

1925

Editorial

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Recommended Citation

Editorial, 16 J. Am. Inst. Crim. L. & Criminology 165 (May 1925 to February 1926)

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EDITORIAL

EX-SECRETARY HUGHES ON THE PRIVILEGE AGAINST SELF-CRIMINATION

On Thursday, May 15, 1924, at a dinner of the National Institute of Social Sciences, in New York City, a distinguished lawyer, Secretary of State, and President of the American Bar Association, lamented the inefficiency of criminal justice, and named several causes or features as reported in the "New York Times," his enumerated causes or features were:

- (a) "Criminal processes are too dilatory,"
- (b) "Juries are too indulgent,"
- (c) "Judges are too lenient in sentences," and
- (d) "It is time also that we give serious thought to the question whether the *privilege against self-crimination* should be maintained . . . The question is whether the interests of justice do not demand the abolition of the privilege."

We do not need to find fault with the eminent speaker's omissions of other causes and features; not all could be fully enumerated on such an occasion. But we are entitled to assume that the four specifically mentioned were in his judgment the four most important; and we may therefore express astonishment at the superficial judgment which places the privilege against self-crimination among the first four.

Just how extensive has been this eminent counselor's observation of criminal practice is not known to us. But we may naturally ask that the critic point out just how the disparaged privilege does actually obstruct criminal justice in any manner that he would be willing to see changed. His speech calls for "immediate prosecution, conviction, and punishment, with a swiftness and adequacy which sacrifice none of the essentials of justice."

Well, would the abolition of the privilege help to attain this end?

Remember that the privilege is a privilege *not to be compelled* to testify *on the stand*. So suppose it is abolished:

- (a) The prosecution could not then compel the accused to confess *before trial*, any more than it can now. The law about confessions forbids that. Would the learned barrister also abolish the law about

confessions? He does not propose that. His proposal therefore would still leave compulsory confessions inadmissible.

(b) The prosecution could, however (the privilege abolished), compel the accused to testify *on the stand*. How is the prosecution going to *compel* him? Would the wise president of the American Bar Association re-institute torture? Look at Judge Gest's description of the law of torture on the continent in the 1600's¹ How else could the accused be compelled to speak?

(c) Perhaps the astute barrister, when he suggests the "abandonment" of the privilege, does not mean exactly that, but means only that an inference of guilt be drawn from the accused's exercise of his privilege. That is a very different thing from "abandoning" it. But in a public speech to non-lawyers such a laxity of expression from a juristic authority is hardly credible.

However, Ohio has done that much, *i. e.*, permitted the inference to be drawn. It is an arguable proposal.

Prosecuting attorneys being what they are, we want to see further experience before we trust this innovation. They told Sir James Stephen in India, when he asked about torturing the accused to get his confession, "There is a great deal of laziness in it; it is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." Would the general prospect of relying upon the accused's failure to testify lead the prosecutor to abate his search for other evidence? Probably not; but we need further experience.

(d) But, after all, how often are the present shortcomings of criminal justice attributable to his privilege? Among all causes, the learned speaker apparently places it fourth. But forty-fourth would be nearer the mark, in our opinion.

JOHN H. WIGMORE.

TECHNICALITY IN INDICTMENTS

What is a "technicality"? It is hard to define safely. But we believe that the following would be unanimously accepted as an example of a mere "technicality" in an indictment; this is not even the literal text, but a journalist's summary of the text; the indictment is the one-found in the recent case of *People v. Shepherd*, for the murder of William McClintock, tried in Chicago, Illinois, in June, 1925:

¹1925, The Old Yellow Book, Chap. IV.

"1. Defendants did give and administer typhoid bacilli.

"2. Defendants did give and administer a certain deadly poison, description unknown.

"3. Defendants did inoculate the body with a certain noxious, deadly and mortal fever known as typhoid fever.

"4. Defendants did inoculate the body with a fever, description unknown.

"5. Defendants did communicate to body a fever known as typhoid.

"6. Defendants did communicate to body a fever, description unknown.

"7. Defendants did infuse, mix and mingle with food and drink certain typhoid bacilli, a deadly poison.

"8. Same, substituting phrase 'deadly disease germs' for 'a deadly poison.'

"9. Defendants did give and administer aconitine and typhoid bacteria, which inoculated the body with a mortal fever.

"10. Defendants did give and administer prussic acid and typhoid bacteria, which produced a mortal fever.

"11. Defendants did give and administer morphine and typhoid bacteria, which produced a mortal fever.

"12. Defendants did give and administer aconite and typhoid bacteria, which produced a mortal fever.

"13. Defendants did give and administer aconitine, a deadly poison.

"14. Defendants did give and administer prussic acid, a deadly poison.

"15. Defendants did give and administer morphine, a deadly poison.

"16. Defendants did give and administer aconite, a deadly poison.

"17. (A short form.) Defendants, by poisoning, did kill and murder.

"18. Defendants did murder by means unknown.

"19. Defendants did give and administer aconite and typhoid bacteria, which inoculated the body with typhoid.

"20, 21, 22. The same as 10, 11, 12, with the word 'typhoid' substituted for the phrase 'a mortal fever.'"

It is perfectly obvious that the accused could have had a fair trial without an indictment (i. e., a notice of the subject of the charge) so multifarious as this one. But the law today is still so insistent on this technicalism that the prosecuting attorneys could not venture to omit the technicalities.

Now, we are not blaming the Law. The Law can be changed at any time by the Legislatures. But it is the Legislatures that we are blaming,—and the lawyers in the Legislatures,—and the lawyers that are not in the Legislatures,—and the citizens that make public opinion.

We possess and retain an anachronistic condition of law because the lawyers and other citizens who ought to take the leadership in a change do actually nothing about it. There is no dispute as to the shortcoming. But none come forward to guide and formulate its cure.

You cannot indict a whole people, said Edmund Burke. Nor does it avail to blame a whole profession. One gets nowhere. What is everyone's business is nobody's business.

Now, the way to make it somebody's business (and thus to get results) is to do what has been proposed long ago in this State, viz., appoint a *Central Superintendent of Criminal Justice*. It would be his duty to take the lead in formulating and proposing needed improvements.

No constitutional change is needed. Give that duty to the Attorney-General. Allot him ample help, and a staff of expert advisers. Define the duty, and add an appropriate title to his office. Then elect the right man.

We shall never get on with Reform until we have Leadership.

JOHN H. WIGMORE.