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SOME FOSSILS OF CRIMINAL PROCEDURE

LENN J. OARE*

The inefficiency in the administration of criminal laws in this country is due largely to the preservation of antiquated and effete rules of criminal procedure. "Some of the instances of enforcement," says Wigmore, "would seem incredible even in the justice of a tribe of African fetish worshippers."

New subjects of substantive law are being constantly created, old subjects amplified and adapted to modern social conditions, but the methods of applying and enforcing these laws have remained essentially unchanged since the American Revolution. The machinery for the enforcement of criminal laws is carrying year after year an increasingly greater burden, but there has been no significant changes in the machinery itself to take care of this increasing burden.

In some respects the administration of criminal justice has advanced but little beyond that of our Anglo-Saxon ancestors. By their system the accused was tried by ordeal, by battle, and by compurgation. In these trials no attempt was made to ascertain the facts and apply human reasoning. The machinery for administering criminal justice was then concerned only with formalities. The Deity supposedly took care of the facts and saw that right prevailed. It was incumbent upon the legal tribunal to see that all formalities were rigidly observed, the judgment itself was *judicium Dei*. Marked traces of these barbaric trials persist even to this day.

The rules of criminal procedure in this country today are more concerned with the preservation of the rules themselves and with the perfection of a system of formalism and the enforcement of this formalism. These rules are treated as ends in themselves rather than as means to an end. The rules of criminal procedure are merely rules of the game which are preserved with cant and technicality; and the question of the defendant's guilt or innocence becomes a subsidiary consideration. This apotheosis of technical formalism in criminal trials is repugnant to common sense, to social decency and to common justice.

It is not necessary to make invidious comparisons to show that the percentage of crime based on population in this country exceeds that of any other civilized country in the world. This American scandal is well known to the most casual student.

Our excuse for this orgy of crime surely cannot be lack of intelligence, or poverty, or greater proportion of insanity and feeble mindedness, or any number of other social or biological causes. The cause must be and is the inefficiency of our machinery for the administration of criminal laws. It is not only significant but is ample proof

* See biographical Note, Page 149.

of this assertion that the proportion of crime in this country to that of any other country is in the inverse ratio of the proportion of criminals that are apprehended, convicted and punished here as compared with other civilized countries. In no other country is there such laxity in the enforcement of criminal laws. This and this only can be the reason for our being the most law-violating of all civilized countries. The enforcement of criminal laws with certainty and celerity would reduce criminality in this country to the minimum under our existing social conditions; but to effectively enforce the criminal laws it would be necessary to abrogate our long established system of arbitrary and technical rules. In England where these rules were created, they were abrogated years ago and a simple and common sense system substituted in their stead.

In the trial of a criminal case there can be but one question for the legal tribunal, "Is the defendant guilty?" Intelligent rules of procedure would present the trial of that single question. Such rules would be merely the means to an end and not the end itself. They would serve a salutary purpose in assisting the discovery of facts.

Nevertheless, we adhere to the fossils of criminal procedure and apply the rules in the trial of criminal cases not as the means of arriving at the ultimate fact at issue, but for the purpose of justifying the rules themselves. Thus the trial becomes a forensic contest of wits and the ultimate end is lost sight of in the fogs of technicality. Preserving technicalities which are of no consequence so far as the substantive rights of the accused are concerned, causes the collapse of our entire system of administering criminal justice.

The public complains of the law's delay, the inefficiency of courts, the manipulation of clever lawyers which prevents cases from being heard on their merits, and the disgraceful and scandalous laxity in the enforcement of criminal laws.

Since the lawyers occupy practically all judicial positions and dominate our legislatures, the public may well hold the lawyers responsible for any defects that exist in criminal procedure. The public has the right to expect that the lawyers, who know best what changes should be made, will make the necessary changes, and adapt the tools of their profession to existing conditions, or abrogate them entirely and adopt a more sensible and workable system.

The reason that our system of administering criminal justice is not modernized is simply inertia on the part of the legal profession. The lawyer of all people is closest bound to precedent. He does not often delve into the history of the rules and often does not know the reason upon which they are founded, or their historical origin. He knows them to be rules of the game and as such they are sacred. To destroy them would be rank heresy. To follow them is part of the lawyer's idolatrous worship of formalism.

Slight analysis is sufficient to convince one of the absurdity of many of the technical rules. A noted example is the one which prevents the prosecuting attorney from commenting upon the defendant's failure to testify. This rule, like most others, was founded upon reason and grew out of necessity. Under the early common law, there was some danger that the accused would be tortured if he refused to testify and not until a late date was the accused allowed counsel for his defense in a criminal trial. To apply this rule now in a court of justice is the rankest anachronism. The accused knows best the facts pertaining to the act of which he is charged and if he refuses to testify, the most logical conclusion is that he is guilty. To deny this process of reasoning in a court of law is an attempt to turn back the most natural stream of human reasoning.

The rule that a defendant is presumed to be innocent throughout the entire trial until he is proven guilty beyond all reasonable doubt is frequently responsible for the miscarriage of justice. When a man is indicted and put upon trial, the question should be simply, "Is he guilty?" To engage in philosophizing about reasonable doubt leads to no logical determination and becomes a smoke screen behind which many a guilty culprit makes his escape.

There is no reason whatever for technicalities and formalism in the indictment or information, and yet the law upon this subject is highly critical and much involved. The necessity of the indictment or information arose to counteract tyranny which sometimes decreed that a man be thrown into prison without knowing the nature of the offense with which he was charged, and without giving him opportunity of trial, or, if tried, sometimes compelled him to be subjected to a second or subsequent trial. Thus the requirement that an indictment or information be filed against the accused became a sacred heritage of a free people, giving the accused an opportunity to prepare for trial and insuring him against double jeopardy. This was the ancient purpose and it is the purpose today of the indictment and information, but the accused is not entitled to all the opportunities given him by the many technical and fossilized rules surrounding the subject of indictments and informations. The indictment or information should be held sufficient if it names the offense and states when and where it was committed as it now is in England. The indictment owes its verbiage and elaborate formalism to its historical origin; but it cannot be maintained that the use of formal and complex allegations in the indictment are now necessary as they simply encumber the machinery for administration of criminal justice. Simple and direct language will serve all useful purposes. Many criminals go unpunished by reason of technical rules with reference to the indictment that have nothing to do with the substantial rights of the defendants. These rules and many others, are familiar to all lawyers; and yet they continue in our procedure and help to bring about the non-enforcement of our criminal laws as a national scandal.

Much can be said on the subject of the inefficiency of our police system and other institutions for the detection of crime and the apprehension of criminals. However, whatever may be said on this subject cannot excuse the existence of our archaic criminal procedure. Criminal procedure must be corrected before any considerable advancement in the police system can be expected. Even the most ignorant police officer can reason that it little avails him to apprehend a criminal when probably the inefficient legal machinery will set the criminal free and permit him to scornfully laugh at the sworn officers of the law for their useless officiousness. It would certainly be encouraging to a police officer to know that if he apprehended a criminal the majesty of the law would be vindicated with certainty and celerity. Intelligent reformation of our machinery of administering criminal laws will to a great extent solve the problem of detection and apprehension.

The excuse that is most frequently given for the maintenance of the present methods of criminal procedure, is the specious argument that to overturn them would be derogatory of constitutional guaranties. It is not maintained that the defendant in a criminal case should be denied rights guaranteed by the constitution; for the conviction of a defendant, however guilty a culprit he may be, is not justified by proceedings violative of our fundamental law. But these constitutional guaranties so frequently brought to the defense of the criminal have as their legitimate purpose the protection of the innocent. The purpose of procedure is regulatory—to secure the orderly administration of a court of law in the serious business of determining a substantive fact, the guilt or innocence of a defendant. Matters of mere procedure are not substantive. The criminal has no right to their perpetuity for the purpose of preventing punishment for crimes committed or to prevent a common sense investigation of the real question before the tribunal.

Too much stress has been put upon the rights of the defendant and not enough upon the rights of the state. The trial should be fair to the defendant but equally fair to the state. The defendant's constitutional guaranties must be religiously observed, but in the spirit in which they came into existence; that is, for the protection of the innocent and to guard so far as human agencies can against the conviction of those who are innocent and unjustly accused of crime. These constitutional guaranties were never intended to shield from justice and merited punishment those who are actually guilty and certainly cannot prevent the institution of such rules of procedure as would guarantee a fair and expeditious trial to both the defendant and the state. The present machinery for the administration of criminal justice has outworn its usefulness and should be relegated to the museum of barbarism and antiquity. In its stead should be substituted a system similar to that in England which would insure a common sense investigation of the facts and would provide for the enforcement of law with certainty and with celerity.