



1917

Economy in Criminal Prosecutions

John C. Duffy

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Criminal Procedure Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Duffy, John C. (1917) "Economy in Criminal Prosecutions," *Kentucky Law Journal*: Vol. 5 : Iss. 3 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol5/iss3/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Kentucky Law Journal

VOL. V

LEXINGTON, KY., JANUARY 1917

NO. 3

ECONOMY IN CRIMINAL PROSECUTIONS.

An Address Delivered by John C. Duffy, Special Assistant Attorney General, Before the Joint Association of Circuit Judges and Commonwealth's Attorneys, in the City of Louisville, December 28, 1916.

Mr. President and Gentlemen.

My efforts were begun for the sole purpose of reducing the cost of criminal prosecutions to the State, but the question has really resolved itself into a question of greater efficiency in criminal prosecutions. The cost to the State, it now seems to me, is but one of the incidents of, or results of a cumbersome criminal procedure which should have been amended years ago. These faults in our system have been added to by many practices and customs, which should be abandoned, not only for a more efficient criminal practice, but for the good of the profession and the public.

I am not in sympathy with the hue and cry against necessary forms of procedure, adopted by the courts for the protection of the right of life and of property, but there are many reforms which could render our courts of law real courts of justice. Some of these are faults of our judicial system, and others are due to many little things in the practice which have grown up to hinder and delay when greater dispatch was not so essential.

Complaints of the delay of the courts are doubtless as old as the

courts themselves, and will probably continue as long as courts continue, but they should, if possible, be made to continue with less reason.

Ex-President Taft, who is noted for conservatism, in an address delivered before the Cincinnati Law School, in May, 1914, and published in the Kentucky Law Journal, Vol. V., No. 2, among other things said:

“If we could remedy the delay and reduce the cost of litigation, there would be very little practical reason to complain of our judicial system.

“* * * When we come, however, to the two defects of delay and excessive cost of litigation, we have a problem much less easy. The enormous expansion of our population, of our commerce at home and abroad, the tremendous increase in business and in the number of transactions that call in the ordinary course of things for litigation and resort to the courts, have swamped a system that was adopted in more primitive times, and was adapted to conditions of a people living in rural rather than in urban communities. Where time does not seem to have been so important, where trials in court were leisurely and deliberate and were allowed to be such because they were a part of the entertainment and education of the people, the custom of delay became so inveterate as to seem to inhere in any proper judicial system. We took our law and our procedure, much of it, from our English ancestors, and the course of our law has been very much influenced by the course of English law and English procedure at a time when English procedure was at its worst, both in respect to dispatch of judgment and cost of litigation.”

Since the American colonies severed their relations with the mother country, reforms among us have been much more difficult and much slower of accomplishment than in England. We crystalized our thought in written constitutions which we have made most difficult of amendment, and the making of our laws has been delegated to legislatures, the machinery of which is as antiquated and cumbersome as the laws which we would have amended, and our criminal procedure has been but slightly modified in a century and a half. On the other hand the Constitution of England and the laws of Parliament have been made respon-

sive to the will of the people, and their system of judicature has been modernized through the labors of two great Lord Chancellors, which has worked a great reform.

There are two causes of delay in our criminal procedure:

First. Those which are due to the system.

Second. Those which are due to faults in the administration of the system.

Those coming under the first head can only be remedied by action of the General Assembly, and a joint committee of your associations should consider and recommend such changes as you may think desirable. But in order that such action may not appear to be inspired too largely by the prosecution in criminal cases, it might be well to have a committee of the State Bar Association to collaborate with you in the preparation of amendments to the Criminal Code. Some of the provisions of the Criminal Code which we now have would seem to have been prepared by counsel for the defense.

Last summer, in his speech before the State Bar Association, Judge Robinson related a number of incidents growing out of the present law which provides for a vacation of about four months during the summer in his court, while persons accused of crime are compelled to lie in jail waiting a trial. It is needless to say that these unfortunate people are not getting the fair and speedy trial which the Constitution has vouchsafed to them. There is no private concern which could or would conduct its affairs in such an unbusinesslike manner, or in such total disregard of the rights of those who depend upon it for anything. It is only a long suffering public which could tolerate such methods in the conduct of its affairs through generations.

Another familiar cause of delay is seen in the method of prosecution of crimes and offenses above the jurisdiction of county judges and magistrates. A citizen of one of your counties is assaulted and beaten by another, and proceeds to the county seat and swears out a warrant of arrest before the County Judge. In due time, or in undue time, the offender is arrested and brought before the County Judge. He demands an examining trial; the case is set and the witnesses are subpoenaed, but do not all ap-

pear; the trial is postponed from time to time, but finally both sides announce ready, and the trial proceeds. Possibly after the Commonwealth has introduced all its proof the defense may decline to introduce any proof, and the case goes over to the Grand Jury. The Grand Jury may meet in one, two or three months and all the witnesses are compelled to return before the Grand Jury. They then return home, and, if an indictment is returned, they will be subpoenaed for another day in that term or the succeeding term, when the case may be again continued, and so on until the witnesses are thoroughly disgusted and worn out before a trial is had. If it should happen that there is a mistake in the name of the person shot, or of the owner of the property stolen, or even of the person assaulted, the indictments must be dismissed and resubmitted to the same or another Grand Jury, before the defendant can be tried, even though he may have decided to plead guilty. If the Grand Jury is not in session another must be called or he must be held over to the next term of court, at the expense of the State and loss of liberty to the defendant.

These limitations and restrictions have all been retained to protect the rights of the accused, and certainly nothing should be done which would deprive him of any of his rights, but many of them are unnecessary, and not a few of them stand in the way of the fair and speedy trial to which the accused is justly entitled.

I am of the opinion that the Grand Jury itself has very largely outlived its usefulness, and since it cannot be abolished short of a Constitutional Amendment, the unnecessary trouble and expense occasioned by it should be lessened as much as possible. Under Sec. 12 of the Bill of Rights of our Constitution, "No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or the militia when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office."

Under Sec. 1141 of the Kentucky Statutes, it is provided that in misdemeanors where the highest penalty that may be imposed is a fine of one hundred dollars and imprisonment for fifty days, the prosecution may be by warrant or information in any court having such jurisdiction. It seems to me that this provision should

be extended to all misdemeanors created by statute, and that the indictment should be limited to those crimes and offenses specified by the Constitution, as indictable offenses. There is no sufficient reason why all misdemeanors permitted by the Constitution should not be tried upon warrant, information or penal action. The saving in time and costs would be enormous, both to the courts and to the public.

The rule which prevents the court from amending an indictment on motion of the Commonwealth's Attorney, where the amendment would only relate to the language of the indictment and would not change the nature or degree of the offense, seems to me to be carrying precautions for the protection of the accused to an absurd degree. This rule should be abolished and the court should have the right to permit an indictment to be amended at any time, before the accused has been placed in jeopardy, most certainly where the amendment only changes the language of the indictment and not the offense charged. Of course the Commonwealth now has the right to waive a higher degree of the offense in an indictment at any time.

The accused in felony cases is now allowed fifteen peremptory challenges in addition to all those for cause. This has long been recognized as one of the chief causes of delay in the prosecution of felony cases, and numerous attempts have been made to amend the law, but without result. No one connected with the execution of our criminal laws should desire to do anything that might result in the conviction of an innocent person, or that would interfere with a fair trial. On the other hand society is entitled to protection from unnecessary cost and delay, and is vitally interested in the conviction of the guilty.

The probability of convicting the guilty in a felony case is by this law rendered unnecessarily difficult and costly, and the remoteness of conviction among some classes doubtless increases the prevalence of crime.

There is one other matter which I feel like suggesting for your consideration, and that is the fee system on which you are paid. I doubt very much whether it is the most economical plan for the Commonwealth, and, besides, I have never liked the idea of a prose-

cuting officer having a pecuniary interest in the conviction of any one. Certainly it is unethical. Public officials should have no motive other than that of duty to prompt them in securing the conviction of any one accused of a public offense. Neither should there be any temptation of this nature to induce the attorney to reduce felonies to misdemeanors. Once a humorous member of the profession in Western Kentucky was seeking to compromise a felony charge, and the Commonwealth's Attorney hesitated because of the nature of the offense. The attorney then said with a smile: "When the Commonwealth placed you upon a commission, it expected you to do a commission business." It would be better for the Commonwealth to pay its district attorneys a reasonable salary. Then there would be no excuse for failure to prepare cases for trial, and on the whole, I believe it would be more economical and better in every respect than the present system. This change, however, could only be effected through a Constitutional Amendment. In fact there are very few reforms that can be.

The court room has always been one of the centers of our social and political life, and the criminal trial in many of our communities is still the event of greatest public interest and entertainment. The court house, picturesquely situated, in the center of the public square, is the concrete expression of its importance in the life of the county seat. The first day of circuit court has been a day of affable greetings, and the court in some communities is not expected to do more than to impanel the juries, and possibly to instruct the Grand Jury, which in some instances constitutes an elaborate discussion of the criminal laws.

In speaking of this question recently to one of our learned judges, he laughingly asked me the question, "Do the people want greater efficiency?" Apparently that is one of the greatest obstacles to the reforms needed. Certainly they have never voiced that desire in any formal demands, but I am convinced that the best element of our citizenship wants greater efficiency and economy, now, and that all will be pleased with it. The present generation has seen absolutely no improvement in our procedure,

and, while dissatisfied, the public has little reason to hope for any improvement.

It is generally believed that it is more dangerous to violate a federal law than a State law, that is, that there is less liability of escape from conviction. It may be that their juries are less subject to local influences than ours.

There may be some prejudice among the members of the profession against the apparent haste in criminal prosecutions in the federal courts, but we can learn and adopt their methods, in many particulars, to very great advantage. The first day of court is never wasted in the federal courts which I have attended. The witnesses and parties have learned that they must be on hand at the time court convenes. The evidence of all witnesses for the government is reduced to affidavit in advance, and the indictments expected to be returned are all prepared and ready for the Grand Jury before it meets. The District Attorney attends to the prosecution of continued cases, and the Assistant District Attorney attends to the examination of witnesses before the Grand Jury. As soon as the continued cases are disposed of, the cases returned by the Grand Jury are taken up and many of them are tried the same day. The work of the Grand and Petit Juries for an entire division of the Federal Court is often disposed of in a single day. There may be too much haste at times, but the method of preparing and disposing of cases is admirable. The best citizens do not seriously object to jury service, when business is handled with such dispatch, but under our system they are constantly beseeching the court to excuse them from service. Right here is the most serious defect in our practice under existing laws. There is a woeful lack of co-operation in the preparation of cases for trial, prior to each term of court.

I stated before the State Bar Association that if any lawyer should make as little preparation for the trial of civil cases, or in the defense of criminal cases, as the average Commonwealth's attorney does in the prosecution of criminal cases, prior to each term of court, he would have to abandon the profession. I say this with the most profound respect for you gentlemen who now hold these positions, and who have honored me with this invita-

tion to address you today, and my reason for stating it so strongly is prompted by as unselfish a motive as I am capable of being controlled by. It is a practice inherited from a long line of able predecessors who practiced according to the leisurely system of our ancestors, and which was a part of the popular and entertaining customs of past generations. You were in nowise responsible for this condition in the past, and from the generous response which I have received in answer to my suggestions, I am sure that you will not be responsible for its continuance in the future.

The necessity for preparation in the trial of criminal cases must be apparent to each of you, and no amount of native ability or of professional skill can compensate for it. If this preparation is not made the work of the courts must be delayed and neglected.

If the preparation of cases in advance of court is a good thing for the Commonwealth in a saving of time and money, it must necessarily be good for you.

In most counties all the cases which it is necessary for the Grand Jury to investigate, it seems to me, could be known in advance and the witnesses should all be summoned before the Grand Jury meets.

The indictments in such cases and in all cases held over to the Grand Jury should be prepared before the term of court convenes. The continued cases should be set with the greatest care, taking into consideration the probability of trial in each case, and the length of time required for trial. The case for the Commonwealth and the defendant should all be gone over, and all the witnesses whose evidence is competent should be subpoenaed, and only those. Thousands of dollars are spent annually for the attendance of witnesses who should not have been called. The evidence of some is incompetent, some cumulative and that of many others entirely worthless. On the other hand, some of the most important witnesses are not summoned at all and the trial is delayed at the great expense of the Commonwealth.

The conclusion to be drawn from all these suggestions is, that to do all these things it will be necessary for the Commonwealth's Attorney to visit each county in the district prior to each term of court, and that will work a hardship. I do not know to what ex-

tent the Commonwealth's Attorneys are accustomed to visit the counties of their districts, prior to each term of court, but I am convinced that the practice is not general. Most of you are, doubtless, men of families, and absence from home for any purpose is undesirable and always expensive; but, taking all these things into consideration, I am still of the opinion that it will be the best for you and best for the Commonwealth, for you to spend all the time in advance of each term of court, which may be necessary to achieve the best results. Time spent in preparation will save time during the court, and your success will be greater with a corresponding increase in compensation. You will have more effective co-operation from the other officers of the court, and especially more co-operation from the County Attorney, who should be made your actual assistant. Unless all our ideas as to the necessity of preparation in the trial of all cases is professional nonsense, it is necessary for the Commonwealth. No amount of professional ability can compensate for it. This preparation is both objective and subjective, both to the attorney and to the case. If you depend upon somebody else to prepare your case, you yourself will not be prepared. No successful attorney would think of doing less than this in private practice, and you cannot afford to do less for the Commonwealth, which is your senior partner and client.

But, in addition to all that the Commonwealth's Attorney should do in the preparation of his cases, there is a class of work which he cannot do and perhaps cannot afford to do on a salary of \$500 per year and that is the class of work usually done by the law agents or the special agents for railroad attorneys in the preparation of their cases for trial. He might perhaps consent to this—the work done by the law agents—but would not consent to do the work done by the special agents. The Commonwealth's Attorney has no one to do this class of work for him, and when his cases are called he has no statements or affidavits as to what each witness will state. Many witnesses are subpoenaed who should not have been and whose evidence is worthless or cumulative, and many important witnesses are often omitted entirely, and in fact all that work which a first class law agent or special

agent can do in the preparation of cases for trial is left undone for the Commonwealth. The State now provides a small sum for detective service, and this has been found to be a very valuable service; but there should be a law agent or special agent in each judicial district of the State, at all times under the direction and control of the Commonwealth's Attorney. A great saving could be accomplished in fees now paid to grand juries and petit juries and in witness fees and the prosecution of criminal cases would be far more efficient and effectual in this State.

The cost of criminal prosecutions to the Commonwealth for the fiscal year ending June 30, 1915, was \$361,813; for the fiscal year ending June 30, 1916, \$330,000. This represents a reduction of nearly \$32,000 in a single year, and it is to be hoped that you may be able to make it \$150,000 for the present year. I am thoroughly convinced that it can be done, by your earnest co-operation.

This does not include the salaries of Commonwealth's Attorneys, nor the cost of juries. The cost of grand juries for the fiscal year ending June 30, 1916, was \$75,872 and the cost of petit juries for the same year was \$327,558.30; the total costs of both petit juries for the year being \$407,382. Probably one-half of this total was due to criminal prosecutions.

There are a number of suggestions which I have received from Commonwealth's Attorneys which could be followed to great advantage, which I will leave to them to make. The thing that I desire most, is to secure your earnest co-operation in seeking such amendments to our criminal laws as will aid you in rendering the greatest possible service to the State, and in adopting such methods as will result in greater economy and efficiency in the prosecution of criminal cases under existing laws.

This is a time of great activity in almost every department of human endeavor. The people everywhere are studying the questions of government, and are demanding greater efficiency in every department of the public service. They are demanding better schools, better roads, better systems of taxation, and equity and justice with less cost and without unnecessary delay.

Real progress in every science is necessarily slow, and but few

enjoy the distinction and the honor of adding to the sum of human knowledge. Our criminal law is as old as our civilization, and innovations are not welcomed generally by the profession, yet certain genuine reforms are demanded. There is no body of men in the State as well equipped as you are for preparing these reforms in our criminal procedure, or whose opinions would have greater weight with the legislature. The question of improving our practice under existing laws or the laws as amended, rests entirely with you. This is a great opportunity for you to serve the people of your State. The opportunity, the responsibility, the honor, are all yours. If you have the desire, you will find the way.

o

THE PENAL ACTION.

Address Delivered by Honorable Charles Carroll, of Bullitt County,
Before the Commonwealth's Attorneys' Association of
Kentucky, December 28th, 1916.

Mr. President and Members of the Association:

I have long since learned that a long talker is an abomination to his hearers, and will govern myself accordingly.

Actions of this character are of ancient origin and are treated at some length by our old and neglected friend, Blackstone, in his entertaining work, "Commentaries on the Laws of England." It appears from this venerable and learned writer that in ancient days penal actions in nature of informations were of two sorts: First, those which were partly at the suit of the King and partly at that of a subject; and second, such as were only in the name of the King. The first were brought upon penal statutes which inflicted a penalty upon conviction, part of the penalty going to the King, the other part to the informer, and it seems they were carried on by criminal instead of civil process. Of the second character of actions, there were two kinds; one of which was brought in the name of the King by the Attorney General, and another on the relation of some private person or common informer, and were filed by the King's Coroner and Attorney (usually called the "Master of the Crown Office"), in the Court of King's Bench.