

1939

## Forum Juridicum: Recent Penal Legislation

Jerome Hall

*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Criminal Law Commons](#), [Law Enforcement and Corrections Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Hall, Jerome, "Forum Juridicum: Recent Penal Legislation" (1939). *Articles by Maurer Faculty*. Paper 1373.  
<http://www.repository.law.indiana.edu/facpub/1373>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

# Forum Juridicum

## RECENT PENAL LEGISLATION\*

JEROME HALL†

### I

Between January, 1937, and April, 1938, the legislatures of forty-seven states as well as the National Congress met in regular and special sessions. An avalanche of penal legislation resulted, and it is no small task to assimilate and analyze it. For no penal law "just happens." Behind every new law, even every seemingly minor amendment, one may assume that experience, economic interest, moral ideas, propaganda, and deep-seated emotional reaction have been at work, molding the representatives of the public will, in order that that will may itself be directed.

The first noteworthy development is the continued broad expansion of the penal law concomitant with ever-increasing state activity. Pure Food Laws; Unfair Practices Acts dealing with unearned discounts, concealed rebates, and the like; the expansion of taxation; requirement of ante-nuptial physical examination (Michigan and Illinois); the Basic Science Acts establishing higher standards for practitioners of the medical arts (Colorado, California)—these are but a very inadequate index of either the quantity or the inclusiveness of current penal legislation. Control of motor vehicles, alcoholic beverages, and gambling present perennially unsolved problems still met by enactment of a mass of stereotyped laws.

Perhaps most important as regards expansion are the nationwide laws on unemployment compensation, old age assistance and other social security measures, penalizing violation by employers and applicants and thus extending potential penal sanctions to an enormous area of the population.

Considerable federal legislation also carries with it the sanction of the criminal law. Thus in such varied legislation as:

---

\* This paper was part of the report of the Committee on Current Developments, and was submitted to the Section of Criminal Law, American Bar Association, on July 28, 1938.

† Professor of Law, Louisiana State University.

provision for loans to farmers (H. R. 1545), regulation of interstate commerce in bituminous coal (H. R. 4985), with reference to certain fixing of fees in receivership, bankruptcy or reorganization proceedings (S. 2849), the further installation of safety appliances by carriers (S. 29), the elimination of unsafe and unsanitary housing (S. 1685), the impersonation of officers and employees of government-owned and controlled corporations (S. 2381), as well as in other wide-reaching national legislation, violation is a penal offense.

This expanse of criminal law is of the utmost importance to the Bar as well as to the community at large. The wisdom of attaching penal sanctions to an ever-increasing range of legislation need not be here considered. But the immediate consequences for the Bar must be noted. First, it seems inevitable that many business and professional men and their various forms of organization will, in greatly increased numbers, find themselves at the bar of criminal courts. Second, social security legislation and legislation affecting farmers and laborers will produce like results for large numbers of the lower-middle and underprivileged classes. It seems probable that the practice of criminal law will be greatly enlarged. The advantages to the Bar, apart from financial ones, are apparent. On the one hand, business men and corporations will consult their regular counsel (who have hitherto refused criminal cases), who will need to provide proper defense. On the other hand, the young attorney will find his services more frequently called upon not by habitual but unsuccessful criminals, but by the poor and the maladjusted. The need for improvement of legal aid services should be considerable; but apart from that the above tendencies in the criminal law may well transform the practice of that law. What the exhortation of scholars and other well-meaning but ineffectual persons has failed to do, that is, to raise the standards of the practice of the criminal law, may well be done by changed social and economic conditions and the laws designed to cope with them. Can anyone aware of the status of the criminal bar in England and on the Continent, as well as its place in this country prior to 1875, doubt the beneficent effects in that regard that may well be anticipated?

From the quantitative growth of the criminal law, we pass to a number of striking, particular developments. The outstanding one since January, 1937, has been the adoption of the four-point legislative program of the Interstate Commission on Crime concerning fresh pursuit, extradition, out-of-state wit-

nesses, and supervision of out-of-state parolees and probationers, together with compacts to effectuate the last-named objective. By April, 1938, a majority of the states had passed one or more of the uniform acts on the subject. Such cooperation by states must be gratifying not only to those who in years past have despaired of wide improvement in criminal law, but also to those who believe that the individual states must remain the focus of law enforcement. For it is apparent that, given an active organization of competent persons, *inter-state* cooperation is entirely practicable. What the results of such wide adoption of the highly publicized four-point program will be remains to be discovered. Certainly the Interstate Commission on Crime could render no greater service than sponsorship of research programs designed to determine the actual working out of the laws whose adoption it advocated so enthusiastically.

Of equal, and, indeed, in some ways of greater significance, are the laws passed in the interests of labor. The lead has been taken by Pennsylvania and New York: strong restriction of unfair labor practices, prohibiting threats against employees who refuse to sign company petitions, prohibiting any firm or person not directly involved in a strike from recruiting or offering to secure employees to fill the places of strikers, with sharp penalties for violations, are among the new Pennsylvania laws. Wisconsin, too, has established a Labor Relations Board, interference with which is penalized. In Pennsylvania industrial police may not carry weapons except when on duty; and, when off duty, the weapons must be left at the place of employment. In Utah, police officials may not deputize employees during a strike or lockout. Utah established regular pay-days; New Jersey limited the hours of employment of women; and Pennsylvania not only established a forty-four hour week but also set up minimum wages for women and children. New York, Illinois and California passed far-reaching laws protecting labor, setting up or supplementing the functions of Labor Boards, and establishing minimum standards of wages and hours of employment. A number of states, including Michigan, Indiana, Maryland, and Connecticut forbade the sale or purchase of convict-made goods—legislation also inspired by labor organizations. Some of these acts are broader than others. They apply to “use” as well as sale or purchase; they include local convict-made as well as out-of-state convict-made goods. New York legislated likewise with reference to goods produced by child labor. Michigan forbade the leasing out of convict labor.

At least two states, Washington and Oregon, repealed their Criminal Syndicalism acts, the latter state substituting prohibition of a conspiracy to commit a felony. That the advancement of labor interests was not without exception may be noted from the Vermont act making the "sit-down" strike criminal.

Perhaps the most noticeable development in crimes against the person is provided by numerous statutes on kidnaping. Connecticut, Colorado, Idaho, South Dakota, Nevada, South Carolina, Georgia, New Mexico, Arkansas, Ohio, and California are among the states that modified their laws on this universally abhorrent offense. The Lindbergh case provided the direct impetus, but experience has brought lessons which are visible in the current session laws. Although maximum penalties have been prescribed for the most serious cases (e. g., Georgia changed the penalty from four to twenty years imprisonment, to death), the statutes generally show flexibility—for example, the capital penalty is not applied where the victim was released unharmed. The statutes also cope with extortion, possession of ransom money, and assistance of various sorts. In Connecticut, kidnaping is punishable like murder, but proof of premeditation is not required. And in South Dakota no pardon can be granted in cases of conviction of kidnaping or lesser related offenses, except where the convicted person is innocent.

Another development of less prominence but of much more importance, is modification of laws concerning sex offenses (e. g., Washington, Michigan, California). More stringent penalties are generally applied. And in Illinois, persons convicted of sex offenses are to be segregated. In many respects treatment of sex offenses is most unsatisfactory. The press of the country seems deliberately to play upon the deepest instinctual fears of the community; the consequent hysteria is hardly conducive to sound analysis. From rape to prostitution, sex offenses present the least adequate part of the criminal law. They call insistently for careful analysis by courageous scholars.

A further development, as regards treatment, concerns the continued adoption of the use of lethal gas as the means of execution. California, Missouri, and Oregon are among the states that have recently made this change; and the National Congress has provided (H. R. 2705) that the manner of infliction of the death penalty shall be the same as that in the state where the sentence is imposed.

A good deal of interest is being shown in control of narcotics, and several states (Minnesota, Arkansas, Colorado, Nevada, and Missouri) have adopted parts or all of the Uniform Narcotic Drug Act. Restriction of growing marijuana is especially to be noted; and, most important is the new federal statute (H. R. 6283), which considerably increases the penalties for repeated selling, importing or exporting of narcotic drugs.

That progress in invention continues to enlist the aid of the penal law is apparent from new legislation requiring the installation of safety glass in all automobiles, and regulation of trailers and aircraft. A Maine statute prohibiting hunting from an aeroplane shows the possibilities.

Among the most significant changes in criminal procedure are: the requirement to file advance notice of intention to plead insanity (Oregon), the use of alternate jurors in homicide cases (Wisconsin), waiver of jury except where the penalty is capital (New York), the use of the summons instead of the warrant in misdemeanors where the judge believes the accused will appear (Indiana), the limiting of venue in newspaper libel cases to the county where the paper was printed (Illinois), and the right of husband and wife to testify against each other (Illinois).

Among the more important developments in administration is the organization of inclusive departments of justice or correction to integrate and coordinate large areas of law enforcement work (Maine, Michigan, South Dakota, Wisconsin). Such centralization within states has long been advocated; it appeals to an urge towards simplicity; but there is no actual knowledge available as to resulting advantages or as to where the boundary had best be drawn. Definite progress is seen in Colorado, New Hampshire, and Oregon where provision was made for remuneration of counsel appointed to defend indigent persons. In Oregon, the fees are set by the statute, and they are small. More flexible are laws in other states which permit the judge to fix the fees. Provision is made, also, to defray expenses of summoning witnesses. Such legislation is helpful indeed, not only because it enlists more competent counsel and encourages them in their efforts, but also because it tends to eliminate some of the gross inequalities that prevail regarding criminal defense. It might be well worth considering whether the above plan does not have advantages over that of the Public Defender. Might not more consistently vigorous defense as well as enlistment of a relatively wide

range of competent counsel be an eminently worth while and attainable objective? In several states, notable changes have been made in the Juvenile Court Laws (Maine and Alabama) extending jurisdiction. Pennsylvania has set up an inclusive Family Court, transferring juvenile jurisdiction in Philadelphia to that court. Civil Service is being extended over police departments. Oregon requires work in penal institutions by all able-bodied persons, but no provision is made for compensation. Illinois requires that the sponsor of an applicant for parole shall not hold public office, and that the Board shall interrogate him to determine his fitness.

Each crop of session laws contains a number of rather curious specimens, sometimes quite worthy in their conception, as, for example, the exclusive use of white canes by blind persons. California forbade the bringing of indigent persons into the state. Washington provided that prosecuting attorneys shall henceforth be called "District Attorneys," and Georgia substituted "public work camp" for "chain gang."

Of special importance are provisions for research and revision of penal laws. The appointment of the Law Revision Commission of New York was the most notable event of recent years. In Pennsylvania, \$50,000 was appropriated to investigate procedure, prosecution, trial, probation and parole; in Rhode Island a Juvenile Court Commission was appointed to study the problem and propose a revision of the laws; in South Dakota a Code Revision Commission was appointed (appropriation \$50,000) to revise the entire code; in several other states (e.g., Illinois, Arkansas, Missouri, Oregon) committees of lawyers have been at work chiefly with reference to reform of criminal procedure. Yet the principal characteristics of such effort are their infrequency and the spontaneous nature of their organization. The states seem far from realization of the need for permanent research and revision commissions.

## II

As one surveys the flood of penal legislation enacted in little over a year in this country, numerous forces and agencies may be seen at work. Special groups—labor, propertied, social, police, welfare, and others are at work, including occasional organizations of specialists—bar associations, commissions, and other relatively disinterested persons—whose recommendations are not

infrequently ignored. Some changes in procedure and administration appear to grow from experience with antiquated forms together with pressure from newspapers and other opinion-forming agencies. Invention, the arts and crafts, add to material interests that are almost automatically brought within the protective arm of penal law. Atrocious crimes are the immediate creators of new legislation or of severer penalties. Economic changes or keener realization of economic need arising from the uncertainties of industrial activity impel wide-ranging efforts to attain security—implemented again by penal sanctions.

One perennial problem concerns draftsmanship—and the quality is most uneven. In some states, draftsmanship is a highly developed art, and clarity of expression joins careful analysis to provide laws which speak as they were intended to. In others, it is obvious that some of the objectives were overlooked and that others will never be realized because clouded in ambiguous language. As regards the amendment of laws, numerous divergent practices prevail. Some require reference back to a whole series of prior laws; others, though complete, do not indicate the changes made by the current laws; but some are both complete in themselves, and show, by italicizing or otherwise, just what the changes are.

So, too, it is apparent that many laws have been added to the books in utter disregard of existing statutes and case-law. They may satisfy pressure-groups but they are short-sighted and wasteful.

The problems of penal legislation, both as regards draftsmanship and as regards content, may be considered from two points of view. In a larger aspect, these problems are those of American legislation generally; in a narrower perspective, there are special problems posed by the particular characteristics of penal legislation or by certain emphasis given such legislation.

As to those factors which affect legislation generally, though they are most important of all, we need here to be brief. That it will not do to dismiss the question simply as one of personnel is becoming increasingly apparent. The legislator is a scapegoat upon whom is vented private and public wrath, partly as a tradition, partly by way of release of emotional drives that find a needed outlet. The fact is that the legislator, though not the ablest of citizens, is apt to be far above average in intelligence. If his product is not what it should be, there must be other more

cogent reasons. In addition to a carping public attitude, the salaries are so grossly inadequate as to deter our best potential candidates, and to stimulate indifference rather than interest. The legislative turnover is terrific. For example, from 1925 to 1935, over 60 per cent of the legislators of Indiana were men serving their first terms. During 1937, for the entire country, the average legislative session was ninety-one days; in Alabama the legislature meets for not more than fifty days once every four years. Technical assistance is rare; even where drafting bureaus and reference libraries have been established they operate sporadically.

Various remedies have been suggested: salaries adequate to make the public business of *primary* importance; a full-time legislature; full-time drafting and reference library bureaus; use of permanent research agencies; the Legislative Council, serving regularly throughout recess (see generally the January, 1938 issue of the *Annals of the American Academy of Political and Social Science*). The traditions of our bar are such that discounting legislation is commonplace. There is need to realize that such criticism is frequently not only unwarranted but may be fraught with no little danger—as will be seen if one considers carefully the various alternatives. Especially as regards penal law, there is need for the filtering process provided by free discussion. The attainment of an enlightened concensus may be slow, or never realized as fully as one might wish. But the problem is how to make the legislative process as intelligent as possible; how to implement its virtues. For the reason suggested, there is a world of wisdom in the epigram that “the expert should be on tap, not on top.”

And this leads, finally, to consideration of the more special phase of improvement of penal legislation. Lawyers who have interested themselves in penal legislation carry on a tradition established in this country by Edward Livingston, who, drawing his inspiration from Bentham, enriched our literature by his thorough-going analyses. Since Livingston, the legislative mill both in this country and in England has turned out such an abundant quantity of statute law that it is a fair conjecture that our criminal law is now more statutory than common. Widespread codification of penal law is but one evidence of this fact. By tradition, practice and necessity, then, the practitioner of criminal law is apt to be much more sophisticated than most of his brethren as

regards statute and code law. This expertness should be directed much more than it has been to improvement in draftsmanship.

For another reason the criminal law can aid the quality of legislation generally. For in this field legal scholars, criminologists and other researchers have been collaborating with practitioners for many years. There result not only attitudes that facilitate greater reliance upon expert help, but also the *abundant availability* of expert helpers.

In light of these traditions and advantages, current penal legislation is disappointing. Here is one field where mere enactment should be recognized for what it is—not supinely accepted as accomplishment of sought objectives. Just what effects have the laws had? What difficulties have courts, district attorneys, defense counsel, administrators, encountered? What experience have other states had? How may this experience be best utilized in drafting statutes? Until these problems are *studied with the greatest of care*, it is folly to decry existing routine formalities or their costly results. Here and there a commission is appointed to investigate and revise—one can count these wise endeavors almost on the fingers of one hand. There should be permanent research and drafting bureaus in every state; and those working in the criminal law field should be qualified to conduct scholarly researches into both social and legal problems. There should be a National Institute of Criminal Law and Criminology to carry on and cooperate in researches and revisions of law, which would act also as a national clearing house for information. For while power may better be localized, research can be centered to advantage. With such national and state organizations, one might with some confidence look forward to an end of ill-drafted, patchwork, penal legislation; to intelligent analysis of problems, to sound application of factual knowledge to competent draftsmanship, and to correct integration of new laws with the general structure of the old. The indications from ever-expanding penal legislation are that those interested in the criminal law will have increasing responsibility placed upon them. Their discharge of that responsibility is one of the most important problems of the day.