NEMESIS RUNS AMUCK

BY MITCHELL DAWSON

"Dear God, send me a hanging prosecutor and a hanging judge!" should be the prayer of the criminal awaiting trial in almost any of our State courts today. There is always a chance—and a good one—that the State, in its zeal to convict, may become the defendant's most effective advocate by violating the rules of the game and thus furnishing grounds for the reversal of the case on appeal.

During the ten years from 1917 to 1927, 41% of the criminal cases appealed to the Supreme Court of Illinois were reversed; and during a similar period in Missouri (1914 to 1924), the percentage of criminal reversals was 43.6%. Standing alone these figures mean nothing. But analysis discloses that in Illinois more than three-fifths of the reversals, and in Missouri more than two-thirds, were due to the misconduct or ignorance of the prosecutor, or the trial judge, or both.

By misconduct I mean any and all of the familiar devices by which a prosecutor, if the court permits, will work upon the prejudices of the jury: the flagrant use of innuendo and sarcasm during the trial, the introduction of improper evidence, the coercion of witnesses, unfair cross-examination, and inflammatory appeals during the closing argument.

Some errors, such as giving improper instructions to the jury, or refusing to give proper ones, may be attributed to the incompetence or ignorance of the trial judge —an ignorance which is usually inexcusable, as instructions in criminal cases have been fairly well standardized.

The popular belief that most reversals are due to technicalities or an over-refinement of reasoning on the part of the appellate tribunals is not confirmed by a study of the criminal reports. It is true (especially in Illinois) that some defendants have been saved from hanging by the neck or a sojourn in the penitentiary because the Supreme Court of the State has thought, for instance, that the name Philip Holdburg charged as the criminal in the indictment did not sufficiently refer to the man on trial, whose name was Philip Goldberg; or because it was charged that the defendant had obtained money through a confidence game from one Rapan Manian when the real victim was Rapan Mananianian; or, as in another case, because the jury found the accused guilty of an *attempt to commit* larceny when the evidence showed that the actual crime of larceny had been consummated.

But hair-splitting of this sort is infrequent and offers much less of an opportunity for the criminal to escape punishment than a headstrong and violent prosecutor who is ready, willing and able to blast the defendant's character from Arson to Zoster whether the evidence justifies it or not. Even such mild epithets as calling a defendant in a bigamy case "a sugar-loaved, squirrel-headed Dutchman," or denouncing him as "a skunk, a villain and a dirty coward," or "a Hun, a vile can-

cer suppurating on the shoulder of humanity," or promising that "the demons of Hell are going to recognize and rejuvenate themselves and put him at their head and rejoice when he gets to Hell, for that's where he's going"—may result in the reversal of a conviction.

The shrewd felon will, in fact, scheme for his ultimate freedom by retaining a lawyer who is sort of forensic *banderillero*, adept at pinning verbal darts in the ego of the prosecutor. A state's attorney, properly baited, is likely to bellow defiance and charge head down, regardless of the rules of trial practice. A few excesses on his part may very well operate as reversible error.

It may be equally effective to play upon the frailties of the trial judge until he betrays a partisan attitude against the defendant. This should be done, however, with due finesse, as obvious impertinences may be properly rebuked by the court. The skilful tactician will direct the judge's anger against his client rather than himself, which is not hard to do if you can once get him started. Many a trial judge has an almost uncontrollable impulse to put not merely his finger but his whole hand in the pie. According to Judge Joseph E. Gary, remembered in Illinois for his keenness and common sense:

> One of the greatest difficulties of a *nisi prius* judge is to keep his mouth shut. I had twenty-five years' experience of it. Many judgments have been reversed in this State because the judge talked too much.

But why should reviewing courts be so solicitous over the treatment of thieves and gunmen? Why not let the prosecutor and judge run them through the legal mill without interference and dump them in jail where they belong? The layman is apt to forget that every defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. No man is a criminal until he has been tried and convicted, no matter how damning the State's evidence may be against him. This doctrine is still technically the law of the land, although the tolerated activities of police and Prohibition agents would indicate that it will soon fall into the discard.

Our upper courts, perhaps quixotically, have held to the ideal of a fair and impartial trial in which the prosecutor is supposed to present the evidence against the accused vigorously and honestly, but without exaggeration or distortion, the trial judge acting only as an umpire charged with seeing that the game is played within certain prescribed rules, it being his duty to refer the evidence to the jury without permitting his own temper, temperament or bias to influence them. But the average prosecutor has little patience with this ideal. He is out to win, and in the heat of trial he is strongly inclined to carry the jury by fair means or foul, especially when he is opposed by hardy and unscrupulous attorneys for the defense. The trial judge too often is the prosecutor's accessory and coadjutor.

II

But the more violent, personal and lawless the prosecutor becomes, the more should the guilty defendant rejoice. If he can arouse the prosecutor's racial or religious prejudice, he is exceptionally fortunate; that is, if he has enough money to appeal from an adverse verdict. In a Mississippi case the district attorney said of the defendant:

> She is a Negro; look at her skin. If she is not a Negro, I don't want to convict her.

The jury agreed with him and convicted

her of being black, but the case was reversed on appeal.

In Tennessee some white witnesses, who had the temerity to testify on behalf of a Negro, brought down upon themselves a tirade from the State's attorney:

> But even at that I have more respect for these nigger witnesses than I have for these two white men who have volunteered to come here and testify in favor of a nigger that he has a good reputation.

A protest from the defendant's attorney merely set off more fireworks:

> What I have said about these two witnesses goes. I would say the same about any white man that would come into court to testify in favor of a nigger if I was going to Hell the next minute. The State has nothing to withdraw and nothing to apologize for.

As the trial judge had made no serious efforts to restrain this outburst, the conviction of the defendant (who may have been guilty) was reversed.

A Texas prosecutor warned the jury:

> When once his [the Negro defendant's] desire for white blood arises, nothing can satiate his bloodthirstiness.

And he congratulated his fellow citizens for refraining from a lynching party.

> Inasmuch as the good citizens of Grand Prairie restrained and withheld themselves until the trial of this case, it is your duty to bring in the death penalty.

It speaks well for the higher courts of the South that they have consistently condemned such tactics and will reverse almost any conviction where it appears that a Negro was unfairly treated.

But for some prosecutors the temptation to stigmatize the accused as a pariah because he belongs to a racial or religious minority is irresistible. A defendant charged with perjury in a bankruptcy case was lucky enough to be prosecuted by a district attorney who said that he did not care how many Jews the defendant brought there to testify, or what they swore to, that he believed that the soldier boy (witness for the prosecution) swore to the truth. The jury agreed with the district attorney, but the conviction was reversed.

Similarly an Oklahoma conviction for larceny was reversed because the prosecutor misquoted Scripture:

> We all know the way of the Jews' dealings in business. These are God's chosen people who the Bible says shall gather into their arms all the wealth of the world.

A Chinaman on trial for robbery in California was asked by the attorney for the People whether he had kidnapped the woman he was living with or mortgaged her body, and whether he was not what is known among Chinamen as a hatchet man. Inasmuch as there was no evidence to support such questions, his conviction was reversed.

There is a wide variance of opinion as to the proper limits to a State's attorney's denunciation of the *defendant*, but insults directed at his *attorney* are almost always legally unpardonable. In a case where an assistant district attorney called the defendant's counsel "the attorney for the pickpocket trust and even a pickpocket himself," the Appellate Division of the New York Supreme Court held that the jury should have been discharged and a new trial granted.

So in Illinois a State's attorney assisted the defendant by saying to the jury:

> It is said that it takes a thief to catch a thief, and it can now be said that it takes a framer and fixer to help a framer and fixer. I apply this to the worthy gentleman who has just spoken. [One of the defendant's lawyers.]

Another happy custom which wins reversals for some defendants is a gratuitous attack on the character of his witnesses. In a Michigan case two doctors had testified on behalf of a defendant accused of attacking a girl. They threw discredit on her story because of certain psychopathic symptoms she had shown. This was too much for the prosecutor, who disposed of their evidence with elaborate sarcasm:

> Now, I would say, gentlemen, if those two doctors were to put on a stunt like that in a vaudeville show they would go over big . . . We all pay taxes for universities and they turn out things like that. I ask you, gentlemen, what chance a girl has to defend herself against such testimony? And I tell you that those two doctors are worse than the Indian medicine men or Negro voodoos. How any man can so prostitute his profession and come in here and swear to such statements as that in a court of justice is beyond me.

But it was not beyond the State Supreme Court, which gave the convicted defendant another chance.

A prosecutor with a sense of melodrama is usually a boon to the defendant, as well as to the weary jury. For example, the State's attorney in a Missouri murder case who actually waved a bloody shirt, saying:

> And for further evidence in this case, here is the shirt where they [the bullets] came out, corresponding with the same holes in the coat, and there is one in the small of the back. [Indicating.] There is the shirt, and as my friend Judge Gosson says, "after one man's lips are closed," but not only being closed, here is one whose lips are closed and left this blood-stained shirt for evidence as he went his way . . .
>
> And the next witness was John Standfield, the fellow with the brush heap on his face, that admitted he was drunk down here yesterday and left a pint of liquor down here . . . and was run out by the janitor.
>
> THE DEFENDANT'S ATTORNEY—Wait a minute. He didn't admit he was drunk.
>
> THE COURT—No, Mr. Stiles, he didn't admit he was drunk.

The waving of a bloody shirt will generally convict anybody. It worked in this case, but the conviction didn't stand, because the shirt had not been admitted in evidence, which made it wholly improper for the prosecutor to use it as he did.

In another Missouri murder case, the State's attorney brought in the mother, father and sister of the slain man, wearing deep mourning, and sat them close to the jury throughout the trial. During the closing argument the prosecutor turned to the mother who laid her head in her daughter's arms and sobbed, while the father fanned them. The court reporter says that "no objection was made by the defendant's counsel to the weeping," but he did object to the staging of the drama and to the prosecutor's sonorous lines:

> No more, men of the jury, no longer will Earl Williams work in the Jacksonville Coal Company mine . . . No more can he go home to his father, mother and sister . . . It is your solemn duty . . . [to bring in a death verdict] because he sniffed out the life of a fellow man and sent him before the judgment bar of God and rushed his soul from the earth with the snap of a trigger. Oh, men, *vindicate the blood of Earl Williams*!

The State Supreme Court, in reversing the defendant's conviction, said: "This stage performance would more befit a theatre than a court of justice," and characterized the prosecutor's harangue as "intemperate, violent and bloodthirsty, and in strange contrast to the humane spirit of the law, which presumes the defendant to be innocent until his guilt is proven beyond a reasonable doubt."

But an ambitious prosecutor usually yields to the temptation of providing the spectacle which the public craves. His talent need not be confined to murder trials.

Any picturesque situation may offer opportunities. Witness, for instance, the case of the People *v.* Bimbo—a modern tale of the Romany Rye. No gypsy vans, campfires, fortune-telling, kidnapping or operations by *comprachicos*, but plenty of atmosphere and intrigue nevertheless.

Bimbo was king of the gypsies in Chicago. He had a marriageable daughter, perhaps beautiful—the unromantic court reporter doesn't say. King Bimbo was haled into court by a woman who complained that he had tricked her out of $2,250, which she gave him as part of a dowry for the proposed marriage of her son to the Princess Bimbo. But the marriage never took place. "It's a frame-up," Bimbo declared. "Her son brutally attacked my daughter. She's trying to scare me out of bringing charges against him."

It is not surprising that the trial developed into a battle royal between opposing counsel. The assistant State's attorney succeeded in getting a verdict of guilty but it was a futile triumph, for the case was reversed because of his insulting manner toward defense counsel and his intemperate language—among other things. Some of his oratory will survive as an example of the theatrical fervor which the upper courts condemn:

> This man [meaning the defendant] who holds himself as the king of these poor, dumb, driven animals; this man who comes here in American clothes and who not only offers his daughter on the ladder of avarice, as I said before, but came in here and exposed to the world what he claims is the shame of himself. I cannot conceive of anything lower or a heart more blackguardly than this man, and I cannot conceive of reputable members of this bar, practicing here for thirty years, who will go up and bellow at the top of their lungs that this case is a frame-up by the State when he knows unquestionably what his client is doing.

In this case, as in most of the others cited, the prosecutor's misconduct was tolerated, though perhaps not approved, by the trial judge. Sometimes, however, the judge goes further than mere tacit assent and indulges in cracking the whip himself over the defendant or his lawyer. It is true enough that defense counsel are usually a rough and irritating lot. They have devious ways and means of obstructing the machinery of the law. But the judge who indicates his impatience, unless it is obviously justified, is working right into the hands of the defense.

One judge paved the way for a reversal by telling the defendant's attorney in the presence of the jury: "You have forfeited all the rights a man ever had in a court-room to ask that question." And again: "You will be taken from the court-room, Mr. H—, if you don't stop talking; go ahead and ask your questions."

And in another trial the court continually ragged a hard-working attorney thus:

> THE COURT—Your cross-examination has not been to the point.
>
> COUNSEL—Do I understand the court to say we don't know what we are doing?
>
> THE COURT—You certainly do not.

And further:

> THE COURT—That is not material; let's get along.
>
> COUNSEL—If I can't ask him a question ——
>
> THE COURT—We are going through this morning.
>
> COUNSEL—Well, if ——
>
> THE COURT—If you are going to ask a question, ask it now, and no more back talk.

This lawyer, however, in spite of the court's opinion turned out to be good, good enough at least to arouse the Supreme Court's sympathy for his client. The conviction was reversed in an opinion severely criticising the trial judge.

Now and then the putative Jehovahs of the bench unintentionally intervene on behalf of a defendant by making him the butt of personal indignation. A New York judge, for instance, invited a reversal by saying:

> Mr. District Attorney, how can we hold this man for perjury so that he can go on his way to Sing Sing? I am sick and tired of the things like that that are entrusted with taxicabs. God help the poor fare that goes into a taxicab operated by a man like that. He would rob him or do anything to him. He is the perfect type of the taxicab robbers of Greater New York that are worse than all the thieves of Europe . . . I hope that you will never see the light of day except behind bars in Sing Sing prison.

III

In the foregoing instances it is apparent that Nemesis ran wildly amuck. The public avenger, instead of sticking to the rôle of relentless pursuing fate, went loco and slashed about him wildly. But the reader (especially if he be a prosecuting attorney) may protest that I have painted too lurid a picture, that the cases mentioned are only isolated instances among thousands tried and that similar misconduct is not widespread or common.

Maybe—perhaps—

Consider, however, the opinion of so sober a journal as the *Harvard Law Review*, which in February, 1929, after a review of a number of cases, commented:

> The most striking feature of these cases is the lawless conduct of prosecutors and judges and the ignorance or perversity which their rulings and instructions portray. Nor are these novel manifestations or isolated instances; the Illinois reports, and others also, bear ample testimony to that. An appellate tribunal has no choice but to reverse convictions when trial judges abuse their discretion, examine witnesses in a hostile manner, disregard fundamental constitutional rights or elementary principles of fairness, tacitly approve the prosecutor's improper conduct, or commit travesties on justice. State's attorneys cannot protest against reversals when they conduct themselves in a grossly unprofessional manner and ask obviously incompetent questions merely to create prejudice against the defendant. The Supreme Court is not unreasonable in its attitude toward improper remarks; yet it has had to remind judges and prosecutors, not once, but many times, that there is not one law for the innocent and another for the guilty.

Unfortunately, statistical data are only scattering. In West Virginia during a period of thirty years, 256 criminal cases out of a total of 417 were reversed. This seems like a large proportion, but it does not mean very much because it does not appear how many times the Supreme Court of the State refused to grant a writ of error, which is one way of affirming a conviction in West Virginia.

In California, Pennsylvania, Massachusetts and New York the percentage of reversals in criminal cases in recent years is much lower than in Illinois or Missouri. Whether this is due to a higher standard on the part of the prosecuting forces or to a greater severity toward the defendant in the upper courts it would be impossible to determine without a painstaking study of all the cases.

The prosecutors, of course, will point out that the number of cases reversed for the misconduct of the prosecutor or judge is relatively small compared with the total number tried. This is true. We have no check upon the conduct of the prosecutor in cases not appealed. It may have been admirable. On the other hand the failure of a convicted defendant to appeal is not proof that he had a fair trial. It often means merely that he could not pay his lawyer for going further.

The prosecutors are also inclined to attribute the frequency of reversals to a fussy and spinsterish attitude on the part of the upper courts. In that I believe they are wrong. The attitude of the reviewing courts has been fully written down. It is a rule often reiterated that no conviction will be reversed for the misconduct of a judge or prosecutor unless such misconduct apparently affected the verdict. There is a wide range of opinion among courts as to what will or will not influence the jury to the prejudice of the defendant. Where the evidence is strong against the accused, the prosecutor may safely indulge in a little vituperation. Thus the Wisconsin Supreme Court sanctioned the following attack by the attorney for the People:

> Call that man a man? Yes, I will call him a man because it would be an insult to a brute to call him a brute. Why, he would get down on the grass and wiggle around on his belly with the snakes, he would get down and crawl with the snakes and let them spit in his face and spit venom on his body.

In another court or in another case such zeal might have been severely reprimanded. Our courts in this respect (as in many others) operate on principles of relativity, permitting the prosecutor as much latitude rhetorically as may seem consistent with the evidence in the case on trial.

IV

A great deal may, of course, be said to extenuate the transgressions of prosecuting attorneys. They are dealing constantly with a race of criminal lawyers who are shrewd, daring and often unscrupulous. In the rush and turmoil of investigation, preparation and trial it is easy to lose sight of the refinements of practice. Only a prosecutor of extraordinary character could keep strictly to the standards of conduct prescribed for him by the upper courts; and if he succeeded in doing so, his political career would soon be ended. His conduct is dictated principally by expediency—the expediency of serving the people in the way which they demand. His misdeeds are their misdeeds.

In fact, the tendency of prosecutors and trial judges to procure convictions—as many as possible, at any cost—is significant only because it is symptomatic of the public's attitude toward crime and criminals.

A committee of the American Bar Association, appointed to investigate the Lawless Enforcement of Law, emphasized this fundamental difficulty when it said in its report at the last annual meeting of the association:

> We are a lawless people. Crime exists among us to an extent unknown in Great Britain, Scandinavia, Holland, Belgium, France and Germany. And our lawlessness is not an acute, but a chronic disease. It is an old ulcer of which no doctor can say how or when, if ever, it will be healed.[1]

And being lawless by nature or tradition or whatever the cause may be, we are also lawless in our attempts to suppress lawlessness. Our extra-legal practices in administering the criminal law begin with the activities of the police, sheriffs and Prohibition agents, extend through the entire machinery of our courts, and continue even after the defendant is duly, or unduly, convicted and lodged in prison, for he may still be burned to death through official negligence or shot by feeble-minded guards—as happened in Ohio.

The Committee on the Lawless Enforcement of Law directed its attention principally to illegal arrests and seizures

[1] Report to the Section of Criminal Law and Criminology of the American Bar Association, August 19, 1930.

and to the use of third degree methods in extorting confessions. "We are not sentimentalists," said the committee. "We don't believe in coddling men accused of crime." But, tough-minded though they were, the members of this committee were appalled by the wide-spread use of the sweat box, rubber hose, water cure and other forms of torture by officers of the law throughout the United States.

We should, no doubt, be thankful that civilization has advanced somewhat since the days when the Iron Maiden, the spiked cradle, the wheel, the rack and the thumbscrew contributed to the amusement of magistrates and jailers. Our ferocity in this respect has abated. We now rely on comparatively milder methods of giving a prisoner "the works." It has been found that depriving him of food and sleep is one of the quickest ways of destroying his morale and making him "come clean." Such a régime, combined with continual, relentless questioning by relays of examiners, will break down the most stubborn resistance. It was effective in the case of Wan, a Chinaman, charged with murder:

> Wan was taken into custody in New York City February 1 and brought to Washington. . . . He was ill at the time. He was taken to a secluded room in Washington and grilled five or six hours by officers. Late in the evening of the first day in Washington he was taken to a hotel, but not registered, put in a room where he was detained one week, all the time ill, most of the time in bed. He was attended by a police surgeon as physician, was not allowed to see his brother who was held in another room in the same hotel. Day and night at least one policeman was on guard in Wan's room, in shifts of eight hours each which were from midnight to 8 A.M. and 4 P.M. Morning, noon and evening, and once after midnight Wan was visited by the superintendent of police or one or more detectives, or both superintendent and detective, and interrogated in persistent lengthy and repeated cross-examinations, sometimes subtle, sometimes severe, always with a view to trapping him into a confession. When these visitors came, the guard was placed outside the closed door. On the eighth day a detective was present all day. In the evening Wan was taken to the Mission [at which the homicide involved was committed] and for ten consecutive hours he was led from floor to floor to examine and reëxamine the scene of the crime, give explanations and answer questions. From 7 P.M. to 5 A.M. the questioning continued without a moment of sleep. On the ninth day he was taken to the station house and placed under arrest, and the examination was resumed. On the tenth day, again at the Mission, he was questioned for hours. On the eleventh day he was questioned at the station. On the twelfth day, a typewritten report of the interrogation was given him to sign, and he signed it.

But Wan's signature to a document obtained in this fashion had no weight as an admission of guilt in the opinion of the Supreme Court of the United States, which reversed his conviction.

Prosecuting attorneys, as well as the police and sheriff's officers, have been known to participate in coercive methods, but they are usually careful to avoid any semblance of the use of physical force, playing rather upon the natural fears and terrors of the suspect. This technique is in high favor because it gets results without leaving any tell-tale marks or bruises, although sometimes a report of such an inquisition reaches judicial ears. In a Texas case, the defendant succeeded in presenting the following facts for review before an appellate tribunal:

> The county attorney testified that he told the defendant, a woman, that a mob of white folks would get her if she didn't sign the confession, that the mob was waiting outside. After her statement was written she declined to sign it, whereupon she was again told that a mob was coming. One of the officers took her to a window and

pointed out a place close to the jail where persons had been hung. One of the officers told her that if she didn't sign the statement a mob would swing her to the big limb. The county attorney testified that the sheriff and deputy sheriff and himself brought the woman to the sheriff's office, told her that they already had enough evidence to justify a jury in breaking her neck; that if she would confess they would try to make it light for her. . . . "One of us suggested that the white folks were getting wrought up over the killing and unless she told a different story they might come in and take charge of it. Something was said about a mob. She begged us to protect her from the mob, but the sheriff told her that unless she would come clean and tell a different story he did not feel inclined to give her any protection. It was after many threats were made before we were able to get her to tell anything that would coincide with the confession of Birdie Green. She never did tell a connected story, but I would ask her questions and she would answer. Finally our patience was about exhausted, and the sheriff took her to a window and pointed out the water-tower and asked her if she knew what it could be used for. There was something else said about a mob about that time, too."

She signed a confession (who wouldn't under the circumstances?) but her conviction was set aside.

The beating and manhandling of prisoners, however, is still the average officer's first resort. He honestly believes that if a man is guilty (and why should he be under arrest if he isn't?) you can knock the truth out of him. And if the prisoner gets pretty badly banged up in the process, he has only his own stubbornness to blame. This attitude is even current in the orderly state of Wisconsin, where the Supreme Court had to reverse a conviction based on a confession obtained by the following methods:

A physician testified that in company with two other persons, one of them a physician, he examined the defendant at the county jail. There were marks on the right arm, marks on the left side from shoulder down to the edge of the ribs; the left arm was bruised to the elbow, and below the elbow toward the wrist left arm was swollen, tissues of back somewhat swollen, bruises on the buttocks. . . . Defendant must have suffered extremely. . . . The condition of his back, right arm, buttocks, must have been brought about by severe hurt. There was testimony that one of the officers on being asked if he had heard of the Lang confession remarked, "Didn't I help knock it out of him?" That when a lady told him she had heard he had helped beat him up he replied, "Well, maybe I did; what we ought to have done would be to kill him." This officer said, "They accused me of beating him up, and I said Yes. And to avoid an argument I gave them the benefit of the doubt and says Yes." Another officer on being asked if they had beat him up said, "We tapped him a couple of times," and another time said, "Yes, they had to use the clubs on him." This officer said the defendant got kind of thirsty about 3 o'clock and asked for a drink of water. . . . From 11 o'clock at night the ordeal of questioning began . . . at times defendant complained that he was thirsty and faint. He was subjected to the third degree inquisition until 4 o'clock. No evidence of resistance at any time. . . .

But such proceedings are not peculiar to any one State. Similar cases can be cited from every jurisdiction. A Texas Torquemada, for instance, obtained a "free and voluntary" confession in this way:

Defendant was denied communication with friends, relatives or attorneys. On his arrest was brought to the jail; denied any connection with the offense; was then whipped by the sheriff who used a leather strap about 2½ feet long with some strips of leather sewed on the end. He was whipped all over the head, shoulders and neck, and there remained scars on his body and head. These scars were exhibited. Testimony about them was given by a doctor and another witness. The injuries to his arm, he said, prevented its use for months

and caused him to swell up so that he could not lie on his side for several months. He was whipped with the side of the strap and the butt end of it, nearly killed, and when he came to they were kicking him in the side; that his head still gave pain and swelled up. The swelling was verified by other witnesses. The county attorney said: "He [the defendant] was whipped by Mr. Plot in my presence. A strap was used with a wooden handle on it. He was whipped there a little while, I don't know, three, four or five minutes possibly."

V

Naturally only the most flagrant instances of cruel and oppressive treatment are likely to find their way into the court records. The extent to which minor brutalities are indulged in by officers of the law will never be known. In asserting that such practices are habitual and common we must base the allegation mainly "upon information and belief." The victims themselves may occasionally complain, but not too loudly, for fear of reprisals. If an innocent prisoner is held *incommunicado* for days without being booked or charged with any specific crime, if he is bullied and browbeaten, if his home is broken into and searched without a warrant, he is nevertheless inclined to keep his mouth shut in the hope of thereafter staying clear of the fearful processes known to him as "the law." Sometimes, however, a hard-boiled official, like former Chief of Police Hughes of Chicago, will frankly express the attitude of the *gendarmerie*:

> You can't pamper a criminal with cream puffs. That's the trouble with all these so-called reformers and criminologists and social workers. They want to protect the criminal and kick the police. I'm for protecting the police and kicking the criminal.

In all their multifarious activities, lawful and unlawful, the police and prosecutors are merely playing the rôles in which the public has cast them. Crime stalks the stage with the hound-dogs of the law yapping hysterically after him. He is the lurid, but alluring, villain of an endless serial melodrama. No one really wants it to end: for we are all fascinated by the horror, the suspense, and the heroics of the tawdry spectacle.

Of course, when our sense of personal security is shaken by "crime waves" or "gang killings," we send up a howl that something ought to be done about it, invoking the three almighty R's—Righteousness, Revenge and Retribution. But it is all part and parcel of the same big show.

The officials charged with the detection and capture of criminals keep their ears to the ground. When they hear rumblings of Righteousness, they stage wholesale raids and clean-ups, during which the professional criminal, like Br'er Fox, will "lay low and say nuffin'." When the furore dies down he creeps quietly back to his business.

On March 3, 1930, a Chicago newspaper reported a round-up by the police of 868 prisoners in twenty-four hours. Only three "big shots" were included, and they were soon turned loose, along with most of the others, for lack of evidence against them. Gang killings thereafter flourished unabated. Three months later another "crime drive" was commenced, under new management. The results were, of course, identical. Ask any newspaper man (especially in Chicago) how many criminals of major iniquity are netted in a well advertised clean-up and you will get an earful of irreverent laughter.

The police in these forays are not as stupid as they may seem. They are discreetly catering to the popular demand. Even those officers who might otherwise wish to respect the law and retain some

degree of integrity are driven by the never-ending bally-hoo from press, pulpit and reformers for more arrests, more convictions and more and better punishments. It is small wonder that the hapless suspect who falls into their hands is subjected to the amenities of the coercive confessional.

The prosecutor, even more than the police, must take his cue from the public. He is Nemesis personified. If he flaunts a blood-red necktie at every murder trial, so much the better. His ability is measured by his record of convictions. In fact, in some States he is still paid a bounty for every defendant hanged or jailed. A former State's attorney, now a prominent politician, is said to have collected more than $200,000 of such blood money during four years in office.

Puppets of expediency, the officers of the law spend their lives fighting crime or compromising with it and have little volition of their own. They are creatures of a society which still cherishes Old Testament notions of crime and punishment, while its individual members exercise the prerogative of breaking or evading any law which may conflict with their desires.

The situation, according to the Committee on Lawless Law Enforcement, is serious but not hopeless. The hope, so far as any can be discerned, lies in the chance that an intelligent minority now at work[2] may eventually succeed in changing the public attitude and creating a constructive social consciousness. Such hope requires unbounded optimism.

We shall undoubtedly see many experiments in procedural reform. The abolition of the grand jury, and even the petit jury, has been widely advocated and discussed. These institutions will probably be among the first of our ancient palladia to go. But the change, when it comes, will not stop there. It will also sweep away the offices of the public prosecutor and the trial judge—as they are now constituted.

Our children's children's children may witness the development of a new technique, which will involve a closer liaison between the law and the social sciences, with special emphasis upon the anticipation and prevention of anti-social acts. Under such a system the hopeless misfits would be weeded out by specialists and assigned to useful supervised tasks, or in extreme instances, eliminated altogether via the lethal chamber.

There should be consolation in such a prospect for those who still believe that fear is an effective crime preventive. The "habitual criminal," who at present has only contempt for our imposing array of threatened punishments, would quail before the inexorable processes of a well-organized and civilized society—processes which he could not understand or easily evade. He would be lost and baffled if we should abandon our primitive ideas of revenge and retribution and treat him as a malignant growth to be excised from the social body—dispassionately, yet humanely, without bluster, bullying or rancor.

[2] American Law Institute, the American Judicature Society, the American Institute of Criminal Law and Criminology, the National Crime Commission, the Social Science Research Council, the American Psychiatric Association, the Institute of Law of Johns Hopkins University, and numerous crime commissions, judicial councils and university research departments.

THE WORSHIP OF THE MACHINE

BY LOUIS UNTERMEYER

I know no more deplorable programme than the current effort to "humanize" the machine. There is, for the appreciative ironist, a sardonic humor in the attempt; as man becomes more and more systematized, less of a temperament, the factory grows more and more temperamental. The robot, dissatisfied with mere robot efficiency, desires a soul; and the protagonists of the machine, quick to oblige their creature, take away the one thing which distinguishes man from his toy-creations. There is, as I said, something humorous about the transference. The surrender to industrialism—in itself a too-early confession of the defeat of the individual—implies the subservience of man not only to things, but to things he has made without love, uses without thought, and destroys without compunction.

There is, it seems to me, only one further extension of the irony, and that step is being taken—tentatively, it is true—but with a fantastic inevitability. It is this: The machine (so say its proclaimers) is now part of our lives; we are governed by new rhythms, hitherto undreamed-of speeds, angular and incisive patterns. We rise at the metallic summons of the machine, are propelled to our labors by it, are clothed and comforted by its dispensation, live every hour by its powerful and beneficent variety. Since we cannot escape it, let us accept it. And since we must accept it, let us do it, not with futile regrets, but whole-heartedly. Let us, first, understand it. Then—as happens with all the intimate connections of our lives—we can transmute the machine into loveliness, sublimate it through art, employ it in beauty.

Such, in short, is the argument. It is, even on the surface, as fallacious as it is familiar—a pathetic fallacy in the actual as well as the technical sense. To begin with, man is actually no more responsive to the machine than he has ever been. Paraphrasing Whistler, I might say there has never been a machine-conscious people, there has never been a Machine Age. Or, rather, there has always been one. The invention of the wheel by some Neolithic Henry Ford was completely revolutionary—the double entendre is unavoidable—but I doubt if it affected the soul of man any more than the perfection of the engine by Herr Diesel. The chariot speeded-up Egyptian blood no less than the Californian; but not one of all the obelisks, stelæ or papyri mention the profound change in motor power which affected the citizens of Thebes and Karnak.

It is not difficult to guess the reason why the Greeks composed no odes to the loom, why the Latins celebrated the wine but not the wine-press, why the Hebrews sang psalms to the Temple but none to the cranes and pulleys that erected it. The reason is the inherent distrust which man has for his engines of power. It is a distrust which springs from a dislike for the