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Criminal Procedure and Civil Rights

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CRIMINAL PROCEDURE AND CIVIL RIGHTS

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Many a law enforcement officer has complained, either vocally or to himself, that often it appears that the present rules of criminal procedure were designed for the protection of the guilty, rather than the efficient administration of criminal justice. To some, rules of procedure seem to place hurdle after hurdle in the path of speedy and aggressive law enforcement. In reality they are designed to protect the individual from the arbitrary or capricious exercise of authority by despots and persons in public office and other high places; they are based on a philosophy which maintains that every defendent is entitled to a fair trial and that it is better to permit several guilty persons to go free than to convict one who is innocent.

In order to understand the philosophy and mechanics of criminal procedure as it exists today in America it is necessary to have some familiarity with the history of our theory of government, particularly those facets which deal with the age old struggle of the common people in all countries to obtain and preserve the fundamental human rights and liberties which we refer to today as civil rights and civil liberties.

THE BEGINNINGS OF CRIMINAL PROCEDURE

Our theory of government, which embraces criminal procedure, developed through many centuries in England before its introduction to the western hemisphere. This political development played a major role in determining criminal procedure as it is administered today. In order to understand the theory and purpose, the "why" of criminal procedure, it is necessary to briefly review the history of man's struggle for freedom and liberty.

Even before that far off date, when man first started to regulate his brother's conduct, he has been concerned with machinery for the administration of justice. In the day of the wooden shield and war club there were no nice distinctions made between crimes and civil wrongs. Disputes were settled by physical means and either the plaintiff or defendant was carried off the field. The first improvements in the administration of justice were characterized by attempts to regulate private combat with various rules and standards, rather than to establish a system of criminal law. It was not until adequate mores and customs were developed sufficiently to maintain at least a code of unwritten law that personal grievances could be settled by appeal to judges. It was not until the tribe, and later the state, assumed its obligations as administrator of justice, that criminal procedure became an official prosecution, rather than an unofficial private skirmish. After personal standards had finally given away to collective group ideas of right and wrong, legal standards and ethical concepts began to develop.

THE ANTIQUITY OF CIVIL RIGHTS

Interwoven throughout the fabric of criminal procedure as we know it in America today, is the concept of civil rights and civil liberties. Contrary to popular and contemporary impression, civil rights were not initiated by the misappropriation of the King's tea in Boston Harbor. Civil rights in a varying degree are as old as mankind. They have appeared in ancient civilizations and then been lost to reappear hundreds of years later. Each new nation that has recreated them always claims to have invented something new.

Greece and Rome

According to western standards, civil rights are of fairly recent origin. It would be entirely misleading to say, however, that civil rights originated in Anglo-American culture. Ancient Greece and later the Roman Empire had many traces of civil rights similar to our western system today. In Athens particularly during the Fifth Century B.C., a form of civil liberty was a right of the citizenry. Equal opportunities for participation in government, trial by jury, to be confronted by witnesses, and be judged by one's peers was guaranteed during Athenian Democracy. True, the society of ancient Greece was relatively simple, and her civil rights concepts could hardly be compared to modern western procedure, but she did guarantee her citizenry an equal opportunity to practice the customs of her particular culture.

It would be stretching things to say that the Romans adopted and practiced a system of civil rights to any extent. During the Republic they came about as close to anything resembling civil rights as in any period of their history. We are indebted to the Romans, for political theory although they did not practice it to any great extent themselves. For the following theories, basic to our own law, we must give credit to the Romans: the social contract theory (that government originated as a voluntary agreement among citizens), the idea of popular sovereignty (that all power ultimately resides with the people), the principle of the separation of powers, and the belief in the equality and brotherhood of man. It should be remembered, however, that when we connect civil rights with the ancient peoples of Greece and Rome, we apply this principle to only a fraction of the population. Fifty percent of the population of Athens was slaves, and in the later days of the Roman Empire only a small percentage of the *populus* could claim the privileges of citizenship. Although this is a far cry from civil rights as we know it today its application within a particular nation seems to be only a matter of degree; rarely if ever has its administration embraced the entire citizenry. Today in our own nation its scope has broadened, and its guarantees have become more extensive. There are those who will contend, however, that even in America its application is not universal.

The Anglo-Saxon Evolution

The English peoples have always maintained a strong inclination towards representative government and civil liberties. The Anglo-Saxons in Pre-Norman times utilized numerous assemblies and courts in which all free-men were encouraged to participate. In many cases these were little more than old tribal gatherings in which justice was determined by common council.

Although there are those who claim otherwise, it would appear that civil rights have developed through enlightened political progress. In any event the very foundations of Anglo-American civil and criminal procedure developed during periods of benevolent despotism in the Norman era of English history. Indeed, it seems strange that the machinery of our present judicial system should find its birth during the totalitarianism of medieval days. Actually, criminal and civil procedure at first existed only as a feudal expediency and civil rights applied to the few only in unwritten feudal law and custom.

Assizes of Henry II

Among the first landmarks in the development of the English judicial system were certain of the assizes or decrees of Henry II. Most important of these was the Assize of Clarendon in 1166, which laid down the outline of a new court system. Prior to this time the courts were either local affairs administered by the feudal nobility or the church. There was no centralized administration of justice except for a few royal traveling judges sent out on circuit by the crown. More specifically, the Assize of Clarendon created permanently the system of circuit judges, and was the first attempt to write laws in contrast to the mere rewording of tradition and custom.

The Assize of Clarendon transformed into written law the Norman custom of utilizing witnesses to give information under oath to the king's officials. It ordered the sheriffs to select certain bodies of men who were expected to report all crimes which the witnesses thought should be tried. This is undoubtedly the direct ancestor of our modern grand jury. The "presentments" of Henry's juries were turned over to the royal judges on circuit, who then tried the accused persons.

The Magna Carta

About this time (1215) there came into existence an instrument which historians point to as the "corner-stone of English liberty". Actually, it was no more than a feudal agreement between a powerful nobility and an unruly king. John I was a rogue even for Thirteenth Century England. His open

corruption and thievery abused the feudal code to such an extent that the irritated nobles rose against him. After a few knights were unhorsed, and a few villages ravaged, the English barons finally cornered John at Runnymede where he was forced to sign the well-known Magna Carta or Great Charter of England.

In reality the Magna Carta did not introduce anything new. It merely compelled the king to respect the ancient customs and the unwritten feudal law. It seems he had not been playing the game according to the rules. The barons were furthering their own selfish interests by limiting the powers of the king, and restricting the scope of his activity. Most of the population of medieval England were serfs whose social and political status were little more than that of slaves. Some have said that the Magna Carta was not designed to guarantee civil rights to the citizens. In reality this is partly true, but we should not judge its importance by its initial purpose. A few of the most significant sections pertaining to civil rights are quoted:

> "A freeman shall only be amerced for a small offense according to the measure of that offense. And for a great offense he shall be amerced according to the magnitude of the offense, saving his continement; . . . And none of the aforesaid fines shall be imposed save upon oath of upright men from the neighborhood.
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> No freeman shall be taken, or imprisoned, or outlawed, or exiled, or in any way harmed . . . nor will we go upon or send upon him . . . save by the lawful judgement of his peers or by the law of the land. To none will we sell, to none deny or delay, right or justice.
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> We will not make men justices, constables, sheriffs or bailiffs, unless they are such as know the law of the realm and are minded to observe it rightly."

The importance of the Magna Carta lies not in its influence upon the particular era in which it was written but in the subsequent use of it. The nobles, in acting to preserve their own interests, established principles which were later to be applied in ways of which they had never dreamed. It is the foundation of modern liberties in the sense that it marked the first successful limitation of the royal authority. It was a symbol of the triumph of law over the personal authority of the king. In the 17th Century the Magna Carta was interpreted by legal-minded reformers into something it had never been before. In an effort to curb the powers of the throne they translated the Magna Carta into a statement of the liberties of all English people.

Habeas Corpus Act of 1679

During the reign of Charles II other restrictions were placed upon arbitrary royal power. The most notable of these was the Habeas Corpus Act of 1679, which provided for a writ, compelling the custodians of a person, witness or prisoner, to bring him before a judge or magistrate. The effect of this act was to safeguard persons against arbitrary detention or imprisonment. By the use of this writ the unlawful imprisonment of a person could be challenged. Habeas corpus proved to be one of the fundamental guardians of a rapidly growing system of civil rights in England. It has found its way into the Federal Constitution and most state constitutions in the United States.

English Bill of Rights

The bloodless removal of the last remaining Stuart, James II, brought with it a new line of kings and a new series of civil rights. When William and Mary accepted the throne from Parliament, the offer was contingent upon their recognition and observance of a declaration of rights, later enacted as the Bill of Rights (1689). Rivaling the Magna Carta in importance, this declaration provided that (1) the king could not suspend the operation of laws, (2) no money was to be levied without consent of Parliament, (3) freedom of speech in and out of Parliament was to be assured, (4) bail was not to be excessive, and (5) Parliament ought to be held frequently.

Political Philosophy

Any historical treatment of civil rights as it relates to criminal procedure would be incomplete if it were restricted to only political and legislative developments. These institutions of mankind have always lagged behind intellectual and social progress. During the Seventeenth and Eighteenth Centuries in both England and upon the continent of Europe, a new middle class arose, made up mostly of business and professional men who wanted to bring about sweeping changes in government and civil rights. This urban middle class challenge of autocratic and monarchical authority provided a stimulating environment for the thinkers of the time. Great thinkers like John Locke, Montesquieu, and Rousseau supplied the philosophical

ammunition for the sweeping changes that were to take place. There is not space here to expound upon the theories of these writers, but they and others like them were to provide the moral justification for the revolutions in France and America.

The political philosophy of John Locke, however, is so important to our present concepts of civil rights that something of what he advocated must be pointed out. The English in the Eighteenth and Nineteenth Centuries absorbed and crystallized many of his concepts into a body of legal precedent, the Americans into their national and state constitutions. Locke's *Two Treatises of Government*, contended that (1) the right to life, liberty, and property was inherent in the very order of nature, (2) man possessed certain natural rights, (3) government was created to guarantee the enjoyment of those natural rights, (4) the people delegated or contracted to the government an authority to regulate, but their basic rights in so doing were neither impoverished or surrendered, and (5) popular sovereignty rests with the people who can remove or replace an unruly government.

Nothing in the past so well illustrates our present philosophy of civil rights in relation to the individual and his government. It undoubtedly helped to inspire the drafting of the Declaration of Independence, and the first ten amendments to the Constitution of the United States, which are commonly referred to as the "American Bill of Rights".

Civil Rights in Colonial America

The colonial period in United States history lasted for about two hundred years. During this time much of English government, law, and ideology was transplanted in America. As was mentioned before Englishmen have always tended toward representative government and civil rights, and the colonies were no exception. The colonial environment of North America coupled with an English heritage that deplored authoritarianism created a psychological environment in which "rugged individualism" could grow. In 1765 and again in 1774 the colonial congress through two consecutive declarations of rights made it unmistakably clear to the British government that its autocratic, and dictatorial policies were not to their liking.

Declaration of Independence

When the inevitable break came with Great Britain, the colonies justified their separation in a statement of rights. The Declaration of Independence, which severed the tie with Britain, expounded the very philosophy upon which the structure of government in the United States was to be built. In reality, the Declaration of Independence was more of an initial declaration of rights than a statement of seccession. This document expounded that (1) all men were created equal, (2) that they were endowed with certain unalienable rights, (3) that government derives its powers from the people, and (4) that the people have the right to abolish and institute a new government when they so desire.

Constitution of the United States

In the summer of 1788, the Constitution of the United States had been ratified by nine state conventions and gone into effect for those adopting it. The remaining states reluctantly followed in 1789; the last being North Carolina and Rhode Island.

The philosophy of government which prompted this document is well expressed by its Preamble.

> We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

American Bill of Rights

Several of the states refused to ratify the Constitution until more explicit guarantees of individual rights and liberties had been incorporated in it. This was done by the addition of the first ten amendments which were ratified in 1791. This document, containing the first 10 amendments to the Constitution is commonly referred to as the Bill of Rights or the American Bill of Rights, to distinguish it from the English Bill of Rights of 1869.

Of these amendments those that have the most direct bearing on criminal procedure are:

Amendment IV

Seizures, Searches and Warrants

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

Criminal Proceedings and Condemnation of Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

Mode of Trial in Criminal Proceedings

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII

Bails—Fines—Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Since the ratification of these original documents, one hundred and sixty-seven years of political development has witnessed the incorporation of eleven additional amendments, and the majority of the states hawe patterned their constitutions after the federal example.

CIVIL RIGHTS IN AMERICA TODAY

Space does not permit a discussion of each facet of civil rights contained in our present federal and state systems. They can, however, be quickly classified. Although numerous and varied, civil rights naturally fall into (1) those relating to personal status, and (2) those having to do with property. Another and even more comprehensive classification might subdivide the former into substantive rights and procedural rights. Substantive rights pertain to the fact and essence of freedom and are expressed in such declarations as: immunity from slavery and involuntary servitude; freedom of religion, speech, and the press; right of assembly and petition; right to keep and bear arms; equal protection of the laws; and treason restricted and defined by constitution. On the other hand, procedural rights relate to the mechanics of safeguarding personal freedom, and of guaranteeing an impartial administration of the laws. It is here that the study of criminal procedure is found. In brief, procedural rights forbid such things as bills of attainder and *ex post facto* laws. It creates regulatory devices in judicial and "enforcement" procedure such as: indictment by grand jury, habeas corpus, trial by jury, search and seizure, and "due process."

SUMMARY

In summary some general features of our system of civil rights can be enumerated. In the first place our system of rights is the product of hundreds of years of political development. This evolutionary process has created a philosophy that government is a creation of the people, and exists at the pleasure of the people, for their benefit. It has powers conferred or agreed to, but *not all power*. In other words, the people have reserved certain powers which government is forbidden to invade—forbidden negatively through lack of constitutional authorization or positively through constitutional prohibition. The individual owes his government loyalty, obedience, and service, but requires it to observe his fundamental rights. These rights are often thought of as being granted to him, but actually he has reserved them for himself.

Another outstanding feature of our theory of civil rights is its extreme complexity. There can be no full listing of civil rights for a complete list would be endless. In addition to this difficulty a comprehensive picture of civil rights today would not hold true tomorrow. Judicial construction is constantly in a state of change depending upon the current philosophy and social theories of American society.

Last but by no means of least importance is the

fact that civil rights do not bestow an arbitrary license upon anyone: they are relative, not absolute. In the final analysis government is an institution created to procure the *greatest good* for the *greatest number*. It protects the many from the few. Liberty under present concepts is not the biological freedom of the animal world; not a "survival of the fittest." As the people require their government to observe their unalienable rights so also does their government require that they too observe the inherent rights of each other.

Conclusion

It is hoped that this brief review of mankinds' struggle to protect the rights of individuals against the arbitrary exercise of authority by persons in positions of power will make more understandable and acceptable to law enforcement officers the rules of criminal procedure. Modern rules of criminal procedure are not designed for the protection of the guilty but rather to insure that the accused, whether he be guilty or innocent, be given a fair and impartial trial. These rules have been developed to reduce to a minimum the chances of an innocent person being wrongfully convicted, whether by chance or design and to insure that each case will be decided on it's own merits regardless of possible biases, preconceptions, and prejudices of persons involved in the process of criminal procedure.

Law enforcement officers, like all citizens, have a heavy stake in American Democracy. They, as much as any and more than most citizens, are in a position to carry out and make effective our theories of government, particularly as they relate to criminal procedure and civil rights.