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THE CRIMINAL AND THE LAW

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THREE hundred twenty-two years ago, November 17, 1603, the highest court of England, driven out of London by the plague, sat at Winchester, the Lord Chief Justice presiding, to try Sir Walter Raleigh for treason.[1] He was without counsel, without witnesses, without the right even to be sworn in his own behalf. He had no opportunity to prepare his defense. He was alone, opposed to the greatest lawyer of his time, Sir Edward Coke, who was the chief prosecuting officer.

The chief, it may be said the only, evidence against Raleigh was an unsigned writing professing to be the confession of an alleged co-traitor, Lord Cobham. Raleigh produced a letter written by Lord Cobham's own hand repudiating this confession. The only witness sworn on the trial was a pilot, who testified that, while he was in Lisbon, some unknown Portuguese said to him that King James "shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come." And this was accepted as proof that Raleigh plotted the death of the king. Thus, the trial closed without a word of testimony on behalf of Raleigh, with no chance to present his case, except as he entered his denials and his protests as this mockery of justice proceeded.

The evidence adduced against Raleigh was such as would be laughed at for its absurdity in a petty larceny case in our age. But Raleigh was disliked and distrusted by James I, and the jury promptly returned with a verdict of guilty.

Before the sun sank on November 17, 1603, the Lord Chief Justice of England pronounced this sentence upon Raleigh: You shall be "drawn upon a hurdle through the streets to the place of execution, there to be hanged and cut down alive, and your body shall be opened, your heart and bowels plucked out . . . . and thrown into the fire before

*Justice-Elect, Wisconsin Supreme Court.

[1] 2 Howell's State Trials 1.

your eyes; then your head to be stricken from your body, and your body shall be divided into four quarters to be disposed of at the king's pleasure. And may God have mercy on your soul."

In the Old Bailey in London on September 1, 1670, William Penn, the founder of Pennsylvania, was on trial charged with preaching and speaking to a great concourse and tumult of people in the street "against the peace of the said lord, the king, his crown and dignity." Penn and his fellow defendant were not permitted to testify. No lawyer represented them. No witness gave evidence for them. When they sought to present their case to the jury, they were rudely taken from the court room, and the trial was completed in their absence.

The jury retired on Saturday. They were kept without "meat, drink, fire, or any accommodation" until Monday. They rendered two different verdicts which the court would not accept, because they did not find the defendants guilty of the offense charged. The court attempted to secure the desired verdict by threatening to starve the jurors, to cut their noses, and even to cut the throat of a juror named Bushel. At last, driven to an agreement by hunger and thirst, the jurors returned a verdict of not guilty. The court was obliged to accept this verdict, but expressed its displeasure by fining each juror forty marks, and by committing each to prison until his fine was paid. Penn and his fellow defendant were found guilty of contempt of court, because, being Quakers, they had not uncovered their heads in the presence of the court, and were committed to prison as punishment for their contempt.

These two cases are chosen because they concern two men known to everyone familiar with American history. They are typical of the cases found in volume after volume of the court reports of the years that precede the establishment of existing rules for the protection of the accused.

Every means was employed to force jurors to find verdicts of guilty. The reports contain the record of cases in which jurors, who have returned a verdict of not guilty, are coerced into finding defendants guilty of offenses punishable with death.[2] If such coercion failed, the jury was punished for returning "an untrue verdict against the king," by long imprisonment and by fines, in some cases, amounting to thousands of dollars, large enough to exhaust the estate of the juror. Before courts composed of judges anxious to serve their master, the king, by convicting persons whom he accused of crime, and before jurors under constant fear of severe punishment if they did not find the defendant guilty, it was truly said: "To be accused of a crime against the state and to be convicted were almost the same thing."

Many persons accused of crime were kept in prison without bail

[2] *Watts v. Brains,* Croke's Reports, Elizabeth, 778-779.

while the proceeding leading to their conviction was conducted in their absence, their only right being that of hearing sentence pronounced. Those who were privileged to attend the trial were almost as helpless as if confined in some dungeon. They were not permitted to testify in their own behalf, nor could they have a lawyer to represent them.

Trial by jury came as a substitute for trial by ordeal. It was administered in an age that had not lost its faith in red hot iron and boiling water as a means of invoking Divine Judgment as to the guilt or innocence of the accused. It seems to have been assumed that, without counsel, without witnesses, without any of the rights now guaranteed to the accused, Divine Providence would bring the innocent through the fiery furnace of the jury trial unscathed. But it must be confessed that few were attended by evidence of the Divine assistance shown Shadrach, Meshach, and Abednego.

Turning from the method of determining guilt to the consequences that followed the determination of guilt as written in these old codes of blood, we find more than two hundred offenses punishable by death, which was often inflicted in the most cruel manner. "Nothing seemed to be so cheap as human life."

Men saw trial by the lawful judgment of their peers, guaranteed by Magna Charta, converted into an instrument to work the will of the king to find guilty those whom he accused of crime. Aroused to action by the gross injustice done in the name of the law, every energy was bent to securely safeguard the rights of the accused. These efforts were crowned with such success that, today, it is too often difficult to convict the guilty.

Most of the abuses against which it was sought to protect the accused never existed on American soil. The colonists did not adopt the barbarous penal codes of England. But they did adopt a mass of technical rules which were invoked to protect the accused in the days when despotic kings sought to convict persons innocent of crime. The traditions of these abuses came with the liberty-loving settlers, who wove into the warp and woof of their constitutions, the prohibitions found essential to protect the rights of the accused in Old England.

These constitutional guaranties effectually prevent the recurrence of such travesties on justice as we saw typified in the trials of William Penn and of Sir Walter Raleigh. But they go farther. They often prevent the finding of the truth and the punishment of the guilty. Since the days of Penn and of Raleigh, these rules have grown from weakness into the strength of a veritable Old Man of the Sea, bestriding and strangling the society that labored to give them birth.

Under these constitutional guaranties, criminal codes are too often interpreted and administered in the light of rules established by humane

judges in the days when punishment for crime was so severe as to shock the sense of justice of many of the judges who administered the criminal law. In those early days, as Mr. Justice Peckham said, "it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe, if not cruel, penalty, should be accorded great weight, and that forms and modes of procedure, having no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful, and which, at the same time, ought not to succeed."[3] But there is no longer reason for maintaining this protecting wall of ancient legal technicalities about the person of the accused. To use the words of Chief Justice Winslow: "The man now charged with crime is furnished the most complete opportunity for making his defense. . . . . The modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation."[4]

With much reason did Chief Justice Winslow ask whether the defendant should be permitted to juggle with his constitutional rights and privileges; whether he should be allowed to play his game with loaded dice, and whether justice should travel with leaden heel.[5] From the beginning to the end of the trial these constitutional guaranties give the accused the advantage. To illustrate, the prosecution must try the defendant in the county or district where the offense was committed; it has no choice. But the defendant may waive this constitutional guaranty and demand that the place of trial be changed, when he feels that it will be to his advantage.

Again, in most jurisdictions the defendant may take the testimony of witnesses anywhere on the face of the globe by deposition and use that testimony at the trial, but the prosecution, in the absence of such statutes as we have in Wisconsin, is confined to such witnesses as it can produce in court, who can confront the accused while testifying. In the days of Raleigh it was necessary in order to protect accused persons from convictions upon such *ex parte* confessions as that of Lord Cobham that they be given the right to meet the witnesses against them face to face. As applied to the modern criminal trial, this rule means that the accused may gather his evidence from the four corners of the earth, but that so far as the prosecution is concerned, no person who has committed a crime can be convicted and punished so long as the witnesses,

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[3] Peckham, J. in *Crain v. United States*, 162 U. S. 625, 646; 40 L. Ed. 1097, 1103.

[4] Winslow, C. J. in *Hack v. State*, 141 Wis. 346, 351-352.

[5] Winslow, C. J. in *Hack v. State*, 141 Wis. 346, 352.

who must be called to establish the commission of that crime, remain outside the territorial limits of the state, whether such absence be through accident or design.

Because the king punished jurors who found defendants like William Penn not guilty, while the accused had no redress in case he was convicted, the defendant in the modern criminal trial is given the right to review, upon appeal, any action taken or proceeding had from the time of his arrest until sentence is pronounced. The prosecution, on the contrary, in most jurisdictions, cannot appeal from any ruling or other proceeding, no matter how erroneous the action of the trial court may be. Thus the timid or incompetent judge or the corrupt juror may favor the defendant at every stage of the proceeding, knowing that his action cannot be reviewed so long as it is favorable to the defendant. This handicap of the prosecution has been partially removed in a few jurisdictions, but the state is still powerless to appeal from any ruling of judgment in a criminal case after the jury has been sworn to try the defendant, because jeopardy then attaches, and the constitutional provision, that the accused shall not be twice put in jeopardy for the same offense, protects him from being subjected to another trial.

Here again we find the dice heavily loaded to favor the defendant. Following rules established by humane judges to avoid the necessity of imposing barbarous punishments, the courts have so interpreted this constitutional provision as to jeopardy that a defendant, who is granted a new trial on appeal, cannot be convicted of a higher degree of the offense charged than that of which he was found guilty on the former trial. A defendant charged with the murder of his wife was found guilty of the third degree of manslaughter in Wisconsin. When he learned that his friends had appealed the case to the supreme court without consulting him, he wrote Chief Justice Cassoday that the appeal was taken without his knowledge and that he desired to have it dismissed. But when informed that he could not be found guilty of a greater offense than third degree manslaughter, if a new trial was granted, he withdrew all objections and desired the appeal to proceed. He was willing to play if he could make "heads I win, tails you lose" the rule of the game.

These old technical rules are no longer enforced in the country from which we inherited them. If a defendant appeals from a conviction in England, the court to which the case goes may increase or decrease the penalty, take additional testimony or grant a new trial, as the justice of the case demands. Is it not time that we clothed our criminal law in some new raiment, cut according to the best English models, rather than to permit it longer to wear the cast-off garments of the mother country?

Imbued with the ancient idea that the purpose of criminal law was to protect the accused, the constitutional guaranty of trial by an impartial jury has been construed to give the accused an almost unlimited right to challenge jurors. As a consequence more time is often spent in selecting a jury than should be devoted to the trial. In a very unusual case more than six thousand men have been called to the jury box, and three months of time devoted to their examination before twelve jurors were selected to try the case. It took but eight minutes to empanel the English jury that tried Dr. Crippen, a world-renowned defendant of two decades ago.

We pride ourselves that great progress has been made since the abolition of trial by battle. But do we not reproduce most of the essential elements of the wager of battle in the modern criminal trial? The state and the defendant are represented by hired champions, while the accused sits serenely watching the contest, wrapped in his mantle of presumption of innocence with the truth securely locked in his breast, because of the constitutional guaranty that he shall not be compelled to be a witness against himself. The outcome of the trial often depends more largely upon the intellectual strength and skill of these hired champions than upon the guilt or innocence of the accused, just as the result of the old wager of battle was determined by the physical strength of the contestants rather than the truth of the charge against the defendant.

We must not forget that the criminal law, like the tariff, can give over protection. When society loses faith in the ability of the law to punish the guilty, it resorts to lynch law and to vigilance committees, while officers of the law, deprived of the right to examine the accused in open court, resort to the third degree or sweating process in the secret confines of the prison cell in order to prevent the escape of men whom they believe to be guilty. Torture has long since been abolished, but in the third degree we find the modern torture, more refined, but often no less cruel than that of past ages.

The third degree should be prohibited. But we may well doubt if it will be prohibited so long as it is society's most potent defense against criminals. Crimes are usually committed in secret. Most frequently no one sees the more serious offenses except the criminal and his victim, and often he does not see or cannot recognize his assailant. As long as our slavish adherence to an archaic rule permits the accused to conceal the truth with reference to his crime, so long may we expect society to protect itself by resort to the third degree or other extra-legal means of finding the truth.

In the days of Raleigh and of Penn, when the accused could not testify in his own behalf, justice demanded that he should not be com-

pelled to testify against himself. But now that the accused is a competent witness for himself, an ancient rule established to protect the defendant from despotic kings should no longer give him an undue advantage in a trial conducted in a free and enlightened republic.

No injustice has been done to the parties to a civil action by abolishing this archaic rule and by giving their adversaries the right to examine them upon the trial. No injustice will be done to the defendant in a criminal case by compelling him to submit to an examination, unless it be unjust to compel the defendant to tell the truth when the truth shows him to be guilty. There is no evidence that can give the jury more light than the truthful answers of the accused.

If a defendant urges the English court of criminal appeal to set aside his conviction because he is innocent, that court may call the defendant and ask him the questions that will enable it to determine his guilt or innocence. Why should Americans hesitate and shudder at the thought of asking a guilty man the questions that will establish his guilt? If he be guilty, no rule of law should permit him to conceal that fact. If he be innocent, the truth cannot harm him.

The tenacity with which we have clung to this old rule well illustrates the erroneous view that we have taken of criminal law. The long struggle begun in the days when the pressing need was to establish laws that should protect the accused has resulted in the deep-seated conviction that the chief purpose to be accomplished by the administration of criminal law is the protection of the accused. We are beginning to realize that the finding of the truth, the protection of society against the criminal rather than the protection of the criminal against society, is the end that should be attained by the trial of a criminal case. When applied to the criminal trial of today, the rules that were essential to protect the accused three hundred years ago put the prosecution to a disadvantage which may approach that under which Raleigh and Penn labored.

It is the application of these ancient rules to the modern criminal trial that is chiefly responsible for the widespread dissatisfaction with the administration of criminal law. Frequent abortive attempts to punish defendants whom the public believes to be guilty is breeding a growing contempt for law and order.

Law must be based on precedent if rights of person and of property are to be secure. Without fixed and established rules of law these rights would be dependent upon the ever changing mind of the mob. Like Socrates, every man would find that his life depended upon the vote of the majority of the body of citizens that sat in judgment upon him. Without law civilization cannot exist. Without law, we must return to an age where might makes right, we must begin anew our struggle for Magna Charta.

Those who are impatient with the law's delay forget that law is but crystallized public opinion, that law will be changed whenever public opinion demands such change. The defects in the administration of criminal law which we have discussed are based on provisions of our constitutions, guaranteeing the rights of accused persons. These constitutions express the will of the people. They are the supreme law of the land. The law, as enacted by the legislature or as interpreted by the courts, cannot contravene these constitutional rights of the accused. The people alone can change these constitutions. Until they do change them, the people who criticize the law must share with the lawyers and the courts the responsibility for admitted shortcomings in the administration of the criminal law.