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## ARE THE CRIMINAL COURTS DOING THEIR DUTY?\*

By FERDINAND PECORA\*\*

No one knows better than the professional criminal that crime would not pay, if swift and adequate punishment were to be its sure reward. For the professional criminal values his liberty as much as does the average law abiding citizen.

The processes by which punishment is determined and meted out to the wrongdoer operate substantially through our criminal courts. Parenthetically, though, it must be observed that the Department of Justice, in certain of its brilliant campaigns against organized bands of outlaws in recent months, has left very little, if indeed anything, for the Courts to do in those cases.

It is highly important that we inquire into the functioning of our Criminal Courts; for to the extent that they may fail in their duty, encouragement is given to our criminal classes.

The mere fact that the subject "Are the Criminal Courts Doing Their Duty?" has been assigned to me by our distinguished Attorney-General for discussion at this conference, is of itself strongly suggestive of the opinion that, in certain respects at least, our criminal laws are not always properly enforced by the courts.

Obviously, it is impossible, within the limitations of time which reasonably must be imposed upon me in this discussion, to deal with all the elements which at times have tended to impair the efficiency of our Criminal Courts. I shall, therefore, consider but a few of them.

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\*An address delivered at The Attorney General's Conference on Crime, Washington, D. C., Tuesday, December 11, 1934. This address is published in cooperation with the committee on the criminal code of The Kentucky State Bar Association. The conference inaugurating a war on crime, national in scope, was largely attended. All of the states were represented by judges, prosecuting attorneys, teachers of law, heads of police departments, and representatives of state bar associations.

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It is trite to say that the prosecution of criminals must be fearless, and that punishment must fit not only the crime but the criminal as well. These things cannot follow where prosecutors and judges are politically minded; nor where they are chosen, not so much for their recognized ability and integrity, as for their political subserviency. We have seen in too many of our communities shocking evidences of partnership between professional and organized criminals and professional and plundering politicians.

Across the facade of the imposing building which is the County Court House in the Borough of Manhattan, City of New York, there are carved the words, "THE TRUE ADMINISTRATION OF JUSTICE IS THE FIRMEST PILLAR OF GOOD GOVERNMENT." This sentiment could well be engraved upon every court house in the land. But it were far better that it be indelibly inscribed upon the hearts of all the men sitting upon the benches of our courts, as a ceaseless inspiration to them in the discharge of their judicial duties.

This is, however, almost too much to hope for in those cases where the judicial ermine is draped around the shoulders of one who is a mere political henchman, or of one who has purchased his robe at the political bargain counter. That some judicial robes have been so acquired, was conclusively established during the current year in a public investigation recently conducted in one of our great Commonwealths.

Particularly does it impress me that it is the duty of local Bar Associations to be ever vigilant about the type of men who go upon the bench in their respective communities. Who sponsor these men? What are their qualifications? Why was preference accorded to them over others? These questions, and others of similar import, might well be pressed and answers insisted upon by the Bar Associations, with great advantage to the public interest and to the cause of justice.

There are instances where our Criminal Courts have failed in their duty, not because of the ineptitude of judges, but because of archaic laws of procedure, and of substantive law.

In their sound wisdom, our legislative bodies have passed laws designed to safeguard the innocent man against conviction. Such laws are expressive of the highest aspirations of public justice, and should be jealously and zealously enforced where they really do protect the innocent.

Some of these laws, however, instead of preserving the liberty and the reputation of the innocent man, have developed into impenetrable shields of defence for the guilty man against the worthiest efforts of well founded prosecutions.

I refer especially to the Constitutional provision against self-incrimination. I am aware that this provision was written into our fundamental law by the founders of the republic, and that their commendable purpose was to keep the soil of America free from the barbarous and frightful inquisitions practiced under legal sanction in Europe, by means of which confessions were extorted from accused persons regardless of their truth. Were the repeal of this provision to be followed by laws permitting the application of torture to accused persons to secure confessions, I would urge that we cling to this Constitutional guarantee as tenaciously as we cling to life itself. But no sane person would advocate the enactment of such laws today.

What, in actual operation, has been the effect of this principle against self-incriminations? Let me recall to you the far from edifying spectacle of a former head of the Department of Justice, whose conduct was the subject of inquiry before a Federal Grand Jury some years ago. He was called before the Grand Jury for questioning about his own acts. But he avoided it by invoking his Constitutional rights against self-incrimination. In asserting these rights, he necessarily had to make the specific claim that his answers to the questions propounded to him might tend to incriminate him. He could not truthfully have advanced this claim unless his acts or conduct had been such that his answers to questions respecting them might have revealed their criminal nature. Yet, the very purpose of the inquiry was to ascertain if he had committed criminal acts. Had he been innocent of any wrongdoing he could not honestly have claimed that his answers would have tended to incriminate him. Hence, there would have been no occasion for invoking his constitutional rights to avoid an unjust accusation.

I cite this instance, not as an exceptional case, but simply because it readily comes within the recollection of all of us. But it illustrates exactly how this constitutional protection against self incrimination, in every case where it is claimed in good faith, is a refuge for a wrongdoer and not for an innocent man.

Let me seriously urge consideration for the breaking down

of this barrier against the ascertainment of the truth. In its place let me suggest a method by which it would be possible for our law enforcement agencies to examine an accused person without placing him under disadvantages repugnant to fairness or justice.

It should be required, as a condition to such an examination, that the accusation itself be made under oath, so that the penalty for perjury might be incurred by one making a false accusation. Then upon the apprehension of the accused he should be brought before a magistrate and publicly subjected to a preliminary examination solely upon the issues directly involved, and not upon any collateral issues. Upon such examination, the accused should have the right of representation by counsel. His testimony should be available for use against him upon any subsequent trial or hearing for the final determination of his guilt or innocence.

As an accompaniment to such procedure, there should be suitable provisions rendering inadmissible in evidence alleged confessions obtained through any other medium from persons so accused. This would largely tend to eliminate recourse to the brutal and brutalizing "third degree," by which the one person acts as accuser, judge, jury and executioner of one who may just as likely be innocent as guilty.

We frequently hear complaints based upon the undue protraction of criminal trials with resultant miscarriages of justice. In many instances, this complaint is probably well founded. In some of them, the responsibility for the inordinate lengthening of trials unquestionably rests upon the presiding judges, who extend too much latitude to counsel for cross-examination of witnesses upon collateral issues. Because of this excessive use of cross-examination on collateral issues, the cases are not rare where the verdicts of juries turn more upon these collateral issues than upon the issues directly at stake.

Nor is it an unusual thing for juries to become confused as to the real issues where too great an emphasis is permitted to be placed upon collateral issues. Then when they retire to the jury room after hearing the Court's charge to acquit the defendant if they have a reasonable doubt of his guilt, they are apt to mistake this confusion for reasonable doubt and hence to acquit the defendant.

I do not deery or underestimate the useful purposes of

cross-examination to test the probative value of testimony given by witnesses. But surely these purposes may be adequately served without permitting counsel to indulge in cross-examination upon collateral issues to such an extent that the real issues may be obscured or distorted beyond recognition.

In the unreasoning criticism that is often flung at our Courts, we frequently fail to give adequate consideration to the prime importance of the functions of the trial jury in our criminal cases.

After all, before the just penalties of the law may be inflicted upon a wrongdoer, a jury must first pronounce him guilty. Bear in mind, too, that in our Federal courts as well as in the majority of our States, such a verdict must be agreed upon by all twelve members of the jury. For in those jurisdictions, we still hold fast to the absurd requirements of unanimity in cases of conviction.

Almost any prosecutor will be able to cite you instances from the pages of his experience, where guilty scoundrels went unwhipped of justice because a single juror out of the twelve held out for acquittal.

A desperate criminal on trial for his life or liberty, is indifferent as to the methods which may be employed to prevent his conviction. He is intent only upon one thing—the thwarting of successful prosecution. And so long as this may be accomplished by corrupting a single juror, that will be resorted to wherever possible.

This crime of jury corruption is one which is inherently difficult of legal proof, because it is consummated with the utmost stealth and circumspection. It could, however, be greatly overcome by amending the law so as to make a verdict arrived at by ten out of the twelve members of a jury decisive of the case. It would then be necessary to corrupt at least three members of a jury in order to defeat justice by venal means. It would be virtually impossible to reach out for three jurors who might be potentially corruptible without leaving behind some evidence of their attempted prostitution.

We accept with equanimity decisions vital to our economic and social well being when made by divided bodies. Business problems arising in our great industrial corporations are determined by a majority vote of boards of directors. Even in our judicial system, questions of vast importance to the com-

mon interest may be decided by a bare majority of the judges composing our highest courts of review. And yet, in most of our jurisdictions, we still fatuously insist upon unanimous jury verdicts upon the relatively simple questions of the guilt or innocence of the accused.

We find ourselves many times quarreling with verdicts of acquittal rendered by juries where it seemed to us that the evidence conclusively established guilt. The action of such juries is frequently condemned as emanating from the heart rather than the head.

This criticism often is made most vociferously by hard headed, clear thinking men of affairs, who themselves have never served on juries because of their studious efforts to evade such service. I know of many such citizens who practically disfranchise themselves in order to avoid being drawn for jury service. That is to say, they deliberately refrain from registering as electors or voters, because of their fear or belief that such registration would result in their names being placed upon the jury rolls.

The importance of the jury in our system of criminal jurisprudence cannot be overemphasized. The sound administration of justice requires the honest and intelligent cooperation of honest and intelligent citizens sitting in the jury-box. Altogether in too many instances those best qualified to give our courts that cooperation, sedulously seek to avoid jury service.

To those citizens I say that they are shirking from a public duty as important as any which the State may require of its loyal, law-abiding citizens in times of peace. They are definitely slackers in the great public undertaking of enforcing through our courts, that respect for law and duly constituted authority which means so much for the safety, security and happiness of the people of America.