Journal of Criminal Law and Criminology

Volume 6 | Issue 4 Article 7

1916

Defects in Our Criminal Procedure

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DEFECTS IN OUR CRIMINAL PROCEDURE.

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[Some of our highest judges are at last speaking out in favor of reforms in our administration of criminal justice. When judges of the Supreme Court set forth such criticisms in their formal opinions, the time has evidently come for the bar to heed the advice. We print here two recent opinions (in part) which deserve universal notice. Are their summons to remain unheeded?

And we print them here to call attention to the real location of the blame for our slow progress. It is not entirely with the judges' indifference; these passages demonstrate that. It is with the *Judiciary Committees of the Legislatures*, and therefore with the bar as a whole, from whom the judiciary committees are selected, and with the people at large, who elect the lawyers in the Legislatures.

The opinion of Judge Faris reminds the people of Missouri that the judges have more than once recommended changes of the law, and that no heed has been given by the Legislature. Anyone who has had to do with judiciary committees in legislatures can confirm this complaint. Take the Illinois Legislature as a recent example.

A committee representing this Institute appeared before the Judiciary Committee, at the 1915 session, to argue in favor of a bill embodying a simple and obvious reform in the method of criminal trials upon a plea of insanity. The bill had been drafted after some years of consultation between eminent lawyers and physicians in various parts of the country; it had been approved by the American Medical Association and the American Institute of Criminal Law and Criminology; it was introduced by a leading member of the Legislature. But what was its reception? An obstructionist politician set upon it, poohpoohed the authors of the bill, ranted with cheap and irrelevant rhetoric, and persuaded a majority of his indifferent and narrow-minded colleagues that the reform measure was needless and over-radical. They emasculated the bill in committee, and what was left of it never reached a third reading.

Such are the prospects nowadays, in too many Legislatures, for any proposal of reform of criminal procedure, however much needed,

1. Chief Justice of the Supreme Court of North Carolina.
2. Justice of the Supreme Court of Missouri.

however well adapted to the purpose, and however much demanded by the eminent thinkers of the country who seek to improve the law. The ordinary legislator-lawyer is not open to the light in that field. He has no respect for the opinion of those who know. He is callous to the situation of the country in its administration of justice. To approach him with a well-thought out plan of improvement is as encouraging a task as to lecture on Kant's philosophy before a primary school.

Let all the good work in this field go on. Let the judges be converted one by one. Let the public be educated, and let the bar associations discuss. But we must not forget that the ultimate place at which all reforms come to running their gauntlet is the judiciary committees oft he Legislatures. And until they are manned by enlightened members, all changes of the criminal law must stand still.

We make this prefatory note to call attention to the fact that judges are not the only responsible officers of justice whose support must be secured before our criminal justice can be improved; and to the fact that these opinions indicate that the judges are becoming ready to accept better laws whenever the Legislatures shall provide them.] J. H. W.

DEFECTS IN OUR CRIMINAL JUSTICE.

WALTER CLARK.

[In the case of *State v. Cameron*, North Carolina Supreme Court, May 6, 1914, 81 Southeastern Reporter 748, the accused was convicted of murder in the first degree. Sixteen exceptions were taken, mostly to the wording of the trial judge's charge. The opinion of the Chief Justice declared them not well taken, pronounced that "the prisoner has had a fair and impartial trial," and then proceeded to criticise criminal justice in this country as follows:]

"Speaking not for the court, but for myself, the objection, if any, to this trial might well come from the other side—organized society. This murder, in which, as it conclusively appears by the verdict of the jury, there were no extenuating circumstances, occurred more than eight months ago, and it is now just presented in argument on appeal. There is much and just criticism of the slow and cumbersome process of executing justice in this country with its intricacy and uncertainty which is in marked contrast with the procedure in Germany and England, where justice is swift and sure. In Germany, in capital cases, the papers on appeal must be submitted by argu-

ment in the Supreme Court in a fortnight after the verdict, and it is very rarely that the court neglects to hand down its opinion within four weeks at the furthest. Under the English law, appeals in criminal cases must be carried up within ten days after trial, and ordinarily the court renders its decision in from 17 to 21 days, although in murder cases this period is usually much shorter. In England, objections to the admission or rejection of evidence are rarely, if ever, taken, and if taken, are not subject to review on appeal. Until 1908 there was no appeal in criminal cases in England, but the verdict of the jury was final and conclusive, subject only to pardon or commutation by the executive department. Since the act of 1908 an appeal in criminal cases is allowed, but not as a matter of course. In 1911 there were applications for appeal in only 7 per cent of the convictions. There was a total of 623 applications for such leave to appeal, and leave granted in only 109 of these. Out of 165 appeals considered, in 104 the conviction was affirmed, in 36 the sentence was altered, and in 25 a new trial was granted. There were in England and Wales in 1911, with 40 millions of people, only 7 appeals on conviction of murder. In 6 of these cases the conviction was affirmed, and in the other it was set aside.

"The procedure in this state, under which one charged with murder or other serious criminal offense is able to protract the controversy (for such it becomes), so that the punishment, if finally inflicted, sometimes comes one or two years after the crime was committed, deprives the punishment of its moral effect, and its infliction takes on rather the appearances of revenge than of punishment. It is largely due to this, doubtless, that, according to official statistics, homicides have been so numerous in the United States, and especially in the Southern part of the Union, as compared with other civilized countries. In 1896 the number of homicides in the United States was returned as 10,662, and in 1895 there was 10,500. Since then the number has decreased. The reports of the Attorney General of North Carolina show that for the year ending July 1, 1912, (page 75), there were 189 prosecutions in this state for homicide, exclusive, of course, of those lynched or not prosecuted for any other cause. The same reports show that in some years we have had from four to six lynchings in this state per year, while the executions by law were one or two. In 1894 our Attorney General's report shows eight lynched and two legal executions, and the next year two lynched and no execution by law. These being reports required by law, we take official notice of them, and, indeed, they are required to be made that the public may benefit by the information. *State v. Cole*, 132 N. C. at page 1087, 44 S. E. 391; *State v. Rhyne*, 124 N. C. at

page 859, 33 S. E. 128. Indeed, this information, having been brought to the public, was largely instrumental in procuring legislation as to lynching, and since then there have been more executions by law and consequently fewer lynchings. Lynching has been defined as a 'vote of lack of confidence by society' against the slowness and uncertainty of justice.

"There has been a serious discussion going on throughout the country, which is broadening in its depth and sweep, not only by the public but by the leading members of the profession and the American Bar Association under the lead of its president, ex-president Taft, as to the best methods of reform in our criminal procedure.

"This is said by the writer, speaking for himself alone, under a belief that, if the matter is called to the impartial consideration of the bench and bar and of the people of the state, a speedier and more just method of trial may be initiated which, in this country and in this state, would have the same effect that it has had in Germany and in England of reducing the enormous number of homicides which brings reproach upon the good name of our people. Indeed, a legal journal of prominence in discussing the excessive number of homicides in the United States (at that time 10,000 annually though now happily reduced), and especially in the South, and the paucity of convictions which at that time averaged 240 (with 100 executions or less) per annum of murder in the first degree, felt justified in its own opinion in referring to certain states by name, among them North Carolina, as being in this respect 'commonwealths of retarded development.' This great number of homicides is due mostly to the slowness in trial and uncertainty of conviction. The law of this state says that death shall be the punishment for deliberate and premeditated murder. But in practice the punishment is too often a moderate fine paid by the murderer, or his friends, to his counsel in the shape of a fee, and a very far heavier fine laid upon the taxpayers for the cost of a long, tedious and futile trial.

"To a large extent North Carolina has reformed its indictments, under the impulse originally given by Chief Justice Ruffin in State v. Moses, 13, N. C. 452, by doing away with redundancy of phraseology and many other technicalities which formerly were held sacred by counsel for the defense. Indictments may well be simplified still further. One great fault in our capital trials has been the vast discrepancy in the number of peremptory challenges; 23 being allowed the prisoner without cause and 4 allowed to the state. This has been to some degree modified by the act of the last Legislature, but our method of obtaining juries in both civil and criminal cases is still very far behind the best methods known. Another fault in our

procedure is in the long delay before trial and in another long delay on appeal and the numerous exceptions entertained during the trial, especially as to the evidence which lengthens a trial inordinately and makes it unnecessarily expensive to the public. In England and Germany the verdict is practically the conclusion of the proceedings against the defendant. In this country, especially when the defendant is a man of means, it is often merely the beginning of a controversy, as, for instance, in the *Becker* case in New York, which is now prominently before the public. The remedy for these evils must be sought in the enlightened discussion by the profession and the public of the evil and of the remedy."[3]

LEGISLATIVE NEGLECT TO REFORM CRIMINAL PROCEDURE.

CHARLES B. FARIS.

[In the case of *State v. O'Kelley*, Missouri Supreme Court, May 26, 1914, 167 Southwestern Reporter 980, the accused, a pharmacist, was convicted of selling liquor illegally. On appeal, the point was raised that the record's failure to show a formal arraignment and plea was fatal; although the fact of the accused's appearance in person, with counsel, and his counsel's informal statement of not guilty, were conceded. The appeal was unanimously dismissed; the opinion being written by Roy, C. But Faris, J., proceeded, in a separate opinion, to deal with the legislative failure to remove the possibility of such objections being seriously raised.]

"The failure of the record affirmatively to show that defendants entered a plea of not guilty is the point here chiefly vexing us, and the sole one which I propose discussing. Since we must, out of absolute necessity, impute verity to a record in a criminal case, certified to us by the clerk of the trial court, we are forced to presume that the absence of a showing that such a plea was entered by defendants proves conclusively that it was not entered by them, nor for them, and that they went to a trial without a formal denial of their guilt. *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. Upon the actual question of guilt or innocence, which is tried and determined in any criminal case, there is but one plea or answer; that is, 'Not guilty.' In the last analysis, some defenses are apparently in

3. The other Judges filed a concurring opinion, in which they decline to concur in the Chief Justice's "indictment against the people of this State and the administration of her laws."

their nature confessions and avoidances, as, for example, the defense of self-defense. But all in all such are comprehended and encompassed by the plea or answer of defendant, orally entered, that he is not guilty. The state avers the defendant is guilty; he says that he is not guilty, and an issue is thus made up to be tried by a jury of the country. So important was the making up of this issue at common law that a case never proceeded till it was made up. So solicitous were the courts at an early day (regrettably this mistaken solicitude survived to a day so near to our own as to be almost unthinkable) as that, if a defendant refused to plead either guilty or not guilty to the ordinary felony, that is, if he stood mute, he was imprisoned 'till he answered' (Briton, C, 4, 22; Fleta, 1, 1 t. 34, –33) except in treason. * * * *

"In the twelfth year of the reign of George III a statute was enacted which changed the above rule—already changed, I gather, by desuetude, though still the law—by providing 'that every person who being arraigned for felony, shall stand mute or not answer directly to the offense shall be convicted of the same' (4 Black, Com. 329), just as if in all respects a plea of guilty had been rendered. Later, and in the time of George IV, and long after Blackstone wrote, a statute was passed by the English Parliament, similar to our own Missouri statute hereafter discussed, providing, in substance, that when the accused stood mute a plea of not guilty should be entered of record for him (7 & 8 Geo. IV, c. 28).

"When we adopted the common law and the statutes in force in England which we did by the act of January 19, 1816, we got all of the statutes of England, of a general nature, 'made prior to the fourth year of James the First,' which were not contrary to our territorial laws then in force, and not contrary to the Constitution and laws of the United States (Laws of the Territory of Mo. p. 436). With such statutes, if it was a statute—and if not then as a part of the common law (4 Black. Com. 328; Yearbook, 8 Henry IV, c. 1)—we got the law of procedure when no plea, either of guilty or not guilty, was entered by the accused. We did not get the statute of 12 Geo. III, c. 20, which declared that standing mute in all felonies was tantamount to a plea of guilty. * * * *

"I have said so much in order to ascertain whether section 5165 of our statute, which is the lion here in the path, is a limitation of the common law, or a grant to the accused of a right not possessed by him at common law. It is fairly plain that it partakes more nearly of the nature of a right granted rather than a limitation imposed. For we have seen that, even before the passage of a statute which we did not get when we renounced the Spanish law and took

over common law, the failure to enter a plea had the effect of a conviction, not indeed pursuant to trial upon the charge before the court, but the accused was executed without trial because he would not plead. The only punishments were fines, jail sentences in later times, stripes and death, mostly the latter, for all offenses great and small, for there were no penitentiaries. Then more than 200 offenses were punishable by death. (Encyc. Brit. says there were 200 capital crimes in the year 1800; 180 in 1819; Blackstone says there were more than 160 in 1789; see 4 Black. Com. 18.) Since attainder and corruption of blood followed conviction either by trial or by confession, and since the property of the accused thereupon escheated to the feudal lord, and since conviction in every case was well-nigh certain, and death followed fast at the heels of the conviction, it is no great wonder that there were those willing to suffer death by *peine forte et dure* in order to save their property from escheating and their families from becoming paupers. Neither is it any great wonder that a shocked public conscience thoroughly aroused by the horrible injustice and brutality of the early criminal law, should, when the awakening came, have gone as it did to the other extreme, and provided well-meant safeguards for the defendant's protection and benefit, which have now grown to be pitfalls for the lagging feet of justice. Great reason there was, when the theft of 12 pence, or of a sheep, or a piece of woolen cloth, or the killing of a deer was punishable by death and the means of an active affirmative defense were withheld, that every safeguard, though built up by silly fictions, as for example, benefit of clergy and of sanctuary, should be invoked to save one driven to such crime by hunger or other compelling extremity.

"The several states, when the War of the Revolution rendered St. 7 and 8 George III, c. 28, noneffective here, passed statutes very similar to ours, which was passed in its present form in 1835, except that the word information was added to it in 1879 (Section 5, p. 485, R. S. 1835). Ever since this section has read thus (Rev. St. 5165):

'When any person shall be arraigned upon any indictment or information, it shall not be necessary to ask him how he will be tried; and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases when he does not confess the charge to be true, a plea of not guilty shall be entered, and the same proceeding shall be had, in all respects, as if he had formally pleaded not guilty to such indictment or information.'

"I think it logically follows, regard being had to the precise evil intended to be corrected by St. 7 & 8 Geo. III, c. 28, and by

Section 5165, which was passed in the same spirit, for the same reason and to correct the same ill, that the intent and spirit of this section was absolutely fulfilled, when by reason of its provisions the accused was in fact accorded a fair trial, in all respects as if he had pleaded not guilty, instead of being pressed to death or executed for that he had failed to answer or plead at all.

"Nevertheless, we may not blink the fact that a failure to enter a plea of not guilty, or that which is, as we have seen tantamount to it, a failure of the record to show that such a plea was entered, has always been, in every jurisdiction (till of late a few are breaking away) reversible error. *Crain v. United States*, 162 U. S. 625, 16 Sup, Ct. 952. * * * *

"So, until lately, stood practically all the law, so far as *stare decisis* could interpret it. Statutes like ours in practically all of the states have stood for years as latent stumbling-blocks of bald, naked technicality, cumbering the path of justice and the legal earth, subserving no appreciable present good. What reason can now be urged for retaining as reversible error the nonobservance of a rule which, after all, but guarantees to defendant, whether he pleads or not, a trial in all respects as if he had pleaded, and when in fact he actually gets the same sort of trial? In this day and age and condition of the law no reason now exists for such a rule, nor has any such existed these 35 years, and we would as well cast it into the dust heap of useless and abandoned technicality. * * * *

"I am mindful of the intimation by a divided court in the case of *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, that a statute which would utterly deny the necessity of entering a plea or having one entered, and which in effect would in all cases force a defendant to trial without an issue made up to try, might possibly violate the provisions of the fourteenth amendment to the Constitution of the United States. But even should such holding be squarely made by the Supreme Court of the United States (and in the Crain case, Mr. Justice, now Chief Justice, White, Mr. Justice Peckman, and Mr. Justice Brewer dissented), yet in my view this holding would not prevent the passage of an act by our Legislature to the effect that a going to trial by the accused without the entering of a formal plea of not guilty, or the fact that the record fails to show such a plea, should not, after verdict, no objection or exception being thereto timely lodged, constitute reversible error, on the ground that failure to interpose timely objection and the act of announcing ready and proceeding to trial and participating therein, operated as a waiver of the failure to plead. This ought to have been done years ago.

"Time after time the conference of judges (section 3892, R. S.

1909) has requested the Legislature to pass a law obviating reversal of criminal cases for this senseless, useless, and piffling reason (No. 2 of Recommendations of Conference of Judges to 47th General Assembly). No attention has been paid to this recommendation. In the light of the construction put upon this section of our statute by a body made up of all of the judges of this state, it will not suffice to say that this section, without legislative action or judicial interpretation, does not mean what it says, nor what this court for 90 years, and nearly every other court in every other jurisdiction, has always said it meant. But I concur with the views of my associates and of the learned commissioner that justice ought no longer to be trifled with and defeated for lack of somebody to act.

"However, I do not think that the courts ought to be asked to do all of the reforming, of which much is now confessedly necessary in both civil and criminal practice and procedure, nor have they the power to do so, without assuming authority by an arrogant aggression, which could subject them to impeachment. Technicalities, so-called, and actually such so far as the good subserved by them is concerned, are planted thick in our statute law. In our Constitution even, they lie scattered through each article almost 'thick as leaves which strew the brooks at Vallombrosa.' Daily odium is heaped upon the courts because they must needs follow the Constitution, when the Constitution itself is fostering and protecting moss-covered technicalities. Many examples of such Constitution-begotten technicalities could be amazingly marshaled here; let two or three suffice: The repetitious, involved, and technical verbiage of indictments of all kinds is prescribed and preserved by the organic law (Section 22, Art. 2, Cons. of 1875), likewise the rule which forbids the state to take depositions in a criminal case (Section 22, Art. 2, Cons. of 1875), as also the provision arbitrarily prescribing the manner in which indictments and informations shall conclude (Section 38, Art. 6, Cons.). Many more might be added to this list. Abortive and defective efforts of the prosecuting officers to follow these provisions of our Constitution have served to reverse the cases of more than a hundred men, all guilty, presumably, for the juries so found them to be (*State v. Murphy*, 141 Mo. 267, 42 S. W. 936; *State v. Plant*, 209 Mo. 307, 107 S. W. 1076; *State v. Wade*, 147 Mo. 73, 47 S. W. 1070; *State v. Burks*, 159 Mo. 568 60 S. W. 1100, and others too numerous to mention); other hundreds have gone unwhipt of justice because the witnesses against them stepped across the state line and stayed there (*State v. Berkley*, 92 Mo. 41, 4 S. W. 24; *State v. Dyke*, 96 Mo. 298, 9 S. W. 925).

"I am not criticizing these provisions, nor am I passing upon their wisdom or unwisdom. The people gave them to us, and it is

for the people alone to take them away. I am stating only that which has happened many score of times by reason of them, and saying that if in the last analysis they do now more good than harm, it is utterly impossible for the ordinary finite mind to perceive wherein it lies. It will not entirely answer to say that a thing which is prescribed by a Constitution, ordained and adopted by the sovereign people, *can never be in any legal sense a technicality.* This, for the reason that since it is solemnly ordained by the people themselves in furtherance of that likewise solemnly ordained prescription of the basic reasons for the existence of government at all, viz., 'that all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of the government, and that when government does not confer this security, it fails of its chief design' (Section 4, Art. 2, Cons. of Mo. 1875); therefore it is a right rule of action, and must be fairly followed and interpreted with honesty and horse sense. But we would be utterly blind and deaf to things which all other men know if we were to lay the unction to our souls that reversals of the cases of guilty men, for that rights and safeguards solemnly granted to the citizen by the sovereign people in the Constitution have been ruthlessly violated, are always to-day condoned, excused, or even accepted tolerantly by the public. Similarly, many ancient, outgrown, and useless statutes, like the one here vexing us, cumber the books, and in spite of us make reversals necessary which would often otherwise be unnecessary. I cannot square it with my duty to override willfully a people-made Constitution, nor, unless overpowering reason urge, a statute made by the representatives of the people freshly accredited by their suffrages, simply because to my mind and in my opinion the law is wrong or the Constitution is ill-advised and unfitted to the uses of these days. What assurance have I that it may not be my mistake? I, it may be, am suffering from a jaundiced view, or from strabismus of the mental machinery, and the Constitution and the law may be right.

"So much is said, as tending, if possible, to show that the responsibility is divided, as Gaul was said to have been, into three parts, and that the people and the Legislature and the courts should, in fairness each toward the other, assume their just proportion of the burden and the odium of permitting justice to be delayed or denied by reason of the operation of any ancient, worn-out technicality, the very reason for whose origin and existence has been lost in the dim mazes of antiquity.

"When, however, legislative action has been requested, as has

been done upon the statute before us, and none such looking to relief has been afforded, and when other courts, outraged by the existence of a like useless statute, are ridding themselves of it by judicial construction, we ought not to lag behind. * * * *

"For these reasons then, in addition to those so learnedly suggested in the opinion of Roy, C., I concur. * * * * I am thoroughly convinced that, outside of such argument as may be urged in favor of the statute under discussion, merely because it is a statute, and because the Legislature has neglected to amend it, after its uselessness has been shown and its amendment suggested by the conference of judges, no right of defendant is protected, and no purpose is subserved by it, when defendant in any case (except a trial for a capital offense) is tried in every respect as if he had entered a plea of not guilty, or had such a plea entered for him."