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SOCIAL SCIENCE AS AN AID TO ADMINISTRATION OF THE CRIMINAL LAW

It is proposed to consider briefly several contributions of social science and especially some of the techniques developed in recent years within that field, with a view to suggesting a number of projects whereby the administration of criminal law may be improved in this state.

The lynching of Charles Bannon at Schafer on January 29th has demonstrated that the administration of the law is inevitably, if not primarily, dependent upon men—a fact which preoccupation with books and the law as it is set down in the code and in the reports, inclines us to forget. The lynching represents the frustration of centuries of progress. It shows that people must be educated to understand that procedure and justice are intimately related. Indeed, it seems clear that justice by and through the law can hardly be conceived of apart from formal procedure. The lawyer knows that procedure is in many instances the real substance of the right. The various steps in what is called “due process” have been achieved with difficulty and paid for by the sacrifice of many lives. Arbitrary, immediate and despotic treatment has given way, after a great many years, to a larger measure of order, reason, fairness and justice for the great majorities of men and women.

So much is generally recognized, and it is not our purpose to dwell upon it. A wise society will turn misfortune into advantage if possible. Not an emotional reaction from the mob behavior, but a competent, scientific, comparative analysis of the means and conditions of criminal justice is in order. Much more important than depreciation of mob behavior, is an understanding of its causes. An adequate determination of the motivation of the mob would be very
valuable; and the problem might well be investigated by serious officials and students while it is still possible to secure the necessary information. It is reasonable to assume that the mob action was based upon opinion of some sort, which in turn, rested upon information, true or false. Obviously, intelligent opinion depends upon valid information. Without speculating unduly upon what changes in behavior might have resulted from a different public opinion, it seems fair to assert that if it were genuinely believed that Bannon was absolutely irresponsible, emotion and feeling would not have been aroused. Considering the nature of the crime, it is anomalous that no mental or other medical examination was given Bannon. And of course no medical report was published. Yet it is clear that the crime has many earmarks of an abnormal mind. One of the best informed men in the state as regards this case has written:

"It is almost impossible to believe that any human being whose mentality even approached normal would have committed the crime and then continue to live on the place and with the bodies of the victims."

Another gentleman to whom all the available information is known, states:

"Charles Bannon was certainly by no means a normal person. Every impression . . . suggests a throwback. He tells his stories . . . with no more feeling than . . . a normal person would have had in relating the annihilation of a family of gophers . . ."

This is a description of an abnormal, unsound mind if ever there was one. Aside from the added horror that the lynching takes on from this aspect, it is reasonable to assume that a public, informed of the mental irresponsibility of the accused, if that were the fact, would not have felt itself outraged. The crime would still have been horrible but it would have been thought to be as effective to slay a cow or an ox as to wreak vengeance upon a perverted, subnormal person. Sound facts would have formed an intelligent public opinion.

What is suggested above is simply this: that public opinion about crime, criminals and the administration of the law cannot be ignored if justice is to be achieved. On the contrary a skillful manipulation of opinion may be necessary, on occasion, so that a proper administration of the law may not be rendered impossible. The various public statements issued by the parties in the Loeb-Leopold
case, prior to and during the trial, testify to the importance of opinion generally, and show that mob action is not the only method, by any means, of defeating a sane administration of the law. But whether opinion should be manipulated or not, there is certainly an obligation to investigate and make known relevant facts in cases where opinion may interfere with justice.

There is a vast field of extra-legal materials intimately related to crime and criminal justice, which does not receive adequate consideration simply because it is not part of the more strictly professional, legal literature. These materials can no longer be neglected if competent administration of the criminal law is desired. In a recent work, Dean Pound of Harvard Law School has shown that many social forces, extending far back into history and rooted very deeply in our institutions, exert an enormous influence upon the administration of the law. The social sciences and the techniques formulated therein provide a fertile field for developing various projects which may be advantageously applied to the criminal law.

The time is especially opportune for considering such projects. Progress has been made in a number of directions during the past decade which in large measure has been shared in by this state. That officials here have for the most part kept pace with developments in the field is demonstrated by such laws as: (1) The Habitual Criminal Act; (2) Act establishing the Bureau of Criminal Identification; (3) The Act creating the Judicial Council and authorizing it to organize a Bureau of Criminal Statistics.

The assimilation of these various projects into the corpus juris requires time. The mere passage of legislation will not solve any problem, as Americans generally are beginning to realize. How these various laws function is paramount. Whether the boards created are sufficiently supported to enable them to be adequately staffed and equipped, so that contact may be preserved with important organizations and developments is of greater importance than their creation.

3N. D. Laws, 1927, c. 126, p. 357.
4N. D. Laws 1927, c. 124, § 7, p. 156.
In the matter of criminal identification, the creation of the Bureau was timely and apt. The field of criminal identification has become immensely significant of late. For example, only very recently ballistics has achieved signal success as an aid to detection, and in some jurisdictions is given the same recognition as that accorded to finger print identification. The uniqueness of guns, the improvements in the microscope, in chemistry, physics and allied fields have joined to form the basis for this new science of ballistics. Recent use has been made also, of plaster casts of footprints, knives and other articles to preserve the peculiar characteristics of these objects to assist detection. Identification of handwriting has improved. Efforts are being made to identify and graphically record the voice of the individual on the theory that each voice is unique and retains its distinctive quality for many years. These are only a few of the developments in the field of criminal identification. There is a national bureau as well as bureaus in many states. In Chicago courses of instruction are being offered to policemen under direction of August Vollmer; and large bureaus of criminal identification have been organized, amply supplied with funds and employing chemists, physicians and specialists of various sorts.

Statistics properly understood and applied, provide an accurate scientific method of measurement. No one claims, however, that the setting up of facts statistically, increases the validity of the material that is put into or comes out of the mill, so to speak. Indeed, the jibe about statistics being a third kind of lie has its kernel of truth. Statistics is a tool like mathematics; like the conclusion to a syllogism, the data depend for their empirical validity upon the premises. But all of this may be said about mathematics; yet modern astronomy and physics could not exist without mathematics. Statistics will be the bridge from introspective moral philosophy to an exact social science, if ever one is created.

A great opportunity exists here to adopt a scientific system of compiling crime statistics. This state has many advantages which

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6For a penetrating analysis of the value and use of statistics, see D. S. Thomas, *Statistics in Social Sciences* (1929) 35 Am. J. of Soc. 1. The author states that statistics is the next best (to controlled laboratory experiments) "means of evaluating variables," but warns us that "there is no magic in the use of statistical methods" p. 2.
should encourage immediate, adequate support of this movement. Other communities have experimented for many years and at great expense, with various types of statistics, and the expert can now speak authoritatively regarding this subject. We may now take advantage of this research. Furthermore, the youth of the state, and the comparatively small population make it possible for an expert statistician to compile not only accurate but also comprehensive, complete data and reports. The need for this is great. George W. Wickersham in his speech to the American Bar Association last year, referring to the difficulties then confronting the National Commission on Law Observance and Enforcement, stated:

"On the threshold of such an inquiry as this, one naturally would turn first to the available statistics of crime. Here we found, what has confronted all other bodies and agencies that have entered this field, namely, a lack of systematic, comprehensive nation-wide or even state-wide statistics. A special committee on Law Enforcement of this Association, reported in 1923, that its work was impeded by the same lack.

"Throughout all our work," said that Committee, "we have been greatly hampered by lack of reliable official information. It still remains true, as stated in our former report, that the United States is the only great civilized country which does not collect and preserve its criminal statistics."

Tremendous difficulties result from present haphazard methods of keeping criminal records. Uniformity is essential if the future is to profit from past experience. Various organizations have developed uniform methods of keeping records. Accurate records of the various crimes, where and when committed, by whom and similar information is an essential prerequisite to a scientific treatment of crime.

(3) A Crime Survey

No survey of crime or of administration of the criminal law in this state has come to this writer's attention. As many well informed scholars, and notably Dean Pound, have suggested, practically nothing is known about the actual operation of the law. With considerable propriety the lawyer is accused of losing his perspec-
tive amid the maze of technicalities and rules in books. The layman, unaffected by professional tradition or bias is concerned with the way the law affects him, i.e., with the operation of the law, especially as it touches his interests. How much is known about the effect of legislation; of any of the rules of law; of the amount and types of litigation; what types of persons are litigants; what conflicts of interests terminate in the courts; what proportion of conflicts are settled; what is the net result to litigants, etc.? The epoch-making Missouri Crime Survey has shown the importance of such an inventory. The recent Illinois Crime Survey has presented materials, analysis of which has already brought improvement in several directions. Many states have undertaken surveys of greater or less extent. In Oregon a large sum was recently appropriated to make a survey. The Institute for the Study of Law of Johns Hopkins University has completed a study of the Maryland courts, and is conducting a very extensive survey of administration of the law in Ohio, towards which a group of business men in Ohio have recently contributed $150,000. The National Commission on Law Observance and Enforcement has undertaken, with the cooperation of a number of law schools, to make a thorough survey of the administration of the law in the federal courts. A survey will objectify procedure, administration, law and conditions in general. Together with valid criminal statistics, it will afford a basis for arriving at competent decisions regarding many vital problems.

(4) The American Law Institute Proposed Code of Criminal Procedure

Although it is hardly a phase of social science (except in so far as law itself is a social science) the work of the American Law Institute affects our problem very directly. The Code of Criminal Procedure drawn by experts of national reputation has appeared in final form. It is being studied everywhere and an analysis of it should be made here by a group of judges, lawyers and teachers. All of the restatements of the American Law Institute are of abiding value, and the bench and bar will be abundantly rewarded for participating actively in this work. The Code of Criminal Procedure is the only one which the Institute recommends for adoption by the various state legislatures. Uniformity of criminal procedure is so essential in our federation that serious thought should be given to the recommendation.

(5) The Juvenile Courts

Are the juvenile courts organized on a scientific basis, keeping accurate, uniform and detailed records, and making use of the data developed by social scientists? The writer knows of no comprehensive study of juvenile courts in North Dakota. Yet the juvenile court is one of the greatest American contributions to the modern world. The juvenile courts should be used not only to deal with delinquent children after they are summoned into the court but also before this critical stage is reached. In cooperation with the psychiatrist and the social worker, the court officials should coordinate their efforts with those of the parent, the teacher and other persons strategically located with reference to the child to the end that social maladjustments may be discovered and cared for in their inception. A serious injury or a death caused by a child arouses the interest of the community. Frequently it appears that the offender is a child with a record of delinquency, and it is then realized that adequate institutionalization might have removed the maladjustment and saved life.

Mr. Alfred Bettman, an expert employed by the National Commission for Law Enforcement, after a comprehensive study of twenty-nine surveys, made the following significant observation:

"'habitual adult offenders, that is, those who commit crime as a mode of life or with some degree of frequency, as distinguished from the occasional offender who commits the occasional crime of impulse or passion, normally and usually begin their habits of delinquency or tendencies toward anti-social conduct in childhood, youth and adolescence. Consequently, if we assume that the prevention or reduction of criminal conduct is the object of society's law enforcement agencies and administration of criminal justice, the juvenile offender is the one upon whom the emphasis of attention needs to be placed, he offering the best opportunity to stem or divert the tendencies toward habitual crime'."

Fortunately, the juvenile court is relatively free from a traditional body of procedural rules and, if adequately utilized can be

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11 For studies of juvenile delinquencies in Grand Forks, see J. M. Reinhart, Juvenile Delinquency in a City of 18,000 (1928) 2 Dak. L. Rev. 233; J. M. Reinhart and Fowler V. Harper, Social and Ethical Judgments of Two Groups of Boys—Delinquents and Non-delinquents (1930) 21 Jour. of Crim. Law and Crim. 364; and for a competent analysis of the whole problem from a psychological viewpoint see Healy, Branner, Taylor and Murphy, Reconstructing Behavior in Youth.

made invaluable to the community. The problem is receiving national attention. Dr. William A. White, a psychiatrist of international reputation, in urging the American Bar Association to marshal its forces in order that courts may become agencies of greater social utility, remarks:

"Perhaps there is no better example (of proper utilization of a social institution) than the Juvenile Court, which has entered the field of penology and boldly cast aside all the usual methods of procedure and developed a program in absolute contradiction to the established traditions, inasmuch as it does not use its machinery for fastening a crime upon someone and then meting out a seemingly appropriate punishment but its whole endeavor is to find what is wrong in the situation that develops as the result of its inquiry into the nature of some overt act that has brought the child before it, and then, with all available facts and the results of a careful study to go on, it tries to apply a remedy."  

We have had presented the point of view of an expert who drew his conclusions from a careful consideration of an enormous amount of data. In checking the careers of the adult criminal, he was struck by the frequency of delinquency during youth. Dr. White's viewpoint is that not only of the doctor and the psychiatrist, but also of the well informed layman. Finally, the conclusions drawn from a comprehensive study of juvenile courts throughout the country are worthy of deep consideration:

". . . 'The community must take upon itself the responsibility for the child's social maladjustments in the community, whether they arise in home, in school, in industry, in recreation, or elsewhere. The community must also detect and treat early symptoms of maladjustments and other difficulties in the child's physical, mental, or moral development.' . . . 'In order to make the preventive and constructive work really effective, the cooperation must be translated into a community movement, which forces back the responsibility upon all social groups and agencies.' . . . 'It is the duty of the juvenile court to see that the maladjustments in family life which produces juvenile delinquency and other abnormalities is reached before conditions get so bad that the children or the family are brought to court.'"

14 For an excellent study pointing in the same direction see DR. S. GLUECK, 500 CRIMINAL CAREERS.
15 HERBERT H. LOW, JUVENILE COURTS IN THE UNITED STATES.
While the early institutions were generally called "Psychopathic Institutes," the more recent institutions are mostly entitled "Child Guidance Clinics." Secondly, the emphasis of most of these clinics is laid on community service rather than on service to juvenile courts only as in the past. It soon became evident that work with children who present behavior problems would be more effective if the problems were recognized and dealt with before the behavior had become so serious as to necessitate some form of court action. This means that it became increasingly necessary for the psychiatric clinics for children to establish direct contacts with public schools, with social agencies and with homes.

Any efforts directed to organization of the juvenile courts along lines suggested by the best modern investigators will amply repay the community, and any study or survey which carefully analyzes existing machinery will be an invaluable prerequisite to the solution of the problem.

(6) Psychiatry

Able psychiatrists and lawyers have been cooperating for a number of years with a view to determining the value and application of psychiatry to the improvement of criminal justice. The state of Massachusetts has recently adopted a far-reaching procedure, which is aptly described by Dr. Winfred Overholser as follows:

"... This law provides that certain classes of felons shall be examined before trial by psychiatrists appointed by the Department of Mental Diseases. The essential features of the law itself are included in the following quotation: 'Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court of the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney, and to the attorney for the accused.'"

"... The examiners are impartial, being retained by neither the district attorney, by the defense, nor by the court. The
report is available to all parties to the case, and the examining psychiatrists may be summoned into court by either side to present the results of their examination if the findings are desired as evidence." . . . "Fully as important as the impartiality of the report, however, is the fact that this examination is a routine one. It is applicable to certain groups regardless of whether or not they are suspected by any one of suffering from mental disease or whether their counsel intends to resort to the 'defense of insanity.' The examination is made without any presupposition or subconscious desires as to what the examiner shall find." . . . "One result of this law has been that the duels between experts on opposing sides have been almost entirely eliminated in criminal cases. In the last six years there have been almost no criminal cases where the spectacle has been presented of experts arrayed on either side, and giving conflicting testimony. The courts and the district attorneys, recognizing the impartial character of the report, have shown a most encouraging willingness to accept the findings and to abide by them. By making comprehensive, clear, and non-technical reports, psychiatrists have had a splendid opportunity to present to the courts and district attorneys some of the principles of the psychiatric point of view."

To those who are apprehensive of wholesale findings of "insanity" Dr. Overholser states:

". . . In view of the loosely made claims of some who are not familiar with the facts that psychiatrists if given their own way would find all offenders psychotic or mentally defective or psychopathic, it is of interest to note that of the entire number examined (two hundred and ninety-five), only twenty-one per cent were diagnosed as either insane, mentally defective, or as psychopathic personalities." 17

It is not pretended that the psychiatrist and the lawyer see all problems eye to eye. The purpose of the law to act as a deterrent is frequently ignored by the doctor who is concerned only with his patient. Yet the psychiatrist has accumulated a considerable amount of evidence to support his position. 18 In this regard, the report of the Committee appointed by the American Psychiatric Associa-

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16 19 Jour. of Crim. Law and Crim. 80.
17 19 Jour. of Crim. Law and Crim. 82.
18 For a competent study, see Dr. S. Glueck, MENTAL DISORDERS AND THE CRIMINAL LAW.
tion to formulate a statement of the position and recommendations of that Association deserves careful consideration.\textsuperscript{10}

In so far as individualization of punishment is opposed to deterrence, a great many people will feel that the aims of the psychiatrist and the lawyer are irreconcilable. However, present views are historical and subjective. No one would exclude valid information from the law. Future studies in criminology may determine

\textsuperscript{10}"The committee recommended that the American Psychiatric Association should advocate the following:

"(1) Types of legislation such as the recent Massachusetts enactment and the expert testimony bill of the American Institute for Criminal Law which put the psychiatrist in a position of counselling the legal authorities as to the disposal of social offenders, implying the development of the necessary machinery (clinics, court of psychiatrists, etc.).

"(2) The following proposals of The American Institute for Criminal Law and Criminology with respect to trial procedure:

(a) 'That the disposition and treatment (including punishment) of all misdemeanants and felons, i.e., the sentence imposed be based upon a study of the individual offender by properly qualified and impartial experts cooperating with the courts.'

(b) 'That no maximum term be set to any sentence.'

"(3) The court appointment from a qualified list, of the psychiatrists testifying in regard to the mental status, mechanisms, or capabilities of a prisoner, with opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds.

"(4) The elimination of the use of the hypothetical question and the terms 'insane' and 'insanity,' and 'lunacy,' and the exemption of the psychiatrist from the necessity of pronouncing upon concepts of religious and legal tradition in which he has no authority or experience, such as 'responsibility,' 'punishment,' and 'justice.'

"(5) The permanent legal detention of the incurably inadequate, incompetent, and anti-social offenders irrespective of the particular offense committed, and the development of the assets of this permanently custodial group to the point of maximum usefulness within the prison milieu, industrializing those amenable to supervised employment, and applying their legitimate earnings to the reimbursement of the state for their care and maintenance, to the support of their dependent relatives, and to the reimbursement of the persons injured by their criminal activities.

"(6) The release of prisoners upon parole or discharge only after complete and competent psychiatric examination with findings favorable for successful rehabilitation, to which end the desirability of resident psychiatrists in all penal institutions is obvious. (Practically identical with another of the proposals of the American Institute).

"(7) The codification of the commitment laws of the various states. 'Insanity' has come to mean nothing but certifiability, i.e., the social desirability of enforced hospitalization. It seems quite unnecessary to have a score of different methods for determining the basis of this step.

"(8) The teaching of courses in criminology in both law schools and medical schools by persons trained in both criminal law and criminal psychiatry." 19 Jour. Crim. Law and Crim. 376.
whether and to what extent deterrence is a fact. In the meantime, a careful division of function between expert and jury chiefly with reference to "insanity" and "responsibility" should permit a utilization of psychiatry consistent with contemporary conceptions in the criminal law.20

Significant indeed was the attitude and action of the American Bar Association with regard to psychiatric facilities, when at its annual meeting in Memphis in 1929, it unanimously adopted the following resolutions:

"I. Resolved that the American Bar Association go on record as stating the following matters to be desirable:

"1. That there be available to every criminal and juvenile court a psychiatric service to assist the court in the disposition of offenders.

"2. That no criminal be sentenced for any felony in any case in which the judge has any discretion as to the sentence until there be filed as a part of the record a psychiatric report.

"3. That there be a psychiatric service available to every penal and correctional institution.

"4. That there be a psychiatric report on every prisoner convicted of a felony before he is released.

"5. That there be established in each state a complete system of administrative transfer and parole, and that there be no decision for or against any parole or any transfer from one institution to another, without a psychiatric report.

"II. Resolved that Criminal Law Section recommend to the American Bar Association that the various state and local bar associations be requested to give consideration to the recommendations in resolution 'I' as a part of their programs during the coming year, and for this purpose to secure the cooperation of their respective state and local medical associations.

"III. Resolved that the Committee on Psychiatric Jurisprudence be continued for further study of this field, in cooperation with Committees from the American Psychiatric Association and the American Medical Association

20 The American Law Institute's Code of Criminal Procedure provides (sec. 318): "Whenever on a prosecution by indictment or information the existence of insanity or mental defect on the part of the defendant ... becomes an issue ... the court may appoint one or more disinterested qualified experts, not exceeding three to examine the defendant. ... The appointment of experts by the court shall not preclude the state or defendant from calling expert witnesses to testify at the trial."
and that it be empowered to adopt such means as in its judgment are best suited to effectuate the purpose of these resolutions.21

Again, at the meeting of the American Bar Association last year, the matter was reported upon by the committee; continued cooperation with the medical and psychiatric associations was approved.

The psychiatrist has amply demonstrated his value in assisting the courts to determine the proper disposition of cases, the degree and type of punishment, institutionalization, hospitalization, probation and parole. Moreover, within the various institutions in some states data are being gathered by the psychiatrist and other experts which will not only make human salvaging possible but will lead, also, to the prevention of countless social maladjustments.22

Thus the social scientist offers hope that the techniques he has developed and the information he has acquired will some day be the basis of a criminology which will be potent to control the social organization scientifically to the end that crime and maladjustment, if not entirely prevented, will be recognized in its incipient stage and effectually eliminated at that time.

22 A committee consisting of Judge Andrew Bruce, Dean Albert Har-no, and Professor E. A. Burgess, appointed in Illinois in 1927 to make a study of the operation of the indeterminate sentence, and of parole reported as follows:

"In 1924 the routine examination of prisoners in the houses of correction (county penal institutions) was commenced by the Department of Mental Diseases. In these cases a complete social history is obtained and a physical examination and psychometric test are made. The prisoner is then examined by a psychiatrist. Recommendation in each case was made and forwarded to the Department of Correction, which attends to the follow-up of suitable cases. Copies of the report are also sent to the Commission on Probation and are available to the courts of the state should the prisoner again be arraigned. These reports in addition to giving a psychiatric diagnosis contain much information which is of value from the social point of view and are of considerable help to the courts and probation officers in understanding the factors of the defendant's delinquency. They are being used in increasing numbers and their possibilities are being appreciated." 19 Jour. Crim. Law and Crim. 83.

"The Committee wishes, at this point, to recommend the introduction of a trained person who will gather a complete, written case-history of all the available data within the prison or reformatory, about the individual parolable inmate. Such history would supplement and vitalize the formal record, which loses every possible utility when it remains in prison or in the institution instead of being in the hands of the supervisory office or agent who has the problem of rehabilitation." 19 Jour. Crim. Law and Crim. 223.
We have been interested in this paper, for the most part, in commenting upon certain of the contributions of social science and especially upon various techniques and methods pertinent to the administration of the criminal law. The techniques referred to have been experimented upon and applied for a sufficiently long period of time in such a vast and varied number of types of work that their utility has been amply demonstrated. While there is and undoubtedly will be for some time, considerable scope for critical analysis of the various techniques and methods used, we have here chosen the role of the advocate, suiting our product to the need of the hour, as it appeared to us.

We have accordingly ventured to suggest that the time is especially opportune to undertake a careful, scientific analysis of the administration of criminal justice in North Dakota. Of special importance are:

1. Adequate methods for forming an intelligent public opinion regarding crime and the administration of the law;
2. Criminal identification;
3. Statistics;
4. A crime survey;
5. The American Law Institute proposed Code for Criminal Procedure;
6. Juvenile courts; and
7. Psychiatry.

Law and culture are intimately interwoven; enlightenment has always influenced and improved the law. Men have become conscious of this process of late, and are turning definitely to the social sciences to provide the information and the methods, to furnish the light and point the way, whereby a more adequate justice may be achieved. The above are only a few of the measures which will accelerate the process.

Jerome Hall.

For a thorough consideration of the problems of method see, Stuart A. Rice, Methods in Social Science.