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Proposed Federal Rules for Criminal Procedure†

BY MURRAY SEASONGOOD*

Federal criminal procedure, trial and appellate, is still somewhat chaotic. Part of it is governed by statutes without much reference to one another, and part of it is to be determined by the common laws as applied in the states and modified by the Constitution and statutes, and decisions of those states so it is a polyglot and heterogeneous affair. It was a very wise thing when Congress passed a law enabling the Supreme Court to govern procedure in criminal cases along the lines of the statute which enables them to make rules in civil cases, and the committee was appointed in February, 1941. If you think that your session here was contentious, I wish you might have listened to the deliberations of the committee on various things that came before it.

Now, the committee, as was suggested in the report of your criminal committee, represented a different thought on criminal matters. We have former United States attorneys, assistants to the Attorney General, and eminent defense counsel. We are not overweighted with professors of law. We have writers on legal subjects. As far as I am concerned, my legal experience in criminal law is limited. I represent the ignorant, and am a fool to test out things.

We have a great diversity of opinion. It is not as one of my friends, asked to recommend a lawyer in another city, said: "Do you want an absolutely good lawyer, or one that will win the case?"

Well, there is not an oversupply of adequate lawyers. I think we have a sound committee, headed by a man, a qualified administrator with knowledge of administrative law and sound common sense, Chairman Vanderbilt, former president of the American Bar Association and we have an excellent secretary in Mr. Holtzoff of the Department of Justice, who knows everything. The reporter, Jim Robinson, many of you know. He is of the University of Indiana, and a very good expert in criminal matters.

Now, this committee has met five different times, and the sessions are long sessions. Energetically, we work long sessions, and we work until late and everything is thoroughly canvassed. I should have added to the membership of that committee J. Crane, former chief judge of the court of appeals of New York, and Mr. McClennon, formerly of the district court in Massachusetts.

In addition to these five meetings of the committee, which were for three or fours days at a time continuously, there have been meetings

†From an address given before the Missouri Bar Association. Reprinted with permission from the MISSOURI BAR JOURNAL.

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of a committee on style, as it is called, which is a subcommittee to iron out mistakes which may appear in the draft of the rules as they are promulgated.

Now, another thing; I must not speak too much of these rules. There are certain handicaps that were not present in the civil rules. One: The Constitution of the United States, which gives an accused certain rights which cannot be taken away as they might appear to be in the civil rules. You have your Fourth, Fifth and Sixth Amendments, and of course I need not say to you that our present Supreme Court is extremely solicitous in the protection of the civil liberties of the citizens.

We have to have these rules passed, not alone through the fire of the committees, but they must be recommended by the Supreme Court. They must be recommended by the Attorney General, and they must pass the Congress.

So, then, I would ask that all the purpose of this talk be to enlist your interest in the matter, because I can't possibly hope in the time available to tell you the many problems that are presented; but I ask your sympathetic interest and ask that you recognize that some pet hobbies, which everyone has in the criminal law, cannot always be put in the rules, or be given practical or constitutional consideration; so we leave out something.

We find some, for instance, on the question, ask the right to comment on the failure of the accused to testify. That was a major battle in the committee, and for the present has been omitted, due to doubtful validity, and doubtful desirability.

Now the trouble with rules and charters and statutes and constitutions, when you have some person who wants some rule very much and it does not appear and it isn't included, he becomes a severe critic of the rule and is apt to denounce the whole set of rules.

I am saying, if not everything you might desire is in the rules when they are adopted, they represent sincere convictions of persons who have approached them from many angles. I can only give you a few of the things that have come up.

For instance, the question of waiving indictment. It has been found in a number of jurisdictions that they frame rules which intend to be of uniform operation. For example, a man would be a criminal in *A* state, and not be a criminal in *B* or *C* state. That is one of the things we are trying to prevent. We are trying to make these rules have uniformity.

When you come to the waiver of indictment, as you know, the Constitution requires presentment of indictment for capital or infamous crimes, and it has been suggested that it would be very desirable to permit people to plead guilty or waive indictment, and get it over with, rather than to languish in jail, as they sometimes do, awaiting indictment for four to six months, or even a year, if the grand jury met occasionally.

The majority. forty-five out of seventy, U. S. attorneys thought it would facilitate matters to let a man plead guilty or waive indictment, and get the thing over with, instead of waiting for the long period before indictment, only to plead guilty after the indictment. Some few thought there was not any advantage to that. It was recommended by the conference, by senior circuit judges, and by several Attorneys General of the United States. When it was brought up in Congress, several of the lawyer members of the House were against the project, considering that unscrupulous prosecutors might induce a man to waive his constitutional rights improperly, and he might be railroaded; also it would have the bad effect of taking away fees of defendant counsel. You can see the variety of opinion in that one single thing.

Another matter that has been very much commented on is the right to alibi. You all know the classic definition of alibi, "You prove you was some place where you wasn't." It has been brought up by the prosecution very much, that alibis are sprung in the closing moment of the trial, without opportunity to rebut the alibi, as you know. I think in about fourteen states, a provision requires that where one intends to rely on the defense of an alibi, he must give notice to the prosecution, and say where he is going to claim this defense is and when; if he proposes to show he was at some other place, he is bound to give notice to the prosecution in advance, to give the opportunity to the prosecution to investigate the strength or otherwise of that proposed alibi.

That is the suggestion that has been carefully considered in the committee.

Your chairman referred to pretrial procedure, which difficulties are not met in civil cases, because if you would ask a defendant to come up and agree to this or that, he would probably say, "No, I won't do it. I am entitled to a jury of my peers, and I don't have to tell you anything or agree to anything in advance." So the committee has tentatively made the pretrial rule to read that the court may invite counsel for the respective parties to come before the court, for the purpose of getting admissions or agreements, to simplify the issues, to plain admissions of fact and documents for questioning, on the number of expert and character witnesses and other matters, to expedite the trial. How far that can be worked, we need to experiment, to see if the benevolent rules of the pretrial are applicable, or to what extent they are applicable to the trial of cases in criminal courts.

Another thing, as to the matter of calling experts, that, of course, has grown to be a great abuse, and consideration has been given to the ability of the court itself to call experts, and how these experts shall be paid.

In some states, at least one state, they are called by the court, and the expenses of the expert are taxed as part of the costs in the case. It has been suggested that the parties themselves should not be deprived

of the right to call their own experts. In addition, if they choose to do so, they should give notice in advance of the name and address of the expert and of the purpose, in order that some little investigation of him may be made before he attempts to testify.

Now, your chairman also mentioned the matter of depositions, which is an interesting matter in criminal procedure. We, in Ohio, have a provision that criminal depositions may be taken by the accused or by the state. Now, of course, if the state takes depositions, the defendant is entitled to be confronted by the witnesses; that is his constitutional right, and he is entitled to the assistance of counsel. Therefore, it does result that the accused and counsel get a ride at the expense of the state; but, in general, the idea that there should be depositions in criminal cases taken by either side; seems a sound point, as it does happen, occasionally, a witness will be lost or either the prosecution or the defense may fail by reason of his unavoidable absence from the trial.

Another interesting suggestion—I mention these in order that you might be reflecting on them and thinking about what you think of them, and when the rule emerges in final form—I shouldn't say final form—the plan will be utilized with the civil rules, when the Supreme Court is satisfied that we have gone as far as we ought to go before throwing the thing to the lions, they will enable us to, I judge, print the rules in tentative form and circulate them for the consideration of the bar and bench of the whole country. I hope that at that time I have your assistance, and frank and free criticisms with respect to the rules.

One of the other things of interest is alternate jurors. In some states there is a provision that there shall be additional jurors to the twelve who are impaneled, so in the case of sickness of any juror, the alternate juror may step in and have a part. How far should the juror be in attendance after the jury had begun to deliberate? Jurors have been known to be unable to continue their deliberations, with the result a very long trial has to be done over. Should these alternate jurors then step in and assist in the deliberation?

I have only mentioned these as the most illustrative of the numerous problems. We suggest that there be summons instead of warrants, serving same in the state, or within one hundred miles of where issued; warrants should not be *functus officio* if not served. We want a simple form of indictment, but not so simple as to invite a flood of demands for a bill of particulars. The thought that it might be serviceable to have a simple motion instead of pleas in abatement, demurrers and motions to quash. Should the *nol pros* be permitted without consent of the court? That is an interesting question for you to consider, and one on which we have had very much sharp discussion, and no doubt will continue to have arguments on each side.

It is readily understandable, in some of the state courts you can't have a *nol pros* without the consent of the judge.

Should our *nolo contendere* be sent to limbo? A great many thought it should. On the contrary, it serves a very useful purpose in anti-trust cases and utility cases, and, speaking for myself, it would seem to me *nolo contendere* should not be abandoned.

One of the most particular problems is the question of rules of evidence. In the civil rules, they have adopted a principle that any evidence which is admissible under the federal rule or state rule, where the case is tried, is admissible. I doubt whether that would be a suitable thing in criminal rules, for the reason, as I have said before, it would not work for uniformity; and perhaps the best solution of that matter, subject to later change of mind, would be to say that the rules of evidence shall be the rules of the common law as interpreted by the court of the United States. That would at least work for uniformity.

One more thing: There should be pre-sentence investigation in every instance, save where the state dispenses with it, before there is a sentence of a person who is found to be guilty.

Perhaps the most important of all would be the question of simplifying appeal.

Of course, I ask you to remember this, also, ladies and gentlemen, that in most of the cases in the federal court, the defendant pleads guilty, and in a very few of the cases, it reaches the appellate court. Now, in the matter of appeals, there certainly can be great improvement. The committee was asked to devise rules for a run-of-mine kind of case, and for the ordinary cases, but which must be adaptable or suitable for the spectacular cases which reach the newspapers.

As originally constituted, the committee was to devise rules only up to and including verdict and finding of guilty; then, later on, the Supreme Court authorized them to make suggestions for revision of their own rules for appeals, and then it was enlarged to take care of the matter of criminal contempt, and just as we got our last draft ready, the Congress passed a law providing that rules relating to appeals by the government to the circuit court of appeals be taken up, so the functions of our committee have been constantly expanding.

I think this might be very suitable in civil rules as well, that is, to do away with the old bill of exceptions, with assignment of errors, with citations, with the right of error, and all of that rigamarole that you go through for appeal, and have your notice of appeal, doing away with the bill of exceptions—no printed record, but appendix brief as adopted in the first, third, fourth and District of Columbia circuits. They seem to have improved upon that procedure, showing an appendix record in which the appellant prints as appendix to his brief the judgment appealed from, any opinion or charge of the court, and such other parts as he deems material and wishes the court to read; and the appellee prints in his brief so much as he thinks is important for the court to know,

which has not been included in the appellant's brief; then the appellant may add any additional parts, in view of what the appellee printed.

If the court thinks the appellant hasn't printed enough to present the case fairly, he will adjudge the cost of extra printing against him.

Legal Means to Mobilize Manpower Discussed in Duke Law Quarterly

Government protection of the terms of employment will be required if workers are to be "frozen" in war industry jobs or are to be compelled to transfer to them, declare Assistant General Counsel Bernice Lotwin and Attorney R. G. Conley of the War Manpower Commission, presenting their personal views in a symposium on "Labor in Wartime," just published in the Duke Law School quarterly, *Law and Contemporary Problems.*

In their study of compulsory labor mobilization the authors also analyze and appraise three methods of mobilization by controlling the activities of employers rather than of employees. These employer controls are the following: (1) employment priorities and control of hiring, (2) conservation of critical workers, and (3) displacement of workers in non-essential activities.

Although the authors express their belief that the Thirteenth Amendment, forbidding involuntary servitude, does not prevent compulsory service in the public interest, nevertheless they state that employer controls would be more expedient than worker controls at the start of a mobilization program. Employer controls would result in the invasion of fewer personal rights, would be easier to administer, and would facilitate compensation in case controls caused serious economic loss.

Among the twelve articles comprising the *Law and Contemporary Problems* symposium are studies of labor recruitment, training, and allocation programs, and several articles dealing with wartime labor disputes. An outstanding authority on American labor law, Professor W. G. Rice of Wisconsin, in writing on "The Law of the War Labor Board," asserts:

"Despite persistent denial that the board is devising any patterns of labor settlement, there now appears to be a program of requiring maintenance of union membership and voluntary check-off if a worthy union asks for them."

American experience may be foreshadowed in an article by Department of Labor experts which traces the successive steps taken in Britain and the Dominions for the control of wages and labor disputes and the mobilization of labor supply. Contrasts and parallels appear in the German experience, described in an article by Dr. Franz Neumann, author of *Behemoth*, the authoritative recent study of the Nazi economy.