

1914

Archaic Constitutional Provisions Protecting the Accused

E. Ray Stevens

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

E. Ray Stevens, Archaic Constitutional Provisions Protecting the Accused, 5 J. Am. Inst. Crim. L. & Criminology 16 (May 1914 to March 1915)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

ARCHAIC CONSTITUTIONAL PROVISIONS PROTECTING
THE ACCUSED.

E. RAY STEVENS.¹

To find the origin of one of the most potent causes for dissatisfaction with present day administration of the criminal law we turn to the days when one accused of crime was obliged to meet his accusers without counsel, without witnesses, without the right even to be sworn in his own behalf. Then the pressing need was to establish laws that would protect the accused. The long struggle to secure such protection resulted in a deep seated conviction that the chief purpose to be accomplished by the administration of criminal laws was the protection of the accused.

Most of these ancient abuses never existed on American soil. The colonies did not adopt the barbarous penal codes of England. But they did adopt a mass of technical rules which were invoked by humane judges to protect the accused in the days when despotic kings sought to secure the conviction of those innocent of crime. The traditions of these abuses came with the liberty loving settlers and they wove into the warp and woof of their constitutions the old technical rules that had been found essential to protect the rights of the accused in the mother country.

Under these constitutional guaranties criminal codes are too often interpreted and administered in the light of rules established by judges in the days when punishment for crime was so severe as to shock the sense of justice of many of the judges who administered the criminal law. In those early days "it was natural that technical objections, which perhaps alone stood between the criminal and the enforcement of a most severe if not cruel penalty, should be accorded great weight and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful and which at the same time ought not to succeed."¹ But there is no longer a reason for maintaining this protecting wall of ancient legal technicalities about the person of the accused. "The man now charged with crime is furnished the most complete opportunity for making his defense. * * * * The modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation."²

¹Judge, Circuit Court, Ninth Judicial Circuit, Madison, Wisconsin.

¹Peckam, J. in *Crain v. United States*, 162 U. S. 625, 646; 40 L. Ed. 1097, 1103.

²Winslow, C. J. in *Hack v. State*, 141 Wis. 346, 351, 2.

PROVISIONS PROTECTING THE ACCUSED

Let us turn to these constitutional guaranties that we may see how much of existing dissatisfaction with the criminal law may be traced directly to these old technical rules so firmly entrenched in our law by constitutional provisions.

From the beginning to the end of the trial these constitutional guaranties give the accused the advantage. To illustrate, the prosecution must try the defendant in the county or district where the offense was committed; it has no choice. But the defendant may waive this right and demand that the place of trial be changed when he feels that it will be to his advantage to be tried in some other place.

Again, the defendant may take the testimony of witnesses anywhere on the face of the globe by deposition and use that testimony upon the trial, but the prosecution is confined by the constitution to such witnesses as it can produce in court who can confront the accused at the trial. As applied to the modern criminal trial, this rule means that the accused may gather his evidence from the four corners of the earth, but that so far as the prosecution is concerned no person who has committed a crime can be convicted and punished so long as the witnesses who must be called to establish the commission of that crime remain outside the territorial limits of the state, whether such absence be through accident or design.

Again, because the king punished jurors who found defendants not guilty, while the accused had no redress in case he was convicted, the defendant in the modern criminal trial is given the right to review upon appeal any action taken or proceeding had from the time of his arrest until sentence is pronounced, while the prosecution in most jurisdictions cannot appeal from any ruling or other proceeding, no matter how erroneous the action of the trial court may be. This handicap of the prosecution has been partially removed in a few jurisdictions, but the state is still powerless to appeal from any ruling or judgment in any criminal case after the jury has been sworn to try the defendant, because jeopardy then attaches and the constitutional provision that the accused shall not be twice put in jeopardy for the same offense protects him from being subjected to another trial, no matter how erroneous the first may have been from the standpoint of the prosecution.

Following rules established by humane judges to avoid the necessity of imposing barbarous punishments, the courts have so interpreted this constitutional provision as to jeopardy that a defendant who is granted a new trial on appeal cannot be convicted of a higher degree of the offense charged than that of which he was found guilty on the former trial. As a practical illustration of the working of this rule,—a defendant, charged with the murder of his wife, was found guilty of the third degree of man-

slaughter. When he learned that his friends had appealed the case to the Supreme Court without consulting him, he wrote the chief justice that the appeal was taken without his knowledge and that he desired to have it dismissed, evidently because he feared that he might be convicted of a higher degree of homicide on the second trial, and therefore suffer a more severe penalty. But when he was informed that he could not be found guilty of a greater offense than third degree manslaughter, if a new trial was granted, he withdrew all objections and desired the appeal to proceed.

These old technical rules are no longer enforced in the country from which we inherited them. If a defendant appeals from a conviction in England, the court to which the case goes may increase or decrease the penalty, take additional testimony or grant a new trial, as the justice of the case demands.

The constitution guarantees to the accused the assistance of counsel for his defense. If he is too poor to provide himself with an attorney he is, in most states, supplied at public expense. The lawyer who defends is often more able and more experienced than the one who prosecutes. The prosecuting attorney is frequently a young lawyer with more time to secure the election than experience to qualify him to serve the public after election.

We pride ourselves that great progress has been made since the abolition of the trial by battle. But do we not reproduce most of the essential elements of the wager of battle in the modern criminal trial? The state and the defendant are represented by their hired champions, while the accused sits serenely watching the contest, wrapped in his mantle of presumption of innocence with the truth securely locked in his breast, because of the constitutional guaranty that he shall not be compelled to be a witness against himself. The outcome of the trial often depends more largely upon the intellectual strength and skill of these hired champions than upon the guilt or innocence of the accused, just as the result of the old wager of battle was determined by the physical strength of the contestants rather than the truth of the charge against the defendant.

We must not forget that the criminal law can give overprotection. When society loses faith in the ability of the law to punish the guilty, it resorts to lynch law and to vigilance committees, while officers of the law, deprived of the right to examine the accused in open court, resort to the third degree or sweating process in the secret confines of the prison cell in order to prevent the escape of men whom they believe to be guilty. The torture has long since been abolished, but in the third degree we find the modern torture, more refined, but often no less cruel than that of the past ages. The third degree should be prohibited. But it may be doubted

PROVISIONS PROTECTING THE ACCUSED

if it will be prohibited so long as it is society's most potent defense against criminals. So long as we permit the accused to refuse to submit to a cross-examination in the court room and thereby conceal the truth, so long may we expect society outside the court room to protect itself by resort to the third degree or other extra-legal means of finding the truth.

No injustice has been done the parties to a civil action by abolishing this archaic rule so that their adversaries may examine them upon the trial. No injustice will be done to the defendant in a criminal case by compelling him to submit to an examination, unless it be unjust to compel the defendant to tell the truth when the truth shows him to be guilty. There is no evidence that can give the jury more light than the answers of the accused, if truthfully given.

If a defendant urges the English court of criminal appeals to set aside his conviction because he is innocent, that court may call the defendant and ask him the questions that will enable it to determine his guilt or innocence. Why should Americans hesitate and shudder at the thought of asking a guilty man the questions that will establish his guilt? If he be guilty, no rule of law should permit him to conceal that fact. If he be innocent, the truth cannot harm him.

The defects in the administration of criminal law which we have discussed are all based on provisions of our constitutions guaranteeing the rights of accused persons. These constitutions express the will of the people. They are the supreme law of the land. The law as enacted by the legislature or as enforced by the courts cannot contravene any of these constitutional rights of the accused. The people alone can change these constitutions. Until they do change them, the people who criticise the law must share with the lawyers and the courts the responsibility for the admitted shortcomings in the law as applied to the criminal.