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RE-DRAFTING THE CODE OF CRIMINAL PROCEDURE*

THE LETTER OF TRANSMISSION

In presenting the outline of a code of criminal procedure prepared by the Committee on Criminal Procedure and Judicial Administration of the National Crime Commission, it will be of interest to know the method by which this outline was considered and agreed upon.

Of the sixteen who accepted appointment on this Committee, thirteen were able to participate in the discussion and preparation of this outline. Those taking part were Judson A. Harmon, former Attorney General of the United States, and Governor of Ohio, under whose administration important reforms in the law of criminal procedure were accomplished; Dean Roscoe Pound, former Commissioner of the Supreme Court of Nebraska, Dean of Harvard Law School; Dean John H. Wigmore, Dean of Northwestern University Law School, extensive writer on subjects relating to the administration of criminal law; Joab H. Banton, District Attorney of the County of New York; Ulysses S. Webb, Attorney General of California since 1902, under whose administration the reform code of California was accomplished; Oscar Hallam, former Judge of the Supreme Court of Minnesota, Chairman, Section on Criminal Law, American Bar Association; Marcus Kavanaugh, member of special Committee of the

*We reproduce here the proposed changes in the Code of Criminal Procedure recommended by the Committee on Criminal Procedure and Judicial Administration of the National Crime Commission, of which Chancellor Herbert S. Hadley, of Washington University, is chairman, and acting Dean Tyrrell Williams, of the Washington University School of Law, is executive secretary. The report is preceded by Chairman Hadley's letter of transmission, and each paragraph of the report is followed by a brief explanatory statement prepared by the chairman and the executive secretary.—Ed.

American Bar Association on Law Enforcement, 1921-23, Judge of the Superior Court, Chicago; Professor Edwin R. Keedy, former Judge Advocate of the United States Army, and President, American Institute of Criminal Law and Criminology, Professor of Criminal Procedure, University of Pennsylvania; George M. Napier, Attorney General of Georgia, President of Association of Attorneys General; Colonel Philip S. Van Cise, former Colonel in the United States Army, World War, former District Attorney for City and County of Denver, in which office he successfully prosecuted members of the national "bunco ring"; J. Weston Allen, former Attorney General of Massachusetts; Dan Moody, former District Attorney and present Attorney General of Texas; and myself as Chairman.

The work was begun on January 19, 1926, by the submission to each member of the Committee of a tentative draft of proposed changes in the criminal procedure generally prevailing in this country with a request for comments, criticisms and additional suggestions. The replies received from thirteen members of the Committee, with answers thereto, were then sent to all the other members of the Committee for their consideration and comment. This discussion by correspondence continued till April 26, when a meeting of the Committee was held at Washington, D. C., which was attended by Judges Hallam and Kavanaugh, Professor Keedy, General Allen, District Attorney Banton, Colonel Van Cise, myself, and Professor Tyrrell Williams, of Washington University Law School, St. Louis, as Executive Secretary. After a two-day discussion of the proposed provisions and the various criticisms and comments, an agreement was reached on an outline of a code of procedure containing twenty sections. As the definite expression of the some of the provisions agreed on could not be completed during this meeting, they were referred to sub-committees for preparation. A Sub-Committee consisting of General Allen, Professor Keedy, District Attorney Banton, and Professor Williams was subsequently appointed to meet with me for the purpose of reviewing and passing upon these final drafts, and this Sub-Committee met in New York City for that purpose on June 17 and 18. In this way the Outline, now made public, was prepared. I do not believe it is too much to say that no definite proposals for the improvement of our criminal procedure have received such careful and thoughtful consideration by so many men experienced and informed upon this subject.

In making these proposals, which are intended to state legal propositions which can be embodied in statutes or constitutional amendments, we have had in mind the necessity and advisability of being

practical. We have sought to accomplish the largest possible measure of correction of the faults of existing codes of criminal procedure that can reasonably be expected considering the present attitude of the public towards such questions. The traditional ideas of the American people as to the administration of justice make it necessary that we should move slowly in initiating changes. There are two theories upon which codes of criminal procedure are founded. First, there is the theory that a code of criminal procedure should be framed primarily for the protection of the citizen against possible injustice and oppression by the state. Second, there is the theory that a code of criminal procedure should provide for such a judicial investigation of a charge of crime as will lead to a prompt and definite decision as to guilt and punishment. I believe it can be fairly stated that the code of criminal procedure that now obtains in practically all our states belongs to the first class, although present conditions seem to demand that the second theory is that one that should obtain, if society is effectively to protect itself against its enemies. In these suggestions we have sought to protect effectively the rights of the citizens, to safeguard the innocent against conviction and also remove from existing codes provisions that work for the escape of the guilty. Where existing practices work to the prejudice of the innocent and tend to create an advantage in favor of the rich we have sought to correct such conditions. We do not, of course, claim to have provided a system which will fully accomplish all the desired results. But that the one proposed will work better than the codes now generally in effect in the different states we confidently assert. For under its provisions the trial of a criminal case will become less of a game or contest of skill, cunning and endurance between opposing lawyers, and will become more of a judicial investigation under the trained and impartial direction of the judge to ascertain the truth.

We have not proceeded on the theory that no innocent persons are ever prosecuted or convicted, nor do we for a moment contend that in the prosecution of those manifestly guilty there should be any disregard of established safeguards and recognized privileges. There will probably be no state in which the adoption of all these proposals will be necessary as there is probably no proposal made that has not in substance at least been adopted in some state. In a number of states a majority of these proposals are now the law. But it is interesting to note that two of the most important changes recommended, viz., the right of the judge to comment on the evidence, as at common law, and the right to comment on defendant's failure to testify, are

now the law in a very limited number of states. The first of those provisions obtains in only eight states and the latter in only two and to a limited extent in only three others. It also is of interest to note that there were no proposals that were more fully and completely agreed to by all the members of the Committee than these two, which have also received the approval of practically all who from the standpoint of experience and study have considered the reform of our criminal procedure. Either of these changes could be accomplished in most states simply by an act of the state legislature. These provisions are found in the criminal procedure of the people of Canada and England, from which latter country we inherited our system of jurisprudence and procedure. They also obtain in the procedure of every other civilized nation in which trial by jury is provided for. Judged from a practical or theoretical standpoint it is difficult to understand why there should not be provided for every jury trial, a disinterested expert authority to advise and assist the jury in dealing with the facts as well as the law. In the absence of such an authority the jurors look to the lawyers for advice and direction and the result is that a trial becomes a contest between opposing counsel, in which the ablest lawyer usually wins. The argument usually offered against this reform is that it might lead to official oppression and injustice. Why should we, the greatest self-governing nation in the world, be more concerned over the fear of official oppression and injustice than any other people? Why should we be more solicitous than any other nation as to devising privileges for those accused of crime, which do not obtain in the system of other countries? In short, why in the prosecution of offenders against our laws should we maintain provisions in criminal procedure that are opposed to the judgment of the past, present expert authority and the rest of the world?

To state the reasons why the judge has been eliminated as a directing influence in the trial of a criminal case in all but eight of the American states, would involve a discussion and explanation of conditions which have long since ceased to exist. And the reasons why the right of the trial judge to direct the trial has not been restored are to be found in the practical operation of our state legislatures which, insofar as such legislation is concerned, have been generally controlled by lawyers, who have been disposed to look at such questions from the standpoint of defendant's counsel. Naturally these men have been more in favor of the maintenance of existing procedure, under which they can practice effectively, than they have been in securing a system that will result in the prompt and certain conviction

of the guilty. If the public want a better system they must secure it through their own initiative and the dominating influence of public opinion. This was the experience of the people of England who, after over half a century of discussion, accomplished some seventy years ago the establishment of an effective system of criminal procedure against the opposition of many of the leaders in the legal profession, including many judges. Aside from the selfish interests involved it is generally difficult for those responsible for a system to realize its defects and accomplish its correction.

By these statements I do not mean to assert that there are not many high minded, able men in the legal profession and on the Bench who have actively and effectively interested themselves in the reform of our procedural and substantive law. The records of the American Bar Association and of the State Bar Associations, of the American Law Institute and of this organization, would overwhelmingly disprove such a charge. But those who have taken the lead in such associations in advocating reforms are as a general rule not the lawyers who defend criminal cases or the lawyers who serve in state legislatures. The experience and self interests of the latter cause them naturally to array themselves in support of the established order for the maintenance of what they are pleased to designate as the ancient bulwarks and safeguards of liberty and innocence.

I have stated the practical side of this situation because it is just as necessary that it should be understood by the public if the problem is to be dealt with successfully as it is necessary that the theoretical correctness of the proposals made should be understood.

As further evidence of the practical phases of this situation only one additional comment may be made. In every American state when a sincere effort is made to remedy an existing evil by statute or constitutional amendment, guidance is sought through an examination of the statutes and constitutions of other states. What we offer is a synthetic arrangement of approved practices in criminal procedure, each one of which actually has been tested by human experience either in this country or in England. It is reasonable to anticipate that this outline will be recognized by broadminded legislators in any particular state as a convenient means for enabling them to be guided by the experience of others.

Many causes have contributed to the result that 90 per cent of those guilty of committing major crimes in this country are not apprehended and punished. Many causes contribute to the result that approximately 75 per cent of those apprehended and prosecuted for major

crimes escape the minimum punishment provided by law. That the archaic, cumbersome and ineffective system of criminal procedure that now obtains in a majority of our states, is one of the causes that has largely contributed to this result, is the conclusion of all who have given the subject a thoughtful investigation, and this is the reason why the members of this Committee have, as a matter of public service, undertaken this investigation and report.

THE REPORT

I.

Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate, or other judicial officer, and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and may answer any question regarding the charge.

(This would introduce in effect a practice which has prevailed in England since 1848 and now exists in New York. It would help to eliminate what is known as the third degree, which prevails in some parts of the country. If the person charged with a felony is given a prompt and public opportunity before a magistrate to make his statement, the police will have no excuse for conducting secret, unregulated and oppressive examinations.)

II.

Prosecution for crime may be either by indictment or information. It will be sufficient in either case to name or otherwise state the offense to be charged. The court, for good cause shown, shall require the filing of a bill of particulars.

(Indictment is an accusation by a grand jury. Information is an accusation by the chief prosecuting official. The two remedies have always been concurrent in the case of misdemeanors. In many states the two remedies have been made concurrent in the case of felonies. This should be true in all states. The information makes it possible to institute a speedy prosecution. The absurdly technical language of traditional indictments should be made unnecessary. If the information or indictment is too general, then the court should be permitted to require the accusation to be made more specific by a bill of particulars.)

III.

In every case where one charged with crime is entitled to bail, the amount of the bond shall be fixed with consideration of the serious-

ness of the offense charged, the previous criminal record of the Defendant, and the probability or improbability of his appearing at the trial of the case. Each bondsman shall be examined under oath and shall be required to make full disclosure of his financial condition and submit a description of his property and the amount of his obligations, and also who, if any one, has indemnified him and what, if any, collateral he has received and from whom. All statements made by him in such examination shall be deemed to be material allegations and if false statements are made he shall be guilty of perjury. The bond shall be conditioned that in case the defendant should not appear, the bond shall thereupon be declared forfeited, which forfeiture shall become a final judgment against the Defendant and his sureties, and execution issued for the amount thereof, unless within ten days the bondsmen shall produce the Defendant and satisfy the Court that the Defendant's absence was not with their connivance. Cash bail may be accepted in lieu of a surety bond.

(All judges, all lawyers, all surety company officials, all scientific investigators and all newspaper men, who have become familiar with the everyday happenings in typical criminal courts, agree that great evils exist in connection with bail bonds. The reforms suggested are practical methods for making such miscarriages of justices less frequent. A sharp distinction should be drawn between bail bonds for first offenders and bail bonds for professional criminals.)

IV.

The Defendant shall have the right to be represented by counsel of his own selection, but if he is unable to secure counsel, he shall be represented by the Public Defender (in case the laws provide for such an official), or by counsel appointed by the Court, to whom a reasonable fee may be allowed by the Court and taxed as costs in the case. The Judge in every criminal court shall maintain a list of reputable attorneys who are willing to act for defendants unable to pay, and shall secure the assistance of the local or state bar association in this matter.

(In many parts of the country the Defendant's right to counsel, while theoretically in existence, practically has been attenuated to an extreme. Our system of criminal justice pre-supposes able lawyers to represent defendants. If defendants are unable to employ counsel, society should furnish them with capable professional advice and service. It always should be remembered that innocent persons frequently are accused of crime. It always should be remembered that guilty persons frequently plead guilty when they are represented by competent counsel.)

V.

The State shall have the same right to secure the disqualification of a trial judge for prejudice as is accorded to the Defendant.

(In some states the Defendant has more opportunities for disqualifying a judge than has the prosecutor. The rights should be equalized.)

VI.

No person shall be qualified for service as a juror in a criminal case unless he is a citizen of the State and of the United States and can read and write the English language, and has never been convicted of felony; but no verdict shall be set aside because a juror was not qualified to serve. The fact that the juror has read or heard of the case and has formed an opinion as to the guilt or innocence of the accused shall not disqualify such juror if, in the opinion of the trial judge he can render a fair and impartial verdict.

(Where needed, statutes should be adopted to insure intelligent jurors, and of course the ordinary citizen who reads newspapers should not be disqualified.)

VII.

In addition to the right to challenge any venireman for cause, both the State and Defendant shall have the same number of peremptory challenges.

(This section is intended to remove an inequality of privilege that exists in many states.)

VIII.

Defendants charged with conspiracy or any other crime, such as riot or affray, that requires joint action, shall be tried jointly and all Defendants jointly indicted for crimes that may be jointly committed but do not require joint action shall be jointly tried unless in the opinion of the trial court the interests of justice require that one or more be tried separately.

(The purpose of this section, like many of the other sections, is to reduce the opportunities for unfair and special advantage on the part of those defendants who financially are able to employ shrewd and resourceful lawyers.)

IX.

The Defendant shall be a competent witness in his own behalf and if he testifies shall be subject to cross examination as any other wit-

ness. If he fails to testify as a witness, his failure to do so may be commented on by the court and counsel in their statements to the jury.

(The prevailing American rule that a Defendant's failure to testify is no evidence of guilt is contrary to the common sense and experience of mankind, and should be modified. It does not obtain in England, Canada, or any other country where the Jury System prevails.)

X.

The Defendant and the State shall be entitled to legal process to secure the attendance of witnesses and each may, if the presence of a witness can not be secured, take the deposition of such witness whether within or without the State, under such conditions to be fixed by the Court as will protect the rights of the Defendant. Both the State and the Defendant may use the testimony of any competent witness who has testified at any hearing of said charge, providing said testimony was given in the presence of the Defendant with an opportunity for him to cross examine such witness. The Court may also under such conditions as will protect the rights of the Defendant permit the State or the Defendant to take the deposition of a witness within its jurisdiction, upon a showing that said witness is likely to leave said jurisdiction before the trial of said case.

(A deposition is the written testimony of a witness to be used in a later trial. Depositions are generally authorized in lawsuits between private citizens. In all states they should be permitted also in criminal cases, under proper safeguards.)

XI.

The Defendant shall be presumed to be innocent of the offense charged, but the effect of this presumption shall be only to place upon the State the burden of proving him guilty beyond a reasonable doubt, and the Court shall so instruct the jury.

(This section is directed against the overemphasis that has been placed on the presumption of innocence by the decisions of a number of states.)

XII.

In the conduct of the trial, including the examination of witnesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case and in said instructions may make such comments on the evidence and the testimony and character of any witness as, in his opinion, the interests of justice

may require,—provided, however, that the failure of the Court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the Defendant. Such instructions and comments by the trial court shall be reduced to writing, before delivery, unless a stenographic record is made at the time of delivery.

(During the early days of our country's history in many states laws were passed and constitutional amendments were adopted which had the effect of reducing the power of the judge to that of a mere umpire unconcerned in the actual discovery of criminal guilt or innocence. In a few states, and in the Federal courts, the power of the judges remained as it originally existed according to the common law of England. The purpose of the section is to restore this judicial power in those states where it was unwisely taken away to the unfair advantage of criminals financially able to employ eloquent and resourceful lawyers.)

XIII.

In all felony cases a five-sixths verdict of a jury shall be sufficient to convict, except in cases where death may be the penalty imposed, and in which cases the verdict of the jury must be unanimous. In misdemeanor cases triable before a jury the jury shall consist of six, and a five-sixths verdict shall be sufficient to convict. The Defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court. In all jury trials, only the question of guilt shall be decided by the jury, and the trial judge shall fix such punishment as may be authorized by law. Before sentence the judge shall be advised of the Defendant's criminal record so far as obtainable, and may seek information as to his mental condition.

(In many states a verdict by fewer than all of a jury is permitted in civil suits, and in several states in criminal trials. Experience has proved the wisdom of such provisions. The same system should be applied in criminal cases in all states. In misdemeanor cases, it is believed that speedy and impartial justice can be obtained by a jury of six. If a defendant is willing to waive a jury and submit his case to the judge, the statutes of all states should be elastic enough to permit this to be done.)

XIV.

A Defendant shall have the right to appeal to an appellate court following a verdict and judgment of guilty. The appellate court shall, on appeal, in addition to the issues raised by the Defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the prosecuting officer of the

county or the attorney general of the State. The State may also prosecute an appeal by the prosecuting officer or by the attorney general of the State from any adverse rulings or decision of the trial court, except a verdict and judgment of not guilty. On the hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the appellate court, after an examination of the record before the court it shall appear that the error complained of has resulted in a miscarriage of justice.

(According to the Supreme Court of the United States, "law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." (213 U. S. 356.) This typically modern and American definition emphasizes the importance of courts, and especially appellate courts, in preserving and effectuating what we call law. To a limited extent there should be a right to appeal in criminal cases even when the Defendant wins in the lower court.

The latter part of this section is directed against the doctrine that all error in criminal cases is presumed to be prejudicial error. Many thoughtful lawyers think that this doctrine, which is peculiarly American, is the most disastrous doctrine that has developed in the criminal jurisprudence of America. It has resulted in the reversal of an average of one-third of all criminal convictions, taking the country as a whole.)

XV.

All appeals shall be taken within — days after the judgment of the court. The record of the appeal shall be perfected and filed in the appellate court within — days after the appeal is taken and shall be given precedence over civil appeals.

The appellate court may call witnesses or receive affidavits in reference to any controverted question of fact relating to the procedure in the trial, or may call upon the trial court to examine into and correct a statement in reference to such matter of procedure. In all appeals, typewritten transcripts of the record and typewritten briefs may be used by permission of the appellate court. In case the appellate court considers the punishment fixed is excessive, it may reduce the same without remanding the case for new trial.

In all capital cases, the record must be reviewed by the highest court of appeal. If the Defendant be found indigent by the trial court, the expense of the appeal together with a reasonable attorney fee to be fixed by the court shall be paid by the county in which the crime was committed.

(The purpose of this section is to prevent avoidable delay in connection with appeals, without prejudicing the rights of Defendants.)

XVI.

If on an appeal by the Defendant the judgment of conviction shall be reversed and remanded the case shall be promptly set for retrial and on such retrial the Defendant shall be subject to prosecution on the original charge made in the indictment, even though he may have been convicted at the first trial of some lesser offense.

(The purpose of this section is to prevent avoidable delay in connection with appeals, without prejudicing the rights of Defendants.)

XVII.

No court authorized to place a Defendant on probation shall consider and pass upon an application therefor without giving reasonable notice to the prosecuting officer and according him a right to be publicly heard thereon. No public official authorized to hear or grant pardons or paroles shall consider an application therefor until reasonable notice has been given, if possible, to the prosecuting officer who secured such conviction, the prosecuting officer of the county at the time of said application and the trial judge; and the decision by a public official granting a parole or pardon shall state the reasons why the same is granted, which statement shall be made public five days before such pardon or parole becomes effective.

(While the pardon and probation system is now recognized as a good and necessary feature in modern American criminal justice, in some states grave abuses have appeared in connection with pardons and probations. This section is directed against these abuses.)

XVIII.

A Defendant appealing from a judgment of conviction shall remain in custody unless the trial Court shall on granting the appeal certify (provided the charge is one which isailable) that there is in its opinion reasonable ground for the prosecution of said appeal. The appellate court shall on application also have the power to issue such certificate. In case of such certificate the Defendant shall be released on bond fixed by the trial or appellate court.

(The system described exists in the Federal courts and in the courts of many states. It should be extended to the courts of all states so as to remove a striking inequality to the advantage of criminals with money and to the disadvantage of criminals without money, and at

the same time to remove a real danger to society. Any presumption of innocence is certainly refuted by a judgment of conviction.)

XIX.

A. Whenever a person under indictment desires to offer a plea of insanity he shall present such plea ten days before trial or such time thereafter as the court may direct.

B. If a Defendant when brought to trial for a criminal offense appears to the court to be or is claimed by his counsel to be insane so that he can not understand the proceedings against him or assist in his defense the question of his sanity shall first be determined and if he is found to be insane he shall not be tried, but shall be confined in a proper institution. If later he is found to be sane, he shall then be brought before the court on the original charge and the prosecution shall not be prejudiced by such lapse of time.

C. Whenever in the trial of a criminal case the defense of insanity at the time of the commission of the criminal act is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial and if the judge does so, he shall notify counsel for both the prosecution and defense of the witnesses so called, giving their names and addresses. On the trial of the case, the witnesses so called by the court may be examined by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as, in the discretion of the judge, may seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

D. Whenever in any indictment or information a person is charged with a criminal offense arising out of some act or omission, and it is given in evidence on the trial of such person for the offense that he was insane at the time when the alleged act or omission occurred, then if the jury before whom such person is tried concludes that he did the act or made the omission, but by reason of his insanity was not guilty according to law for the crime charged, then the jury shall return a special verdict that the accused did the act or made the omission but was not guilty of the crime charged by reason of his insanity.

E. When the special verdict provided for in Section D is found, the court shall immediately order an inquisition to determine whether the prisoner is at the time insane, so as to be a menace to the public

safety. If it is found that the prisoner is not insane as aforesaid, then he shall be immediately discharged from custody. If he is found to be insane as aforesaid, then the judge shall order that he be committed to the state hospital for the insane to be confined there until he has so far regained his sanity, that he is no longer a menace to the public safety.

(This section has to do with the borderland between law and medicine. The practice suggested has already been established in some states, and undoubtedly is far preferable to the archaic practice of the common law which exists in most states.)

XX.

After an indictment has been returned for an information filed in a court of record, there shall be no nolle prosequi entered except on a written statement of the prosecutor, giving his reasons therefor. If, in the opinion of the trial court, such reasons are not sufficient to justify such action, the judge can refuse to enter said dismissal or he can make further investigation as to whether such case should be prosecuted. If the trial judge decides that such prosecution shall continue, he shall have the authority, if he thinks the interests of justice require it, to appoint a special prosecutor to conduct said case.

(A nolle prosequi in a criminal case is an abandonment of prosecution by the chief prosecuting official. It places an extraordinary power in one man. This power is naturally liable to abuse, sometimes through corruption, more frequently through politics and incapacity. The section is directed against the abuse of the necessary power of nolle prosequi.)