Journal of Criminal Law and Criminology

Volume 2 | Issue 1 Article 2

1911

Editorial Comment

EDITORIAL COMMENT

CRIMINOLOGY IN THE LAW SCHOOLS.

Is it not time that our law schools should begin to demand some training in criminology from their students? If it is desirable that our criminal law should be made scientific, our experts in criminal law must receive scientific training. It is practically universally acknowledged that the problem of crime is primarily a scientific problem—that is, it is amenable to analysis and solution by scientific methods. Nevertheless, so far as we know, students in criminal law in no school in the United States are as yet required to take a preliminary course in scientific criminology. Put bluntly, this means that our students in criminal law are introduced to the subject usually from a non-scientific standpoint, the standpoint of precedent and tradition. It can hardly be expected, therefore, that, later, such students will readily acquire the scientific point of view in dealing with crime and the criminal.

It may be objected that we are not ready to introduce criminology into our law schools, or even in pre-legal courses, because the science is as yet in such an unsettled condition; but it must be replied that this unsettled condition of the science exists more largely in the minds of those who are ignorant of the scientific work which has been accomplished along criminological lines than it exists in the actual state of the science itself. The work of the American Institute of Criminal Law and Criminology is largely to render accessible the consensus of the best scientific opinion in criminology and to bring this consensus to bear upon the actual problems of our criminal law. Through its translations the Institute is preparing a series of texts which may be made use of in courses in criminology, and there can scarcely be any doubt but that already a sufficient number of adequately equipped teachers exist in this country to give such instruction, provided law schools were at all interested in discovering them.

Closely connected with the necessity of some training in criminology for all students of criminal law is the matter of special training for our criminal judges. The judge of the criminal court ought to be an expert in criminal law and criminology, which is very rarely the case in this country. Special courses of training should be given by our law schools as preparation for this work. All of this, of course, implies that our criminal courts can never be properly organized as long as we retain the method of popular election to determine who shall be at their head, or the

still more objectionable practice of having the same individual serve as a judge in both civil and criminal courts. Such practices ought not to be tolerated among an enlightened people. Criminal judges should manifestly be appointed upon the basis of competitive examinations, which should emphasize criminology and criminal law, and their work should be entirely separate from the civil courts. C. A. E.

ADMINISTRATION OF CRIMINAL JUSTICE IN CONNECTICUT.

The *Bridgeport* (Conn.) *Post,* commenting on the Lawson-Keedy report on English procedure, declares with evident pride that none of their recommendations are entirely foreign to Connecticut procedure. Objections to indictments, it says, are rarely ever made in Connecticut. The examination of jurors on their *voir dire* is nearly always limited to the asking of questions intended merely to show incompetency or bias. Accused persons unable to employ counsel are furnished legal assistance, both in the superior court and (by a recent act) in the court of common pleas. It has been many years, we are told, since the Supreme Court granted a new trial on a technicality. In many cases prosecuting attorneys follow the English rule of non-partisanship and make only impartial presentations of the evidence to the jury. The fee system of compensating prosecuting attorneys does not prevail in the case of the higher prosecuting officers, though, unfortunately, it is still recognized as a means of compensating prosecutors in the minor courts. In recent years there has been less of a tendency among the lawyers, we are also told, to inject error into the record and more of a disposition to confine their endeavors to disproving guilt. Finally, the goal to which Connecticut is steadily moving is the investment of the trial judge with larger powers in the conduct of trials, as is the practice in England. We are glad to have the truth of these statements confirmed by a member of the New Haven bar, who says there is now very little cause of complaint with Connecticut criminal justice. "Mistrials and the discharge of criminals notably guilty on technical grounds is," our informant says, "almost, if not quite, unknown to our experience. Appeals to our court of last resort in criminal cases are comparatively few and convictions are never reversed except for very grave reasons." Our informant attributes much of this happy condition in Connecticut to the fact that the judges and prosecuting attorneys are not elective, the latter being appointed by the judges of the superior court, and are usually retained in office until they are promoted to the bench or until they retire from practice. A second reason advanced for the satisfactory conditions described above is the absence of a penal code or code of pro-

cedure. The entire body of penal law and procedure in Connecticut is embodied in eighty pages of only 453 sections. Connecticut is to be congratulated on this showing, and other states might well follow her example. J. W. G.

A BILL TO LIMIT THE POWERS OF TRIAL JUDGES.

There is a bill pending before the Pennsylvania legislature, now in session, in regard to jury trials, which it is to be hoped will not be enacted. This bill provides that in any jury trial "the trial court, in charging the jury, shall limit its said charge to the law applicable to or controlling the issue joined, without any criticism or discussion of the testimony produced at said trial."

The common law rule that the trial judge, in charging the jury, may comment on the evidence, may express an opinion as to the weight of the evidence, or any part of it, provided he does not give binding instructions and leaves the jury free to determine the questions of fact, has always prevailed in Pennsylvania. This is the present practice in England. Profs. Lawson and Keedy, in their report on "Criminal Procedure in England," in the January number of this JOURNAL, say: "After counsel have addressed the jury the judge reviews the evidence in detail, and directs the jury as to the law governing the facts. In this summing up the judge generally expresses his opinion regarding the weight and importance of the evidence. This has always been regarded as a very important function of an English judge." This important judicial function has been preserved in the federal courts and in some of the state courts, although it has, unfortunately, been much limited or abolished in many of the states. It is certainly a valuable function and of great aid to the jury, especially in cases with complicated facts and much testimony. Our loose systems of pleading multiply subsidiary questions of fact in most cases and render necessary a large amount of evidence. The summary of the testimony by the trial judge and the directing of their attention to the salient points and as to where the weight of evidence lies are important elements of the trial by jury. In states where constitutional or statutory limitations have been placed on this power of the judges it is believed that experience has universally shown that such changes were unwise and detrimental. They are being severely criticized, especially of late, in all states where they exist.

In Pennsylvania a long line of cases lay down the rule that it is the duty of the court to comment on the testimony and that it is not only the right of the court, but in some cases its duty, to express an opinion on the facts. In *Commonwealth v. Orr,* 138 Pa. 283, the

Supreme Court said: "We find in some instances the expression of a decided opinion upon the facts, but in no case was there an interference with the province of the jury. We have said in repeated instances that it is not error for a judge to express his opinion upon the facts if done fairly; nay, more, that it may be his duty to do so in some cases, provided he does not give a binding direction or interfere with the power of the jury." And in a murder case, *Commonwealth v. Van Horn,* 188 Pa. 164, the same court said: "That a trial judge should abstain from comments on the testimony in such a case as this could not possibly be expected. It would be a violation of his plain duty if he did."

This bill is an illustration of the way in which courts are rendered ineffective in administering justice by unwise statutory interference with details of pleading and practice. It is to be sincerely hoped that the bill will fail of passage and that the Pennsylvania courts will not be obliged to recede from the position they have taken as to the functions of the judge in trials. E. L.

THE MELBER TRIAL AND THE DEFENSE OF INSANITY.

The recent trial of Mrs. Melber at Albany, N. Y., for the murder of her only child by the administration of carbolic acid calls attention again to the subject of insanity as a defense in criminal trials. An attempt was made to prove the defendant insane, although the evidence offered for that purpose, according to the press accounts of the trial, was very slight. The jury returned a verdict of murder in the second degree and it is stated that the jurors subsequently said that they had agreed upon that verdict, not because they were free from all doubt as to the insanity of the defendant, but because it would not keep her from the insane asylum if she be really demented, but would operate to prevent her confinement in such an institution with the chances of a discharge later on insanity proceedings.

A committee of the New York Bar Association has recommended a change in the law as to insanity as a defense to crime which is formulated as follows:

"If upon the trial of any person accused of any offense it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity; and if upon the expiration of

such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and, further, when such a verdict of 'guilty, but insane,' is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the Governor shall have the power to pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe to the public to allow such person to go at large."

There would seem to be obvious and conclusive objection to this proposal. It recognizes that the defendant proved to be insane is not responsible for his act, but requires a finding of guilt, which is, of course, an affirmation that the person *was* responsible. It also requires the imposition of the punishment of imprisonment for the same term as a sane person would have to serve, the only difference being that the place of confinement is an asylum instead of a prison. It would be more consistent to say that he should be imprisoned the same as a sane person, if he is to be punished at all. The purpose of an asylum is restraint and treatment, not punishment. If the insane criminal has really responded to treatment and recovered, what sort of logic or common sense is it that would keep him, perhaps for years afterward, shut up in an asylum? Of course, the real trouble is the suspicion that the criminal was not insane in the first place, but that assumes that the verdict was wrong, and the problem to be met is, then, the securing of correct results in trials, not the punishment of the insane. The obvious way of meeting that problem would seem to be a stricter application of the rules of evidence in criminal trials. No evidence should be admitted that has not an apparent probative value on the subject under investigation. There are rules of evidence to this effect and they should be strictly enforced. Of course, it sometimes happens that, where the mental state of the defendant is involved in the issue, as in questions of intent, deliberation and premeditation, which bear upon the degree of the crime, evidence is admissible which would not properly tend to show insanity. In such cases, however, it should be limited to its legitimate purpose. The question of expert testimony and its proper regulation is also of importance here. Of course, no person acquitted of crime on the ground of insanity should be allowed to go at large, but should be committed to an insane hospital for so long as he continues insane. This is, however, provided for by existing law, although, perhaps, some improvement in such provisions is possible. To hold an insane person, however, responsible for his crimes when he is

not held responsible for his torts, his contracts or any other actions, is an inconsistency that the law should not be guilty of. The result of the Melber trial would seem to indicate that juries can be trusted to scrutinize carefully the defense of insanity. E. L.

LEGAL PROCEDURE AND LEGISLATION.

There is much criticism of the procedure of our courts nowadays, both in and out of the legal profession. It is alleged that too many cases are decided on technical questions relating to procedure, instead of on the merits of the case, and the complaint is often made that this is due to the legal profession clinging to old forms which are outworn and which should be simplified in accordance with the practical demands of the time. This complaint, however, overlooks the fact that for many years the legislatures of our several states have been regulating legal procedure until there remains at the present time very little of the old common law forms to which are attributed the evils of delay and over-technicality. The common law rules, while in many instances over-refined and technical, nevertheless formed a logical and related system based on general principles and with a well-defined aim. The reform of common law pleading, unfortunately, did not stop at simplification and the removal of over-technicality, but substituted arbitrary rules in endless detail, based on no principle whatever. A long course of judicial construction was the necessary consequence; but, to make matters worse, the legislatures have continued to pass "practice acts" at every session changing the rules relating to some branch of procedure. It is obvious that with this continual change going on numerous questions in regard to procedure inevitably arise. It is to this continual legislative tinkering with the details of procedure that over-technicality is due where it exists at present, rather than to any vestiges of the refinements of common law pleading. It is a hopeful sign that this is beginning to be recognized. In his presidential address at the last annual meeting of the New York State Bar Association Senator Elihu Root said:

"The original Field Code of Procedure of 1848 contained 391 sections and was comprised in 169 of the small, loosely printed pages of the session laws of that time. The last edition of our present code at which I have looked contains 3,384 sections, a large proportion of them dealing with the most minute details. It is doubtless true that some provisions of substantive law have found their way into this enormous mass of statutory matter and that some special branches of procedure are covered by the present code which were not included in the original

code. Nevertheless, the comparison between the two statutes reveals plainly the fact that for many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process which, under a multitude of varying conditions, suitors may get their rights.

"Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency inevitably leads to continual discovery of new contingencies and unanticipated results requiring continual amendment and supplement. Whatever we do to our code, so long as the present theory of legislation is followed the code will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong, the theory is wrong, and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone."

The principles which should be fundamental to a system of procedure adapted to our substantive law and methods of trial are fairly well known and have been developed by experience, but so chaotic has been our procedure in this country of recent years, due to legislative interference, that there may not at once be agreement as to them. Whether or not the present craze for detailed legislation can be overcome for some time in the future, the attempt to do so cannot too soon be begun. E. L.

AN IMPORTANT REFORM IN FEDERAL PROCEDURE.

In a previous issue of the JOURNAL attention was called to a bill prepared by a committee of the American Bar Association, and endorsed by that body, designed to diminish the abuse of reversals and otherwise improve the administration of justice in the federal courts. We are glad to be able to say that the more important parts of this bill were passed by Congress at the recent session and are now law. The law provides that:

"No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error com-

plained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require."

This rule is now in force in a number of states, notably New York, Massachusetts, New Hampshire, Wisconsin, Kansas and Oklahoma, and there is a widespread demand for its adoption in other states. Now that it has been made a rule of procedure for the federal courts, it is to be hoped that the example set by the nation will be followed by all the states. There seems to be no good reason why it should not be a rule of procedure in every appellate court in the land. Some of the instances of reversals for errors cited by the judiciary committee of the House in its report recommending the passage of the bill seem almost incredible and would not be tolerated anywhere outside the United States.

As originally framed, the bill contained a provision forbidding the issue of writs of error in criminal cases, except where a justice of the Supreme Court should certify that there was probable cause for believing that the defendant was unjustly convicted. But this section was not passed. As it is, the judge has practically no discretion, but must allow an appeal as a matter of course. Thus a criminal who has been convicted in a state court, and whose conviction has been affirmed by the highest court of the state, may sue out a writ of error to the Supreme Court of the United States alleging that a federal question is involved and the court is bound to allow the writ, although it may be perfectly clear that the purpose is merely to delay the infliction of a deserved punishment. The rejected provision made it incumbent upon the appellant or plaintiff in error to satisfy a justice of the Supreme Court that he had been unjustly convicted, otherwise the writ would be refused. Still another rejected provision was designed to diminish the abuse of the writ of *habeas corpus* proceedings, except where a justice of the Supreme Court was willing to certify that in his opinion there was probable cause for believing that the petitioner was wrongfully deprived of his liberty. A third provision, also rejected, allowed appeals and writs of error to be taken from the district courts to the circuit courts of appeal in cases of conviction for infamous crime. Under the present procedure writs of error in capital cases may be taken to the Supreme

Court, making it necesasry for this court, already over-burdened, to review nearly every capital case where there has been a conviction in a district court. Had this provision been enacted, the decision of the circuit court of appeals in capital cases would have been final, as it now is in other criminal cases, and thus an important cause of delay in the administration of justice would have been removed and the Supreme Court relieved of the burden of reviewing criminal cases. Nevertheless, the most important provision of the bill was enacted into law and the advocates of reform everywhere should be thankful that the nation has made the rule of harmless error a part of its judicial procedure and thus set an example which it is to be hoped the states will quickly follow. J. W. G.

COMMON SENSE IN THE FRAMING OF INDICTMENTS.

In the last issue of the JOURNAL we called attention to the need of greater simplification in the preparation of indictments, and for purposes of comparison we printed the text of a typical American indictment and along with it the same indictment as it would be drawn in England. An official of the attorney general's office of Canada calls our attention to the fact that the form employed in the Dominion is even more simple than that of England. The indictment in question, he says, would in Canada read as follows:

The jurors of our Lord the King present that J. F. G., on the sixth day of August, one thousand nine hundred and eight, at the city of Winnipeg, in the Province of Manitoba, murdered F. M.

The Canadians, it will be seen, have gone further than the English and have abandoned the use of the words "feloniously, wilfully, and of his malice aforethought," for the obvious reason that the elements of the crime of murder are sufficiently alleged in the word "murdered," and, hence, any further allegations are regarded as superfluous.

Commenting on the exhibit published in our last number, the New York Tribune asks: "What wonder that justice is slow in America, when all the trumpery of the Middle Ages is preserved in its practice?" In the same spirit the *Rochester Herald* dwells upon the crying need for greater simplicity and more common sense in the formulation of charges. "The phraseology now required in setting forth an offense," it says, "is so involved that it is seemingly next to impossible to draw an indictment in which the reviewing courts, which employ a microscope in their inspection, cannot find a flaw which serves to undo a great deal of painstaking effort on the part of the trial officers, sending it back to be done over again, to the probable advantage of a criminal whose deserts do not call for so much consideration." Be it said

to the credit of the more candid members of the bar, they generally admit that the excessive particularity now religiously required in most of the states is unnecessary, and many of them are advocating a simpler form. But with a few exceptions it has not been possible as yet to convince the legislatures, and our codes of procedure nearly everywhere still require charges to be framed much as they were in England in the time of the Tudors. There are, however, some notable exceptions, of which Kansas is an example. The penal code of this state long ago abolished the technical requirements of the common law indictment and enacted that indictments and informations should be stated in simple and concise language, without repetition. It is not considered necessary in Kansas for the indictment or information to set forth every element of the offense charged, but only so much as may be necessary to give the defendant reasonable information concerning the nature of the act to be proved and its identity. Nor may indictments be quashed for clerical errors or immaterial flaws, such as the omission to allege that grand jurors have been impaneled, sworn and charged; that the act was done "with force and arms;" that it was committed "against the peace and dignity of the state." and similar superfluities.

There is now pending before the legislature of Illinois a bill prepared in the state's attorney's office of Chicago which provides, among other things, that indictments, informations and complaints shall be stated in simple and concise language. Fictitious names are allowed to be substituted by the grand jury for real names when the latter are unknown, and if during the course of the trial the real name is discovered it may be substituted without the necessity of starting the trial anew. The place of the crime and the means by which it was committed need not be alleged unless it is an essential element of the crime. The omission of the words "then and there," "traitorously," "feloniously," "burglariously," "wilfully," "maliciously," "negligently," "corruptly," "with force and arms," and other verbiage of the kind, shall not vitiate an indictment unless such descriptions are a statutory element of the crime charged. The conclusion, "contrary to the statute," in an indictment for felony shall be considered as an allegation that the act was done "feloniously." Indictments relating to forged instruments need not enter into a full description of the offense, but may designate it by the name by which it is commonly known. Likewise indictments relative to the theft or embezzlement of any kind of money, obligation or other security may employ the words "dollars," or "money," without specifying particulars or entering into the long and verbose descriptions now commonly employed. Nor need the value or price of stolen prop-

erty be stated unless it is an essential element of the crime. An appendix to the bill contains 100 specimen forms of indictments for various offenses, drawn in accordance with the principle of brevity and simplicity. The proposed form of indictment for murder, for example, is as follows: "That A. B., on the ..... day of ....., 19...., of his malice aforethought, with a certain ax, did assault and beat (shoot, stab, choke, poison, etc.) C. D. with intent to murder him, and by said assault and beating (shooting, etc.) did kill and murder said C. D." The general purpose of the bill is admirable. It is framed by men who are actively engaged in the prosecution of criminals and who know the shortcomings of the present system. The objects at which it aims certainly should commend themselves to the legislature.

J. W. G.

THE CHURCH AND THE CRIME PROBLEM.

Recently there has been a remarkable awakening of popular interest in the crime problem. This interest has found expression not only in the discussion of measures for the prevention of crime and for dealing with criminals in a more rational manner, but in organized movements for the betterment of the criminal law and procedure. The flood of discussion in the newspapers, popular magazines and law periodicals has been quite unprecedented. Hardly any other topic has found a place on the programs of so many different and unrelated organizations. Bar associations, learned societies, scientific bodies, civic organizations and even the labor unions have all taken a hand in the discussion of the problem in some form or another. Lately religious bodies have begun to join in the agitation for more effective methods of combating crime and punishing criminals. For several years the State Baptist Convention of Georgia has had a standing committee on criminal law reform, at the head of which is a distinguished member of the Atlanta bar. The committee has taken its duty seriously and has presented two reports to the convention, in both of which it dwells upon the increase of crime in this country; the causes which, in its opinion, are responsible therefor, and the remedies which should be applied. We publish on another page of the JOURNAL a summary of the resolutions adopted by the convention at its recent annual meeting, in November last.

The activity of all these organizations affords further evidence of the widespread dissatisfaction with the administration of the criminal law in certain parts of this country. Their diagnoses of the causes are not always correct, their criticisms of the criminal law and its machinery of administration are not always just, nor are all the remedies which they propose practicable or effective. But of one thing we are certain:

No such widespread discontent, no such outpouring of criticism, would be possible were there not real causes for it. Some of the evils complained of, it will readily be granted, are wholly imaginary, but many of them are real and cannot be ignored. We need the coöperation of the learned societies, the scientific bodies, the religious denominations and all other organizations that are capable of aiding the cause, whether it be in the inculcation of higher standards of respect for law, the diagnoses of causes, the collection of data bearing upon the conditions which must be dealt with, the investigation of results obtained elsewhere, the remedies to be applied, and so on. The bar associations in many states are earnestly considering schemes of reform, and everywhere there is an evident desire among the better class of lawyers to remove the cause of the popular discontent. Intelligent and constructive coöperation of all organizations should, therefore, and doubtless will, be welcomed.

J. W. G.

TWO CALIFORNIA JURISTS ON LAW REFORM.

The JOURNAL has recently had the privilege of presenting to its readers two admirable papers on law reform by two of the most distinguished jurists of California, Mr. Justice Sloss, of the Supreme Court, and Judge Lawlor, of the Superior Court. The defects of our present procedure and the remedies, as pointed out in these two papers, deserve the thoughtful consideration of the bench and bar, to say nothing of the legislatures, from whom much of the relief must come, if it comes at all. Mr. Justice Sloss frankly admits that there is much force in the criticism that the entire scheme of procedure is too cumbersome and inadequate and that improvement may and should be had. In the second place, he says, the objection that the law in its present condition gives the accused too great an advantage as against the state is well founded. In the third place, the delays with which prosecutions are disposed of is an evil the seriousness of which cannot be over-estimated. Both he and Judge Lawlor dwell upon the evil practice of reversing convictions justly obtained, upon errors which do not affect the merits of issues. Where there has been a painstaking and laborious trial of the facts before a court and a jury, says Justice Sloss, and the result has been the establishment of guilt, the entire proceeding has been reduced to a futility if the judgment is reversed upon some ground which has no direct relation to the ultimate question of guilt or innocence. The practice of considering on appeal, says Judge Lawlor, virtually every question that is raised reduces the final authority of the trial court to a minimum, involves voluminous records, delays justice and fosters lawlessness. The verdict of the jury and the judgment of the trial court

constitute but the preliminary skirmish in the contest. Causes, he says, are frequently reversed on points which have never been raised in the trial court at all—a practice which is opposed to every rule of order and common sense. And, what is the worst feature of it all, he adds, reversals in the great majority of cases result in the defeat of justice.

Both jurists point out the evils resulting from the wide latitude of appeal now allowed, and, though neither would abolish appeals, both believe the privilege should be restricted to more reasonable limits or properly safeguarded so as not to obstruct justice. When the guilt of the accused has been fairly established, says Judge Lawlor, the conviction should never be disturbed by a higher court except upon considerations of the gravest character. The accused is entitled to a day in court, not two days or three days, and when he has had his day, with every presumption of innocence in his favor and with the benefit of every reasonable doubt, he has had every right to which he is justly entitled. The protection of the innocent is the prime aim of the criminal law, but it is also necessary to the protection of the innocent that the guilty shall be punished.

Justice Sloss favors the adoption of the English rule which allows the Court of Criminal Appeal to dismiss the appeal, notwithstanding substantial errors have been committed by the trial court, if, upon an examination of the entire record, the appellate court is satisfied that the conviction was just and that the same result would have been reached if the error had not been committed. Under the practice prevailing in the United States, material error always works a reversal, even though the appellate court may be clearly satisfied that there has been no miscarriage of justice.

Justice Sloss is also of the opinion that the higher courts should be given power in criminal cases to review questions of fact as well as of law, to the extent that it may be necessary to determine whether any error of law has worked substantial injustice to the appellant. Both jurists plead for the enlargement of the power of the judge in the conduct of the trial. Justice Sloss points out that in the English courts and in the American federal courts the trial judge has the power to sum up the evidence and comment on its weight to the jury, and that the exercise of this power has not resulted in the return of verdicts unwarranted by the facts. Judge Lawlor thinks the judge should have more power to deal with litigants, witnesses and counsel. Under the present practice, the authority of the court may be challenged at every turn and exceptions taken to every act and word of the court which does not meet the approval of counsel and client. This practice weakens

the authority of the court, diminishes respect for it, and is often resorted to for the purpose of destroying the effectiveness of the judge with the jury. The court and the prosecuting attorney are on trial and the proceeding is largely a contest over errors the results of which are deplorable in the extreme.

Both judges condemn the present rule in regard to the qualifications of jurors. No man, says Judge Lawlor, who has formed or expressed an opinion upon the matter or cause to be submitted to the jury should be held disqualified if it appears that he can and will act favorably and impartially, provided such opinion is not founded upon a personal knowledge of facts material to the issue, or upon statements made in the presence and hearing of the challenged person by one having or claiming to have such personal knowledge. No man should be disqualified for jury service because he has read the newspapers or formed an opinion upon hearsay evidence unless the opinion is so fixed that it cannot be removed by evidence which leads to a different conclusion. With the present facilities provided by the press for discriminating information concerning the facts of crime, it is difficult to find a jury no member of which has not formed an opinion as to the guilt or innocence of the accused, especially in cases which have attracted widespread interest in the community. Under such circumstances the citizen cannot keep abreast of the times without rendering himself ineligible to jury service. In short, the more he informs himself the less likely is he able to meet the requirements for sitting on the trial of cases. The present rule is made use of by counsel, not to secure fair and intelligent jurors, but rather those who will meet the needs of the defendant's situation. It often leads to long delays in the starting of trials and constitutes one of the greatest abuses in the administration of the criminal law. Moreover, the state should have the same number of peremptory challenges as are allowed the defendant. Judge Lawlor thinks the numerous exemptions from jury duty should be limited and the exempt class confined to clergymen, doctors, druggists and lawyers. He also advocates legislation making it a crime for any newspaper to attempt to corrupt public opinion and thereby interfere with the impartial determination of cases on their merits. The abuse of the rules of reasonable doubt, moral certainty and presumption of innocence, he thinks, ought to be reduced by legislation defining the elements of those facts.

Both jurists advocate the abolition of the unanimity requirement for verdicts in all criminal cases except capital offenses. Mr. Justice Sloss points out that in the trial of civil cases three-fourths of the jury may render a verdict, and that there is no reason to believe that it

would not work satisfactorily in criminal cases. The great advantage of such a rule would be that it would always insure a verdict, notwithstanding the opposition of a stubborn and corrupt juror. Judge Lawlor also suggests that the double-jeopardy immunity be modified so that the privilege will not apply to the case of a mistrial or the retrial of an action. Under the present practice, he says, a person who is charged with murder and convicted of manslaughter cannot be again tried for murder, on the theory that the verdict for manslaughter was in legal effect an acquittal of murder. Mr. Justice Sloss advocates a modification of the constitutional guarantee relating to the exemption of the accused from testifying against himself. As the provision is now generally construed, it not only exempts the accused from being required to testify in his own trial, but that his refusal or failure to do shall not be considered by the jury as a circumstance tending to establish his guilt. Such a theory, says Justice Sloss, is contrary to the common experience in the ordinary affairs of life. Why, he asks, should not the mental processes that influence thought and action in other relations of life have weight in criminal trials? It is no abandonment of the doctrine of presumed innocence to say that when the prosecution has shown a state of facts which points to the guilt of the accused and those facts are such that a denial or explanation of them by him would tend to establish his innocence, his failure or refusal to make that denial or give that explanation may be considered by the jury as an item of evidence bearing upon the question to be decided.

In conclusion, Justice Sloss declares that the need of a more rational and less technical administration of our criminal law has long been apparent, and has now come to be regarded as imperative. To those who have made the law their life study the community has a right to look for guidance in the effort to find a way to make that law more effective. J. W. G.

ENGLISH AND AMERICAN PROCEDURE COMPARED AGAIN.

A member of the Rochester (N. Y.) bar, in the March number of *Case and Comment,* takes issue with us on the proposition that the English methods of administering justice are more efficient than those prevailing in most parts of the United States. In the first place, he argues, "conditions in England are wholly different from those in this country;" and then he proceeds to draw a comparison between the vast difference in the geographical areas of the two countries, overlooking the fact that many of the states, which are the units for the administration of justice in all but a comparatively few concerns, are in reality

much smaller than England. The argument, therefore, that since England is a small and compactly settled country as compared with the United States, the administration of justice is attended with fewer difficulties, does not strike us as being to the point. The geographical comparison should be made, not between England and the United States as a whole, but between England and some particular American state, in which case the advantage will be rather with us. In any case, we are unable to see how geographical differences enter into the question at all. It would be quite as illogical to argue that the superiority of the system of municipal government in England over that of the United States is due to the smaller extent of territory.

In the second place, it is argued that England has the advantage of longer experience. Her courts were in existence centuries before America was even discovered. In our opinion, the time has long ago passed when the plea of infancy should be given any weight in such arguments. There has been entirely too much of a disposition to attribute our faults and our backwardness in certain fields of endeavor to the newness of the country. As a matter of fact, we have outdistanced England in our inventive genius, in our industrial and business methods and in the success with which we organize and manage great industrial enterprises. The experience of many centuries has not been necessary to establish our primacy over England in these fields of activity. Yet when proof is produced to show that we are behind England in our general lack of respect for law and authority, in our lower standards of political conduct and in the relative inefficiency of our methods of administering the criminal law, the excuse commonly offered is our comparative infancy and want of experience. The fact is our judicial experience has extended over several hundred years, and we wonder how much longer the infancy argument will be thrown in our faces.

Again, our critic tells us that "legal procedure suitable for a monarchy will not suit the needs of a republic." Why not, may we ask? Everybody knows, or should know, that England is a monarchy only in name. The English people are a free, liberty-loving people, exceedingly jealous of their rights. In some respects—as, for example, in the extent of the suffrage—they are more democratic than many of our American states. From them we inherited our system of law and procedure. Trial by jury and all the other safeguards for the protection of the innocent are and have long been a part of their legal procedure. They are the same people as ourselves in race, language and ideals. Why, we ask again, is the judicial procedure which they have adopted and which has given so much satisfaction to the English people, and

which is admired by so many American jurists, unsuited to our conditions?

Our critic asserts that the rights of individuals, as well as those of the community, are as fully protected in this country as anywhere in the world. If this be true, what is the explanation for the widespread discontent, both among laymen and lawyers, with the administration of the criminal law?

Again, we are told that "nowhere else has a poor man so good an opportunity to secure a vindication of his rights"; and he adds: "Our appellate courts pass upon trivial claims at the request of litigants of very limited means, and a person without means can prosecute or defend an action as a poor person." How can a person without means avail himself of the privilege of appeal any more in this country than in England? Counsel must be hired and the court expenses of taking an appeal must be met here, as there. Those expenses, as everyone knows, are much higher here than in England. President Taft has over and over again pointed out the disadvantages under which the poor man labors as compared with the wealthy litigant who is able to employ shrewd and able counsel and meet the other expenses of taking appeals. The actual inequalities between the rich and poor under our system are set forth in a convincing article by Mr. Brandon in the last issue of this JOURNAL.

The merits of English procedure have recently been made the subject of an extended study by a committee of the American Institute of Criminal Law and Criminology which spent four months in the courts of England. Their report may be found in the November and January numbers of this JOURNAL, and we believe it is a fair and accurate presentation of the facts. It is based on actual observations of a large number of trials, both in the courts of London and the assizes, and upon conversations with many of the leading judges and barristers. Their conclusions are distinctly favorable to the English system, and we believe it will convince most fair-minded members of the bench and bar in this country. J. W. G.

LAW REFORM IN CALIFORNIA.

During the past year the problem of criminal-law reform, and especially of criminal procedure, has apparently overshadowed all other questions of public interest in California. And well it may; for we are told that in certain parts of the state the administration of the criminal law has perilously nearly broken down. The state bar association, the San Francisco bar association, as well as the bench, have been wrestling with the problem of how to improve existing conditions. A number

of civic organizations, like the Commonwealth Club of San Francisco, have also been active and influential. Both political parties in their last platforms pledged themselves, if successful, to enact legislation to make the administration of justice more speedy and certain. The legislature at its recent session devoted much of its time to a consideration of this question and enacted as many as eleven different statutes changing the penal code, each of which is designed to improve in some particular the existing procedure. A constitutional amendment was also submitted to the voters providing that no judgment shall be set aside, or new trial granted, in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. This amendment follows closely the provision of the recent act of Congress forbidding reversals by the federal courts in such cases, and is substantially the same as an amendment adopted by the voters of Oregon last November.

Two other amendments to the constitution were proposed: one to permit verdicts in all except capital cases to be returned by ten jurors, and one permitting the court to comment on the failure of the accused to testify in his own behalf. Both, however, failed to receive the constitutional majority required.

Among the statutory changes made in the penal code may be mentioned the following: An act permitting the amendment of indictments by the district attorney when it can be done without prejudice to the substantial rights of the defendant and provided the amendment does not change the offense charged; an act to facilitate the selection of grand jurors and to do away with the evil of quashing indictments because of the possible lack of qualifications by grand jurors; an act compelling accomplices to be witnesses or to produce papers, provided that the testimony or papers shall not be used in any criminal prosecution against the person so testifying; an act giving the state the same number of peremptory challenges as is allowed the accused (formerly he was allowed twice as many); an act changing the method of taking down testimony given before the grand jury; an act relating to the arraignment of the accused; and an act providing for substitute judges in case of the death or disability of the judge before the termination of a trial over which he is presiding.

The desirability of a number of the changes made by this legislation was pointed out by Justice Sloss and Judge Lawlor in their articles

recently published in this JOURNAL. Verily, the movement for a better criminal procedure is making encouraging progress. California is to be congratulated on this auspicious beginning. We are gratified to be informed that the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY "has been of some material assistance in concentrating the sentiment that has produced this legislation." J. W. G.