Shortcomings in the Administration of Criminal Law

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Purpose of the Criminal Law

PROTECTION of the physical safety of the lives and property of the public and its individual members is the basic and primary purpose for which society was originally organized. The defense of the nation against external aggression is the task of the armed forces and the diplomats. The safeguarding of the public from internal depredations by persons who disregard the rights of others is the function of the criminal law. In turn, the enforcement of the criminal law has a number of aspects. First, there are the police and other law enforcement agencies in the executive branch of government, whose duty is to preserve the peace, prevent and suppress crime, and detect and apprehend perpetrators of offenses that have been committed. The next and crucial step in the administration of criminal justice lies with the courts—the judicial branch of the government. Providing this protection remains the fundamental purpose of government, even though, in the course of centuries, gradual complex social and economic developments have led governments to assume additional burdens in social, economic, and financial fields.

Manifestly, the criminal law is more than a branch of jurisprudence. It is the instrumentality by which the public is protected from inroads against the safety of the lives and property of its members. In dealing with malefactors, the law inflicts punishment for their misdeeds. The term “punishment” is, however, perhaps misleading in this connection. Modern criminology no longer views punishment as the imposition of a penalty, or the exaction of retribution. A sentence in a criminal case looks to the future. Its objectives are to prevent repetition of crimes by the culprit and to dissuade others from perpetrating similar offenses. These ends are sought to be attained, in part, by immobilizing the criminal for some time, thereby making it impossible for him to continue his nefarious activities during that period. Also, the example of a sentence imposed on one person is intended as a deterrent to others. The law endeavors to reform and rehabilitate the

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offender, either by suitable discipline and appropriate training while in prison, or by placing him on probation and giving him guidance by a probation officer. When the last-mentioned course is pursued, its purpose is not primarily to aid and assist the criminal, but to protect society by transforming him into a constructive member of the community.

The great Italian criminologist and penologist, Beccaria, observed: "The aim, then of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise."¹

**Need for Efficient Administration**

"The more prompt the punishment and the sooner it follows the crime, the more just it will be and the more effective."² Swiftness and certainty of punishment are indispensable to a successful administration of the criminal law. Undue delay between arrest and trial, or a long interval between trial and final disposition of appellate proceedings, especially if the defendant is enlarged on bail in the interim, weakens the criminal law in its effort to protect the public, detracts from its effects as a deterrent, and tends to create disrespect or contempt for law in the eyes of the underworld, as well as disdain on the part of the thinking public.

These introductory remarks may seem simple and elementary, as indeed they are. In exploring and analyzing any important topic, however, it is essential to penetrate to its underlying philosophy, even if it is so well known that to do so seems, at first blush, needless repetition. Unfortunately, all too often matters of this kind are overlooked or forgotten in the consideration of a mass of disorganized details. Fundamentals must always be borne in mind if a consideration of details is to be fruitful. One must not let the proximity of the trees obscure the view of the forest.

The administration of justice is a practical rather than a scientific matter. It must be approached in a realistic, rather than a theoretical spirit. While the law itself may be regarded as a science, its application and administration is an art. The law is not an end in itself. It is merely the tool or the instrument by which justice is attained in a practical manner. Beccaria sardonically observed in his famous essay, "Happy the nation, whose laws are not a science."³ This is peculiarly

¹ Beccaria, Of Crimes and Punishments 42 (1964).
² Id. at 55.
³ Id. at 23.
applicable to the field of criminal law, which deals primarily with the protection of the community.

Crime is always present in human society. All that can be hoped for is to reduce it to a minimum. Unfortunately, in recent years in the United States, the number of violent crimes has increased tremendously, especially in some of the larger cities. Suppression of crime has become one of the most important and vital internal problems of our country. The rate of crime has grown enormously and rapidly, far in excess of and out of proportion to the expansion of the population. What is particularly ominous is that the ratio between young criminals and the total number of criminals has greatly increased.

In this study no effort will be made to explore and analyze the ultimate causes of crime. If this can be done at all, it is the task of the sociologist and the psychologist. We shall confine our discussion to the impact of the criminal law and its administration on the crime problem.

The Primary Tool of the Criminal Law is the Trial

In the last analysis, the purpose of a trial of a criminal case is to ascertain in a fair, impartial, and orderly manner whether the accused has committed the crime with which he is charged; to convict the guilty,

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5 Ibid.
6 In recent speeches before the Maryland and New York State Bar Associations the President of the American Bar Association called attention to some shocking facts. He indicated that there has been an increase of 10% in serious crimes reported in 1963 over the parallel figure for 1962, and that for the first 9 months of 1964 there was a further increase of 13%; that more than 40% of all arrests involved persons 18 years of age or under; that crimes of violence continued to increase; and, finally, that since 1958, crime has been increasing five times faster than the growth of the population.
7 Hoover, op. cit. supra note 4, at 3.
8 Id. at 24.
9 It is sometimes said that an ultimate cause of crime is poverty. This is a superficial and shallow view, because two or more generations ago there was much more poverty and much less crime. Moreover, many persons charged with serious crimes are found to be employed and they use this fact as a reason for applying for release on low bail, or even on personal recognizance. Cities in Western Europe have a much smaller volume of violent street crimes than many of the big cities of the United States. For example, one feels safer in walking at night the streets, including even the back streets and alleys, of Rome, Florence and Venice, than those of some of our cities; and yet until recently Italy had much more poverty than the United States. One wonders whether the ultimate cause is not the modern attitude of parents toward the discipline and training of children, the failure of parents to require obedience, and their omission to inculcate in their offspring proper ideas of right and wrong and regard for the rights of others during the formative years of the children.
provided guilt is proven beyond a reasonable doubt; and to acquit those whose guilt is not so proven. The closer the administration of criminal law approaches this end, the more successful it is. The more it deviates from this target, the more it fails to fulfill its function. Rule 2 of the Federal Rules of Criminal Procedure summarized this aim in the following trenchant terms: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Mr. Justice Cardozo enunciated this ideal in his usual inimitable phraseology: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

An eminent English judge, Sir Patrick Devlin, recently stated: "When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted."

Rights of the Accused

The common law countries, such as the United States and England, take a just pride in the fact that they place stronger emphasis on the protection of rights of individual defendants than do Roman law countries, where the law directs its attention to a greater extent to the interests of the general public. Under the Anglo-American system of law the accused is clothed and surrounded with a number of potent safeguards. Their purpose is to erect a screen to prevent the erroneous conviction of an innocent person.

The first basic requirement is a public trial. The purpose of a public trial is not solely to shield the defendant, but also to protect the interests of society, by allowing the public to view the administration of justice. In fact occasionally there are defendants who would prefer a secret trial in order to avoid publicity or embarrassment.

Another vital privilege accorded to the accused both in federal and state courts is the right of counsel. While originally it was construed as confined to a right to be represented by counsel retained by defendant, it has been properly extended to require the appointment of counsel for defendants who are financially unable to hire a lawyer,
unless the defendant knowingly and intelligently waives that right. This recent advance is enlightened and wholesome. It is an important step in the right direction in the defense of personal liberty.

A further safeguard is the defendant’s right to be confronted with witnesses at his trial. It is of the essence of a criminal trial under Anglo-American jurisprudence that witnesses be produced in person, face the accused, and give their testimony orally. The defendant and his counsel must be in a position to hear the testimony and to cross-examine the witness. There may be no convictions on ex parte affidavits or depositions.

The prosecution is required to prove the defendant’s guilt beyond a reasonable doubt, and unless such proof is forthcoming, the defendant must be acquitted. Coupled with this requirement is a presumption that the defendant is innocent until his guilt is established beyond a reasonable doubt. This is not really a presumption in the technical sense. It is an emphatic restatement, in converse form, of the doctrine requiring proof of guilt beyond a reasonable doubt.

Under the Anglo-American system of law, a defendant is usually entitled to a trial by a jury. This mode of trial perhaps does not rise to the dignity of being an essential feature of ordered liberty, because there are other enlightened and progressive systems of law that do not always provide a trial by jury. There is a mounting admiration, which this writer shares, for trial by jury and for the caliber of justice meted out by the average jury. Historically the jury represents a cross-section of the population, selected at random, and interposed between the state and the accused. The system accords to the defendant a trial by a tribunal that is not a part of or dependent on the government. It is a fact, however, that defendants frequently waive trial by jury and elect to be tried by the court alone. For instance, this practice prevails locally in the Maryland courts and is frequently followed in the federal courts. One may wonder why a defendant would waive the apparent protection extended to him by a jury trial. Observation and

19 U.S. Const. amend. VI; Cal. Const. art. 1, § 7.
20 In federal courts, this may be done only with the consent of the Government counsel and the court. Singer v. United States, 380 U.S. 24 (1965). In California, a waiver of a jury must be consented to by the district attorney. Cal. Const. art. 1, § 7.
experience show that this is done at times in cases involving a particularly unpopular or disgusting crime in which the evidence of the prosecution is not very strong. In such a situation, judges are likely to demand more proof than juries. Again, jury trials are occasionally waived when the facts are not seriously contested or controverted, and the matter hinges on a question of law.

Every defendant is granted the privilege against self-incrimination guaranteed by the fifth amendment, as well as by most state constitutions. In respect to defendants in criminal cases, it comprises not only the privilege not to be questioned at the trial, unless the defendant voluntarily chooses to take the witness stand, but even precludes an inquiry, in the presence and hearing of the jury, whether the defendant will elect to testify and desires to submit to an interrogation.

This privilege has been much discussed of late years. It is a part of the warp-and-woof of Anglo-American jurisprudence. It is not, however, an integral part of ordered liberty, nor is it an indispensable feature of abstract justice or natural law. Mr. Justice Cardozo made the following interesting and illuminating comments on this subject:

The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

Fundamentally, it seems entirely logical and proper to interrogate the defendant, provided that this is done fairly and not oppressively, as he naturally knows best whether he committed the act with which he is charged. An American or English visitor to a French court is amazed when he observes that, after the trial commences by the read-

ing of the indictment, there follows an enquiry by the presiding judge to the defendant: "What have you to say?" The defendant, not his counsel, answers. Under that system, innocent persons are not railroaded to prison, but it is much harder for a guilty man to escape justice. However, we must ungrudgingly accept the privilege against self-incrimination as being imbedded in our law. It is the product of centuries of history. But it need not be glorified, or extended beyond its traditional limits. It is not a lofty or exalted principle, but is merely an artificial advantage extended to the accused.\(^2\) Perhaps it is unconsciously derived from the Anglo-Saxon idea of sportsmanship. The privilege gives to the defendant the right to remain silent and see whether the government can establish his guilt beyond a reasonable doubt without his assistance.

The defendant is further protected by the exclusionary rules of evidence, under which certain types of evidence are deemed inadmissible. Perhaps the most important of these is the doctrine that bars the introduction of hearsay testimony. This principle constitutes an important protection to an innocent person, since hearsay testimony is easily distorted or taken out of context, and, at times, may even be fabricated. It is a salutary doctrine in the interests of justice. Facets of this rule of evidence have been frequently criticized and even condemned as being purely arbitrary and as excluding valuable information from the jury.\(^5\) It is interesting to observe, however, that many of the critics have been neither trial judges nor trial lawyers. Those who are in constant contact with the realities of the trial courtroom realize that the hearsay rule at times shields an innocent person from an unjust conviction, and, in civil cases, may preclude the perpetration of a fraud. In this respect the common law differs from systems prevailing in Roman law countries. The latter have no law of evidence, but admit evidence of every type, provided it is relevant or germane to the issues. There, the court or jury is presumed to appraise the weight of any item of evidence in accordance with its probative value.

\(^2\) No comment is permissible before the jury on the defendant's failure to testify. Griffin v. California, 380 U.S. 609 (1965). The defendant is entitled to an instruction that no adverse inference may be drawn from his failure to do so. Bruno v. United States, 308 U.S. 287 (1939). Many experienced trial lawyers often request the court not to give this instruction because actually it is likely to prove a boomerang and do the defendant more harm than good. It calls the attention of the jury to a matter that they might possibly otherwise overlook and calls upon them to perform a feat of intellectual gymnastics that is psychologically difficult, if not impossible. In England the judge may comment on the defendant's failure to take the witness stand, but counsel for the prosecution may not refer to the matter.

Thus the accused in a criminal trial under Anglo-American law is surrounded with numerous safeguards and is accorded many advantages. The fact that he may not be convicted except on proof beyond a reasonable doubt, established by competent evidence, is a mighty bulwark for the innocent against the possibility of an unjust conviction. It is necessarily inherent in this system that, in the light of these rigorous requirements, some guilty persons will escape through the meshes. This result is inevitable, even under an efficient administration of our criminal law, and must be accepted with equanimity. But it is thoughtless to say, as some do, that the unlimited resources of the prosecution enable it to wield a heavy hand against a "helpless" defendant. This idea was well expressed by Judge Learned Hand some years ago:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.26

Rights of the Victim

While stressing the rights of defendants, our system of law, in recent practice, seems to neglect the interests of the public and the victims of crimes. It tends to overlook Cardozo's admonition that "justice, though due to the accused, is due to the accuser also."27 The rights of the victims, for example, the man who was attacked and robbed at the point of a gun, the woman whose purse was snatched and who was knocked down and injured, the family of a storekeeper who was killed during the perpetration of a robbery, or the unfortunate victim of a rape, seem to be treated but cavalierly and their interests not emphasized as much as those of the perpetrators of the offenses. Yet the victims' rights not to be molested have been violated by the criminal. These are worthy at least of as much protection and consideration as those of the accused. The pendulum has swung too far to the side of the accused. It must be brought back to an even position. A plumb line must be redrawn between the criminal and his victim.

In some quarters the accused is often depicted as a poor, oppressed, cowering, frightened individual, bewildered and ignorant of his rights, who deserves sympathy, consideration and kindness. Such a picture of the average prisoner charged with a serious crime of violence is far from accurate. It is an unjustified embellishment and a fantastic idealization. Many defendants arrested on such charges have had prior conflicts with the law, and previous contacts with the police and the courts. Although not well educated, they are likely to be ruthless, entirely oblivious of the rights of others, sophisticated in an evil way, cunning and crafty. They are often quite familiar with their legal rights and the restrictions that hamper the police and the prosecution. The latest rulings of appellate courts in the field of criminal procedure seem to travel through the grapevine of the underworld, and are sometimes even mentioned by a prisoner to the arresting officer. The defendant is often skilled, in a petty way, and ready to fence intellectually with the police, or to try to bargain with them or the prosecuting attorney.

Some sociologists and psychologists picture a criminal as being entirely the product of his environment. Naturally, every human being is influenced by his heredity and environment. But to envisage him as a helpless puppet or robot, entirely controlled by external influences, is not only fallacious, but is a complete denial of the existence of human dignity. If these assumptions were true, criminal law should be abolished, because no one should be punished for doing something from which he is unable to refrain. Free will and the ability to choose are part of the psychological makeup of every human being, except perhaps the insane or the mental defective. Only an atheist or an agnostic is in a position to deny freedom of the will, because the existence of such volition is one of the fundamental principles of all religions. If there were no freedom of the will, there would be no such concept as sin, or punishment for sin. Sin is punished only because the sinner is in a position to choose between sinning and refraining from sinning. Some fine individuals have risen from poor environments and, on the other hand, some evildoers have been surrounded by excellent living conditions.

Every human being should have compassion. But it is error to direct compassion solely toward the criminal, as is done too often nowadays, and to ignore the helpless victim of the crime. Actually, those who adhere to that attitude compose a minority, though a vociferous one. The majority of the population, inarticulate as it may be, undoubtedly condemns the criminal, extends its sympathy to the victim, and wishes and hopes for greater protection for its own safety.
Reversals on Technicalities

The trial of a criminal proceeding or a civil action is a quest for justice, not a game of skill. While justice must be administered in accordance with law, one must never lose sight of this objective and become immersed in the morass of legal minutiae that sometimes degenerate into trivia. The farsighted leaders of the legal profession brought about a great reform in the field of adjective law by the introduction of the Federal Rules of Civil Procedure, which revolutionized and simplified civil procedure in the federal courts. This example has been followed by a large number of the states. One of the main purposes of this far-reaching advance was to eliminate, or at least reduce to a minimum, what was labeled by Wigmore many years ago as "the sporting theory of justice."

The broad success and the wide acceptance of the Federal Rules of Civil Procedure, emboldened those interested in law reform to attempt a similar result for criminal litigation in the federal courts. The outcome was the adoption of the Federal Rules of Criminal Procedure in 1946. The purpose of this measure was also to simplify legal procedure and to clear away the technicalities that had accumulated through the centuries, like barnacles that encrust the hull of an old ship. Many of them originated in a bygone era in England, when practically every serious crime was punishable by hanging, and judges, who were humanely inclined, tried to devise pretexts for avoiding capital punishment in instances in which they did not think it was morally merited. These cobwebs were brushed away in the federal courts. The window was opened to a strong breath of fresh air.

The Rules were welcomed with acclaim, and for a number of years were administered in the spirit in which they were intended. It was realized that the purpose of the safeguards that surround the defendant is to protect the innocent from unjust conviction, and not to interpose obstructions to the conviction of the guilty or to create an obstacle course for the Government. It was not the objective of the Bill of Rights and cognate provisions to frustrate convictions and to turn criminals loose, unwhipped of justice merely because the Government may fail strictly to observe all procedural niceties.

The Rules did away with technical forms of indictments, and with the succession of pleas in abatement and pleas in bar that were often interposed seriatim. In many other ways they streamlined and simplified procedure. The keystone of the arch is the "harmless error" rule. It reads as follows: "Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be
disregarded." This principle should be emblazoned in red letters. It is of primary importance. If the evidence against the accused is overwhelming and there is no doubt of his guilt, an error in procedure that has no bearing on the issue of his guilt or innocence should manifestly be ignored. Such was the obvious intention of the framers of the Rules. Legal procedure does not prescribe a ceremonial or ritual that must be followed rigidly and inflexibly in every detail, and that requires an acquittal for a slight deviation from a prescribed meticulous formula.

In this connection it is interesting to note the attitude of the English Court of Criminal Appeal. That tribunal hears appeals in criminal cases from various courts in England. Appeals are argued within four to six weeks after the trial. In the vast majority of cases, decisions are delivered orally at the close of the argument after a brief whispered consultation on the part of the three judges on the bench in full view of the public. The extemporaneous opinion, generally couched in felicitous phraseology, becomes the opinion of the court, which may eventually appear in the reports. An examination of reported cases of that court, as well as personal observation of the court’s proceedings on different occasions, lead one to the conclusion that this tribunal does not reverse convictions for error in procedure unless the error has led to an unjust result. That appellate courts in the United States should adopt this enlightened and progressive attitude is a consummation devoutly to be wished.

Unfortunately, after the Federal Rules of Criminal Procedure had been in effect for but a few years and their novelty had worn off, the pendulum began its swing to the side of the defendants and the harmless error rule came to be honored more in the breach than in the observance. In fact, it seems to have reached a state of innocuous desuetude. Many judges do not even refer to it and seem not to bear it in mind. Ignoring the harmless error rule leads to many reversals and new trials in cases in which guilt is undoubted and may even be undisputed. The result is delay in the administration of justice and sometimes its complete frustration.

The granting of a new trial is not to be treated lightly. A new trial is not to be likened to an additional performance of a drama. Lapse of time may make a new trial impossible or impracticable, due to disappearance or death of witnesses, or the fading memory of those who are still available. Moreover, new trials frequently are unfair and onerous to witnesses. The ordinary witness, who may be just an inno-

\[28\] Fed. R. Crim. P. 52(a).
cent bystander, is unnecessarily burdened with repeated appearances in court, at times to the detriment of his own affairs. Much worse is the plight of witnesses who are victims of crimes and members of their families who are subjected to the ordeal of being compelled to testify at repeated intervals and thus relive a horrible nightmare that they have been endeavoring to forget. The victim of a rape, for example, is at times required, a year or two after the original trial, again to go through the harrowing experience of reviving the scene and relating before a curious public the pain and embarrassment to which she had been subjected. Similarly, members of the family of the victim of a murder may be asked to recall afresh the vividness of an atrocious scene which they have witnessed. Such burdens are a gross injustice to victims and other witnesses to crimes. No thought or consideration appears to be accorded to them. The ultimate consequence of reversals and new trials is that many obviously guilty persons eventually escape punishment, to the detriment of the public, leading to a lack of confidence in the administration of justice. In cases in which punishment is finally inflicted, after a protracted course of repeated proceedings, the long delay in its imposition results in a loss of its full significance and effect.

While these defects in the administration of the Federal Rules of Criminal Procedure naturally relate to the federal courts, it must be noted that their influence to some extent permeates the administration of justice in the states. This tendency has become particularly marked in recent years because, under modern post-conviction procedures, cases tried in the state courts are subject to review in the federal courts. While theoretically the scope of this review is restricted to vital constitutional questions, this term has been so liberally and broadly construed that the federal courts have conducted what amounts to practically a re-examination of the original trial\(^2\).

It is not the intention of this author to criticize in this essay any specific rulings on questions of law. It is urged, however, that an outstanding defect in the administration of justice today is found in treating as grounds for reversal of a conviction errors that have no bearing on the question of guilt or innocence of the defendant and thereby ignoring the "harmless error rule" which, as has been stated, should be deemed fundamental. Many times several new trials are had in succession in the same case.

Superimposed on this weakness are the delays that are prevalent

in both federal and state appellate courts. In the numerous cases in
which new trials are ordered, a long time elapses between the original
and the new trial. A survey made by the Committee on Appellate
Delays appointed by the Criminal Law Section of the American Bar
Association in 1963, showed that in most states the period between
the imposition of sentence and the final disposition of an appeal in
a criminal case varies from 10 to 18 months. In very few states was
the gap less than 10 months, but in no instance less than 5 months.
In the federal courts the time lag between filing a notice of appeal
and its final disposition in the United States Court of Appeals varied
from 11.8 months in the Eighth Circuit, to 6.3 months in the First
Circuit.30 A comparison with the English courts, where the interval
between trial and disposition of an appeal is only 4 to 6 weeks, ap-
ppears startling.

A few specific instances will illustrate the deplorable trend that
we have been discussing. The notorious Chessman case in California
is so well known that to discuss it in detail would be superfluous.
Suffice it to say that the commission of an atrocious crime by him was
eventually not actually in dispute, and yet the case went back and
forth between the state courts and the Supreme Court of the United
States for a dozen years before the sentence was carried out. Mr.
Justice Douglas made the following pointed remarks in dissenting
from a decision by the Supreme Court in favor of Chessman in a
habeas corpus proceeding:

But the fragile grounds upon which the present decision rests jeopar-
dize the ancient writ for use by federal courts in state prosecutions.
The present decision states in theory the ideal of due process. But
the facts of this case cry out against its application here. Chessman
has received due process over and again. He has had repeated re-
views of every point in his case. . . . Nearly seven years later we
return to precisely the same issue and not only grant certiorari but
order relief by way of habeas corpus.31

On the evening of March 12, 1953, in Washington, D. C., one
Willie Lee Stewart entered a grocery store, brandished a loaded pistol
or revolver, "held up" the proprietor, and fatally shot him. The grocer's
wife and adult daughter were present and witnessed the harrowing
tragedy. The fact that Stewart had committed the crime was not con-
tested. He pleaded insanity. The psychiatrists at Saint Elizabeth's
Hospital, an outstanding government hospital for the mentally ill to

30 The report of the Committee on Appellate Delay in Criminal Cases is published
which Stewart was committed for observation and examination, reported that he was free of mental disease or defect and indicated that he was shamming insanity. Nevertheless, the case was tried five times over a period of ten years. Each of the first three trials ended with a verdict of guilty of murder in the first degree, which carried a death sentence. There was a reversal and a grant of a new trial in each instance on points that had no bearing on the guilt or innocence of the accused. When the case reached the Supreme Court, Mr. Justice Clark, dissenting in his vivid, vigorous style, made the following graphic observations:

It may be that Willie Lee Stewart "had an intelligence level in the moronic class," but he can laugh up his sleeve today for he has again made a laughingstock of the law. This makes the third jury verdict of guilt—each with a mandatory death penalty—that has been set aside since 1953. It was in that year that Willie walked into Henry Honikman's little grocery store here in Washington, bought a bag of potato chips and a soft drink, consumed them in the store, ordered another bottle of soda, and then pulled out a pistol and killed Honikman right before the eyes of his wife and young daughter. The verdict is now set aside because of some hypotheticals as to what the jury might have inferred from a single question asked Willie as to whether he had testified at his other trials. In my view, none of these conjectures is sufficiently persuasive to be said to cast doubt on the validity of the jury's determination.

At the fourth trial the jury disagreed. At the fifth trial the jury again found the defendant guilty of murder in the first degree, without recommending life imprisonment, as it had a right to do under a recent local statute. In the absence of such a recommendation, a mandatory death sentence was again imposed. At this trial the Government had demonstrated that the defendant had been shamming insanity, by producing some requisition slips written by him in his own handwriting and signed by him from time to time, directed to the jail library and requesting permission to borrow certain volumes of the District of Columbia Code and the United States Code, invariably naming the particular volumes containing the Criminal Code. The victim's widow died several years after the first trial, but his daughter was compelled to testify at each of the five trials, and thus to revive and relive the horrible scene every couple of years for a decade.

Stewart v. United States, 214 F.2d 879 (D.C. Cir. 1954); 247 F.2d 42 (D.C. Cir. 1957); 366 U.S. 1 (1960).

The long and tortuous history of this case apparently led the United States Attorney to a feeling of complete frustration and hopelessness, which is easily understood. After the fifth trial, Stewart offered to plead guilty to murder in the second degree. The United States Attorney took the unprecedented step of moving the court to vacate the judgment and recommending that the plea be accepted. It carried a maximum sentence of imprisonment for a term of fifteen years to life. The court had no alternative but to acquiesce. The plea was accepted, and sentence was imposed on June 17, 1963, more than a decade after the commission of the original crime.

On October 3, 1960, also in Washington, D.C., James W. Killough strangled his wife, put her body in the trunk of his automobile, and threw the corpse into the city dump. He was arrested shortly thereafter and admitted his guilt. The fact that he had killed his wife was not controverted. He made both oral and written confessions. Although he was indicted for murder, the jury found him guilty of manslaughter. The judgment was reversed on the ground of inadmissibility of a confession, although it was voluntary and its voluntary character was not contested. He was tried and convicted again. Another reversal followed. The second reversal was also based on a ground having no bearing on the question of guilt or innocence. On both occasions there were emphatic dissents. At the third trial, which took place on October 7, 1964, almost four years to the day after the murder, the Government found itself bereft of sufficient evidence deemed admissible in the light of the previous rulings of the Court of Appeals which resulted in exclusion of all the confessions. The trial judge found himself constrained reluctantly to direct a judgment of acquittal for lack of sufficient evidence. He did so with a very emphatic expression of disgust and distaste, bemoaning the miscarriage of justice.

There are numerous cases arising out of the state courts in which federal post-conviction remedies have been pursued for years by the device of raising a different constitutional point on successive motions to vacate the sentence. Much could be accomplished in the direction of achieving a more expeditious administration of justice by requiring a defendant to exhaust all of his grounds in a single motion. A defendant is entitled to one trial and one appeal. Ordinarily his rights end

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84 Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). (Confession held to be the fruit of earlier inadmissible confessions.)

85 Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964). (Standard interview form at jail would not have been used against him if he had been informed of this right at time of interview and had so demanded.)
at that point. The original purpose of post-conviction remedies was a beneficent one: to provide a cure for an exceptional miscarriage of justice, not an additional routine review. But in some districts, the federal court is flooded with applications from prisoners in state penal institutions to vacate sentences imposed on them. While the great bulk of these proceedings terminate unfavorably to defendants, each has to be examined and many have to be heard, thereby unnecessarily consuming a great deal of time of the court, to the detriment of the rights of other litigants whose cases are being delayed in the interim. Moreover, the criminal proceeding itself is prolonged, all to the demoralization of the enforcement of the criminal law.

To multiply examples would unduly prolong this essay. Those just given clearly illustrate some of the difficulties confronting the administration of justice and the suppression of crime in the United States today.

Many members of the bench have emphatically protested against the trends that we have been discussing. Thus, Judge Wilbur K. Miller of the United States Court of Appeals for the District of Columbia Circuit, in a dissenting opinion in *Killough v. United States*, explored, “this court’s tendency unduly to emphasize technicalities which protect criminals and hamper law enforcement, against which I have repeatedly protested.” He added, “in our concern for criminals, we should not forget that nice people have some rights too.”

The United States Court of Appeals for the Second Circuit, a tribunal that has not succumbed to the current tendency of reversing convictions on technicalities that have no bearing on the guilt or innocence of the defendant, made the following eloquent comments in an unanimous opinion in *United States v. Guerra*.

The day has certainly not come when courts will set a convicted criminal free for no reason other than some practice of police or prosecution—wholly unrelated to the conviction itself—did not meet with their approval. If that unhappy day should ever arrive, the often-heard criticism that law and lawyers are interested only in “technicalities” will have a ring of truth, and courts may rightfully be accused of exalting form above substance.

Mr. Justice Clark, in a dissenting opinion in *Milanovich v. United States*, registered emphatic protest against the tendencies to which we have referred. He said:

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86 315 F.2d 241, 265 (D.C. Cir. 1962).
87 334 F.2d 138, 146 (2d Cir. 1964). (Emphasis added.)
88 Perhaps Judge Kaufman, the writer of the opinion, might well have said “should” instead of “will.”
My duty here is to help fashion rules which will assure that every person charged with an offense receives a fair and impartial trial. But that obligation does not require my ferreting out of the record technical grounds for reversing a particular conviction, grounds which could not possibly have affected the jury’s verdict of guilt as a factual determination.

Search and Seizure

We shall now pass to another aspect of the subject that likewise tends to frustrate the conviction of the guilty. We refer to recent developments and trends in the construction and application of the fourth amendment. The fourth amendment to the Constitution of the United States reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added.)

These provisions of the Bill of Rights, together with the writ of habeas corpus, constitute a palladium of liberty. They erect a strong bulwark against even a remote possibility of a police state. They render impossible such things as the oublie in the Bastille during the ancien regime in France, an institution that was still in existence when the Founding Fathers framed the Constitution. They ban the dreaded knock on the door in the dead of night and the arrest or removal of one or more of the occupants of a home to an unknown destination, as has occurred in our own times under Communist and Fascist dictatorships. They preclude imprisonment without a trial. They prevent a series of arbitrary arrests for the purpose of discovering the identity of a perpetrator of a crime, such as a dragnet apprehension of numerous persons within a certain area in order to interrogate them and ascertain which one may have committed a particular crime. They ban visitatorial and exploratory searches of homes and places of business, solely for the purpose of determining whether any contraband is to be found on the premises—such searches as were condemned by Lord Camden in the celebrated case of Entick v. Carrying.40 They banish the notorious writs of assistance used by the English authorities to conduct exploratory searches in the Colonies.

In recent years the classic splendors of this imposing edifice began to crumble away by a process of erosion. The philosophy underlying

the fourth amendment and the far-sighted purpose of its framers seem to have been distorted and deflected. These constitutional provisions have all too frequently been applied, not to guard the precious rights which are formulated by them, but in a manner that, time after time, results only in liberating criminals. The Supreme Court, in a majority opinion by Mr. Justice Jackson, sounded this warning: "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty."

It was not until 1914, when the Supreme Court decided the case of Weeks v. United States, that the rule was established banning, in federal courts, evidence obtained by an unconstitutional search and seizure. Prior to that time, the admissibility of evidence was not affected by the manner in which it had been obtained. Four years ago, the proscription was extended by the Supreme Court to state courts on the theory that the provisions of the fourth amendment were a part of due process of law as guaranteed by the fourteenth amendment to the states. Whether the Founding Fathers intended to impose such a drastic sanction for a violation of the fourth amendment is immaterial because the rule of exclusion has become definitively crystallized and must be accepted. It is the law of the land.

It must be emphasized that the fourth amendment does not ban all searches and seizures. It forbids only those that are "unreasonable." A search of the place where a legal arrest is made, as well as a search of the person arrested incidental to the arrest, are regarded as reasonable and are permitted. There are searches and seizures of other types that may be deemed reasonable, depending on the facts of the individual case.

The fourth amendment also authorizes arrests on the basis of warrants properly issued, as well as arrests without warrants, but made on probable cause. A problem arises frequently whether a seizure of the fruits of a crime or of the means by which the crime was committed, or of some other incriminating article, was legal and therefore, whether the evidence should be admitted at the trial. At times the

42 232 U.S. 383 (1914).
evidence is crucial and whether a conviction can be had, or once had whether it can stand, depends on the admissibility of the article. This in turn often hinges on the question of whether the arrest of the defendant was legally made on probable cause, which directly affects the legality of the search and seizure. Unfortunately, in recent years, there have been numerous decisions of appellate courts drawing fine-spun distinctions and hairsplitting refinements between what does and what does not constitute a probable cause for an arrest, and between what constitutes a reasonable or unreasonable search and seizure. When the point is reached at which the distinction between validity and invalidity in these matters depends on minor details and minute differences, the lofty and exalted aim of the fourth amendment becomes at least partially obliterated. In fact, many a thinking layman is gradually led to an attitude of disparagement towards the law. The majesty and the grandeur of the fourth amendment become tarnished. There is a plethora of cases in which trial courts have been constrained to direct verdicts of acquittal or in which appellate courts have reversed convictions, where the guilt of the defendant was undoubted and perhaps not even contested, but the arrest or the search and seizure were found to be technically invalid.

The reports are replete with such decisions. To endeavor to discuss many of them would prolong this article beyond reasonable limits. Perhaps an extreme case might be cited, in which police officers, who had arrived at the defendant’s home in order to arrest her on a charge of violating the law relating to narcotics, saw her walk out of the house and drop a small package into a garbage can that was located outdoors in the areaway. The keen-sighted officers retrieved the parcel which was found to contain narcotics. On the basis of this evidence the defendant was convicted. There was no real contest over the issue of her guilt or innocence. The conviction was reversed, however, on the ground that the action of the officers in recovering the narcotics from the garbage can, constituted an unconstitutional search and seizure.48

Whether a police officer has probable cause to make an arrest cannot be determined by study and reflection in an ivory tower, library, or conference room. A police officer may be confronted with a practical dilemma requiring him to make a decision on the spur of the moment. Unless a court called upon to determine such a question endeavors to visualize the momentary scene encountered by the police officer, it is not in a position to reach a realistic result. The court hears

arguments of counsel, receives and examines briefs, and then, after reflection, arrives at a decision perhaps weeks or months later. In many instances the decision is reached by a divided vote on the basis of a discussion of close legal distinctions. The application of hindsight in this leisurely, careful manner, without picturing the actualities that faced the police officer and the necessity of his making an immediate decision, is not conducive to a practical resolution of the question. A police officer is not a constitutional lawyer. He sees a situation before him momentarily, often outdoors in the dead of night, and sometimes in inclement weather. He must determine instantly whether to make an arrest or run the risk of allowing a miscreant to escape. He has no opportunity to seek immediate legal advice, and even if he did, by the time it was received it might be too late to make a seizure or apprehend a criminal, who in the meantime may have fled or destroyed the evidence.

So, too, allowance must be made for the police officer's intuition, such as is developed by practical experience in every profession. For example, an old family physician is often aided by his intuition in making a diagnosis. To a trained police officer some minor circumstance, which may seem insignificant or even may not be noticed by any one else, may appear exceedingly suspicious and may reasonably justify an arrest, even though on a prosaic recital of the facts subsequently embodied in a typewritten or printed record, a judge, no matter how learned, may be unable theoretically to find probable cause. At times some authorities refer to arrests or searches and seizures later adjudged invalid as "misconduct" by the police. This choice of words is hardly felicitous. The police officer is not engaged in a private enterprise for his own profit. He is not bent on a frolic of his own. He is trying to do his duty, generally arduous and frequently hazardous. He has the same frailties and shortcomings as other human beings. He may make a mistake in trying to guess what a court may hold in the future. He is no prophet. Perhaps he may be charged with error, but hardly accused of misconduct, except in flagrant situations.

There is another aspect of this subject that is of considerable importance. It is invariably assumed that the validity of an arrest or of a search and seizure must be determined on the basis of the facts before the officer at the time when he apprehended the prisoner, or conducted the search and seizure. The fact that the defendant was later shown to have been guilty of the offense for which he was taken into custody, or that the search resulted in successfully locating contraband articles, may not be considered. The logic of this reasoning is
invulnerable. Yet we must not overlook the well-known precept of Mr. Justice Holmes that, "The life of the law has not been logic; it has been experience." As a matter of common sense and substantial justice, it does not seem reasonable to ignore the outcome of the arrest or the result of the search and seizure. It is like saying to the officer that it is true that he arrested a guilty person, or seized an article that was properly subject to seizure, but he had no business to think that his prisoner was guilty or that he was about to find contraband. The manner in which these questions are handled seems to relegate us to the artificial world of *Alice in Wonderland* or *Gulliver's Travels*. It surely would seem sensible to take into consideration subsequent events and their outcome in determining the validity of an arrest, or the legality of a search and seizure, even though stern, deductive logic would preclude this course.

In many criminal trials the proof adduced by the Government of the defendant's guilt is not controverted. At times guilt is even tacitly admitted. Often the only question litigated is whether the vital evidence against the accused was procured in violation of the fourth amendment, as construed in recent decisions. The trial is transformed from a proceeding for the ascertainment of guilt or innocence of the accused into a determination of the legality of obtaining the evidence of guilt. The trial judge finds himself in effect trying the policeman on a charge of making the arrest, or of seizing contraband articles, instead of trying the defendant. For the time being, the world seems to be turned upside down. We must find a way to return to reality.

**Juvenile Courts**

As was pointed out earlier in this article, one of the grave aspects of the crime problem in this country today is the rapid growth in the number of vicious crimes of violence committed by young people and the vast increase in the ratio between young criminals and older offenders as compared with the ratio of a generation or two ago. It is proper and fitting, therefore, that consideration should be given to a reappraisal of our method of dealing with juvenile offenders and to a need of an overhaul of the juvenile court system. Juvenile courts were inaugurated about the turn of the century. Their creation was a benevolent, progressive step in the direction of humane and understanding treatment of children who came in conflict with the law. The essential purpose of these tribunals was to deal informally and sym-

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50 *Perkins, Criminal Law* 733 (1957).
pathetically with a child who committed a minor pecadillo, such as pilfering from a fruit stand, or a child who managed to get drawn into an undesirable and unsavory gang of youngsters older than himself. It was intended that such boys and girls should be handled in a kindly manner, without giving them a criminal record that would stain their entire life. As is so often true of innovations, in the course of time the original and basic admirable purpose of the reform was lost sight of, or at least became buried underneath an underbrush of weak sentimentality. In many areas the maximum age under which juveniles were within the jurisdiction of such courts was placed at eighteen years. Much is to be said in favor of the proposition that this limit is too high and that the age should be set at sixteen, as is the case in some other places. If we permit a young man of sixteen to drive an automobile, thereby considering him mature enough to be vested with the responsibility for a high powered piece of machinery, he should be deemed sufficiently developed to be answerable for his acts. So, too, the jurisdiction of juvenile courts is almost everywhere made dependent solely on age, giving them authority to deal with offenses of any type, other than capital, committed by anyone within a specified age group. The result is that many gunmen and robbers whose chronological age is fifteen, sixteen, or seventeen, but who may be steeped in crime and may have committed a vicious offense, are brought into a court intended primarily for children. To refer to such a defendant as a “child,” as is sometimes done, is farcical, unless the word “child” is used in the sense that every human being is the child of his parents.

All too frequently, when a young robber or automobile thief is brought before a juvenile court, the personnel of the court, instead of trying to impress him with the gravity of his offense, lament the fact that some sort of deprivation or compulsion led him to commit his crime, and express sympathy for him. The result is that often the young man either becomes defiant, delves in self-pity, or feels that society is indebted to him. Yet the first step toward rehabilitation of a criminal, if he is to be reformed and reclaimed, must be a realization and a recognition on his part of the immorality of his offense and some feeling of remorse and contrition. It is not unusual for a criminal over six feet tall, and weighing over 200 pounds, but only sixteen or

seventeen years of age, to say to a police officer when arrested that
the latter can do nothing to him because he is a juvenile.

To be sure, juvenile courts are generally vested with authority to
waive jurisdiction in specific cases and transfer the defendant to a
criminal court.\textsuperscript{54} Whether jurisdiction is to be relinquished in any
particular case depends entirely on the discretion of the individual
judge, who has no rule of law to guide him. The Federal Juvenile De-
linquency Act\textsuperscript{55} has solved this problem in a logical and desirable
manner. It vests the power of final decision of the question whether
a juvenile should be prosecuted under juvenile or adult procedure in
the prosecuting authority, namely, the Attorney General.\textsuperscript{56}

Paradoxically, juvenile courts often fail to accord to young offend-
ers the constitutional rights guaranteed to every person by the Bill of
Rights. For example, many juvenile court judges discourage repre-
sentation of the accused by counsel, in spite of the fact that the right
of counsel is basic and fundamental under the sixth amendment. Yet
the Bill of Rights is not restricted to persons over a specified age; one
would search in vain in the Bill of Rights for any age limit. These
constitutional provisions accompany every citizen from the cradle to
the grave. Another opportunity that is frequently denied to a juvenile,
though not a constitutional right, is a preliminary hearing before a
judge without unnecessary delay. Frequently, a juvenile is detained
in custody for days or weeks before he faces a judge.

An overhaul of the machinery for dealing with juvenile offenders
seems overdue. Questions may well be considered: whether the age
limit for minors within the jurisdiction of juvenile courts should not
be reduced to sixteen, wherever it is higher than that; whether the
jurisdiction of a juvenile court should not depend both on age and
the nature of the charge, instead of on age alone; and whether the
prosecuting authorities, rather than a juvenile judge, should decide
in what court a juvenile should be prosecuted. Most important, there
is a crying need for a change of attitude toward the youthful offender.
In serious cases he must be impressed with the enormity of his mis-
conduct and with the fact that he alone has the power of choosing
whether to become a useful citizen or to pursue a criminal career.
To minimize and palliate his crime does him a disservice.

\textsuperscript{54} \textit{E.g.}, CAL. WELFARE \& INSTITUTIONS CODE § 606.
\textsuperscript{56} 18 U.S.C. § 5032 (1964). Under this section, the juvenile may not be proceeded
against as a juvenile delinquent without his consent, as well as that of the Attorney
General.
Conclusion

The crime problem as a whole manifestly cannot be solved by a change in legal procedure. To hope so to solve it would be an iridescent dream. There are involved many deep-seated traits of human nature. Parental control, moral training of children, perception of ethical standards, all blend together like strands that form a single piece of tapestry. They can be elevated only in the course of time, perhaps a generation or two. This is a task for clergymen, educators and other moral leaders. The criminal law, however, plays an important part in the control of crime, and its successful operation can be improved without a long range program. We may hope for a return to the ideals set forth in the Federal Rules of Criminal Procedure, and their administration and enforcement in the spirit originally intended; for a strong application of the "harmless error" rule; and for an abandonment of reversals on technicalities. Following the philosophy of Cardozo, justice must be accorded to the accuser as well as the accused. As the present cycle passes, the pendulum will eventually swing back to a true balance. The basic need is not for any change in the law, but for a modification and shifting of attitudes. It is to be hoped that in the course of time, in the not too distant future, this end will be attained. Let us not take one jot or tittle from the law that protects the innocent, but let us wipe the slate clean of subtleties that serve only as a refuge for the guilty.