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## Reform of Criminal Procedure - A Judicial or a Legislative Problem

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## REFORM OF CRIMINAL PROCEDURE—A JUDICIAL OR A LEGISLATIVE PROBLEM?

THE century and a quarter that has elapsed since Edward Livingston wrote his code of criminal procedure has witnessed vast changes in our social structure. The automobile, the airplane, the radio, and countless other innovations all have contributed to the many-fold acceleration of the tempo of society. Almost no aspect of human existence has remained unaffected and unchanged. Although criminal motives have, as always, remained unchanged, criminal methods have not; there has been terrifying progress in the technique of crime. Today's well-equipped bandit can do the work of a dozen brigands of Edward Livingston's day.

There is, however, one tool of society in which there has been only slight progress: The procedure by which the modern high-speed criminal is brought to justice is essentially the same procedure created by Edward Livingston more than a century ago, and put into use in Texas more than ninety years ago.<sup>1</sup> Since its enactment in 1856 the Texas Code of Criminal Procedure has been patched sporadically but has never enjoyed a thoroughgoing overhaul.<sup>2</sup> Is it, then, unreasonable to suggest that this procedure, geared to the tempo of a society which no longer exists, is no longer sufficient?

Texas must be provided with a criminal procedure that is not only adequate to present needs but also sufficiently adaptable to accommodate itself to future requirements. It should be at least as progressive as the criminal with whom it must cope. Hope of attaining

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<sup>1</sup> See Wilkinson, *Edward Livingston and the Penal Codes* (1922) 1 TEX. L. REV. 25.

<sup>2</sup> Probably the most far-reaching change in the Code was effected by the adoption of the Common Sense Indictment Act in 1881. Tex. Laws 1881, c. 57, p. 60, 9 LAWS OF TEXAS (Gammel, 1898) 152, carried forward in the Code of Criminal Procedure of 1895 as articles 448 to 464, and appearing as articles 405 to 412 in the Code of 1925.

this ideal would seem to lie in the frequently espoused proposal that the courts be charged with the duty and responsibility of maintaining an adequate procedure, and that the judiciary be given the power necessary to perform that duty.<sup>3</sup> An examination of the successes and failures of the past as well as the merits of the proposal will, perhaps, shed light on its efficacy.

At the time Henry II laid the basis of modern procedure in the twelfth century, justice was not a right but a royal prerogative. There was no separation but rather a fusion of the powers of government in the person of the king. In the absence of royal edict, procedure was largely controlled by the custom of the court. The existence of a custom was, of course, determined by the judge and thereafter preserved in men's memories and, later, in the Year Books.<sup>4</sup> At an uncertain time (but very early in English legal history) the courts began regulating practice by formally declared rules of court.<sup>5</sup> In this manner an intricate system of procedure was built up which, as it matured, became fixed and settled. Until the nineteenth century Parliament interfered with procedural matters only rarely.

This rigid court procedure was abruptly antiquated by the speed-up of society attendant upon the Industrial Revolution. In the early part of the nineteenth century public opinion, led by a crusading press, condemned the legal profession in unmeasured terms and demanded reform. These attacks were fiercely resisted by the

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<sup>3</sup> See, e. g., Kaplan, *The Validity of Legislative Regulation of Procedure* (1941) 16 TEMP. L. Q. 51; Simpson, *Power of Courts over the Rules of Procedure* (1941) 27 A. B. A. J. 591; Dean, *Rule-Making for Criminal Procedure* (1940) 24 J. AM. JUD. SOC. 81; Pound, *Practical Advantages of Rules of Court for Criminal Procedure* (1939) 25 A. B. A. J. 825; Cummings, *A Rounded System of Judicial Rule-Making* (1938) 24 A. B. A. J. 513; Taft, *Success of English Procedure Attributed to Judge-Made Rules* (1925) 9 J. AM. JUD. SOC. 126; Morgan, *Judicial Regulation of Court Procedure* (1918) 2 MINN. L. REV. 81; Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163.

<sup>4</sup> See Tyler, *The Origin of the Rule-Making Power and its Exercise by Legislatures* (1936) 22 A. B. A. J. 772.

<sup>5</sup> The oldest known Chancery Orders go back to 1388, the oldest Common Law Rules to 1457. Rules of the King's Bench date from 1604. It seems clear that these are not the oldest rules since some of them refer clearly to older ones. See JENKS, *A SHORT HISTORY OF ENGLISH LAW* (2d Am. ed. 1922) 188.

judges and lawyers who considered their beautifully complicated procedure to be the ultimate fruition of human logic.<sup>6</sup> Parliament, grown strong but reluctant to withdraw from the judges what it considered to be the very necessary function of issuing rules of practice,<sup>7</sup> compromised with the enactment of the Civil Procedure Act of 1833<sup>8</sup> by which the courts were expressly authorized to make rules for the reform of pleading. The judges, apparently not understanding what was expected of them, published the famous Hilary Rules of 1834 which removed some of the anomalies of common-law pleading but were generally disappointing.<sup>9</sup> In 1852 Parliament moved again, this time enacting a code of 239 sections.<sup>10</sup> The code was, in effect, a suggestion offered to the courts since the act gave them power to repeal, modify, or add to the code as they saw fit. Parliament was still looking hopefully to the courts to take the lead in the reform.

The Supreme Court of Judicature Act of 1873 made sweeping reforms in the court structure to remove jurisdictional conflicts between divisions.<sup>11</sup> In addition it returned full rule-making power to the courts<sup>12</sup> and created a council of judges required to meet annually to consider revisions of the rules.<sup>13</sup> This council, expanded in 1909 to include four members of the legal profession in addition to eight judges,<sup>14</sup> now bears the responsibility for main-

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<sup>6</sup> For an interesting account of the dispute see Sunderland, *The English Struggle for Procedural Reform* (1926) 39 HARV. L. REV. 725.

<sup>7</sup> See JENKS, *op. cit. supra* note 5, at 189.

<sup>8</sup> 3 & 4 WM. IV, c. 42.

<sup>9</sup> The rules were a compromise "between the conservatism of six centuries and the demands of modern criticism and modern convenience." HEPBURN, *HISTORY OF CODE PLEADING* (1908) 77

<sup>10</sup> Common Law Procedure Act, 1852, 15 & 16 VICT., c. 76.

<sup>11</sup> 36 & 37 VICT., c. 66.

<sup>12</sup> *Id.*, §§ 71, 74.

<sup>13</sup> *Id.*, § 75.

<sup>14</sup> Judicature (Rule Committee) Act, 1909, 9 EDW. VII, c. 11. The Rule Committee in its present form consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, four other judges of the Supreme Court, two practicing barristers, and two practicing solicitors. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 GEO. V, c. 49, § 99 (4).

taining an effective legal procedure, except for certain phases of criminal procedure that have been placed under the control of other judicial committees.<sup>15</sup> The Rule Committee, as it is now called, has power to repeal, amend, or add to the rules after forty days notice, subject to annulment by either house of Parliament.<sup>16</sup> The power to annul has rarely, if ever, been exercised by Parliament.

From this brief resumé of England's long struggle for procedural reform, two things are immediately apparent. In the first place, during the eight-hundred years that have elapsed since the foundations of the modern system of judicial administration were established, Parliament never undertook "to chain the courts to the chariot wheel of a legislative code of procedure."<sup>17</sup> The control of practice has never been considered other than a judicial function. Second, the judiciary, the element which conserves, is inherently inert. England's present high degree of procedural efficiency came only after that inertia was relieved by fusing the judges and representatives of the bar into a body having no other purpose than the improvement of procedure.<sup>18</sup>

When the United States borrowed England's procedure, practice there was governed by the King's courts at Westminster. Rules issuing from these courts governed not only their own practice, which was largely appellate, but also the trial proceedings in the courts of

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<sup>15</sup> Power to control criminal appellate procedure by rules of court was conferred upon the Lord Chief Justice and the judges of the Court of Criminal Appeal by the Criminal Appeal Act, 1907, 7 EDW. VII, c. 23, § 18; Criminal Justice Act, 1925, 15 & 16 GEO. V, c. 86, §§ 16, 17; Coroners (Amendment) Act, 1926, 16 & 17 GEO. V, c. 59, §§ 25-7. The Indictments Act, 1915, 5 & 6 GEO. V, c. 90, § 2, prescribed short form indictments to replace the cumbersome common-law indictments, and created a special rule committee, headed by the Lord Chief Justice of England, to make rules regulating indictments. The rules of criminal procedure promulgated by these agencies are subject to the approval of the Lord Chancellor and may be annulled by either house of Parliament.

<sup>16</sup> 36 & 37 VICT., c. 66, § 68.

<sup>17</sup> Sunderland, *The Exercise of the Rule-Making Power* (1926) 12 A. B. A. J. 548.

<sup>18</sup> See Sunderland, *The Judicial Council as an Aid to the Administration of Justice* (1941) 35 AM. POL. SCI. REV. 925.

assize and nisi prius, which were independent courts.<sup>19</sup> This unquestionably furnished the pattern for practice in this country.<sup>20</sup> But the procedure then employed in England was, as we have observed, hopelessly inadequate; and it was quite as inadequate to the needs of this country.

American jurisdictions entered at once upon a season of legislative control of procedure. Even as Congress created the federal court system, it undertook to control judicial procedure in actions at law.<sup>21</sup> In 1848, while Parliament was patiently trying to prod England's inert courts into taking the lead in reform, New York's legislature took unto itself complete control over procedure in that state with the enactment of David Dudley Field's code. The Field Code set the pattern of reform in other states and the movement spread rapidly. Code-making became the legislative fashion of the day. Undoubtedly, the precedent furnished by the Field Code was a factor leading to the adoption of the Texas Code of Criminal Procedure.

Legislative control of procedure is not consistent with the doctrine of the separation of powers,<sup>22</sup> but that inconsistency was no deterrent to the code movement. The doctrine was understood in its broader aspects, but understanding of its exact application was

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<sup>19</sup> See Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163.

<sup>20</sup> In 1792 when the Attorney General requested information concerning the rules and regulations governing the procedure of the Supreme Court, the Chief Justice stated that "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." *Hayburn's Case*, 2 Dall. 411 (U. S. 1792).

<sup>21</sup> TEMPORARY PROCESS ACT, 1 STAT. 93 (1789); PERMANENT PROCESS ACT, 1 STAT. 276 (1792).

<sup>22</sup> See Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally* (1928) 23 ILL. L. REV. 276; cf. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931); *Walton v. Walton*, 86 Colo. 1, 278 Pac. 780 (1929); *Blanchard v. Golden Age Brewing Company*, 188 Wash. 396, 63 P. (2d) 397 (1936).

shadowy.<sup>23</sup> It was considered only slightly restrictive of the legislature; enthusiasm for the new democracy had engendered the idea that the legislature, as the immediate representative of the people, was supreme. The lawyers of the period were largely apprentice-trained, which training consisted of little more than instruction in local procedure. Such training fostered the idea that procedure is the main department of the law and, if the separation of powers is to be observed, should be left to the legislature. Failing to recognize the distinction between procedure and substance, they thought of the right in terms of the remedy.

The code movement was the natural result of causes peculiar to the moment. Procedure was inadequate, and the courts, engrossed with the task of building a system of substantive law, had little time for procedure. The legal profession, here as in England, was obstinately arrayed against reform. It was inevitable that the people should look to the legislatures for leadership, far greater faith being reposed in the legislatures than in the judiciary.<sup>24</sup>

The movement spread until twenty-nine states and two territories were controlling the details of procedure by statute,<sup>25</sup> but the codes

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<sup>23</sup> The courts seem to have accepted, without argument or analysis, the power of the legislatures to control procedure. For example, Chief Justice Marshall declared that the courts "may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department." *Wayman v. Southard*, 10 Wheat. 1, 43 (U. S. 1825). It is interesting to note, however, that an amendment to the Constitution of New York was considered necessary to confer the power upon the Legislature to enact the Field Code. See *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43, 51 (1st Dep't 1922), *aff'd without opinion*, 235 N. Y. 534, 139 N. E. 724 (1923).

<sup>24</sup> See Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599.

<sup>25</sup> New York in 1848, Missouri, 1849; California, 1850; Iowa, 1851; Kentucky, 1851; Minnesota, 1851; Indiana, 1852; Ohio, 1853; Oregon, 1854; Washington, 1854; Nebraska, 1855; Texas, 1856; Wisconsin, 1856; Kansas, 1859; Nevada, 1860; North Dakota, 1862; South Dakota, 1862; Arizona, 1864; Idaho, 1864; Montana, 1865; Arkansas, 1868; North Carolina, 1868; Wyoming, 1869; South Carolina, 1870; Utah, 1870; Colorado, 1877; Connecticut, 1879; Oklahoma, 1890; New Mexico, 1897; Alaska, 1900; and Puerto Rico, 1904. See Cushing, *The Rule-Making Power of the Courts*, supplement to March, 1927, A. B. A. J. 14.

did not prosper. In 1908, just prior to his election as President, Taft voiced his opinion that codes of procedure were generally much too elaborate.<sup>26</sup> In his message to Congress on December 6, 1910, he called upon it to enact legislation empowering the Supreme Court to regulate, by rules of court, the procedure in actions at law as well as equity.<sup>27</sup> In 1909 a committee of the American Bar Association urged several principles of procedural reform, one of which was stated as follows: "Whenever in the future practice acts or codes of procedure are drawn up or revised, the statutes should deal only with the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time, as actual experience of their application and operation dictates."<sup>28</sup>

New York, leader of the movement, failed to find the anticipated procedural peace under the Field Code, which, within a few years, had swelled from a modest 391 sections when enacted to more than 3,000 sections. In 1904 a board was appointed to study possible simplification of New York practice. The board reported in 1912 that "the present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment."<sup>29</sup> In 1926 Professor Sunderland, surveying the history of procedure in America, concluded that the enactment of the Field Code "was a political and economic blunder of the first magnitude, and set a precedent which changed the American judicial establishment from a living stream into a stagnant pool."<sup>30</sup> The legislatures had unquestionably failed to vindicate their invasion of the judicial province.

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<sup>26</sup> Taft, *The Delays of the Law* (1908) 18 YALE L. J. 28, 31.

<sup>27</sup> 46 CONG. REC. 25 (1910).

<sup>28</sup> *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Costs in Litigation* (1909) 34 A. B. A. REP. 578, 595. Dean Pound, a member of the Committee, urged the same principle the following year in an article entitled *Some Principles of Procedural Reform* (1910) 4 ILL. L. REV. 388, 491.

<sup>29</sup> Quoted in Stewart, *Rules of Court in Iowa* (1928) 13 IOWA L. REV. 398, 400.

<sup>30</sup> Sunderland, *The Exercise of the Rule-Making Power* (1926) 12 A. B. A. J. 548, 549.

Statutory procedure failed for lack of flexibility. The rigidity of the codes gave rise to frequent need for repairs—repairs which the legislatures were ill-equipped to make.<sup>31</sup>

The codes represented an attempt to create, *a priori*, a system of procedure that would be sufficient to every occasion—an attempt to serve a dynamic society with a static procedure. The frequent use of mandatory words added to the inflexibility which had resulted from the embodiment of procedural rules in statutory form.

The intrinsic shortcomings of the code provisions as enacted were not infrequently multiplied by narrow construction at the hands of unsympathetic or even hostile courts. In respect to the Texas Code of Criminal Procedure, it could perhaps be said that the construing court suffered from an excess of sympathy for the accused. Later, the Court of Criminal Appeals, required by statute to prepare a written opinion in every case,<sup>32</sup> apparently seized upon technicalities occasionally to reach results considered desirable on the merits. However collected, these undesirable precedents clung like barnacles, disrupting the smooth flow of justice. Ordinarily they could be removed in no less drastic manner than by removal of the impaired rule and substitution of a new one—surgery that could be performed only by the Legislature.

But the legislatures, composed largely of laymen,<sup>33</sup> had little occasion to observe the working of the codes and remained in ignorance of procedural shortcomings. In recent years proposals for change and improvement have most frequently come from the bar

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<sup>31</sup> The Honorable William D. Mitchell, in his address, *Uniform State and Federal Practice* (1938) 24 A. B. A. J. 981, 982, quotes the late Judge Cardozo as follows: "The Legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend."

<sup>32</sup> TEX. CODE CRIM. PROC. (1925) art. 847.

<sup>33</sup> Out of 150 members of the Texas House of Representatives only 56 were lawyers in 1941. See Simpson, *Power of Courts over the Rules of Procedure* (1941) 27 A. B. A. J. 591, 593.

(the body best acquainted with procedure) and have been regarded with cynical suspicion by the law-makers.<sup>34</sup>

To the inertia of legislatures, not cognizant of the need for change, was added the inertia engendered by divided responsibility for effective procedure. It was difficult to place the blame for procedural aberrations; the courts and the legislatures were found pointing accusing fingers at one another. Thus did the pressure of public opinion, prime mover of legislatures, become diffused for lack of focal point.

Legislatures convened infrequently, were usually confronted with a large volume of pressing political issues to be considered. In the rush of business reform bills were pushed aside and allowed to die on the calendar.<sup>35</sup> The legislators, ignorant of the need for change and the effect of a proposal, quite naturally chose to leave what they considered "well enough" alone, shielded as they were by the courts from the direct glare of public opinion.

Many of the intrinsic disabilities that doomed legislative control to failure would be relieved by the return of the rule-making power to the court. It would effect the highly desirable purpose of uniting the power of control with the responsibility for the exercise of that power; the courts would be enabled to discharge that duty for which they are now responsible in the eyes of the public.

Failure to make use of the available expert knowledge in the accomplishment of a highly technical task is improvident. The court, better trained than the legislature and constantly occupied with procedure, has a far better knowledge of the operation of

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<sup>34</sup> "The [Texas] Legislature evidently has the idea that the Supreme Court can not be trusted to make the rules. There seems to be a suspicion somewhere that somebody is 'trying to put something over' in the enactment of this measure." *Report of Committee on Remedial Procedure and Law Reform* (1929) 48 PROC. TEX. BAR ASSO. 68, 70.

<sup>35</sup> "In view of the failure of the Texas Legislature to respond to the suggestions of the Bar Association and the Judicial Section in the matter of amending the Code of Criminal Procedure, the members of the Section at this meeting expressed themselves freely in the belief that the duty and responsibility of making rules of procedure for the courts in both civil and criminal cases ought to be restored to the courts." *Report of the Judicial Section* (1935) 54 PROC. TEX. BAR ASSO. 206, 207. See also *Report of Special Committee on Criminal Law and Procedure*, *id.* at 218.

the rules. It "will not have to be taught the existing practice and the mischief as well as the proposed remedy."<sup>36</sup> In session for at least nine months out of every year rather than biennially, as the legislature, the court could subject the rules to a continuous study, making amendments as the need became apparent. Proposals offered by the bar would receive serious consideration unshadowed by that suspicion with which they seem to be regarded by the legislature. In this manner all the trained legal talent in the state could join the battle for better procedure.

Perhaps the greatest advantage of court-made rules over procedural statutes would lie in the attitude of the court interpreting the rules. It is inconceivable that the court would be other than sympathetic to its own rules. They would be so construed as to effectuate the purpose for which they were promulgated. In their status as rules of court they could be liberally applied so as to prevent any particular oppression, whereas "Legislative rules are inflexible; and, when explicit and clearly understood, they must be enforced without regard to the individual injury that may be the result."<sup>37</sup> Procedure, relieved of its present inflexibility, could fulfill its office as handmaiden rather than master in the administration of justice.

Historically, the record of the courts in regulating procedure is little better than that of the legislatures. The legislatures have been guilty of misfeasance; the courts, of nonfeasance. We have seen that the procedural reform that has come to England in the last century and a half came, for the most part, in spite of the courts. The Supreme Court of the United States, empowered in 1792 to make rules governing procedure in equity,<sup>38</sup> allowed thirty years to

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<sup>36</sup> Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599, 602.

<sup>37</sup> *De Leon v. Owen*, 3 Tex. 153, 154 (1848); *accord*, *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326 (1905); *House & Co. v. Burnett*, 40 Tex. 346 (1874); *Mills v. Bagby*, 4 Tex. 320 (1849); *Holmes v. Coalson*, 178 S. W. 628 (Tex. Civ. App. 1915), *aff'd*, 111 Tex. 502, 240 S. W. 896 (1922).

<sup>38</sup> 1 STAT. 276 (1792).

slip by before the power was exercised.<sup>39</sup> The equity rules promulgated in 1822 were not changed for another twenty years,<sup>40</sup> and thereafter remained largely unchanged until supplanted by the equity rules of 1913.<sup>41</sup> The Michigan Court, empowered by the constitution to make rules, remained inactive for eighty years.<sup>42</sup> The Virginia Court of Appeals was, after the passage of three enabling acts, induced to make one rule.<sup>43</sup>

This apparent failure of the judiciary to sustain the burden of creating an adequate procedure has been attributed to two factors. First, the courts, with their crowded dockets, are simply too busy to undertake the painstaking task of drafting new rules of procedure. Second, there is inherent in courts generally slight incentive to act; as commonly understood, the judicial function is not to create but to conserve.

It is not suggested that the drudgery of drafting new rules should be performed by the judges of the court. Such a burden in addition to their official duties would be intolerable. The spade work should be done by a body of experts created for that purpose. In this connection it is interesting to observe the method employed by the Supreme Court of the United States in drafting the new Federal Rules of Criminal Procedure. The Court appointed an Advisory Committee composed of lawyers, judges, and law teachers, with membership well distributed geographically. The Committee fell to work on a preliminary draft, giving attention to procedures employed in each state, in other countries, and to the code of criminal procedure drafted by the American Law Institute. Each senior

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<sup>39</sup> The thirty-three equity rules of 1822 are reported in 7 Wheat. v (U. S. 1822)

<sup>40</sup> The equity rules of 1822 were supplanted in 1842 by ninety-two rules reported in 1 How. i (U. S. 1843).

<sup>41</sup> The rules, eighty-one in number, are reported in 226 U. S. 649 (1912).

<sup>42</sup> The power to regulate procedure was conferred upon the Supreme Court of Michigan in 1850 by the Constitution, but the power was not exercised in a substantial manner until 1931, after the bar had obtained enactment of a bill requesting the court to act. See Harris, *The Extent and Use of Rule-Making Authority* (1938) 22 J. AM. JUR. Soc. 27.

<sup>43</sup> See Sunderland, *The Judicial Council as an Aid to the Administration of Justice* (1941) 35 AM. POL. SCI. REV. 925.

circuit judge appointed a bar committee in each of his districts to study the problem and make suggestions to the Advisory Committee. Suggestions so made were, after careful consideration by the Advisory Committee, synthesized into tentative drafts which were circulated among the bar committees for further study and criticism. The final draft, approved by the Supreme Court acting more as arbiter, was submitted to Congress for its consideration. Congress raised no objections to the Rules, and they became law on March 21, 1946.<sup>44</sup>

The machinery for regulating procedure in the federal courts is subject to criticism on one count: No provision has been made for a possible recrudescence of the court's traditional inertia; no permanent body has been created for the purpose of subjecting the rules to a continuous critical study. It is true that the Supreme Court has continued the advisory committees in existence,<sup>45</sup> but the foresight exhibited by that Court would seem to offer no reason for the failure of Congress to insure constant surveillance of the rules. Texas is equipped with a body created by statute in 1929 "for the continuous study of and report upon the organization, rules, procedure and practice of the civil judicial system of this State."<sup>46</sup> This body, the Civil Judicial Council, is required to report annually to the governor and to the Supreme Court. There seems to be no valid reason why the duties of the Council should not be expanded to include criminal as well as civil matters, with a corresponding expansion of the membership to include some experts on the administration of criminal justice. The fact that the Council's function was limited to civil matters exemplifies the neglect which has led to the decay of the State's criminal process.

The problem as to which of Texas' two "supreme" courts should be invested with control of criminal procedure will be determined

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<sup>44</sup> For a more elaborate discussion of the machinery employed in formulating new federal rules see Holtzoff, *Participation of the Bar in Judicial Rule-Making* (1943) 3 F. R. D. 165; Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process* (1945) 31 A. B. A. J. 236.

<sup>45</sup> Order, 314 U. S. 720 (1942).

<sup>46</sup> TEX. REV. CIV. STAT. (Vernon, 1936) art. 2328a.

by the degree of esteem accorded the one or the other. The seemingly logical answer is that the court of last resort in criminal matters should control the procedure. But Section 25 of Article V of the Texas Constitution empowers the Supreme Court to make rules of procedure for itself "and the other courts of this State." It is believed that either court could constitutionally be empowered to make the rules. In the case of the Supreme Court no further enabling act would be necessary—only a repeal of the statutory rules of procedure—for the Supreme Court is empowered by the Constitution to occupy so much of the field as is not occupied by the Legislature.<sup>47</sup> It would be necessary to pass an enabling act to empower the Court of Criminal Appeals to make the rules, but such an act would not be an unconstitutional delegation of legislative power. "The authorities clearly establish that the power to regulate procedure is considered a judicial power, or at least that it is not considered to be a purely or distinctively legislative power."<sup>48</sup>

If the Texas Legislature sees fit to confer the criminal rule-

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<sup>47</sup> Article V, Section 25 of the Constitution of 1876 conferred the rule-making power on the Supreme Court without restriction. The Section was amended in 1891 to restrict the power to the promulgation of rules "not inconsistent with the laws of the state." The fact that the Court of Criminal Appeals was created by the same constitutional amendment that restricted, but re-emphasized, the rule-making power of the Supreme Court would seem to evidence an intent that the Supreme Court should make the rules for the Court of Criminal Appeals as well as for the civil courts.

It is apparent that the Texas Civil Judicial Council concluded, after five years' study of the judicial system of the state, that the Supreme Court rather than the Court of Criminal Appeals is the proper body to control criminal procedure. The Council has proposed an amendment to the Judiciary Article of the Constitution, Section 8 of which would empower the Supreme Court to make "all rules of practice and procedure for all the courts of the system." Section 6 would create an advisory judicial council for the continuous study of the rules, criminal and civil. The proposed amendment, a worthy opus, would go far to cure the administrative and procedural ills of the state's judicial system. See PROPOSED AMENDMENT TO ARTICLE V OF THE STATE CONSTITUTION RELATING TO THE JUDICIAL SYSTEM OF TEXAS AS REDRAFTED BY THE TEXAS CIVIL JUDICIAL COUNCIL (1946).

<sup>48</sup> *State v. Roy*, 40 N. M. 397, 60 P. (2d) 646, 659, 110 A. L. R. 1, 19 (1936); *accord*, *Bank of United States v. Halstead*, 10 Wheat. 51, 61 (U. S. 1825); *Burney v. Lee*, 59 Ariz. 360, 129 P. (2d) 308 (1942); *Petition of Florida State Bar Ass'n*, 21 So. (2d) 605, 158 A. L. R. 699 (Fla. 1945); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928); *In re Constitutionality of Wisconsin Statute*, 204 Wisc. 501, 236 N. W. 717 (1931).

making power on the appropriate court, it will not be pioneering in that field of procedural reform, although it might have taken the lead in the reform had it acted when the measure was first urged upon it a quarter of a century ago.<sup>49</sup> Since that time the field has been well explored. As we have seen, the power of the courts to control procedure has never been denied in England. With the appearance of the new Federal Rules of Criminal Procedure the control of federal practice by the Supreme Court became complete.<sup>50</sup> A number of states have granted to their supreme courts full

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<sup>49</sup> At the meeting of the Texas Bar Association in 1920 Judge C. H. Jenkins proposed a constitutional amendment vesting the rule-making power in a judicial council. (1920) 39 PROC. TEX. BAR ASSO. 30. Two years later a resolution was offered urging the repeal of all statutory rules of procedure to be replaced by rules of court. (1922) 41 *id.* at 57. The following year President W. A. Wright in his opening address urged, "Stop the Legislature from tinkering with every little petty detail of procedure. Cut out the legislative details of procedure and practice, and let the Supreme Court, aided by distinguished members of the District Bench and of the Bar, make your rules, that they may amend, abolish or amplify, as experience teaches." (1923) 42 *id.* 6, 12. To the same effect, see *Report of the Committee on Judicial Administration and Remedial Procedure, id.* at 113. The Committee on Jurisprudence and Law Reform urged, "First: That rules prepared by the Supreme Court, with the aid of a commission of lawyers appointed on the recommendation of the judges of the Supreme Court, be substituted for all statutes on procedure, *civil and criminal.*" (Italics added.) *Id.* at 39. The proposal was unanimously adopted by the Association. *Id.* at 127. The Committee on Jurisprudence and Law Reform for the following year recommended the same principle, (1924) 43 *id.* at 29, and it was again adopted by the Association. *Id.* at 62.

The same or similar proposals were made in 1926, 45 *id.* at 170, adopted at 173, in 1928, 47 *id.* 50, 68, in 1929, 48 *id.* 68, and again in 1932, 51 *id.* at 172. In 1935 both the Judicial Section of the Bar Association and the Special Committee on Criminal Law and Procedure urged "that the duty and responsibility of making rules of procedure for the courts in *both civil and criminal cases* . . . be restored to the courts." (Italics added.) 54 *id.* 206, 218, adopted at 208. The Committee on Criminal Law and Procedure reported in 1942 that efforts to improve the administration of criminal justice by piecemeal legislation had proved to be of little use. It urged that the power to control criminal procedure be conferred upon either the Court of Criminal Appeals or the Supreme Court. See *Report* (1942) 5 TEX. BAR J. 211, adopted (1942) 61 PROC. TEX. BAR ASSO. 36.

<sup>50</sup> Complete control over federal procedure has come to the Supreme Court gradually over the past century and a half; Equity, 1 STAT. 276 (1792) (for the Rules see notes 38-40, *supra*) ; Admiralty, 5 STAT. 516 (1842), see Rules in 1 How. xli (U. S. 1842) ; Bankruptcy, 30 STAT. 554 (1898), 11 U. S. C. § 53 (1940), see Rules in 172 U. S. 653 (1898) ; Copyright, 35 STAT. 1081 (1909), 17 U. S. C. § 25 (1940), see Rules in 214 U. S. 533 (1908) ; Criminal Appeals, 47 STAT. 904 (1933), 18 U. S. C. § 688 (1940), see Rules in 292 U. S. 661 (1933) ; Civil Procedure in the District Courts, 48 STAT. 1064 (1934), 28 U. S. C. §§ 723b - c (1940), see Rules in 308 U. S. 645 (1939) ; Criminal Procedure before Verdict, 54 STAT. 688, 18 U. S. C. § 687 (1940), see RULES OF CRIMINAL PROCEDURE FOR DISTRICT COURTS OF THE UNITED STATES (1944).

rule-making power in matters criminal as well as civil.<sup>51</sup> Notable among these states is Arizona for the abruptness with which complete reform came. In 1939 the Arizona Legislature passed an act giving the Supreme Court full power to regulate procedure.<sup>52</sup> New civil rules went into effect on the following January 1. They were, in substance, the Federal Rules of Civil Procedure modified in a very few instances to suit local conditions.<sup>53</sup> Three months later, on April 1, new rules of criminal procedure went into effect. With the exception of one inappropriate chapter out of twenty-five, the American Law Institute's Code of Criminal Procedure was adopted in Arizona.<sup>54</sup>

Texas has not been wholly backward in the matter of procedural reform; in 1939 the Forty-sixth Legislature thought it desirable to vest in the Supreme Court complete control over civil procedure.<sup>55</sup> The reasoning which compelled that act is equally compelling as to criminal procedure. As Dean Pound has observed, "On the whole, what has been said repeatedly in the past thirty years as to legislative regulation of civil procedure is quite as applicable to criminal procedure."<sup>56</sup> To fret over the rights of the

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<sup>51</sup> Courts of the following states have full control over criminal procedure: Arizona, ARIZ. CODE (1939) §§ 19—202.4 (procedural statutes to continue in force as rules of court until modified or suspended by order of the Supreme Court); Idaho, Idaho Laws 1941, c. 90, §§ 1-5 (statutes in conflict with rules of court are of no further force); Missouri, MO. CONST. (1945) Art. V, § 5; New Mexico, N. M. STAT. (Supp. 1938) §§ 34—501.2 (procedural statutes to remain in force as rules until changed by the Supreme Court); North Dakota, N. D. REV. CODE (1943) § 27—0208; South Dakota, S. D. CODE (1939) § 32.0902 (procedural statutes to remain in force as rules until changed by the Supreme Court); Washington, WASH. CODE (Pierce, 1939) §§ 8676—1.2 (statutes to remain in force as rules until modified by the Court); West Virginia, W. Va. Laws 1935, S. B. 220, p. 170 (statutes to continue in force as rules until modified by the Court); Wisconsin, WIS. STAT. (1941) § 251.18 (statutes to continue in force as rules until modified by the Court).

<sup>52</sup> ARIZ. CODE (1939) §§ 19—202.4.

<sup>53</sup> See Sunderland, *Arizona's New Rules of Civil Procedure Effect Conformity with Federal Rules* (1940) 23 J. AM. JUD. SOC. 215.

<sup>54</sup> See (1940) 23 J. AM. JUD. SOC. 174.

<sup>55</sup> TEX. REV. CIV. STAT. (Vernon's Supp. 1939) art. 1731a.

<sup>56</sup> Pound, *Practical Advantages of Rules of Court for Criminal Procedure* (1939) 25 A. B. A. J. 825.

accused is useless; those rights are embodied in the Constitution beyond the reach of either court or legislature.

There is good reason to believe that, should the Legislature, or the people by constitutional amendment, confer upon the proper court the power to control practice, Texas would be benefited by a vastly improved system of criminal procedure. Here again the trail has been blazed. The new Federal Rules of Criminal Procedure are now being tested. Formulated in the manner described above, these rules are the distillate, the essence of the considered opinions of numerous leaders in the legal profession, and, as such, are worthy of more than a passing consideration.

The American Law Institute Code of Criminal Procedure is the product of a vast amount of time and money expended on research by the leading experts in the field. These works and the experiments that have been conducted in the other forty-seven "laboratories" should clearly define the path to the ideal in procedure—that procedure which "is a means, not an end; (which is) made subsidiary to the substantive law as a means of making that law effective in action."<sup>57</sup>

*George C. Potts.*

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<sup>57</sup> Pound, *The Canons of Procedural Reform* (1926) 12 A. B. A. J. 541, 543.