

1916

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Recommended Citation

Albert C. Barnes, Causes of Delay in Criminal Cases, 7 J. Am. Inst. Crim. L. & Criminology 330 (May 1916 to March 1917)

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CAUSES OF DELAY IN CRIMINAL CASES.¹

ALBERT C. BARNES.²

Much has been said and written on this subject in recent years. Nothing new can be added. The only excuse for further discussing it is the hope that repeated insistence on needed changes may lead to their adoption. Agitation must precede legislation, but should be directed with organized and intelligent effort, such as may come from Bar Associations and societies like this. To effect such changes, however, requires co-operation of the Bar and overcoming the conservatism of both lawyers and legislatures. Little can be expected of the latter that is not approved by the former. In this state we encounter a formidable obstacle—a divided bar. The country lawyer faces no such conditions as suggest the necessity for swift procedure in populous centers. He loves the game as he was taught it and sees no benefit or profit in changing its rules. As he shapes much of our legislation, we must break through the crust of his conservatism before we can hope for any marked changes in our criminal practice and procedure.

Another difficulty in dealing with the subject is the prevailing fear of destroying some safeguard to personal liberty. Vigilant attention to its preservation is enjoined by the constitution, and in our deep concern for it we touch at the same time the strength of our substantive and weakness of our adjective law respecting crime. We proudly differentiate our system that jealously guards the liberty of the accused at every step of procedure from that whereby he may be dragged at once before a magistrate and compelled to answer any question and prove his innocence. Viewed from results, however, it is probable each system might borrow features from the other with benefit to society and no loss to the principles of human liberty. We point with justifiable pride to those tireless sentinels, 'presumption of innocence' and 'reasonable doubt' but admit under our breath that at times they are grievously overworked and assume undue proportions. On occasions they become so awe-inspiring as to obscure the jury's vision of a whole army of facts and circumstances, and when panoplied with the grace of oratory and paraded with impressive dignity through reiterated written instructions, there is little wonder that they cap-

¹Presidential address before the annual meeting of the Illinois Branch of the Institute, Chicago, May, 1916.

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tivate the imagination of the inexperienced juror and imprison his judgment.

While no student of jurisprudence underestimates the value of the safeguards thrown around personal liberty, he may well consider whether, in a worthy purpose to preserve our ideals, we do not cling to methods that no longer subserve a valuable use and retard rather than promote the ends of justice. And while, with a better understanding of the causes of crime and a more scientific classification of offenses, the treatment of the offender will undergo such modifications as humanity, experience and science suggest, still we cannot as yet dispense with punitive methods, and the protection of society will demand that the door to the prison shall be more easily unlocked to get in as well as to get out and that rubbish in the path be swept away.

Delay is a marked feature of our system of procedure. Crime is partly condoned when justice is postponed. In the rapid succession and publicity of current events the incident of crime is quickly forgotten. No one notes the fact more surely than the criminal. Hence delay is his first line of defense. It is more valuable to him and sought oftener than the constitutional guaranty of a speedy trial. He recognizes that lapse of time softens the zeal of the prosecution, impairs its forces, and strengthens a fictitious defense; and everyone knows that it so far palliates the offense or obliterates its recollection that when a conviction is obtained it loses much of its deterrent influence. Whether a trial results in conviction or acquittal, it often carries to the public a common significance—that somebody at last has been tried for something that happened a long time ago. Too frequently attempted vindication of the law comes too late to carry either respect for its authority or fear of its enforcement. If these consequences are to be averted, if penal statutes are to operate as a deterrent of crime then the law must be so administered as to bring offenders to swift and certain accountability.

Some desirable changes would require alteration of our state constitution, but reference will be made here to a few that can be effected without it, in the order in which their necessity is suggested.

First. Delay incident to indictment.

Whatever reasons existed in the past for resort to an indictment, the intervention of a grand jury is no longer required to aid prosecution or conserve personal liberty. As tribunals of justice are now organized and cases tried, every facility is afforded for the protection of one's liberty without recourse to the presentment of a grand

jury. It has already been abolished in some states with no complaint of public detriment or personal deprivation. The power to institute proceedings for trial immediately after commission of the offense while evidence is fresh and obtainable and before a fictitious defense can be constructed, is one of the most potential factors in the assertion of law and suppression of crime. With the power to proceed in all cases by information the public prosecutor could bring most cases to trial within thirty to sixty days after arrest, without infringement of a single guaranty or denial of an essential right. And if the violator of the law knew that trial would follow close on the heels of arrest, that prosecution would not wait the tardy process of grand jury action, the laying on of the hand of the law would take on a more serious aspect and carry greater terror in its expression. A trial would often be ended before an indictment could be returned, guilt or innocence would be speedily established, justice less often defeated by spurious defenses, and respect for the law enhanced by its swift vindication. As it is, delay intervenes for no useful purpose. The grand jury affords no assistance to the prosecutor and no protection to the accused. Its findings are more or less perfunctory and usually as suggested by the state's attorney, and its no-bill does not preclude a re-submission of the charge. It imposes on the state a useless expense, on witnesses an unnecessary loss of time and money, on the prosecutor a duplication of labor, and on our judicial system a needless encumbrance. As a means of securing justice it is a hindrance, and should no longer be retained, except, perhaps, to meet extraordinary situations. If, however, under the peculiar wording of our constitution the system must be entirely abolished or retained as it is, it would better go, for the gain would greatly exceed the loss.

Second. Delay incident to pleading.

With the abolition of the grand jury would go another source of delay—the inability to amend the criminal charge. Proceeding by information would enable the prosecutor to amend the pleading or draw a new one in less time than it frequently takes to argue a motion to quash an indictment, and would discourage resort to frivolous, specious, and purely technical objections that waste time without conserving any real benefit. The nice accuracy of common law indictments partly grew out of the necessity of safeguarding the liberty of the individual in a period when it was endangered by the exercise of tyrannical power, and its requirements have induced resort to technicalities along the whole line of procedure until our criminal practice

has become encrusted with precedents that now present obstacles to prosecution rather than protection to the accused. Refuge in mere technicality would be largely abandoned under simpler forms of pleading and a procedure adapted to the practical ends for which it primarily exists. No sound reason can be advanced for adherence to an antiquated system that has too long served to convert a process designed for ascertaining the fact of guilt or innocence into a game of wit and subtle learning. In its maze of forms the ultimate object is frequently lost sight of. When forms are not essential to conserve rights and to secure a full and fair hearing, they render no service to the cause of either liberty or justice.

The elements of most crimes are so well understood that their statement with technical nicety is entirely unnecessary to the understanding of the charge or a preparation of defense. Anything required for either purpose beyond a simple statement charging the accused with having committed at a certain time and place a named crime, or an offense described sufficiently for reasonable identification and an understanding of its nature, could be supplied by order of court, and in that way adequate information for preparation of defense and protection against being placed twice in jeopardy for the same offense would be furnished. Any failure to prove its constituent elements or essential particulars could be availed of as well under such a system as under the most technical forms of pleading. If a statement merely said that the accused "stole A's coat from room 180, LaSalle Hotel, Chicago, May 31, 1916," what else would he need to know to prepare a defense unless he stole another from the same room, or desired a description that would enable him to take advantage of a variance? And if it simply said that he "murdered B by shooting him" at a certain time and place, what details would be necessary to a proper defense that could not readily be supplied by a rule of court? Is it not time to employ in our pleadings the simple, terse, direct language of the present day which the accused himself will understand, and try cases with less regard for departures from form that affect no fundamental right? As a removal from criminal pleading of the excrescences of form and refinements that no longer serve a useful purpose can be accomplished without violence to a single principle essential to personal liberty or loss of adequate protection against surprise or insufficient notice, and would inevitably result in expediting trials and discouraging appeals, why should we longer postpone means to these desirable ends?

Third. Delay incident to the jury.

The time and methods taken to obtain a jury have brought scandal on the system. It occasions little surprise that in some jurisdictions the necessity of an unanimous verdict is no longer required, and that apparent miscarriages of justice evoke the frequent comment, "What else could you expect of a jury!" It is too painfully evident to admit of denial that the methods generally pursued for impanelling and selecting jurors do not bring the most competent and qualified members of the community into service, and usually each successive process in the selection tends to diminish the average of their intelligence. In fact, it requires no discernment to note the policy and purpose of the accused in most instances to secure in the name of "impartial justice" a class of jurors whose environment, association and ignorance justify hope in an appeal to prejudice. Indulging the presumption of innocence against open methods that support the presumption of guilt presents a judicial paradox.

A jury is an indispensable part of the court in trying a felony. A court is organized to administer justice; justice rests on truth; and truth requires intelligence for its solution. But when truth is converted into a plaything for ignorance and prejudice, a ball to be bandied in a legal game, we must admit that the high sounding terms we employ in the most sacred function of government have only relative meanings. It is plain, however, that prejudice and ignorance should not be employed as the handmaids of justice, and that when they are substituted for integrity and intelligence delays will ensue and justice miscarry. But where lies the fault? First, in the false theory that we should democratize the court by a practically indiscriminate selection of one branch of it from the body politic; second, in the neglect or reluctance of the presiding judge to weed out the incompetent veniremen; third, in the latitude of examination allowed lawyers into matters affording no proper test of the juror's qualifications; fourth, in statutes that make the jury judges of the law as well as the fact and require written instructions; and fifth, in legal methods calculated to hinder rather than facilitate ascertaining the truth.

It is too much to expect of any system of selection from a large electorate that only competent persons will be listed for jury service. But methods can be adopted that will encourage acceptance instead of evasion of service by men of intelligence and experience. A plan urged before recent legislatures is that of requiring the jury commissioners to consult and accommodate those on the jury list as to the most convenient times for service, and to place their names in ap-

propriate boxes from which they may be drawn at one of those times. There is reason for evading jury service when the citizen is compelled to serve at inopportune times and at a large sacrifice. But consideration of his convenience coupled with assurance that his service would not be required again except in emergencies, would elicit his patriotic response and enlist an interest in the cause of justice that would insure not only a speedier but more intelligent disposition of cases.

The law of this state prescribes among other qualifications of jurors that they shall be "of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language." The duty of ascertaining the existence of these qualifications does not end with putting names on the jury list. The judge must assume ultimate responsibility. A proper construction of these words calls for conscientious preliminary sifting of the panel by the presiding judge that will effect the purpose of the statute to secure intelligence as well as integrity in the jury box. "Sound judgment" is not possessed by those whose educational acquirements barely exceed those possible to the moron, and the "well informed" are not found among those who confine their reading to the sporting and advertising columns of a newspaper. One arm of the court is palsied when prejudice and ignorance sit in the jury box. It is a travesty on justice when either is invoked to its aid. A discriminating and not a mere perfunctory examination by the judge, followed by a fearless exercise of his power, would result in largely eliminating those elements that bring the jury system into disrepute and destroy confidence in the courts. But perhaps exercise of the requisite discrimination is too much to expect of an elective judiciary.

Such sifting, too, would remove much excuse for prolonged examination by the lawyers. The loss of time so taken is a severe reflection on our system of administering justice. It indicates an equipment ill-advised for the purpose, or excessive indulgence of the judges. It has become a flagrant abuse, and there is something radically wrong in a system that promotes or tolerates it. It takes longer to get the jury in a simple conspiracy case in Illinois than to try a case of treason in England. Our criminal courts seem to be the only machinery of government never ready for service, and the most difficult to put into efficient operation. But the trial judge should assert his power to control and limit the examination of jurors, and when it is abused force the parties to exhaust their peremptory challenges.

But the statute itself in making jurors judges of the law gives excuse for further delay. It furnishes a pretext for numerous in-

quiries into each juror's understanding of the law and for conducting him through a preliminary course of legal instruction. (A repeal of this senseless statute, so incompatible with reason and the function of a jury, would result in hastening the selection of the jury and shortening the time of argument. There is little doubt too that this provision of the law is often interpreted by the jury as a license to apply the "unwritten law" and to adopt any construction it sees fit to justify acquittal of the guilty. It serves to destroy both time and conscience, and is out of harmony with any rational theory of attaining justice. It should go into the discard of legal fallacies.

But delay does not end with impanelling the jury. The devices for protecting human liberty at the cost of public justice are not then exhausted. Take a frequent situation. Assuming, as it should, the burden of proof the state puts in its case fortified, we will say, by direct and circumstantial evidence which the accused personally does not undertake to refute though able to do so if it is not true. Silence in most situations when one is expected to speak carries unfavorable inferences. But here where liberty or life is at stake and the innocent would hasten to deny or explain incriminating evidence of matters within his own knowledge, the law steps in to reverse mental processes. The constitution merely requires that he shall not be compelled to speak, but the law goes further and forbids allusion to his silence and enjoins the mental operations it naturally produces. Whether or not the constitutional right should be removed, as advocated by able jurists, there is no justification of its extension beyond constitutional limits. In an age when the accused is given every facility for defense, when he is permitted to have counsel, testify in his own behalf, meet his accusers face to face, when he is furnished with a written charge and necessary particulars, with the names and addresses of witnesses to be called against him, with process to compel attendance of his own witnesses, with a copy of the venire from which his jury will be selected, with a right to address them, and with every protection afforded by the most enlightened system of jurisprudence, under what principle of natural or distributive justice can he claim the right to dam the logical processes of the human intellect? There is a wide gap between compelling one to incriminate himself and alluding to his failure to avail himself of a privilege accorded by law that would naturally be resorted to if it would help him. The only effect of this provision is to put a clamp on legitimate argument and render conviction of the guilty more difficult.

A kindred anomaly under circumstances of defendant's silence is

the calling of numerous witnesses to his good reputation when it has not been impeached or questioned and is supported by legal presumption. Taking time to hear from twenty-five to fifty and more character witnesses in such circumstances, as is done in our courts, is wholly indefensible. The failure to restrict the practice has led to calling mere casual acquaintances—even the judge's associates on the Bench—to establish good reputation. The psychological effect contemplated by the number and social or political prominence of witnesses is wholly apart from the legitimate purpose for which such evidence is admissible, and when received without limitation it adds to delay a perversion of privilege and abuse of judicial discretion.

A reasonable limitation should likewise be put on argument. The cases are few that cannot be adequately argued within one to three hours. Of course it is too much to expect that any restriction will eliminate resort to sophistry and maudlin sentiment, or patent distortion of evidence. The judge often sits with humiliation, and loss of pride in our boasted system, when compelled to listen to arguments directed to the jury that no respectable lawyer would venture to address to him, and required to remain silent as he sees truth smothered with sophistry and justice chained to ignorance and prejudice. But when hours and even days are taken to analyze and summarize testimony that in essential parts would cover but a few pages of legal cap, it suggests either a very patient court, or a very obtuse jury, or a very incompetent or cunning lawyer,—in any event a defective tribunal. And when part of that time is taken to discuss and read law to the jury the situation approaches a climax little less than ridiculous.

But, as a last step to bewilder the jury, they are given written instructions, couched in redundant language and in the most exact and technical phraseology. They are seldom understood and rarely consulted except to justify the obduracy of some recalcitrant juror or to bring him to the views of the majority. Usually only the parts favorable to these particular purposes are regarded. The common law right of the judge to charge the jury and elucidate the points of the case whereby it is aided in reaching an intelligent conclusion should be restored. Judges of the Municipal Court of Chicago are given the right to instruct orally and comparatively few reversals result from failure to instruct properly. But better still is the court's illuminating analysis of the questions at issue which enables the jury to clear away the underbrush and get a perspective of the case not afforded by written instructions. Restoration of our former practice would unques-

tionably result in better verdicts, fewer disagreements and less reversals.

A cause of delay and disagreements in murder and some other cases is the requirement that the jury fix the penalty. Cases made important by their serious nature or the social station of the accused usually result in an unsatisfactory compromise. The views of the several jurors vary with their characters, training and experiences. They are not accustomed to the application of standards and differentiation of facts essential to that function. If the power of fixing definite punishment, unless it be death, should be a province of the court, it should be vested in the judge, who from varied experience, wide observation and study, and the opportunity to investigate the history and mental characteristics of the convicted, is best fitted to determine it. Many times a jury would speedily reach a verdict of guilt if the responsibility of its consequences did not rest on their shoulders.

It is a recognized fact that from fear and inexperience the first verdicts of a jury, whatever the evidence, are generally for acquittal, but that as they gather experience they convict on even flimsy evidence, thus illustrating that fluctuating standards and unstable opinions accompany that course of justice that calls the uneducated and inexperienced to its administration. It is a common observation that the service of jurors usually ends just as they begin to get educated to their work—just as they become familiar with the ways of the criminal and the arts of his lawyer, and able to distinguish perjury from truth. The jury system, however, will remain long beyond our day, despite its inherent defects. But those grafted on it by indefensible practices and statutes can be removed, and until they are we should no longer hug the delusion that the verdict of a jury is the epitome of human wisdom.

But all delay cannot be charged to juries, judges and methods. Much must be laid to the so-called criminal lawyer. The term in large cities has become ambiguous and almost a reproach. Too frequently he does not practice law but lends his services to defeat it. To that end perjury is unblushingly employed. Though masked, it stalks boldly through the temple of justice under his ministrations. It seldom passes the detection of the experienced judge but frequently deludes a weak and undiscerning jury. The ethics and ideals of the legal profession abhor such a prostitution of the calling, but like others it cannot wholly eliminate the unworthy. Proof for conviction or even disbarment is seldom obtainable. The other members of the

conspiracy rarely "squeal". Effective remedies beyond tireless vigilance and fearless exposure by bar associations are not easily suggested. But persistent exposure of those whose names become associated with "crooked" methods will tend to make perjury unprofitable and its employment dangerous.

Fourth. Delays after conviction.

But when conviction is reached final judgment and punishment should not be unduly delayed. Continuance of motions that defer entry of judgment is too freely indulged. Every step of criminal procedure should suggest expedition without hurry and consideration without dallying. There should be but one review, and that should not wait the slow arrival of court terms. It should be had just as soon after conviction and a reasonable time for preparation, as the case can be heard.

The swift methods employed in other countries have bred a national respect for law notably lacking in America. Doubtless laxity in the enforcement of law has contributed much to that unfortunate defect in our character. But back of that are our inadequate methods of attaining results. We need to revamp our judicial machinery. To that end three things are indispensable—an independent judiciary, intelligent juries, and swifter procedure. As to the last, there is a wide range for action between the attitude of worshipping forms and the iconoclastic spirit that would destroy system. Standards confirmed by wisdom and experience should remain unshaken, but precedents, forms and theories that have lost all practical value are barnacles on the keel of justice and should no longer be permitted to impede it.

As to securing an independent judiciary much can be said. But as the chief fault lies in the state constitution, I shall not discuss it.

Possibly there are those who think these criticisms of our jury system are overdrawn. But they are the result of 20 years' experience and observation as prosecutor and judge in the second largest criminal court of this country. Under the forms and methods annexed to our jury system it lodges more causes of delay and miscarriages of justice than any other branch of our judicial system. Recently a patient Chicago judge remarked that there were seventeen successive verdicts of not guilty in his court. In little over six years, fifteen women have been tried in Cook County for murder, nine for killing their husbands, without a single conviction. After a dozen fruitless efforts by one state's attorney with different juries to secure a conviction for violating the Sunday laws where the facts were not disputed such prosecutions were abandoned. But why cite instances when they crowd the

court dockets and have become so familiar that they no longer excite surprise? That such results are due to the defects of our jury system no one can question. But unless we are wakened from indifference to the consequences, there will surely follow a looser regard for law, less respect for the courts and a weakened sense of civic responsibility.

There are other causes of delay in attaining final results in criminal cases, but those referred to are patent and the necessity for their removal is less a question of theory than a call for action. While the efforts of this society to correct evils in dealing with crime will often carry it into fields where theory is alluring and experiment interesting, it can accomplish much in urging the adoption of methods that will expedite justice and promote respect for law—two pressing needs in the State of Illinois.