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## HOW THE CRIMINAL ESCAPES THE LAW AND HOW TO STOP HIM.

SINCE the late Chief Justice Taft, a quarter century ago, declared that the administration of criminal law in this country was a disgrace, conditions have grown worse and the disgrace has become an alarming menace. Serious crimes are daily committed for which no one is ever convicted, and widely known criminals openly travel the streets of the second city of the Republic immune from even arrest. Nor is this astounding fact peculiar to Chicago, but, to a greater or less extent, obtains in most of the large cities of the country. The hazard of punishment for crime has become so slight that potential criminals readily accept it. The Operating Director of the Cleveland Association for Criminal Justice estimated, upon carefully assembled data, that, in Ohio, the chance of being sent to a penal institution for crime was one to twenty-four, *i. e.*, that the criminal had twenty-four chances to escape imprisonment to one that he would undergo it. Examination of the data tabulated by the Chicago Crime Commission leads to about the same conclusion. Such a hazard would not deter anyone from going into business, and it is not sufficient to deter anyone from engaging in a criminal career. Many considerations may induce people to refrain from the commission of crime, but likelihood of punishment through the administration of the criminal law is not one of them.

Everybody conversant with the facts agrees that this state of affairs exists, and that it is a threat to government itself. Everyone agrees that it is a monstrous evil and an ever-present menace to the security of life, limb and property. Everyone admits that, in many cities, there is a substantial breakdown of the law-enforcing agencies. And yet, with few exceptions, nothing really effective is being done about it. Bar associations adopt high-sounding resolutions roundly denouncing the evil, and then adjourn to their several homes with the feeling that a duty has been performed. High officials of the government say that "there must be reverence for law," and that "respect for law should be fostered," to which pious platitudes no one takes exception, least of all the criminal himself. As long as nothing is actually done to make the machinery for the administration of criminal justice function effectively, he plys his trade in placid contentment and insolent security. When the people are aroused their representatives in the legislatures usually make two characteristic blunders: (a) Make the penalties so severe as to make convictions very difficult, if not impossible; (b) Make it a felony for anyone to carry a concealed weapon, thereby disarming the law-abiding citizen, at the same time knowing that the criminal will go armed whatever the law may be. Having embalmed these typical errors into statutes, the legislators go home with a feeling of having heavily contributed to the "war on crime." The psychiatrists prescribe more psychiatry, blissfully unaware of the fact that their theories logically lead to the conclusion that nobody is responsible for anything. None of these measures will remedy the evil, which requires a liberal application of common sense.

The design of this article is to inquire into the real causes of the failure of the machinery of the state to function effectively for the protection of its citizens from crime, to consider the value of remedies for its betterment that have been applied, and, perhaps, to suggest other remedies. In preparing this article, the author has been afforded the privi-

lege of examining the voluminous and valuable reports and data of the Chicago Crime Commission and the Cleveland Association for Criminal Justice, as well as an extended correspondence with Col. Henry Barrett Chamberlin, the Operating Director of the first named, and Miss Leona Marie Esch, the Operating Director of the second. I here make grateful acknowledgments to each of these two experienced and highly skilled investigators for material of inestimable value which they have generously furnished. The writer, also acknowledges his indebtedness to Judge George A. Shaughnessy of the Municipal Court of Milwaukee for data and suggestions of equal interest and value. In addition, the author has had four years experience as a prosecuting attorney, during which he tried nearly 200 criminal cases. That is the background. We now consider *causes* of the grossly ineffective administration of criminal justice in a great many, if not most, of our large cities.

## I.

### *The Political Underworld.*

No intelligent consideration of this subject is possible without, first of all, taking into account the political influence of the so-called "underworld" of large cities as it exerts itself upon law-enforcing agencies. And it must constantly be borne in mind that this rather loose designation embraces not only the large number of urban dwellers who are actually engaged in criminal activities and their immediate kindred and friends, but, also, that far greater number who, for various reasons, are in sympathy with, or, at least, tolerant of them. For example, the butcher, baker and candlestick maker whose business thrives upon the patronage of the active criminal element and their friends, rarely exerts himself to destroy the source of his profit. For similar reasons, managers of corporations seeking fraudulent special privileges from municipal governments are in no position to de-

mand an honest administration, since such an administration would defeat their purposes. They are what is euphemistically known as "practical men," or "farseeing men," albeit some of them have not had sufficient prevision to escape the penitentiary. Taken all together then, the *political* underworld of any large city consists of many thousands of voters,—just how many it is, of course, impossible to say. But it is numerous enough often to control, and always to influence elections, a significant fact of which candidates for public office are keenly aware, not only when they are candidates for the first time, but, also, when, during their terms of office, they are preparing to run again. This evil political underworld, in cities in which the two major political parties are of about equal strength, is numerous enough to control general elections absolutely, and, in other cities, to control primary elections for the nomination of candidates for office to a very great extent. And this is true, not only on account of its numbers, but on account of its quality.

The political underworld has certain unfailing characteristics, *viz.*: (a) Complete absence of partisan allegiance; (b) Absolute solidarity; (c) Unquestioning obedience to the Big Chief; (d) Capacity for instant political action; (e) Ruthless political reprisals; (f) Knowledge of municipal affairs in so far as their interests may be affected. Added to this, the leaders closely watch the conduct of public officials, and exact strict performance of all promises. In this, they differ from the mill run of folks, who are content with mere attractive promises. Such a tremendous political power is to be reckoned with by any candidate for public office, who is the particular kind of candidate who is ready to reckon with that particular kind of political power. It is a force as mobile and as relentless as a detachment of guerilla cavalry, is always influential and often decisive in elections. It is the evil force which too often elects candidates for public office who are subservient to its purposes. The average citizen is far more intent upon the success of his party than discrimi-

nating in the choice of candidates. Moreover, it must be admitted that political managers sometimes treat this political force with suspicious toleration, if not downright friendliness. The exigencies of political warfare are sometimes thought to be imperious.

The foregoing is a fair picture of the political underworld as it exists in many large cities today, and the fact simply cannot be blinked that it applies pressure of a persuasive kind to many police officers, prosecuting attorneys, witnesses for the state, and even to judges on the bench of trial courts. This pressure often, if not usually, accounts for multiplied continuances of criminal cases, the acceptance of fictitious bail, the waiving of felonies and accepting pleas of guilty to misdemeanors, and all the other tricky tactics for the obstruction and defeat of justice, including the time-tried *nolle prosequi*. It is idle to deny or to attempt to minimize these ugly facts, for the proof of their widespread existence is conclusive.

## II.

### *Unreasonable Delay in Bringing Cases to Trial.*

The next most important factor in defeating criminal justice is unreasonable *delay* in bringing criminal cases to trial. Delay is absolutely essential to the success of the criminal's plan for "beating the law," which, again euphemistically is often referred to as "preparing for trial." Without delay, the criminal cannot marshal the sinister political influence of the political underworld to influence or intimidate the prosecuting attorney, or the witnesses for the State, or spirit such witnesses out of the State or out of the country. Without delay, he cannot so easily arrange "fake bail" to secure his release from custody. Without it, he is not in as good position to "bargain" with the prosecuting attorney for a modification of the charge against him. To the criminal, delay is a *sine qua non*, and it always operates in his favor. His attorney blandly asks for time in which to "prepare for

trial," and he is clearly entitled to a reasonable time for that purpose. Nobody questions that, but, while such request has a fair sound, it too often turns out to be a ghastly mockery in actual practice, for, instead of preparing for trial during the time allowed him by the court for that purpose, he is really engaged in an attempt to avoid trial altogether, or in trying to have the charge against him minimized, or in weakening the State's case by intimidating or corrupting its witnesses, or in arranging for perjured witnesses to construct a false defense. Ostensibly engaged in preparing to meet the State's case, he actually occupies himself in one or the other or all of the corrupt activities named. And, when some of the efforts are successful, often the prosecuting attorney is compelled to dismiss the indictment because the memories of the witnesses for the State have strangely lapsed since the indictment was found, or they have gone beyond the jurisdiction of the court. Thus, when once unreasonable delay enters into a criminal case, it progressively tends to weaken, nullify and thwart all subsequent efforts of the State to secure a conviction.

How does the criminal defendant secure this delay?

First, by attacking the legal sufficiency of the indictment against him, by interposing demurrers, motions to quash and other dilatory pleas thereto. This the defendant has a perfect legal right to do even though such attacks border upon the frivolous, and the writer would be the last to deny him that right. It is axiomatic that no person can be put upon his trial unless and until a valid indictment or information has been duly filed against him sufficiently charging a criminal offense. And the defendant's counsel has a perfect legal and moral right to present and argue such objections and to be patiently and fully heard upon them, and to see to it that a valid charge has been duly made against his client before arraignment. Nobody denies or questions this. But what happens in actual practice? What happens is that, at the

conclusion of the argument, the trial judge too frequently "takes the matter under advisement," and so keeps it for weeks and even for months before passing upon the question, thereby, consciously or unconsciously, aiding the criminal. This "taking under advisement" by a trial judge is another of those things which have an outward appearance of fairness, without having much, if any, substance, since any judge of ordinary ability is able to pass upon the usual dilatory plea, within a day or two after it has been submitted for decision. In this respect, the trial judge occupies an almost impregnable position for no one would contend for a moment that he should act hastily, and no man can measure with certainty the speed of another's mental operations. Very often, too, the judge takes the "matter under advisement" to avoid giving offense to the defendant's counsel by an immediate ruling which might imply that counsel's position was nonsensical.

After these preliminary objections have been overruled,—as the defendant's counsel likely knew they would be,—at last the defendant is arraigned and pleads "not guilty." Thereupon, although likely the defendant's counsel has all along been contriving a defense, he asks the court for "a reasonable time in which to prepare for trial," and to this he is clearly entitled. But just what is "a reasonable time"? I am informed that, in Chicago, there is a sort of general understanding at the bar that 60 days is a reasonable time, notwithstanding the many means of rapid communication we have. During 60 days, the defendant could make at least four round trips to Europe and have time to spare. As a matter of fact, 60 days is unreasonably long, and 30 days is ample as will hereinafter appear. But, even though we concede 60 days to be reasonable, what is the likely situation at the end of the 60 days? Why, instead of being prepared for trial, the defendant comes into court with an application for a continuance, on the ground, perhaps, that there is a very material and necessary witness for the defendant whose



whereabouts he has been unable to discover. Often, this witness is entirely mythical, but it would be unsafe for the trial judge to overrule the application as it might constitute reversible error, that is that, in case of a verdict of conviction, there might be a reversal in an appellate court. So the defendant is again successful in his quest for delay. Nor does this process end there, for there may be subsequent applications for additional time. Often the prosecuting attorney agrees to a continuance.

How general is this evil of unwarranted continuances? Let us look to authentic sources for the answer. On August 24, 1928, Col. Chamberlin made a report on this subject to Frank J. Loesch, President of the Chicago Crime Commission, as he found it in the Chicago courts, and I quote from the second paragraph of this voluminous report as follows:

"1. Continued six or more times and still pending disposition there were 383 indictments on the docket of the Clerk of the Criminal Court August 11, 1928. The 383 indictments involve 428 defendants. The crimes include all classes of felonies including murder. Figuratively, the 383 cases have been continued 3,855 times before 945 judges.

"2. Two cases have been continued 44 times before 11 judges; one 44 times before two judges; two 38 times before nine judges; one 36 times before seven judges; five were continued from 31 to 35 times; six from 26 to 30 times; twenty from 21 to 25 times; fifty from 16 to 20 times; ninety from 11 to 15 times; and 203 from six to 10 times."

The report then gives specific data in 28 indictments showing the number of continuances granted, and the names of the judges granting them, which it is not necessary to repeat here. These continuances produced delays of trials from a few months to several years, during which time there was of course, a great deal of the dispersion and improper influencing of witnesses, if the cases ran their customary course. Moreover, pending these delays, it may be that another prosecuting attorney had been elected who was unfamiliar with the facts in the cases, and thus handicapped.

But some one may point to certain sensational criminal cases wherein the defendant has been brought to trial within a few weeks after the commission of the crime as conclusive disproof of the foregoing. And it must be admitted that where a crime is of a peculiar, or a particularly atrocious kind, the temptation to shine in the headlines produces prompt results. Still it must be remembered that these sensational crimes are usually those involving personal violence, such as murder, and are not the standard crimes of the gangster, such as robbery, larceny, fraud and the like. Moreover, it is to be observed that the fact that defendants charged with crimes that create public interest are speedily brought to trial proves that the official machinery *can* function efficiently when it will. The pressure of public opinion transforms complacent official lethargy into earnest official activity. In a word, it shows that this unreasonable delay is unnecessary. One bad feature of the speedy trial of sensational criminal cases is that it deludes the public into a belief that their law-enforcing agencies need no attention.

In striking contrast to the facts revealed in the report of Col. Chamberlin from which we have quoted, are the facts disclosed in the Report of the Eighth Annual Meeting of the Cleveland Association for Criminal Justice in regard to the average time required for the disposition of felony cases in Cuyahoga county, Ohio. Table 3, on page 12 of this report, shows the time elapsed from arrest to final disposition, and, also, from indictment to final disposition by acquittal, or by conviction and sentence during a period of 9 years, from 1919 to 1929. To economize space, this report will be condensed. It shows that the time elapsed, from arrest of the defendant to the final disposition of the case, ranged from 67 days, in 1919, to 49 days, in 1929. In 1919, the time from indictment till the final disposition of the case by acquittal or conviction was 46 days, and, from 1922 to 1929, this time ranged from 27 days as a maximum to 21 days as a minimum. This demonstrates the absurdity

of allowing as much as 60 days to "prepare for trial," and that, in the ordinary case, 30 days is not only ample, but over-liberal. In Milwaukee, the defendant is usually put upon his trial about two weeks after the commission of the crime with which he is charged. The report from Cuyahoga county, also, shows that the trial courts in that county view with extreme suspicion applications for continuances upon fictitious or frivolous grounds, and that the bar of that county, as it always does, has fallen in with that judicial attitude. It cannot be too often repeated that the whole matter of expedition in the disposition of criminal cases is wholly within the power of the judges of the trial courts, and upon them rests the grave responsibility. The bar of that county have been well advised by impressive judicial example that no tactics for the obstruction of criminal justice, by the time-worn method of delay, will be tolerated. Experience has demonstrated that, when the trial judge promptly overrules frivolous application for delay, the practice of making them suddenly, and almost magically, ceases. Experience, also, proves that, when the trial judge permits unethical counsel to play with the process of the court, that practice will continue and grow increasingly worse. It is the contrivances for delay, so advantageous to the criminal and so harmful to public order and security, in brazen, active operation, and, if tolerated, directly contributes to the defeat of criminal justice. Under such circumstances, one is tempted to enquire, "*Under which flag, O Judex! The Jolly Roger, or the Stars and Stripes?*"

How is this monstrous evil of delay to be eliminated? What is the remedy?

If one were to follow the customary silly and absurd course, he would immediately exclaim, "Pass a law." But that would be wholly useless, since no statute can compel any judge to do his duty, no legislation can make a good man out of a bad man, or an industrious man out of a lazy man. Then what? Sole responsibility for the existence

and correction of this evil rests squarely upon the judges of the trial courts, and the only remedy is to elect good candidates for judges and to defeat bad candidates. Elect the right men to these judicial positions, and they can and will speedily eradicate this abuse. But, how are the people to know which is the worthy and which the unworthy candidate? That is a question most difficult to answer. When there is a well-organized local bar association, the best plan is to follow its recommendations, if they are free from partisanship and self-interest. Speaking at a dinner of the Association of American Law Schools in Chicago in December, 1932, Frank J. Loesch, President of the Chicago Crime Commission, suggested that, perhaps, the only really effective way in which to combat crime was to have appointive judges, and a secret police. Many things might be said in favor of this double proposal, but, possibly, the American people will be unwilling to approve any proposal to take the selection of the state judiciary out of their immediate hands. They might think the likelihood too great that a governor would make judicial appointments political rewards. Some of the federal appointments have not been altogether happy ones, though the Federal bench as a whole is composed of superior men. Then the recent widespread atrocities of Federal "dry agents" are not persuasive in favor of a secret constabulary. At least, however, President Loesch places primary responsibility upon the judges of the trial courts where it, unquestionably, belongs. The theory of an appointive judiciary, of course, is sound. In Canada, where there is real respect for law and real enforcement of law, all judges are appointed for a life tenure of office. If there was a wholesome sense of the grave responsibility in the appointing power, it would be desirable. In those comparatively rare cases in which the defendant is innocent of the crime charged against him, of course the reasons for a speedy trial are greatly multiplied. In no case, is the undue delay hereinbefore referred to justified, or even excusable; and, un-

til it is eliminated from the administration of criminal law, there will be no appreciable improvement. Let none, either innocently or intentionally, distort my meaning. Every defendant in every criminal case should have ample time in which to prepare and present his defense, but the time almost universally allowed him in most large cities is absurdly and unreasonably excessive. To substantially shorten it will lessen the opportunities to concoct a spurious defense; to intimidate, bribe or spirit away witnesses for the State; and to "bargain" with the public prosecutor for a minimization of the gravity of the charge and other similar things, and it will aid more in "the fight against crime" than anything else, and, at the same time, inflict no injustice upon the defendant. His rights are sacred, but the rights of the public are, likewise, sacred.

### III.

#### *Fictitious Bail.*

In order that the defendant in a criminal case may effectively establish contact with the leaders of the political underworld, it is indispensable that he be liberated from prison. He must be free to move about, and talk with these leaders, for their business is transacted almost wholly by word of mouth. So the prisoner must arrange for bail, and, in many cities, the bail for which he arranges is of a wholly fictitious kind, as will presently appear. Often, indeed, the prisoner never intends to appear for trial, but deliberately plans to forfeit any bail that he may give.

Bail, of course, is security for the appearance of the defendant in a criminal case in court at a specified time. When it is furnished and approved, he is liberated from confinement. Usually, the trial judge fixes the amount of the bail, and the clerk of the court approves it. And, usually, the right to be admitted to bail *before* trial, is a constitutional right, which, of course, must not be denied. The prisoner is presumed to

be innocent of the crime charged against him. In the process of applying for and furnishing this bail, if there is ordinary *good faith* and common honesty, the legal rights of both the State and the defendant are amply protected; but, unfortunately, this is rarely true, in large cities. Again, I expressly exclude from the scope of this article the situation as it exists in country districts, where the usual practice is wholly different. So, except in murder cases, "where the proof is evident or the presumption great," the defendant is clearly entitled to be admitted to bail. But what kind of bail does he furnish? In *form*, it complies with the law, but, in *substance*, it is a ghastly mockery. Nevertheless, it operates to liberate the defendant from prison, so that he may make the contacts mentioned, and, also perhaps, enable him to continue his criminal activities to replenish his depleted exchequer. There is nothing new in these facts, which are well known to all who are familiar with the practices in and around criminal courts. The furnishing of worthless "bail" is a regular business along the periphery of criminal courts in most large cities, and a profitable business at that, since the risk of becoming a surety on "bail bonds" is slight. The following is from the report of Col. Chamberlin at the annual meeting of the Chicago Crime Commission on January 15, 1931:

"Notably, almost at the inception of the Commission, was the establishment of a Bail Bond Department in the State's Attorney's office and the enactment of a new bail act after ten years of effort. Now come Grand Jury investigations into the evils surrounding bond *runners*, bail sharks, *conniving officials* and professional corruption. They have borrowed the inscription from the banner of a great order '*in hoc signo vinces*'; but they have changed the sign to that of the double cross."

As indicating the negligible risk assumed by sureties on bail bonds, I quote page 18 of the publication of the Chicago Crime Commission, called "Criminal Justice," under date of December, 1930, as follows: "Bail Bonds forfeited and action taken on bonds forfeitures, week ending May 10,

1930, to week ending May 31, 1930. This was a period of only three weeks, and during that time, bail bonds were 'forfeited' to the gross amount of \$81,000, of which not a dollar was collected, and a judgment rendered for only \$12,500, no part of which was actually collected." It may reasonably be assumed that no collections of the forfeitures were made because the sureties were worthless. No instances are cited in this article except such as are believed to be typical.

The following is from the address of Judge Dan B. Cull, made at the annual meeting of the Cleveland Association for Criminal Justice on May 8, 1929:

"3. Bail Bond Forfeitures: A number of surveys were made of bail bond forfeitures and collections thereon, which indicated the average maximum collection on the bonds to be *two cents on the dollar*. In the majority of cases, judgments were obtained but no collections whatever were made, not even court costs. The 'bail bond evil' was stressed in three bulletins issued to the public. There has been some legislation on this subject in the recent General Assembly which it is hoped will aid in remedying the evil."

Later on, we will see that the evil *was* remedied, but largely through the rules adopted by the judges of the trial courts. Previous to that, however, Bulletin No. 21 of this same Association, dated June 30, 1926, had this to say on this subject:

"The inadequate enforcement of Bail Bond Laws in event of forfeiture continues to be emphatically called to the attention of the Association through ineffectiveness in either producing prisoners for trial, or, in the event of failure to do so, in collecting the penalty of the bondsman. Carefully compiled statistics indicate that in felony cases during the past four years some seventy-five prisoners escaped punishment by means of bail bond forfeitures. The economic value of the forfeited bonds in terms of collections thereon amounted to an average of *two cents on the dollar*, while for less serious crimes somewhat less than two cents on the dollar was collected from bondsmen."

In September, 1925, this same Association issued a special bulletin on this subject in the following words:

"In the courts of Cleveland and Cuyahoga county, bail bond lax enforcement has come to be a farce. Prisoners are turned loose under

bond to prey upon the community. They fail to appear for trial, presumably continuing the practice of their nefarious pursuits. Their bondsmen rarely pay even the costs of the cases which are brought upon their forfeited bonds by the state. Procedure upon bonds is unbelievably lax and inefficient. The county loses annually thousands of dollars which might be collected through intelligent and proper procedure in bail bond cases. The dollars and cents phase of bail bond law enforcement or lack of enforcement, would be of negligible importance were it not for the fact that year after year felony bail bonds *fail to produce prisoners for trial.*"

I now quote from a report on this subject made to me in November, 1932, by Miss Esch, Operating Director of the Cleveland Association for Criminal Justice, as follows:

"From January 1, 1922 to December '31, 1929, more than 250 bail bonds in felony (penitentiary) cases were forfeited in Cuyahoga county, and again and again fugitives on forfeited bond were arrested and charged with new crimes in this community.

*"Collections on forfeited bonds:* Statistics compiled by the Cleveland Association for Criminal Justice show that \$119,846.00 worth of forfeited bail bonds, forfeited from June 30, 1924, to June 30, 1925, had netted the state exactly \$125.00 at the close of that year. These were all Municipal Court criminal bonds,—felony cases.

"\$85,500.00 of these bail bonds were forfeited in the Court of Common Pleas of Cuyahoga county, and at the close of the year (or June 30, 1925) *not one cent* had been collected on these bonds.

"In 1926 (a year after the period above referred to) the Association checked both the Municipal and Common Pleas Court bail bonds for the period referred to above (June 30, 1924, to June 30, 1925), and found that of the bonds referred to (combined face value \$205,146.00), *exactly \$1100.00* had been collected, approximately  $\frac{1}{2}$  of 1% of the face value of the bonds."

Among other things, the foregoing conclusively shows that the risk assumed by the surety on a bail bond is slight, perhaps 98 to 2, even 200 to 1, that he will never have to pay anything at all. Now, how do public officials conceal this glaring assistance to the criminal, and fraud upon the public? The method is well expressed in the same report as follows:

"Information relative to the laxity indulged in by the administration of justice and especially by the County Prosecutor's office, in proceedings in the civil branch of the court to collect on forfeited bail



bonds, was given a tremendous amount of publicity by the Association. The truth was that the then—County Prosecutor used to get JUDGMENTS two or three times a year, and then issue publicity statements to the effect that \$75,000.00 or \$100,000.00 in JUDGMENTS against bondsmen had been obtained. The public didn't realize (but the bondsmen did) that unless execution were levied on the judgments, the state couldn't realize a cent."

It is altogether probable that, even though execution had been issued for the collection of the judgment, nothing would have been realized for the very simple reason that the surety never had anything from which any judgment could have been collected. Likely, he was wholly irresponsible financially at the time he was approved as a surety by the clerk, which, of course, indicated official criminal negligence or direct criminal connivance. It may here be mentioned that there is the case of a professional surety on bail bonds in criminal cases that may be regarded as typical. He owned a property worth \$4000, encumbered for \$3000. He owned no other property and his net worth, therefore, was \$1,000; and yet this man became surety on bail bonds to the extent of \$80,000, during the same time. "Farce" is a feeble word.

Confronted with these damning facts of the bail bond farce, so forcibly and inescapably brought to their attention by this Association, what did the *judges* of the trial court of the city of Cleveland do? There were several technically sound and superficially plausible excuses that they might have put forward. For example, they could have said that it was the duty of the clerk of the court,—not theirs,—to approve bail bonds. They could have said that it was the official duty of the County Prosecutor,—not theirs,—to collect on bail bonds. And, to the uninitiated, either of these alibis would have seemed a perfect defence. Or the Cleveland judges might have taken a more usual course and, wringing helpless hands, have wailed for "legislation to cure this evil." This is the ordinary method of "passing the buck." Or, they might have taken another convention-

al,—and ineffective,—course and, at some noonday luncheon club, indignantly inveighed against the “crime wave” and gotten a hearty hand from their approving,—and duped,—auditors. The Cleveland judges *might* have resorted to either or all of these subterfuges, and the evil would have remained unabated. But, instead, realizing their power, duty and responsibility, they courageously rejected all of them, and set *themselves* to work to remedy the evil. And they did it, in the fall of 1929, by adopting *rules* clearly prescribing the qualifications of sureties on bail bonds, and the duties of the Clerk of the Court in approving them. These rules cannot well be abbreviated entirely, and, in the main, they follow:

“9. (a) It shall be the duty of the Clerk before accepting any bond for bail in a criminal or *habeas corpus* case, to require any person offering himself as principal or surety upon said bond, to make an *affidavit* setting forth the amount of real estate owned by him in fee in this county, together with the house number, if any, and the subplot number of said property, the value of the same and all encumbrance thereon; also, whether or not he is surety on any other bond or bonds, and, if so, to give a detailed statement of the same.

“It shall be the further duty of the Clerk in all bail bond cases and in all *habeas corpus* actions, where the amount of bail is more than the sum of five hundred dollars (\$500.00), to require any person thus offering himself as principal or surety upon said bond and desirous of qualifying as the owner or surety on same, to file with the Clerk a certificate of title or abstract of such real property from one of the three abstract companies designated by the court, which certificate or abstract shall be extended *to the date of the signing of the bond* and which shall show:

- (1) The record owner.
- (2) All mortgages, mechanic’s liens, judgments, *court bonds* and encumbrances of any kind which appear uncanceled of record.
- (3) Any pending action in which the premises pledged are specifically described.
- (4) The valuation of the land and buildings as shown by the County Auditor’s duplicate.
- (5) The bond in question.

“The said certificate of title or abstract shall also state that the examination and extension was made for and at the instance of the

Clerk of the Court of Common Pleas of Cuyahoga county and the owner of the property seeking to qualify upon the bond in question.

"The Clerk, after accepting the affidavit of the principal or surety upon the bond, shall immediately forward the certificate or abstract of title, together with a notice of lien, to one of the designated abstract companies who shall immediately record the same. If, after the abstract or certificate of title thus furnished is extended the applicant fails to qualify and is thus not accepted as a bondsman, the Clerk shall immediately cancel the notice of lien of record. If, on the other hand, the principal or surety does qualify, then the abstract company shall immediately record said bond which will date back to the time of the filing of said notice of lien and shall remain in full force and effect as a lien until the same shall be legally satisfied, when it shall be cancelled of record.

"The assessed valuation of the real estate, as shown in the abstract or certificate of title, shall be considered by the Clerk to be the true value thereof.

"No person shall be considered qualified as principal or surety upon a bail bond in a criminal or *habeas corpus* action, unless the aggregate value of his real estate, over and above all encumbrances, including any and all bonds previously signed by him and uncanceled of record, and \$1,000 in homestead exemptions, is equal to or exceeds double the amount of the bond to be secured."

These rules then go on to provide that the Prosecuting Attorney shall bring suit upon all bonds forfeited in Criminal Court within three weeks from the date of the forfeiture, unless the forfeiture has been vacated; and, upon the first court day of each month, shall present to the presiding judges a list of all bonds forfeited upon which suit for recovery has been brought during the month preceding, and the court in which suit has been instituted and disposition of the same. These rules, also, provide that, on the first day of each month, the Clerk of the Court shall prepare a duplicate list of all cases in which bonds have been forfeited during the month preceding and deliver one copy to the Presiding Judge in Criminal Court and one copy to the Chief Justice. A careful reading of the foregoing rules will convince anyone that the "bail bond farce" could not continue except from such gross negligence of the clerk or prosecuting attorney as would amount to malfeasance in office.

Now, what were the *results* of putting these rules in operation? The report of the Operating Director shows the following:

Bail Bond forfeitures, year ending June, 1925, 47 bonds.

Bail bond forfeitures, year ending June, 1930, 3 bonds.

Incidentally, it may be stated that the 1929 General Assembly of Ohio passed an act making a bail bond in a felony case in the Court of Common Pleas a lien on the property of the bondsman. Brushing aside any constitutional objections to such an act, the situation was well taken care of by the rules adopted by the judges, which provided notice of a potential lien, arising from the liability on the bond, thus excluding any notion of innocent subsequent purchasers or encumbrancers as against the possible liability on the bond.

Before leaving consideration of "fake bail" as the effective ally of the criminal, reference should be made to the experience of the city of Detroit where the evil was widespread before the year 1900. Judge W. McKay Skillman, of the Recorder's Court in Detroit, went to Cleveland and studied their revamped system relating to bail bonds, considered the amount of "straw bail" being given in Detroit, and recommended the creation of a bond department in the Recorder's Court and the adoption of rules to govern its procedure. The result in Detroit was the same as in Cleveland. One Report from Detroit shows that, from January 1, 1931, to March 1, 1932, 2,133 defendants were released on bonds aggregating \$1,687,050, and only five bonds were forfeited amounting to a total of only \$2,200. These reports are most significant. *The Judges of the trial courts can, if they will, remedy this evil*, and abolish this aid to the criminal. Of course, the sinister political influence of the underworld stands in the dark shadows in the offing, with the threat of political defeat of such a judge, while the citizens who ought to support him for re-election are furiously debating the tariff.

On this subject of fictitious bail bonds, Judge Shaugnessy, of Milwaukee, writes me as follows:

"We have no fictitious bonds here in Milwaukee. There is no rule of court pertaining to this, but it's just a case of every officer doing his duty."

Modestly, he omits to state that he has had great influence in impressing the importance of that duty upon those officers. From other sources, I find that it has been very great.

#### IV.

##### *Waivers of Felonies.*

Another of the favorite devices for playing into the hands of the criminal and his political associates, is the practice of prosecuting attorneys of waiving the felony charge in the indictment,—which, on conviction, incurs a sentence to the penitentiary,—and accepting a plea of guilty to a charge of a misdemeanor, involving only a fine or short jail sentence, a mere rap over the knuckles. Sometimes this practice is justifiable, but the instances of its grave abuse so far outnumber those of its justification that it should be permitted only rarely by the courts. One would think that the danger of obvious implications arising unfavorable to the prosecutor would limit this practice to but a few rare cases, but the contrary is true. The practice is widespread. Again we cite the authentic record of the Chicago Crime Commission, which appears at page 25 of Criminal Justice for March, 1929, and find that, during the months of January to September, inclusive, of 1928, the felony charge was waived in 928 cases, in Chicago. From Criminal Justice, the publication of the Chicago Crime Commission, for May, 1930, page 25, it appears that, in January and December, 1929, and in January, 1930, felonies were waived in the Chicago courts in 242 cases.

A familiar instance of waiving the felony and accepting a plea of guilty to the misdemeanor occurs in burglary cases, with intent to steal, where only a small sum of money is

taken when the charge is reduced to petit larceny, thereby insuring only a jail sentence. Another is where the defendant commits the felony of robbery with a gun, and the charge is reduced to petit larceny, with like results. Still another is where the charge is rape, and is minimized to simple assault. These illustrations are sufficient to show the possibilities for favor to the criminal which exist in the now familiar practice of "waiving the felony," and accepting a plea of guilty to the misdemeanor. Still the prosecutor often counts them as "convictions" secured by him in his reports to the public, instead of reporting them for what they really are, *viz.*, *surrenders* to the criminal. And yet people wonder why the administration of criminal justice has so nearly broken down in large cities!

The days in Chicago courts when these "waivers of felonies" are arranged are called "Bargain Days," by even some of the judges themselves. And here are some of the "bargains" that are made on such days. It should be explained that, under Illinois law, the stealing of personal property of the value of over \$14 is grand larceny, and, therefore, a felony; and that the embezzlement of \$200 or more makes the culprit ineligible to probation. That will make clear the otherwise unintelligible tinkering with the values of property stolen or embezzled in the cases now to be given.

(a) On June 2, 1930, a defendant appeared for trial, charged with the embezzlement of \$20,400 and entered a plea of guilty to the charge and testimony was heard. The defendant was found guilty of the embezzlement of property of the value of \$199 and released on probation for one year. This defendant was indicted on November 6, 1925, was found guilty on November 23, 1928, and a new trial was granted on December 22, 1928. After the date of the indictment, the case was continued 23 times on the motion of the defendant, 9 times by agreement, 5 times upon the order of the court, and once upon the motion of the State.

Although the defendant was charged in the indictment with the embezzlement of \$20,400 while an employee of the city of Chicago, he was judicially found guilty of the embezzlement of property of the value of \$199 and released on probation.

(b) On May 20, 1930, a defendant appeared for trial on a charge of burglary. The felony was waived and, on his plea of guilty to petit larceny, he was sentenced to one year in the the House of Correction. The testimony showed that he was caught in the act of taking 70 dresses from the shop of the prosecutrix. The prison record of this defendant was as follows:

In June, 1927, fined \$25 on petit larceny charge. In January, 1929, he was sentenced to the House of Correction for 90 days on a petit larceny charge. In October, 1929, he was again sentenced to the House of Correction on a petit larceny charge which had been *reduced* from grand larceny. And on August 29, 1929, he was sentenced to pay a fine of \$50 for disorderly conduct. "How many crimes is a defendant permitted to commit before he is considered a felon?," asks Col. Chamberlin.

(c) On June 16, 1930, two defendants appeared for trial on a charge of burglary. The *felony was waived* and both defendants entered pleas of guilty to petit larceny. The arresting officer testified that the defendants were apprehended while in the act of burglarizing a drug store. An accomplice was killed as he sought escape. These defendants were sentenced to the County Jail for a period of one year. According to the Bureau of Identification record, one of these defendants was on May 7, 1925, sentenced to one year in the House of Correction on a robbery charge *reduced* to petit larceny; and at the same time one robbery charge and one larceny charge was stricken off with leave to reinstate. On May 5, 1927, the same defendant was sentenced to the County Jail for a period of four months on a robbery

charge, again reduced to petit larceny; and on March 9, 1928, the same defendant was held over to the grand jury on six charges of robbery with a gun. The other defendant, too, had a criminal record.

(d) On June 19, 1930, a defendant charged with the embezzlement of \$3,560 was placed on probation for one year. Restitution in the amount of \$3,566 was ordered to be made, although at a previous hearing of the case the value of the property embezzled was judicially fixed at \$190! Were it not known that the reason for reducing the value of the property to \$190 was to make the offence a probationable one, under Illinois law, it would appear ludicrous to order a defendant to make restitution of \$3,566, when he had been found to have embezzled only \$190! It was simply a judicial falsification of the known facts.

(e) On September 18, 1929, a defendant was indicted for burglary, etc. One count of the indictment charged the defendant with being an habitual criminal. On January 14, 1930, the habitual criminal count of the indictment was *waived*, and the defendant pleaded guilty to burglary, and was sentenced to the penitentiary under the indeterminate sentence law for a term of *one year to life*. And here was this criminal's previous criminal record: In 1900, sentenced on a burglary charge; paroled in May, 1902, and discharged in April, 1903; on April 2, 1908, sentenced to the House of Correction for one year on a burglary charge; on June 29, 1909, he was again sentenced to the House of Correction for one year on a burglary charge; on November 21, 1910, he was again sentenced for burglary, and two other burglary charges were stricken off with leave to reinstate. He was *paroled* on December 17, 1914. On September 8, 1915, he was again sentenced for burglary and again two other burglary charges were stricken off with leave to reinstate. He was discharged from the penitentiary on December 21, 1917. On April 21, 1919, he was again sentenced to the penitentiary on a burglary charge, and one burglary indictment and



one attempted burglary indictment were stricken off with leave to reinstate. (Of course, no one is silly enough to think that there was ever any reinstatement.) He was *paroled* December 12, 1923, and discharged October 23, 1923. But, on July 22, 1926, this same man was sentenced to the penitentiary for the *fifth* time on a burglary charge *reduced* to grand larceny. He was *paroled* for the *fifth* time on July 23, 1928, and was *still on parole when he committed the last burglary*. And yet the habitual criminal count in the indictment of September 18, 1929, was "*waived*"!

(f) On February 12, 1930, a female defendant charged with larceny, appeared for trial. On motion of the State, the felony was *waived*, and the defendant was sentenced to one year in the House of Correction on her plea of guilty to petit larceny. In her testimony, this defendant admitted her guilt. According to the Bureau of Identification Record No. C-19034, this defendant's record for shop-lifting dated back to October 24, 1917, and yet the State *waived* the felony and accepted a plea of guilty to the much lesser charge, and the trial judge approved and countenanced the "bargain."

(g) On March 6, 1930, two female defendants charged with larceny appeared for preliminary examination in the felony branch of the municipal court. By agreement with the state's attorney, the felony was *waived* and defendants permitted to enter their plea of guilty to the charge of stealing property of the value of \$14, though they were caught in the act of making away with property of the value of \$153. Both admitted that they had previous criminal records.

(h) On March 28, 1930, a defendant appeared for trial upon a charge of forgery and confidence game. The felony was *waived*, and, on his plea of guilty to obtaining money by false pretences, he was sentenced to the House of Correction for one year and ordered to make restitution of \$45.

His criminal record was as follows: June 24, 1913, sentenced to the Booneville, Missouri, Reformatory on a forgery charge, paroled on June 3, 1914, and returned for violation of parole on January 30, 1915. On July 16, 1918, he was sentenced to a term of two and a half years in the Leavenworth Federal Penitentiary for larceny of United States mail. During the period from 1920 to 1926, he was arrested and in several instances sentenced on minor charges in the cities of Los Angeles, Berkeley, East St. Louis, Peoria, Chicago, Toledo, and Rochester, New York. And, on April 27, 1926, he was sentenced in Milwaukee for a term of from one to two years on a forgery charge. Still notwithstanding this long criminal record, in March, 1930, in Chicago the felony was *waived!*

The foregoing are only samples taken from a long list of "bargains" judicially sanctioned in the Chicago courts. Is there anyone so childish as to think that Chicago's political underworld did not participate in these *bargains*, in every one of which justice was cheated and Illinois law flouted by a "waiver of the felony," approved by the trial judge?

Of course, the standard, time-worn excuse for this sort of betrayal of the interests of the public is that, by taking this course, the "huge expense of a trial is saved to the people." To those who think only in terms of dollars, this excuse has a persuasive and plausible sound, but, even on that low basis, it is superficial because that method of treating a criminal simply invites the commission of hundreds of other crimes in the same community thereby enormously increasing the expense. And it renders life and property less secure, wherever it is tolerated. Moreover, it brings the law itself into contempt and subjects the courts to just and merited reproach. It is a vain thing to call upon the people to "respect the law," when the *administration* of the law is not entitled to respect.

## V.

*Misconduct of Prosecuting Attorneys.*

It is axiomatic that every defendant charged with crime is clearly entitled to a fair trial according to the established rules of criminal law, and that, if a conviction is secured on account of a denial of this right, it must be set aside, and a new trial had. Yet, notwithstanding this wholesome and universal principle of law, one often finds prosecuting attorneys resorting to all sorts of illegal and sensational methods in securing convictions, with the result that such convictions are often reversed in appellate courts, and the cause remanded to the trial court for a new trial, when interest in the case is greatly lessened and, very often, the witnesses for the State have dispersed, or their memories have strangely lapsed. In such case, a *nolle prosequi* is entered and criminal justice has again been thwarted.

These unwarranted methods, generally classified as "misconduct" of the prosecuting attorney, which result in reversals of convictions, usually take one or another of the following forms: (a) Commenting on failure of defendant to testify in his own behalf; (b) Abusive epithets toward the defendant; (c) Appeals to racial or community prejudice or passion; (d) Asking improper and prejudicial questions to inject poison into the case; (e) Making arguments to the jury which have no support in the evidence. In passing, it is appropriate to observe that any and all of these illegal practices *can* be stopped by the trial judge, but, instead of doing so, too frequently he declines this responsibility and, when defendant's counsel makes objection, glosses the incident over by some such insipid and ineffective remark as "Please keep within the record, Mr. Prosecutor"; or "Counsel will observe the rules"; or "Proceed, let us get along." Every experienced practitioner has heard such remarks from the bench again and again. It is further to be noted that, by employing such methods, the prosecuting attorney can-

not lose in popularity, however far he falls short of doing his plain duty. And this is so because, by attacking the defendant with verbal ferocity, he at once gains the reputation of being an "enemy of crime" and, at the same time, plays into the hands of the criminal by affording him ground to secure reversal in case of a conviction. And, as a sort of by-product, he crashes the head-lines and breaks into the picture section of the daily paper. Whatever the purpose may be, that is the result. Sometimes, it is quite conceivable, ambitious prosecuting attorneys are more interested in having the cameramen present than the witnesses for the state. Court trials ought not be turned into vaudeville performances, to public detriment.

In the *The Notre Dame Lawyer* for November, 1931, the writer assembled over thirty cases in which convictions had been reversed in appellate courts because of such misconduct of prosecuting attorneys. Since then, the United States Supreme Court, in the case of *Powell v. Alabama*,<sup>1</sup> reversed a conviction of eight negroes of rape, because the defendants were given the outward form of a trial according to law, but denied its substance.

Correction of this abuse in criminal trials is in the absolute power of the trial judge, and plain duty calls for the constant exercise of that power.

## VI.

### *Indeterminate Sentence Law.*

Assume now that the criminal defendant has employed all the devices hereinbefore mentioned without success; has secured undue delay while he was at large on fictitious bail; that his efforts to intimidate and spirit away witnesses against himself have failed; that he has vainly sought to have the charge against himself minimized from what it really was to what it certainly was not; that he has failed to "pack a jury" with his friends; that an appellate court

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<sup>1</sup> 53 S. Ct. 55 (1933).

has decided that he had a fair trial, and has affirmed the sentence pronounced upon him by a fearless trial judge,—has he, at long last, come to the end of his resources for “beating the law”? *By no means.* There still remains for him the Indeterminate Sentence Law, administered by a politically appointed Board of Pardons and Paroles, which very often, if not usually, passes upon applications to it with a view to their political effect, and, moreover seem prone to be influenced by the most transparently hypocritical professions of penitence.

What is this Indeterminate Sentence Law so widely adopted by the several states of this Union? First of all, it is a *legislative sentence*, pronounced by a legislature upon a convict whom it never saw, and in a case in which it never heard the evidence. The legislature denounces a certain act as a crime, and fixes the sentence, upon conviction, to be say “not less than one year nor more than twenty years,” and the trial judge merely pronounces that formula. With the length of the imprisonment he has nothing to do, though of all officials connected with the prosecution he knows most about the extent of the defendant’s criminality, and the appropriate duration of his imprisonment. On the face of it, this looks preposterously absurd, but, theoretically,—and *only* theoretically,—it is much better than it looks, for it is based upon the holiest motive of religion,—the saving of those who seem lost. In *theory*, the position of the advocates of this law is simply unassailable. It rests upon the commendable idea that there is always a substantial hope of salvage of every human wreck; and this law is drafted with the central idea that, when reformation of the convict is complete, he should be liberated so that he may begin life anew. The boards of pardons and paroles are, theoretically, supposed to decide the question of whether there has been a genuine reformation, and act accordingly. Granting a board of the highest intelligence, with absolutely disinterested motives, absolute impartiality, and almost limitless in-

dustry, the arrangement would be ideal, but, unfortunately, such a board is wholly mythical. The theory and the actual practice are widely at variance. Consider for a moment what actually happens when a convict is given this legislative sentence of from one to twenty years. Ordinarily, he can make application for clemency when he has served the minimum of one year. By this time, though notice of the hearing upon his application is given, it may well be that the witnesses have become dispersed or disgusted with the processes of the law, the time and attention of the prosecuting attorney is occupied with more recent crimes, and he is indifferent, the interests of the public are not represented in any real sense, and it is "up to the board," everyone being willing to unload the responsibility on it. Then, too, no man relishes the task of attempting to keep a prisoner confined for a longer period. We all very much prefer to "set the prisoner free." The writer himself would infinitely rather open the door of the dungeon than to close it. And, if in addition to this general disposition to be humane there be added political or personal influence, the criminal's chances are enormously increased, and he may reasonably hope to be a member of the Graduating Class in Crime, at the next "commencement" under the auspices of the Board of Parole.

This seems to lead to brief consideration of the three well-known theories for the justification of the criminal law, *viz.*: (a) Reformative, (b) Punitive, and (c) The protection of society, concerning which a vast deal of debate has been unleashed. Whether the State, as such, has anything to do with "reforming" a criminal is, at least, highly debatable. The punitive theory must be rejected by anyone who even calls himself a gentleman as barbarous, even though disguised in the theory that it is a "deterrent to others," which is demonstrably false. The truth is that *protection to society* is the only sound theory, and all criminal law administration should proceed on that theory alone. And, when it

has been established with certainty that a given individual is a substantial menace to society, he should be so restrained as to protect society from that menace, as long as it exists. It is submitted that the trial judge is in a better position to determine that question in the first instance than an irresponsible and, often, profoundly ignorant "board," and that, when any convict has truly and sincerely become penitent, the road to executive clemency is still wide open to an official who must take full responsibility.

From hundreds of cases, a few have been selected for this paper in which paroles were given, again and again, to criminals who merely resumed their lives of crime, after brief interruptions. The truth is that, in most cases, the convict has experienced no change of heart, whatever, and has only sought to convince those in authority that he has. The following is from an address of Newton D. Baker, when President of the Cleveland Association for Criminal Justice,:

"When a prisoner learns that a parole board exists that has power to release him from prison, every power of his mind is directed to bring influence to bear upon that board to let him out of prison. *He is not interested in amending his own character.* He is interested in making the Parole Board *think* he has amended his character. He is not particularly interested in becoming converted to some form of religion; he is interested in *appearing converted* so that the *chaplain will say* to the Parole Board that he *is* converted. Then if the prisoner is not released from prison, he gets into his head the thought that the other fellows who got out were able to hire politicians to influence the Board of Parole. It doesn't mean that the Board was influenced, but the prisoner thinks it was, and over in the Ohio penitentiary at the present time, there isn't a man, not one, who is there beyond the time of his minimum sentence, who does not feel that he is unjustly detained there as against other prisoners who have been able to hire lawyers, or *have persuasive friends* to bring influence to bear on the Board to release them so that, instead of being cured by incarceration in the penitentiary, the prisoner is seething with suspicion and discontent and believes that the very agencies which society has appointed to control and correct his conduct, are themselves cruel and unjust and, when he is finally released, he leaves the prison filled with suspicion and revenge."

Secretary Baker speaks of "persuasive friends," but, in the case of most hardened criminals, these friends are a part of the political underworld. Recently a comprehensive survey of the working of the Indeterminate Sentence Law in Ohio has been made, and the sober conclusion of the competent people who made it is that it is "just another racket," in actual practice.

Just what connection is there between what I have called "the political underworld" and the administration of the criminal law? In his annual report of January 15, 1931, to the Chicago Crime Commission, here is what Col. Chamberlin had to say about it:

"While considering additions to the American Word Book, it may not be amiss to recall that the phrase 'organized crime' emanated from the Chicago Crime Commission. At the time of its birth, it was received with sneers and jeers, but it now occupies a respectable place in the phraseology of the scientific writer. Then has come 'paltering with crime,' a part of the word picture painted by the President of the Commission when he had something to say concerning jurists; and not to be forgotten in his emphatic declaration concerning an 'alliance between crime and politics,'—a statement which has been discovered to have a *factual* basis."

Nor are we confined to the conclusion of the investigator above stated. The circumstantial evidence that the influence of the political underworld is continually being exerted upon court proceedings is convincing. There is no other way to account for the outrageous delay in bringing criminal cases to trial; no other way to account for fictitious bail; no other way to account for that judicial repeal of a criminal statute known as "waiver of felony." And, if there be one who rejects circumstantial evidence and the conclusion of an earnest and skilled investigator, then the direct evidence is easily accessible.

If this paper followed conventional lines, it would contain a diatribe against the police, and impute to their ignorance, laxity and corruption responsibility for crime conditions; but it will do nothing of the kind. The main pur-



pose of this article is to fix responsibility where it belongs, *viz.*: upon the judges of the trial courts. There is no doubt at all that there is widespread corruption among the police,—which is not to be marveled at considering the judicial examples set before them. The police know what is going on in the courts. They know about these delays, and fictitious bail, and are not so dumb about how it is all arranged. They actually see these “bond runners” haunting the courts. They know that a felony is a penitentiary offense, and they see men whom they personally know to be guilty of felonies, by the “waiver of felony” device, sentenced to a few days in county jail or workhouse, whence they presently emerge “under parole,” only to resume criminal activities. The example of judicial bartering with crime naturally has its effect on the police, and they do a little bartering themselves. And does anyone in his senses fail to perceive that the tender solicitude shown the criminal chills the ardor and discourages the activity of the police? It is the fashion in certain metropolitan centers for the press to have an occasional “investigation of police headquarters” with the well known scare-heads about “shake-up in police department,” etc. If these newspapers really want to accomplish anything, *they should begin at the court house*, instead of at the police station. But the police force seems to be fair game and an attack on it serves very well to distract attention from those primarily responsible.

As to remedies for this menacing crime situation, they have been suggested from time to time throughout this article. In a single word, the remedy lies in the hands of the judges of the trial courts. They have the *power*, and theirs is the *responsibility*. Perhaps, a little,—very, very little,—legislation may be needed, but, for the most part, everything necessary may be done by simple rules of court, as was done by the Cleveland judges. And, above all, the judges can accomplish most by an example of stern adherence to the law, and this example will have its inevitable wholesome ef-

fect on the bar and on the police. Anyone who has had a rather extensive practice in the courts has observed how quickly the members of the bar fall in with the example and practice of the trial judge. Almost at the first session of court he holds, his measure is taken, and it is known to every member of the bar whether anything will influence him outside the facts and the law. In short, they know what will "go" with him and what will *not* "go" with him.

Obviously, it would be not only unfair but disastrous to permit the judges of trial courts to be exposed to the sinister influences herein specified without establishing some political influence to meet and counteract it. So we find that both in Chicago and Cleveland, civic organizations have supported the Chicago Crime Commission and the Cleveland Association for Criminal Justice. It is, perhaps, not too much to say that, if it had not been for those two organizations, these cities would have been at the mercy of the organized criminals.

### *Is this Situation Unavoidable?*

That question may be at once and emphatically answered in the negative. The means for eradicating this monstrous evil have already been pointed out, and, if specific *proof* is desired, we have but to turn to the conditions existing in the city of Milwaukee, where, for years, criminal justice has been efficiently administered, by a single criminal court for the trial of felony cases, presided over by a single judge. Milwaukee has a population about one-third of that of the city of Chicago where there are *eleven* judges regularly assigned to try felony cases. Of course, the apologists for the existing situation in Chicago,—if any there be,—will be quick to say that there is *more crime*, in proportion to population, in Chicago than there is in Milwaukee, which is true. But to this limping excuse, it may be replied that, if criminal justice were really administered in Chicago, there would be less crime and so fewer criminal cases to try.

For years, Judge George A. Shaughnessy has been the Judge of the Municipal Court of the City of Milwaukee, and his letter to me of November, 1932, tells the story and furnishes the proof. It follows:

"The Municipal Court of the City and County of Milwaukee has jurisdiction over all felony cases arising in Milwaukee County, and in addition thereto has appellate jurisdiction in all cases of misdemeanors and cases involving ordinances of the city of Milwaukee. Notwithstanding that Milwaukee has a population of over 715,000, the Municipal Court is still presided over by one Judge.

"We try jury cases throughout the *twelve months* of the year, trying them even between Christmas and New Year. We do this to insure each and every person charged with crime, a speedy trial by jury, if he so desires. Under the law creating the Municipal Court, the defendant may, if he chooses, waive his trial by jury and submit the entire case to the Judge. We try in the neighborhood of one hundred jury cases in the course of a year, and in some years have tried as many as 140. The great majority of our work is disposed of on pleas of guilty and on trials before the court on waivers of juries. Strange to say we tried fewer cases in 1931 than we did in 1930, and, at the rate we are going, we shall try fewer cases in 1932 than we did in 1931. I have heard that the depression is causing enormous increases in crime throughout the country, but this does not seem to be true in Milwaukee County. We call in our jury only when we have work for the jurors to do. Upon the first day of the term we take the telephone number of each juror, and when we excuse him we do so until a day certain. If we find out the day before that we have no work for the jury on that day, we telephone each member of the jury not to come in on that day, but to come in on some subsequent day upon which we have work for them to do.

"The Judge of the Municipal Court *handles his own calendar*. He sets all cases for trial, and expects both the District Attorney, who is the prosecuting attorney, and the defense counsel to be prepared. *Continuances are only granted for good cause*. Both the District Attorney and the Bar of Milwaukee County have co-operated with the court, and seldom, if ever, do they request continuances, unless it is absolutely necessary. The District Attorney files a *written nolle* in which he sets forth the reasons why he *requests* that he be permitted to file a *nolle*. The Judge goes over such reasons and if they are sufficient permits the filing of a *nolle*.

"The great majority of our felony cases are brought to *trial within two weeks after the commission of the crime*. In some cases, however, thirty days elapse, and in some cases as long as two months; it de-

pends upon the nature of the crime and the length of time necessary for proper preparation for trial. We believe in speedy justice, but do not believe in hasty justice. We proceed quietly and efficiently, and permit no harangues, and do not permit the wasting of time in any other manner. The time of argument before the jury is always limited, and the attorneys are held to the limit. We open court at nine o'clock in the morning and run through until twelve, with a ten minute recess when we try a jury case. We convene again at 1:30 and continue until 5:00 or 5:30 or 6:00 o'clock as the condition of our calendar demands. We have little trouble with out-of-town gangsters. It is decidedly true that *they steer clear of Milwaukee*.

"On the 1st of January, 1923, there were 974 cases pending on the calendar of the Municipal Court; on January 1st, 1924, there were 573; on January 1st, 1925, there were 229; on January 1st, 1926, there were 272; on January 1st, 1927, there were 180; on January 1st, 1928, there were 84; on January 1st, 1929, there were 13; on January 1st, 1930, there were 7; on January 1st, 1931, there were 8; on January 1st, 1932, there were 5. Of the five cases pending on January 1st, 1932, none had been bound over to the Municipal Court for trial for a period of over two weeks."

The foregoing splendid record demonstrates what can be done when a trial court judge takes charge of his own court and manages it *himself*, without outside interference. Also, it demonstrates that there is simply no necessity, or excuse, for undue delay in bringing criminal cases to trial. It shows just why the people of Milwaukee have adequate protection against criminal activities, and why "gangsters steer clear of the city." It is to be especially noted that "the Bar cooperates." As has been pointed out herein, there is no such thing as fictitious bail in the Municipal Court of Milwaukee, due to "each man doing his duty," and, also, there would be little advantage since there would not be sufficient time to "prepare (?)" for trial, by intimidating witnesses and the rest of it. And there must be sufficient *reasons* before any *nolle* is permitted to be filed.

At the dinner of the Association of American Law Schools last December, President Loesch took the ground that the best way to cure the evil was by the appointment of the judges, and there is considerable discussion going on among

the members of the bar in regard to the wisdom and desirability of that plan. Then, there is the Maryland plan by which judges are placed beyond the reach of political influence by electing them for terms of 14 years and making them ineligible for re-election, and retiring them on half pay. This plan has its obvious advantages. Any plan should make the judge absolutely free from any temptation to "play politics" and secure his financial independence. When a lawyer is elected to be a judge, he severs all professional relations, and, in effect, bids "good-by" to the practice; and, if he serves as judge for a few years, it will be difficult, if not impossible, for him to build up a satisfactory new practice. This, however, is beyond the scope of this article.

If the judges of the trial courts of this country, supported by public opinion, should exert themselves, they could speedily do away with this menace. And, if the average run of citizens would observe the workings of our courts as keenly, and hold the judges as sternly to account, as the political underworld does, then the present just reproach to the administration of the criminal law would be replaced by that respect for the law and the courts so fervently to be desired

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