

1-1954

## Crime Prevention and Judicial Casuistry

John Barker Waite

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

John Barker Waite, *Crime Prevention and Judicial Casuistry*, 5 HASTINGS L.J. 169 (1954).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol5/iss2/6](https://repository.uchastings.edu/hastings_law_journal/vol5/iss2/6)

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

## CRIME PREVENTION AND JUDICIAL CASUISTRY

By JOHN BARKER WAITE\*

The conventionally accepted purpose of criminal law enforcement is to scare the Devil out of his potential disciples by demonstration of what will happen to disciples who are caught. Correlative with this purpose is the hope, presumably conceived in ivory towers, that the segregative period of punishment will truly be reformatory and will return its subjects to society less dangerous than before. And, though it be only a result rather than a purpose, segregation is in fact effectively crime preventive—for so long as the segregation endures. Hence, when judges sentence offenders to confinement they seek accomplishment of two theoretically possible objectives and a practical end.

Under these circumstances one might suppose that, except where the wisdom of probation or its equivalent interposes, judges having power to do so would order provedly dangerous persons into segregation from society whenever opportunity arises. Yet with surprising frequency they do not. On the contrary they sometimes turn loose upon the public men whose criminality, or potential criminality, is obvious.

One might draw illustrations from various fields—the once commonplace reversal of conviction because of “variance,” for example; the magnification of miniscule errors in procedure; or the more modern judicial exclusion of relevant and material evidence. Here, however, it may be interesting to look at the somewhat more subtle and less conspicuous exemplification in the cases dealing with criminal attempts. Consider for example three cases, essentially similar but involving superficially different details. In each the protagonists had demonstrated themselves as more likely than normal men to injure the social safety, hence to be particularly in need of “reformatory” punishment and preventive detention. Yet in each case those obviously special disciples of the Devil were left free to do what they would.

Charles Rizzo knew where to lay the finger on a paymaster who would be easy making for a stick up. Tony Dorio could get an automobile; Tom Milo and John Tomasello had pistols. They combined assets and went after the money. But Rizzo’s timing was off. Rao, the paymaster, had already been to the first place they looked; he had not reached the second. They went to the bank where he got his money but he had left. While they were looking for Rao elsewhere, the police, suspicious of their actions, picked them up. In due course they were indicted and convicted of attempted robbery. Dorio, Milo and Tomasello took their medicine and went to Sing Sing; Rizzo’s attorneys appealed. The appellate division sustained the conviction. The court of appeals reversed it.

---

\*Professor of Law, University of California, Hastings College of Law. A.B. 1905 Yale; LL.B. 1907, University of Michigan; Professor Emeritus, University of Michigan.

That court began its opinion: "The police of the City of New York did excellent work in this case by preventing the commission of a serious crime."<sup>1</sup> Then the court set Rizzo free! He had intended to commit crime, the court said, and would have done so had he been able. But up to the point of arrest he had not yet "attempted" a crime.

Of Rizzo's companions Judge Crane added:

"Two of these men were guilty of carrying concealed weapons, pistols, contrary to the law. Two of them, John Tomasello and Thomas Milo, had also been previously convicted, which may have had something to do with their neglect to appeal. However, the law would fail in its purpose if it permitted these three men, whoever or whatever they are, to serve a sentence for a crime which the courts subsequently found and declared had not been committed. We therefore suggest to the district attorney of Bronx County that he bring the case of these three men to the attention of the governor to be dealt with as to him seems proper in the light of this opinion."

Accordingly those three also were given their freedom.<sup>2</sup>

Charles Miller, a bit drunk, had said to others, "If the people here look at things like that, I'm going to take the law in my hands. I'm going to kill the God-damned nigger." Then Miller got his rifle and walked to a field where Jeans, the negro whom Miller alleged to have annoyed his wife, was picking beans. He stopped to load his rifle with a high power cartridge, saying, "When I shoot a black son of a bitch I want something that will go through him." As Miller got within 200 yards of Jeans, a local constable who was also picking beans jumped him and took the gun. Jeans profited by the interference and departed rapidly, Miller went home, threatening to get Jeans another time. A jury convicted Miller of attempted homicide. The supreme court, however, said that he had not quite got to the point of criminal attempt and ordered him released.<sup>3</sup>

Clarence Youngs, working for Ralph Walker as a cornhusker, struck up a saloon acquaintance with Munson Foughty. Youngs told him that Walker kept a large amount of money in a bureau drawer and suggested that he and Foughty go to Walker's house the coming Saturday night, enter through a window, chloroform Walker if necessary and steal the money. Foughty pretended to agree. They met on the night fixed. Youngs had brought carpet slippers on which to enter quietly and a revolver. He bought cartridges for the gun and loaded it, saying, "That came pretty near killing one man the other night, and I'm going to have that money tonight or it will kill another man." Then Youngs went to a drug store and bought chloroform. As he came

<sup>1</sup>People v. Rizzo, 246 N.Y. 334, 335, 158 N.E. 888 (1927)

<sup>2</sup>*Id.* at 339, 158 N.E. at 890. The decision seems to be in flat conflict with People v. Sullivan, 173 N.Y. 122, 65 N.E. 989 (1903). And, query, what might Judge Crane have considered to be the law's purpose? Obviously not preventive segregation. Then mere retaliation for injury accomplished?

<sup>3</sup>People v. Miller, 2 Cal.2d 527, 42 P.2d 308 (1935)

out he was arrested and charged with attempted burglary. Again the jury thought him evil and brought in a verdict of guilty. Again a supreme court decided that an "attempt" had not yet occurred and let Youngs go his way.<sup>4</sup>

As a mere matter of public safety, aside from technical questions of "punishability," were these several defendants any more fit for freedom than if they had been legally punishable?

Of course, if one assumes, as did Clarence Darrow,<sup>5</sup> that the law's one purpose is retaliation, and that the conventional postulates about deterrence and reform are only "good" reasons designed to camouflage the real reason, there would obviously be no reason at all for punishing any of these men. They had wrought no harm; given no justification and created no urge for retribution.<sup>6</sup> But even under this extreme, narrow view of the purpose of punishment, if the strict "punishability" of the men be disregarded, there still remains the social advantage of segregating known dangerous persons. Hence from either point of view the question remains—Could it fairly be said that these men had shown themselves socially dangerous, at least to the extent that men who have committed "punishable" acts are presumed dangerous enough to justify confinement?

<sup>4</sup>People v. Young, 122 Mich. 292, 81 N.W. 114 (1899).

In State v. Rains, 53 Mont. 425, 164 Pac. 540 (1917), the gist of the charge was that Rains, equipped with a loaded revolver, a loaded rifle, and a bottle of laudanum, met his estranged wife on the street, struck her in the face, compelled her to return to her house and forced her to enter with him, "all of which was done with the deliberate, premeditated, and felonious intent—to kill her"; that Rains stepped out of the house to get a bucket of water, locking the door from the outside; whereupon Mrs. Rains opened a window and escaped. The court reversed conviction of attempt to kill on the ground that this allegation did not as a matter of law charge an attempt.

A somewhat similar difficulty in drawing the line between where a potential offender can not yet be dealt with by the courts and where he becomes "punishable" arose in State v. Lowrie, 54 N.W.2d 265 (Minn. 1952). Lowrie being desirous of conducting gambling operations without molestation had asked Cliff to approach the county attorney and find out how much of a bribe he would want. Cliff, who in truth had not approached the prosecutor, reported that a stated amount would be acceptable and Lowrie gave him the money, to be paid as a bribe. The fact was discovered during an investigation of the conduct of the prosecutor and county sheriff. Again the appellate court thought that there had been no attempt to bribe.

The lack of any precision in drawing such a line is illustrated by State v. Lavine, 96 N.J.L. 356, 115 Atl. 335 (1921), affirmed without discussion, 97 N.J.L. 583, 117 Atl. 927 (1922). Lavine desiring to have a certain civil suit decided in his favor solicited Callaghan to approach the jurors and influence them in his favor. There is no indication that Callaghan did anything of the sort. Lavine was actually indicted for "soliciting and attempting to persuade one James J. Callaghan to see and talk with the jurors." But the court's opinion begins "the defendant was indicted for an attempt to influence a jury on the trial of a cause by solicitation of a court officer. . . ." The jury found him guilty of "attempted embezzlement," which the court defined as "attempt to influence a juror." Here, unlike the Lowrie case, the conviction was affirmed.

20 MICH. L. REV. 542 (1922), "Some courts have treated solicitation to commit a crime as though it were an 'attempt'. By the weight of authority, however, solicitation is not considered a sufficiently casual act to be indicted as an attempt, but must be indicted as a distinct offense." Citing authority. Confusion confounded!

<sup>5</sup>DARROW, CRIME; ITS CAUSE AND TREATMENT 19 (1922).

<sup>6</sup>The same thing might be said of any unsuccessful "attempt", even though it has gone amply far, as the courts said these did *not*, to meet the technical definition of attempt. Yet "attempts" are punishable, though only half as severely as success—which suggests a confused sort of compromise in the legislative mind between retaliation and deterrence.

Consider first Clarence Youngs. If he had in fact carried out his plan he would have been subject to many years' imprisonment. It is conceivable, however, that even had he not been interfered with he might have recoiled with horror from his own intention and given it up. Judges not infrequently recognize such a possibility. A man who had been convicted of attempt to steal a slave was freed by the appellate court because:

"The time proposed for consummating the crime was so far distant as to render it very doubtful whether the accused had fully resolved upon the commission of the act. There was ample room for the *locus penitentiae* before making a final decision. It would be too much to say he would not have awakened to a just sense of the enormity of the crime and relented before the proposed time for its perpetration arrived."<sup>7</sup>

There was indeed "room" for a *locus penitentiae* in Youngs' case had he not been otherwise stopped. It is conceivable that he would have profited by it—but hardly credible. Certainly the thought seems not to have occurred to either the majority or dissenting judges. None of them suggested it. The majority merely said flatly, in a brief opinion without discussion, that the situation was "preparation" not "attempt." Judge Grant, dissenting, declared that Youngs' intent had "manifested itself by an outward act in or toward the commission of the offense" which was all that was necessary. On the whole it seems a reasonable assumption that society was quite as much in need of Youngs' segregation for a term as though he had succeeded in his burglary.

Miller presents a slightly different case. The California Supreme Court opinion suggests that:

" up to the moment the gun was taken from the defendant no one could say with certainty whether the defendant had come into the field to carry out his threat to kill Jeans or merely to demand his arrest by the constable."<sup>8</sup>

If that were the fact, then obviously Miller, not having shown an intent to offend, could not fairly be said to require detention. But that apparently casual remark by the court was in the last paragraph of a decision already

---

<sup>7</sup>Lovett v. State, 19 Tex. 174, 177 (1857) But there is no "rule" that there can be no conviction while there still exists an opportunity for possible withdrawal; otherwise there could be no criminal attempt until the bullet, as it were, had actually been sped upon its way. In a Massachusetts case, Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901), the court, by Holmes, C. J., approved the propriety of conviction—which was actually reversed because of defect in the indictment—where the defendant had arranged combustibles for arson, hired a man to light them, started with him toward the building but "when within a quarter of a mile said he had changed his mind and drove away." There may be an "attempt", said the court, "although there is still a *locus penitentiae* in the need of a further exertion of the will to complete the crime"—and apparently, as in this case, although the change of mind and withdrawal actually did take place.

See also People v. Lombard, 131 Cal.App. 525, 21 P.2d 955 (1933), where the protagonists lost their nerve and quit the undertaking, yet were held properly convicted of attempt.

<sup>8</sup>People v. Miller, 2 Cal.2d 527, 532, 42 P.2d 308, 310 (1935)

settled on precedent; chiefly *People v. Murray*,<sup>9</sup> a California decision of 1859 to the effect that a man and woman who declared their intent to make an incestuous marriage and sent for a magistrate to perform the ceremony had not yet "attempted" to be married. Moreover the suggestion about Miller's uncertain intent was voiced in utter disregard of the evidence which had satisfied both the trial judge and the jury. In the lower court's opinion it said explicitly, after setting out the facts as detailed above:

"The intention with which one person performs an act is manifested by the surrounding circumstances. . . . The jury was warranted in believing that the reason he did not fire upon the negro was that he was waiting for a better opportunity when he had arrived close enough to make more certain of his aim."<sup>10</sup>

On the whole it seems fairly inferrable, despite the appellate court's make-weight comment, that Miller was not a person wisely to be left at large, unchecked.

As to Rizzo and his pals there would seem no possible question of their demonstrated social menace. To be sure, in the course of his exempting opinion Judge Crane after basing his decision casuistically upon precedents does say:

"The law must be practical and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for the interference."<sup>11</sup>

Then with not unprecedented judicial illogic he holds that Rizzo's acts were *not* indicative that the crime would have been committed; in complete disregard of his own opening sentence: "The police of the City of New York did excellent work in this case by preventing the commission of a serious crime."<sup>12</sup>

If we assume as seems rationally unavoidable that all these several defendants have shown themselves potential menaces of the social safety, the question becomes: *Could* the courts have ordered them into preventive detention without violence to established judicial customs? The answer is "yes."

In the *Miller* case the court expressed the situation well:

"The authorities agree that it is impossible to formulate a general rule or definition of what constitutes an attempt which may be applied as a test

<sup>9</sup>14 Cal. 159 (1859).

<sup>10</sup>*People v. Miller*, 35 P.2d 549, 552 (Cal.App. 1934).

<sup>11</sup>*People v. Rizzo*, 246 N.Y. 334, 337, 158 N.E. 888, 889 (1927)

<sup>12</sup>See note 1 *supra*. By contrast, in *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924) the defendants were held properly convicted of attempt to break and enter a railway car because they had driven with the necessary tools to the supposed location of the car, despite the fact that they became suspicious of treachery and abandoned their plan, and the car *was not in fact at the place supposed*.

in all cases, and that each case *must be determined on its own facts* and with the assistance of general guiding principles."<sup>13</sup> (Emphasis added.)

In these cases, to suggest that the appellate court *could not* reasonably have reached a different decision would be to malign the intellectual capacity of the other judges involved. As Coke once put it, "The knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding." And from the well of facts and "guiding principles" in these cases the various judges did draw differing conclusions. In the *Miller* case the trial judge and all three judges of the intermediate appellate court thought him legally convictable. Concerning Youngs, the trial judge was joined by a member of the Supreme Court; two to four. Of Rizzo, three appellate division judges joined with the trial court. In short, these courts *had they wanted to* could have sent those various defendants into preventive detention, quite within the scope of "guiding principles."

Out of other characteristic "attempt" cases a different situation arises—no possible doubt of the demonstrated criminality of the defendant, but a possible question of judicial right to protect society.

Sam Jaffe, for example, was a buyer of stolen goods. Having bought various pieces of cloth from a clerk in a dry-goods concern he suggested that next time the fellow should steal a particular type of cloth. The clerk did take such a roll and hid it, but before he could deliver it to Jaffe he was suspected, and confessed. The roll of cloth was returned to its owner. Then at police suggestion it was given back to the clerk who took it to Jaffe and received the money. In due time Jaffe was prosecuted for knowingly receiving stolen goods and was convicted.<sup>14</sup>

Another case involved Cosad, Crane and Shear, who were charged with forcible rape of a young woman. The jury found them guilty of *attempt to rape*.<sup>15</sup>

Here there were four men undeniably dangerous in the sense that any known criminal is presumed dangerous enough to require segregative treatment. Yet New York's judges turned all four loose.

---

<sup>13</sup>People v. Miller, 2 Cal.2d 527, 529, 42 P.2d 308, 309 (1935)

"All that can definitely be gathered from the authorities is that to constitute a criminal attempt the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between these two extremes; but as to the method by which it is to be determined the authorities give no clear guidance." Rex v. Barker, [1924] N.Z.L.R. 865, holding the mere request of the defendant to a boy to come into the park with him and have some fun constituted an attempt to commit sodomy.

Compare with the Miller decision People v. Lombard, 131 Cal.App. 525, 21 P.2d 955 (1933), where persons intending to kidnap prepared ransom notes, started for the place of operation, suspected they were under police observation and returned home, yet were held properly convicted of attempt. Noted 24 J. Crim. L. 964 (1934)

See also as conflicting with the Miller case, People v. Stutes, 75 Cal. 570, 17 Pac. 693 (1888)

<sup>14</sup>People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906)

<sup>15</sup>People v. Cosad, 253 App.Div. 104, 1 N.Y.S.2d 132 (1937)

In Jaffe's case they said that when the employer got repossession of the cloth from the thief it somehow ceased to be "stolen" goods. Jaffe when he received it thought it was stolen; believed himself to be committing a crime. But he had in judicial sophistry received not stolen goods but only had-been stolen goods. To receive once stolen but no longer stolen goods is no crime said that court. Moreover, he had tried so far as his purpose and belief were concerned to commit a crime; in a lexicographical sense he had attempted a crime; but the court as a matter of semantics thought otherwise. Jaffe could not, it declared, be convicted either of what was no crime, nor of attempting what was not criminal.

In the *Cosad* case, though the jury had for some inexplicable reason acquitted the defendants of rape and found them guilty only of attempt, the appellate court itself looked at the evidence, found that actual penetration had been accomplished and that each defendant was in truth guilty of rape. Having been tried and acquitted of that offense they could not again be brought to trial in the future. Having *succeeded* in their attempt they were not, said the court, legally convicted of attempt.

Again the problem is raised: Were those decisions, so clearly unsound and impractical from a social point of view, either legally sound in themselves or forced upon the courts by established precedent and rule?

The Jaffe case does have some precedent to support it. Nearly a century before, during England's war with Napoleon, a Mrs. Martin was suspected of aiding French prisoners to escape. To get proof of her guilt the English officials gave a prisoner named Mallet money for bribery purposes, authorized him to get into communication with Mrs. Martin and go wherever she might take him. She accepted his bribe and took him secretly from the prison camp. Thereafter she was prosecuted and convicted of aiding a prisoner to escape. The English appellate court reversed the conviction on the ground that since Mallet had permission to leave the camp with her he was not semantically a prisoner, hence Mrs. Martin could not be said to have aided a "prisoner" to escape.<sup>16</sup>

But on the other hand, there were precedents contrary to the *Jaffe* decision. One Lee Kong, intending to kill, had accurately put a bullet through a hole in the wall into empty space which he erroneously believed to be a spying policeman's body—just as Jaffe, intending to commit crime, had received unstolen property which he erroneously believed to be stolen. The

<sup>16</sup>Rex v. Martin, R & R Crown Cases 196 (1811).

The Jaffe case was followed, the goods held to have lost their stolen character before receipt by the defendant, in *United States v. Cohen*, 274 Fed. 596 (3d Cir. 1921).

See in general, re the Jaffe case, Strahorn, "*The Effect of Impossibility on Criminal Attempts*," 78 U. OF PA. L. REV. 962 (1930).

California Supreme Court had little difficulty in finding that "in this case it is plain that the appellant made an attempt to kill the officer."<sup>17</sup> A decade after that decision another man was sent to prison for five years on conviction of an attempt to murder. He had accurately put a bullet into an empty space which he erroneously believed to be the body of a sleeping enemy. Here likewise the Missouri Supreme Court sustained the conviction.<sup>18</sup>

The propriety of the *Cosad* decision as a mere matter of precedent is, like that of the *Jaffe* case, highly disputable. Here even the pretense of any precedent obligation could have been avoided by judicial respect for a state statute which specifically provides that "a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated. . . ." <sup>19</sup> Another statute reads, "Upon the trial of an indictment, the prisoner may be convicted of the crime charged, or . . . of an attempt to commit the crime charged."<sup>20</sup> Without benefit of any such statute an earlier New York decision<sup>21</sup> had held that prosecution for conspiracy to commit a felony would not fail merely because the objective felony had been successfully accomplished. It said that a conspiracy is criminal in itself, therefore liability is not lost in success. The later *Cosad* court might have paraphrased and said, quite soundly, that "attempt" is a crime in itself, wherefore liability is not lost in success. But the court in the *Cosad* case chose to ignore both this possibility and the words of the statute. Out of the two statutes in combination it evolved the proposition that section 260 in

<sup>17</sup>People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892)

<sup>18</sup>State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902)

The *Jaffe* decision itself seems to have been repudiated, tacitly, in *People v. Boord*, 260 App. Div. 681, 23 N.Y.S.2d 792 (1940). Here the defendant was charged with attempting "to divert travellers" from their intended hotel. The persons he sought to divert were not in truth "travellers" but police officers masquerading as such. In the appellate court a dissenting judge relied strongly upon the *Jaffe* case, pointing out that there "the stolen character of the property was an essential element of the crime" and here the defendant's activity dealt with police officers, not with "travellers." The majority however affirmed the conviction without reference to the *Jaffe* case and the court of appeals affirmed without opinion. 285 N.Y. 806, 35 N.E.2d 195 (1941)

In *Copertino v. United States*, 256 Fed. 519 (3d Cir. 1919) a differentiation from the *Jaffe* case appears: "The property did not lose its character as stolen property where railroad detectives did not take physical possession of it but merely watched the place where it was hidden." (Syll.)

Sayre, "*Criminal Attempts*," 41 HARV. L. REV. 821 (1928) summarizes: "There can be no criminal liability for an attempt without proof of a specific intent to effectuate the particular criminal consequence which constitutes the crime attempted. Three important groups of attempt cases may be separately considered. Where the consummation of the crime was prevented by some mistake of fact on the part of the defendant. In cases falling within (this) group the defendant may usually be convicted if a reasonable man in the same circumstances as the defendant might expect the intended criminal consequence to result from the defendant's acts."

<sup>19</sup>N.Y. PEN. LAW § 260.

<sup>20</sup>N.Y. PEN. LAW § 610.

<sup>21</sup>People v. Tavormina, 257 N.Y. 84, 177 N.E. 317 (1931)

expressly permitting conviction of attempt although the objective crime is successfully carried out applied only when the attempt is specifically charged, and not where success is charged but a verdict of attempt is rendered in accordance with section 610.<sup>22</sup>

Even in the absence of statute there was in the *Cosad* case, as in the *Jaffe* case, no absolute rule of precedent by which the court could be said to have been bound. Again there were precedents to the effect that success precludes liability for the attempt.<sup>23</sup> But again there were also precedents to the contrary.

"The rule [that success precludes conviction of attempt] is not general and does not prevail in this jurisdiction. If an information admits of conviction of an attempt to commit a felony, an accused may be found guilty of the attempt though the evidence shows a completed offense. Such a verdict may be illogical, but the people cannot complain, and the defendant must accept it, even though less in measure than his just deserts; at least he cannot be heard to say that he has suffered injury."<sup>24</sup>

The truth is that each one of these various cases could have been decided otherwise, and the various defendants *could have been taken out of society for a time had the courts wished to do so*, without doing violence to any established rule of precedent. As commentators have repeatedly pointed out, there virtually are no "rules" in the field of "attempt" and no possibility of

---

<sup>22</sup>Query: If the prosecutor instead of relying upon section 610 for authorization of a verdict of attempt, had as a matter of uncommonly prescient precaution drafted the accusation with a count for rape and an additional count for attempt, would the court have put the defendants where they belonged?

*People v. Wasserbach*, 185 Misc. 67, 54 N.Y.S.2d 302 (1945), which speaks of section 260 as "somewhat indefinite," holds only that a defendant who is charged with attempt may have the indictment dismissed if the evidence before the grand jury shows clearly that he could be indicted for the objective crime.

Compare *State v. Harvey*, 119 Or. 512, 249 Pac. 172 (1926), "Where as in this state the statute expressly provides that one charged with the substantive offense may be convicted of an attempt to commit that offense thus making the attempt a necessary ingredient of the substantive offense no sound reason can be advanced for acquitting one charged only with the lesser offense upon evidence tending to prove the substantive offense."

A California statute, CALIF. PEN. CODE § 663, likewise provides that "Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court in its discretion discharges the jury and directs such person to be tried for such crime." This statute appears not to have been judicially restricted as was the New York statute in the *Cosad* case. See *People v. Benanato*, 77 Cal.App.2d 350, 175 P.2d 296 (1946)

<sup>23</sup>*Graham v. People*, 181 Ill. 477, 55 N.E. 179 (1899); *People v. Lardner*, 300 Ill. 264, 133 N.E. 375 (1921).

<sup>24</sup>*People v. Baxter*, 245 Mich. 229, 232, 222 N.W. 149, 150 (1928).

So also *State v. Shepard*, 7 Conn. 54, 55 (1828), holding that proof of a rape will sustain an indictment for an attempt to commit a rape. "There would seem to be little reason for the acquittal of a prisoner because the offense *proved* is more aggravated than the one *charged*, if it be of the same nature; nor in such a case could the prisoner have just cause of complaint—nor is this opinion upheld by any other authority."

satisfactorily reconciling decisions—the way is fairly free for each court's own preferential opinion.<sup>25</sup>

But assume, violent though the assumption be, that strict adherence to *stare decisis* would have compelled any of these several decisions, could not these courts have departed from the precedents had they thought incarceration of the defendants desirable? Even so long ago as the *Jaffe* case courts had come far from Bacon's restriction to "*Jus dicere*, and not *Jus dare*," and were well beyond Holmes' dictum that courts in making new law are confined from molar to molecular action.<sup>26</sup>

In the criminal law field the Supreme Court itself has set a striking example of change. In 1928 when a conviction obtained through wire tapping was before that court it found that the listening-in, under the peculiar circumstances from which any element of physical trespass was lacking, did not constitute "search." Justices Holmes and Brandeis argued that the evidence should be excluded nevertheless, on the ground that it was somehow "ignoble" to get evidence of a man's criminality by listening to his talk. The majority of the court, however, declined to go beyond exclusion based on the Constitutional search and seizure prohibition.<sup>27</sup> But in 1943 the McNabb brothers had been convicted of homicide, partly by means of their own confessions. The Supreme Court made it clear that the confessions had not been produced by any form of compulsion and could not be excluded on a basis of the Fifth Amendment, yet it nevertheless reversed the conviction and forbade use of that evidence because the confessions had been made while the men were in custody and the police were at fault for not having yet brought them before a magistrate.<sup>28</sup> Thus did the court in effect adopt

---

<sup>25</sup>United States v. Stephens, 12 Fed. 52, 54 (C.C.D. Ore. 1882), "It is said that the subject of attempt to commit crime is 'less understood by the courts' and 'more obscure in the text books' than any other branch of the criminal law."

See in general, Arnold, "*Criminal Attempts—The Rise and Fall of an Abstraction*," 40 YALE L. J. 53 (1930)

Chief Justice Clark's vigorous disagreement with the majority and the precedents he relies on in *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922), illustrates the absolute impossibility of determining such cases by "rule."

Note also the conflict between the *Rizzo* decision, *supra*, and *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903)

<sup>26</sup>A century ago an Illinois judge, dissenting from an opinion based on precedent, remarked "the common law seems to be undergoing radical changes in some of its fundamental principles, not by legislative authority, but by the will of the courts." Caton, J. in *Seeley v. Peters*, 10 Ill. 130, 154 (1848), citing many illustrations.

Still earlier according to a commentator—WILLIAM SEAGLE, *MEN OF LAW* (1847)—Sir Edward Coke was "guilty of stretching a precedent now and then when it suited his purpose. He had the happy faculty of being able to persuade himself that what he was doing was legal, and all that ever interested him was the legal aspect of things."

<sup>27</sup>*Olmstead v. United States* 277 U.S. 438 (1928)

<sup>28</sup>*McNabb v. United States*, 318 U.S. 332 (1943)

Justice Holmes' suggestion of a new rule which it had rejected fifteen years before.<sup>29</sup>

Most of the judge-made change in criminal law has favored the wrongdoer rather than sought to control him. But without need for 'disquisition at this place upon jurisprudence in general or judicial law-making in special, it can safely be said that no accepted philosophy permits judicial alteration of rule to benefit the individual while precluding it for the good of the public. If established precedent had required the various decisions here discussed, the courts which rendered them could have departed from the rule of those precedents while safely within the scope of the accepted practices of judicial power to change. But no established rule of precedent did in truth require the decisions. Each one was a matter of judicial choice; the result of a judicial willingness to save from punishment even when punishment would have been legally permissible.

So, what?

These cases and all that are like them put together are too few in number to carry any responsibility for the Devil's indifference to threat of punishment. Of the 2,000,000 major offenses reported by the police each year, approximately 1,800,000 go unpunished. Just how many criminals, as distinct from their crimes, evade punishment no one knows; there are not sufficient data to indicate the crimes per criminal. But whatever the precise relation, it is evident that occasional escapes through court-opened doors could hardly affect actual operation of the law's threats.<sup>30</sup> So too the additional prevention by incapacitation had all these people been confined would have been *de minimis*.

But there is more than one way of deterring crime by the use of punishment. The most potent of all restraints are the inhibitions developed in individuals by the mass conscience of the group to which they belong. Men who would cheerfully have risked a penitentiary sentence for crime during prohibition now stop for traffic lights though there is clearly no danger of a fine. Consciously or unconsciously, the conduct habits formed by conditioning in a conventional atmosphere have far more effect in the prevention of the first crime at least than any menace of physical ill-consequence. Whether in the home or outside it the local group opinion of tolerable conduct is the dominantly determinative factor in behavior.

---

<sup>29</sup>See also the "distinguishing" of *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907), by *People v. Schweinler* Press, 214 N.Y. 395, 108 N.E. 639 (1915); a process which offers wide opportunity for effective but unacknowledged change of rule.

<sup>30</sup>The opinions of sophisticates in criminal psychology concerning the value of mere punishment as a crime preventive are collated, De Grazia, "*Crime Without Punishments A Psychiatric Conundrum*," 52 COL. L. REV. 746 (1952).

See also BARNES AND TEETERS, *NEW HORIZONS IN CRIMINOLOGY* (2d ed. 1951).

In the words of others:

"The stamping of an act the commission of which the State will prosecute with unrelenting severity, immediately rouses the feeling that the act is unsuitable, inadmissible, disreputable, contrary to duty. Thus general prevention operates rather quietly, slowly and penetratingly, making the consciousness of right sharper, intensifying the general feeling for right and wrong. . . ."<sup>31</sup>

"The sentence of the law is to the moral sentiment of the public what a seal is to hot wax. [It] constitutes the moral or popular sanction of that part of morality which is also sanctioned by the criminal law."<sup>32</sup>

Because of this value of punishment as an open and notorious stigmatization of what is socially intolerable, every judicial refusal to impose a punishment merited by the facts inevitably suggests judicial tolerance of the activity. It may be tolerance of the crime as compared with some minor official misconduct, as when relevant and material evidence is rejected, or tolerance of it over departure from conventional rule, as in the cases here discussed. But on any basis of comparative tolerability, a judicial exemption from deserved punishment weakens the subconscious public sense of intolerance for the act. A single decision of this sort may wreak more deterioration in the factors of individual abstention from crime than thousands of offenses unpunished because the offenders are unknown. Thus every judge who sets casuistry above merited penalty must accept individual responsibility to an appreciable extent for the country's burden of crime.

---

<sup>31</sup>ASCHAFFENBURG, CRIME AND ITS REPRESSION 259 (1913)

<sup>32</sup>SIR JAMES STEPHEN, 2 HISTORY OF THE CRIMINAL LAW OF ENGLAND 79 (1883)