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EDITORIAL COMMENT.

JOHN ADAMS AND GROVER CLEVELAND ON THE ADMINISTRATION OF JUSTICE.

Referring to an editorial on "Proposed Reforms in Federal Procedure" in the last number of the JOURNAL, in which the statement was made that Theodore Roosevelt was the first President of the United States to make the law's delay a subject of dis-

cussion in an annual message to Congress, a correspondent calls our attention to the fact that John Adams, in his annual message of November 22, 1800, referred to the delays and uncertainties in the administration of the law and urged Congress to give "serious consideration to the judiciary system of the United States." From every point of view, said the President, it is of primary importance that the laws should be promptly and faithfully executed, so as to render the administration of justice by the federal judiciary as convenient to the people as may consist with their present circumstances (Richardson, Messages and Papers of the Presidents, Vol. I, p. 306). Our correspondent informs us that Horace Binney, in a letter written at the time, referred to the fact that President Adams' remarks about the need of reform in federal procedure attracted wide interest and stirred up considerable discussion throughout the country.

Our correspondent also calls attention to the fact that President Cleveland, in his annual message of December 8, 1885, complained of certain hardships in the administration of justice by the federal courts, especially in the trial of offenses under the internal revenue laws. The district courts, said the President, were crowded with petty prosecutions for offenses punishable by slight fines, while the parties accused were often required to attend courts situated hundreds of miles from their homes. If poor and friendless, they were obliged to remain in jail for months and were finally brought to trial, surrounded by strangers and with but little opportunity for defense (Richardson, Messages and Papers of the Presidents, Vol. VIII, pp. 354-355).

The evils complained of by Presidents Adams and Cleveland, however, were primarily those of organization and jurisdiction and were easily cured. The far more serious evils, growing out of the abuse of the habeas corpus, the right of appeal and reversals for technicality, had not yet appeared, at least they had not become the subjects of widespread complaint. Roosevelt and Taft were the first Presidents to dwell at length upon these evils and to urge thorough-going measures of reform, to the end that a more inexpensive, speedy and certain administration of criminal justice generally might be provided. J. W. G.

The "Game" Spirit in the Administration of Justice.

In a recent discussion of the problems of insanity in criminal procedure, one of the speakers had the frankness to stand up for the

human feelings which actuate the public and the lawyer, in making a bold and brave fight, rather than a considerate and calm determination of justice the issue in criminal trials. The appeal to the passions under the unwritten law and the appeal to the word "freedom," the excitement of the "game" of criminal procedure, the assurance that in the main nine times out of ten our juries decide correctly, and that it is easy in the turmoil to get transgressions of the rules to obtain a reversal of the decision—all this was a glimpse into what we might call the practical, and especially the human, side of justice.

Since criminal law claims to have stripped off the principles of ethics, we might consider it fair also to rid ourselves of the passions. Or shall we allow a field to righteous indignation as a legitimate balancing factor? Human feelings are among the greatest assets of a race. We should regulate them and restrict their abuses; but to disregard and repress them is a vain and directly detrimental onslaught on human nature. The only way out of a nasty situation is to create sound and productive standards or directions of human feelings and public sentiment.

The gambling spirit and the "game" spirit could not stand up against a well-organized mode of procedure which would command the respect of a fair majority of our population. To get that we must have the principles and the facts in an easily intelligible order and the rules of procedure simple enough to avoid misconstructions and real cause for the more than reasonable doubt in the efficiency of our laws and courts. Clean-cut ideas and plain facts will deprive the alluring thought of a fight for freedom of its glory, as if it had any stand on the same level as legitimate self-defense.

We need simple and plain records of the doings of the courts and of the authorities in charge of the inquiry into crimes, together with simple and plain reports of the measures applied and carried out and the results attained. This means a system of reports and statistics, digested for the student and fit to be handed on as the material for public opinion.

Unification and simplification of laws is an essential step out of the prevailing confusion. A clear knowledge of the real activities in practical criminology is the other step. With these two aims, it should be possible to emerge from half-civilization into a lawful and law-abiding use of our best instincts. To-day, with the best intentions, we have nothing to offset the bold and fresh fighting spirit of the artist of the legal game, except another set of feelings, and in these days when respectability alone is no longer a sufficient asset to

sway public opinion, the only available and efficient remedy is the use of plain facts and the appeal to simple and unequivocal laws.

In both these directions, the workers of our JOURNAL have plenty of opportunity to help us out. May it be possible to do it without leaving out of sight that, after all, the emotional side of our nature will determine the action and practice and that we have to heed the demands of public feeling if our recommendations want to reach and improve the public feeling in turn? A. M.

PROPOSED CONFERENCE ON CRIMINAL LAW REFORM IN KANSAS.

In the last issue of the JOURNAL we published an account of the Wisconsin Conference on Criminal Law and Criminology held at Madison last November, pursuant to the recommendations of the National Conference held at Chicago in June. This conference was attended by the judges of the Supreme, Circuit and Municipal courts, district attorneys, leading members of the bar, physicians and educators; a permanent organization was effected and a program of future action was mapped out. The conference considered such topics as trial procedure, expert testimony, judicial organization, appeals and reversals, juvenile justice, probation, the indeterminate sentence and the causes and prevention of crime.

It is announced that the example of Wisconsin is to be followed by Kansas next fall. Upon the invitation of the state university, the state bar association has decided to hold a conference on criminal law and criminology at Lawrence and a committee has been appointed to arrange for the meeting. We know of no more effective way of going about the study of the problems of punitive justice than through such conferences as these. They afford an opportunity for an exchange of views by members of the legal profession, judges of the courts, lay scientists and all those concerned in a practical way with the administration of punitive justice. Cooperative effort among all classes concerned directly or indirectly with the administration of the criminal law in the larger sense of the term, such as is involved in state conferences of this kind, cannot fail to be productive of tangible results.

In both Wisconsin and Kansas substantial progress toward a simplification of legal procedure and the elimination of technicalities has already been achieved. The Wisconsin code of criminal procedure forbids reversals for technical errors which do not substantially prejudice the rights of the accused, and the Supreme Court of the state is observing this sensible rule both in spirit and in letter.

The same principle has recently been embodied in the new code of civil procedure of Kansas and a movement is under way for the introduction of the rule into the code of criminal procedure. A committee of the state bar association is now considering the question and will report during the present year.

The example of these two progressive commonwealths ought to be followed by other states where reform is much more needed

J. W. G.

Executive Reversal of Judicial Decisions.

The circumstances under which Colonel Duncan B. Cooper was granted a pardon by the governor of Tennessee for killing ex-Senator Carmack raise the question whether some of the criticism now being directed against the higher courts for reversing the verdicts of trial juries in criminal cases cannot with propriety be turned against some of our state executives for the reckless, not to say lawless, exercise of the pardoning power. It is not our understanding of the power of executive clemency that it may properly be employed to set aside verdicts fairly reached and solemnly affirmed by the highest courts. It seems to us that the jury which hears all the evidence and the court which reviews the record are better judges of the guilt or innocence of the accused than any executive can be, especially one who does not examine the record at all. We think a sound interpretation of the purpose of such a prerogative would restrict its use to cases where the discovery of evidence subsequent to the conviction of the accused clearly establishes his innocence, or where, before the full penalty has been paid, it becomes reasonably evident that adequate punishment has already been inflicted and the majesty of the law fully vindicated. Where the guilt of the accused is determined by a jury whose verdict must be unanimous and where he is allowed all the safeguards and opportunities for clearing himself such as our procedure allows, some of which go even further in their liberality than a strictly rational interpretation of the rights of society would permit, where every presumption of the law is in his favor and where he is allowed the right of appeal and often a second opportunity to establish his innocence, no reason exists for allowing the executive to suppress the verdict except under the unusual circumstances mentioned above.

In the Cooper case, after a fair trial before a jury of his neighbors had been allowed and after the conviction had been solemnly affirmed by the highest court of the state, the governor, without a

petition from anyone and almost before the ink with which the opinion had been written was dry, granted Carmack's slayer a full and complete pardon. The reason given by the governor for his action was that, in his opinion, the defendant was not guilty; that he had not had a fair and impartial trial; and that he had been convicted contrary to the law and the evidence. In other words, the governor virtually constituted himself judge and jury and, without the record before him, pronounced the defendant innocent and released him. A bitter political enemy of Carmack and a close ally of his murderer, he, least of all, was competent to hold the scales of justice in a case in which the slayer of Carmack was the defendant. We are unable to view the affair in any other light than that of a gross prostitution of the pardoning power. It was more than a mere trifling with justice; it was, as a Tennessee paper described it, a strangling of justice and a nullification of the law which the governor was sworn to support. During the past year complaints have been made in a number of states of jail deliveries through the exercise of executive clemency, though none have been quite so shocking as this. Perhaps such abuses may serve a good purpose in turning public attention to the desirability of reorganizing the pardoning authority and hedging it about with more effective restrictions in the interest of law enforcement and social security. J. W. G.

Signs of Progress.

A Pittsburg lawyer, in sending us a contribution for the advancement of the cause for which the American Institute of Criminal Law and Criminology was founded, remarks that "it is constantly becoming clearer that the criminal law and procedure in our country is badly in need of reform." Confessions like this from leaders of the bar are most refreshing. One of the encouraging signs in the progress of the movement for reform is the active interest which the honest and candid members of the legal profession are beginning to take in the effort to devise a more rational criminal law and procedure. As soon as the sympathy and coöperation of the better class of lawyers shall have been secured, the success of the reform movement will be assured. On another page of the Journal attention is directed to the appointment by the American Bar Association two years ago of a special committee to inquire into the subject of needed reforms in the administration of justice and to suggest and formulate remedies for existing evils. A thorough-going measure for reform of federal procedure was prepared by the com-

mittee and unanimously approved by the association as a whole. This bill is now before Congress and is strongly recommended by President Taft. During the past two years the bar associations of many states have given serious consideration to the subject of procedural reforms, especially in criminal cases, and in a number of instances they have formulated measures which have been enacted into law. In others, special committees are now studying the question and will report their conclusions during the present year. We call attention elsewhere in this issue of the JOURNAL to the recommendations of some of these associations. The editor of the *American Law Review*, in his testimony before the judiciary committee of the national House of Representatives on January 12 of this year, in the hearing on the bill referred to above, stated that an examination which he had recently made of the proceedings of the state bar associations for the past year revealed the fact that in all of them except one the main subject of discussion was the question of reforming their systems of legal procedure and in every one of them, with a single exception, there were one or more papers read by lawyers, all on the same side, advocating reform (Hearings in H. R. 14, 552, p. 31). In a number of states during the past year governors have given the subject of legal reform a leading place in their messages to the Legislature, and in several instances commissions were appointed to investigate and report to the next Legislature. In a number of the larger cities the district attorneys have also been active and in some cases they have introduced important reforms. The local bar associations, especially in the larger cities, like Chicago, New York and San Francisco, have also shown unusual activity. In Chicago, the bar association, the law institute and the civic federation joined hands in the effort to secure a more effective method of selecting juries and a bill for this purpose was prepared and introduced into the Legislature. Several national scientific and civic organizations, such as the American Academy of Political and Social Science, the American Political Science Association and the National Civic Federation have likewise recently given important places on the programs of their annual meetings to a discussion of some of the proposed reforms in the administration of criminal justice. The medical associations everywhere are discussing the abuses of expert testimony and proposing reform. Even the alumni associations of the colleges are turning their attention to the subject. Recently, three hundred graduates of a law school in Chicago, on the occasion of a banquet, pleaded guilty to the indictment charging the bench and

bar with clinging to an antiquated court procedure; adopted resolutions urging reform and appointed a committee to investigate and report. Even more encouraging is the awakening of interest among the courts themselves. In Chicago, for example, the Superior Court and the Circuit Court have appointed committees from their benches to consider and report amendments to the practice act, with a view to simplifying procedure and doing away with archaic rules and useless technicalities. So, in New York, the justices of the Supreme Court of the first department have been grappling with the problem of how to expedite the trial of commercial cases. They have recommended a more simple procedure and other reforms intended to shorten the delays of the law in such cases. What is still more hopeful is the changed attitude some of the courts are beginning to take toward technicality in the decisions of their cases. In the last issue of this JOURNAL we commented on a recent decision of the Supreme Court of Oklahoma, where the court, after refusing to reverse the decision of a trial court on a trifling technicality, declared its intention of doing all in its power to put the jurisprudence of Oklahoma "upon the broad and sure foundation of reason and justice, so that the innocent may find it to be a refuge of defense and protection and the guilty may be convicted." If, said the court, we place our criminal jurisprudence upon a technical basis it will become the luxury of the rich, who are able to hire skilled and resourceful lawyers, while the poor and friendless, who need the strong arm of the law for their defense, will be left without protection. The court went on to declare that it "had no respect for precedents found in the rubbish of Noah's ark and which had outlived their usefulness, if they ever had any." If this is revolution, added the court, then we will continue to be revolutionary. The Supreme Court of Wisconsin has recently taken a similar attitude toward immaterial errors, declaring that many of the technical requirements in regard to the framing of indictments are nothing but "rhetorical rubbish" and have no place in the procedure of a court which is seeking to discover truth and render justice.

In our judgment, such an attitude is not revolutionary, but thoroughly in harmony with common sense and reason and is calculated to increase immensely popular respect for the courts and confidence in our methods of administering justice.

The widespread popular dissatisfaction with our present procedure and its results does not represent the vaporings of theorists or the agitation of demagogues or muck-raking agitators. It is the discontent of intelligent laymen, candid lawyers and thoughtful men

the country over. The outpouring of discussion to which we have been treated recently is not without cause. No such widespread complaint would be possible if there were not well-founded reasons for it. It is evidence of real evils which must be removed or the agitation will continue and spread, confidence in the courts as instrumentalities for administering justice will be impaired and lawlessness will increase beyond its already alarming proportions. J. W. G.

The Prevention of Crime, Not Merely Its Punishment.

The third section of the forthcoming International Prison Congress will devote its discussions to the methods of preventing crime; and the fourth section, since it studies the treatment of neglected children and youth, seeks to deal with the same problem.

The best lawyers have long since recognized the paramount importance of prevention, even where they have failed to work out any program or system for social conduct. Thus Blackstone (Book IV, chap. 18) recognized the significance of prevention when he said: "We are now arriving at the fifth general branch or head, viz., the means of preventing the commission of crimes and misdemeanors. And really it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort; since preventive justice is, upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to punishing justice; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances."

One would expect from this praise of preventive justice an exhibit of agencies and provisions of corresponding importance; but one is disappointed, for the brief chapter on "the means of preventing offenses" touches merely the question of sureties and recognizance. "This *preventive justice* consists in obliging those persons, whom there is probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offense as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior." This is rather a small contribution to our investigation, though one of real value.

The eminent Belgian jurist, Prof. Adolphe Prins (Science pénale et droit positif, p. 25), praises preventive efforts. "Criminality having social causes we ought to fight with social

measures, and in this respect preventive measures have more significance than repressive measures, just as preventive hygiene is above all remedies. Compared with prevention, repression appears as a necessary evil, as an expedient to which we must recur in the last resort. A penal system of whatever kind is chiefly a bridle for the hesitating, a means of keeping dangerous persons out of the way; it is rarely a means of regeneration of malefactors." The learned author thus gives a skeleton outline of a policy of prevention, then passes to the criminal law. The vista he opens for a brief glimpse soon closes, but our curiosity compels us to go further.

The great German jurist, von Liszt, actually questions whether the direct administration of the criminal law has any power to diminish crime; perhaps on the whole, it increases criminality. He urges preventive methods to resist the rising tide of anti-social conduct, and lays emphasis on the education of youth. His earnest plea helped to secure the important Prussian law of 1900, which brought juvenile offenders under the parental discipline of the State before they had become fixed in vicious habits.

Krohne (Gefängniskunde, p. 284) is not so skeptical about the reformatory power of prisons, but says: "Punishment is directed against the individual causes of crime; it leaves the great social causes untouched." In the last analysis "individual" causes are found to be rooted in social conditions and neglect.

The more direct preventive methods chiefly discussed in Prison Congresses fail almost as completely as punishment to reach the roots of criminality; care of discharged prisoners and their families, colonies for inebriates, prison schools and libraries, dealing with vagrancy and alcoholism, and kindred methods. These are necessary, but they come too late; they are like fighting a prairie fire close up to the haystacks, with the wind driving the sparks ahead of the flame. We need "backfiring" to keep the hungry enemy at a distance from home and harvest.

It is socially urgent that we first outline and then study systematically an adequate social policy to which all useful ameliorative agencies may contribute. Many of those agencies are not established with reference to any special conflict with crime, but they can be better appreciated when their preventive value is recognized. Without attempting to offer illustrations, or

even extended definitions at this time, it is worth while to suggest the general lines of such a social study.

So far as criminality is extended and intensified by inheritance of physical defects which incapacitate persons for orderly conduct, the problem is one of elimination. We are seeking a humane and effective substitute for natural selection and capital punishment. Some of the steps already taken or discussed are prolonged and progressive sentences for habitual, professional and dangerous criminals, more thorough segregation of the insane, epileptics and feeble-minded, colonies for inebriates, and a few advocate asexualization.

But the field of hereditary influence is gradually narrowed; we have found that most children, if well nourished and brought up, have a fair chance to make reliable citizens. As the medical profession has cut down the list of inherited diseases, and as crime is seen to have no special microbe for ancestor, the meliorist concentrates energy on infant welfare, instruction of mothers, pure milk, open windows, higher wages, improved dwellings, prohibition of crowding in sleeping rooms, ventilation of workplaces, industrial insurance. Misery drives to drink and crime; and therefore all agencies of economic betterment erect barriers to anti-social conduct. The temptation of the Sampsons in commerce is to heartless exploitation of the public; hence pure food laws and governmental control of monopolistic corporations.

The State itself is becoming more conscious of its obligations as employer and as lawgiver; it begins to see that slow, costly and uncertain administration of criminal law irritates and exasperates. By developing a program of constructive social legislation it diminishes the friction of life and appears before the workmen not merely in repressive and hateful attitude, but as father and friend. The cheerful optimism of Victor Hugo and Horace Mann, inherited from the Illuminists of the eighteenth century, has been chilled by the discovery that the "three R's" have no magic power to resist crime; but the introduction of vocational training awakens a chastened optimism which looks to better results from practical preparation to earn an honest living.

The great psychologists have urged the "expulsive power of a new affection," and have given to our preventive agencies a deeper insight into the padagogic principles at the root of the settlement movement, the creation of playgrounds, the furnishing

of music in public places. The "institutional" churches and the religious associations for young men and women have renovated the methods of the "ancient confederacy of virtue," removed the emphasis from fear and emotional excitement to well-defined and systematic methods of kindling and satisfying all the nobler wants of human beings.

All these methods deserve a place in the discussions of the new JOURNAL side by side with the profound studies of criminal law and procedure. While the administration of justice holds the adult offender by the throat, the ministers of culture and progress take care that the children and youth are kept afar from contact with the police, the courts and the prison, all of which are at best but a pathetic confession of social neglect, a costly apparatus, whose product is an army of cripples, whose position is always unstable, whose return to vicious ways bitter experience has led most men to expect under too great stress.

C. R. H.