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FRENCH AND AMERICAN CRIMINAL LAW
THREE POINTS OF RESEMBLANCE

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French criminal procedure is very different from American procedure. But underlying the diversity there are certain similarities which have not been noted. The French system is described as an investigatory; and the American as an accusatory system. Under the accusatory process, in order that an action may be begun, there must be a complainant. The matter is presented to the judge, who acts, for the purposes of the investigation, simply as a passive receptacle, and who gives judgment upon the basis of the evidence that is presented before him. On the other hand, under the investigatory system, no specific complaint is necessary in order that an action may be begun; and the judge may, of his own initiative, begin and carry through an investigation. There are three ways in which an investigation may be begun: by specific complaint made by the victim of a crime against the perpetrator of the crime; by denunciation made by any individual who has become cognizant that a crime has been committed, and who does not know the perpetrator of the crime; or by proceedings on the part of the *Juge d'Instruction* himself. The differences between the two systems are perfectly obvious. But if we go beneath the surface, and if we investigate our own system a little deeply, we shall see that in some instances we are not so all-powerless in the search for crime as one would believe from reading an account of the accusatory process.

In the American system we have John Doe proceedings. There are obvious differences between John Doe proceedings and the proceedings of investigation by the *Juge d'Instruction.* But the fundamental and characteristic element in the investigatory process is found in the John Doe proceedings. That element is the search for a crime which has been committed, and for a criminal who committed it. It is really a fishing excursion to discover the author of a crime.

The French procedure of indictment is entirely different in theory from the American procedure. In France, a body of Judges decides upon an indictment; the Chamber is called the *"Chambre de mise en accusation."* The *Juge d'Instruction,* who is our magistrate and our District Attorney rolled into one, and more, has already made an investigation of the matter and the documents in the case—the *dossier* —come before the Chamber of Indictment. In contradistinction from

our own system, the accused person may be represented at the hearing in the Chamber. The District Attorney is there to present the matter for the side of the Government. After hearing, the Court decides whether the facts in the *dossier* constitute a crime. Here, then, you save a double guarantee for the accused: the guarantee of a technical body of men, and the guarantee of judges learned in the law. In this particular instance, in the procedure, the French are more scientific than we are. It would seem to be logically perfectly natural to have a technical person or body of persons, learned in the law, to decide as to whether the facts in a particular case constitute a crime or not; but we, for historical reasons, have continued to operate by means of the Grand Jury, which is a popular body. The French procedure gives us a suggestion for having things done by experts. Time is saved, money is saved, and liberties are preserved. Our Grand Jury system should be abolished. Whatever its uses once upon a time, it has no good uses now. Theoretically, our system is wrong because a popular body is brought into being for the purpose of deciding concerning a technical matter; and practically the system is vicious, because it violates the theory of the law. In actual practice, the Grand Jury does not decide for itself as to whether the facts related before it constitute a crime, but allows the District Attorney to decide for it. A District Attorney presents the case, adduces the witnesses and all the testimony, and then advises the Grand Jury what to do. In a great number of instances, there is no advice, but actual disregard of the functions of a Grand Jury and overriding of law. The District Attorney reaches a certain decision, and that decision is simply ratified by the Grand Jury. The exceptional case where the Grand Jury acts against the wishes of the District Attorney is so rare that it need not be taken into account.

At this point, we come to a resemblance between the French system and our system, in spite of the fundamental difference in theory. The practice in America approaches the practice in France. The District Attorney is a technical man, the District Attorney is supposed to be learned in the law. It is the District Attorney who imposes his wishes upon the Grand Jury. Here, then, we have a guarantee, it seems, for the accused. But what does this guarantee amount to, when we consider, not the theory of the law, not the theory of the functions of the District Attorney, but the exercise of the functions of the District Attorney? The District Attorney is a quasi-judicial officer—in theory. But in practice, how different! He is called almost everywhere a Prosecuting Officer, and it is rare

to see him exercising his functions in any way except in a way in which a prosecuting officer would exercise them. "But," it may be said, "it is true that the District Attorney is a Prosecuting Officer; but he becomes a prosecuting officer only after he has investigated a case impartially, and has come to the conclusion that the person is guilty; but then, proceeding upon that basis, he attacks and attacks, with all his might." The general public sees only the latter portion of the process in a case that comes before the District Attorney. But the former process, up to the time of the decision of the District Attorney, is entirely hidden from the view of the public, and so a wrong idea is got, concerning the exercise of his functions. But this argument is more specious than real. Anyone who has seen an investigation carried on by a District Attorney knows that the investigation is almost always one-sided. A complainant presents himself; witnesses are heard in support of the complaint. The person who is complained against is not notified by the District Attorney, and if the accused wishes to bring evidence in exculpation before the District Attorney, the District Attorney will not allow it. After this preliminary investigation by the District Attorney, the witnesses are heard by the Grand Jury. But what witnesses are heard? Only the witnesses presented by the District Attorney—witnesses all on the side of the complaint. And by law the accused is prohibited from appearing before the Grand Jury. How many cases would be thrown out at the threshhold if the Grand Jury only heard the other side! The French system makes it possible for the other side to be presented, and for that reason, among others, it is to be preferred to ours.

The Grand Jury system is doomed. In England, under the stress of war, a discussion has already been begun concerning the utility of it. It is said: "To summon twenty-four grand jurors to deal with a charge of stealing boots" (see "The Times" of January 6th) "is hardly to advance the economic organization of the community for the strain of war." The question may freely be asked in America. To summon twenty-four grand jurors to deal with almost every charge—with the possible exception of charges for political offenses—is hardly to advance the judicial organization of the community and the interests of society.

The doctrine of attenuating circumstances is a doctrine that seems to be very far from anything we have in our own system. And yet search will bring to light two very remarkable similarities. The doctrine of attenuating circumstances was invented because of the rigors and the inflexibility of the law under the old régime. The

Napoleonic Code made a great many changes for the better in the Criminal Law of France, but still it retained some of the inflexibility and severity of the old régime. After the dissolution of the Empire, there were rapid changes in the social organization of France, and immediately people began to perceive the disharmony between the code under which they were working and the actual facts of life. The law was rigid, and there was no power that could mitigate it. Jurors, who were convinced of the guilt of individuals, acquitted them simply because the punishment for the crime with which they were charged was too great for the crime. A great deal of scandal in the administration of Justice was brought about in this way. In 1824, the Judge was given power to mitigate the punishment by the application of attenuating circumstances, but jurors were distrustful of the action of the judge, and acquittals continued the even tenor of their way. Another change came in 1832. It is under the system that came into existence in that year that the French jury works now. The right of mitigating the punishment was taken away from the judge and given to the jury. The jury became, to all intents and purposes, and is today in every case, with the exception of several which we shall not consider here, the judges of the facts and of the law.

The first observation to be made is that here you have a clash with the principle underlying the institution of the Chamber of Indictment. In the case of the application of attenuating circumstances by the jury, it is a popular body, unskilled and untrained, that decides concerning the fate of an individual. Not only concerning his fate in respect to the matters of fact presented before it, but also in respect to the matters of law. The determination of questions of fact is very difficult, but the determination of questions of law by a jury is perfectly impossible; and yet this illogicality exists under the French system. The absurdity is carried to an extremity in cases of the *crime passionnel.* Not only is it more difficult, in these cases, to tell what attenuating circumstances are and how much weight should be given to the attenuating circumstances presented; but the law is actually violated by the jury in acquitting after an admission by the defendant of guilt. The acquittal is based on the attenuating circumstances that have been adduced at the trial. One of the curious features of French Criminal trials in the *Cour d'Assises*—a feature which is perfectly comprehensible, when the system is understood—is that most of the defendants who come to the Bar of Justice have already pleaded guilty to the *acts* with which they are charged. The

attorney for the defendant in these cases lays stress upon the attenuating circumstances—which, under the law, would not excuse the defendant, but which, when presented to the jury, will be likely to make the jury acquit, in violation of the law. The brazen-faced manner in which the jury is often asked to disregard the law for a higher, unwritten law, a law of justice and a law of conscience, is one of the great features of a criminal trial in France. The President of the Tribunal of three judges who sit in the *Cour d'Assises* never interrupts and reproves the attorney for the defendant. But I shall treat this matter more fully in another communication. The facts in crimes of passion are extraordinarily intricate and caried; there are questions of anatomy, physiology, psychology, medicine, sociology, philosophy and jurisprudence. And yet the jury is given power to decide these difficult questions! But the Code lays down certain punishments which must be meted out to individuals who are convicted of crimes with attenuating circumstances. The Code nowhere says that attenuating circumstances entirely excuse a murder; but the law lays down certain rules by which the Court is to be governed in the sentencing of the individual who has been convicted of murder with attenuating circumstances. The jury, however, overrides the law, makes a popular interpretation of attenuating circumstances, drives the doctrine of attenuating circumstances to the extreme, and decides in these cases that the attenuating circumstances have completely refined and dissolved the crime indicated by the law to have been committed by the facts presented in Court.

The vicious procedure on the part of the jury has infected Military Courts also. In these courts we should expect a different treatment to be accorded to individuals who come there accused of crimes of passion. The jury, is made up of seven officers of the Army—persons who, one would think, would be likely not to be affected by the popular notions. But in fact the case is far otherwise. I had the privilege of listening to one of the greatest speeches that I have ever heard. The narration of the events leading up to the commission of the crime was far and away more eloquent than the narration of facts in the White murder trial. The attorney was defending a woman for sheltering a deserter from the army. The appeal was a most impassioned appeal, full of logic, social vision and sentiment, and all clothed in the sweetest of melody. I have never seen an audience more wrapped up, and I have never seen judges so enveloped in the presentation of a subject. I was wondering what would happen. The arguments that had been presented were not sufficient to acquit. The

case was a perfectly clear case of guilt, but, by the application of the doctrine of attenuating circumstances, the guilt could have been refined down to almost nothing. I was very, very anxious to see the result, and I expected an exceedingly small punishment. But in a few moments the Court came back and announced a conviction of the defendant, with no attenuating circumstances, and a heavy penalty. It was a sort of defiance to the wonderful speech that had been delivered. If Rufus Choate was able to win an unwilling jury that was hard set against him simply because of his reputation, this attorney, who merited an acquittal—and really, in this case, an acquittal would not have harmed—could not.

This was the treatment accorded to a *woman of the street.* But, behold, the treatment accorded to a *man* who commits murder because one of his mistresses has been unfaithful to him! I attended two trials of this sort. In the first case, there was an acquittal, although the facts were proved beyond a shadow of doubt. In the second case, the Court Room was crowded with the *Beau Monde,* with the women of fashion. The word had gone out that it was going to be a very, very exciting trial, and a great orator was going to plead. The facts were very solacious, and the whole of Paris of the upper world —so-called—that could come in, was present. The facts were perfectly clear and the guilt of the defendant was beyond doubt. The Court was being watched. It felt a responsibility different from the responsibility that is felt by an ordinary, popular jury. It saved its face by bringing in a verdict of guilty. But this verdict of guilty was destroyed by the application of the doctrine of attenuating circumstances and by the application of the Béranger law. The man was convicted to two years' imprisonment, but execution of the sentence was suspended by application of the Bérenger law.

Acquittals for *crimes passionnels* are a purely Parisian institution. In the provinces, a defendant in such cases gets short shrift.

The recommendation to mercy under our system approaches the application of the doctrine of attenuating circumstances; but the jury can make only a recommendation to the judge. The judge is the individual to take that recommendation into consideration if he pleases. Under the French law, a determination by the jury of the existence of attenuating circumstances is binding upon the Court. But in the Anglo-American system of law, the same causes have tended to produce nearly similar effects. The law was felt to be too rigid, and the recommendation to mercy was invented in order to mitigate the rigors of the law. But the American system is better than the French system,

inasmuch as the judge is a better instrument for the application of the doctrine of attenuating circumstances than a popular body such as the jury.

But more recently in America we have had the introduction of Probation. A defendant is convicted, and after conviction the judge seeks light from the Probation Officer concerning the circumstances surrounding the commission of the crime and concerning the history of the individual who has committed the crime. All the facts which are, as a matter of course, brought out in a French trial in Court, may, in America, be brought out by the Probation Officer and by persons interested in the conviction, in Court or in the Chambers of the Judge after conviction. Again, the American system is preferable to the French system. A judge, skilled and learned in the law, just as experienced in the affairs of life and more indeed as the jury, and very experienced in the treatment of criminals, decides the fate of the convict. But our American system does not go far enough. It is not the judge, a legal officer, who ought to decide the fate of a person who has been convicted of a crime, but a Board of Parole. The convict should be sent to prison. All the facts concerning his history should be brought out and kept on record, all the facts of his history after his conviction and introduction into prison should be followed and a record kept, for the purposes of the Board of Parole. The Board of Parole, a body, technical, specially suited for the work because of its constant dealing with criminal matters, and because of its constant supervision of the individual concerned, is better fitted to decide the length of imprisonment.