

1914

## Address of the President

Orrin N. Carter

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### Recommended Citation

Orrin N. Carter, Address of the President, 4 J. Am. Inst. Crim. L. & Criminology 485 (May 1913 to March 1914)

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## ADDRESS OF THE PRESIDENT.<sup>1</sup>

ORRIN N. CARTER.<sup>2</sup>

We meet in this fifth annual conference to report progress, hopeful that the work of this organization has vindicated the wisdom of its creation. Never more than now has there been a greater need for "scientific study" and investigation of the problems of criminal law and criminology. The spirit of unrest is everywhere. Criticism of all forms of government, of every system of law, civil and criminal, is prevalent. The critics, both of substantive and procedural law, have too frequently assumed that Pope's philosophy, "Whatever is, is right," should be changed on these questions to "Whatever is, is wrong." One can hardly pick up a legal periodical without finding some article or editorial on "The Law's Delay," "Failure of Justice in the Courts," "Technicalities of the Law," "The Criminal Law has Broken Down as an Unworkable Machine," "Criminal Procedure a Disgrace to Civilization," "The Incapacity of the Judiciary" and similar topics. Even the daily press teems with like criticisms and the religious journals are not entirely free from similar articles.

Much of this criticism is made without investigation, and changes are often suggested by those who are without experience or knowledge of the particular subjects. These criticisms of the laws and courts are not alone in the United States. Our citizens are frequently referred to the laws of Great Britain as a model, yet the legal periodicals of that country indicate that the courts and laws are not accepted there as perfect. During the present year the *Law Times* and *Law Journal*, published in London, contain numerous suggestions as to changes in the laws in order to bring about speedy and certain justice. The *Law Times* of May 24, 1913, gives a table showing the condition of the dockets of the courts of appeal, the courts of chancery, king's bench and others, stating that they are all far behind in their work. An editorial in the *Law Journal* of May 17, 1913, comments vigorously on the same subject. In the *Law Times* of June 21, 1913, is a statement that many of the cases in the king's bench di-

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<sup>1</sup>Delivered before the fifth annual meeting of the Institute of Criminal Law and Criminology, Montreal, Sept. 3-4, 1913.

<sup>2</sup>Judge Carter has been identified with the legal profession in Chicago since 1889. County Judge of Cook County, 1894-1906. Justice of the Supreme Court of Illinois, since June, 1905. Chairman of the Charter Convention of Chicago, 1905-1906. Member of American Bar Association, Illinois Bar Association, Chicago Bar Association, Chicago Law Institute. Former President of the Congregational Club.

vision in Ireland, which on account of the public interests should have been heard months before, cannot then be heard and decided, but must be postponed over the long vacation. I have seen in recent articles on Law Reform in the United States a suggestion that we would do well to study and pattern after the India Criminal Code; yet I notice in the *Law Times* of June 28, 1913, an account of a murder trial in India where five months after an acquittal before a responsible judge, who heard the witnesses and saw the accused, the defendants were re-arrested and condemned and ordered hanged by an appellate court. That sentence was executed. The editor of the *Law Times* says that such a proceeding "is repugnant to the first principles of justice, and any code that permits such procedure should be amended forthwith." The court of criminal appeals in England in many cases has no power to remand a criminal cause for new trial. If it reverses the case, that is the end of the prosecution. This weakness has more than once been noted by that court with regret in reversing cases. In that respect English Criminal Law can hardly be considered ideal. Even in Canada, where the criminal law and procedure is often, I think with much reason, held up as an example to emulate, the *Canadian Law Journal* of January, 1913, sharply calls "to book" a trial judge for his rulings in criminal cases.

Some argue that our criminal procedure is chiefly at fault, while others insist that our whole treatment of crime has been based on a wrong theory; that punishment does not deter the prisoner from again committing crime and that its value in deterring others from committing crimes has been greatly over-estimated.<sup>1</sup> Without question, the prevention of crime, especially with the young, is more important than its punishment.<sup>2</sup> Because of these views juvenile courts have been established and laws are being enacted on parole and probation.

Even a cursory examination and comparison of the laws of the various countries prove that no nation has a monopoly on what is best; that laws may be effective in one country or one age which may not be practical in another country and another age. Human nature, after all, in this as in all other governmental matters, is the main factor, and one which often overturns our preconceived theories. Lowell was not only a poet but a philosopher as well when in Bigelow papers he wrote:

"The moral question's o'us plain enough,  
It's jes' the human natur' side thet's tough;

<sup>13</sup> *Journal of Criminal Law and Criminology*, p. 376, Spaulding.

<sup>20</sup> *Yale Law Journal*, p. 599.

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Wut's best to think mayn't puzzle me nor you,—  
The pinch comes in decidin' wut to du;  
Ef you read History, all runs smooth as grease,  
Coz there the men ain't nothin' more'n idees,—  
But come to make it ez we must to-day,  
Th' idees hev arms an' legs an' stop the way."

One of the chief objects of this association is to bring together the teacher, the theorist, the writer, the philosopher and the man of practical affairs—whether a judge, the warden of a penitentiary or any other public official connected with the enforcement of criminal law—so that all may co-operate in helping to bring about the necessary changes in criminal law and procedure and in the treatment of criminals, to the end that criminal law may be properly enforced; ever having in mind, however, justice to the accused as well as protection to society. Whatever success the institute has had in the past has come quite largely from the fact that it has in some measure been able to bring about a co-operation of many of those interested in these various subjects.

What we need as a basis for all our work is the facts gathered from experience in this and other countries. Some one has said that "a pound of facts is worth a ton of theories." This may be too strong a statement, but we certainly need, first of all, facts sifted from experience of officials in penitentiaries, reformatories and courts and in the light of this experience we want to adopt the admonition of Paul, "Prove all things; hold fast that which is good." To do this we must have the best thought of the men actually "in the harness" and of teachers, writers, criminologists and all others interested in these great problems. The institute has been and ought to be particularly helpful along that line. The report of its standing committees are filled with information—such information as no one studying or drafting either a substantive or procedural law can afford to ignore. To enforce this thought I call attention to only two of a number of valuable reports made last year; one is that made by the committee on indeterminate sentences and parole. There is given the substance of all the laws in each of the states of the Union on that topic, with a summary covering the whole field of experience. The other, that of the committee on criminal procedure wherein were considered the grand jury and indictments; the number and causes of reversals in courts of review; the right of appeal in criminal cases; methods of review in appellate courts; the question whether when an accused asks to have his case reviewed in a court of review he should be compelled to be examined under oath, and lastly, procedure in habeas corpus matters. The ma-

majority and minority reports on these questions furnish practically a complete index of the facts and arguments that have been urged for or against present methods in those matters.

What impresses one in the study of the various subjects as to the enactment and enforcement of the criminal law is that the problems he meets in the jurisdiction where he resides have been, or are being faced in other jurisdictions; that the remedies often proposed have been or are being tried; furthermore, that no remedy has been found a panacea. As an illustration, the question whether the failure of the accused to testify shall be permitted to be considered by the court and jury or commented on by counsel is frequently discussed. In an amendment proposed by the Ohio Constitutional Convention, afterwards adopted in that state in 1912, among other things it was provided that "No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel." The great majority of attorneys present at the Ohio State Bar Association last July were opposed to this amendment.<sup>3</sup> That question is not new in experience or discussion. In France, the accused is compelled to testify; indeed a large part of the investigation in a criminal trial in that country comes from questioning those who are accused of crime—not only by lawyers but by members of the court. In the early history of Great Britain, the questioning of the prisoner on his arraignment formed a most important part of the trial. Soon after the revolution of 1688 this practice died out and the accused was not allowed to testify if he desired; then came the change in Great Britain of permitting the prisoner to testify if he wished.<sup>4</sup> This last practice has generally obtained in the United States, but in most jurisdictions no comment can be made or conclusions drawn from the failure of the prisoner to testify.

I do not wish to be understood as claiming that there is no need of change or modification in present laws. On the contrary, I think changes ought to be made in practically every one of the United States. It will not do to say, merely because criticism is too often founded on misapprehension, that no evils exist. There is truth in the assertion that law tends to become fossilized and procedure technical. It is generally easier to follow precedent than by study and investigation to adapt the fundamental principles of justice to the

<sup>3</sup>Ohio State Bar Association Reports, 1912, p. 156.

<sup>4</sup>Stephens' General View of the Criminal Law, p. 186.

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special facts of a given case or to draft an act to meet new conditions. Truth and justice are ever the same, but their fundamental principles must be ever adjusted to meet changing conditions, as wrongs assume new and varied forms. Lawyers and judges especially need to apply common sense to rules and procedure.

The failure to exercise in the decision of cases the sense that men ordinarily use in the common affairs of life is not new to our age. It is true that the Supreme Court of Missouri in 1907 reversed a conviction because of the omission of the word "the" before "state" in the formal conclusion at the close of an indictment.<sup>5</sup> That the Supreme Court of Ohio in 1910 reversed a judgment of conviction of murder because while the victim was named in the indictment as Percy Stuckey, alias Frank McCormick, the evidence did not show that Frank McCormick was the same person as Percy Stuckey.<sup>6</sup> But it is also true that in 1841 the Supreme Court of Delaware reversed a case because the accused was indicted for stealing a pair of boots; when the proof showed that he stole two right boots, one from each of two pairs;<sup>7</sup> that in 1829 one Puddifoot was indicted in Great Britain for stealing a sheep, while the proof showed that he stole a ewe, under a statute which used the word "ewe" as well as "sheep," the prisoner being sentenced to death, and the upper court held the conviction wrong because there was a variance between the proof and the indictment. In 1827 Mr. Justice Buller quashed an indictment for murder in England because it said that "the jurors on their oath" present, etc., instead of "on their oaths."<sup>8</sup> Long before that, in Lord Hale's time, he complained that "more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, to the shame of the government, to the reproach of the law, to the encouragement of villainy, and to the dishonor of God."<sup>9</sup>

Courts cannot make and unmake laws as they will. The matters for which they are criticised are often faults of legislative enactment, rather than judicial findings. One who studies the cases in courts of last resort must be impressed with the ingenuity which courts frequently display in avoiding the application of technical rules in the decision of cases. Cases such as we have referred to are seized upon by critics as typical of all cases, when as a matter of fact in recent

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<sup>5</sup>*State v. Campbell*, 210 Mo. 202.

<sup>6</sup>*Goodlove v. State*, 82 Ohio St. 365.

<sup>7</sup>3 Harrington's Repts. (Del.) 559.

<sup>8</sup>Century of Law Reform, pp. 61 and 62.

<sup>9</sup>46 American Law Review, 379.

years, in many cases in all courts, convictions have been sustained on records filled with error, but which on the whole record were held not to have prejudiced the accused, for, as was said by the court of which I am now a member, "What we know as men we cannot pretend to be ignorant of as judges."<sup>10</sup>

Any proper system of criminal procedure should ever keep in mind not only the welfare of the state but the rights of the individual. Safety to the public demands certainty and reasonable celerity, but in bringing this about the rights of the accused must at all times be protected. The charge in the indictment or information should be sufficiently specific so that the accused may prepare his defense and not be taken by surprise on the trial, and so specific that he may not be prosecuted again for the same offense. In recent years there has been growing—and rightly—a disposition on the part of legislatures and courts to restrict the scope of objections in courts of review to those which affect the substantial justice of the cause. This has been brought about by agitation and education. Public opinion, where there is government "of and by the people" is certain in the end to influence directly or indirectly every branch of government, including the courts.

A new law or a new system of government cannot be created in a day; only time and experience can tell us the needs of any people. Change, simply for change, is not the ideal of this organization. What we demand is that if a change be made, it shall give us a better law than the one displaced. A judge of one of our courts of last resort said recently that "Laws seem to be born full grown about as often as men."<sup>11</sup> Edmund Burke stated long ago, that every people have as good a government as they deserve. The courts and the laws fairly represent the ideals of the nation.

Furthermore, whatever our system of laws, good government depends much on the manner of their enforcement. Of course it is not true that that "which is best administered is best." It was Emerson, I believe, who said that there was a best way of doing everything from peeling a potato to managing a government. The best thought of those interested in these problems should be used to find the best methods.

Such a thing may exist as too much haste in the enforcement of the criminal law. Our people are impatient with delay. They want

<sup>10</sup>*Ritchie & Co. v. Wayman*, 244 Ill. 409, 520.

<sup>11</sup>New York Bar Association Reports, 1912, p. 1005.

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instant reform. Dr. Paley, more than a century ago, uttered a great truth which students of this subject frequently overlook, that the certainty of punishment is more effective than its severity. To obtain a fair trial immediately after a crime that has attracted great attention and has aroused public indignation is difficult. Much of the criticism as to the length of trials has been caused by extraordinary cases. The ordinary criminal case in most Anglo-Saxon jurisdictions is disposed of with such celerity that all interests are protected. Lengthy trials have not alone been confined to the tribunals of the United States. The trial of Warren Hastings took nearly seven years. The Tichborne trial, in the Criminal branch, began in Great Britain in February, 1873, and ended in February, 1874; the actual time consumed in court sessions was 188 days. In the Camorra trial in Italy, which ended about a year ago, the inquiry lasted about six years and the trial itself was protracted over a year; 41 persons were accused, 4 died during the proceedings and one of the judges who presided at the trial went insane. The noted Steinheil case in France in 1910 is another illustration of a criminal trial of great length.<sup>12</sup>

Those who advocate the trial of every case according to its merits, regardless of all legal rules or precedents, should bear in mind that the difference between procedure in Anglo-Saxon jurisdictions, and under the civil law as enforced in France and other European countries, is that the English speaking races are governed by settled rules, while in France precedents are never necessarily controlling. Precedents have their place in law; they are the corner stones of legal principles. Tennyson in portraying the qualities of the Anglo-Saxon race, with its noble civilization, characterized England as

A land of settled government,  
A land of old and just renown,  
Where freedom slowly broadens down  
From precedent to precedent.

It has, however, been too generally true that the opposition of lawyers, and especially of the judges, to all changes in the law has included beneficial as well as unwise changes. Judges and lawyers cling to the old forms. They are prone to believe the laws of the fathers were best. They need to study the changes that have been made in the English law during the last century. Then, in Great Britain, the sentence of a man convicted as a traitor was that he be drawn on a hurdle from the jail yard to the place of execution and then that he, not be hanged until he was dead, for he must be cut

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<sup>12</sup>Law Journal, July 13, 1912 (Vol. 47).

down alive and his bowels taken out and burned before his eyes. This was not changed until 1814. Down to 1808 the crime of stealing from a person anything above a shilling was punishable by death; in 1810 Lord Eldon was greatly alarmed because a bill was introduced in the House of Commons to abolish the punishment by death for the offense of privately stealing in a shop to the value of five shillings. In 1800 the ducking stool was still the punishment generally inflicted on a common scold. As late as 1817 a woman was wheeled around town on a chair, but not ducked, as the water was too low.

You can find examples of speedy trials even under the Anglo-Saxon laws. On May 11, 1812, at five in the afternoon, one Bellingham shot Spencer Perceval, then Prime Minister of England. On the same day Bellingham was committed for trial at the Old Bailey. On May 15 he was called to the bar to be tried. A request of his counsel for a postponement on the ground that he desired time to secure witnesses to prove that the prisoner was insane, was refused. Bellingham was convicted and hanged on Monday, May 18.

In 1836, when there was a bill pending before Parliament to give a prisoner the right to have counsel appear for him and address the jury, 12 out of 15 prominent judges of England condemned the bill and one of them—Justice Parke—wrote a letter to the attorney general, Judge Campbell, that he would resign his office if he (the attorney general) allowed the bill to pass. The bill did pass, but the learned judge did not resign. Until the passage of the Juries Act in 1870 in Great Britain the bailiff was sworn to keep the jury in a criminal case "without meat, drink or fire." Until 1828 no one who had been convicted of a crime or had any interest in the result of a trial could give evidence.<sup>13</sup> Bentham in discussing certain of these old rules of evidence said, "They were admirably adapted to the exclusion of the truth."<sup>14</sup> The mouths of all the witnesses who knew the most about a dispute were then practically closed. Without doubt, the present statutory regulations in many jurisdictions as to the competency of witnesses might well be modified in the interest of truth.

More often than we would wish, some courts give more weight to method than to merit, to form than to substantial justice, to the shadow rather than the substance, to the science of pleading rather than to real facts. This does not mean, however, that we can admin-

<sup>13</sup>Century of Law Reform, chapter on Changes in Criminal Law and Procedure, p. 53.

<sup>14</sup>19 Yale Law Journal, 328.

ister laws without forms; that is, as a leading writer on this subject said, as impracticable as to obtain justice without laws.<sup>15</sup> The legislatures, more frequently perhaps than the courts, ignore social development and human nature itself. Laws are enacted without study or investigation, simply to satisfy the passing whim or caprice of some individual or class.

We who are members of the legal profession, in connection with this work, may lay the greatest stress on changes in the trial of criminal cases. Quite as important possibly are changes in the care and treatment of prisoners after they are convicted and sentenced to some institution for punishment. While there have been notable changes in the treatment of those sentenced to workhouses, jails and penitentiaries, we cannot pride ourselves that we have reached the best methods in the management of such institutions. Whittier more than a half century ago said,

"Thank God! that I have lived to see the time  
When the great truth begins at last to find  
An utterance from the deep heart of mankind,  
Earnest and clear, that all revenge is crime  
That man is holier than a creed,—that all  
Restraint upon him must consult his good,  
Hopes, sunshine linger on his prison wall,  
And Love look in upon his solitude."

The spirit of these lines has been carried into practice more thoroughly in the treatment of juvenile offenders—under the juvenile court acts and the probation system—than with adults. Even with the latter, by the parole system, we are testing whether the statement is necessarily true, as frequently asserted, that there should be written over the door of every penitentiary, "Let him who enters here leave all hope behind." In many penitentiaries at the present time, the management is trying to demonstrate that men even if guilty of serious offenses, are still human and appreciate and respond to fair treatment. In the State Penitentiary of Iowa and that of Colorado, I have read that the wardens are endeavoring to enforce these principles. The results in the last five years in the Colorado state prison at Canon City have been noteworthy; hundreds of thousands of dollars have been saved for the state in the care of prisoners, and permanent improvements worth other hundreds of thousands of dollars to the state have been made by the prisoners. The famous "sky line drive," one of the most remarkable scenic highways in the world, has been constructed over the top of a range of mountains by these convicts. Many of them are working on state farms in the vicinity, the guards

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<sup>15</sup>22 Green Bag, 440 (Prof. Pound).

in charge being without arms and the prisoners placed upon their honor.<sup>16</sup> Whether the results in these prisons can be formulated into a system that will be practical and permanent, or whether in these special instances they depend largely or almost entirely upon the personal magnetism of the men in charge, cannot yet be decided. This question is well worth the most earnest study and investigation on the part of the institute.

The plan of the institute is that the results of such study and investigation may be made easily accessible to those who desire information along these lines. To that end the *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* is being published by the institute. It is the first, and so far as I am advised, the only journal of the kind published in this country. Its value, not only educationally, but in furnishing information to serve as a working basis in drafting proper laws as to crime and procedure in the courts and the treatment of criminals, cannot be overestimated. The establishment of this journal alone justifies the existence of the institute.

Society is changing radically along many lines in these later years. The industrial system of the world is being reorganized. The limited experience of mankind as to many of these new problems in social and criminal law cannot meet and regulate them at once by new legislation. Neither can the courts adjust the law to these new conditions without friction and mistakes. Criticism of the courts and the law necessarily follows. This in itself is not an evil. Reasonable agitation and just criticism are most helpful.

Speaking as a representative of the courts, I am confident that if they are given the assistance in the future they have received in the past, many judges will deserve in some small measure the tribute that was rendered by Lord Campbell to that other great English jurist, Lord Holt, that he was "misled by no predilection, seeing what the law ought to be, as well as what it was supposed to be; giving precedent its just weight, and no more; able to adapt established principles to the new exigencies of social life; and making us prefer judge-made law to the crude enactments of the Legislature."<sup>17</sup>

<sup>16</sup>Harper's Weekly, Aug. 5, 1913.

<sup>17</sup>Canadian Law Times, May, 1913, p. 463.