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## A NEW SYSTEM OF CRIMINAL PROCEDURE.

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During the last few years much interest has been aroused in this country in the reform of criminal procedure. It has become very evident that there is a great need for such reform because many trials are prolonged much beyond a reasonable length to the inconvenience of most of the persons involved and at the expense of the state. There is good reason to believe that some guilty persons escape punishment as a result of technicalities in procedure. Such a condition of affairs is certain to stimulate the increase of crime and it has undoubtedly done so to a certain extent in this country.

As a result of this interest various reforms in criminal procedure have been suggested and a number of the more important of such reforms I shall discuss first in this paper. These reforms will undoubtedly increase greatly the efficiency of the present procedure but they will not change its character radically. They will not make it much more feasible to utilize in the course of procedure many scientific facts which have recently been secured with respect to the nature of the criminal, the causes of crime, and the effects of the different kinds of penal treatment. And yet these data are of the greatest significance for the treatment of crime and the criminal. I shall, therefore, in the latter part of this paper describe a more or less new system of procedure in which these data may be utilized.

A general simplification of the existing procedure is needed. Its present complexity is due largely to the effort to protect the accused. Such effort is justifiable up to a certain point because it is of the greatest importance that no innocent person shall be convicted. But when carried beyond this point it becomes a shield and cloak for the guilty under which some of them will escape punishment. This has been illustrated in numerous cases where a conviction has been reversed because of the omission of a word in an indictment or a similar unimportant error. Such miscarriages of justice have caused a lack of confidence in the courts, have increased the amount of crime and have en-

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couraged the rise of lynch law. In order to avoid such miscarriages of justice the forms for the indictment and the information should be made as brief and simple as possible so as to reduce the possibility of error to a minimum. This has been done in England and there is no reason why these documents should not be quite as simple in this country.

Furthermore, the prosecuting of crimes could be made much less cumbersome by making it possible to prosecute in the case of most if not all felonious offences by means of an information prepared by a prosecuting officer instead of an indictment. Thus would be swept away the cumbersome method of indicting by grand jury. In fact, this reform has already been effected in a number of states and should be adopted by all. It may appear that by abolishing the grand jury an important protection for the innocent will be destroyed. But sufficient protection will, I believe, still remain. In the first place, in every case there should be a preliminary examination by an examining magistrate. Then if the case is very weak the prosecuting officer will be almost certain to dismiss rather than take the chances of defeat in a trial. The grand jury has been regarded with a great deal of veneration in the past but the examinations made by it are so brief and superficial that it is doubtful if it has ever been very efficient in its work of selecting out the cases to be tried and this work can be done quite as efficiently and much more promptly by examining magistrates and prosecuting officers. This is a very important gain, for the necessity of waiting for an examination by the grand jury has frequently resulted in long delays in bringing cases to trial.

In the English common law the accused was not required to testify. This provision was supposed to be for the protection of the accused because if he did not testify he could not incriminate himself. More recently the accused has testified if he chose to do so but has had the right to refuse and the law has provided that such refusal should not have any weight with the jury and judge. Now it is very evident that the testimony of the accused is of great value in every case and in the interests of justice it should be introduced. So that the accused should be required to testify, or, at any rate, if permitted to refuse, such refusal should have weight with the jury and judge. It is doubtful if making this change would remove any justifiable protection from the accused, for if he is innocent his testimony should help rather than injure his cause, while if he is guilty there is no reason why he should not incriminate himself.

In the common law there developed for the protection of the accused the presumption of innocence. On the Continent there has

never been any such presumption or any other presumption, though many people seem to think that there is a presumption of guilt. And it would certainly appear as if there is no need for any presumption whatever, or at any rate for no presumption which will have any practical effect upon the procedure. But this has been the fault of the common law presumption of innocence that it has strengthened too much the position of the accused and has made it very difficult to convict the guilty. It would therefore be well if this presumption could be abolished, at any rate so far as it affects procedure, if not entirely, from the theory of the law.

The power of the trial judge should be greater in conducting the trial, in summing up the evidence at the end, and in commenting upon it before the jury. The judge ought to be able to put a stop to arguments which do not affect the material point at issue but which sometimes serve the purposes of counsel who wish to delay the course of the trial, and to introduce errors which will furnish the basis for appeals later on. The judges cannot, or at any rate do not, interfere very much to stop such arguments because the spirit of the common law was to regard a trial as a contest between the two sides over which the judge was to preside simply as an impartial arbiter. In like fashion the judge should be able to sum up the evidence and comment on it more freely before the jury. The judges have a good deal of power along all these lines in England. But in this country, and the same is true on the Continent, the tendency has been to limit the power of the judge for fear of his influencing the jury too much. It is, of course, true that this may sometimes happen. But as a rule the jury will make a better decision if it is aided by the superior knowledge and experience of the judge and it is a pity that this knowledge and experience should not be used more in arriving at a decision.

When the jury was first introduced on the Continent in France immediately after the French Revolution an important change was made in its mode of rendering a decision. In England unanimity was needed for a verdict but in France and elsewhere on the Continent this was changed to a three-fourth's majority. The same change has now been made in some of our states for certain kinds of cases. The unanimous verdict was another of the safeguards for the accused. But certain evils have resulted from it. It frequently happens that one or two jurors cannot agree with the rest and the consequence is that no verdict is arrived at and usually another trial has to take place. Thus the decision is greatly delayed and sometimes is never reached while the time of the courts and of all those involved is wasted. It

certainly ought to be a sufficient safeguard to the accused in most if not all cases to require that as many as three-fourths of the jurors believe him to be guilty while to require a unanimous verdict gives the accused an unfair advantage.

The right of appeal is now being greatly abused in this country. A large percentage of criminal as well as civil cases are appealed and many of them are reversed upon purely technical grounds which do not affect the merits of the case. Many of these appeals are on errors in rulings on rules of order which should not usually be reviewable because they do not usually affect the substantial points at issue. But in most jurisdictions the rules of procedure, based largely upon previous decisions, are such that any of these rulings may be reviewed and frequently furnish a basis for a reversal. Already in a few jurisdictions the rules of procedure have been so changed or appellate courts have made such decisions that this is no longer possible and the same should become true all over the country. In England there was no criminal court of appeal whatever until 1907, and even now appeal is not of right but can be made only when the trial court believes that the merits of the case are involved.

In the last place I should like to speak of something which is not exactly a matter of procedure but which frequently influences the workings of procedure and which may therefore be touched upon in this connection. In England and elsewhere the press is forbidden under rather severe penalties from expressing opinions upon questions at issue in courts before a judicial decision has been reached. In this country, however, there is very little restraint upon the press so that opinions are frequently expressed upon cases and persons on trial. This is very likely to influence harmfully the workings of procedure either by influencing the opinions of judges and jurors or by stimulating public opinion which will make it difficult for the courts to arrive at decisions impartially. The press should therefore be forbidden from commenting upon the questions at issue in a court. This does not mean however that they cannot report what has happened in connection with the case and in the court or that they cannot comment upon the decision after it is made. Such restrictions would constitute too great a restraint upon the freedom of the press and would be dangerous to free institutions.

I have now discussed some of the more important reforms in our criminal procedure which will increase greatly the efficiency of this procedure. But, as I said at the beginning of this paper, these reforms will not make it much more feasible to utilize many scientific data of

great importance. And yet, looking at it not from a purely legal, but from a broad sociological point of view, we should be most interested in devising a procedure which can make use of these data. The principal criticism I would make of most of the writings up to the present is that they have been too narrowly legal in their character. They have not recognized sufficiently that procedure is an instrument by means of which society attains certain important ends and should therefore be so adapted that it will attain these ends most effectively.

Let us therefore consider what are the objects of criminal procedure. These objects may be stated in different ways but I will suggest the following statement. Criminal procedure is, in the first place, for the purpose of distinguishing the criminal from the non-criminal members of society, and, in the second place, for the purpose of prescribing penal treatment, at least tentatively, for these criminals. To attain the first end of procedure it is necessary, in the first place, to secure evidence which will show whether or not those accused of crime are guilty, and, in the second place, to weigh and judge this evidence. How the second end of procedure is to be attained will depend upon the legal principles according to which penal treatment is inflicted. If the penal code specifies just what treatment is to be inflicted in the case of every kind of crime then the judges have nothing to do but apply the law. But if variations may be made in penal treatment according to the character of the criminal a great deal of power is placed in the hands of the judges and the procedure should be so adjusted that they will exercise this power in the best possible manner.

There are many scientific methods which may be used in securing evidence. In the first place, the police might secure a great deal of evidence while in the pursuit of criminals which they now lose. The securing of this evidence is not, strictly speaking, a part of criminal procedure, but in order to admit some of this evidence before a court it will be necessary to change somewhat the method of procedure and the law of evidence.

During recent years the psychologists have devoted a good deal of study to the psychology of testimony. They have found that by means of psychological methods both the veracity and the degree of accuracy of a witness can be tested to a considerable extent. By such methods, also, it is sometimes possible to secure evidence from witnesses or from the accused which they did not intend to give. It goes without saying that such methods should be used as far as possible in the courts,

but in order to do so it will be necessary to vary somewhat the law of evidence as to the admissibility, credibility, and weight of testimony.

The way in which medico-legal testimony is admitted in the criminal courts should be changed. At the present time such testimony is usually partizan in its character. That is to say, the medico-legal experts are usually summoned to testify and are paid by the opposing sides, so that the testimony of the expert is very likely to be influenced in favor of his own side. Whenever there is need for such expert testimony the expert should be summoned and paid by the court, so that there will be no danger of his being biased in favor of either side. It is all the more important that this change should be made because medico-legal expert testimony is the forerunner of many kinds of expert testimony which will be used in the future in criminal cases, and it goes without saying that none of this testimony should be partizan in its character.

I have now indicated some of the ways in which more use can be made of scientific methods in securing evidence. It will now be necessary to consider how such evidence should be presented in court. The usual method at the present time is by means of the so-called contradictory debate. That is to say, each of the opposing sides presents the evidence in its favor. This method of presenting evidence is derived from one of the fundamental types of procedure, namely, the procedure of accusation. This type of procedure began to develop at a time when it was customary for individuals to settle their differences by means of personal combat. In course of time these combats or duels came to be regulated by law, and then changed into a system of procedure in which each party sought for and presented the evidence in its favor, while the judge or judges weighed and judged the evidence presented to them. In this type of procedure criminal acts are regarded too much as private matters of interest only to individuals. In the opposing type of procedure, namely, the procedure of investigation or inquisitorial procedure, the judge secures the evidence for himself and then weighs and judges it. In this type of procedure, therefore, crimes are regarded as matters of great public importance, to be dealt with by officials representing the public. Our present system of procedure is a mixture of these two types. For example, the evidence is presented by means of a contradictory debate which is in accordance with the procedure of accusation, but the prosecuting is usually done by a representative of the public, which is in accordance with the spirit of the procedure of investigation. It goes without saying that crimes are matters of great public importance, so that the spirit of the procedure of investigation should undoubtedly prevail in criminal procedure. This seems

to indicate that the contradictory debate should be abolished from our procedure. And it is undoubtedly true that this feature of our procedure is undesirable in some ways. For example, the procedure of accusation from which it is derived is undoubtedly responsible for what has sometimes been called "the sporting theory of justice," which is more or less characteristic of Anglo-American law. That is to say, according to this theory a trial is a contest between individuals in which the strongest will win.

It is, however, true that in some ways the contradictory debate has proved to be the most effective way of securing and presenting evidence. Each side has a strong incentive to secure as much evidence as possible and to present it in the most effective manner possible. For this reason the contradictory debate will undoubtedly be retained for some time to come, and perhaps always. There is, however, one important change that should be made in it. As has been suggested above, the prosecution now is usually public, but the defense has remained private as in the procedure of accusation. Under such conditions it is indeed true that in accordance with "the sporting theory of justice" the stronger side will win rather than the side which is in the right. In the interests of justice it is most essential that the two sides should be about equal in the ability to secure and present evidence. For this reason the defense, as well as the prosecution, should be public in criminal trials. That is to say, the defense should be conducted by an advocate employed by the state and who is about equal in strength to the public prosecutor. Thus would the rich and poor be placed on the same basis in the criminal courts.

Public defense would also be of great value for another reason. As we have seen above, scientific methods should be used more and more for securing and presenting evidence. But in order to do this it is essential that those who are conducting the procedure shall have special scientific training. It will be impossible to bring this about so long as the defense is conducted by private counsel who have not had such special training. If the defense, as well as the prosecution, is made public, it will be possible to require such special training for both public prosecutors and public defenders. Such training could be provided in the law schools, in connection with the police, and in the prisons, so that those who wish to enter the profession of conducting criminal trials would be properly trained for the use of scientific methods of procedure. Those who enter this profession should serve alternately as prosecutors and as defenders in order to avoid acquiring any bias, and this experi-

ence would, as we shall see in a moment, prepare them for judicial positions in the criminal courts.

Let us now consider how evidence should be judged in the criminal courts. In the minor cases it is now customary to have the cases decided by one or a few professional judges. In the more important cases it is customary to have them decided by lay judges in the form of a jury. The jury has a long and distinguished history. It arose as a safeguard of the rights and liberty of the individual against the use of tyrannical power. It is evident, however, that in our modern democracies there is not much need for the jury for this purpose. On the other hand, it is evident that the jury cannot possibly have the technical knowledge which is necessary to judge intelligently evidence presented by the scientific methods indicated above. For that matter, the jury is frequently unable today to judge intelligently evidence which is placed before it. The jury is being used less and less as time goes by, as, for example, in England, where the summary jurisdiction acts have made it possible for professional judges to try and convict summarily on the consent of the accused in the case of many indictable offenses. It is probable, therefore, that the jury will disappear in large part if not entirely from our criminal courts. It should be replaced with professional judges who have been trained in the manner which has been suggested above. Special preliminary training and experience as public prosecutor, public defender and judge will produce a body of judges much more competent to weigh and judge evidence than the professional as well as the lay judges of today. It is evident that under such a system the criminal judges could not be elected to office, since they would enter the profession for life and would have to be upon a merit basis. But there is little doubt that this system would produce a better group of judges than the electoral system, and there is not much danger today that the executive branch of the government would secure too much power over such judges.

We have now reviewed very briefly the methods for securing and judging evidence of guilt. After a conviction has resulted from a trial it becomes necessary to determine the penal treatment to be inflicted upon the criminal. As has been suggested above, under the old system of fixed penalties this was an easy thing for the judge to do. But the tendency today is towards the individualization of punishment, that is to say, towards adjusting the penal treatment to the character of the criminal. It is evident, therefore, that judges should be well acquainted with the nature of criminals. This would involve a knowledge of the different types of criminals and the social causes of crime. This knowledge they would have under the system outlined above, for the prelim-

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inary training would include the study of criminal anthropology and sociology, while their experience in connection with the police, in the prisons, and in the courts as prosecutors and defenders would have given them ample opportunity to study the different types of criminals and the causes of crime. This new criminal procedure would, therefore, provide for securing evidence as to the character of the criminal after the question of guilt had been decided.

But the decision of the judge as to the penal treatment to be inflicted would in many cases have to be tentative. For example, if an indeterminate sentence was imposed it would have to be determined later when this sentence is to terminate. At present this is done by prison officials. But it has been suggested that judges should participate in these decisions also, thus bringing the courts and penal institutions into co-operation in deciding these questions. It might be possible to establish a system of periodic revision of sentences by which the judge would revise from time to time the sentence of each person convicted by him so as to determine when the sentence should be terminated or whether the penal treatment should be changed in its character. Such revision of sentence would be made upon the advice and with the co-operation of the prison officials. If such a system of periodic revision of sentences were introduced the function of criminal procedure would be extended through the judge beyond the time of the conviction and original sentence to the end of the penal treatment of the criminal.

It has been impossible within the narrow limits of this paper to discuss many of the detailed points involved, but it is to be hoped that as time goes by the discussion of the reform of criminal procedure will look beyond technical forms in the procedure of today towards the development of a system of procedure which will make the largest possible use of the data and methods of science.