Indiana Criminal and Penal Legislation Respecting Women

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Recommended Citation

James, Daniel (1933) "Indiana Criminal and Penal Legislation Respecting Women," Indiana Law Journal: Vol. 8: Iss. 4, Article 2.

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The American cradle of the women's rights movement, so called, was New Harmony, Indiana. The man who furnished the impetus for that movement in its inception can be definitely named. He was Robert Dale Owen. Because of his belief in equality between the sexes he gave to women a voice equal with men in conducting the affairs of his colony. One of the first women attracted to New Harmony was Fanny Wright, the famous pioneer feminist and ward of Jeremy Bentham. She founded the first recorded women's club, the Female Social Society, in New Harmony in 1825, and was associated editorially with Owen in several publications which were extremely radical, for their time, on the question of women's emancipation.1

The first blow in an attempt to mold women's rights into the form of law was also struck by Owen. As a representative in the convention that drafted the Indiana Constitution of 1852, he began, early in the proceedings, a contest which lasted almost until the convention dissolved. He advocated only one simple provision for the constitution: that married women should be allowed to acquire and possess separate property and have it recorded.2 There was some tendency to try to laugh him down with the good humored toleration we accord those whom we believe to be a bit unbalanced on a particular subject; but when the success of his proposition assumed serious proportions, the debates became stormy and voluminous, with much quoting of poetry and scripture back and forth.3 His proposition failed to become a part of the fundamental law of the state, but his brilliant advocacy of it served to bring the evils of the old law

* Of the New York Bar.
1 *Boston Transcript*, Jan. 24, 1931, Magazine Section, p. 3.
to light, and gave the question of women's rights a vitality it had never before had.  

The fight was then carried to the legislature, and within the next three decades there were passed no less than twenty-three statutes gradually chiseling out legal capacities for women with respect to property.  The contest was for a long time confined to property rights alone; it is not until 1881 that we find any legislative reference to women's political rights.  It is not necessary here to trace the separate steps of women's struggle for freedom. It was slow and arduous, suffering many setbacks, and leading sometimes almost to violence.  

A restricted kind of educational advantages for women appears in the statutes earlier than women's rights. The first legislative pronouncement appears as early as 1806, in the second session of the First General Assembly of Indiana Territory. In an act establishing Vincennes University (the money for which was to be raised through lotteries) it was provided:

"That the said Trustees as soon as in their opinion the funds of the said institution will admit are hereby required to establish an institution for the education of females."

The first women's independent educational institution to be established, however, was the Monroe County Female Seminary,

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4 A group of Indiana women in 1851 presented Owen with a silver pitcher for his "true and noble advocacy" of their rights. Boston Transcript, ubi supra, note 1.

6 Rev. Stat. 1852, Vol. i, pp. 236, 250-251, 254, 505; Vol. ii, pp. 28-29; Acts 1853, Ch. 35; Acts '1857, Ch. 45, Ch. 46, Ch. 47; Acts 1859, Ch. 4, Ch. 141; Acts 1861, Ch. 102; Acts 1866, Ch. 65, Ch. 85; Acts 1867, Ch. 122; Acts 1869, Ch. 30; Acts 1873, Ch. 43; Acts 1875, Ch. 7, Ch. 73; Acts 1877, Ch. 54; Acts 1879 (Spec. Ses.), Ch. 44, Ch. 160; Acts 1881, Ch. 38, §§11, 38, Ch. 45, §§ 45, 122, 193-196, Ch. 60.

8 In 1881 a constitutional amendment was proposed to give women the vote. Acts 1881 (Spec. Ses.), Joint Res. No. 8. It does not appear again in the books.

7 The courts themselves, because of the dominance of the historical school's idea of the futility of legislation, retarded the movement very appreciably through rigid construction of emancipatory legislation. Pound, Interpretations of Legal History, (1923) 65.

9 Acts Ind. Ter., 1806, Ch. 5, § 13; Ind. Ter. R. L., 1807, Ch. 67.

10 Acts 1833, Ch. 32.
in 1833, where females were to be taught "any of the languages, sciences, fine arts, ornamental branches, general literature, and such other branches or departments of education, as the trustees may authorize." Thereafter there followed a number of similar incorporations, all of them private and most of them denominational institutions. The first one providing for coeducation was the Lawrenceburg Male and Female Institute, in 1849. In 1852 the legislature petitioned Congress for two townships of land for the support of an "Indiana Normal University for the education of females," in order "to fit our daughters, not merely for a business by which they may gain for themselves an honorable livelihood, but render most important services in the general education of the State." In 1866 a state normal school was established to which women were admitted at the age of sixteen and men at eighteen. The following year the first coed was allowed to enter Indiana University—the first state university in the United States to become coeducational. Women became "eligible to any office under the general or special school laws of this State" in 1881.

In view of this background of feministic leadership on the part of Indiana, the criminal and penal law of the states should show some repercussions in alteration of the common law treatment of female offenders. The woman in the common law has never been in the position of the woman under the early Roman law, who was answerable for her misdeeds only to him in whose manus or potestas she was. To be sure, there is Blackstone's often quoted statement:

"The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the

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11 The following twenty local laws each incorporates a female college or seminary: 1837, Ch. 55; 1840, Ch. 31; 1842, Ch. 35; 1846, Ch. 2; 1847, Ch. 22; 1848, Ch. 62, Ch. 54 and Ch. 319; 1849, Ch. 18, Ch. 188 and Ch. 265; 1850, Ch. 18, Ch. 37, Ch. 140, Ch. 234, Ch. 283, Ch. 303 and Ch. 341; 1851, Ch. 87 and Ch. 208.

12 Local Laws, 1849, Ch. 265. Two others followed within two years: the Lagrange Male and Female Seminary, Local Laws, 1850, Ch. 234; and the Laporte Male and Female Seminary, Local Laws, 1851, Ch. 87.

13 Local Laws, 1852, Ch. 22 (Joint Res.). Apparently nothing came of the petition.

14 Acts 1866, Ch. 36.


16 Acts 1881 (Spec. Sess.), Ch. 118.

17 Couch, Woman in Early Roman Law, (1894) 8 Harv. L. Rev. 39, 42.
husband: under whose wing, protection, and cover, she performs everything.\textsuperscript{18}

The common law, however, has never carried this doctrine very far into its disposition of criminal causes.\textsuperscript{19}

Criminal women have usually acquired a great notoriety,\textsuperscript{20} but except for prostitutes, which have seldom been effectively controlled,\textsuperscript{21} female criminals have never presented as serious a problem as their erring brothers, for they have not been as numerous.\textsuperscript{22} With women's emergence from the family group, however, they presented problems of social control which began to engage attention. Most of the instances, at least in modern

\textsuperscript{18}Commentaries, (1765) Bk. I, 442. This attitude was based upon a premise which went without argument: that women are of an intrinsic inferiority to men. See, e. g., Lecky, History of European Morals, (1869) Vol. ii, 379, 381-382, 387-388.

\textsuperscript{19}A seventeenth century writer, unknown, having established the identity of husband and wife, adds: "But let her bee of good cheare, though for the neere conjunction which is betweene man and wife, and to tye them to a perfect love, agreement and adherence, they bee by intent and wise fiction of the Law, one person, yet in nature & in some other cases by the Law of God and man, they remaine divers, for as Adams punishment was severall from Eves, so in criminnall and other speciall causes our Law argues them severall persons . . . ." The only doubt the author had of this position is that the word "person" applies to "any thing which hath reason," and women were not clearly within that definition. The Womans Lawier, (1632) 4.

\textsuperscript{20}E. g., some of the most vicious members of the early New York gangs were women. Asbury, The Gangs of New York, (1927) 29, 51-52, 64-65.

\textsuperscript{21}McCurdy, The Use of the Injunction to Destroy Commercialized Prostitution, (1929) 19 J. of Crim. L. and Criminol. 513; Lecky, op. cit., supra, note 18, at 299-301; May, Social Control of Sex Expression, (1931) 126, 132-133, 205-206.

\textsuperscript{22}The respective numbers of men and women felons who were inmates of penal institutions in Indiana during the first twenty-eight years of the present century are given below at five year intervals. The figures are taken from the Indiana Bulletin of Charities and Correction, May, 1929, p. 230.

<table>
<thead>
<tr>
<th>Year</th>
<th>Men</th>
<th>Women</th>
<th>Per Cent of Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>1759</td>
<td>46</td>
<td>2.54</td>
</tr>
<tr>
<td>1906</td>
<td>2043</td>
<td>52</td>
<td>2.48</td>
</tr>
<tr>
<td>1911</td>
<td>2170</td>
<td>61</td>
<td>2.73</td>
</tr>
<tr>
<td>1916</td>
<td>2621</td>
<td>53</td>
<td>1.97</td>
</tr>
<tr>
<td>1921</td>
<td>2143</td>
<td>46</td>
<td>2.10</td>
</tr>
<tr>
<td>1926</td>
<td>3473</td>
<td>73</td>
<td>2.05</td>
</tr>
<tr>
<td>1928</td>
<td>3992</td>
<td>80</td>
<td>1.96</td>
</tr>
</tbody>
</table>

Perhaps if total convictions instead of mere total inmates could be given, and if misdemeanants as well as felons could be included, the percentage
times, in which women have received separate treatment in the hands of the criminal law have been sexual crimes.  

II

DISCRIMINATIONS IN CRIMES AND PENALTIES

In certain instances the common law doctrine of identity of a married couple has saved the wife from criminal punishment for capital offenses.

“If a woman commit theft, burglary, or other civil offenses against the laws of society by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will.”  

of women would be larger. In New York in 1913, it was stated that the annual proportion of women among all persons who entered jails, workhouses, reformatories and prisons was twenty-three per cent. Davis, A Plan of Rational Treatment for Women Offenders, (1913) 4 J. of Crim. L. and Criminol. 402. Lecky (op. cit., supra, note 18, at 380), on the authority of a counsellor of the Imperial Court at Paris, says that male criminals are five times as numerous as females. According to figures in Prisoners in State and Federal Prisons and Reformatories (1931) issued by U. S. Dept. of Com., Table 1, p. 3, women constituted 3.78 per cent of all inmates in ninety-eight institutions on January 1, 1927, and 3.93 per cent on January 1, 1928. As to accepting statistics of total inmates as indicating any more than a very rough estimate of a general trend, see the caveat, ibid., p. 2.

There is indication also that the proportion of women among sex offenders is greater than among any other class of criminals. 43.66 per cent of all sex offenders, not including rape, who were received by state prisons and reformatories in 1927, were women. Prisoners in State and Federal Prisons and Reformatories, (1931) issued by U. S. Dept. of Com., Table 8, p. 15.

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24 Blackstone's Commentaries, (1765) Bk. IV, 28; see also, Erwin, Husband and Wife in the Criminal Law, (1895) 17 Crim. L. Mag. 269, 273-277. Compare: “It is not a defense, to a married woman charged with a crime, that the alleged criminal act was committed by her in the presence of her husband.” Cons. L. N. Y. (Penal), §1092. Also, “A married woman who commits an offense by the command or persuasion of her husband shall in no case be punished with death, but may be imprisoned for life or for a term of years, according to the nature of the crime; and in cases not capital she shall receive only one-half the punishment to which she would otherwise be liable.” The husband shall, “at the discretion of the jury, in capital cases be punished by death, and in other cases the punishment shall be doubled.” Com. Tex. Stat., P. C., 1928, Art. 32, 33. And if an accomplice in a crime stands in the relation of husband to the principal, he may be punished by as much as double the highest penalty for the offense. Ibid., Art. 75.
But the wife's responsibility for murder or treason was her own, even though she acted under coercion of her husband, for such acts, being against nature, were not to be committed by her even at his behest.\textsuperscript{25}

At common law, because of the marital relation, a woman could not be convicted of being an accessory after the fact for harboring her husband after he had committed a felony. A husband, however, would be guilty if he harbored a felon wife.\textsuperscript{26}

When the benefit of clergy came into such abuse that comparatively few men who were guilty of capital crimes actually suffered the penalty, it became necessary to extend the benefit of clergy to women, whether they could write or not, in order to equalize penalties. This concession to women was made during the seventeenth century,\textsuperscript{27} and thereafter, instead of being hanged for certain offenses, they were "burned in the hand and whipped, stocked, or imprisoned for any time not exceeding a year."\textsuperscript{28}

For the crime of treason men suffered an exceedingly cruel death, but women, as Blackstone explains with eighteenth century delicacy, could hardly be treated in the same way:

"For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other,), is, to be drawn to the gallows, and there to be burned alive."\textsuperscript{29}

There is a certain amount of miscellaneous sex discrimination apparent in the Indiana statutes in the definition of crimes and the fixing of penalties. Some of this can be explained on the basis of common law ideas. Thus, in 1816 it was provided that a man, married or unmarried, who cohabited with a married woman, or a married man who cohabited with an unmarried woman, was guilty of adultery, whereas a woman could be guilty only if she were married.\textsuperscript{30} This was simply a small extension

\textsuperscript{25} Blackstone, op. cit., supra, note 18, at 444; op. cit., supra, note 19, at 206.
\textsuperscript{26} "A woman cannot be accessory to her husband, insomuch as she is forbidden by the Law of God to betray him." Op. cit., supra, note 19, at 206; see also, Lush, Husband and Wife, (2 ed. 1896) 14.
\textsuperscript{27} 21 Jac. I, Ch. 6 (1623); 3 & 4 W. & M. Ch. 9 (1691); 4 & 5 W. & M. Ch. 24 (1692).
\textsuperscript{28} See Blackstone, op. cit., supra, note 23, at 369.
\textsuperscript{29} Commentaries, Bk. IV, 93.
\textsuperscript{30} Acts 1816, Ch. 33. In Connecticut such an offense is adultery only if the woman is married. Gen. Stat., 1930, Rev. § 6223. In some states if either
of the common law definition, which was framed to protect the husband from being defrauded into bringing up the illegitimate offspring of another, and to protect such property rights as he had in his wife. He could even kill another man caught in the act of adultery with his wife and yet be guilty only of manslaughter.

Many of the discriminations are hard to explain on any basis other than the probable feelings of the legislators. Thus, in 1818 when it was made an offense for a white person to have sexual intercourse with a negro, a penalty of a fine up to one hundred dollars was provided for a man found guilty; a guilty woman to be imprisoned for not more than ten days. A similar discrimination in penalties appears in 1821, when the penalty for adultery or fornication for men was set at a fine in any sum up to three hundred dollars; the penalty for women was imprisonment up to three months. This was equalized twenty years later. Again, for petit larceny the penalty provided in 1829 was: for men, fine and imprisonment in the state prison for so much and so long as the jury should determine; for women, a county jail sentence up to sixty days was imposed for


At common law, "adultery is sexual connection between a married woman and an unmarried man, or a married man other than her own husband." Hood v. State, 56 Ind. 263, 271 (1887).

May, op. cit., supra, note 21, at 211; Lecky, op. cit., supra, note 18, at 299, 365. As to the general inefficacy and futility of criminal statutes on fornication and adultery, see Lecky, op. cit., 298; Cairns, Sex and the Law in Sex in Civilization, edited by Calverton and Schmalhausen (1929) 200; May, op. cit., Ch. XIII. In England private, voluntary acts of normal sex expression are not punishable by criminal law. May, op. cit., 221, 225.

Blackstone, op. cit., supra, note 24, at 191-192. Thus also in Anglo-Saxon times the husband could exact physical retribution without being liable to the vendetta. May, op. cit., supra, note 21, at 60-61. Cf.: "Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated." Com. Tex. Stat., P. C., 1928, Art. 1220.

Acts 1818, Ch. 5, § 59.

Acts 1821, Ch. 23, § 6.

A three hundred dollar fine was prescribed for both sexes. Acts 1841, Ch. 104.
a first offense, and for subsequent offenses the same penalty as in grand larceny, which was equal for both sexes.\textsuperscript{37} 

The evils of imprisonment for debt were first relieved in favor of women, in 1835.\textsuperscript{38} This is reasonable in view of the fact that women at that time had little control over property and comparatively slight opportunity of earning. Imprisonment for debt for men was not abolished until seven years later.\textsuperscript{39} 

It was also felt that a man found begging outside of the county in which he lived should be deemed a tramp, and penalized for certain trespasses, whereas women were expressly exempted from punishment for leading that carefree life.\textsuperscript{40} 

There is one discrimination which one would be led to believe was caused by careless draftsmanship if it did not appear also in other states. In 1881 it was made a felony for a man to have carnal knowledge of an insane woman, knowing her to be insane.\textsuperscript{41} Obviously the social evil against which such a statute is aimed is not so much the harm which may be done to insane women as it is the burden on society of illegitimate, imbecile offspring. It should make no difference whether the man or the woman is the sane person. Whichever party is sane should be criminally responsible, and now is.\textsuperscript{42} One statute, however, that can be explained on no basis other than careless draftsmanship is that of 1905\textsuperscript{48} which is so worded as to make it possible for a brother to be guilty of incest with his sister, although the sister is guilty in no event. There can be no reason for the distinction. 

There are other discriminations in the statutes which are explicable as manifestations of a double standard of morality and the higher value in which the chastity of woman is held.

\textsuperscript{37} Acts 1829, Ch. 29, § 4.
\textsuperscript{38} Acts 1835, Ch. 39. Also: "No female . . . shall be imprisoned upon any order of arrest and bail, or upon an execution against the body." Acts 1881 (Spec. Ses.), Ch. 38, § 577.
\textsuperscript{39} Acts 1842, Ch. 55.
\textsuperscript{40} Acts 1881 (Spec. Ses.), Ch. 37, § 225; reenacted, Acts 1905, Ch. 169, § 637. To the same effect is Pa. Stat., 1920, § 21432.
\textsuperscript{41} Acts 1881 (Spec. Ses.), Ch. 37, § 17. See also, Mass. G. L., 1921, Ch. 272, § 5; Cons. L. N. Y. (Penal), § 2010 (1); Page's Ann. Ohio G. C., 1926, § 13025; Wis. Stat., 1929, § 351.06.
\textsuperscript{42} The inequality was adjusted by Acts 1905, Ch. 169, § 362, providing that a woman between the ages of eighteen and fifty shall be criminally responsible for having intercourse with an insane man. \textit{Cf.:} Gen. Stat. Conn., 1930 Rev., § 6277.
\textsuperscript{43} Acts 1905, Ch. 169, § 465.
Thus, in 1895, it was provided that whoever by publication “maliciously and falsely charges any female with want of chastity, shall be deemed guilty of criminal libel,” but such charges against men are not prohibited.\textsuperscript{44} Similarly, in 1905 it became a misdemeanor to use obscene language in the presence of women, although men’s ears are not so protected.\textsuperscript{45}

As respects capital crimes no discrimination for or against women has been made, although it was provided in 1881 that execution could be stayed until the birth of a child if the condemned woman were \textit{enciente} at the time of the sentence,\textsuperscript{46} and this provision has been carried down to the present time.\textsuperscript{47}

\section*{III
Criminal Laws for the Protection of Women}

\subsection*{1. Desertion and Non-Support}

In attempting to pass legislation which will cope with the evil of the deserting husband who does not support his wife the lawmaker is confronted with a delicate problem. On the one hand some kind of legal pressure must be brought to bear upon the offending husband, while on the other hand corrective measures in the form of fines or imprisonment may tend only to enhance the suffering of his wife and children, thus causing the law to defeat its own purpose.\textsuperscript{48}

\textsuperscript{44} Acts 1895, Ch. 45; reenacted, Acts 1905, Ch. 169, § 369. \textit{Cf.}: Com. Tex. Stat., P. C., 1928, Art. 1293; Act of Mar. 3, 1901, 31 Stat. 1323 (Dist. of Col.).

\textsuperscript{45} Acts 1905, Ch. 169, § 461. See also, Page’s Ann. Ohio G. C., 1926, § 13032. In New Jersey it is an offense to send an indecent communication to a female without her consent. Comp. Stat., 1910, p. 1763. Scandalous lewdness which by the eighteenth century had become a common law offense (May, \textit{op. cit.}, supra, note 21, at 171), is in Ohio by statute specifically directed against men for the protection of girls. Page’s Ann. Ohio G. C., 1926, § 12423-1.

\textsuperscript{46} Acts 1881 (Spec. Ses.), Ch. 36, §§ 299-302. This was no innovation upon the common law. \textit{Blackstone’s Commentaries}, (1765) Bk. IV, 394-395.

\textsuperscript{47} Acts 1889, Ch. 94; Acts 1905, Ch. 169, § 320. Massachusetts also has a special provision for the pregnant woman who is merely imprisoned. She may be given a permit to be at liberty or be discharged when “the best interests of the woman or of her unborn require.” G. L., 1921, Ch. 127, § 142.

\textsuperscript{48} See Gault, \textit{In Case of Family Desertion or Non-Support}, (1912) 3 J. of Crim. L. and Criminol. 496.
Indiana's first attempt to deal with the problem appeared in 1818, when it was provided that if a man deserted his wife, the overseers of the poor in the township could seize his property, if any, under court order, and support her therefrom. If he had no property he could be put in jail until he provided for her support, giving security therefor, or until he was otherwise discharged by the court. Under this statute the deserted wife did not have direct access even to her own property which had come to her husband through the marriage or through her; she could reach such property only through the overseers of the poor or by special act of the legislature. It was not until 1857 that she was given a right to use her own property, and then only if her husband was outside of the state. The statute was, that if any man, absenting himself from the state, abandoned his wife without making sufficient provision for her, the circuit court might authorize her to sell and convey realty and personalty which came to the husband by reason of the marriage, to collect debts due her husband, to receive payment for her labor and that of her minor children free from debts of her husband, to contract and to sue and defend in her own name as though she were unmarried. In the same year the courts were given power to order a sale of any property of a deserting husband for the support of his wife. In 1881, probably in order to make extradition possible, the legislature brought in the criminal element again in the form of a fine of ten to one hundred dollars for deserting a wife or children and leaving them a charge upon the county. This was reenacted in 1905, and again in 1907, with the exception that a husband should not be guilty who deserted his wife “for the cause of adultery, or other vicious or immoral conduct.”

It is obvious that none of the statutes thus far given will cope with the problem with any degree of efficacy. To give the de-

49 Acts 1818, Ch. 14.
50 See such a special act in Local Laws 1840, Ch. 75.
51 Acts 1857, Ch. 45.
52 Acts 1857, Ch. 47.
53 Acts 1881 (Spec. Ses.), Ch. 37, § 223. See Page’s Ann. Ohio G. C., 1926, §§ 13008-13010, where a husband is guilty of a criminal offense only for abandoning a child under sixteen or a pregnant wife.
54 Acts 1905, Ch. 169, § 635.
55 Acts 1907, Ch. 49. Compare Fla. Rev. Gen. Stat., 1920, § 5496, providing that a husband cannot be convicted of desertion and non-support when, at the time of desertion, he had sufficient grounds to have obtained a divorce.
sioned wife access to her husband's property is, in most instances, to give her nothing; for the deserting husband is not generally a man who owns property. To impose a fine upon the husband only deprives the wife of means which might have contributed to her support; to put him in jail only deprives her of the possibility of his earning a living. It has been said:

"The court that handles these cases should be a great probation institution with a group of trained officials at its disposal, with power to imprison at hard labor, the compensation for which should go to the family; with power also to forego commitment on condition that at stated intervals a specified sum be paid to a representative of the court for the support of the family concerned."\(^5\)

A suggested uniform act embracing the foregoing qualifications appeared in 1912,\(^5\) and was substantially enacted in Indiana three years later. The Indiana act\(^5\) provides that one who fails to furnish necessary food, clothing and medical attention for his wife or children shall be guilty of a misdemeanor, and shall be subject to a fine of not more than five hundred dollars, to which may be added a term in the county jail or workhouse for not more than six months. Upon conviction, however, the court may suspend sentence and put the defendant on probation for a period not exceeding two years, conditional upon his supporting his family, and may order him to pay a certain sum weekly to his wife. If the defendant is imprisoned, he may be put to work upon the roads at a salary of not more than one dollar per day, which shall be paid to his wife. An obvious improvement of the statute would be to authorize the court in its discretion to apply to the support of the wife and family funds realized from fines imposed upon the erring husband\(^5\) as it may now apply the amount of his bond when forfeited.\(^6\)

2. Bastardy

Bastardy statutes in Indiana have for the most part furnished remedies more of a civil than a criminal nature, the end in view being the support by the father of the illegitimate child. The only real reason for making the offense criminal is to render

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\(^5\) Gault, loc. cit., supra, note 48, at 497.
\(^5\) (1912) 3 J. of Crim. L. and Criminol. 618.
\(^5\) Acts 1915, Ch. 73.
\(^6\) See also Wis. Stat., 1929, § 351.30.
extradition possible. The territorial assembly first dealt with this problem by authorizing justices of the peace, in proceedings before them, to compel the payment to the mother of such lump sum as she might accept in full satisfaction, or in the alternative to charge the father with the maintenance of the child. In 1818 it was provided that if the putative father, upon being sued, confessed that he was guilty, he should be compelled to pay the mother such sum as she would be willing to accept in full satisfaction, and to give a bond to the overseers of the poor for support of the child. If the mother failed to sue, the overseers might do so, and the court was authorized to order him to provide support for the child. In 1875 the prosecuting witness was given authority to dismiss the suit after entering of record an admission that proper provision had been made to her satisfaction for the child. Two years later the penal element came into the remedy. It was provided that the court should make such order as should seem just for the maintenance and education of the child, payments to the mother to be annual. The defendant was to be required to give good freehold surety for the execution of the judgment, and upon default he was to be confined in jail. If at the end of twelve months he was still unable to comply with the order, he might be released by the court.

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61 Acts Ind. Ter., 1810, Ch. 33.
62 Acts 1818, Ch. 36. In New York the poor officers alone, not the mother, can prosecute the father or compromise with him. 41 Cons. L. (Poor), §§ 60-75; Commissioner of Public Welfare v. Chandler, 123 Misc. 201, 204 N. Y. S. 187 (1922).
63 Acts 1875 (Spec. Ses.), Ch. 4. In some states prosecution can be dropped only if the court or some officer on behalf of the public is satisfied that proper provision for support of the child has been made. E. g., Gen. Stat. Conn., 1930 Rev., § 5870; Mass. G. L., 1921, Ch. 273, § 17.
64 Acts 1877, Ch. 3.
65 The Ohio act provides also for cost of confinement and of prosecution. Page's Ann. G. C., 1926, Tit. IV, Div. VIII, Ch. 2.
66 There are a few variations in other states. In Massachusetts the court may revise its order for maintenance from time to time as circumstances or the welfare of the child may require. G. L., 1921, Ch. 273, § 14. In New Jersey the bastardy action may also be brought by “the person having the physical custody of the child.” Comp. Stat., 1930 Supp., § 18-39. Many states also have special criminal statutes for concealment of the birth of illegitimate issue. E. g., N. J. Comp. Stat., 1910, p. 1784; Wis. Stat., 1929, § 351.06.
3. Seduction

Seduction, another crime which by its very definition is aimed at the protection of women, appeared first, in a form closely approximating abduction, in the Laws of the Governor and Judges of Indiana Territory. The statute had three provisions: (1) It shall be a felony to "take any woman ... against her will unlawfully," and the act says that its purpose is the protection of women against being abducted as a means of securing their consent in marriage, the motive of the misdoers evidently being to obtain their property. (2) If any person abducts a "maiden or woman child unmarried, being within the age of sixteen years," against the will of the person in whose lawful keeping she is, he shall be subject to imprisonment for not over two years. (3) If any person shall take away and "deflower any such maid," or contract secret marriage with her, he shall be subject to imprisonment for not over five years "without bail or mainprize."

The modern statutory crime of seduction appears for the first time in 1847. The crime consisted of an illicit connection, under promise of marriage, with a female of good repute and less than twenty-one years of age. The penalty was a fine of not more than five thousand dollars and one to three years imprisonment, provided that the jury might substitute for the latter a jail sentence of from ninety days to one year if there were mitigating circumstances. The promise of marriage could not be established by the testimony of the woman unless it were "corroborated by other evidence, either strongly circumstantial or positive." The only alteration in the handling of the offense has been in the penalty. In 1852 it was made imprisonment of one to three years and a fine of not more than five hundred

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67 Compare the following English editorial comment: "In a fairly recent Bill a section was inserted, at the suggestion of certain feminists, to make seduction of a youth by a woman older than himself an offense, and thus give some colour to the equality principle, but, fortunately for our reputation for humour and common-sense, it was dropped. The spectacle of the young prosecutor giving evidence that the injury (?) was done to him without his consent would not have been edifying." (1929) 73 Solicitors' Journ. 696.

68 Acts Ind. Ter., 1804, Ch. 6, §§ 2-4.

69 Cf.: 3 Hen. VII, c. 2 (1487); 4 & 5 Ph. & Mar. c. 8 (1557).

70 Acts 1847, Ch. 95.
dollars, or imprisonment in the county jail for any term up to six months. In 1881 the maximum prison term was made five years, and the 1905 legislature added to the jail sentence a fine of not more than one hundred dollars.

4. Rape

In the statutes dealing with rape one element in the definition of the crime has remained constant throughout—sexual intercourse with a woman forcibly against her will. The variations have come in the penalties provided, and in that part of the definition of the crime which has to do with the age of the parties. These two elements of the crime have fluctuated very actively. The first statute on the subject was passed two years after Indiana became a state, prescribing the death penalty for rape as defined above, and for carnal knowledge of a woman child under the age of ten, and a penalty of thirty-nine to one hundred stripes for assault with intent to commit rape. In 1852 the age of consent for the girl was raised to twelve years, and there was a substantial reduction of the penalty, making it from two to twenty-one years in prison. Seven years later it was provided that anyone who was convicted of having had carnal knowledge of an insane female person other than his wife, knowing her to be insane, should be subject to a sentence of two to ten years at hard labor. In 1881 this was combined with a rape statute, similar to that of 1852, with a penalty of five to twenty-one years. The legislature of 1881 also defined what should constitute sufficient proof of the commission of the crime, and provided that the killing of a person in perpetra-

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72 Acts 1881 (Spec. Ses.), Ch. 37, § 87. In the same year the seduced woman was given a civil action for her own seduction. Ibid., Ch. 38, § 26.
74 Acts 1818, Ch. 5, § 49.
75 Ibid., § 66.
76 Ibid., § 67; reenacted, Acts 1821, Ch. 23, § 3.
77 At common law there was some doubt as to whether the age of consent should be ten or twelve. Blackstone's Commentaries, (1765) Bk. IV, p. 12.
79 Acts 1859, Ch. 62.
80 Acts 1881 (Spec. Ses.), Ch. 36, § 233; reenacted, Acts 1905, Ch. 169, § 243.
tion of, or attempt to perpetrate, rape should constitute first
degree murder.  

The latter provision appears again in 1929
with death as a penalty. In 1893 the age of consent was raised
to fourteen, and the minimum term of imprisonment reduced to
one year.

Twelve years later a new statute was passed defining the
crime as: (1) sexual intercourse with a woman forcibly against
her will or of a girl under the age of fourteen, and (2) sexual
intercourse of a man over seventeen with an insane or feeble
minded woman or with an inmate of a poor asylum, of the
Woman's Prison, or of the Industrial School for Girls. The
minimum sentence was raised to two years, and a proviso was
added that if the girl assaulted were under the age of ten im-
prisonment should be for life. The next General Assembly
raised the age of consent to sixteen and made the sentence of
life imprisonment apply if the girl were under twelve. In
1921 another rape statute was enacted, keeping the definition
of the 1905 act, as amended, except that the man's age is changed
from seventeen to eighteen, and with the rather significant
change that a woman may also be guilty of rape if she has an
unlawful sexual connection with a male child under sixteen. The
penalty was changed to a fine of not over one thousand
dollars and imprisonment of five to twenty-one years, with the
same penalty applicable to attempted rape. The life sentence
was retained if the offense were committed on a girl under
twelve. This comprehensive statute lasted but six years.

In 1927 the legislature passed a new act dividing rape into
first and second degrees. First degree rape is rape as defined
in the 1921 act, and carries a penalty of five to twenty-one years.
Second degree rape is defined as sexual intercourse with a female
under the age of eighteen and in such a way as not to constitute
first degree rape, that is, with a girl between the ages of sixteen

81 Acts 1881 (Spec. Ses.), Ch. 37, § 3.
82 Acts 1929, Ch. 54.
83 Acts 1893, Ch. 23.
84 Acts 1905, Ch. 169, § 361.
85 This act also provides a penalty for a woman who has an unlawful
connection with an insane man. See supra, note 42.
86 Acts 1907, Ch. 60.
87 Acts 1921, Ch. 148.
88 Compare note 67, supra.
89 Acts 1927, Ch. 201.
and eighteen, and with her consent. The penalty is fixed at one to ten years imprisonment.

The constant and haphazard vacillation shown in the statutory history of this crime is certainly cogent evidence that the

As between different jurisdictions at the present time the whole gamut of possible variations appears. The following table shows the crime in twelve jurisdictions picked at random.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Penalty for Rape—Forcible Sexual Connection With an Adult Woman</th>
<th>Age of Defendant</th>
<th>Age of Consent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Imprisonment up to 30 years.</td>
<td>No provision.</td>
<td>Sixteen.</td>
</tr>
<tr>
<td>Florida</td>
<td>Death or life imprisonment.</td>
<td>Statute abrogates common law age limit of 14 years and provides that jury shall determine defendant's capability to commit rape.</td>
<td>Ten.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Imprisonment of 5 to 21 years.</td>
<td>Eighteen.</td>
<td>If the girl is under 18 the offense is second degree rape; if she is under 16 it is first degree.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Imprisonment for life or for any term of years.</td>
<td>No provision.</td>
<td>Sixteen.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Fines up to $5,000, or imprisonment at hard labor up to 30 years, or both.</td>
<td>Sixteen, as to offense committed on girl under 12; otherwise no provision.</td>
<td>Twelve.</td>
</tr>
<tr>
<td>New York</td>
<td>Imprisonment up to 20 years.</td>
<td>Fourteen, unless, being under that age, defendant is proved to have physical capacity to commit rape.</td>
<td>Eighteen.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Imprisonment of 3 to 20 years.</td>
<td>Eighteen, as to offense committed on girl under 16; otherwise no provision.</td>
<td>Sixteen.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Fines of $1,000, and solitary confinement at hard labor, or simple imprisonment, up to 16 years.</td>
<td>Sixteen, as to offense committed on girl under 16; otherwise no provision.</td>
<td>Sixteen, but if jury finds girl under that age not to be of good repute for chastity, and to have consented, conviction shall be for formation only.</td>
</tr>
<tr>
<td>Texas</td>
<td>Death, or imprisonment for life or for any term of years not less than 5.</td>
<td>Fourteen.</td>
<td>Eighteen, provided that if she is over 15 the defendant may show that she is not of previous chaste character as a defense in consent cases.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Imprisonment of 1 to 30 years, provided that if woman is shown to be a prostitute the penalty shall be 1 to 7 years.</td>
<td>Age of incapacity not provided, but penalty for statutory rape is greater if defendant is 15 or over.</td>
<td>Eighteen.</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Imprisonment up to 30 years, or death penalty in the discretion of the jury.</td>
<td>No provision.</td>
<td>Sixteen.</td>
</tr>
<tr>
<td>England</td>
<td>Penal servitude for life or for not less than 3 years, or imprisonment with or without hard labor for not more than 2 years.</td>
<td>No provision.</td>
<td>Sixteen.</td>
</tr>
</tbody>
</table>
legislature has been acting in darkness—a darkness for which there is probably as yet no light. In their groping back and forth for age limits for the parties, the lawmakers should receive some assistance from medicine, psychology and allied sciences. As to fixing penalties for the crime, help will have to come from the science of penology, if it can be called a science. But even with the help of all the abstract scientific information in the world, the social ideals of the community in which the law is to operate will have a great influence on its content. It is probably also true that some of what has been done with this crime has been in direct response to unappealed, and hence unreported cases. The feeling of the average person about the crime of rape is simply that it is horrible and that something drastic should be done about it; and such a feeling constitutes just about all the material with which the legislator has to work.

(To be concluded)
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* Mr. Harding was chosen to replace Mr. Franklin G. Davidson of Crawfordsville who died September 27, 1932.