Editorial Comment

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EDITORIAL COMMENT.

THE JOURNAL'S NEW MANAGING EDITOR.

Professor James W. Garner, who has been Managing Editor of this Journal since its foundation in April, 1910, has obtained leave of absence from the Department of Political Science in the University of Illinois to spend a sabbatical year of vacation and study in Europe; leaving here in August, 1911, and returning in August, 1912. He has therefore felt it necessary to relinquish his post. The Executive Board of the Institute takes this opportunity to wish him an agreeable year in Europe, and to express to the readers of the Journal the Board's sense of its deep obligation to Professor Garner for his invaluable work on behalf of the Journal. His indefatigable labors, his wide learning, his comprehensive study of the numerous departments of science involved in Criminal Law and Criminology, his familiarity with the numerous workers available for contributing to the Journal, and his broad aims in giving representation to all topics and views in its pages—these qualities have made him an ideal managing editor, and have been chief factors in its instant success in the attainment of the purposes of the Institute. To establish a journal in a field where none existed in the English language, to bring together the results of all the contributory sciences, to keep abreast of the current activities in these varied fields, and to make the Journal broadly representative of all scientific and practical work that bears on criminal justice—this was a creative task, and it has been thoroughly accomplished. The Board, having deeply at heart the interests of American criminal science, and regarding the Journal as an indispensable organ for its advancement, are desirous of acknowledging their debt of gratitude to Professor Garner for a cooperation without which they could not have hoped to succeed in their aims.

Robert H. Gault has been elected by the Executive Board of the Institute as acting Managing Editor during the ensuing year. Dr. Gault is a specialist in criminal psychology. He is a native of Ohio, and after graduating at Cornell University (1902) was a fellow in Psychology, first at Clark University, and then at the University of Pennsylvania, where he received the degree of Ph. D. He was Honorary University Fellow at Clark University in 1904, and later a member of
the staff in the Friends' Asylum for the Insane at Frankford, Pa. He was Professor of Psychology and Education at Washington College, Pennsylvania, from 1905 to 1909, and is now Assistant Professor of Psychology in Northwestern University. Professor Gault has published various articles in scientific journals, including a "History of Investigations in Reflex Action," and has carried on extensive research in the field of defectives and delinquents, and has conducted lecture courses on criminology, with especial reference to defectives. His broad acquaintance with the literature of criminology, his practical experience in the field of criminal psychology, and his executive skill, are an assurance that the interests of the Journal will continue to be capably administered under his supervision.

THE JOURNAL'S MANAGING DIRECTOR.

Colonel Harvey C. Carbaugh, U. S. A., Judge-Advocate, Department of the Lakes, has resigned his post as editorial director of the Journal, and the executive board, after repeated refusals to consider his resignation in August, at last accepted it. Colonel Carbaugh was one of the original Chicago committee which organized the National Conference on Criminal Law and Criminology, in June, 1909, and, after the conference, was one of the committee appointed to found this Journal. His loyal services during the first year of the Journal were then zealously and unstintedly devoted to the task of managing the Journal and widening its influence. Under the pressure of official and personal duties to the War Department, he is now obliged to give up active connection with the Journal. The executive board feels that words are inadequate to express their personal gratitude to Colonel Carbaugh for his hearty co-operation from the beginning in the affairs of the Institute and the Journal. His long experience in the administration of criminal justice in the army, and his vigorous interest in the work of the Institute, have placed the Institute and the Journal under a permanent debt.

Frederic B. Crossley has been elected by the executive board of the Institute as managing director of the Journal for 1911-12. Mr. Crossley was a member of the original committee which organized the National Conference. During the past year he has been a member of the executive committee of the Institute. His wide familiarity with the literature of the subject, as librarian of the Gary Collection of Criminal Law and Criminology in Northwestern University, and his executive skill, insure a capable continuance of the policies which have given the Journal its efficiency.
THIRD ANNUAL MEETING OF THE INSTITUTE

PROGRAMME FOR THE THIRD ANNUAL MEETING OF THE
AMERICAN INSTITUTE OF CRIMINAL LAW AND
CRIMINOLOGY.

BOSTON, AUGUST 31, SEPTEMBER 1 AND 2.

FIRST MEETING, Thursday, August 31, 2:30 p. m.
President's Address.
Annual Address by
Report of Committee D, on Organization of Courts.

ENTERTAINMENT, 4:30 to 6:00 p. m.—Informal reception by the
President to members of the Institute at the Vendome Hotel.

SECOND MEETING, Friday, September 1, 10:00 a. m.
Report of Committee E, on Criminal Procedure.
Report of Committee B, on Insanity and Criminal Responsibility.

ENTERTAINMENT, 1:30 p. m.—Steamer excursion down the harbor.
8:00 p. m.—Annual informal reception and smoker.

THIRD MEETING, Saturday, September 2, 10:00 a. m.
Report of Committee F, on Indeterminate Sentence and Release
on Parole.
Report of Committee G, on Judicial Probation and Suspended
Sentence.
Report of Committee A, on System for Recording Data Concern-
ing Criminality.
Report of Committee (No. 3), on Criminal Statistics.

FOURTH MEETING, Saturday, September 2, 2:30 p. m.
Report of Committee (No. 1), on Co-operation with Other Organi-
zations.
Report of Committee (No. 2), on Translation of European Treatises
on Criminal Science.
Report of Committee (No. 4), on State Branches and New Mem-
bership.
Report of Secretary.
Report of Treasurer.
Report of Managing Editor of Journal.
Election of Officers.
Adjournment.

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THE PROGRESS OF LEGAL REFORM IN WISCONSIN

ILLINOIS SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

In response to a call issued by Judge O. A. Harker, Dean of the Illinois State University college of law, a meeting of judges, members of the bar, sociologists, penologists and others interested directly or indirectly in the problems of the criminal law was held in the law library of the University of Illinois at the time of the annual meeting of the State Bar Association in June, and a state Branch of the American Institute of Criminal Law and Criminology was organized. Dean O. A. Harker was elected president of the society, Hon. Orrin R. Carter, Chief Justice of the Illinois Supreme Court, was elected first vice-president, and William G. Hale, secretary. It was decided to hold the first annual meeting of the society at the University of Illinois October 26-27, at which committees will present reports on the following topics: (1) crime conditions in Illinois, the increase of crime, causes and remedies, the need of more adequate criminal and judicial statistics in the state; (2) existing methods of dealing with juvenile delinquents in Illinois; (3) present status of probation and parole in Illinois; (4) organization of courts, and (5) criminal procedure.

This makes the fifth society of the kind to be organized during the past two years, the others being those of Wisconsin, Pennsylvania, New York and Minnesota. Steps have been taken in a number of other states looking toward the organization of similar societies. The opportunities of such organizations for promoting the movement for a better criminal law and procedure are certainly abundant, and it is to be hoped that other states will soon fall in line.

J. W. G.

THE PROGRESS OF LEGAL REFORM IN WISCONSIN.

The achievements of the Wisconsin Branch of the American Institute of Criminal Law and Criminology furnish abundant evidence, if evidence were needed, of the value of organized cooperative effort in bringing about legal reform. This society, organized two years ago, has formulated a program of constructive reform and at the past session of the legislature it actively urged its recommendations upon that body with the result that no less than four of its proposals were enacted into law. One act which it succeeded in having passed amends the law relating to the trial of questions of insanity so as to provide that if the jury shall find that the defendant was insane at the time of the commission of the offense charged, or that there was reasonable doubt of his sanity, it shall return a verdict of "not guilty because insane," in which case he shall forthwith be committed by the court to one of the state hospitals.
CAMPAIGN FOR REFORM OF JUDICIAL PROCEDURE

for the insane, there to be detained and treated until he shall be discharged according to law. A re-examination of his sanity may be had as in the case of other patients, but he shall not be discharged unless the magistrate or jury upon whom devolves the duty to pass upon his insanity shall, in addition to finding him sane, also find that he is not likely to have such a recurrence of insanity as would result in acts which, but for insanity, would constitute crimes. Another act, fathered and advocated by the Wisconsin Society, amends the law of procedure so as to allow the accused to waive trial by a jury of twelve persons and be tried by a jury of less than twelve. Still another act which must be credited to the society is one which allows a writ of error to be taken by and in behalf of the state from various orders and judgments, such as orders granting new trials, setting aside or sustaining demurrers, orders in arrest of judgment or sustaining pleas of abatement, judgment of conviction upon a record containing rulings adverse to the state in cases where the defendant prosecutes a writ of error, and the like. The society also urged the enactment of a law raising the age at which a girl may be considered "delinquent" to eighteen years, and that of a boy to seventeen, instead of sixteen as heretofore. The proposed recommendation was incorporated into the laws of 1911. Finally the society urged the adoption of an amendment to the constitution abolishing the immunity of the accused from being compelled to be a witness against himself. The proposed amendment passed the senate but failed in the house of representatives.

Altogether this output of reform legislation represents a distinct achievement for the Wisconsin Branch of the American Institute and clearly demonstrates the possibilities of such an organization. The newly founded societies in other states would do well to follow the example thus set.

J. W. G.

CAMPAIGN FOR REFORM OF JUDICIAL PROCEDURE.

The Central Law Journal, one of the most active advocates of a more simple and efficient judicial procedure, remarks that the campaign for reform is now on in many states of the Union. To one who reads the proceedings of the bar associations and the law journals this is evident. No other subject is being so widely discussed by the bar associations or is exciting so much widespread popular interest. In nearly every state, bar association committees are considering projects of reform, and in a number of instances they have been instrumental in securing the enactment of legislation designed to bring about improvement. That there is widespread dissatisfaction with existing methods
AN EXAMPLE OF ILLINOIS CRIMINAL JUSTICE

and results in many states the complaints, as set forth by various governors in their messages to the legislatures, afford ample evidence. "The complaint," observes the Journal, "is not that we have an administration of law in which flaws exist, which might be asserted of the best administration that human wit could devise. But it is felt that there are fundamental defects which amount to an indictment of the intelligence of our age in permitting them to exist.

"The President of our country arraigns them, and the Congress has endeavored to respond to his admonitions for the correction of what he has inveighed against. That it has not responded as fully as the exigency pointed out by our Chief Executive seems to demand, possibly was not expected. One admirable characteristic of Mr. Taft is the conservatism that believes in the evolution of reform in gradual processes rather than by heroic methods in legislation. A little advance in good, when it takes on by accretion, through sentiment in favor of its tendency, other good, is better, often, than the heralding in statute of a pretended panacea for every ill we may be enduring."

"Something needs to be done to get us out of the 'slough of despond,'" the Journal concludes, "or the 'bog of floundering.'

"Whether letters come agreeing with us as to any suggestions about pulling us out or disagreeing with us, they will be welcome. Agitation of the subject is needed. It cannot hurt, for what we have in the way of a system seems so bad that there are none so poor as to do it reverence."

"It seems utterly inconsequent to assert that this agitation is going to stop. You might, as the revolutionary orator said, 'as well attempt to dam up the Nile with bulrushes' as stop the movement in which this journal has enlisted. It affects 'substantial justice' that justice is delayed, and no man may reasonably rely upon what principles, as principles, the courts of justice will apply to his acts and contracts."

J. W. G.

AN EXAMPLE OF ILLINOIS CRIMINAL JUSTICE.

The Supreme Court of Illinois has lately rendered a decision (People v. Cleminson, 250 Ill. 135; June 7, 1911) which does honor to the judges who concurred in the opinion and which deserves the commendation of everyone who desires to see justice administered without regard to technicality or harmless error. Cleminson had been convicted of murdering his wife and was sentenced to imprisonment for life. An appeal was taken and the usual staggering number of errors were assigned as grounds for reversal, the more important one being that incompetent and immaterial evidence had been admitted, evidence which threw no
light on the issue. The Supreme Court readily admitted that a grave error in this respect had been committed (the evidence complained of related to the immorality of the accused), but, after a careful reading of the testimony, the court said it was unable to escape the conclusion that the verdict could not have been otherwise even if none of the errors complained of had been committed, and so it affirmed the conviction. The competent evidence in the record, it said, left no room for the slightest doubt of the defendant's guilt, and, consequently, error in the admission of incompetent evidence was no ground for reversal where the competent evidence so conclusively established the guilt of the accused that there could be no room for reasonable doubt as to his guilt.

It goes without saying that the decision has been criticized by some members of the bar who still maintain that the accused should be given the benefit of every technicality which the most latitudinarian construction of the law allows, however trivial and immaterial. It is refreshing to note, however, that the rule laid down by the court in this case has met the approval of the more candid and progressive members of the bar. It commends itself to us as being in strict accord with reason, common sense and justice. England long ago abandoned the rule which required reversals for errors which consisted merely in the admission of immaterial or irrelevant evidence, and her appellate courts now act on the sensible principle that it is the function of an appellate court to administer justice as well as the law. Consequently, if they find that competent evidence was introduced in the trial which left no doubt in the minds of the jury of the guilt of the accused, they never reverse for the admission of immaterial evidence which could not have prejudiced the case of the accused and which could not have led to a different verdict. The original reason for the rule which forbade the introduction of irrelevant evidence was not that it necessarily prejudiced the case of the defendant, but because it involved a useless waste of time and unnecessarily encumbered the record. If the jury is capable of properly weighing competent evidence and of reaching a just verdict on the basis thereof, it is equally capable of disregarding wholly or discounting at its proper value irrelevant evidence which may have been erroneously admitted. To assume that the jury is incapable of weighing and discounting evidence which is improper merely because of its irrelevancy, but that it is perfectly capable of weighing and estimating the real value of material evidence, is a denial of the very principle upon which the jury system rests.

In our judgment, the ruling of the Supreme Court in this case violated no fundamental right of the accused, and in refusing to inter-
ENGLISH AND AMERICAN PROCEDURE COMPARED

fere with a conviction based upon competent evidence which left no
doubt of guilt either in the minds of the jury which tried the accused
or in that of the court which reviewed the testimony, it set an example
calculated to inspire respect for the court and exert a wholesome influ-
ence on the administration of justice. It is to be hoped that the rule
will be followed in the future.

J. W. G.

GEORGE GORDON BATTLE ON ENGLISH PROCEDURE.

Mr. George Gordon Battle, a distinguished member of the New York
city bar, in a recent address on “The Administration of the Criminal Law
in England and in the United States of America,” compares English
and American methods of criminal procedure and points out the more
salient differences between the two systems. Now that the English parlia-
ment has recognized the justice of allowing an appeal to persons convicted
of crime, there is no longer, he observes, any great difference between
the two systems. Such differences as exist, he says, are differences in mat-
ters of detail rather than of principle, and they are due very much more
to differences of national temperament and differences of condition and
circumstances than anything else.

“The society of England,” he remarks, “is, of course, far older, more settled
and more conservative than our own. They have more respect for law and
order than we have; they have far more deference to the authority of public
officials, and particularly of judicial officers, than have we. They are far more
apt to be satisfied with the verdicts of their juries and the decisions of their
courts than the restless temper of our people will permit.

“And the result is that the English people allow and approve a control by
the judge, not only of the course of the trial, but of its result and of the verdict
of the jury, which the American people would find intolerable. As a corollary
of this absolute predominance of the judge, it follows that their trials are much
more expeditious than ours. The counsel for the prisoner, although there are
no men on earth bolder to resist oppression than the English bar, are yet, by
their own cast of mind, as well as by the national temperament, inclined to defer
to the opinion of the judge, to take his suggestions and to allow him to shape
and manage the trial in a manner to which our contentious advocates would
never submit.

“The English judge manages the criminal trial from beginning to end.
Although the accused have the theoretical right to peremptorily challenge against
jurymen, it is a right which is almost never exercised. As to challenges for
cause or reason, it is, as we shall see, a difficult and cumbrous matter to make
and try such challenges, with the result that they are almost unknown. So that
the selection of the jury generally results in taking the first twelve talesmen
who present themselves. The opening addresses of counsel on either side are
almost always brief and colorless. When the witnesses are sworn the judge
takes an active part in their examination and cross-examination. When testi-
mony has been introduced which, in his opinion, is sufficient upon any partic-
ular point, he makes the suggestion to counsel that further testimony along that line is unnecessary, and this suggestion is always observed. So, too, the judge is quick to cross-examine any witness of whose testimony he is suspicious and, by the tone and manner and substance of his questions, he clearly indicates to the jury his view of the credibility of the witness. After counsel have made their final addresses, the court sums up to the jury. He does not scruple to state his opinion as to the guilt or innocence of the defendant and as to whether any particular witness has, in his opinion, testified truthfully or falsely. He is careful to state to the jury that they are the judges of the facts and he is only expressing his opinion. But those of us who know how the slightest word from a judge, even in this country, carries more weight with the jury than all that counsel will say will recognize that even more in England, where there is so much deference for judicial authority, the opinion of the judge must be, as a matter of fact, practically controlling upon the jury, and the verdict of the jury is commonly little more than the registering of their sanction of the opinion of the court.

"Under these circumstances and with this procedure, there is small wonder that the English criminal trials are so much more expeditious than our own. As to the relative advantages of the two methods of procedure, there is much to be said on both sides. For my own part, after reading very many English criminal trials, it seems to me that in cases in which the innocence of the defendant is clearly apparent the English procedure preserves his rights as effectively as our own. But in the great number of border-line cases in which the guilt or innocence of the accused is a matter of doubt, I believe that our system far more effectively protects the rights of the defendant. With all of its crudities and defects, I think it is very seldom that an innocent man is convicted under our administration of the criminal law.

"I am, however, irresistibly led to the conviction that many innocent men must have been convicted under the English system. It is a matter of common knowledge, and it arises from the constitution of human nature, that a judge who sits continuously in the hearing of criminal cases gradually comes to believe that nearly all of the men who are tried before him are guilty. As a matter of fact, an overwhelming majority of them are guilty, either of the crime charged in the indictment or some crime connected with it. And the constitution of the human mind is such that in trying a vast number of criminal cases, in most of which the accused are guilty, the judge will insensibly and with the best and highest intentions come by degrees to view every case, except those in which the defendant is clearly innocent, as a case of guilt. For this reason I am unalterably opposed to any system of criminal law which allows a judge to express to the jury his opinion as to the guilt or innocence of the prisoner. There must be that predisposition in the judge's mind to which I have alluded; and, in border-line cases, the doubt will unconsciously be resolved against the prisoner, and the result will be a miscarriage of justice. And although it is a trite saying that there is no such thing as absolute certainty in human justice, still there is that in all of us which revolts, to the very depths of our being, against the conviction of an innocent man. For my own part, I am a firm believer in the time-worn proverb that it is better that ten guilty should escape than that one innocent man be convicted. And that there have been many miscarriages of justice and many convictions of innocent men under the English system is a matter, not of doubt, but of record, as I shall attempt to establish later on. So
that, while I strongly approve the dignity and the expedition of English criminal justice, still I believe that such expedition is sometimes at the cost of the defendant. I do not believe that in the future there is so much danger of this as in the past, because the establishment of the court of criminal appeal will undoubtedly serve to make the trial judges more cautious in the conduct of trials. But even with an appeal, I do not believe that there should be any rule of law permitting a judge to express in a criminal case his opinion as to the guilt or innocence of the defendant."

We are inclined to think that Mr. Battle over-emphasizes the part played by the English judge in the trial, especially in regard to expressing opinions concerning the guilt or innocence of the accused. It is true that the English judge reviews and sums up the testimony, sifts out the immaterial evidence, puts the material evidence before the jury in coherent and intelligible form, and usually expresses his opinion upon the weight of the evidence introduced, all of which is often a great aid to untrained lay minds in reaching a verdict upon the facts. He may also comment on the demeanor of the witnesses as well as upon the failure of the accused to testify, a power which many American lawyers think the judge should possess. But it is not a general practice for English judges to express a positive opinion upon the guilt or innocence of the accused. They occasionally do so when the evidence strongly points to guilt or innocence. Moreover, this power works to the advantage of the accused as well as to his disadvantage, since the judge may express an opinion in favor of the innocence as well as the guilt of the accused and direct a verdict of acquittal when the jury may think him guilty. Surely the exercise of such power by the judge is no more a usurpation of the function of the jury than the exercise by the jury of the power to judge of the law applicable to the case is a usurpation of the judicial functions, as is the rule in a number of American states. Again, it by no means follows that the predisposition in the judge’s mind is naturally in favor of the guilt of the accused and that in “border line” cases he will unconsciously resolve the doubt against the defendant. Our judges, with comparatively few exceptions, are humane men with deep sympathies for the unfortunates who are brought before them, and certainly in this country they have shown little disposition to deal arbitrarily with accused persons. It will readily be admitted that innocent persons have occasionally been convicted in England, but that will happen under any effective system of criminal law. No system of criminal justice is or ever will be perfect. The time-honored principle that it is better that ten guilty men should escape than that one innocent man should be convicted may be sound, although there are many thinking men who are beginning to question its value. But does it follow that the proportion ought also be thirty to one or fifty to one? In our zeal for the rights of the accused, must we over-
look the rights of the injured victim or of the society whose peace and dignity have been outraged? If fifty guilty men are allowed to escape in order that we may be sure that not a single innocent man is convicted, what becomes of the rights of the fifty innocent victims who have been injured by the guilty? Obviously the principle has its limits. When it has been pushed to the point where it becomes almost impossible to convict a guilty criminal, it is a menace to society, not a protection. In our judgment, it has already passed that point in America and it is high time for us to consider whether in its present form it should not be modified. As a well known jurist has observed, the problem with us to-day is no longer how to prevent the conviction of an innocent man, but how to make sure of the conviction of a guilty one. The English procedure contains the answer. Mr. Battle reviews the Lawson-Keedy report at length and endorses their recommendations, though he would add another, namely: That the trial judge should be strictly forbidden to express his opinion on the facts and particularly as to the guilt or innocence of the defendant.

J. W. G.

SENATOR ROOT ON PROCEDURAL REFORM.

Rarely have the general principles which should govern in the procedure of a judicial trial been stated with such singular lucidity or with such convincing force as they were by Senator Elihu Root in his address before the recent annual meeting of the New York State Bar Association. Although his remarks were intended primarily to apply to civil procedure, many of his suggestions apply with equal force to the procedure of criminal trials. Mr. Root started out with the general proposition, which ought to be accepted without dissent, that procedure should be made as simple and direct as possible. Referring to the Field Code of Procedure, which has grown from a volume of 391 sections to one of 3,384 sections, he declared that for many years in the state of New York they have been pursuing the policy of attempting to regulate by specific and minute enactment all the details of procedure—a policy which, if adhered to, can never end. Such a method, he said, was fundamentally wrong and the remedy to be applied was to abolish the code and substitute a simple procedure, leaving everything else to be determined by rules of court.

"The condition," he said, "in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are over-worked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, and the dishonest man who seeks to evade his just obligations is encouraged to litigate for the purpose of postponing them. The system of attempting to cover every minute detail with legislation
ESSENTIALS OF PRISON REFORM

appropriate to every conceivable set of circumstances is to create a great number of statutory rights which the courts are bound to respect because they are the law, and suitors are entitled to demand because the law gives them, though they may and frequently do result in the obstruction or defeat of justice.

"The energies of counsel are absorbed with these proceedings instead of with the trial of the case, and the disposition of the multitude of motions to which they give rise often leads to delay during which time witnesses die, remove from the jurisdiction of the court, or forget material facts. Under such circumstances suitors become discouraged and abandon their cases, or their means become exhausted, in either case the rendering of prompt and equal justice being impossible. The judges are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required."

Among the simple rules of procedure which he suggests as suitable for legislative enactment are: (1) that in every case a day shall be given when the parties, through their counsel, may come before a judicial officer informally for a rule regulating the further procedure in the case, covering the whole ground of pleadings, bills of particulars, discovery of documents, depositions of witnesses, mode of trial, etc., and (2) that no error or ruling upon the admission or rejection of evidence in a trial shall be ground for reversal unless it appears that a different ruling would have led to a different judgment. This latter rule, in substance, it will be remembered, was embodied in an act of Congress passed last March for the regulation of the procedure of the federal courts. Real acquiescence in such a rule by the bar would put an end to the incessant objections and exceptions which now disfigure so many of our trials. Speaking of our "highly artificial and technical" rules of evidence and the strictness with which we enforce them, Mr. Root says: "I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there, again and again, by objections as to irrelevancy and immateriality and hearsay, when what he is trying to say would not do the slightest harm to anyone and would merely help him to state what he knows that is really competent and material." The whole argument of Mr. Root against legislative-made codes of procedure seems to a layman sound and unanswerable, and we believe it represents the better opinion of the bar.

J. W. G.

ESSENTIALS OF PRISON REFORM.

At the end of a visit with Dr. Krohne on his round of inspecting prisons in West Prussia, that wise veteran and high authority in prison
science recently gave me a message for the United States. He is familiar
with conditions in America, he has long had the confidence of the Minis-
try of the Interior in the office of the Chief of State of the German Em-
pire, and his words are entitled to weight with us. He says:
(1) Do away with short sentences to prisons as far as possible.
(2) Abolish county prisons as places for serving sentences. It is
impossible to reform them.
(3) Secure central state control of all prisons and jails, and sub-
ject them to rigid and competent inspection. Lodge the power in a cen-
tral board to correct abuses, improve conditions, and enforce a common
standard.
(4) Build no prisons with more than 500 cells. No director can
know personally more than 500 prisoners, and he must know them all
thoroughly. Never have more than one person in a cell.
(5) Be sure to have a permanent trained staff of men of character.
Success in reformatory, or even repressive management, depends far
more on the character of the officers than on prison architecture, regula-
tions and systems of discipline. Such men cannot be won to the service
unless they are independent of all political managers, secure in their po-
sitions during good conduct, sure of promotion when they deserve it, and
certain of having a modest pension when they are worn out in the service.
Under this method, a state can always have new blood for power, and the
wisdom of experience, without being weighted by old men no longer ca-
pable of thought or action. C. R. H.

TEXAS CRIMINAL JUSTICE AGAIN.
The Texas Court of Criminal Appeals continues to maintain its
unenviable reputation of being the foremost technicality worshiping tri-
bunal in the land. In our last issue we commented on one of its recent
decisions in which it reversed the just conviction of a burglar because
of a trivial variance between the allegation and the proof, an error which
could no more have affected the substantial rights of the accused than
the failure of a copying clerk to dot an “i” or cross a “t” in the indict-
ment. The press dispatches from Texas tell of another case which
illustrates the difficulty with which criminals are punished in that state,
so great is the importance which the court of appeals attaches to tech-
nical perfection in the procedure of the trial court.

One Walter Hickey shot and killed Tom Dixon near Haskell in
1903. He was tried no less than six times. Two of the trials resulted
in disagreements of the jury; in the other four, convictions were ob-
tained. Three times a life sentence was imposed and once the offender
was sentenced to a term of imprisonment for twenty-two years. Each
time the Court of Criminal Appeals reversed the conviction, and finally
the prosecuting attorney gave up the task as hopeless and stated in open
court that it appeared to be impossible to conduct the trial in such a
way as to meet the requirements of the reviewing court. As stated in
our last issue, nothing but absolute perfection in the framing of the
indictment and in the conduct of the trial will satisfy the court of
appeals. No matter how conclusive the evidence of guilt, no matter
how great the regard shown by the trial court for every substantial right
of the accused, no matter how carefully the trial may have been con-
ducted, the slightest error works a reversal.

It is no wonder that widespread complaint now exists in Texas that
the administration of the criminal law in that state has almost broken
down. The president of the Texas Association of Prosecuting Attor-
neys recently stated that 51 per cent of the cases appealed to the Court
of Criminal Appeals were reversed. The Democratic party of the state
in its platform has several times called attention to the disgraceful con-
dition of affairs and has demanded a more simple procedure and a reform
of the jury system. The governor of the state in his campaign for refor-
mation in 1908 made the question of reform an issue in the campaign, and
in his two last messages to the legislature he dwelt at length upon the
need of reform and recommended the enactment of legislation to improve
existing conditions (see the July number of this Journal, pp. 304-305).
In his message of January 12 of the present year he said: "Every
thoughtful man admits the necessity for legislative reform along the
lines suggested and so often urged. The people and the press of the
state are protesting against existing conditions and have the right to
expect relief at the hands of your honorable bodies. The technicalities
and high-sounding, ornate literary nonsense now obstructing the courts,
encouraging crime, delaying civil and criminal trials and defeating jus-
tice should be swept away by some common sense legislation. With this
done, the number of courts could be reduced instead of increased, and
criminals could be more speedily and certainly punished." Under such
circumstances, with an appellate court making it almost impossible to
punish criminals in the face of incontrovertible proof, it is little wonder
that the popular demand for the recall of judges should be gaining head-
way.

J. W. G.

The legislature of Illinois at its recent session passed a bill forbid-
ding the publication (1) of any detailed statement or description of the
execution of any person convicted of crime, (2) any detailed statement
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of any evidence of indecent or obscene acts given in any trial or proceeding or any such statement in regard to such acts of any person charged with immoral conduct, and (3) any detailed statement or description of the commission or attempted commission of the crime of murder. The penalty prescribed for the violation of the act was imprisonment in the county jail not less than six months or a fine of not more than $1,000, or both, for each offense. The newspapers of the state protested that the effect of the bill would be to prevent the publication of anything but the briefest statement of facts about a murder, even of the assassination of the President or of a crowned head, and that such a law could not be enforced. In consequence of the newspaper opposition the governor vetoed the bill.

Clearly, there have been many notorious abuses by the newspapers in publishing, not the facts about crime, but false statements or statements the effect of which was to corrupt public opinion or to prejudice the minds of those who were called as jurors to try particular cases. It is this abuse that should be stopped rather than the publication of the actual details of crime, even though their recital is offensive to the healthy moral sentiment of the community. It is the trying in advance by newspapers of crimes which excite widespread public interest that constitutes the real evil. In England it is a serious contempt of court to publish during the course of a trial an opinion as to the guilt or innocence of the accused, or other matter calculated to prejudice the jury in reaching a conclusion. There it is unlawful for a newspaper to publish anything concerning a case in court other than a verbatim report of the proceedings in open court or to comment, editorially or otherwise, upon the evidence until after final judgment, and it was for a violation of this rule that the editor of the London Chronicle was fined $1,000 in connection with the trial of Crippen. Some of the leaders of the American bar have advocated the enactment of similar legislation in this country, and if it were done there is little doubt that it would bring about a substantial improvement in the administration of justice. But the Illinois bill was not intended to check the real evil and it would have had no effect on the administration of justice, though it would have penalized a species of indecency of which no reputable newspaper should be guilty. J. W. G.

WHIPPING AS A MODE OF PUNISHMENT.

Governor Simeon E. Baldwin, in a recent address before the Connecticut State Conference of Charities and Corrections, made a plea for a return to the lash as an effective, reformative and inexpensive method of punishment for certain offenses. His views are said to
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have quite shocked some of the advanced penologists, who severely criticized him for advocating a return to methods of punishment which have for the most part been abandoned in this country, and which are now generally condemned by enlightened public sentiment as being out of place in the punitive system of a civilized country. An examination of the views of Governor Baldwin on this subject, as they are stated by him in his "American Judiciary" (pp. 245-246), raises some doubt in our minds as to whether the criticism is entirely justified. After advertting to the fact that whipping was until a comparatively recent date a common mode of punishment for certain offenses in all our states (until 1830 it was the only mode of punishment allowed in Connecticut for theft), and is still recognized in the statutes of some states, he points out, what, upon reflection, must appear perfectly obvious, namely, that for boys it may be the only punishment that can properly be administered. To impose a fine upon a boy is merely to punish his parents or others who are obliged to pay the fine. To punish him by imprisonment in a jail, which is the only alternative in many states where reformatories are lacking, is often to degrade him beyond recall. President Roosevelt in his annual message to Congress in December, 1904, called attention to the fact that the prevailing methods of punishment for certain crimes of brutality are ineffective and do not always reach the person for whom they are intended. Thus the punishment of a wife beater by fine or imprisonment may involve the punishment of the wife and children by depriving them of their means of support. The President suggested that perhaps some form of corporal punishment was better suited to crimes of that character than any other.

The recent statute of Virginia, says Governor Baldwin, which allows whipping as an alternative to fine or imprisonment in the case of boys under sixteen, is absolutely unobjectionable from every point of view. Whipping, he says, is less degrading and is a less inhumane invasion of the sanctity of person than imprisonment against a man's will. Whether whipping is degrading depends much on the place and manner of its infliction. The old method of whipping offenders in public subjected them to needless shame and humiliation and it is this which is to be condemned, but if whipped in private, the only real degradation will be that which comes from the crime itself.

Finally, Governor Baldwin points out what is well known to many persons, that jail imprisonment as a punishment for negro criminals is, frequently, ineffective. It is notorious that jails have no terror for many young negro criminals, especially those of the vagrant
VETO OF THE NEW YORK ANTI-MUGGING BILL

and idle class and, indeed, there are not wanting instances in which they have welcomed imprisonment on account of the means which it furnishes for living a life of idleness without suffering the pangs of hunger. Those who are familiar with the character and habits of such criminals know well that punishment by whipping, if properly administered and safeguarded from abuse, is not necessarily objectionable, and is perhaps less degrading than some other forms of punishment commonly resorted to in the South. We are inclined to think, therefore, that something may be said in favor of the governor's views. Judge Newcomer of Chicago has recently stated in a public address that 65 per cent of the crime of Chicago is now being committed by boys between the ages of sixteen and twenty-five years, while Judge Rosalsky of New York City estimates that 40 per cent of the criminals of that city are under twenty years of age. Juvenile crime is, as is well known, everywhere on the increase, a fact which leads us to doubt whether the existing methods of punishment are exerting the deterrent influence which punishment should exert. Reformatory considerations should, of course, have the paramount place in any juvenile penal system, but in our judgment the deterrent element ought not to be needlessly minimized.

J. W. G.

VETO OF THE NEW YORK ANTI-MUGGING BILL.

The New York legislature at its recent session passed a law which was designed to prevent the photographing or measuring before conviction of persons arrested by the police, and also to break up the so-called "third degree" practice. The bill provided that:

Hereafter a public officer or other person having arrested a person upon any charge or who has in his custody or under his control any person under arrest or held upon any charge, who shall photograph, measure or make for record any physical examination of such person, and every person who shall order, assist or take part in the photographing, measuring or prohibited physical examination of such person so arrested or so held at any time before such person so arrested or so held has been convicted of a crime, except by an order of a judge of the Court of General Sessions in the county of New York or a county judge in any other county in the state, shall be guilty of an assault and shall upon conviction be punished by imprisonment for not less than six months or more than one year.

Any such officer or person who having arrested any person upon any charge, with or without a warrant, shall restrain such person so arrested more than is necessary for his or her detention to answer the charge, or who shall subject such person so arrested to any interrogation or examination beyond such as may be required for his or her identification, except by direction of a magistrate and in the presence of a magistrate, or in obedience to an order of and in the presence of a judge of the Court of General Sessions in the county of New York or a county judge in any other county in the state, shall be guilty of
VETO OF THE NEW YORK ANTI-MUGGING BILL

oppression and shall upon conviction be imprisoned for not less than six months or more than one year.

It will be remembered that Mayor Gaynor of New York City in March of last year issued an order directing that thereafter no person should be measured or photographed until he had been tried and convicted or had pleaded guilty to the commission of a crime. Such treatment of a prisoner, he declared, amounted, in fact, to an unlawful battery upon him and constituted an outrage unworthy of a civilized people. At the same time, the mayor claimed that he had the names of a large number of innocent persons who had thus been wronged. (See this Journal for July, 1910, p. 115.) The law mentioned above was intended to prevent this and similar alleged abuses in the state. Its enactment was opposed by practically every police department in the state, on the ground that it would have seriously interfered with the apprehension and identification of criminals, as must be obvious to everyone. We are, therefore, glad to be able to record that the bill was vetoed by Governor Dix, who declared that it would "hamper the police in securing the most used and simple means of identification of suspected criminals." It is doubtless true that there were occasional instances in which innocent persons accused of crime had their pictures placed in the rogues' galleries, but there is no evidence that the resulting abuses or wrongs were serious enough to warrant the absolute prohibition of a well-approved and universal method of criminal identification.

In our judgment, the abuses of the so-called "third degree" practice have been greatly exaggerated, and we trust that the investigation now being carried on by a committee of the United States Senate will show that such is the case. We readily admit that there have been instances of brutality among the police, but, as Major Sylvester, chief of police of the city of Washington, has repeatedly asserted in public addresses, they are isolated cases and by no means indicate a common practice of the American police. As he has pointed out, there is no community in this country where public sentiment would tolerate such practices as the police have been charged with in connection with the examination of prisoners, and it would be difficult for them to conceal effectually from the public view such practices if they wished. As Mr. Towne shows in his article on Mayor Gaynor's police policy in this number of the Journal, the police of New York have already been demoralized by the mayor's mistaken policy of prohibiting them from following time-honored methods everywhere practiced by the police, and that crime and lawlessness are rampant in that city to an unprecedented degree.

One of the most effective means of dealing with the situation which
now exists in many of the larger cities, due to an unprecedented amount of crime, is to strengthen in every legitimate way the police forces to which the innocent must look for protection, and we confess to an utter want of sympathy for any policy which aims to deprive them of reasonable and well-approved means of dealing with lawbreakers. We do not believe there is any popular demand or solid justification for such legislation as that embodied in the New York act referred to above, and we admire the common sense which led the governor to withhold his approval of it.

J. W. G.

THE ETHICAL SIGNIFICANCE OF THE MODERN TENDENCY IN CRIMINAL LAW.

In the Liszt jubilee number of the "Zeitschrift für die gesammte Strafrechtswissenschaft" the celebrated Dutch jurist, Prof. van Hamel, who is already known to our readers, writes a paper with the above title, from which we have selected the following extract because it seems to us to show with particular clearness the difference in the modes of thought of the classic and the modern schools of penal law.

Prof. van Hamel says: "By touching upon general philosophic problems the modern school has also approached the province of ethical principles, where it has been called to account. It was reproached as follows: The idea of an aim, the setting of a goal to be reached in the repression of criminality with the three methods, to deter those who can be deterred, to correct the corrigible and to render harmless the dangerous incorrigible, throws aside the formula for retribution and with it the great ethical idea and the great ethical force that this idea contains. Thus, for instance, in an article, 'Die Vergeltungsidee und ihre Bedeutung für das Strafrecht,' in the first number of the 'Kritische Beiträge zur Strafrechtsreform,' edited by Birkmeyer, the foremost exponent of the classic school, Dr. Ernst Beling, says: 'The universal ethical view of today—in its strictly phenomenological sense—is, after all, absolutely inseparable from the idea of the 'justice' of retribution. If ethics give judgments of valuation and non-valuation as regards human actions, they also demand vociferously that ethical merit and ethical guilt should not fail to receive their due reward. . . . Whoever disapproves of a reward for a good deed cannot qualify the deed as useful; and whoever disapproves of compensation by evil for a reprehensible deed cannot reject the deed morally. To eliminate the idea of retribution from ethics is essentially equal to ethical indifference toward the value of deeds.'

"Is this presentation a right one, at least in as far as the ethical
side of criminal law is concerned? It is not difficult to suppose that compensation of the evil deed by state penalty is disapproved of for reasons that have nothing to do with the reprehensibility of the deed and that this reprehensibility is expressed in another way. If I can and may explain and emphasize—that it is impossible for the state to devise and apply a real, ethically valid compensation; nor can it be the state's task to endeavor to realize such impossibilities; moreover, that in such an endeavor it runs the risk of injuring its actual task, the prevention of legally reprehensible deeds, the defense of the population against their attack, the protection of legal rights to the uttermost; that when it uses its means of combat, its preventive and repressive measures that are directed toward the person of the perpetrator, it obviously and clearly stigmatizes the deed as reprehensible—then, I think, we have freed ourselves from the foregoing.

"Being does not, indeed, deny the presence of an ethical idea in 'preventive activity,' but he does regard it as a 'fundamentally different' one. He takes the idea to be: 'that it is altruistically moral to subordinate one's interests to the predominating interests of others, and especially to the interest of a larger community of which one is himself a 'serving member.' He sees the fundamental difference in this, that 'when we proceed along preventive lines we require of the individual involved a sacrifice which he must make, whereas with retribution the whole force of our moral judgment is directed against him and the suffering that he must take upon himself by no means appears to be a sacrifice required of him.' And he goes on to say: 'Therefore, the ethical idea in preventive law figures merely as a sort of excuse for the state when it follows the purely practical aims of prophylaxis, while with retribution the practical aim has positively the ethical aim as a partner.'

"Is this sentence anything more than a clever repetition of the former one? As regards the ethical idea of disapproval, of moral judgment, I, too, should like to repeat the former answer. And the sacrifice that the perpetrator has to make, in his freedom, let us say, is not merely expected; it is imposed, extorted. But it seems to me that the ethical judgment of the modern tendency in criminal law, with its preventive repression as an outgrowth of the criminological idea of purpose, aim, must attack the matter from another side.

"The all-controlling factors in the whole sphere are not the criminal deeds, but the standards that they injure. The multitude is struck by the deed, but it is the sight of the disturbed legal order that affects the thinker and the powers of the state. It is this legal order that is the moral factor in the matter. We are confronted by a concrete social-
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moral subject, not by generalities or abstract rules which, so to speak, until the deed shows them to be such, seemed to be lost in a shady dusk.

"In the sphere of law it is the normal standards that characterize the evil deed, not the deed the standards. Wrong is injury done to the standards of the law. These standards tower above social life and surround it; in their protection lies the preservation of peace, lie the legal rights of society. Observance of the legal standards, veneration for their sublimity, are universal duties. It is the offense against these duties that is immoral. The ethics that rule in the realm of law determine the judgments of valuation of people's action or non-action as regards these duties.

"So far so good, and after an offense against the standards how can these judgments of valuation be more sharply emphasized than by a repression that is directed toward the future observance of the standards? Not that the man meets with evil expresses the disapproving judgment, but that the legal order will be observed again in the future, that the efforts of the state powers are directed toward this end and that the perpetrator is involved in these efforts.

"Our concern in legal life is not the humiliation of the criminal, but the elevation of the legal standards. The question of ethics in law is frequently—and this seems to me the fundamental error—regarded as something special, something entirely separate from criminal law. Why? In principle there is no difference in the form, the nature or the origin of the standards in civil, penal, public and administrative law. The standard, 'Thou shalt not steal,' is not differently formed from 'Thou shalt not leave thy creditor unpaid' or 'Thou shalt not take thy infected ships out of quarantine.' Where is the difference? The protection of the standards is everything. Social life demands their protection. And it is this protection that the law seeks to attain by different kinds of protective and defensive means; among them is also repression, with its threefold tendency, is the penalty with an aim.

"This, then, is the ethical significance of the modern tendency in criminal law, that through it the principal thing is grasped and felt, that is, the high value of the legal standards and the necessity of respecting them; that it directs its efforts toward the effective observance of these standards and that it strives to educate the evil-doer to a further observance of them, but, when the danger is great and the possibility of education small, it decides to keep him outside society.

"Thus the education of the criminal should be a socially ethical one in the active sense. It does not aim to teach him that after he has paid the penalty he has expiated his guilt, but rather that after the penalty is
paid he must start out to live a life in accordance with the law. It expects no sacrifice from him; it urges him to coöperate in striving toward the high goal. Thus in its sociological tendency it joins the social movement for reform so that the social order itself may be elevated and, advancing on the plane of a higher culture, may be more and more worthy of the protection of the law."  

A. A.