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SOME PRACTICAL SUGGESTIONS AS TO THE REFORM OF CRIMINAL PROCEDURE.¹

MOORFIELD STOREY.²

Superstition and tradition are mighty forces, which exercise a deplorable influence on the conduct of human affairs. We recognize and weep or laugh, according to our mood, over their results in the past, whether we review the history of religion or medicine, of physical science or metaphysics, of politics or morals, and we find it impossible even to imagine how much they have retarded the progress of mankind, or how great has been the waste of time and of human life for which they are responsible. The libraries of the church are crowded with ponderous tomes devoted to the discussion of questions which we cannot understand, the books of ancient medicine are full of remedies so absurd as to make us gasp at the possibilities of human credulity, though there are schools of medicine to-day whose doctrines seem equally preposterous, and the daily newspaper with its advertisements of miraculous remedies, and the constant success of unblushing quacks in every field of human activity show that the sons are not less credulous than the fathers.

There is no profession which has suffered more from superstition, none in which tradition has exercised and still exercises a more baleful influence than our own. The common law which in theory "broadens down from precedent to precedent" has almost inevitably been influenced too much by the past, and has been very slow to change its methods with the changing needs of society. Those forms and rules which were needed in the days of absolute power to protect the individual are unsuited to a time when very different conditions exist, and when respect for the law as law, which has been the great safeguard of ordered liberty among English-speaking men, is dangerously weakened.

Let me to-day appeal to that common sense which we believe to be a distinguishing trait of the American people, and consider what the present situation is, and how we should deal with it as practical men. We call ourselves a highly civilized nation, and we have a body of laws, the gradual growth of centuries, intended in the interest of society to

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restrain and punish the individual for acts which affect injuriously his neighbor, or the community as a whole. We know that there is among us a well defined class of people who live by plundering their fellow-men, burglars, thieves, confidence men, persons who practice fraud of various kinds. We see in the most respectable newspapers too often advertisements which we know to be mere false pretences, designed to cheat the ignorant or unwary by inducing them to buy worthless stocks, or *editions de luxe*. In the daily papers also we encounter columns containing the cards of soothsayers, palmists and mediums, and we know what these mean. We are aware that in every large city are many criminals who pander to the vices and weaknesses of men and women, and whose resorts are notoriously maintained in defiance of law. New York is not the only city where policemen are in league with criminals and grow rich by sharing the proceeds of crime.

Passing from these vulgar criminals to those of higher grade, there are sections of this country where murder is committed with almost no risk of punishment, as is shown by the comparison between the enormous number of homicides and the beggarly account of prosecutions with much rarer convictions. When the victim is a colored man, whether black, red or yellow, his murderer far too frequently escapes even arrest. All over the United States mob-violence and lynching go unpunished, and whether in Springfield Illinois, Coatesville Pennsylvania, or in the Southern States, murders attended by atrocities which would disgrace a savage, and which in my early days were believed to be peculiar to the North American Indians, are committed with impunity, and the public opinion of the community sustains the murderers. It has been estimated that not less than 100,000 men have taken part in lynchings of whom not one has been punished. In Kentucky recently a whole commonwealth was terrorized by night-riders, and the law was powerless to punish the guilty, since witnesses dared not testify, grand juries would not indict and juries refused to convict.

The pleas of guilty by the McNamaras and the disclosures of the trial at Indianapolis with the conviction of the accused show that the leaders of the labor unions do not shrink from a campaign of desperate crime in order to promote the objects of their organization and to terrorize their employers. Every great strike is marked by violent assaults on men, who are exercising only the right of every man to work, and too often no serious effort is made by the public authorities to bring those who are guilty to justice. Their attitude is shown by the fact that it was left for the United States to indict and punish for transport-

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ing dynamite the men who were convicted at Indianapolis, and no state official has used his power to prosecute any of them for the far more serious crimes which the evidence disclosed.

Lawlessness is a disease from which even our so-called "best citizens" are not exempt. The history of Collector Loeb's attempt to enforce the customs laws proves this, and the business men of high standing, like the officers of the American Sugar Refining Co. and others, the "gentlemen and ladies" returning from foreign travel, who do not hesitate to lie or bribe in order to cheat the United States, are melancholy witnesses to the fact. Laws are passed to protect the traveller on the highway from the recklessness of his rich and prosperous neighbors who use automobiles. Are they respected and obeyed, or are those who violate them punished adequately? That they are not is proved by the fact that recklessness is not abated. The automobilists openly form combinations to warn each other against the efforts of officers to enforce the law, denouncing them as "spies" and their attempts as "traps." How carefully do politicians respect the statutes intended to prevent improper expenditures at elections? In short, where is the class in our society which does not hesitate to disobey any law which for the moment stands between it and its desire?

Nor is the disease confined to our country! When in England women can set fire to theatres, burn dwellings, lay violent hands on public men and attack their houses, destroy the property of "innocent third parties" those favorites of the law, or interrupt the mails, and escape with a few days' confinement by the simple device of refusing to eat, the law is effectually paralyzed and "the strong lance of justice hurtless breaks." This easy method of escaping the penalty of crime may well cross the seas and be applied by other criminals than the suffragettes, and in other kinds of agitation. In a word the situation is critical. The innocent citizen no longer needs protection against tyranny, but society and all its innocent members need protection against crime, and upon the members of our profession in the first instance rests the duty of furnishing this protection, since it is we who enforce and to a very great extent make the law. As Mr. Taft well said at New Haven:

"We must keep law and justice together in order to justify the law," and I may add to preserve for the lawyers their ancient standing.

The object of the criminal law is to protect the community against crimes by making it dangerous and unprofitable to the criminal. Its methods are prevention and punishment. The criminal is an enemy of society to be reformed or restrained from committing crime, and our

laws and procedure must be adapted to accomplishing the extirpation of the criminal classes. Let us see how well our existing methods answer this purpose.

Our present system is to wait until a crime has been committed, ignoring the familiar proverb "An ounce of prevention is worth a pound of cure." Is it not possible to prevent in many cases? Take for example the swindles which are perpetrated daily by advertisements in the newspapers full of misrepresentations, such for example as the familiar ones which offer to the public at a low price shares in some enterprise sure to return two per cent a month or some equally improbable income, alleging that the price is to be raised in a few days, so that the opportunity must be seized at once. Every one knows that were the statements of the advertisers true, the enterprise would be financed or bought up by the men in the great business centres who are seeking such chances, and because they cannot find them invest their money at much lower rates. Every person of experience knows that such advertisements are merely devices to plunder innocent and helpless people, and that many who cannot afford to lose will be ruined by them. Within a few years in my own state months have been spent in trying to convict such heartless swindlers at enormous expense to the state, and the revelations made by the witnesses have been pathetic. We all know of many such cases that never see the light, and yet we let the scoundrels continue their work. The fraud is accomplished by the combination of two agencies, the author of the advertisement and the newspaper which prints it. They divide the spoils, the newspaper receiving its share in so much a line for the false pretence, the author securing the rest after paying rent and office expenses. Without the newspaper the fraud cannot be perpetrated, for advertisement is essential. To-day the Federal government seizes the books and papers of men engaged in business like this for using the mails fraudulently, and by so doing breaks up the business, arresting at the same time the persons engaged. It is an arbitrary proceeding, as before the seizure the accused has no hearing, and if innocent, he suffers a serious injury, for which there is no redress. This proceeding, moreover, is founded on evidence that fraud has been practiced. It is applied after the crime has been committed, but it shows what is possible. Why not attack so clear a fraud earlier and prevent the crime? Why act only against one party to the fraud, the writer, and not also against the other, the publisher of the advertisement? Why not authorize a magistrate on having the advertisement brought to his attention, either by a public prosecutor or a private citizen, to issue a summons to

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both author and publisher, and institute an inquiry as to the truth of the publication? If they fail or refuse to show that it is true, further publication could be enjoined, and proper penalties could be provided for attempting to obtain money by false pretences. We indict the editors and printers of newspapers for libel if they publish false statements about individuals, because such statements injure the person libeled. Is there any valuable distinction between publishing a lie which injures one man, and publishing a lie which injures many by inducing them to part with their property? The law should require proof that the publisher as a reasonable man must have known or suspected the fraud, and in the latter case evidence enough to put him on inquiry could be required. If the law made the newspaper liable either civilly to the injured party or criminally few prosecutions would be necessary, for few newspapers would take the risk of printing such advertisements if the loss to which they expose their readers were likely in any event to fall on them. The duty of looking for such advertisements might be added to the duties of the public prosecutor, and if he needed further assistance, the expense would be nothing in comparison with the loss to the community while the present practices are tolerated. The so-called "blue-sky" laws are aimed at these frauds, but they do not cover the ground. The statute of Iowa is the most effectual, but it contains provisions as to frequent returns by brokers of their dealings which are most objectionable, and all of them on examination are full of loopholes.

Again the various gambling hells and houses of vice are known to a large section of the public. They must be known to succeed. The localities where they abound are notorious. Men who have never seen New York have heard of the "Tenderloin," and could find it if they were dropped in that city. The owner of every building in which such places exist can be discovered by examining the records, and in most cases knows how his property is used. Such owners are vulnerable and cannot escape if attacked, for real estate cannot be carried out of the jurisdiction. Why not punish those landlords who reap an income from vice and through them drive the wretches who are engaged in criminal operations out of house and home? With a proper prosecutor and an efficient police force this would not be difficult, and many a tragedy, many a ruined life, would be prevented.

There is law enough in most large cities to justify such proceedings, and vigorously enforced, it would make such tenants unprofitable to landlords. Vice is the parent of crime, and many a resort in which criminals meet would thus be broken up, and not only the vicious prac-

tices directly attacked would be discouraged, but more desperate crimes would be prevented. What we need is a public opinion more intolerant of vice, more alive to its horrible effects on the young and weak, which shall insist on a vigorous enforcement of the law and support a prosecutor who dares to do his duty.

Many other examples of preventive procedure will suggest themselves to you. I can only hint at a few, but I commend to you all the study of preventive law, for it is just as necessary and just as valuable to the community as preventive medicine, which lately has made such strides. Vice is a disease as dangerous as tuberculosis.

Passing now to the consideration of criminal procedure as a means of punishment, the requisites are simple. It should be swift and sure. In these days of rapid motion punishment should no longer have leaden feet, but its hands should still be iron.

A man who is charged with crime is entitled to a trial by a jury, and to one review by an appellate court of the rulings on questions of law at this trial, but that is all which justice requires. A conviction should not be set aside for error "which shall not tend to the prejudice of the defendant," to use the language of the Federal statute. To put it more broadly, no man convicted by a jury on legal evidence sufficient to sustain the verdict should be allowed to escape because of errors at the trial which do not raise a reasonable doubt in the mind of the court as to the justice of the conviction. How nearly do we realize this reasonable ideal?

As a rule we must be content to leave the detection of the crime and the arrest of the criminal to the usual police agencies, assisted in conspicuous cases by the reporters. Our criminal procedure may be said to begin when the accused is brought before a magistrate for the preliminary investigation. Here the prosecution is required to produce evidence enough to justify his detention, and except in petty cases, he is committed for trial. It is at this point that we first encounter the full effect of tradition in a rule of law which to-day stands between the criminal and justice at every stage of the proceedings against him. The accused cannot be examined, nor can any inference be drawn from his silence, nor in some jurisdictions can statements made by him after his arrest be used as evidence against him. The constitution prevents his being compelled to criminate himself, and statute or decision protects him against inferences from his silence or evidence of his statements.

The result is that society, anxious to free itself from a pest, instead of using the most obvious method of learning the truth, deliberately im-

poses upon itself unnecessary difficulties in the way of discovery. The accused of all persons in the world knows best whether he is guilty or innocent. If innocent he has only to state the truth, and if guilty, why shouldn't he criminate himself? Circumstantial evidence may mislead, and eye witnesses may be mistaken, but except in the very rarest cases, the admission of the accused can be relied upon. There is no species of evidence which is freer from the possibility of error.

What is there in the relation of a guilty man to his fellows which should secure him against the consequences of being asked to account for himself and to tell what he knows? I would not compel him to answer by any force or undue pressure, for extorted confessions are notoriously unreliable, but I would put him where he may be questioned, and answer or keep silent, and I would in courts of law draw all the inferences from his silence which men inevitably draw elsewhere from silence where one would naturally speak. The operation of the human mind is illustrated by a story told of a well-known Massachusetts judge, who being asked to instruct the jury in a criminal case that no inference could be drawn against the accused from his omission to take the stand, did so in the following language:

"Yes, gentlemen, that's the law, and we are all bound to obey the law. If the legislature were to pass a law that when you walk down State street and see the shadow of the old State House thrown across the street, you are not to infer that the sun is shining, you'd be bound to obey it, and so you're bound to obey this law."

Instead of proceeding by the natural direct method to discover whether the accused is guilty, we give the criminal an artificial protection, we tie our own hands and turn what should be a prompt and effectual proceeding to free ourselves from a man whose liberty is dangerous to society into a race in which we give the accused a long start and then see if we can overtake him.

What are the reasons for this indulgence to crime? It may have been necessary in the days of Scroggs and Jeffries to protect the innocent, but to-day the innocent are in no appreciable danger. Society watches with too much care the proceedings of courts, the press is always on the lookout for a sensation, and any abuse of a witness is too promptly condemned to leave an innocent man in any danger of being browbeaten into an admission of guilt, or being convicted by a perversion of his answers. On the contrary, society is too ready to intervene in behalf of the guilty, to shield him by unwritten law, or by sentimental nonsense to prevent adequate punishment.

"It is hard on the criminal." Well, why should we not be hard on the criminal? We wish to prevent crime, and there is no undue hardship in asking the accused questions. When we know whether he is guilty or not, and what manner of criminal he is, we may be as merciful in punishing as the case requires, but our present system is not mercy. It operates to defeat justice, and mercy to the criminal is cruelty to the state. Society needs mercy now, not the criminal class. "Let the assassins begin."

I am not asking you to try an experiment of uncertain issue. In highly civilized countries like France and Germany the accused is always interrogated, and there is no complaint in either that the system works injustice to innocent men. On the contrary it facilitates the discovery of crime, and increases the certainty of punishment. I do not know whether it is this practice and the consequently greater difficulty of escaping justice, or what else in the administration of law, that makes the community more law abiding, but certainly in Germany a condition of things exists unknown in this country. I have been in Frankfort when a great athletic competition brought in a day 50,000 strangers to the city, and have found the streets at midnight quiet and orderly. Compare this with the conditions which follow a Harvard-Yale football game in the cities affected. I have been at Molde in Norway when 3,000 sailors from the German fleet were given a day on shore, and I met them during the day in small parties scattered over the neighboring country and at evening crowding to the boats without seeing any drunkenness or disorder, or hearing any noisy disturbance. I have been on an excursion steamboat on a Swiss lake on the evening of their Fourth of July, a boat filled with a miscellaneous crowd of people, with a bar and a band, and I saw that a lady alone would have been in no way annoyed by any person, or anything that she saw or heard. I have seen roads lined with cherry trees and other fruit trees filled with fruit and unprotected from the passers even by a fence, and that fruit as safe as if a policeman guarded each tree, and I knew that in my own country such respect for law and the rights of others exists nowhere. We should make the way of the transgressor harder if we would end a state of things which to-day discredits us all.

I know that my proposition to change our constitutions by repealing the provision which relieves the accused from criminating himself will seem to many lawyers monstrous. I know that I am going counter to traditions and superstitions of great antiquity, but I appeal to your common sense. I ask you to consider the question as if it were new, or as if

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you came from Mars, and to weigh the considerations on both sides with an open mind. I ask you to realize how completely this rule protects a whole class of crimes. Take for example bribery, or what in language borrowed from thieves we call "graft." Here is a crime which elects senators like Lorimer, which supports great organizations of plunderers like Tammany Hall, which corrupts legislatures, decides close elections and influences the press, which not only at any moment may change the policy of the nation and influence its whole future, but in smaller ways demoralize the whole community. It paralyzes the police of New York, it secures bad government in our cities, and it corrupts the agents of buyer and seller in ordinary business dealings. It is impossible to exaggerate the prevalence of this crime, or the danger to which it exposes us all. Yet to-day it can be committed with almost certain impunity, since as a rule it is known only to the briber and the bribed, both are criminal, and neither can be compelled to testify against the other because in so doing he will criminate himself. The consequence is that this crime can be proved only by traps, marked money, dictagraphs, concealed witnesses and like devices, and these do not commend themselves since in too many cases they are employed where a man is tempted to commit the crime in order that he may be punished. In dealing with crimes of this character the law threatens with one hand and extends immunity with the other.

However you may justify the present law by arguments drawn from the supposed evil results of a change, the common sense of the community has already repealed it in practice, and by methods which cannot be approved. Otherwise how can we account for the prevalence of what is called in the slang of the day, applying "the third degree" to a prisoner while in the hands of the police? The newspapers print elaborate accounts of what the police call "roast and freeze third degree rooms"; the chief of detectives in a western city publicly states that "If we suspect a man we see that he doesn't get a lawyer near him until we get through with him. We question him and corner him up until he confesses." Detailed accounts of cruel practices are published, but the public is not disturbed, and "the third degree" continues to be used. This means that society has outgrown the constitutional protection of criminals, and the question presented to us is whether the cause of justice is not better served by having the prisoner questioned by a judge in open court with counsel at his side to protect his rights and the public, through its eyes, the reporters, watching every step in the process, rather than to have him cornered by police officers in the secret

cells of a police station and subjected to pressure, or even to what is in fact torture, in order to make him confess. Let us either make our practice conform to law, or change the law so as to make it accord with the practical demands of the day. The present conditions are intolerable.

But even if you are not willing to overthrow the constitutional bulwark of guilt, it is not necessary to heighten it. The constitution says that "No man shall be compelled, in any criminal case, to be a witness against himself," and the courts say that if a confession is procured by threats or promises, it is not admissible in evidence. It is not necessary, however, to strain the law in favor of the guilty, to treat the mere fact of arrest as a reason for excluding all statements of the accused, and to treat even denials as confessions. I might multiply examples of what in my judgment is an unfortunate tendency on the part of the courts, and could readily find illustrations in the reports of every state. I shall venture, however, to cite only one, and that the decision of the Supreme Court of the United States in the case of *Bram v. United States*, 168 U. S. 352. This man was found guilty of murdering three persons on board a ship of which he was an officer. The evidence was convincing, but in the course of the trial a person connected with the police department of Halifax testified that he examined Bram, no one else being present, and that no inducement, threat, promise, suggestion or influence of any kind was made or used to make Bram speak. He was then permitted to testify as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said 'He could not have seen me; where was he?' I said 'He stated he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

Because this testimony was admitted the conviction was set aside on the ground that the prisoner was protected by the constitution, and that the statement must have been offered as a confession, and was not

voluntary for the reason that it must have been induced either by the fear that if he remained silent, his silence would be treated as a confession of guilt, or the "hope that if he did reply he would be benefited thereby." The fact is that Bram's statement in reply to the charge was the argument made in his defense by his counsel at the trial. It was a denial of guilt, and in no sense a confession, so that Bram evidently was not induced to testify against himself, but was testifying in his favor. He was not confessing but denying, and he felt free to do so. He was not intending to confess, and unless that intention existed, he had not been forced or induced to confess.

Probably all men who plead guilty do so in the hope of being benefited thereby through receiving a lighter sentence, or of being placed on probation, or of getting some advantage in this world or the next, but that confession of guilt is none the less received without objection. I cannot deny that the decision of the Supreme Court is law, though three of its members did so by dissenting, but I insist that it should not continue to be the law, and that a villain like Bram, convicted on overwhelming evidence, should not be set free or tried anew because, when confronted with the charge against him and trying to escape, he denied his guilt in such terms as to prove that his denial was false. Why should criminals be protected against justice with such extreme solicitude? It would seem to me wiser if courts should construe such provisions strictly in favor of society, and not liberally in favor of the guilty.

If arrest is to be held compulsion, almost every confession is inadmissible in evidence, for they generally follow arrest, and in many cases are made not only willingly but from the anxiety of the accused to get a load off his conscience. It is absurd to spend time and money in a protracted attempt to prove by other evidence facts which the accused was entirely ready to admit, and it is difficult to see how any one but the criminal is benefited by the exclusion of such admissions.

But among the most absurd protections now afforded the guilty by law is the provision that the silence of the accused in the face of accusation, or his omission to take the stand in his own behalf, shall not warrant any inference against him. The limits of reasonable space do not permit me to argue this point in full, but it is certainly imposing no improper burden on the accused if his failure to tell what he knows is held to justify the inference that what he knows will not help him. The prosecution carries burdens enough without being forbidden to use an argument, the force of which is felt by every sensible man in the

community. The inference is inevitable, and in saying that it shall not be drawn, the law is forbidding men to use their reason. This is mere superstitious regard for an imaginary innocent man, not common sense in dealing with actual conditions.

I cannot dwell further on this point, but must make my other suggestions briefly, or I shall abuse your patience. The next step in the prosecution is the indictment. The grand jury votes that the accused has committed a crime, and the public prosecutor then draws up a statement of the charge. This is intended to inform the court, the jury and the accused of the charge against him. The accused and his counsel know perfectly well what the charge is, and a statement that John Smith committed murder by killing John Brown would answer every practical purpose. The word "murder" covers all the essentials of the charge, everything else is ornament. Yet we have gone on for years loading indictments down with meaningless verbiage, statements that the murdered man "languishing did live" &c., and the courts instead of trying the question whether John Smith did murder John Brown waste time and intellectual power in deciding whether a statement of the charge, the meaning of which is clear to all concerned, is sufficiently full and accurate to exclude any possibility of innocence. The trial becomes a trial of the district attorney's skill in statement, or his opponent's ingenuity in suggesting omissions, and not of the only question in which the public is interested. The indictment should be made as short as possible, and in most cases can be made very short, the government should have the right to amend, if necessary, and the accused, if more information is needed by him, should be given the right to ask for a fuller statement and to have it where the necessity is shown. These changes can be made by statute, and if common sense is permitted to shape our procedure there can be no such escape for the guilty as is now offered by "a flaw in the indictment." The very phrase "flaw" in itself condemns our present practice.

Let us now bring the accused into court, and proceed to impanel a jury. Here in some jurisdictions, but happily not in all, if a case is very important, days may be spent in a contest between the counsel, each striving to secure not a jury of competent and impartial men, but a jury likely to be prejudiced in favor of his side. Thus in the Diggs case lately tried in California the prosecution deliberately undertook, and with apparent success, to get a jury in which the fathers of daughters should predominate and bachelors be absent, not because the fathers of daughters are more impartial than the parents of sons, or even

than the ostracised bachelors, but because they could be more easily influenced against the crime for which the accused was to be tried. In Chicago 9,425 jurymen were summoned and 4,821 examined in order to select twelve, and in the Calhoun case in San Francisco ninety-one days were spent in getting a jury. This time can be used in trying to corrupt a juror, as seems to have been done in the McNamara case, with the right of peremptory challenge to fall back upon if the attempt fails. Again by excluding men who have derived casual impressions from the newspapers, at a time when almost every intelligent man reads a newspaper and gets some impression from what he reads, and when almost every newspaper devotes columns to presenting evidence and theories in every conspicuous case, intelligence is kept out of the jury box. The courts should frown on this practice, should not tolerate the extended examination of jurors, should drive the parties more promptly to their peremptory challenges, which are generally used in cases where no real objection to the juror exists, and should insist on having a competent jury, not a panel of weak and ignorant men easily influenced by appeals to sympathy or prejudice.

Again we should revert to the English practice and give judges more power in the conduct of trials, and power to charge on the facts. The judge should be an able and impartial man, experienced in the trial of causes, familiar with the tricks of witnesses and the devices of counsel, and sincerely desirous to secure justice. The jury may be equally anxious to do right, but they cannot have the training and experience in weighing evidence and arguments which the judge should have, and they are entitled in the discharge of their duty to all the help which he can give them. The jury and the judge are the only impartial men in court, and the judge's training should make him more absolutely impartial. Not to give such a judge as I have described his full weight in the decision is to deprive the tribunal of its most valuable element, and thereby make it less effective in the administration of justice. If it is said that judges such as I have described are rare, injustice is done to the Bench in my judgment, but if not, then we must change our methods so as to secure such judges. Good judges are essential to the administration of justice under any system, and if they are not the rule in this country, our first step should be to get them. We may apply to the administration of criminal justice with slight changes the words of a distinguished statesman in regard to municipal government, "If Gabriel draws your charter and Lucifer administers it, your government will be bad. If Lucifer draws your charter and Gabriel adminis-

ters it, your government will be good," or as an older writer has put it,
 "For forms of government let fools contest;
 Whate'er is best administered is best."

First get good judges, then give them the power which good judges should have and such travesties of justice as the first trial of Thaw will not disgrace us. And in dealing with this question, bear in mind that the power which I would give all judges is to-day exercised by the judges of the federal courts and by the judges in England, and I have yet to learn that more injustice is done in the tribunals over which they preside than in the courts where to quote from a judge's address to the Bar Association of Kentucky, "the judge must daily 'sit like a knot on a log' and listen to speeches to the jury—speeches that are the disgrace of our civilization—and daily watch practices which he is powerless to prevent, and which are recognized by all the community as void of all semblance of morality." Unhappily the legislatures of our states have been influenced by lawyers, who like all of us have hated so much to have their glowing appeals to the jury answered and discredited by the judge that they have procured legislation to shut his mouth in order that theirs may be opened with impunity. It is not the desire for justice, but the desire for victory which has written the laws under which the Bench now languishes. With good judges exercising adequate power our criminal trials will be briefer and more decent, and justice will be the rule rather than the exception as it now is in too many jurisdictions.

When the verdict has been rendered and the accused becomes a convict, the chances that the verdict will be set aside on appeal for error at the trial are unfortunately almost even. The criminal law is simple, the rules of evidence have long been established, but in any hardly contested case it seems almost impossible that some departure from the law's ideals should not be made. It is a bitter jest that there is no man whose life is so safe as the convicted murderer, or as Mr. Dooley puts it, "th' insurance comp'nies insure his life for the lowest known premium," but it is bitter because it is so true.

What was the history of the verdicts won by Governor Folk in the celebrated bribery case in St. Louis? There was no doubt that the verdicts were just, but all but two, unless I am mistaken, were set aside by the Supreme Court, a result which was prophesied confidently by the principal rascal. I will not weary you with instances, for the reports are full of them, but I will content myself with a single illustration of what seems to me an evil tendency, a bad example set by the highest

court in the country. I refer to *Crain v. United States*, 162 U. S. 625. The head note states the case thus:

"A record which sets forth an indictment against a person for the commission of an infamous crime; the appearance of the prosecuting attorney; the appearance of the accused in person and by his attorney; an order by the court that a jury come 'to try the issue joined;' the selection of a named jury for the trial of the cause, who were 'sworn to try the issue joined and a true verdict render;' the trial; the retirement of the jury; their verdict finding the prisoner guilty; and the judgment entered thereon in accordance therewith; does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, and the conviction must be set aside; as it is better that a prisoner should escape altogether than that a judgment of conviction of an infamous crime should be sustained, where the record does not clearly show that there was a valid trial."

This decision was rendered under section 1025 of the Revised Statutes of the United States which declares that "no indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The object of arraignment and the opportunity given to the accused of pleading to the indictment is to ascertain whether the defendant admits his guilt or desires a trial. He may plead "guilty" or "nolo contendere" in which cases no trial is needed. He may plead "not guilty" or stand silent, in which case the court enters a plea of "not guilty," and in either case the trial proceeds. In the *Crain* case, it was clear that the accused desired a trial, and it was accordingly had. If there was an omission to arraign or require a plea, he had all that he could have secured by a plea of "not guilty." His interests were protected, and he certainly did not suffer by the omission. The record showed that no objection was made by him in the trial court to the omission, if there was an omission, and yet the court set the conviction of this guilty man aside, though he was not prejudiced, though it was clear that in fact if not in form he pleaded not guilty, and when if there was an omission to arraign he did not complain. "*Omnia presumuntur rite acta*" is a familiar maxim. I need only quote it, and add the words of Justice Peckham in his dissenting opinion, which commend themselves at least to many.

"In this case there cannot be a well founded doubt that the defendant was arraigned and pleaded not guilty. The presumption of that fact arises from a perusal of the record, and it is, as it seems to me, conclusive. There is no presumption in favor of a defendant upon a criminal trial, excepting that of innocence. Error in the record is not presumed, but must be shown. A presumption that proper forms were omitted is not to be made. There must be at least some evidence to show it. And yet, because the record fails to make a statement in terms that the defendant was thus arraigned and did so plead, this judgment is to be reversed, and that, too, without an allegation or even a pretence that the defendant has suffered any injury by reason of any alleged defect of the character in question. I think such a result most deplorable."

We must assume that the authorities justified this decision, since it was made the law by such eminent judges, but I cannot help thinking that such authorities should be overruled, and that the highest court in the land was required by the statute which I have quoted not to follow them in such a case as this. The decision seems like a triumph of superstition over common sense. This at least is clear, that until by a change in the attitude of the courts, whether caused by statute or by the pressure of enlightened professional and public opinion, such a miscarriage of justice become impossible, eminent laymen will be justified in saying with President Eliot, "The defences of society against criminals have broken down," and in adding as I add, the blame rests on us lawyers at the Bar, in the Legislature and on the Bench.

The delays in decision, the long periods which elapse between arrest and trial, between conviction and the hearing on appeal, between hearing and decision are without reasonable excuse. The administration of criminal justice should be swift as well as sure. In some jurisdictions it is much more prompt than in others. The courts of New Jersey have long enjoyed an enviable reputation in this regard, and "Jersey justice" is proverbial. Mr. Whitman has shown us what a prosecutor who is in earnest can accomplish in New York, though all good citizens tremble lest the results of his work may be lost in the appellate courts. If the latter are overworked, let us have distinct courts to hear criminal appeals. If the trial courts are unable to keep up with crime, let us have more courts. The District Attorney of my native city justifies the omission to try men charged with violating the automobile law on the ground that the courts could not do their work if

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he tried these cases. The result is that police officers think it idle to prosecute since offenders convicted in the lower court escape sentence by appeal. The lower courts feel themselves discredited, and the automobilist loses all respect for a law which is admittedly not to be enforced. If the community wishes offenders punished, it must supply the machinery, and in the end it is cheaper, for when punishment is sure the law is obeyed and offenders are few, while impunity breeds lawlessness. In London with its vast population, in 1909 there were only nineteen cases of murder; in Louisville, Kentucky, during a similar period there were forty-seven homicides and only one execution for murder. We all appreciate the evils and dangers of delay, and it is idle for me to dwell upon them. Let us have the common sense and courage to apply the remedy, and prove that neither England nor New Jersey enjoys a monopoly of either quality.

Let me now call attention to another absurdity. We all know that there exists in the community a large body of professional criminals. Their names are known, the specialty of each, whether sneak thief, second-story burglar, bank robber, "gunman" or counterfeiter, is known; their portraits adorn rogues' galleries, their measurements and their identifying peculiarities are recorded, yet we leave them at liberty and for a while they pursue their avocations in safety. We finally catch and convict them with great difficulty and at great expense. We confine them for limited periods in prison, where they corrupt more innocent associates, and then with no reason to believe that their confinement has worked in them any change of heart, we turn them loose to prey upon society again, and repeat the difficult and expensive process of catching and imprisoning them. Indeed we practically make it impossible for them to earn a living except by crime, since there are few men who are willing to give the graduate of a state prison the chance to earn an honest living. It takes a lifetime to wipe out the brand which a convict bears, and to win again the confidence of his fellow men. Our prisons are manufactories of criminals, and it is time that we changed our whole method of dealing with convicts. My position is so well stated by Mr. Randall, who stood last year in the place I occupy today, and who has since been made chairman of the Massachusetts Prison Commission, that I venture to quote his words:

"The object of imprisoning such convicted persons should be first to change the anti-social temper of those who can be changed, and to

send them back into society as soon as it is safe for society, through their changed attitude, for them to be at large.

"The second object should be to remove permanently from the social freedom they have abused, those convicted persons who through various defects are incapable of keeping out of crime when they are at large; and, in addition those who cannot be persuaded to give up, genuinely, their anti-social attitude.

"Sentences for particular terms, or to particular institutions should not be imposed by a judge when a person has been convicted of committing a crime or misdemeanor.

"All convicted persons should be turned over to a commission charged with full responsibility for their care and custody under an indeterminate sentence, with authority to release them at such time and on such terms, and after such discipline and moral education as would substantially guarantee their future harmlessness to society."

In other words we should treat criminals rather as sick men than as bad men, and our places of confinement as hospitals rather than as prisons. This system has been tried in Utah, where the officers in charge are required to keep a separate record of each prisoner containing all that can be learned of his antecedents, his history and his personal peculiarities, a record to which is added from time to time statements of how he has conducted himself in prison, and what his character and possibilities seem to be, with a view to deciding when and under what conditions he may be released. Here also he is allowed a certain sum for his labor, which if he has a family is paid to them, and if not, accumulates for his benefit and is given to him on his release, so that he is not turned adrift helpless and hopeless.

Under this system the professional criminal would not be returned to renew his crimes, but would be detained until he was reformed, while better men could be restored to society with such an indorsement by the prison authorities as would make it possible for them to obtain work. Indeed, as officers in colleges and technical schools now find places for graduates, a similar system might grow up on finding places for deserving convicts. We have had at least one eminent financier who graduated from prison, and on both sides of the ocean men with criminal records in the legal sense of the term have found their place in the Cabinet.

Capital cases could hardly be dealt with in the manner proposed unless the death penalty were abolished, or the commission were given

power to impose it, but in other cases some such system would remedy many existing evils.

A reform in our method of dealing with convicts is one important step towards the prevention of crime.

I have trespassed on your patience too long, and as I am well aware have said much that to many of you is familiar. I have doubtless made suggestions which shock the prejudices and what seem the well-settled convictions of many lawyers. Let me urge them to consider these suggestions as practical men, and ask whether their prejudices and convictions are really warranted by reason, and whether the practices which prevail are adapted to existing conditions. We are confronted with a prevalence of crime, an atmosphere of lawlessness, fraught with the most disastrous consequences to the nation. Our methods are admittedly faulty, and the faults are apparent to all, thinking and unthinking, law-abiding citizens and criminals alike. Society is engaged in attempting to defend itself against crimes, and it cannot afford to fail. It now offers its enemies ample and needless protection, and it paralyzes thereby its own arm. It should recognize in the words of Mr. Randall that the question is not whether one innocent man shall suffer or ninety-nine guilty men go free, for when ninety-nine guilty men go free not merely one innocent man, but in all probability many times ninety-nine innocent men suffer. As a mere arithmetical proposition the old rule which is responsible for so much injustice cannot be sustained. Certainly for the sake of an imaginary or only possible innocent person in a community where innocence is so well protected, it is no longer necessary to let loose on society ninety-nine men who are clearly guilty. Such a doctrine now is mere superstition.

Our profession is to-day more discredited than ever before. Mr. Taft expressed only the general opinion when he said that "the administration of criminal law in this country is a disgrace to our civilization." Our profession which makes and administers this law is on trial, and we cannot afford to delay the reforms which society imperatively demands. "New occasions teach new duties," and it is for us to realize this truth and act upon it, if we would retain the respect and confidence of our fellow citizens, and regain our proper leadership in the community.