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OUR DANGEROUS CRIMINAL PROCEDURE

WILLIAM A. DUNN¹

The history of mankind discloses that society has always fought a losing battle with crime. Epochs in any country are rare and of short duration which show a tendency to the contrary.

Society has never changed its line of attack. From the earliest dawn of recorded time to the present day, its chief reliance has been the inspiration of fear. Its theory is that punishment inflicted on those who offend against its laws causes would-be offenders to desist.

It is possible that this age-long theory is basically erroneous. That it must be discarded like the once universal belief that the Earth was the center and foremost of all known and unknown worlds, before crime can be appreciably restrained.

The common law of England is the principal foundation of our state and federal laws, and its varied administration there, when carefully studied, teaches valuable lessons, which are now quite forgotten or ignored, both in that country and in this.

However strange it may seem, and whatever the psychology of the matter, it is nevertheless true that when the courts were punishing practically all accused persons indiscriminately, crime was more rampant than when many were being freed on so-called technical grounds. The framers of our National Constitution and Bill of Rights recognized this fact and in their endeavor effectually to shield the innocent, were content to announce the great principles embodied in these instruments though on occasions they might also shield the guilty.

In the discussion that follows, no consideration is given to other than felonious crime; fines and forfeitures, and other penalties not tending to degrade and debase, being excluded from the term "punishment" as herein used.

Grounds Urged for Penal Sanctions

Since governments were instituted among men, penalties for the violation of municipal law have been prescribed on two principal grounds:

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(a) For the protection of society against those who have demonstrated their unfitness to be at large.

(b) For inciting fear of a like probable fate threatening others who may offend.

All remedies hitherto proposed for the suppression of crime, start with the premise that the first and indispensable step to that end is a judgment of conviction by the courts against the supposed offenders. Even for one minor offense, a delinquent must be found guilty, be disgraced in the public estimation, and unfitted for life to become a useful and respected citizen, as the first step. Possibly the premise is false. Acting on it throughout the ages mankind has never at any time made headway toward the suppression of crime, save to the extent that it has rid society of numerous offenders who *merited* the death penalty. Applied indiscriminately, as it has been, to actual and probable offenders of all classes, we are confronted with astonishing results in this, our modern America, with its plethora of laws defining and multiplying crimes. And, as will appear later, our law and procedure as a whole, under present day conditions, operate like cleverly constructed machinery, devised, among other uses, for the rapid "manufacture" of criminals.

Fear of Punishment as a Deterrent of Crime

Anciently, and almost down to our own day, prevention of crime was sought by inspiring fear of summary punishments of the most terrible and revolting nature. One turns in horror from the cruel tortures, lingering deaths and vile imprisonments for which governments were responsible in the vain attempt to frighten people away from crime. Even in England, whose laws were the least obnoxious of all the old-world nations, the death penalty was inflicted for practically all felonies until early in the Nineteenth century. Scarcely earlier than this, did the nations in general cease to inflict torture on accused persons in the endeavor to wring from them confessions of guilt; a practice to which our American authorities are more or less given with their perfected "Third Degree" methods.

Neither barbarous penalties, nor the tendency and power of the courts aforesaid to condemn the overwhelming majority of accused persons, appears to have accomplished the end sought to be attained. In the reign of Henry VIII, for example, we find it asserted in an Act of Parliament that the prisoners then in the Kingdom of England for debts and crimes were sixty thousand

persons and above; a figure, which to Hume, in his "History of England," seems almost incredible. (Vol. 3, 227, Chap. XXXIII.)

"Harrison asserts," continues Hume, "that seventy-two thousand criminals were executed during this reign for theft and robbery, which would amount nearly to two thousand a year."

Based on the experience of mankind and the observation of present day conditions, one may not rashly conclude that fear of the law's penalties is an altogether negligible factor in restraining crime; but that it has proved, and is proving, a grossly inefficient factor is undeniable. In the language of the street, people are prone to "take a chance" in order to gain their ends.

Where a prescribed remedy for an ailment has been applied since the first rude beginnings of social organization known to man, and has at no time effected anything approaching a cure, it might be the part of wisdom to consider the problem from another angle.

The Relapse to Simplified Procedure

Social progress has never moved forward in any sphere at an even and steady pace. Civilization stumbles and falls on its upward climb and plunges headlong into like abysses from which it had once emerged. Lies there dormant for a longer or shorter space before awakening to the realities of its condition, and to the realization that it must find a way out. It is a tendency of man to believe in the superiority of the era in which he lives, and to disregard the lessons of history.

Our National, and all our State Governments, with one or two exceptions, recognized as salutary, and adopted, the basic principles of the English Common Law, relating to Criminal Procedure, as these governments were respectively established. Common Law practice and procedure in England was vastly different when our National Constitution was formed from what it had been ante-dating the English Revolution of 1688; and it was the spirit of the later and then current period which our forefathers imported into America, and sought to perpetuate by means of a written Constitution and Bill of Rights. The principles of justice are unchanging. They found apt expression in these instruments.

Has America climbed upward or stumbled and pitched downward during its one hundred and fifty years of existence with a written Constitution? A glance at the principles governing Criminal Procedure in England before and after the Revolution referred to is relative to a decision of this query.

Prior to the Revolution, a defendant on trial for a felony, was denied both witnesses and counsel, and otherwise had no legal rights of value which he was entitled to demand. Theoretically, his counsel was the presiding judge, charged with the duty of seeing that he was not unjustly convicted. But it was the attitude of the judges that rendered the trial of practically all accused persons little better than a mockery. They were imbued with the idea that "Law Enforcement" meant the disregard of all technicalities and the conviction, not only of the guilty, but of every defendant against whom there was the slightest incriminating evidence; and not infrequently, juries were penalized for returning verdicts of acquittal. Hence the thousands marched annually to the gallows. Criminal Procedure was *Simplified* to the highest degree of perfection.

For one hundred years and over, following the Revolution, the English courts, aided by wise Acts of Parliament, were building up and administering a system of Criminal Jurisprudence the most just, and the most admirable in many respects, the world has ever known. The judges, abandoning their former attitude of virtual prosecutors for the crown, took the position that "Law Enforcement" meant the observance of certain fundamental rights of defendants, and that these rights must be enforced with no less vigor than those clearly possessed by the government.

The presumption that a defendant was innocent until proved guilty was given practical effect; confessions of guilt unfairly obtained, and uncorroborated testimony of accomplices were received with the gravest suspicion; evidence was permitted in behalf of accused persons, and their right to the assistance of counsel was so recognized and extended as to assure a full presentation of their defense.

It was required that the indictment set forth with particularity facts constituting the offense sought to be charged, and if the allegations as made were insufficient clearly to charge the commission of a crime, the prosecution was subject to summary dismissal. Where indictments were found defective after trial, judgments of conviction were boldly arrested and the defendants discharged. And although the guilty might sometimes escape, the course of the courts in suffering no citizen to forfeit life or liberty except by due process of law, became in time one of the proudest boasts of the English Nation.

Sir William Blackstone, David Hume, Sir Walter Scott, and many others of note, writing in the latter half of the Eighteenth Century, comment on the security of life and property, the up-

rightness and courage of the judges and at the reference heretofore made, Hume estimates that in all England the annual executions did not then exceed fifty. This, despite the fact that the death penalty was still assessed for most felonies.

The spirit of the common law as thus administered, was the guide of our forefathers when they wrote into our National Constitution a Bill of Rights.

Having in mind the miseries inflicted on the human race by the oppressions of government and the tyranny of courts throughout all known eras of the past, they sought to erect safeguards for the protection of the people of this country against similar abuses of authority. The security of the citizen from the exercise of arbitrary power was made the cornerstone of their Bill of Rights.

Limitations on the power of the courts were written into the National Constitution, declaring, among other things, the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures; that no person should be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury; that no person should be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law. In all criminal prosecutions it was required that the accused be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and the assistance of counsel for his defense. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

How far have these safeguards which our jealous forefathers enunciated for the security of the people against judicial oppression been preserved? The answer is not far to seek.

Ignorant propaganda for "Law Enforcement," backed by the growing power of the press, has not been conducive to the observance of Constitutional Guarantees by the servants of government. The "Law Enforcement" idea of the propagandists was that persons charged with crime should be convicted. They spoke glibly of "archaic forms" and "technicalities" whereby alleged offenders secured acquittals, however incapable they were of passing judgment of the merits of the questions involved. Ignorance is wont smugly to term "archaic" and "technical" the preservation of a principle on which its own freedom from judicial tyranny and governmental oppression depends. "Worst types of criminals freed;

sweep aside your cumbersome procedure and convict them!" cries Ignorance, and by dint of loud and persistent repetition has secured sufficient following to undermine many of the most valuable concepts of law.

The conviction and removal from society of the worst types of criminals, is an end very much to be desired; and the framing of procedure to that end is the manifest duty of legislators and courts: *Provided*, the procedure so framed does not nullify the fundamental rights of every accused person, innocent as well as guilty, vouchsafed him by the Constitution; and provided further that the machinery devised and without discrimination made applicable to all supposed offenders, does not tend, inevitably, to recruit the ranks of professional and provenly dangerous criminals.

Judges and legislators (with many noteworthy exceptions) believing like most others that the punishment of one offender served as a warning example to those not yet offending, and influenced in many instances by the clamor of "Editorial" lawyers, have reverted to the standard of "Law Enforcement" held by pre-revolutionary England, and have rendered nugatory not a few of our Constitutional Guarantees.

Thus, an indictment, the primary purpose of which is to inform the accused of how, when and where the crime he is charged with was committed, has become a veritable "scrap of paper." Time, place and circumstances, may all be omitted, under the "Simplified Procedure" now in vogue, and the defendant be put upon his trial, notwithstanding that provision in the Bill of Rights, declaring that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation.

The provision that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury is nullified in most of the states on the theory that it applies to federal prosecutions only. The states not observing it permit capital prosecutions on Information, which may be presented at the whim of a prosecuting attorney, whether from corrupt or other motives, at the instigation of a wholly irresponsible individual. The provision that no person shall be compelled to be a witness against himself is not infrequently nullified by his confession being put in evidence against him, though obtained by "Third Degree" or other unfair methods.

That he shall not be twice put in jeopardy for the same offense is nullified by trying and punishing him for the identical offense in different jurisdictions, namely: Federal, State and Municipal.

Recent widespread visitations, searches and seizures when Prohibition took precedence over the Bill of Rights, often violated the declared "Right of the people to be secure in their persons, houses, papers and effects." And the daily press constantly reminds us of the little respect now paid to that intended safeguard from oppression which declares that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Besides this undermining of Constitutional Guarantees, laws have been enacted and court rules made, with the design of depriving a defendant of relief by appellate courts, although the record of his trial and conviction may disclose that his conceded legal rights were persistently invaded. These enactments and rules invest appellate courts with the power to determine whether or not the denial to a defendant of his legal rights (*Rights!* God save the mark!) was prejudicial. In other words, an appellate court may affirm the judgment of conviction, though the record be replete with errors.

Whither is all this process of "Law Enforcement" leading? Manifestly *not* to the suppression of crime. Beyond question immense numbers of accused persons are being convicted, as overflowing prisons testify.

But whom? The gangster, or criminal of the professional sort, with his past court experience and available trained witnesses, is more apt to escape conviction than the inexperienced offender. Youthful, inexperienced, and oftentimes doubtful offenders, are mostly unequal to the clocklike work of newly "Simplified Procedure," and their rapidly swelling ranks merit serious public concern.

"Manufacturing Criminals"

Where persons convicted of minor felonies were assessed the death penalty and executed, as they were aforesaid in various countries, the criminal career of these specific persons was abruptly and for all time terminated. But where, as in the United States, the penalties assessed for minor felonies are terms of imprisonment, varying, say from one to five years, the penalized offenders are still to be reckoned with.

When they have served their terms, what is their most probable course of life thereafter? Would it have been wiser, and more conducive to the public welfare, never to have condemned many of them as felons?

The letter of the law declares that jurors must believe from the evidence "beyond a reasonable doubt" that the defendant is guilty in order to justify a verdict to that effect. When the courts attempt to tell juries what so simple a term as "reasonable doubt" signifies, as is much the custom, the minds of the jurors are more likely to be confused than clarified by the definition. The practice thus becomes dangerous and tends to encourage verdicts of "guilty" if the mere probabilities seem to favor that view. In many cases, the general attitude of the court during the course of a trial may influence the verdict of a jury.

AB and CD are young men twenty-one years of age, residents of the same state, but of different judicial districts. Each is separately indicted for a minor felony, brought to trial, enters a plea of "Not Guilty" and offers evidence challenging consideration in conflict with that of the state.

For the purpose of illustration let it be assumed that they are youths of the same temperament, charged with committing a like offense, and that on the trial of each the evidence adduced is to the same identical effect; that they are without criminal records, but the evidence, while not conclusive, is nevertheless open to a construction of guilt.

AB, tried before a court that respects and enforces the legal rights of the defendant equally with those of the state, and before a cautious jury, is acquitted. Whether guilty or not, there is a fair chance, at least, that he will profit from the experience and opportunity is still open for him to win esteem as a law abiding and useful citizen. His narrow escape from a blasted life, and the faith indirectly expressed by judge and jury that he would not abuse his liberty, must be regarded as powerful incentives to future good behavior.

CD, tried before a court and jury of another temper, is convicted, sentenced to five years in the penitentiary and serves his term. Guilty or innocent, he is turned loose embittered by the horrors of restrained liberty and prison usage, and well schooled in the ways and practices of hardened offenders. Realizing that his social status is lost, and that with the "brand" of the ex-convict on him, he can no more inspire the confidence of his fellow man, the likelihood is great that he will enter on a criminal career, and that his regained freedom will be of short duration.

CD and the thousands like him, marched annually to state and federal prisons, form the bulk of recruits for the professional and gangster classes now over-running the land. If the "manufacture"

of recruits were materially abated, it might be reasonably expected that the professionals and gangsters would eventually become comparatively scarce.

That eminent authority, George W. Kirchwey, head of the Department of Criminology, New York School of Social Work, and formerly warden of Sing Sing Prison, makes the following observations in an article on crime, prepared for the 1938 Britannica Book of the Year:

"The inordinate sentences imposed for felonious crimes have had the effect of filling the state prisons throughout the United States to a point of dangerous over-crowding. A study of this prison population brings to light two facts of profound significance. The first of these is the youthful immaturity of a great majority of the inmates. The second is the more disquieting discovery that with rare exceptions, these young felons are what prison language describes as 'Repeaters', young 'old offenders', who have previously, almost continuously, served prison sentences, or, in childhood, equivalent demoralizing 'durance vile' in so-called 'Pro-tectories', 'Houses of Refuge', 'Reformatories', and the like."

Following this statement of Kirchwey, the Year Book gives interesting data, supplied by Mr. Victor Brodsky, on the crime situation in Great Britain, which has also reverted to the pre-revolutionary idea of "Law Enforcement," and so simplified its procedure, that most accused persons are without difficulty convicted. After stating that indictable offenses against children, of which they are convicted, are increasing rapidly Mr. Brodsky says that the total number of persons found guilty of burglary more than doubled between 1929 and 1935; that cases of violence against the person showed a marked increase, and that cases of larceny increased from 41,045 in 1929 to 51,477 in 1935.

What Remedy?

The time will be long in which society must continue to protect itself against its lowest element; that element of debased individuals whose criminal bent is manifest, and who hesitate at no enormity to gain their ends.

Happily this element is insignificant as to numbers, and its ravages might be restrained within narrow limits could it be dealt with as a distinct and separate entity. But the tendency of ex-convicts to develop a like mentality multiplies the difficulties of the problem by constantly adding to the instinctive criminal element a greater or less supply of offenders grown equally desperate.

Is it practicable materially to reduce this supply of ex-convicts without prejudice to public safety? Evidently ex-convicts exist

by reason of judicial sentences to penal servitude, and the inquiry therefore goes back to the wisdom and policy of sentences, which officially and finally *create* convicts.

It has been seen that "Law Enforcement" which denies to defendants their constitutional and legal rights, and the simplification of criminal procedure to procure and sustain the conviction of accused persons with ease and dispatch, have not tended to suppress crime. The trend is to the contrary.

Probation, the suspended sentence and kindred measures of humane tendency, have gained rather extensive public approval in recent years; but these measures take effect *after* the persons who are supposedly trustworthy, have been condemned as felons. If trust were reposed *before* condemnation, what would be the probable consequences?

No person ever made anything "out of himself" driven by a bull whip held in readiness to lash him unmercifully if he faltered. There are traits in human nature, common to all persons save the instinctively criminal minded, which, if properly appealed to, produce a respect for and obedience to authority, not compellable by force or fear.

The French Armies, under Napoleon, and the Army of Northern Virginia, under Lee, afford striking examples of this truth. Armies are composed of all sorts and conditions of men, and obedience to authority is the first and most essential of military laws.

No better disciplined or effective armies ever went into the field than those which moved with machine-like precision at the will of these commanders. Officers as well as common soldiers seemed to vie with each other in doing *what was expected of them*, or more. Obedience and enthusiasm of this character were not inspired by fear. Leniency wisely exercised was more compelling.

It is related of Napoleon that while personally and alone he was inspecting the outposts of his army in the night he came upon a sentry asleep at his post; an offense meriting summary execution by established military usage. Napoleon, having perhaps studied the man's appearance for a moment, took the musket from his relaxed grasp and himself did sentinel duty for thirty minutes before arousing the sleeper, restoring his musket and cautioning him to be more vigilant. When the sentry learned who it was that had relieved him and reported it among his comrades, the incident inspired added loyalty and affection in the troops to their chief.²

² Abbott's Napoleon.

Shortly after General Lee had issued orders and caused them to be read to his army, strictly forbidding the taking or destruction of private property, except on military necessity and by command of the proper officers, he was passing with his staff near a farm of which the fence had been torn down and a number of private soldiers were perceived inside, helping themselves without stint to the produce of the field. This direct disobedience of recently published orders would have subjected the offenders to immediate arrest and punishment at the hands of most military commanders. General Lee drew his horse to a stop, contemplated the men earnestly for a brief space, then said: "Gentlemen, you will oblige me by coming out of there and putting up the fence." Which, and no more, was the final word of authority on the subject.³

Knowing when *not* to punish! It is a thing vastly to be desired in all constituted authority, when invested with discretionary powers. Individuals who have fallen into error not infrequently redeem themselves through the knowledge of trust and confidence reposed in them by those whose good opinion they esteem.

Not only must courts rigorously observe and enforce the rights of accused persons; but judges of trial courts must be invested with greater discretionary powers if the official and unnecessary creation of convicts is to be avoided. If, for example, the evidence adduced on the trial of an accused person, and from other knowledge available to the court, the case should appear to justify a suspended sentence in the event there should be a verdict of "guilty," the judge should be authorized to discharge the defendant without a finding by the jury. There need be no pronouncement by court or jury concerning the guilt or innocence of the defendant, but a mere statement by the court that the defendant is discharged.

The question then is: Would the defendant, given his freedom, and still finding the opportunity open to redeem his error (if guilty) by justifying the faith of the court, be less of a menace to society than if convicted, "branded" as a felon, and turned loose on probation? All logic and all experience of mankind call for an affirmative answer.

Assuming that the evidence strongly indicated the guilt of defendant, and that from the vicious nature of the crime, or other sufficient reasons, the court should deem him unworthy of trust, and that he would be a constant menace to society if liberated, the issue of "guilty" or "not guilty" should be submitted to and determined by the jury. Although sporadic adverse criticism has been

³ Related to the writer by an officer who was present on the occasion.

leveled at the jury system, the power to condemn an accused too easily becomes arbitrary and tyrannical if lodged elsewhere than in the "judgment of his peers," a tendency observable in the history of all those countries which deny the right of trial by jury.

Conclusions

The commonly accepted belief that crime can be materially checked by inspiring a fear of punishment has been proven untenable by the record of human experience. If trial judges were invested with discretion to discharge a defendant before conviction, it would be preferable to the suspended sentence or any form of probation. These latter, if not abolished, should be restricted to very exceptional cases.

The enforcement of the safeguards enumerated in the National Bill of Rights is essential to the safety and security of the people. Their denial is not only a grave public danger, but brings the law into contempt.

Protection of society demands the exclusion of provenly vicious and dangerous offenders, who are unfitted to be at large. To bring about which, the maximum penalties for most felonies should be vastly increased.

There should be drastic revision of the laws governing indictments in many states. No person should be required to plead to a "scrap of paper," which tells him nothing as to how, when or where he is charged with offending.

Confessions of an accused, obtained by torture, (Alias Third Degree Pressure) or under circumstances exciting the least suspicion of unfairness, should be excluded from evidence on his trial.

Where a clear legal right of an accused has been invaded or denied in the trial court, appellate courts should be given no implied or express power to call the error harmless and affirm a judgment of conviction.

Law enforcement! It means the preservation of the enduring principles enunciated in the Bill of Rights, and not a Procedure that endangers the innocent, if so unfortunate as to be arraigned at the "Bar of Justice." It means the preservation of those basic rights, which the Declaration of Independence terms UNALIENABLE.