Denver Law Review

Volume 5 | Issue 7 Article 6

January 1928

Crime and the Gallows

George K. Thomas

Encouraging co-operation is shown in the response to the request for members to send letters to clients advocating the bar ticket, 15,000 letters having been promised immediately, and it is estimated that as many as 50,000 all told will have been mailed to lists provided by members of the Association. Aside from this source, numerous organization lists will be utilized, which will afford a distribution of about 60,000 additional letters.

The two outstanding objectives of the campaign are, first, familiarizing the public with the purposes of the Association; second, inducing the public to support the Association's candidates at the polls. Interviews from prominent citizens expressing approval of the work of the Los Angeles Bar Association are being secured."

Crime and the Gallows

By GEORGE K. THOMAS *of The Denver Bar*

BANDITS, machine guns, love triangles with the hypotenuse shot out, and organized murder are the order of the day. We have reached an era in which public apathy towards civic responsibilities, in hand with maudlin curiosity and misdirected sentiment have conspired to make it possible for the accused on trial for his life, to walk, with comparative ease, from the shadow of the noose into the arms of his cheering and admiring followers. Or if, perchance, the law exacts its penalty, the public is treated to a harrowing description of the execution and the erstwhile villain becomes another national hero. The virus thus distilled has penetrated every walk of life until it is small wonder that the professional gunman regards himself as a modern Robin Hood or that those who ought to know better, are seriously proposing the erection of a monument to Jesse James.

Just why, in an otherwise enlightened age, such things should be must give us pause for thought. Though fostered by the law's delay and tabloid journalism, their roots must be sought in certain fundamental social and economic forces which permeate modern civilization. It is an undisputed fact that more murders are committed today than yesterday, but considering the rapid increase in population, and particularly its concentration in our large cities, it is difficult to say whether there are actually many more homicides per capita than heretofore. The alarming feature is the unprecedented rise in the ratio of acquittals to convictions. Of what use is government by law if, when all the processes of the State have set to work in apprehension and trial, an offender can with impunity evade its penalty? Some suggest new and more drastic laws, but these are doomed to failure, since each carries within itself the blight which destroyed the old. Others suppose the American Jury is to be to blame and decry its frailties from every housetop. The jury is but a symptom and not a cause. We have abolished the professional juryman and with him we have buried a trained and hardened servant of the State. Much has been said and more written of our modern substitute. Many lawyers now advocate a trial solely to the court. There is no doubt but that such a system would be ideal for speedy administration of justice in all its branches. It presupposes, however, a divine infallibility in the court and

few, if any, of its advocates would risk their necks to the efficient mercy of a magistrate in preference to the time-honored "Twelve Good Men and True". A judge is as human as the man in the box, and while he may possess the official courage and training to do his duty, the enormous power over life and death so to be entrusted to his administration carries a responsibility greater than should in fairness be required of any man. Moreover, trial by jury is our heritage. It is embodied in our Constitutions and deeply ingrained within our social consciousness. Its abolition, therefore, no matter how desirable, could be actually accomplished through no agency short of revolution. It may not be the best of systems, but, so far as major criminal prosecutions are concerned, time and experience has shown it to be the safest. A suggested middle course, but one not calculated to cure the present evil, would be the classification of felonious or penitentiary offenses into major and minor felonies, the former to be tried before a jury and the latter to the court. Delay and expense in the adjudication of minor offenses would thereby be eliminated so as to clear our crowded dockets and make way for more efficient prosecution of major trials. Such is the tendency in civil procedure and once the Constitutional barrier be lifted, we may hope to see criminals tried before police magistrates for all offenses, save those against the person and the state.

Lacking such reforms, however, the prosecution and defense now face a body of twelve persons selected at random. As a rule male jurymen prevail, but women are not infrequently to be seen adorning the panel in many jurisdictions. Such a group is fairly representative of the community from which it has been drawn, reflecting the same in all its idealism and responding to its social and economic forces. Being wholly untrained and moved by sympathy for the accused who is held up to them as a victim of insanity or passion, they naturally shrink in capital cases from a verdict which they know will carry with it the penalty of death, little dreaming that they are violating their solemn oath. Their solicitude for the individual thus supplants their judgment of the merits. Men should be made of sterner stuff, but experience proves our modern jurors lack it sadly. If, therefore, an American Jury will not convict, the law which it is sworn to observe becomes unenforceable.

The evil, therefore, has its root in capital punishment. If by such means, society can still protect itself from the criminal or the insane, it should be applied with Spartan fortitude, but if it is regarded as a vestige of barbarism, unenforceable in modern highly organized communities, why not recognize it as such, and have it out? Time was when it was thought that the greater the punishment, the more forceful the example and the less danger of repetition of the offense. Upon the authority of such humane reasoning, punishments increased until petty larceny was listed as a capital offense. While it held sway, however, crimes not only increased in number but in magnitude. The petty offender was driven to desperation, preferring to be hanged for a sheep rather than a lamb and juries rebelled against convictions, well knowing that the same sentence must be imposed for stealing sixpence as for the taking of human life. It was eventually modified to conform to the requirement that the punishment should fit the crime, but here again the error of human judgment creeps in, for no two legislators can have the same perspective towards the crime and the punishment. Your militant dry may honestly believe that hanging is too good for bootleggers while his companion may just as honestly maintain that the cause is better served by

the imposition of a fine. In the absence of a Mussolini, therefore, the best that can be expected is that our laws should reflect the average will of the community in the light of its prevailing customs and manners. We shudder to read about the days of Salem witchcraft, and yet those same witch-burning Puritans might wonder why a man should be imprisoned for life because he possessed a modicum of rum. Like the jury system, however we have yet to find a better solution and our penal legislation must be accepted for better or for worse.

Assuming, then, that penal statutes are enacted for the two-fold purpose of punishing the offender for his offense against society and of restraining or preventing a recurrence of the act through example or fear of consequences, tempered by the requirement that the penalty should fit the crime, it may well be said that capital punishment is one of our most costly and useless relics. Useless because seldom enforceable and costly because it leads to sensational trials and acquittals that sap our moral strength and destroy regard for law. It can now be used solely in cases involving murder, treason or breaches of military discipline in time of strife. War, being a reversion to brute force, furnishes its own justification for the firing squad. The death penalty has yet to be exacted in this country for treason. It may well be said, therefore, that the advance of civilization has eradicated capital punishment in all cases save homicide.

In an age when millions are expended to preserve and prolong human life, murder, in any form, should be and is abhorred. Man has devised countless means to insure his survival against the ravages of disease and the elements. The forces of nature obey his commands, but he has yet to learn to master himself. Human passions, unless guided and bridled, are destructive influences, so subtle in their workings that no individual can with safety predict today, to what lengths they may lead him tomorrow. Our ancient forbears made no bones about the matter. They took what they could, kept it by force and if, perhance, they shed another's blood, the relatives were duly compensated by payment of the deceased's appraised valuation. National development put an end to individual power, the state assuming, for the protection of its members against each other, the duty of controlling their actions. Conversely, in return for the safeguards afforded him by the state, the individual parted with certain natural rights. Government by law supplanted that of force, order grew out of chaos and most citizens learned to control their actions through a common sense of self-preservation. Those who defy the rules imposed by society are outlaws and every community past, present and future must have its quota. Crime, therefore, is a social and economic risk at the head of which stands murder, which, like a smouldering fire, springs into flame when fuel is added or like a caged beast, leaps forth when locks are broken. The best that society can hope to do is to keep it under control and minimize the risk. Every acquittal and every public "martyrdom" of a condemned prisoner conspires to undermine the social structure and increase our criminal hazard until the day will come when human life becomes the most ungarded of human possessions.

Insanity is the "Open Sesame" for homicide and criminologists argue that pathologically every murderer is insane. The ancient Greek test for insanity was whether the individual could distinguish right from wrong. Medical investigation may succeed in demonstrating the accuracy of their philosophy. Indeed, the law has always recognized degrees of insanity, humanely seeking to excuse an offender proved

to be so mentally depraved that he is unable to make the distinction. But legal insanity and pathological insanity are now so hopelessly confused that it is small wonder twelve laymen should honestly disagree when called upon to solve a problem as yet undeciphered by scientific research. Granting, however, that the alienist is right and that murder is the act of a madman, should he, by that same token, be loosed upon society? No sane person would so contend, yet such is the effect of this modern plea, so popular that it has "out-alibied" the alibi. Occasionally it fails and the offender is executed, but then the deceased is wholly forgotten in the martyrdom of the condemned. Hickman, Snyder, Gray, Hamon and Thaw are household words. Who knows the names of their victims? Were Thaw and Hamon insane and Gray and Snyder sane? The law says, "yes", but medicine says "no", and while the two are wrangling, the fox escapes. We must accept one or the other. If we choose the law, insanity should not excuse. If it is medicine, the chair must yield to the Asylum.

Few physicians, however, are willing to go the full length of their theory. If taking human life be an act of insanity, is not mayhem also a sign of depravity? If mayhem be so classified, why not robbery and assault? If robbery, then also embezzlement and larceny? And so on until every crime be brought within the fold. Why should a jury deliberate for days as to whether or not a prisoner accused of murder be sane or insane and yet scoff at such a plea if made by a footpad? Why should doctors and lawyers endlessly debate over the degrees of criminal responsibility in a killer and never dream of bestowing such attention upon an absconder? Either the greater includes the less or a distinction must be drawn between one taboo and all others. Accepting the legal distinction of crimes against the person and crimes against property, the discrimination still prevails, the question becoming why insanity should be a successful defense to homicide and not to assault and battery? If we exact a life for a life, why not an eye for an eye? It is the shadow of the noose that intervenes. Just as a dispassionate man dreads the thought of bloodshed, just so will he shrink from the precepts of Mosaic law. Crime punishable by death thus becomes important in proportion to the severity of the sentence. If robbery with a gun were so penalized, this defense would instantly appear and juries then be called to pass upon the sanity of the unfortunate highwayman, his mother, brothers, sisters and children. Remove the death penalty, however, and the average juryman can intelligently ascertain the guilt or innocence of the accused. No longer blinded by compassion or victimized by fear of shedding innocent blood, he then can see and judge, content to let the court impose such sentence as the case may warrant. No better example could be furnished than the parallel cases of fiendish abduction and murder recently arising in the States of Michigan and California. In Michigan, where capital punishment has been abolished, the accused was apprehended, convicted and sentenced within a fortnight, while California presents the spectacle of a similar fiend using every defense known to American criminal law to save his neck and this in the teeth of his open confession of guilt. In the first instance the penalty of death is absent, in the second, it is the stake for which the parties are at play with the odds heavily favoring the accused.

So long, therefore, as stakes are high, so long will the defense employ every resource at its command, drawing from the fertile field of American sentiment and good natured sympathy, the pernicious elements from which it

fashions a means of escape. Unless we insist upon observance of the law and prompt and speedy punishment of offenders, we imperil the safety of our lives and homes. Unenforceable laws must go. Begin at the top. Impose life sentence as a maximum and the idea of judicial murder is dispelled. Should the innocent or the insane then be convicted and sentenced, opportunity for vindication and correction is afforded. Seven States of the Union have already done so and we have yet to hear that human life is less precious in Wisconsin than Missouri. On the contrary, the whole nation may profit by the example.

Colorado Supreme Court Decisions

(Editors Note—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of).

No. 12,009

Holbrook v. Bank

Decided June 11, 1928.

Banks—Preferred Claims—Insolvency

Facts—The irrigation District sought to obtain a decree that a deposit standing to the credit of the Irrigation District in the Defendant Bank should be paid by the State Bank Commissioner as a preferred claim upon two counts:

1. That the Secretary of the Irrigation Company had unlawfully deposited the monies in the bank instead of remitting them to the County Treasurer. The Secretary of the irrigation company also being cashier of the bank, and that, therefore, the bank must be deemed to have accepted the deposits with knowledge that they were unlawfully deposited, and that such deposits must be treated as a trust fund.

Held—1. That to entitle a trust creditor to a preference, it must be satisfactorily established that the property of the insolvent remaining for distribution includes the proceeds of the trust estate.

No. 11,931

Conrad v. Davison

Decided June 4, 1928.

Release of Trust Deed—Innocent Purchaser.

Facts—Conrad held a note and a trust deed taken as collateral to secure an antecedent debt. He received same in reliance on the record showing a release of a prior trust deed at the written request of the payee, stating payment in full. Said release was executed before maturity of the obligation but not acknowledged or recorded until a year thereafter. Davison claimed the said release was invalid, setting up that the note was not in fact paid at that time and that later he had bought the note in a transaction of purchase and not of payment, that Conrad was put on inquiry by the release before maturity and the lapse of time between its execution and recording, and that an antecedent debt was not value.

Held—The note not being paid in fact, the release in question would be invalid except as against a subsequent bona fide encumbrancer for value. Conrad was such, as the rule that a release before maturity puts one on inquiry is not in point where the request for release is signed by the payee herself and states payment in full. The lapse of time between execution and