St. John's Law Review

Volume 4, May 1930, Number 2 Article 34

Limitation of the Baumes Fourth Offender Laws

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CURRENT LEGISLATION

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LIMITATION OF THE BAUMES FOURTH OFFENDER LAWS.—The proposed amendment [1] to Section 1942 of the penal law is intended to limit its application, by substituting for the fourth felony the following crimes: anarchy, arson, assault in the first or second degree, burglary, crime against nature as defined by Article 66, homicide, except murder in the first degree, kidnapping, maiming, rape, robbing or seduction. The present law provides that a person four times convicted of any felony must be sentenced to life imprisonment. The problem presented to the Legislature is whether the proposed amendment constitutes an improvement on the existing law.

With the theoretical basis of the Baumes Law, it is difficult to quarrel. For if, indeed, an individual has been hopelessly lost beyond all possibility of reclaim; if he has acquired, either through mental disease or through long-continued habit, a propensity to commit antisocial acts, for which there is no cure, then obviously the only safe thing for society to do is permanently to segregate him. It will do very little good in such an instance to blame the social organization for having produced the particular instance of social depravity, or to engage in lamentations over the fate of the individual. A dangerous and hopelessly incurable maniac should not be allowed to roam the streets of the state. Similarly, a hopelessly unreclaimable and habitual criminal should likewise be permanently segregated. There are those, of course, who say that there are no hopelessly unreclaimable criminals.[2] With that issue we are not here concerned, for the question is one of fact and of scientific investigation. If there are such individuals, then there is a scope of permanent segregation. If there are not, then there is no such sphere of theoretical permissible state action.

The severe criticism of Section 1942 has been not of its theory, but of its application and practice. Critics have maintained that the fear of severe punishment, even of the death penalty, has not in the past been a crime deterrent, and that the permanent incarceration of a man merely because he has committed four felonies is a punishment out of all proportion to the necessities of the case; that some of these people might in some way be reclaimed for society, or that even if some of them could not be reclaimed, certainly the state should not arbitrarily say so in advance and before any effort has been made to do so or to study their individual situations.[3]

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[1] Act No. 1033 to amend the Penal Law in relation to punishment for fourth conviction for certain felonies, introduced by Mr. Sargent Feb. 12, 1930.

[2] Except, of course, mental and physical defectives. See Barnes, The Repression of Crime (1926), p. 26.

[3] *Ibid.* at pp. 342, 343.

A more immediately important criticism has been that the word "felony" contained in Section 1942, includes such a variety of crimes, that a person may be sent to prison for life for committing a series of offenses which do not render him a serious social menace, and that in that way severe punishment is meted out to people whose crimes do not seem, to a liberal-minded public, to merit such severe vengeance on the part of the state. Editorial and newspaper comment in connection with the recent sentence of life imprisonment meted out to Ruth St. Clair, is only one instance of the public interest that is aroused when such an obvious miscarriage of purpose results from the application of the Baumes Law. The amendment here discussed is undoubtedly intended to meet that situation, and proceeding on the theory that the principle of the Baumes Law is sound when applied to fourth offenders who have committed serious crimes involving moral turpitude or danger to society, it specifies such crimes in order to insure that the mere repeated conviction for the unenumerated felonies will not result in life imprisonment.

It is submitted that the amendment is haphazard and unscientific, and that in selecting the particular crimes for which four convictions will result in life imprisonment, no study has been made of the relation between each particular selected crime, and the type of people who commit it.

Lumped together in one list are political crimes, crimes of violence and sexual crimes. It is reasonable to assume, even without having any evidence, that there is a vast difference between the typical habitual criminal who is engaged in burglary, and one who is engaged in crime against nature, or in rape or seduction. Again the crime of anarchy is not one which follows in the wake of crime waves. And to incarcerate anarchists for the period of their lives savors of Siberia, and methods popular in Russia and not in more Occidental civilizations.

Undoubtedly, the emergency calls for the passage of this amendment, for it will at least eliminate from the operation of the statute all offenses which are less serious than those listed in the amendment. But, nevertheless, we cannot avoid the conclusion that the amendment is indicative of a certain discouraging method of criminal law-making.

One need not be equipped with criminological statistics to realize that the regulation of criminal law involves a detailed study of the psychology, and the social and economic life of men convicted of crime. Few will admit, although some still assert that vengeance is even now the basis of our criminal law. To some extent this is inevitable. As Mr. Justice Holmes has long ago pointed out in his great work on the Common Law:[4] "There remains to be mentioned the affirmative argument in favor of the theory of retribution, to the effect that the fitness of punishment following wrongdoing is axiomatic and is instinctively recognized by unperverted minds. I think, it will be seen on self-inspection, that this feeling of fitness is absolute

[4] Holmes, The Common Law (1881), p. 45.

and unconditional only in the case of our neighbors. It does not seem to me that any one who has satisfied himself that an act of his was wrong, and that he will never do it again, would feel the least need or propriety, as between himself and an earthly punishing power alone, of his being made to suffer for what he had done, although, when third persons were introduced, he might, as a philosopher, admit the necessity of hurting him to frighten others. But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element of punishment." Nevertheless, it may be assumed as a postulate of sound legal philosophy that the excellence of the criminal law is directly proportional to the extent to which it abandons vengeance as a criterion and adopts prevention and reform as the essential basis for dealing with crimes and criminals.

It is difficult to say how this can be accomplished without the complete individualization of the treatment of criminals. For if the truth were known, it should probably be found that every member of every gang, no matter how closely affiliated with his colleagues, was nevertheless an individual distinct and apart from the other members of the gang, and for whose emancipation from the life of crime, an individual study and treatment was necessary. The theory of modern education which is based on factual studies leaves that impression with regard to the non-criminal portions of our society. In the absence of data it is, of course, not safe to assume anything. But the chief lesson, here as elsewhere, is that uninformed legislation cannot be expected to be significantly corrective.[5]

VERNON F. MURPHY.

FILING OF CONTRACTS OF CONDITIONAL SALES IN NEW YORK.—Legislation which has for its goal the clarification of enactments which have to do with the filing of conditional sales contracts cannot fail to be of value. A study of existing laws reveals solely confusion and contradiction. The new bill promises relief to a branch of the law in which succor is sadly needed.

The bill in substance provides that the filing of conditional sales contracts, provided for in Sections 65, 66, and 67 "of this Article" shall be valid for a period of three (3) years only, "except that, in the counties embraced in the city of New York, such filing shall be valid for one (1) year only." We must look to the history of conditional sales contracts to appreciate and comprehend the necessity for such an amendment.

Under the common law in New York, as in many other states, it was settled that a conditional vendor of goods retained title as

[5] *Cf.* Lawes, Crime and Rehabilitation, New York State Bar Assn. Bull., Jan., 1930.