

CAN A RICH MAN BE CONVICTED?

YES, says Mr. Train. But the fact is not always apparent, because rich men are not so plentiful as poor ones and are subject to fewer temptations to crime. Although up to the time of trial a rich man has a great advantage over a poor one, once he is brought before a jury all his money and expensive lawyers avail him nothing.

NO, says Mr. Sinclair. Rich men can and do buy protection — sometimes before they have had the pleasure of committing their crimes and when they are merely contemplating them. "Fury-fixing" is common, usually safe, and connived at by many lawyers of standing. Americans don't want to convict wealthy malefactors anyhow. They aspire rather to join their ranks.

I—THE STIGMA OF WEALTH

ARTHUR TRAIN

LET me answer this rather disingenuous question by asking another: "Can any man be convicted?" I am aware that the Editor of THE FORUM is not looking for an exposition of the virtues or the failings of criminal justice in the United States. He is asking what is known as a "provocative" question. Such questions are apt to be as ambiguous as provoking, and one of its not least provoking aspects is that the question in question obviously does not mean precisely what it says and must be recast by the answerer at his peril.

The perspicacious Editor naturally seeks to capitalize the present and perennial public disgust at the sight of a rich malefactor (kindly observe that I do not at this present date of writing use the word "criminal") apparently riding roughshod over the laws and putting his fingers to his nose at the processes of the courts. In the hortatory tone affected by learned publicists, the Editor turns upon me, his selected victim, and demands, "What have you to say about that? Is it not a fact that there is one law for the rich and another for the poor?" Of course he knows, as everyone does, that rich men have been sent to jail from the days of "Boss" Tweed to those of Abe Hummel, Henry Siegel, and Charles W. Morse. (I mention only a few of the procession from my own bailiwick to Blackwell's Island, Atlanta, and that town upon the Hudson euphemistically rechristened Ossining).

Now I know that our Editor is as wise as he is just and (I hope) generous. Hence I have less temerity in telling him what he means. "Can a rich man be convicted?" being interpreted in the light of reason should read: "Granted that criminal jurisprudence as a science is foggy and criminal procedure antiquated, clumsy, and inadequate, what are the chances, all other things being equal, of bringing to justice a rich man who has committed a crime, as compared with a poor man."

Before attempting to answer the precise question under the spotlight let me attempt, by parable and otherwise, to illuminate it indirectly by calling attention to certain considerations that might otherwise be overlooked.

The total number of persons convicted of crime — whether these involve moral turpitude, such as murder and forgery, or are merely *mala prohibita*, like walking upon the grass or selling gimcracks without a license, is infinitesimal in comparison with the number of those who commit them — certainly less than a fraction of one per cent. Yet that tiny prick of the lance of justice is enough to make the whole body politic sit up, even if it does not make it walk exactly straight.

The fact, which nobody will deny, that fewer rich men are convicted of crime than poor men has, of course, no significance whatever. There are fewer of them. If all the persons who commit crimes in the City of New York in a single day were rounded up, the natural percentage of rich to poor among them would be certainly no greater than among the entire population. It would be small. So would be that of Scotchmen to Italians. Yet it would not occur to anybody, I assume, to ask whether or not a Scotchman could be convicted. In like manner, it would be found that the percentage of persons who had committed homicide was insignificant compared with those who had been guilty of larceny. This would not lead us to infer that murderers cannot be convicted. We know that convictions for murder occur almost every week. The answer to a prospective big game hunter's suppositious "Can I shoot an *Ovis Poli* or a Greater Koodoo?" would naturally be framed to depend not only upon the hunter's skill, but upon — and perhaps chiefly — the prevalence of the animal.

Lastly, at the very outset of our own inquiry, we are confronted by the unpalatable but highly relevant fact that not only — in spite of the publicity that shapes their ends — is the ratio of rich to poor exceedingly small, but that unquestionably the percent-

age of criminals, meaning thereby those who are not merely "undesirable citizens," skunks, or sinners but who have violated some criminal statute, is infinitely smaller among the rich than among the poor. The comfortable rich man, surrounded as he is by every safeguard to his life and property, has far less temptation to commit sordid or violent crimes than his less fortunate compatriots. He can get what he wants by drawing a check, without hazarding jail. Batteries, assaults, petty thefts, rapes, man-slaughters, and frequently murders are the concomitants of crowded living.

The rich man, generally speaking, has no need to commit crime. He can buy, where the tramp must steal. He can loot a corporate treasury or defraud a minority of stockholders out of their equity without necessarily committing any crime, if shrewdly (I was almost going to say "properly") advised. The meanest malefactor who ever lived was not necessarily a criminal. You can calmly let your neighbor's baby crawl in front of an on-coming trolley car and be wholly guiltless of criminality in the technical sense. Roosevelt chose his words well when he coined the phrase "malefactors of great wealth." He said he was "going after" them, yes — but he never boasted that he would "*convict*" them. The nearest he ever got to it was to force the retirement of Senator Foraker. Charles Evans Hughes, who won his legal spurs in the Insurance Investigation, left New York County strewn with ruined reputations, but nobody went to jail for the simple reason that the district attorney, eager as he was to do so, could find no criminal statutes which had been violated.

It was with profound intuitive wisdom that the little girl, asked in Sunday school, "What must one do to be forgiven?" answered — "Sin." To convict a rich man you must first find one who has committed a crime. The ordinary wealthy citizen has no call to burglary, arson, or homicide. His evil deeds consist of sins of the flesh and sharp financial transactions which usually are within the law. Of course, you cannot convict a rich man for doing something which the law allows, any more than you can convict a poor man for an offense against morals or decency which "if it isn't a crime, ought to be." There is a world of misapprehension and loose speech about what are termed "evasions" of the law. From the point of view of criminal jurisprudence there is no such thing as an "evasion." The act complained of is either a crime or it isn't a crime.

As Mr. Justice Holmes pointed out in *Bullen vs. Wisconsin* (240 U. S. 625, at p. 630), "We do not speak of evasion because, when the law draws a line, a case is on one side of it or the other and, if on the safe side, is none the worse legally that a party has availed himself to the full extent of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

The "moral equivalent" of larceny is not necessarily the legal equivalent to larceny. You cannot send a man to jail — and if I may be permitted to say so, you should not *want* to send a man to jail — unless it has been shown beyond a reasonable doubt to the satisfaction of twelve jurymen that he has *transgressed* the line drawn by the law. Otherwise none of us — yourself included — would be safe.

All of which may seem to the informed reader very old stuff. Concededly it is, but it is worth bearing in mind. For who of us has not joined in the general outcry when some rich and notorious evildoer has sidestepped the prison entrance? Yet while we may lament the impossibility of punishing moral offenses which stink in the nostrils of all honest men and women and perhaps cry to Heaven, we must not forget that it would be surprising indeed if a rich man found it necessary to violate a criminal statute when the ablest and most highly paid attorneys in the United States are at his beck to tell him how otherwise he may accomplish the same result. The most infamous railroad wrecker of the last century never asked his lawyers but one question. "Don't tell me what I can do or can't do!" he used to say. "I know what I can do a damn sight better than you do. — What I want to know is, *can they lock me up for it?*"

For the sake of clarity, then, let me repeat that not only are very few men, either rich or poor, convicted at all, but also that the rich have less incentive to commit ordinary crimes than the poor and usually do not find it necessary to transgress the criminal statutes to accomplish ends which may be no less worthy of condemnation than if they did.

And now, having cleared away some psychological underbrush, I am prepared to give a direct and emphatic answer to the question, "Can a rich man be convicted?" It is "Yes!" I utter it enthusiastically and as loudly as pen can ring on paper. But although it is loud and ringing, it is a "yes" with an equally

emphatic "if" attached. Rich men can be convicted (and are) beyond a doubt, but until they are actually brought to the bar of justice they have many and great advantages over poor and inconspicuous offenders against the law — the same advantages that they have almost everywhere else.

In the first place they enjoy a certain immunity so far as minor offenses are concerned, analogous to the "privilege" of aristocracy. There are many reasons for this, not the least being the natural disinclination of an officer of the law to "start something" in a case which may possibly involve him in difficulty and which, if left alone, may and probably will take care of itself. The policeman who lives in the aroma of politics is reluctant to interfere with persons of influence. He is loath, as he expresses it, to "take a chance on getting in Dutch" with anybody likely to make trouble for him either then or later. This fear of supposed "influence" is something very real. "Say! Don't you know who that guy is? Go easy!" is a phrase not so uncommon as it might well be. The wealthy jazz hound who gets into a scrap in a cabaret is bundled home in a taxi, while the "wop" who indulges in a rumpus lands in the "cooler." Prosperous citizens are not arrested "on suspicion" as are their humbler brothers, nor are Park Avenue poker parties, however drunk, wild, and disorderly, usually raided.

When it comes to crimes involving actual moral turpitude the rich man's advantages over the poor man are equally marked. The first of these lies in his greater ability to "square" those whom he has wronged. The idea of a crime's being an offense against the public is historically of comparatively recent origin. In the not remote past it was regarded rather simply as an injury to the victim and his relatives which could naturally be compounded for money. There was no difference made between willful and accidental acts. The question was one of damage. Human beings varied in value, in accordance with their station. Thus the Code of Hammurabi (King of Babylon about 2250 B.C.) provided that "if a man strike another man of his own rank, he shall pay one mana of silver," and "if a freeman strike a freeman he shall pay ten shekels of silver." Among the primitive Germans, from whom many of our Anglo-Saxon institutions were derived, there was no conception of an abstract breach of the peace. The folk-laws dealt with private "offenses" merely and contained provisions fixing the amount of damages (*compositio*) which were

called in cases of homicide *weregildum* and *werigilt* (meaning "man money" or "man price") and calculated with regard to the importance of the part of the body injured or lost and also to the rank of the party injured. A trace of this inherited disposition to view crimes as private injuries is to be found in the English practice of allowing private counsel to conduct criminal prosecutions.

Many people even to-day find it difficult to understand the technical difference between a civil action for damages and a criminal prosecution for the same act. It is in fact not unnatural that in some instances all parties, including even the district attorney himself, should feel justified in uniting in a common effort to seek the rehabilitation of the injured rather than the exaction of the uttermost retribution from the guilty. In the case of embezzlement of funds of poor people who, if the thief goes to prison for the limit, may recover nothing, it may well seem hard that those who have lost the savings of a lifetime should be compelled to give up all hope of getting them back "in order that justice may be done."

It is unquestionably a fact that in the overwhelming majority of criminal prosecutions the machinery of the criminal law is set in motion, not because the complainants have the public weal at heart, but because they wish either to satisfy their desire for revenge or to compel the defendant to make restitution. If the defendant can pay — particularly if he can be made to pay "with interest" — they quickly lose their enthusiasm. If an indictment has already been found, the complainant and his witnesses can frequently be induced to go away, "forget," or "find that they were mistaken." In the flood of criminal cases that congest our courts, judges and prosecutors are often more glad than not to find that injured parties are willing to "let their cases drop." In all this the rich man has a palpable advantage over the poor man, who either has no money to make good the damage that he has caused or, if he did have any, has probably turned it over to some shyster lawyer, more of a thief than himself.

The natural human inclination to "hush things up" also militates markedly in favor of the person able to pay for it, although in the case of the rich it often involves a heavy penalty of blackmail.

On the other hand, among the poor, there is an equivalent tendency to view the processes of the law with suspicion and all officers of the law as natural enemies, which works similarly in

favor of the criminal. The outlaw — even if the commoner sort of crook be not — is almost always looked upon as something of a hero. All of us entertain a furtive sympathy for an escaped convict which in part is due to soft-heartedness, the sporting instinct, that leads us to wish him “a run for his money,” and our inherent conviction that so-called justice is anything but “just” in the sense of being “equal.” Among our Italian population the *omerta* (that conspiracy of silence which envelopes all crimes of violence) makes the procurement of evidence difficult. The East Side gangster dies with his lips tight shut. These are but aspects of a universal distrust of and distaste for criminal process. Nobody wants a policeman around if he can help it.

If a rich man cannot buy judges and jurymen (and after a quarter of a century in the courts I have absolute confidence in the honesty of the bench and have never known of the bribery of a talesman) he nevertheless enjoys a greater opportunity than a poor man to “pull off” complainants, “spirit away” witnesses, “get rid” of evidence and invoke delay. It is practically impossible to force a defendant indicted for a major crime, who has able counsel, to an immediate trial. Often he can obstruct the prosecution for so long a period that public interest (and hence often the district attorney’s interest) has subsided and the evidence become stale. His lawyer, who perhaps reads this article, will at once reply: “That is as it should be. No defendant should be tried in the midst of public clamor against him.” However true this may be, the poor man faces the music as soon as the prosecutor can yank him to the bar.

But once the rich criminal has exhausted his dilatory tactics and at last faces the grim twelve who are to pass upon the evidence against him, how far will his money continue his advantage over the poor man? It is true that he can employ the most adroit and most eloquent of legal gladiators, and be sure that no point in his defense will be overlooked, while the poor man often has to be content with counsel “assigned by the court,” students just out of the law school, or briefless barristers of little or no ability. Yet the mere presence of a phalanx of formidable attorneys often tends to create in the minds of the jury an impression of guilt. The very fact that with the guidance of his lawyers the rich man can go the very limit — to the uttermost rim of the precipice — without violating any criminal law makes it all the more easy to convict him when through arrogance or carelessness he crosses the line.

For fifteen years I was actively engaged in the pleasant pastime of defending men charged with crime (all innocent, of course!) and of sending the guilty to jail. During that time I had a fairly good opportunity to form an estimate of the practical value to a guilty man of high-priced counsel. My conclusion was that on the whole they were a detriment. Their very ability to avail themselves of every technicality prejudiced the defendant in the eyes of the jury. One of the most distinguished of New York trial lawyers, who had many malefactors of wealth for clients, made his reputation through the brilliant conduct of cases which he lost. This attorney had a monopoly of millionaires, who, in spite of his acknowledged ability and his reputed knowledge of the law (and of the judge) usually were convicted. Yet his professional shadow never seemed to grow less. The operations were successful, as it were, but the patients died. Probably, he was retained chiefly in desperate cases. They were undoubtedly those he desired, for the greater the jeopardy undoubtedly the greater was his fee. But desperate or not, his rich clients generally went to jail.

My own feeling is that money or representation by able and adroit counsel is a great advantage on the purely procedural side of cases and but a small advantage on the human side; and that, where a man is clearly guilty of a crime, delay rarely saves him. In fact, after trying many hundreds of cases and watching countless others, I have a rather shamefaced feeling that practically the same results would be obtained if there were no lawyers at all. I think juries in criminal cases usually find defendants guilty when they are convinced that they ought to be convicted, acquit them when in doubt, discount most of the talk of the lawyers, and follow the judge's instructions except when he is in conflict with their common sense — and all this without much regard to anything but the evidence, save where they are moved by sympathy, which is less often in the case of the rich than of the poor.

Personally, if I had committed a crime, I would rather face the jury as a poor man than a rich one, provided in the latter case my mere wealth could not be made an argument in my favor. It would be difficult, I think, to convict Henry Ford of pocketpicking or John D. Rockefeller of breaking and entering. Juries, being drawn from the great mass of the people, are as a rule no respecters of persons, suspect the Park Avenue district of loose morals, and would take a secret satisfaction in jugging a millionaire. If it were a sex crime he wouldn't have a chance.

Juries have a deeply grounded prejudice against policemen, clergymen's sons, lawyers, rich men, and all supposed hypocrites and wasters in general, which goes far toward equalizing the technical advantages afforded by wealth in the preliminary skirmishes before the battle and in the ability of counsel. Once the wealthy wretch, pale and haggard and flanked by his rotund and suave attorneys, actually stands at the bar of justice, the jury are apt to be convinced that he must be guilty because he is there at all. Time and again the rich defendant who has postponed the day of atonement does so only to plead guilty or commit suicide in the end. These gruesome finales are often overlooked. I even go so far as to assert a belief that the percentage of rich men convicted who stand trial, is greater than that of poor men. Can rich men be convicted? Of course they can be! To ask a disingenuous question myself, will my opponent name a single rich man guilty of crime who has not been convicted of it?



II — JUSTICE — BOUGHT AND PAID FOR

UPTON SINCLAIR

BEFORE a rich man can be convicted of a crime, he must commit a crime. I shall therefore have to deal at length with that part of Mr. Train's article which questions whether the rich as a general rule ever commit crimes — and when I say crimes, I mean crimes, not near-crimes or ought-to-be crimes. I agree with Mr. Train that rich men do not commit petty crimes. Henry Ford does not pick pockets and John D. does not break and enter — not in the physical sense. They don't have to. The crimes of rich men are committed wholesale. They are successful crimes because the criminals make certain of success before they begin; and also because the bigger the crime, the less the possibility that it can be punished.

I will make this sober statement: I do not believe that, under our present social system, a single profession or business can be conducted on a large scale without the commission of crime. I can think of very few in which I have not had leading practitioners