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Political Crime and Criminal Evidence

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POLITICAL CRIME AND CRIMINAL EVIDENCE

POLITICAL crime is beginning to be heard of in this country. I propose to examine the French theory and practice in respect to political crime, and compare them with the Anglo-American.

Garçon, the distinguished authority upon the criminal law of France, says that contemporary criminal law distinguishes felonies and misdemeanors that are political from those that are common.[1] To the same effect is Garraud, the classic writer on the criminal law of France.

"Political crimes [says the last named author] are to a less extent directed against the very bases of social life than they are against the established order. They have not, then, the same *nature* as the ordinary crimes. The motives which urge to action in political crimes are most often disinterested, sometimes they are even laudable. Political crimes have not, then, the same *immorality* as the common crimes. A rational legislation will repress these two classes of crime by different penalties, because political criminality is of an entirely distinct nature from that of ordinary criminality."[2]

The history of legislation on the subject of political crime is long and interesting.[3] We cannot, however, linger over this fascinating and instructive story. We may, in running, glance at the Revolution of 1830 and note that the distinction between

[1] Garçon, Code Pénal, annoté, Art. 1, No. 124.

[2] Garraud, Précis de droit criminel, onzième edition, Paris, 1912, p. 88 fol.

[3] The authorities will be found collected in Professor Garçon's Code Pénal, annoté, Art. 1.

political and common crimes comes into French legislation about 1830.[4] By 1848 the principle that no extradition will be *permitted* in political crimes is established.[5] Since the last named Revolution of 1848 no doubt upon the subject has ever been entertained that political crimes should be dealt with upon a different footing from that of ordinary crimes. The Constitution of 1849 also enshrined the principle that the jury and not the judge has jurisdiction of political felonies.[6] Some political misdemeanors go to the Correctional Courts (Tribunaux Correctionels), presided over by three judges without jury; others go to the Cour d'Assises—the court for the trial of common felonies, presided over by three judges and having a jury.[7] There are two exceptions to the principle just enunciated in that misdemeanors due to speech and press (delits de la parole et de la presse) are within the exclusive jurisdiction of the Cour d'Assises;[8] and in that the Senate may be constituted a High Court of Justice for the trial of certain political crimes—as in the recent Malvy case.[9]

The great problem is, of course, to determine what political crime is. There is little difficulty in deciding what is a *purely political crime.*

"A purely political crime is that which has not only as predominant characteristic, but draws along with it as an exclusive and single consequence, the destruction, modification or the troubling of the political order in one or more of its elements. This order includes: in regard to external matters, the independence of the nation, the integrity of its territory and the relations of the State with other States; in regard to internal affairs, it includes the form of the government, the organization of public powers, their mutual relations, in short, the political rights of citizens. We can recognize without dispute, purely political crimes in the following cases: communication with the enemy; the levying of arms against one's government; conspiracies and attempts to change the form of the government; affiliation with unlawful societies; press crimes (except attacks against private persons); violations of the laws relative to elections, public assemblies, etc. All these crimes offend only public law and interest."[10]

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[4] Garraud, op. cit. p. 84 note.
[5] Garçon, op. cit. Art. 1.
[6] Garçon, op. cit. Art. 1, No. 134.
[7] Garçon, ib. No. 135.
[8] Ib. 143.
[9] Ib. 143.
[10] Garraud, op. cit. p. 86 fol.

"All speech and press crimes are certainly not political. No one dreams, for example, of placing in the category of political crime the defamation and the injury of private persons. On the contrary, we do not doubt that the following must be considered, by their nature, political crimes: the defamation, in their public quality and by reason of their functions, of the ministers or the members of parliament; offenses against the President of the Republic, or against the Heads of foreign States; violence to foreign diplomatic agents."[11]

Again, crimes against the internal or external security of the State are political crimes;[12] crimes of association and combination and of unlawful meetings;[13] riotous assemblies;[14] espionage.[15]

"The difficulty of determining whether a crime is political or common commences [says Garraud] when the crime is a violation of law which without doubt, taken in itself, injures an individual or the State considered as a private person, but which, in the *intention* of the author, has a political motive, end or occasion. Crimes of this class are called, in technical language, *complex crimes* and *connected crimes*. The crime is *complex* or mixed, when the same criminal fact injures at the same time the political order and the ordinary penal law; or when a breach of the ordinary penal law is committed with a political intention. Such is the assassination of the Head of the State with the object of overturning the government. *Crimes* are called *connected* with a political fact when violations of the common penal law are committed in the course of political occurrences and have a certain relation with these occurrences. (Code d'instruction criminelle, Art. 227.) Such would be the pillaging of the shop of an armorer by political insurgents."[16]

A criterion is in these and similar cases most vital. There are the subjective and the objective theories. The former theory leads to the following consequence that—

"the intention, the motive, the end the actor proposed to reach, characterize the criminality of the act. According to this theory, murder, assassination, assault and battery, and theft would be considered political crimes. The latter theory conduces us to the proposition that the political or non-political character of an act which is legally criminal, is not to be considered as being determined by the existence of political motives; this character would depend upon the nature of the act considered in itself.

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[11] Garçon, op. cit. Art. 1, No. 179.
[12] Garçon, No. 176.
[13] Garçon, ib.
[14] Garçon, ib. No. 177.
[15] Garçon, No. 178.
[16] Garraud, op. cit. p. 86 fol.

These theories are exaggerated. The question cannot be resolved except by distinguishing two situations."[17]

The conclusion of Garraud is that periods of peace are to be differentiated from periods of war; and that, making this distinction, in time of peace an act which would be considered a violation of the ordinary penal law will be dealt with as such, notwithstanding that the end or the motive of the author was political. The objective theory is here put into effect, in accordance with which the character of the act is determined by the act itself and not by the motive, the intention, or the end envisaged by the author. But "the judge, in examining into the culpability of the individual, may take into account the more or less antisocial, and more or less odious motives of the criminal act. But this act remains, whatever the motive which has inspired it, that which it is in itself—an assassination, an arson, a theft, a destruction of buildings, that is, ordinary crime, a crime of the ordinary penal law."[18]

In time of war, however, acts which would be considered in times of peace to be common crimes may bear the character of political crimes. The distinction here is that—

"if the violation of law is committed in the course of political happenings, as an insurrection or a civil war, pillages, murders, burnings, which would be legitimate if produced in a state of regular war, would, in a measure, be absorbed by the political crime of which they are the necessary consequences or the accidents. This political crime must cover them from the point of view of extradition and from that of the application of the penalty of death. But if, in the course of the insurrection, crimes are committed against persons or property which would be condemned by the law of nations, even in a state of regular war, these crimes would come within the ordinary penal law. If it is just to recognize that all acts which are the direct consequences of the insurrection must be deemed to be political as the insurrection itself is political, it would be immoral to consider as political prisoners, malefactors who profit from the disorder to satisfy their vengeance or their cupidity."[19]

The French theory, therefore, is the objective.

The consequences that flow from political crime are concerned with the penalty,[20] with the treatment of the offender in prison, with the procedure in court. The death penalty cannot be

[17] Garraud, op. cit. p. 87.
[18] Garraud, op. cit. p. 88.
[19] Garraud, op. cit. p. 88.
[20] See Garçon, op. cit. Art. 86, No. 8. The penalty of death was abolished in France for political crimes after the Revolution of 1848.

imposed;[21] certain forms of imprisonment are not permitted; certain others are definitely prescribed. There is no incapacity after conviction to serve in the army;[22] there can be, for another example, no temporary suspension or dismissal from the medical profession.[23] Political amnesties are given[24] and are frequent and normal. The prison privileges are extensive;[25] political prisoners are not compelled to work; they do not wear the prison garb; they are kept in places separate from those where offenders of the ordinary penal law are kept; and may have their food brought in from outside. Extradition is not allowed.[26] The procedure at trial I have already pointed to in passing. All felonies go to the court with a jury, in which the jury is the judge of the law and the facts. Most misdemeanors also go to the same court.

These are for the most part special provisions not only in France, but in almost all Continental countries for the benefit of political prisoners and convicts. But there are some provisions of law which apply to political prisoners as well as to all other prisoners. They are, briefly, the theoretic impotence of the judges in jury trials. The President of the Court—there are three judges—does take an active part in all trials; but the effect of his participation and occasional partisanship is minimized, if not obliterated, by the independent and intelligent character of the juries. Both theoretically and practically, however, the jury is master of the law, and the facts; and this principle is carried so far as to exclude any charge by the judge. The defendant has the right in all criminal trials to present all the evidence in his favor, and against the prosecution, which he wishes. This principle is crystallized and consecrated in the formula that the defense must be free. This free defense means not only that the defendant himself shall be free to say anything in his favor, but that he may bring forward any witnesses he pleases who also shall be free to express themselves fully and unhindered. One of the implications of this freedom is that the testimony is to be given by *deposition*, that is, by narration. During this narration by the witness he is not interrupted. He must be allowed to continue in his own way. After the narration, he may be

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[21] Garraud, p. 84.
[22] Garçon, No. 141.
[23] Garçon, No. 142.
[24] Garçon, No. 137.
[25] Garraud, p. 84.
[26] Garraud, p. 89.

questioned by his side, by the other side, and by the court; but he always has the right of reply. It will be seen that the Continental theory is the reverse of the Anglo-American. The witness, in our system, is at the mercy of the court and of the attorneys. In a conflict with an attorney our judge takes the side of the attorney. But the spirit of independence is so high abroad that witnesses will not submit to ill treatment even at the hands of barristers and judges. One would think that under such a system of freedom to present evidence, trials would be interminable, and that, secondly, the absence of exclusionary rules of evidence would militate against the search for truth. But this is not so. Trials are much shorter than they are among us; they are much more interesting; they bring out many facts we exclude; they present a clearer and ampler view of the whole case; and they are not obnoxious because of the introduction of hearsay and other evidence which under our system would be inadmissible. Nauseating wrangles between opposing counsel on the admissibility of evidence are unknown. The prosecution is free to present its case as fully as it pleases; and the preliminary investigation by the juge d'instruction helps a great deal toward this object; and the defense is also free to explain as fully as it wishes. A complete presentation of the defendant's case is thereby assured. And especially is this so in political cases where the necessity seems to be greatest because of the character of the alleged unlawful acts committed. The defendant, again,—continuing the review of the general procedure in criminal cases on the Continent—has the right to close. He considers the right of the last word a precious one; and anyone who has seen an ordinary trial, or, in particular, a recent political trial in this country, will immediately concede the high importance of the final speech.

These general elements in criminal procedure should be pondered by us. They are all important, and especially are they so in cases of political crime, where it is vital to the defense to labor within a medium which gives free and full movement. We ought to recognize the distinction between political and other crime; we ought, in political cases, to give the right to the jury of deciding upon the law and the fact, and take away the power of the judge to instruct on the law.[27] To be sure, the jury is not much

[27] One or two judges in New York City made wonderfully courageous charges to juries; and one or two elsewhere gave the defendants a large latitude in the presentation of evidence. But this was, of course, a matter of discretion. What is needed is the *right* to free presentation.

to be depended on. But in numbers there is sometimes strength to the opponents of the established order, because of possible divisions in the ranks of standpatters and because of the possibility of hitting upon one man in twelve who may see the justice of the defendant's case, though that case may be in a hopeless minority. We ought to give the defendant the last word. We ought to make the defense free to introduce any and all the evidence it considers best to introduce. We should, as a consequence of this, hasten the ends of trials, by doing away with wrangling on the part of attorneys over rules of evidence. By abolishing the question and answer method of eliciting information from witnesses—a method which consumes a world of time—we should make the evidence, upon which the jury is to base its verdict, interesting, and, therefore, more intelligible and easily followed by that jury: we should follow the natural method of seeking truth, which in this case happens also to be the best method: and we should be doing the political prisoner the justice of drawing the logical conclusion from the premises that political crime is to be distinguished in our law from common crime, namely, that a distinction in the nature of the crime carries along with it a distinction in the nature of the court procedure. All these changes I urge primarily for political prisoners. But I do not hesitate to conclude that the rights of common criminals and *of society*—for society, in the case of these criminals, is now hampered a great deal more than is the defendant in our court procedure, due to the presumptions and the constitutional prohibitions, and we ought not to make the discrepancy between law and justice greater than it now is—will be better preserved by the introduction of these changes into our trials.

Certain objections ought now to be considered. It is said that the abolition of the rules of evidence is unthinkable; or, at any rate, that no precedent exists in our country. We have seen how utterly thinkable and, indeed, realizable the abolition of rules of evidence is, and we have glimpsed the operation of free proof on the Continent of Europe. But the ready response is at hand: "That is a foreign practice: what is good for them may not be good for us."[28] Wigmore, in his powerful introduction to the

[28] See my articles, "The American Student in the French Law School and the French Student in the American Law School," in "Le Bulletin de la Maison francaise de Columbia University"—March-April, 1918, New York City; "Le Secret Professionel," in "Le Bulletin de la societé des prisons," Oct.-Dec., 1907: "Comparaison du système des règles de preuve en France et

second edition of Volume V of the Supplement Index to his treatise on the Law of Evidence, says:

"A *complete abolition* of the rules is at least arguable, not merely in theory, but in realizable fact. They are today mostly ignored in the practice of four important jurisdictions—in the Interstate Commerce Commission, in Patent litigation, in Admiralty trials, and in (some of) the Juvenile Courts. This shows that, in the United States, and today, justice *can* be done without the orthodox rules of evidence.

"These four exceptional cases are of course explainable as abnormal. In the first place, there is in all four practices no separation of jury and judge; and the safeguarding of the lay jurors from misleading evidence is the main reason for the orthodox system of evidence. In the next place, there are no lawyers (ordinarily) in the Juvenile Court; while, on the other hand, the practice of the first three classes of cases named is chiefly in the hands of a select group of specialists, both judges and lawyers; and this makes for mutual confidence, discouraging petty evasions of the rules and also petty insistence on them."

The abolition of the rules would add to the strength of the movement for better jurors. Our present system of jury trials is marked by exemptions and by inferiority of jurors. The inferiority is due directly to two matters: first, the statutory exemptions allowed, and second, the practice of attorneys, connived in by the judges, of weeding out of the panel of jurors any persons who might by any possibility be intelligent and competent to pass upon the questions at issue. The more of a Tom Noddy the juror is, the less he knows about what is happening around him, the greater ignorance he has of history and human experience, and even of human nature, the more readily acceptable he is to the contending attorneys. The theory of our law that jurors are to be safeguarded from misleading evidence is based upon the paternal doctrine that a layman cannot reason upon the facts unless these facts be presented in a particular way. And by statute and by practice in our courts we declare by our acts the reason for such careful safeguarding. The cat's out of the bag. The reason is plain. We make the jurors incompetent, and then we must protect them—and ourselves from their ignorance. Evidence has therefore been influenced, in part, by our American practice of sifting out the strong and accepting

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aux États Unis," in "Le Bulletin de la societé des etudes Législatives," Paris, Janvier, 1918; "The Procedure in the Cour D'Assises of Paris," 18 Col. Law Rev. 43.

the weak. Herein, I should say, lies an interesting channel for speculation.

As for the other point touched on by Wigmore—the fact that the practice is in the hands of a group of specialists—it may be said that in Europe generally the problem is simpler than it is here. There there is a separation between office lawyers and trial lawyers, and specialization and expertness and breadth of mind in trying cases are the common possessions. But it should be noted that after the abolition of all rules of evidence in the trial court no expertness in the application of rules is required; no petty insistence on the rules is possible; no petty evasions of the rules are encouraged. I am arguing for the full and complete unshackling of the fetters from fact. There is no half measure. We must go to one extreme or the other. Quibbles and quirks will otherwise be the result.

I am aware that there will always, theoretically, be the problem of the judge of admitting certain evidence and excluding other evidence. This, though a problem frequently forgotten, is nevertheless one that is in theory possible, and sometimes arises in practice. But we should be astonished to see how few the occasions are which spring up to baffle judges or attorneys, and, indeed, how rarely the mere possibility comes to the surface at a trial that certain testimony will not be heard. Over and over again in my attendance at French trials I have prepared for an interesting "incident personnel" between the judge and the attorneys for the defense—only to be disappointed. Almost never is testimony rejected that can in even the remotest way throw light upon the case; and the Continental system is so liberal that on occasion individuals whose testimony will not—and it is previously known that it will not—throw any light upon the facts of the case are allowed to come to the stand and give their "depositions," that is, to make their declarations. The instance which most often produces such a proceeding is when a witness has made some remark derogatory to another who may not have anything to do with the facts at issue of a case, but who is permitted to take the stand in defense of his reputation. This may be going too far. But it is to be remarked that the occasions are rare, that when they do arise they are soon over, and that the spirit of independence is so great that a person may not be defamed even in a court of justice.

I do not follow Dean Wigmore when he says (p. xv) that

"to *abolish* the bulk of the rules, in the ordinary courts would be a futile attempt . . . . you cannot by fiat legislate away the brain-coils of one hundred thousand lawyers and judges; nor the traditions embedded in a hundred thousand decisions and statutes." I may appear to be wise after the event. But surely, whether or not we could from a study of past history deduce the proposition I am about to lay down, there does not seem to be much wisdom in *now* affirming that revolutionary changes utterly unthinkable a few years ago are now taking place all around us; and the comparatively simple matter of the abolition of a highly technical and intricate system of rules which have grown up through centuries from precedent to precedent in a wilderness of single instances, which Wigmore rightly says were not systematized till very recently, is a change we can bring about if we have the will to do it. The Continent of Europe had rules of evidence, and the transformation came. I fear we in America bank too little upon the resiliency of the human mind and too much upon stare decisis.

But Wigmore has this much right on his side that the force of circumstances and training is so great that lawyers keep on contending in the same old way for insignificant details, concerning the introduction of insignificant facts long after the jury has passed out of their ken. Witness their bickerings and their insistence upon exclusionary rules even when the case is being tried before a judge acting as jury.

It is said by Wigmore that the growth through contact with human experience of the law of evidence gives the rules the weight of reality. But the system of rules in medieval times arouses—and justly—our mirth, though that system was also the result of contact with human nature. And despite the fact that that ridiculous system existed for long, human experience outlived it, and when the human mind saw its injustice and its inanity courageous peoples threw it over for a saner system. Now it is, according to the Continental peoples, the present free proof system that is in accord with the experience of human nature.

It would be interesting, though the length of the discussion would here be prohibitive, to follow the Anglo-American system of evidence into its details, compare it with the system of free proof, show for each of the many rules the value of the reasons adduced, and indicate how these reasons when sound are modified

by other reasons which favor the free proof method. But I cannot let this occasion go by without reference to what has been called—

"the greatest and most distinctive contribution of Anglo-American law (next after the jury trial) to trial procedure. Bentham thought this much of it and we can afford to continue in this conviction. But if it is the greatest and most valuable, it is also (like other great truths) overworshipped and overworked,—especially in its unessential details. The difficulty about it is that it has two principal aspects, one of which is vital and the other of which is not.

"The vital aspect is that we are *not to credit any man's assertion until we have tested it by bringing him into court (if we can get him) and cross-examining him.* Now, the development of this art of cross-examination, during two centuries, is the great valuable contribution of the rule. Here modern psychological science confirms emphatically this empiric result: for it has shown us something of the hundred lurking sources of errors that inhere in all testimonial assertions; and we now perceive that our traditional expedient of cross-examination was the true way to get at the sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test would be to surrender the best expedient anywhere invented of getting at the truth of controversies. For this reason, the abandonment of the Hearsay Rule, in this vital aspect, is unthinkable."[29]

But we can, under the free proof system, cross-examine; and we can go further than the Continental peoples and insist, as we do now, upon the right, which, by the way, in this country in practice may be and is sometimes seriously trammelled by the judge. The Continental peoples have the right of cross-examination, theoretically, through the President; but I have seen questions put—of course with the consent of the President of the Court—directly to a witness on cross-examination. I did not see any prolonged cross-examinations; but I was assured that when the occasion requires it, extended, elaborate, and severe cross-examination does take place. And the records of trials prove that this is so. The reasons for the lack of frequent cross-examination are several, among which are the preliminary investigation, which is thorough and which has included cross-examination; and the previous examination by the court and the lawyers of the dossier—the evidence presented before the examining and investigating magistrate.

[29] Wigmore, op. cit. p. xxviii.

But there is yet more. The witness who makes the hearsay statement is subject to cross-examination, though the individual who is said to have made the statement extra-judicially is not brought before the court to give his testimony. And this hearsay witness may be examined as to his sources of knowledge; and evidence may be introduced to rebut the hearsay statement—a thing which is sometimes done. The hearsay statement is made and received for what it is worth. This is certainly done in actual life, and it is not a far cry—or ought not to be—from actual life to court trials. Further, if the hearsay statement is important, the man who made the statement extra-judicially is brought to court. It can be seen that it is to the interest of the parties to present important evidence by the mouths of the most competent witnesses; and we therefore find that as a result either the prosecution or the defense will not allow an important statement for its case to rest upon the unsupported word of a man who shows by hearsay testimony that the actual eye-witness to the facts of which he gives testimony is another. For instance, A takes the stand and says B said X struck Y. If the prosecution rests there, the weight of the testimony of A would not be great. The evidence would, under the Continental system, be admissible; but this is a long way from saying it would be sufficient proof of the fact that X struck Y. The prosecutor would bring on the witness B. Cross-examination of A would show, perhaps, that little if any weight was to be attached to B's statement, because, for instance, B was an enemy of X, or because A cannot hear well. This is the method we employ in our ordinary affairs, and it cannot well be maintained that in these affairs we are at a loss for a proper solution of many problems, any more, indeed, than we are in courts of law. What the hearsay rule does is this, in some cases: it prevents any evidence whatever from going to the jury and deprives the jury of any means of arriving at a proper conclusion. The discrepancy between court justice and extra-judicial justice is marked. What is produced on the offer of hearsay evidence is this: there is objection, there is discussion, there are obstructive tactics, there is confusion, there is uncertainty in the minds of the jurors, and, in short, there is great waste of time, confusion of issue and dissatisfaction on the part of the jury because of lack of full testimony.

The method of presenting evidence in the two contrasted systems is next to be inquired into. The Anglo-American method

is clear, simple, and logical: the Continental is involved and practical. Curious that the French, for example, who are known for logic and symmetry should be lacking in a logical and symmetrical system of presenting evidence. But in this case we find the Continental method fashioned after the practice outside courts of law. In our system—the product of a practical and analytical people—the method is fashioned logically and symmetrically: examination followed by cross-examination and this again followed by re-examination and recross-examination; and the evidence of the prosecution first presented, and then that of the defense; and this followed by rebuttal evidence and surrebuttal; and finally the summing up of the defense—the only breach in the regularity—followed by the summing up of the prosecution. And previous to the introduction of evidence at all, the exposition of the case by the prosecution and by the defense. Whereas on the Continent cross-examination may take place during examination; and so may rebuttal, and part of summing up, and confrontation—just as these things happen in life. And there is no clear exposition of the case by the prosecuting officer, but a reading of the indictment; matters of defense are put in during the case of the prosecution, and the prosecutor sums up first and the defense last.

The thing to note here is that while the evidence is presented in an Anglo-American court with strict logical regularity, abroad the evidence is presented in what seems to us a haphazard fashion. The defense of the Continental system may be made upon two grounds: first, it is the natural if not the logical, artificial system of searching out the truth; and second, as Wigmore says in his treatise—section 1368—speaking of the advantages of cross-examination in contrast to the adducing of proof by other witnesses called by the opponent:

"The cross-examination *immediately succeeds* in time the direct examination. In this way the modification of the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses to diminish or conceal their force. Proving the same facts by new witnesses, after others of the proponent have intervened might lose this benefit, and the counsel's argument at the close might not be able to replace it."

So it is that human experience has taught the Continental peoples to seek out truth in court as we seek it out in our daily life, and so it comes that the examination and cross-examination

and rebuttal and surrebuttal are mixed; and the presentation of the case for the prosecution is intermingled with the presentation for the defense. The evidence over there is introduced before other facts have intervened—after which that evidence might lose its force. Simplificative rules of evidence do not always simplify or clarify.

The third detail of the law of evidence I should like to discuss briefly is the giving of testimony. How the testimony is to be presented is a serious problem. Our system prescribes the question and answer method; the Continental, the deposition or narrative method. The advantages and disadvantages of the question and answer method, and the rules devised for the lessening of harm in the search for truth are known to every practicing lawyer and are admirably stated and commented upon in Wigmore's chapter on Testimonial Narration or Communication. The method of the direct and untrammelled narration by a witness is unknown to us. On the Continent the right of a witness to speak freely and fully is sacredly maintained. But it is not so generally known that *after* the narrative has been given, the witness may be examined and cross-examined. This method, therefore, presents us with the advantages of the question and answer method, and with the further great advantages of the direct method of narration. The saving of time is enormous, as I can testify from experience here and abroad. Any one of the interminable political trials held in the city of New York during the last year and a half, some of which took two weeks and one of which took eight weeks to try, could have been tried in much less time under the Continental system of free proof and direct narration. And yet we hear that to let in all testimony and evidence is to protract unduly the trial of actions. Moreover, it is said that free proof does not protect the parties, especially the prisoner, and that the rules of evidence are primarily to guard against the introduction of evidence harmful to the parties, and of course, and particularly harmful to the prisoner. The rules of evidence in the trials mentioned—as in all others—almost without exception did nothing else but prevent from going into evidence a great deal of testimony which would undoubtedly have added to the value of the trials as investigations into truth and might have changed the verdicts.

Nothing, again, can be less interesting or more sterile than examinations and cross-examinations in our courts. This is

partly due to our lack of skill, and partly to the inherent defects of the question and answer method of getting at facts. A narration that would take five minutes is drawn out into an examination that takes two hours; and the facts brought out are not only shockingly disproportionate to the effort and time, but positively fewer and less important than by way of unhindered narration.

I have ventured to question some of the conclusions of Wigmore. I cannot leave the subject to which he has given so much of his time and loving and fruitful thought without declaring my indebtedness to him as a writer and as a man. We all know he is a great authority. It remains yet to be generally recognized that he is an admirable citizen and a great man. It is the fact of his superb human quality that makes one diffident in questioning his conclusions, especially upon such a human subject as evidence.

Finally, I use the concluding words of Wigmore in the preface already quoted from:

"General denunciations against the system, and general denunciations against denunciations, will do little service either way. A great national and racial system cannot be easily set aside; and its historic growth indicates that it has at least some right to exist, as it is and where it is. What is needed rather is detailed study and concrete criticism."[30]

Many national and racial systems—thought to be such at any rate—have been recently swept aside; and history records others. The jury system is considered by Anglo-American writers as an Anglo-Saxon institution. Yet we find that this national and racial institution flourishes on the Continent where it is according to those writers an exotic: we find also that the institution is even more jealously guarded there than among us; and, lastly, we find that it works well among them. Dean Wigmore, himself, in his treatise, and elsewhere, has given us ample evidence of his broad human sympathy and lack of chauvinism. Differences between peoples we have in the past exaggerated. We ought now to emphasize the common racial traits of mankind. These traits, we shall discover, are many; and idiosyncrasies and peculiarities are few. We are beginning to become aware of the overweening power of circumstances, of environment. Change this environment, and the change in national and racial nature will be astounding. We must endeavor to approach to just relations in society, and these just relations will be repre-

[30] Wigmore, op. cit. p. xxxviii.

sented on the bench and at the bar. "Sound rules of evidence, in short, are as much a symptom as a cause of better justice."[31] No more profound truth was ever uttered. The kind of system of law we have, and of evidence, in particular, illustrates and exemplifies our social advance. Since I have been arguing for the abolition of all rules, I may be permitted to modify the quotation: A sound system of evidence is as much a symptom as a cause of better justice.

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[31] Wigmore, Vol. 5, op. cit. p. xxxix.