

## New York Anti-Lynching Legislation

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MARJORIE MOSS.

NEW YORK ANTI-LYNCHING LEGISLATION.—The Legislature of the State of New York during its last session joined an ever increasing list of states making lynching and mob violence crimes *sui generis*.<sup>1</sup> The words "lynching"<sup>2</sup> and "mob violence" have no technical significance as the offenses were unknown to the common law.<sup>3</sup> The authorities unite in interpreting it as the action of a group of persons in illegally inflicting punishment on a person either convicted or suspected of a crime.<sup>4</sup> In the United States lynching and riots are re-

<sup>21</sup> N. Y. PERS. PROP. LAW § 58 (this section was added by N. Y. Laws 1934, c. 574).

<sup>1</sup> N. Y. Laws 1938, c. 397, amending N. Y. PENAL LAW §§ 1390, 1391, 1392.

Section 1390: "Any assemblage of three or more persons which shall exercise or attempt to exercise by physical violence and without authority of law any power of correction or punishment over any person shall constitute a mob within the meaning of this article."

Section 1391: "Any act or acts of violence committed by a mob on the body of a person in custody of any peace officer, or suspected of, charged with or convicted of the commission of any criminal offense, which act or acts result in the death of a person, shall constitute lynching; provided, however, that lynching shall not be deemed to include violence occurring between members or groups of law breakers such as are commonly defined as gangsters or racketeers, nor violence occurring during the course of picketing or boycotting incidental to any labor dispute, and each and every person who is a member of a mob which commits such an act or acts of violence is guilty of lynching, and is punishable by imprisonment under an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the offender's natural life."

Section 1392: "Each and every person composing a mob, which mob shall commit an assault upon any person in custody of any peace officer or suspected of, charged with or convicted of the commission of any criminal offense, not resulting in the death of such person, is guilty of a felony and is punishable by imprisonment for a term not exceeding ten years."

<sup>2</sup> The word "lynch" derives its origin from a Virginia farmer named Charles Lynch, born in 1736, who lived in the vicinity of what is now Lynchburg, Virginia. Lynch was a man of considerable importance in his community and a member of the Virginia House of Burgesses. During the War of Independence the nearest trial court was some two hundred miles of frequently impassable and dangerous roads and rather than navigate this route Lynch prevailed upon his neighbors that they join him in dealing with the suspected criminals in a summary fashion. Shortly after the Civil War this method of trial was recalled and has since been in vogue throughout the country; WHITE, ROPE & FAGGOT (1929) c. V; State v. Lewis, 142 N. C. 626, 55 S. E. 600 (1906); WORDS & PHRASES, Vol. V, 4262.

<sup>3</sup> See State v. Lewis, 142 N. C. 626, 55 S. E. 600, 611 (1906).

<sup>4</sup> See Kirkland v. Allendale County, 128 S. C. 541, 123 S. E. 648, 650 (1924); State v. Aler, 29 W. Va. 549, 20 S. E. 585, 588 (1894); Bouvier's Law Dictionary, p. 287; Black's Law Dictionary, p. 742; 38 C. J. 328.

current to a degree exceptional among civilized states.<sup>5</sup> During the year 1938 there have been at least six instances of the invocation of lynch law in various sections of this country.<sup>6</sup> According to figures industriously gathered by the National Association for the Advancement of Colored People, 5,120 lynchings have occurred throughout this country during the years 1882 to date.<sup>7</sup> Lynchings have occurred in Alaska and all of the states with the exceptions of New Hampshire, Massachusetts, Rhode Island and Vermont.<sup>8</sup> In the face of this appalling disregard for due process and this constant menace to law and order during all of these years of promiscuous flaunting of the law, less than one per cent of the offenders have been punished, or only twelve instances in which convictions have been procured from prosecutions for these lynchings.<sup>9</sup> The primary reason for this abominable record doubtlessly is that the action of a mob ordinarily reflects a strong excited public opinion, which has a deterrent effect upon witnesses, juries and even judges and other officials of the state.<sup>10</sup> The wilful disregard of duty on the part of elected or appointed peace officers, their sheer negligence, and, in some instances, their willing co-operation with the mob, are additional factors leading to this most unwholesome and unenviable record.<sup>11</sup>

In view of the aforementioned statistics many are of the opinion that the only cure is federal anti-lynching legislation.<sup>12</sup> According to Professor Chadbourn, attempts to curb lynchings by means of federal action began in the nineteenth century<sup>13</sup> but the first known bill presented to the Congress of which a copy is available was that of Congressman Dyer, of Missouri, in 1920.<sup>14</sup> This bill, like its successors, including that introduced at a recent session of the Congress,<sup>15</sup> passed the House but was defeated in the Senate by the extremely effective use of the filibuster. Assuming its eventual enactment the question of constitutionality must still be met. Its opponents declare its enactment would be an invasion of state rights and consequently unconsti-

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<sup>5</sup> EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928).

<sup>6</sup> Figure supplied to the author by the National Association for the Advancement of Colored People.

<sup>7</sup> Tuskegee Institute of Alabama reports a lesser number of lynchings during the aforementioned years while the International Labor Defense figures are slightly higher.

<sup>8</sup> WHITE, *op. cit. supra* note 2, App.

<sup>9</sup> CHADBURN, *LYNCHING AND THE LAW* (1933) § 13.

<sup>10</sup> EAGLETON, *op. cit. supra* note 5, at 131.

<sup>11</sup> ROPER, *THE TRAGEDY OF LYNCHING* (1933).

<sup>12</sup> In 1921 the American Bar Association passed a resolution seeking the enactment of federal legislation.—*Outlook*, Vol. CXXXII, 596.

<sup>13</sup> CHADBURN, *op. cit. supra* note 9, at 117.

<sup>14</sup> H. R. No. 71, 68th Cong., 1st Sess. (1920).

<sup>15</sup> Gavagan, Wagner, Van Nuys Anti-Lynching Bill, H. R. No. 1507, 75th Cong., 1st Sess. (1937).

tutional.<sup>16</sup> Its proponents argue that the concept guaranteeing a defendant a fair trial once his trial begins, should be expanded in whatever manner necessary to at least assure him a trial. They agree that, generally, when a lynching occurs it is not due to any act of the state nor of its officials but insist that very often it is due to state inaction which may as readily lead to a denial of due process or equal protection as does state action and thus it is within the power of the Congress to enact corrective legislation<sup>17</sup> under Sections 1<sup>18</sup> and 5<sup>19</sup> of the Fourteenth Amendment. In any event, the wholesale opposition of southern lawyers and judges to any federal legislation makes the possibility of passing such an enactment a very remote one.<sup>20</sup> Action by the states so that there will be no need for federal intervention is obviously needed.

Legislation dealing with lynching and mob violence, as in all crimes divides itself into two distinct groups. The first deals with the punishment of the perpetrators of the wrong and is, accordingly, punitive; the second concerns measures which tend to prevent the perpetration of the wrong and is, accordingly, prophylactic.<sup>21</sup> The New York State statute recently adopted<sup>22</sup> is punitive in nature.

The new law defines a mob to be "any assemblage of three or more persons which shall exercise or attempt to exercise by physical violence and without authority of law any power of correction or punishment over any person".<sup>23</sup> In other jurisdictions the least number comprising a mob vary<sup>24</sup> and it has even been held that the size and strength of the gathering is immaterial.<sup>25</sup> Immaterial, too, is the fact that the original motive actuating the assemblage was lawful for if the persons assembled later unite in unlawful conduct they will be

<sup>16</sup> See speeches in the U. S. Senate by Senators Borah, Connolly *et als.*, on August 11, 12, 1937 and thereafter, during consideration of Federal Anti-Lynching Bill.

<sup>17</sup> *Ex parte Virginia*, 100 U. S. 339, 345 (1880); *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601 (1882); *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (1921); *Powell v. Alabama*, 287 U. S. 45, 53 Sup. Ct. 55 (1932); Committee on the Judiciary Report to accompany H. R. No. 1507; (1938) 38 COL. L. REV. 199; WHITE, *loc. cit. supra* note 8.

<sup>18</sup> " \* \* \* nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>19</sup> "The Congress shall have power to enforce, by appropriate Legislation, the provisions of this article."

<sup>20</sup> CHADBOURN, *op. cit. supra* note 9, at 119. In response to a questionnaire sent out to professional men in the South, out of 213 voting, 194 disapproved of the Dyer Bill making lynching a federal crime and fourteen expressed approval and seven gave qualified answers.

<sup>21</sup> *Id.* at 25.

<sup>22</sup> N. Y. LAWS 1938, c. 397.

<sup>23</sup> N. Y. PENAL LAW § 1390.

<sup>24</sup> "Any number of persons", ALA. CODE (Michie) §§ 4938-40; 5 ILL. STAT. ANN. (Callaghan, 1924) par. 537, § 1; 5 IND. STATS. (Burns) §§ 10-3301 *et seq.*; 4 KY. STAT. (Carroll) § 1151a-1.

<sup>25</sup> *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497 (N. D. Ill. 1902).

deemed mobsters.<sup>26</sup> The statute further provides that violence committed by a mob on a person in the custody of a peace officer, suspected of, or convicted of a crime, resulting in death, shall constitute lynching.<sup>27</sup> It declares that lynching does not include violence between gangsters nor violence occurring during any labor dispute.<sup>28</sup> It punishes by imprisonment for not less than twenty years nor more than the offender's natural life any member of a mob committing a lynching. When a mob commits violence upon any person suspected of, or convicted of a crime, in the custody of a peace officer, not resulting in the death of such person, each and every member thereof is liable to imprisonment for a term not exceeding ten years.<sup>29</sup>

Certainly, it is agreed that no harm has come to the state through such legislation but what benefit is derived by merely supplying new phraseology for an indictment? Sureness of punishment to the violators does not follow by reason of enactment of the statute defining lynching. The mob in its frenzy does not stop to consider the name its act is called nor the punishment provided for it. Prior to the enactment of these statutes convictions could have been obtained when death resulted by prosecution under our homicide statutes. Lynching is everywhere murder, and, whether by common law or the penal legislation of the state in which it occurs, is everywhere punishable as such.<sup>30</sup> If convictions are more readily obtainable by subdivision of types of murder, let us not stop here but let us enumerate the thousands of reasons for homicide and the methods of committing it. When death does not result, even prior to the enactment of Section 1392 of the Penal Code, society could avenge itself against mob action by looking to its statutes on assault and battery, riot and unlawful assembly. Professor Chadbourn in his excellent review suggests that such a statute with its definitions gives a rhetorical unity to the whole body of the law which in any way deals with lynching.<sup>31</sup> Assuming this to be so, additional legislation is needed in New York else the aforementioned statutes cannot even supply this rhetorical unity.

The General Municipal Law of New York provides that a city or county shall be liable for any damages to property within its jurisdiction caused by a mob or riot in the absence of negligence on the part of the owners.<sup>32</sup> This type of liability on a municipality is an

<sup>26</sup> *Solomon v. The City of Kingston*, 24 Hun 562 (1881), *aff'd*, 96 N. Y. 651 (1884); *Marshall v. Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411 (4th Dept. 1900); *Harvey v. City of Bonner Springs*, 102 Kan. 9, 169 Pac. 563 (1918); *Champaign County v. Church*, 62 Ohio 318, 57 N. E. 50 (1900).

<sup>27</sup> N. Y. PENAL LAW § 1391.

<sup>28</sup> Legislature refuses apparently to dignify a gang killing by the term lynching and excludes violence arising out of labor disputes lest the act become an important weapon in the fight against labor unions. The state bill by these exclusions followed H. R. No. 1507, as amended.

<sup>29</sup> N. Y. PENAL LAW § 1392.

<sup>30</sup> (1934) 34 COL. L. REV. 970.

<sup>31</sup> CHADBOURN, *op. cit. supra* note 9, at 31.

<sup>32</sup> N. Y. GEN. MUN. LAW § 71.

extension of the ancient English law which made the inhabitants of the respective hundreds<sup>33</sup> liable for burglaries and unlawful destruction of property.<sup>34</sup> The liability usually exists whether or not the authorities had notice or could have prevented the damage. The statute is intended to punish the inhabitants for permitting riots and unlawful assemblages and to incite them to prevent and suppress the same by making it a matter of interest to the taxpayers to give their moral support to the enforcement of law and order.<sup>35</sup> Seventeen other states have legislation protecting property rights.<sup>36</sup> Only twelve states accept liability for mob death<sup>37</sup> while but seven states will recompense mob injury.<sup>38</sup> This is but another example of the placing of property rights above the right to live. The majority of the states as yet have no legislation granting any type of relief against the onslaught of the mob.

In the State of New York there have been but three reported cases of lynching since 1882.<sup>39</sup> Its citizens will not rise in revolt if it assumes the role of leader and enacts model anti-lynching legislation in the fervent hope and prayer that sister states will follow in its steps. It should concentrate upon the prophylactic or preventive type of legislation and in addition to its present statutes should consider the following additions:<sup>40</sup>

1. The summary removal of peace officers of any jurisdiction wherein mob action occurs subject to reinstatement, after investigation, upon findings of non-negligence and due diligence.<sup>41</sup>

2. Making civilly and criminally liable any peace officer found, after official investigation, negligent in his duty to protect the safety of any prisoner in his custody, or person within his jurisdiction from the acts of a mob.<sup>42</sup>

3. Making mandatory the calling for military aid by the sheriff, warden or any responsible public official, upon receipt of information, or upon suspicion founded upon reasonable grounds, that mob action

<sup>33</sup> The hundred was a subdivision of a county. 1 POLLACK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 556.

<sup>34</sup> STAT. WINT. 13 Edw. I (1285).

<sup>35</sup> Luke v. City of Brooklyn, 43 Barb. 54, *aff'd*, 42 N. Y. 444 (1864); Marshall v. Buffalo, 50 App. Div. 149, 64 N. Y. Supp. 411, 4th Dept. (1900).

<sup>36</sup> Cal., Conn., Ill., Kan., Ky., La., Me., Md., Mass., Mo., Mont., N. H., N. J., Pa., R. I., S. C., Wis.

<sup>37</sup> Conn., Ill., Kan., Minn., Neb., N. J., N. C., Ohio, Pa., S. C., W. Va., Wis.

<sup>38</sup> Conn., Ill., Kan., N. J., Ohio, S. C., Wis.

<sup>39</sup> Figures supplied author by National Association for the Advancement of Colored People.

<sup>40</sup> In the following citations the author has not attempted to note all of the statutes bearing similarity to his recommendations as appropriate legislation but mentions only a few to give merit to his suggestions and further credits Professor Chadbourn for the majority of the suggested statutes.

<sup>41</sup> ILL. STAT. ANN. (Callaghan, 1924) par. 542, § 6; KAN. REV. STAT. ANN. (1923) § 21-1007.

<sup>42</sup> GA. CODE ANN. (Michie, 1926) § 363.

may ensue against any prisoner or person within the jurisdiction and the number of peace officers available for aid in the protection of such prisoner, or person is apt to be insufficient to effectuate such protection.<sup>43</sup>

4. Making mandatory the deputizing of citizens, by responsible peace officers, to aid in the protection of the safety of a prisoner, or person in the community, when such prisoner, or person, is in danger of mob assault and insufficient time exists for the calling and arrival of local reinforcements or military aid.<sup>44</sup>

5. Making mandatory the acceptance into the custody of the sheriff, warden, or appropriate police officer, any person fearing mob action and petitioning that he be taken into such custody when reasonable grounds for such fear exists.<sup>45</sup>

6. Making mandatory the change of venue of trial for such crimes as are apt to cause mob hysteria.<sup>46</sup>

7. Providing for the removal of a prisoner suspected of, or charged with, such crimes that tend to excite a mob, to a county other than that in which such crime has been committed immediately following his apprehension or surrender.<sup>47</sup>

8. Upon the arrest or surrender of any prisoner charged with, or suspected of, such crimes that tend to arouse a mob it shall be the duty of the responsible peace officer to petition the court to call a Special Term and it shall be the duty of the court to call such Special Term and do all that is necessary to provide an early, just, and impartial trial for such prisoner.<sup>48</sup>

These proposed statutes may well aid in supplying the demand of public welfare that trial by due process of law and conviction shall precede punishment and when that condition has been assured no more will one recall:

"I oft have heard of Lydford law,  
How in the morn they hand and draw,  
And sit in judgment after."<sup>49</sup>

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<sup>43</sup> IND. ANN. STAT. (Burns, 1926) § 2536; KAN. REV. STAT. ANN. (1923) § 21-1009.

<sup>44</sup> ALA. CONST. § 138; GA. CODE ANN. (Michie, 1926) § 362; ILL. STAT. ANN. (Callaghan, 1924) par. 549, § 13; IDAHO COMP. STAT. (1919) § 9428.

<sup>45</sup> PA. STAT. (West, 1920) § 486a.

<sup>46</sup> GA. CODE ANN. (Michie, 1926) § 964.

<sup>47</sup> IND. ANN. STAT. (Burns, 1926) § 2175; FLA. COMP. LAWS (1927) § 8541; IDAHO COMP. STAT. (1919) § 9421; ILL. STAT. ANN. (Callaghan, 1924) par. 549, § 10.

<sup>48</sup> ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 2211, 2212.

<sup>49</sup> Daniels v. Homer, 139 N. C. 219, 51 S. E. 219 (1905).