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NECESSITY FOR A REVISION OF OUR CRIMINAL PROCEDURE.¹

EUGENE LANKFORD.²

As I initiated this meeting of the judges, I shall give my reasons for doing so. This I shall endeavor to do as briefly as possible, but the nature of the subject demands a somewhat lengthy statement.

We wish to ascertain, if possible, if our courts and the law accomplish that which they were designed to accomplish; and, if not, what should be done to remedy the defects.

If we are to sit as jury and judges upon our own cases, we must be very unselfish indeed. In order to accomplish anything we must for the time forget the law and its technicalities, as we have been trained to look at them, and consider what I shall say from the viewpoint of the ordinary, intelligent, common-sense citizen. Habit becomes part of our nature, and we have been trained to think in legal terms, just as we think in English.

This is the real difficulty in the whole problem—our training and habit of thinking. We think too much in legal terms, and not enough in common-sense English. We were lawyers before we were judges; and after we became judges, the lawyers kept up preaching "the law" to us, and reading precedent after precedent; and the Supreme Court is constantly reminding us that it must be done "just so," or it is "reversible error." Then it should be no wonder that we think in legal terms.

However, we shall accomplish nothing unless we can look at the problem from a common-sense, every-day-citizen point of view, for the law is for the guidance of these common-sense citizens.

Whatever I shall say must not be considered in any sense a criticism of the integrity of any of our courts; for our judges are intelligent, honest and honorable; and the fault, if fault there be, is in our training, professional habits and the system under which we labor. But while this is not a criticism of our courts and judges as such, I shall assail our criminal laws and procedure and our penal institutions, for I think they are a disgrace to thinking, reasonable men in this civilized age. To say that we are a hundred years behind the times in our criminal procedure and the treatment of criminals, is putting it too mildly.

If we were to read some of our case law to an intelligent, reasonable man who is not a lawyer, he would think that we were reading some of Dickens' stories in which he ridiculed the technicalities of the courts of a hundred years ago. This is not exaggeration; but is a burning, shameful fact.

Commerce, mechanics, the science of medicine, chemistry, and all the practical arts and sciences are changing methods and procedure every day to suit the thought and necessities of modern life, but the

¹Read before a meeting of judges in Little Rock, August 8.

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courts keep on citing authorities and precedents that hampered justice in the courts a hundred years ago.

A few years ago the doctors "cupped" and bled their patients for various diseases, but when they learned that they were wrong, they quit it. When a child had diphtheria they burned his throat with caustics, but when they learned that instead of doing the patient good they were injuring him, they quit that and administered anti-toxins to kill the pathogenic bacteria and cure the patient.

But our courts are still quoting Chitty on Pleadings and Rapalje on Larceny, and other authorities so old the memory of man runneth not to their origin.

A short while ago I was on board an old English convict ship over a hundred years old, and the captain in charge told me a history of the ship and many of the noted characters who spent long sentences in the dark, foul dungeons in the hull of the ancient craft. There were "dark holes" way down in the lower part of the ship where they would chain a convict with his hands behind him in such a position that he could not sit, stand nor lie down, and without light and with very little air, he would have to stay there for weeks if he lived that long. If he survived that treatment, he was subjected to still more trying tortures to rid him of the evil spirits that caused him to commit the crime. All the old instruments of torture and dungeons were still there just as they were in those days of ignorance and cruelty.

I saw the dungeon in which one man was placed under a seven years' sentence for being drunk and disorderly, a crime for which one might get ten dollars and costs in the police courts in Little Rock. He went mad and died before the time was out.

Prior to the last century even our English-speaking people punished nearly all serious crimes by death; and those they did not kill they thrust into dark dungeons. It was only a hundred years ago that the penitentiary was thought of and built. And even after the first one was built, in New York, bills were introduced to abolish it, because the convicts had too much fresh air and liberty in it, and the punishment was not severe enough. North Carolina was the first state to give the convict more fresh air and sunshine by putting him on the state farm. The convict lease system has about passed from the stage of civilization; and I think the penitentiary, as now conducted, will follow as soon as we learn more of the cause of crime and the humane method of preventing it and curing the criminal.

So, when I say that our "criminal procedure" needs a radical change, I mean the way we proceed with the accused from the time the state takes him in charge till he is released.

The old theory of crime and its punishment was that when the law was violated, the offender must be punished, and often very much out of proportion to the offense. The object of the defendant, then, was to escape this punishment by any method or means possible. That was the issue, the battle ground. It became a sparring match between the state's attorney and the lawyer for the defendant. A trial in our courts has been described as a contest to see which side

has the best lawyer. It is a game of chance, and the technicalities are the points. The Supreme Court is the referee to decide which one has won on points.

Reformation of the defendant, or the proper treatment of his "disease" or malady is forgotten. His case is simply used as the subject-matter of the legal contest. Then when the state succeeds in winning the contest, the theory of punishment in our prisons is all wrong.

Under our system, when the officers punish a criminal, they assume, *first*, that the offender when punished will not repeat the crime; *second*, that others, seeing that he was punished, will be deterred from committing crime. Now, if that were true, our present penal system might accomplish something, but it is not true. The system is based upon the false theory that the man who commits crime is reasonable. The law-makers expect the criminal to look at punishment as they do. All crime is unreasonable, and the criminal is a moral defective or diseased person. The old theory is that all who commit crimes are criminals at heart, and that is not true. There are many men who commit crimes who are really not bad, and if properly treated would make good citizens, but if not properly treated at the right time they may become hardened criminals.

Our present system is a failure. Every up-to-date, thinking man must admit that. The law does not prevent crime, nor are we properly treating those who commit crime so as to make better men of them.

Ex-President Taft said that our present administration of the criminal laws in this country is a disgrace to civilization. I need not tell you which one of the ex-Presidents said: "The fault is with our judges, who are either corrupt or are so blind to the problems of the times that they obstruct progress and deny justice to the great body of our people."

Governor Fielder of New Jersey said: "The sentiment of these enlightened times demands a change in the care and treatment of prisoners. The idea that offenders against the law can be reformed by confinement and punishment alone, is obsolete."

There is a movement now to establish a Federal Office of Prisons, for the purpose of studying proper methods of treating those confined in federal prisons.

An effort is being made, too, to abolish Sing Sing prison, and convert this antiquated mausoleum into a hospital, if you please, where they may make a scientific study and diagnosis of the defective persons committing crime in the state of New York. What a wonderful awakening of humanity and science.

Morefield Story, once president of the American Bar Association, said: "Our prisons are manufactories of criminals, and it is time that we changed our whole method of dealing with them."

Justice Peckham of the Supreme Court, in a dissenting opinion, referring to the court's decision reversing a case on a technical point, said: "I think such a result is most deplorable."

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Collier has published a series of articles about the criminal laws of America. The latest of these is "The Scandal of the Lawless Law." The title indicates what the laymen think of our law.

The courts of California became so technical that the people of that state adopted an amendment to the constitution, as follows: "No judgment shall be set aside or a new trial granted in any criminal case on the ground of misdirection of the jury, or improper admission or rejection of evidence, or 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."

Now, that came from the people and sounds like justice, common sense and even science.

Now this is what the Supreme Court of that state did: They reversed a case after the jury had decided the defendant was guilty and needed treatment by the state, because forsooth, the prosecuting attorney left the letter "n" out of the word larceny in the indictment.

And they reversed another case because the indictment said: "Lee Look had feloniously, etc., murdered Lee Wing," without alleging that Lee Wing was a human being, although they had gone through the evidence which showed that he was a human being, and the jury had decided that he needed punishment for it. That came from the Supreme Court, and, most humbly begging their pardon, I will say that it sounds like silly nonsense. As Justice Peckham said, it is most deplorable. Yet these judges were learned men. All judges are learned, honorable men. And our court cites California court as authority.

It was said by a Californian before the amendment quoted was adopted, "As it is now, the common people have lost confidence in the courts; criminals count on escaping punishment; crime increases, and the state is put to a vast expense in fruitless efforts to prosecute offenders."

The people of the state of Oregon have an amendment to their constitution similar to that in California, and so have the people of Wisconsin.

Canada has a simple procedure. This is their form for an indictment for murder: "The jurors for our Lord the King present that John Doe murdered Richard Roe at Toronto, on February 1, 1912." Why is that not sufficient?

Compare the simplicity of this indictment with the technical rule of our court in the Ray case, where our court reversed the verdict of a jury and judgment of the court below, because in the indictment there was "nothing but the general and indefinite charge that the defendant killed and murdered deceased with a double-barreled shotgun loaded with gun powder and leaden bullets." If one were to tell you this moment that someone had loaded his double-barreled shotgun and had killed and murdered your wife or brother with it, it would not sound very vague and indefinite to you, but such is the wisdom of our criminal procedure.

The people of Maryland have awakened to the necessity of a change in their procedure, and the legislature of that state has created a "Penal System Commission" to investigate their system and make needed changes.

A man named Pope in Alabama was convicted of murder by five different juries of his own selection, and each time the Supreme Court of that state reversed the case, except the last time. Think of the perseverance of that prosecuting attorney. The case was reversed twice because a witness was permitted to say that a certain shoe or foot could make a certain track. The jury were supposed to be sensible men and able to weigh such evidence, but that was not the way to do it, according to precedent way back in the dark ages, so, of course, the whole case must be reversed. We cite that court as authority, too.

Walter Hickey murdered Tom Dixon in Texas in 1903; the prosecuting attorney was faithful to try the case in the Circuit Court six times, but he, the juries and trial court were unable to try him "according to law," and finally the prosecuting attorney in open court stated that he would give up the task, as "it appeared impossible to conduct a trial in such a way as to meet the requirements of the reviewing court." Think of it! The law too technical to punish a murderer!

The trial judges of the state of Georgia have recently, in convention, passed resolutions looking to making needed changes in their legal procedure. And judging from some of their technical decisions to which I shall refer later, they certainly need a change.

A federal judge in Fort Smith recently quashed an indictment against Alva Gunn, so the papers say, because the letter "o" was left out of Wagoner. He was charged with robbery, but it matters not about the crime nor the criminal, if Wagoner is mis-spelled. It is fatal to leave "o" out of Wagoner; plain Wagner won't do. Yes, that's the law. Judge Youmans should have read Justice Smith's opinion in the Smith case, 40th Ark., where he said: "We are told in Holy Writ that 'the letter killeth, but the spirit giveth life.' He who sticks in the letter of the law goes but skin deep."

The Supreme Court of the United States recently reversed the case of *Crain vs. United States* because the record did not affirmatively show that the defendant was formally arraigned. We know he must have pleaded not guilty or there would have been no trial; that is all the arraignment is for—to see what his plea is. The record showed all the trial to be regular, and the jury found him guilty, and decided that he needed treatment by the government, but this little "flaw" in the record was fatal.

The court of Delaware reversed a case in which a man was convicted for stealing a "pair of shoes," because the evidence showed that both shoes were for the same foot.

We notice a very salutary effect of modernizing the criminal laws in the older countries. Judge Story said that in 1909 there were but 19 murders in the great city of London, while in the city of Louisville, Ky., a small town in comparison, there were 47 homicides, and only one of the 47 was executed for his crime. Too many "flaws" in the procedure. No wonder we hear of the "Scandals of the Lawless Law."

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If, in a state where they have capital punishment, only one out of 47 who commit homicide is executed, a murderer's life would be a fine risk for the insurance company. One of the writers in a current funny paper said that they are the very best risks if they are able to hire a good lawyer.

Our laws against murder are severe enough, but they are not enforced, nor will they ever be until our courts quit quibbling over words and phrases, and study the man at the bar and his needs.

We have strict laws against gambling, but when the officers make their annual raid on the gambling dens, it is so unusual to see the houses "dark" that the newspapers even notice it and mention the fact in big headlines. Our laws against fraud in elections are very drastic, but the ballot thief laughs at the law. Study the Kelly case, 105 Ark., and Hester case, 80 Ark., for the cause of this lack of respect for the law.

In a neighboring state they have state-wide prohibition, but the saloons even refused to close up on Sundays, and they thought an officer was committing an outrage to arrest one of them. Yes, the law was strict enough, but it was conceded that it could not be enforced.

A banker recklessly squanders a million dollars of the people's money, but the criminal procedure is so lame he is not even tried. County treasurers and bankers all over the land steal the people's money entrusted to them, but they feel safe behind the technicalities of the law. The more they steal, the safer they are.

Houses of ill fame are permitted to run in public view, and out of these dens of vice and disease go many subjects for the hospital, asylum, and the penitentiary, but the inmates do not fear the law.

We have very stringent laws against trusts, and the penalty against those who violate these laws is severe; but who fears them? It is common talk that you "cannot do anything with them; that the laws cannot be enforced. They never think of obeying the laws of Congress or of a state, till a "test case" goes to the Supreme Court. *The law-making power makes the law they want, but that is not so important to the violator of the law as what precedent the Supreme Court is going to follow in construing it.* When the Standard Oil was "busted," the magnates actually got together and discussed the question as to whether or not they would obey the court's decision; and I think the authorities have decided that they have it so mixed up in the tangles of technicalities now, they don't know what to do. If our citizens respected the law, there would be no trusts. They know the law is so full of technicalities that the chances are all in their favor. So thinks the criminal.

Under our laws and procedure the chances are that the real criminal, if he be shrewd, will escape punishment and be actually rewarded by his friends. Caleb Powers was convicted by three juries of his state, and twice they said that he should die for his crime, but thanks to Kentucky criminal procedure, he escaped and was afterwards elected to Congress.

Governor West of Oregon said: "My belief is, that three-fourths

of the men sent to the penitentiary are not criminals at heart, are really not any worse than thousands who, through some turn of fortune's wheel, escape the stigma of the penitentiary."

Governor Foss of Massachusetts once said: "In all seriousness, the managers of my shops and factories make a more efficient and intelligent assortment and reclamation of scrap metal than the laws have generally made of living men and women, who have been thrown upon the scrap heap of our prisons." Governor Foss is pushing the reformation of the procedure and prisons in his state, and they have a commission studying needed changes now. He says the politicians are against any change. Why? The reason is plain to me. The more complicated, the more technical the laws are, the more dependent the ignorant and helpless class (and this is a large class when it comes to law) are upon the ruling of influential class. Of course, the political boss would have it so he can take care of his men. That is what makes a boss in politics.

We all know that a man may embezzle and steal all he pleases, if he be a financier and stand "high in the community," he is not in any very great danger. The turn of fortune's wheel lets him go free. If the state succeeds in pushing him through the technical labyrinths of the law, and gets a conviction, influential friends will convince the governor that a pardon is necessary; while the poor, ignorant, friendless man who takes a three-dollar pig for his hungry children is thrown into prison and forgotten. A man who is intelligent and does not need to steal, and recklessly and feloniously appropriates other people's money or property, needs punishment; but he is the one to escape under our procedure, and we all know it. The poor, ignorant man, whose training the state has neglected, and whose destitute condition is perhaps brought about by the conduct of these high financiers, is the one who is punished. This is not right. It is not just, and should not be tolerated.

Attorney General Cosson of Iowa said a short while ago, that "For years the technicalities of the law and defects in our criminal procedure have been denounced, but mere denunciation, in itself, amounts to nothing in the absence of some constructive methods of relief." He said the "conservatism of the lawyers has thus far prevented our bar association from taking favorable steps, etc." Some "jackleg" lawyers think it might hurt their business if the law is simplified. It would hurt the business of the "jackleg" lawyer, but would not affect the business of the lawyer who seeks justice for his client.

Nathan William McChesney, a prominent member of the American Institute of Criminal Law and Criminology, said two years ago: "The growing distrust on the part of a large portion of the country of the efficacy of our entire system of dealing with the criminal is apparent. This distrust is an ominous symptom, as it is an endorsement of the saying of Solon two thousand years ago, that 'Laws are like spider webs, which catch the small flies, but through which the great flies break.'" He stated further that his own state, Illinois, has

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the procedure of England in the time of George the First, the last vestige of which England abandoned years and years ago.

In speaking of the old rut in which our legal procedure has been moving in the past, the editor of the "Journal of Criminal Law and Criminology" recently said: "It is not many years since the great mass of the people seemed to regard the administration of the law as an occult science, whose defects and shortcomings however lamentable, must be regarded as necessary and unavoidable evils, which, for some unknown but entirely sufficient reason, must exist and be endured. If the courts and the lawyers said that such was the law, it was accepted with resignation, and with the reflection that there must be some good reason which the judges and the lawyers in their inscrutable wisdom knew, but would not divulge, why the law must work injustice."

The priests used to be the keepers of the law as well as the religion of their people, and until recent years there was among the people a superstitious awe of the law and its mystical forms and procedure. This technical mystical law and procedure could not be loved nor even respected by the people.

It is important that our laws be simplified so that the innocent may be more speedily released from unjust arrest and prosecution; and the guilty may be more certainly punished or reformed. The strong should be made to fear the law, and the weakest of our citizens confidently look to it for protection. It should be so simple and plain that everyone could understand it.

It is not the severity of the punishment that deters the criminal, but it is the certainty of it; but what is still more important, if our laws were such that we could act promptly and summarily with the beginner in crime, we could save the state many good citizens, and the cost of many long trials. The time is near when it shall be so. The country is full of unselfish, thinking men at work on this problem now.

A few years ago the "American Institute of Criminal Law and Criminology" was organized in this country for the purpose, as stated in their constitution, "to further the scientific study of crime, criminal law and procedure; to formulate and promote measures for solving the problems therewith in the administration of speedy justice." The membership of this institute is composed of some of the leading judges, lawyers, doctors, scientists, presidents of universities, experts in penology, anthropology, psychology, and every other science that throws any light upon the conduct of man. They are going at it right. They are looking for the cause of the disease of crime, and the best method of treating it. Before we can formulate any intelligent method of treatment of the criminal, we should first understand the criminal and ascertain why he committed the crime.

When a doctor of medicine is called to treat a sick man, he first makes a diagnosis of his case before he treats him. If he have a fever, the doctor tries to find out what caused the fever. Our family physician can more readily make the diagnosis because he knows our weak points, our habits and history. When the doctor thoroughly understands the nature of the disease, it is not so difficult for him to treat the case.

A criminal is a sick man—sick morally. The penologists call him a “defective.” You have heard it said that criminals are born; well, I suppose we are all born, but we were not criminals when we were born, except in the Bible sense through the fall of father Adam. We are *potential* criminals just as every man is a *potential* sick man. Some men have stronger physical constitutions than others; so some men have stronger moral characters than others. Our moral character is just as much a real entity or thing as our body, and is subject to development or neglect just as the body is. Some men with very big bodies have very small souls or moral characters.

Men can be “bred up” like stock, both as to bodies and as to their moral characters. The insurance company looks up the health and longevity of your ancestors; the bonding company inquires into their honesty.

As we all know, these rules have apparent exceptions, for the children of healthy men die, and the sons of preachers go wrong. That makes us know that there are other factors to be considered. Environment and training have much to do with the boy’s development.

The Italian scientist, Cesare Lombros, contended that there is a definite criminal type. If that be true, it must be after they are fully developed. A hardened criminal may be a distinct “type;” but I do not agree with him if he considers all those who commit crimes as the criminals. Those of the French schools, on the other hand, composing quite a list of prominent criminologists, contend that the criminal is the exclusive product of environment.

We cannot agree wholly with them, but think Signor Ferri, professor of criminal anthropology in the University of Rome, has the best idea of the criminal. He says we must account for the criminal in a more complex way; that crime is the “result of three factors, which are inseparable, no matter how much in some cases one of these factors or another may predominate.” The anthropologic factor, that is, the organic and psychic organization of the criminal; the telluric factor, that is the geographic environment in which the man finds himself; the social factor, the family and community conditions, and associations which influence the hereditary predispositions and daily conduct. These are the factors, then, which enter into the make-up of the criminal, or the defective individual.

Now, in considering the anthropologic factor, we should bear in mind that this defect of organism does not necessarily mean a weakness. It may mean an abnormal development of some quality or attribute of the person, such as selfishness, abnormal sexuality, or excessive temper, etc. But they are defects just the same.

Now, in considering these defective persons, we may, for convenience of study, place them in eight classes:

- Class A—The ignorant, weak, and easily influenced.
- Class B—The intelligent, but weak and easily influenced.
- Class C—The ignorant and vicious, who prefer crime.
- Class D—The intelligent, but cruel-hearted, who love revenge.

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Class F—The intelligent, very selfish scheming grafter.

Class E—The ignorant, very selfish and sneaking.

Class G—The ignorant, law-abiding normally, but influenced by whiskey, or excited by abnormally developed sexuality or passion, or influenced by some form of mania, he becomes a criminal.

Class H—The intelligent, law-abiding normally, but with the same defects as "G."

There are really but four classes. The other four differ from these only in strength and cultivation of the intellect.

Now, it would be unreasonable to say that when these men commit crimes we should treat them all alike; nor should we punish "A" and let "F" slip through the spider web of technicalities.

The crimes they commit might be the same, have the same legal definition, and the same technical procedure govern all; but there is just where our system fails. When the lawyers and the courts are quibbling over definitions, the poor, sick criminal is forgotten.

Suppose two men steal a horse together; one in class "A" is persuaded by a man in class "C" to help steal the horse. "A" has been honest heretofore, and this is his first offense. "C" has been in the penitentiary several times before, and cannot be reformed. They are indicted and tried.

The attorney for the defense does not put them on the witness stand. The jury are the doctors to decide what treatment these defective men need. The evidence is the same against both men under our rules of evidence, and of course the punishment is fixed for both alike. Each gets one year in the penitentiary.

That is not all. Both men appeal. The state's attorney happens to get all the technical proceedings against "A" correct. His case is affirmed, and he is thrown into prison and forgotten. There is a little "flaw" in the proceedings against "C," and his case is reversed; and this vicious, hardened criminal finally goes free, and seeks other weak-minded men to corrupt. A ten-year-old child would know that that is not a reasonable method of treating persons who commit crime, but all of us know that that is the way we do it under our present system.

The law should be so that the court could proceed in a simple method stripped of all technicalities, to find out all about the defects in these men and the cause of their crime. The presiding judge could then send "A" home to his wife and children under a proper parole and send "C" to the industrial farm to be confined and treated till the scientific board in charge would say it was safe to turn him out. The trial jury should simply find the defendant "guilty" or "not guilty." The law fixes the limit of the punishment; the expert board would discharge them when they are prepared for it. Our whole criminal procedure is wrong and should be made over *in toto*.

Our criminal law and procedure should be so framed and executed that it may have three principal objects or purposes with reference to the criminal or possible criminal.

First—Education. The criminal and possible criminal can be educated to obey the law by being constantly taught that it is better

for them to obey the law, and that punishment is absolutely sure if they violate it. This education may be done not only in the schools, but in the courts, by properly enforcing the law.

Second—Reformation. The criminal's malady should be studied and treated so as to *cure* him, if possible. If the case is not so serious, he may be paroled by the judge and cured without going to prison. If his is a more serious case, still over the door of his place of reformation should be written, "HOPE," instead of that usual sad fortune of the convict, "He who enters here leaves all hope behind." And if while there, he is humanely, scientifically treated, the chances are he will be saved to his family and the state.

Third—Segregation. If a man is vicious and dangerous, he should be kept from society, where he cannot influence other weak persons to become criminals, and should not be turned loose by pardon, or expiration of sentence fixed by a jury who, in the nature of the trial, could not understand the man's case and his needs, and who according to our technical rules of evidence could not investigate it.

Let us now consider a few cases under our procedure and see how the courts proceed.

Let us consider a Missouri case that was reversed because "the" was omitted from the concluding sentence of the indictment. The record does not disclose whether the defendant belonged in class "A" or class "F," or even whether the verdict of conviction was just or unjust; and what difference does it make if "the" is left out? The defendant has a constitutional right to have "the" in the indictment, even if it costs the state a thousand dollars to put it there, and a miscarriage of justice, too. No one but a lawyer can understand why he has, but he has. That must sound exceedingly technical, even to a lawyer. It has been said that the judge who rendered that decision worried over it so much it finally killed him. He held that because the constitution required it to be there, indictments were void without it. Our court in the Anderson case "went him one better," and said it would have to be there, even if the constitution had not said so, as it was an affirmation of an old principle in England, whence the form was borrowed.

Our court cites the Missouri court as authority in the case of *State vs. Tally*, indicted and convicted for embezzlement. The indictment alleging ownership, etc., and saying, "and being then and there the bailee of said Louis Reinman and L. Wolfert, did unlawfully and feloniously convert and embezzle to his own use said horse of the value of \$150, etc., the property of said Louis Reinman and L. Wolfert, against the peace and dignity, etc."

The opinion of our Supreme Court in the case opens with the sentence: "The indictment does not state facts constituting a public offense." If you read that indictment to anyone except a lawyer, he would say it was a serious offense, and that the offender needed treatment. The "flaw" seems to have been, that it was not alleged the property "came into his possession as bailee." The court said "the proof tended to show that," still, as it was not written

into the indictment, what difference does it make about the evidence and the verdict of the jury? Yes, the defendant was guilty and needed treatment by the state, and everybody knew that he did get possession as bailee, and it was not denied by anybody; but the court reasoning on the matter said: "He might have been their bailee and have stolen the horse and buggy himself." Just think of it! It would have been dreadful to punish him if he stole it. Besides, there was no "might" about it; the evidence was before them.

The court further said: "Our court adopted the construction of the Supreme Court of Missouri." My honored friend, Judge Wood, handed down that law. I think he was following the court of Missouri and not his own reasoning in doing so.

Of course, Tally did not understand these definitions and precedents, but he understood that he "beat the case."

Now, let us consider a Georgia case, *State vs. Hunter*. The defendant was indicted for cattle stealing. The jury were charged that "Although the killing was accidental, if the defendants thereafter formed the intention of converting the carcass to their own use, they would be guilty." Held that the charge was error, and that the court should have instructed the jury, though there was no such request, that if the intention to steal was not formed until after the killing of the cow, the defendants would not be guilty of "cattle stealing," and reversed the conviction.

In other words, if they stole a dead cow, and not a live cow, they were not guilty, and needed no treatment by the state. The men who stole the cow did not understand how they "beat the case," but their lawyers did. Our court follows that precedent.

Let us take another Georgia case, the *State vs. Laniers*. The defendants, husband and wife, were indicted and convicted for the murder of their infant child by "choking, strangling, and by beating and striking." The court instructed the jury that "if the defendants acted in concert with each other it would make no difference which actually struck the blow, or choked or smothered the child, each would be responsible regardless of who may have struck the fatal blow." The Supreme Court, in reversing a verdict of guilty, said: "To smother is to stifle, to suffocate by stopping the exterior air passages to the lungs; to strangle is to suffocate by pressure or constriction of the throat. The jury may have believed that under the evidence the child was smothered and not strangled, and found him guilty of murder in a manner not charged in the indictment."

Poor little angel will never know what the "exterior air passages" or "constriction of the throat" means; and those brutal parents might not have known the definition of those big words, nor what that technical rule means, but they knew that their lawyer had "beat the case." Lord Raymond, in referring to such an instance of vicious technicality, said: "It was a thing no man living who is not a lawyer, could think of."

The evidence surely showed how the child was killed. If he was killed either way those defendants should have been classed with

the vicious criminals, and treated accordingly. And such silly quibbling over definitions of words, or technicalities in the law, is a crime in itself. That court did not comprehend the object of that trial, nor the purpose of the criminal law. No wonder there is a popular demand for the "recall of judges." Unless the judges adopt justice instead of precedent as their guide, I am heartily in favor of a recall of judges and judicial decisions too.

Let us see how well our laws accomplished the desired end in the Quertermous case, 95th Ark. Rept. The defendant was cashier of the bank at Humphrey, and the bank failed. The Arkansas county treasurer had the county money there, and of course it is difficult to convict for embezzlement, so the state's attorney tries to get the easiest case possible to prove. In the Quertermous case he was indicted in a long indictment setting out the facts, and alleging that "he, the said Frank Q., as cashier aforesaid, and having in his custody the books, accounts, etc., did feloniously and unlawfully alter and change with the intent to defraud the said Joseph Ireland (the treasurer) and his bondsmen, and the common school fund of Arkansas county, Arkansas, the books, accounts, etc." He was tried on this count and the jury convicted him, and said he should be confined in the penitentiary for it. The defendant appealed and urged many serious technical errors in the trial.

In the first opinion the Supreme Court stated: "Upon a *careful* consideration of the whole record in this case, we reach the conclusion that the case was *correctly tried*; that the defendant had a *fair trial*, and has been convicted upon legally *sufficient evidence*."

The defendant being a shrewd lawyer himself, was not satisfied with that, and made another effort to find some precedent or technicality that might keep him out. He succeeded; and on rehearing, the court in speaking of the indictment, not of the evidence, mind you, said: "We do not think the words, 'said felonious, fraudulent change,' as used in the indictment, take the place of, or are equivalent to, a charge that the entry was 'falsely altered.' The gist of the offense is to 'falsely alter.'"

Now, I cannot see, for my life, why to "feloniously and unlawfully alter and change with the intent to defraud," does not mean to "falsely alter," even if we are to convert a criminal trial into a technical sparring match. The chief justice thinks so, too, and he says in his dissenting opinion that any "other construction would do violence to the plain meaning of the words."

Just suppose the court is technically right, what did these words have to do with the guilt or innocence of the defendant, or his proper treatment? It was a mere technicality that at the trial neither the defendant, although a lawyer, his attorneys, the state's attorney, the trial judge, nor the jury noticed; nor did the Supreme Court notice it till after they had rendered the first opinion. When his lawyers filed the formal demurrer to the indictment, *they* thought it charged a "false change" for they demurred to the indictment charging him with *falsely altering* the books, *using the very words that the Supreme Court said was the "gist of the crime."* This law was

handed down by my learned friend, Judge Hart, than whom there are few better men or better lawyers. Do you think that a man who would do what the jury found him guilty of in this case, has the proper respect for a procedure so technical? The fact that I have since that time had to sentence him again for a felony shows that he has not.

Why should we have technicalities at all? The big flies break through the web, while the little flies get caught. Oh, but the lawyer says, these men have constitutional rights. Well, what are they? Do you call these hair-splitting technicalities rights? But he must be deprived of his liberty only by "due process of law," according to the constitution of the United States, etc. They forget that even in the preamble of the constitution it states that the constitution is to *establish justice*, and any procedure or process that does not establish justice is not "due process of law." "But," says the technical lawyer, "we must have fixed rules of law so one will know what to depend upon." Now he has the fixed rules of law governing property rights mixed up with this technical procedure in criminal law. There is no analogy between them.

If a cashier of a bank decides to steal all the money in the bank, has he a right to know that there will be some technical flaw somewhere in the prosecution that will be overlooked by the officers, and by which he can "beat the case?" Would it not be better for the depositors, and even for the criminal, for him to know that if he steals the money he will be punished regardless of any technical flaws in the procedure?

Let us wipe out all these technicalities, and get down to justice, or rather *up* to justice. We have been studying words and phrases; we have been practicing law, and not treating these unfortunate criminals according to their needs.

The Supreme Court of Oklahoma is making the right kind of beginning. In the case of *State vs. Caplas*, the Supreme Court of that state said they proposed to give the state of Oklahoma a just and harmonious system of criminal jurisprudence, founded upon justice and supported by reason, freed from the mysticism of arbitrary technicalities. This standard will control our decisions, it matters not what or how many other appellate courts may have decided to the contrary."

"Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice, so that the innocent may find it to be a refuge of defense and protection, and the guilty may be convicted and taught that it is an exceedingly serious and dangerous thing to violate the laws of this state, whether they be rich and influential, or poor and friendless." They add that they have no respect for precedents which were found in the rubbish in Noah's ark, and which have outlived their usefulness, if they ever had any. They are not waiting for constitutional amendments, but adopt the logic of the poet-statesman who said: "For forms

of government, let fools contest; that which is best administered is best."

Judge Ben Lindsey is working wonders with juvenile offenders in Colorado. This is the secret of his success. He said: "We pay little attention to rules of evidence or technicalities; *we proceed in the interest of the boy*. If they are released on technicalities, they are encouraged to commit crime. Our laws are very flexible, and we *make them fit every case*, and above all we never release a boy till he thoroughly understands that he must obey."

He takes a would-be criminal boy who has strenuously denied his guilt to the officers and even to his parents, and by his informal and searching, though kind, manner of investigation, he finds out all about the boy and his bad habits, and the boy finally tells him all his secrets, and from that time on he is a friend and supporter of the judge and the law, and actually helps the judge lead other boys to right living.

How like reason and wisdom that seems to me!

Under our system, a lawyer might have "beat his case" for the boy, and after a few other such encouraging escapes, the boy would develop into a hardened criminal.

If a boy violates the rules at school, and the teacher undertakes to punish him for it, and then the parent defends the boy and prevents him from getting a deserved punishment; he, the parent, does for his son just what a lawyer does for a criminal when he "beats a case" on some technicality.

Men are but boys grown tall, and we shall never succeed in solving the problem of the criminal until we change our methods entirely, and adopt some rational method of investigating these defective people and the causes of their abnormal conduct, and then adopt the best method of curing them, or preventing their continuation in crime.

Our system is only a slight evolution of the ancient system litigants had of selecting their knights or representatives and letting them enter the lists and fight it out. They employ lawyers to fight it out now, and the lawyer who is shrewd enough to master our

I imagine that when we stand before the Great White Throne technical procedure, is likely to win the contest, regardless of which is right.

to receive judgment upon our deeds done while in the body, we will not be heard to plead technicalities to the indictment, nor object to the admission of evidence against us because it is prejudicial.

Sacred history records the first indictment against the first murderer on earth. Cain pleaded "not guilty" before the indictment was read. The Supreme Court of the United States would have reversed Cain's case, as they did Crain's case, because there was not a "formal arraignment." The indictment simply said: "Cain, the voice of thy brother's blood cryeth unto me from the ground."

The Supreme Court of Missouri would have quashed the indictment because "the" was not in the right place; and the Supreme Court of Arkansas would have set his conviction aside because the

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indictment was vague and indefinite and did not state whether he killed his brother Abel by beating him over the head, or punching him in the ribs.

The indictment was rather informal, but God framed it and Cain understood it.

In conclusion, let me suggest that this convention draft a resolution to present to the next legislature, asking them to create a Commission consisting of judges, lawyers, scientists, and other men of common sense and experience with criminals, to draft a criminal code based upon science and reason, and in harmony with modern demands of common sense and justice together with such constitutional changes as may be necessary to make it effective.

We should also provide a humane and scientific method of treating our defective convicts, with a view of reclaiming to society and a useful life all who can be cured by proper methods and by keeping all who are vicious and dangerous confined where they will not go at large and corrupt weak and easily-influenced persons to become criminals, and destroy the lives and property of our citizens. And this industrial farm or place of confinement should be a human laboratory, in charge of men selected because of their learning and skill in this most complicated and important work, whether they happened to be political supporters of the administration or not.

Gentlemen, I beg your pardon for making this address so long, and I offer my interest in the subject which I have so feebly presented as an excuse for this trespass upon your time.

I should be very ungrateful indeed to the many writers upon this subject if I did not acknowledge that I am indebted to the "Journal of the American Institute of Criminal Law and Criminology," more than to any other source, for my facts and ideas in preparing this address.