it was completely subordinated to the physical. It is a noble thing that the convict should have a warm cell in winter and a cool one in summer, with electric light and running water, nutritious food, books. wholesome and bathrooms. hospitals, chapels, concerts, ball games and chaplains. "But it must be noted that along with this movement has grown up a sickly sentimentality about criminals which has gone altogether too far, and which, under the guise of humanity and philanthropy, confounds all moral distinctions." To a large number of well-meaning people every convict is a person to whom the State has done an injury.

Then came the study of degeneracy, with the cranium of every criminal as a subject of investigation. In 1881 or thereabouts Professor Benedickt published his conclusion that "the brains of criminals exhibit a deviation from the anthropological variety of their species, at least among the cultured races." It was a commendable thing to point out the relation of insanity to crime. It is an undeniable truth that there are insane people who are predisposed to crime just as there are those who are predisposed to dance.

The vicious criminal class contains many who are actually or incipiently insane, and it numbers a great many more who are physically and mentally normal, who yet by reason of their education and environment are not much to be blamed for doing wrong. But it is far from true that a majority of the "real" criminals are mentally defective. Crime and insanity are no more closely related than sin and insanity. Certain criminals are also perverts. But they would be criminals even if they were not perverts. The fact that a man who takes drugs is also a criminal does not prove that he is a criminal because he takes drugs. We know many drug-

takers who are otherwise highly respectable. Go to the General Sessions and watch the various defendants who are brought into court and you will discover little more degeneracy or abnormality than you would find on the corner of Twenty-third Street and Fifth Avenue among the same number of unaccused citizens.

The point which the writer desires to make is that, leaving out the accidental and experimental criminals, there is a much closer relation between all law-breakers than the public and our legislators seem to suppose. The man who adulterates his milk to make a little extra money is in the same class with the financial swindler. One waters his milk, the other his stock. The same underhanded desire to better one's self at the expense of one's neighbor is the moving cause in each case. The forger belongs to the class whose heads the criminologists delight to measure, but they would not measure your milkman's. The man who steals your purse is a felon and a subject of scientific investigation and discussion; the man who forges a trade-mark commits only a misdemeanor and excites no psychological interest. But they are criminals of exactly the same type.

The "crime-is-a-disease" theory has been worked entirely too hard. It is a penologic generality which does not need any truckling to popular sentimentality to demonstrate its truth. But there are as many sorts of this "disease" as there are kinds of crime, and some varieties would be better described by other and less euphemistic names. Crime is no more a disease than sin, and the sinners deserve a good share of the sympathy that is at present wasted on the criminals. The poor fellow who has merely done wrong gets but scant courtesy, but once jerk him behind the bars and the women send him flowers. If crime is a disease, sin is also a disease, and we have all got a case of it. It is strange that there is not more "straight talk" on this subject. Every one of us has criminal propensities—that is to say, in every

one of us lurks the elemental and unlawful passions of sex and of acquirement. It is but a play on words to say that the man who yields to his inclinations to the extent of transgressing the criminal statutes is "diseased." Up to a certain point it is his own business, beyond it becomes ours, and he transgresses at his peril.

The ordinary criminal usually is such because he "wants the money"; he either does not like to work or wants more money than he can earn honestly. He has no "irresistible impulse" to steal—he steals because he thinks he can "get away with it."

The so-called professional thief is usually one who has succeeded in so doing or who, having been convicted of larceny, finds he cannot live agreeably other than by thieving; but the man is no less a professional thief who systematically puts money in his pocket by dishonest and illegal methods in business. The fact that it is not, in the ordinary sense, his "sole occupation" does not affect the question at all. Indeed, it would be difficult for one whose business life was permeated by graft to refute the general allegation that his "sole occupation" was criminal. Granting this, your dishonest business man fulfils every requirement of Mr. Warner's definition, for he "preys upon society and is [secretly] at war upon it." He may not be an "outlaw," but he should be one under any enlightened code of criminal laws.

There is no practical distinction between a man who gets all of a poor living dishonestly and one who gets part of an exceedingly good living dishonestly. The thieving of the latter may be many times more profitable than that of the former. So long as both keep at it systematically there is little to choose between the thief who earns his livelihood by picking pockets and the grocer or the financier who swindles those who rely upon his representations. The man who

steals a trade-mark, counterfeits a label, or adulterates food or drugs, who makes a fraudulent assignment of his property, who as a director of a corporation declares an unearned dividend for the purpose of selling the stock of himself and his associates at an inflated value, who publishes false statements and reports, makes illegal loans, or who is guilty of any of the thousand and one dishonest practices which are being uncovered every day in the management of life insurance, banking, trust, and railroad companies, is precisely as "real" a criminal as one who lurks in an alley and steals from a passing wagon. *Each is guilty of a deliberate violation of law implying conscious wrong*, and each commits it for essentially the same reason.

Yet at the present time the law itself recognizes a fictitious distinction between these crimes and those of a more elementary sort. The adulteration of foods, the theft of trade-marks, stock-jobbing, corporation frauds, and fraudulent assignments are as a rule only misdemeanors. The trouble is that we have not yet adjusted ourselves to the idea that the criminal who wears a clean collar is as dangerous as one who does not. Of course, in point of fact he is a great deal worse, for he has not the excuse of having a gnawing at his vitals.

If a rascally merchant makes a fraudulent conveyance of his property and then "fails," although he may have secreted goods worth fifty thousand dollars, the punishment of himself and his confederate is limited to a year in the penitentiary and a thousand dollars fine, while if a bank cashier should steal an equivalent amount and turn it over to an accomplice for safe keeping he could receive ten years in State's prison. Even in this last case the receiver's punishment could not exceed *five* years. Thus Robert A. Ammon, who was the sole person to profit by the notorious "Franklyn Syndicate," [10] when convicted of receiving the proceeds of the fraud, could be sentenced to only five years

in Sing Sing, while his dupe, Miller, who sat at the desk and received the money, although he acted throughout by the other's advice and counsel, in fact did receive a sentence of ten years for practically the same offence. However inequitable this may seem, what inducements are offered in the field of fraudulent commercial activity when a similar kind of theft is punishable by only a year in the penitentiary?

One can hardly blame such picturesque swindlers as "Larry" Summerfield, who saw gigantic financial and commercial frauds being perpetrated on every side, while the thieves who had enriched themselves at the expense of a gullible public went scot-free, for wanting to participate in the feast. Almost every day sees some new corporation brought into being, the only object of which is to enable its organizers to foist its worthless stock among poorly paid clerks, stenographers, trained nurses, elevator men and hardworking mechanics. The stock is disposed of and the "corporation" (usually a copper or gold mining enterprise) is never heard of again. Apparently if you do the thing Accordinaly correctly there can be no "come back." Summerfield and his gang of "sick engineers" hawked through the town nearly eighty thousand dollars' worth of the securities of the Horse Shoe Copper Mining Company, which owned a hole in the ground in Arizona. It was all done under legal advice and was undoubtedly believed to be within the letter of the law. But there were a few unnecessary falsehoods, a few slips in the schedule, a few complainants who would not be placated, and "Larry" found himself in the toils. He was convicted of grand larceny in the first degree, secured a certificate of reasonable doubt and gave bail in a very large amount. Within a short time he was re-arrested for working the same game unsuspecting southerner. This time his bail was increased to thirty thousand dollars. It was not long after the

investigations into the Ship-Building Trust scandal and New York had been edified by seeing the inside workings of some very high finance. After his temporary release Summerfield strolled over to Pontin's restaurant for lunch, where he sat down at a table adjoining one occupied by the assistant district attorney who had prosecuted and convicted him.

"How are you, Mr. ——?" inquired "Larry" with his usual urbanity. "How are things?"

"So so," replied the prosecutor, amused at the nonchalance of a man who might reasonably expect to be in Sing Sing within three months. "How's business?"

"Oh, pretty good," returned Larry. "You know there is a sucker born every minute."

"I should think after your conviction you would have had sense enough to keep out of swindling for a while," continued the assistant.

"Swindling!" exclaimed Summerfield. "Swindling nothin'! My lawyer says I didn't commit any crime. Didn't the Supreme Court say there was a reasonable doubt in my case? Well, I'm just giving myself the benefit of it—that's all. I'm entitled to it. How about those Ship-Building fellers?"

The "Ship-Building fellers" have never been convicted of any wrong-doing. Perhaps they committed no crime. Summerfield has three years more to serve in Sing Sing.[11]

In this connection the reader will recall the attitude of the inhabitants of Lilliput as chronicled by Gulliver.—"They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege that care and vigilance, with a very common understanding, may preserve a man's goods from theft, but honesty has no defence against superior cunning;... the honest dealer is always undone, and the knave gets the advantage. I

remember when I was once interceding with the king for a criminal who had wronged his master for a great sum of money, which he had received by order, and ran away with; and happening to tell his Majesty by way of extenuation that it was only a breach of trust, the Emperor thought it monstrous in me to offer as a defence the greatest aggravation of the crime; and truly I had little to say in return, further than the common answer, that different nations had different customs; for, I confess, I was heartily ashamed."

Any definition of the criminal class which limits it to those who "make their living" by crime is inadequate and begs the question entirely. There is no choice between the grafter and the "professional" thief, the boodler and the bank robber. They are all "real" criminals. One is as "diseased" and "degenerate" as the other. Every reversed conviction of a "grafter" lowers a peg the popular respect for law. The clerk in the corner grocery in Dakota feels the wireless influence of the boodler in St. Louis, and the "successful" failure in New York sets some fellow thinking in San Francisco.

The so-called degenerate and professional criminals constitute a very small fraction of the law-breakers and it is not from either class that we have most to fear. Our real danger lies in those classes of the population who have no regard for law, if not an actual contempt for it, and who may become criminals, or at least criminal, whenever any satisfactory reason, coupled with adequate opportunity, presents itself. From this class spring the experimental criminals of every sort, who in time become "professionals," and from it the embezzler, the stock jobber, the forger and business thief. From it as well are largely recruited those who commit the crimes of violence which, however undeservedly, give the United States such an unenviable place upon the tables of the statisticians. From it spring the