A NATIONAL BAR PROGRAM SUBJECT

LAWYERS AND THE ADMINISTRATION OF CRIMINAL JUSTICE

Most Lawyers Have Little or No Appreciation of the Fact that Responsibility for Inadequate Administration of Criminal Law Is Directly Chargeable to Members of the Profession—Unsatisfactory Methods of Teaching Subject—Limitations of Lawyers' Thinking About Criminal Law—Antagonism to New Procedures Such As Psychiatric Clinics and Probation and Parole—A More Friendly Approach to Problems in Both Procedural and Substantive Fields Is Imperatively Demanded — Challenging Questions the Profession Must Answer, etc.

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"THE administration of the criminal law is a disgrace to our civilization." This statement of William Howard Taft has been quoted, restated, elaborated and demonstrated in hundreds of bar association meetings. If we may judge by such data as are available, however, the statement is just as true today as it was when first uttered. The realization of the truth of the statement seems to have had little effect in producing a change. This has been the result of several factors. Perhaps the most important of these are the conventional attitudes of lawyers toward criminal law and its administration. One of these attitudes is that of the so-called "better class" lawyer who prides himself on his lack of knowledge of criminal laws and of conditions which prevail in the criminal courts. Another is the attitude of the prosecuting attorney who regards himself as a partisan advocate of the rights of the state, which he represents, and who seeks to make the criminal law as effective a weapon as possible in securing convictions of persons whom he believes to be guilty of crime. A third is the attitude of the defense lawyer, whose reputation and income depend upon the acquittals which he secures and who, consequently rationalizes his intense partisan advocacy as being in justifiable defense of the underdog; and the preservation of antiquated principles of law and rules of procedure, as a more or less sacred obligation. A fourth is the attitude of a more commendable type of defense lawyer, which speaks of the attorney as an officer of the court, who has no other responsibility than to defend his client by any proper legal method. Between these attitudes there falls, generally unseen, the need for improvement of criminal law and for constructive planning of methods of procedure and administration, in the light of present day conditions.

Most lawyers have little or no appreciation of the fact that the responsibility for inadequate criminal law administration is directly chargeable to the members of the legal profession. This lack of appreciation is due in large measure to inadequate teaching of criminal law and to the inadequacy of text-books and case-books which have been prepared for teaching purposes. This is said with full appreciation of the several well trained and conscientious teachers of criminal law in the various law schools of the country. Unfortunately the teaching time assigned to criminal law and its administration is entirely inadequate, in most instances, to permit of proper instruction, and case books are prepared for such instruction as is contemplated in such schedule assignments. Comparison with the number of courses given and the amount of teaching time allowed for such subjects as property law and business associations will quickly reveal the discrepancy. Presumably this condition arises as a result of the assumption that it is sufficient to give to a student a casual acquaintance with what is generally referred to as substantive criminal law. An examination of the announcements of courses of the leading law schools will reveal that in most instances the one course in Criminal Law which is offered, is limited to the substantive law topics; the following list being usually inclusive of its contents: The Nature and Sources of Criminal Law; the Criminal Act; Parties to Crime; Criminal Intent; Circumstances affecting Criminal Liability; Specific Offenses. Sometimes the announcements include subdivisions or elaborations of these main headings. Sometimes there is included a chapter on Jurisdiction and another on Jeopardy. Occasionally, usually without the addition of sufficient teaching-time to justify it, there is included also the topic, Criminal Procedure. An examination of standard case books and student text books reveals the same limitations. To see just how limited such a course is, one needs only to make a comparative examination of the encyclopedias and digests, and consider the number of topics grouped under the title "Criminal Law" by the editors of these work books; to say nothing of the many additional sections, under the titles of particular crimes.

In many cases it is no doubt true that students' concepts of the scope of criminal law are actually narrowed by their law school courses. They watch in vain for the appearance therein, of the law relating to police administration with which they have themselves come into contact. They are surprised that nothing is said about the dramatic events of jury trials. They are advised by criminal law in-

structors, in some cases at least, that this is a branch of law to be avoided by self-respecting lawyers. It is not surprising that they should be confused by such an unrealistic approach. Nor is it surprising that in their later years they should be unable to improve the disgraceful administration of criminal justice to which Taft, C. J. referred.

Consider a few examples of the limitations of lawyers' thinking regarding criminal law. In practically every state the solemn assurance is given that every person is entitled to be represented by counsel and if he be too poor to employ counsel, the court will appoint a lawyer to defend him. In practically every state this right to counsel is interpreted to mean right to counsel during the trial of the case. Although competent counsel is of great value at that time, the time when an accused person really needs the help of a lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that he may have lost any legitimate defense, long before he is arraigned and put on trial. Both the prosecuting attorney and the attorney for the defense—if there be one—should be keenly interested in the powers of the arresting officer, the propriety of keeping the accused incommunicado, his right to bail, the possibility of making a civil adjustment of the case and thus escaping criminal prosecution, the laws governing the introduction of evidence in criminal cases, the holding of material witnesses in custody, the securing of evidence from witnesses outside the jurisdiction, the use of the writ of *habeas corpus*, the process of extradition and many other administrative techniques and procedures. These are either given very sketchy consideration, or none at all, in courses in criminal law, and are quite unfamiliar to many lawyers. Even when the defendant secures the advice of a lawyer during this pre-trial period, if that lawyer be one whose experience has been largely confined to civil practice, his client may be very poorly served.

Surveys of the administration of criminal justice, which have been made since 1920, have revealed that about eighty-five percent of the cases of arrests for crime are disposed of before trial. An examination of such surveys and of the reports of attorneys general will reveal also that of those cases in which the guilt of defendants is established, approximately sixty to seventy-five percent of them are on pleas of guilty. In other words only a small percentage of those who are arrested are ever brought to trial. The obvious corollary is that the administration of criminal justice is carried on largely by police and other administrative officials under rules of law, which are generally untaught in the schools and unknown by many lawyers. The failure of lawyers to recognize, either the facts stated or the importance thereof, is largely responsible for inadequate administration.

During the period following arrest and preceding trial, there occurs to a greater or less extent in almost all cases, what is known as the third degree. The nature of the force, threats, intimidation, inducement, persuasion or gradual wearing down of resistance, which takes place varies according to the intelligence, training, experience or disposition of the police and prosecuting officials. It is sufficient to say that it is the universal practice of such officials to secure from the accused person all possible information, by the use of such means as may seem proper. The psychologist knows that beating one type of person into unconsciousness may be less terrifying to him than the use of entirely nonforceful methods on a person of another type. Whether a person under arrest should be required to undergo an inquisition of any character is a debatable question. If he be represented at once by counsel he is advised that he has a right to refuse to answer any questions and frequently does so. When we consider the difficulty of convicting criminals, we are inclined to sympathize with the officials who use such methods—provided they do not go too far. But the important point is that the answering of such questions of public policy, and the adoption of laws for securing proper procedures, can be accomplished only by persons trained in lawmaking and administration. That most lawyers are ignorant of the facts and the law concerning the third degree and confessions secured thereby, is shown by the fact that in their meetings and in their publications they solemnly propose to abolish the third degree by two methods, neither of which, if adopted, would have any appreciable effect. The first of these proposals is that the defendant be brought before a magistrate and examined immediately after his arrest, so that such an examination may be conducted without harassment of any kind; the second is that no confession shall be admitted in evidence on the trial, but that the defendant may be asked to testify and if he refuses to do so, his refusal may be commented on by the prosecutor in his argument and by the judge in his instructions—procedures now generally forbidden. As previously indicated, neither of these proposals would have any appreciable effect on the use of the third degree for the simple reason that the third degree is used primarily to secure—not a confession to be used at the trial—but an admission or other evidence, which is clearly admissible, or a plea of guilty, which when made by the defendant, avoids both the necessity of using such a confession and the opportunity of the defendant to repudiate it. As from sixty to seventy-five percent of all determinations of guilt are made upon pleas of guilty, it is obvious that the methods proposed would have little effect, except perhaps to increase the pressure, in order to secure more pleas of guilty.

Contrary to popular belief many of the present day, better trained police executives are anxious to substitute scientific methods of crime detection for the cruder methods typified by the third degree. In some instances striking contributions to this new science are being made by medical doctors and by criminological institutes, through the use of laboratory techniques in such fields as chemistry, physics, pathology, bacteriology, ballistics and human prints and measurements. In this work a few lawyers are participating, but, generally speaking, most of them are quite ignorant, both of present developments and future possibilities.

During recent years the crime surveys and other investigations of the subject have revealed with increasing clearness the importance of placing greater emphasis upon certain phases of criminal law and its administration, which heretofore have been allowed to develop almost without supervision. They also indicate the necessity for that type of controlled development which only lawyers can give. For many years, practically the only statistical information available, related to such matters as

the number, sex, age, color, religion, etc. of persons incarcerated in prisons. Recently, a beginning has been made in securing information concerning crimes reported to police, arrests, dismissals, convictions, acquittals, pleas of guilty, releases on probation and on parole, recidivism, juvenile delinquency, pleas of insanity, waiver of trial by jury, reversals and affirmances on appeal, and other similar matters. Intensive studies of state and federal administration have been made; millions of fingerprints have been recorded; and information concerning criminals and methods of crime commission is being collected in increasing volume by state and federal bureaus and departments of identification, investigation and apprehension. The work of the American Bar Association, of the American Law Institute and of the Association of American Law Schools has also indicated the importance of studying the various experiments in administration which are being carried on in the different states and by the federal government.

It is remarkable that the lawyers of one state should be so unacquainted with the procedures and administrative methods already effectively used in other states. Examples of this situation appeared in the discussions of the various provisions of the Code of Criminal Procedure prepared by the American Law Institute when that code was presented to the members at the annual meetings in Washington. For instance, some of the members present knew only of the method of initiating prosecution in felony cases by the use of indictments, found by grand juries. Others present, knew only of the method of using an information signed by a prosecuting attorney, dispensing with the grand jury, largely, or altogether. The amazement of representatives of each group, upon finding that such different procedures were actually successful and generally approved where used, was amusing.

The American Bar Association appointed a special committee to examine this code and report its recommendations thereon. After the hearing of the committee's report the Association, by unanimous vote, adopted a resolution urging the lawyers of the various states to study the Code and to take appropriate steps looking toward its adoption in whole or in part. See Volume 58 A. B. A. Reports, page 68. In this Code will be found provisions relating to short forms of indictment, the incarceration and taking of depositions of material witnesses, the waiver of jury trials, the elimination of a multiplicity of motions and many other useful procedures, each one of which has been successfully used in some state, but which is unknown, or at least unused, in some others.

In order that such procedures as proposed in the Institute Code may be properly used, however, it is necessary that lawyers should be thoroughly informed concerning the organization and methods of work of the police department, the prosecutor's office, the grand jury and the office of the committing magistrate; the latter of whom conducts the preliminary examination, which, generally speaking, is used in connection with the indictment as well as the information. The practice prevailing in most states of permitting the selection of persons untrained in law to fill such positions, and the practice still prevailing in some states of compensating such magistrates and their constables by fees collected from accused persons has resulted in a maladministration of criminal justice in many inferior courts which has contributed materially to the lack of respect for law and which cannot but breed distrust or contempt for its administration upon the part of the great majority of people; whose only knowledge of methods of criminal law administration is obtained in such courts.

Moreover, it is necessary that the generally used method of compromising criminal cases be brought into the open, instead of being used as an undercover method of disposition as at present. Although the compromising of criminal cases is forbidden in most cases and although it amounts to the crime of compounding felony in many cases, as practiced at present; nevertheless in large numbers of cases, not only the injured person, but the prosecuting attorney, the attorney for the defense, the police and the committing magistrate are parties to such compromises. It avails nothing to teach, and to pretend that there exists, a criminal law which knows nothing of such procedures, when they constitute the most vital parts of criminal law administration.

Not only is the maladministration of criminal justice largely attributable to the ignorance of lawyers and their resulting indifference; but it is contributed to also, very greatly, by the antagonism of lawyers to new procedures; of the reason for which they are ignorant, and being ignorant are fearful and being fearful are contemptuous. Good examples of such procedures are the psychiatric clinic and probation and parole.

Although the physical sciences have undergone a remarkable development, prior to the beginning of the twentieth century, very little progress had been made in the field of mental science. Just as for years men were afraid of those who experimented in such fields as chemistry and physics and even prohibited the study of human anatomy, so they were even more afraid of those who attempted to explore the human mind. During this period, nevertheless, they were forced to consider the effect of the condition of mind of the person who was accused of crime. This they did largely upon a basis of guesswork and the crude formulae of the medical doctors of the eighteenth and nineteenth centuries. Much of that guesswork is written into the law of intent in criminal law and the definitions of insanity, still generally used, are phrased in terms of the crude formulae of the old medical doctors. Many lawyers do not know the source of the law which they have learned regarding criminal intent and insanity, but they are very jealous of it nevertheless. During recent years the psychiatric clinic has appeared, in a few states, giving an entirely new character to the procedure for determining insanity in criminal cases. Those members of the medical profession who are most skilled in mental diseases are able to make reasonably accurate diagnoses of the mental health of accused persons and predictions as to the probability that they will respond to treatment sufficiently to make them safe risks if returned to society. This they are doing in such states. The procedure used in committing insane persons, following a psychiatric examination, being a summary one which may even avoid the use of a jury and all the attendant difficulties of the judicial determination of guilt, the psychiatric clinic

has proved acceptable to lawyers and judges, and its use in some places has largely eliminated the use of the insanity defense. Where it is unknown, however, it has been resisted by the lawyers, even though its use has been recommended by the American Bar Association, as well as by the American Medical Association and the American Psychiatric Association.

Probation, the second example referred to above, is an administrative device by means of which an accused person, after conviction or a plea of guilty, may be released under the supervision of a trained probation officer, on good behavior, subject to return to custody and punishment. So far as the lawyer is concerned, probation is an outgrowth of the old and well known "suspended sentence." The latter procedure, based as it was upon inadequate investigation and followed by no supervision, was generally in bad ordor. Probation as a method of treatment, based upon careful investigation and followed by careful supervision, under definite conditions of behavior, has proved effective where properly used. Unfortunately, because of the ignorance and indifference of lawyers and judges, based largely upon prejudice against the suspended sentence, there has been great resistance against the use of probation by lawyers generally, and great abuse in its application by methods of "trading" which prevail among judges, prosecutors and defense lawyers.

Lawyers are largely responsible for the commonly prevalent notion that the crime problem can be solved by more and longer imprisonment; in spite of the fact that our penal institutions are filled to overflowing; that prison authorities are forced to release convicts after comparatively short terms, in order to provide room for those newly committed; and that the average term of imprisonment for major felons is about three and one half or four years. Growing realization of these facts is causing a rapid increase in the use of probation. The possibilities for further increasing its use are great, thus relieving us from the necessity of supporting in idleness large numbers of socially inadequate people. Moreover, an increasing use of probation in cases of persons who are guilty of minor offenses and who can be safely released under supervision, will provide room for the imprisonment of hardened or habitual or incurable criminals for much longer periods; even for life if necessary. But outright abuse of probation, together with failure to realize that it can be useful, even in proper cases, only if preceded by careful study of the individual and his social environment, and if accompanied by intelligent supervision by well-trained probation officers, has caused it, also, to fall into disrepute. Lawyers who, during their entire college and law school experience never heard of probation cannot, perhaps, be expected to understand its theory or use.

What has been said of probation is also applicable in large measure to parole. Many lawyers do not know the difference between probation, parole and pardon, and think of all three as grants of clemency or mercy. Pardon is the only one of the three which may be properly so considered and then only as to some pardons. Parole, far from being an act of clemency, is really an extension of discipline beyond that usually applied. Under the old system of imprisonment followed by outright release, if a man were sentenced to five years imprisonment, he might be given credit for two years "good time" on account of good behavior and released at the end of three years free and clear of all restraint. Under the parole system, such a person may be released at the end of three years for similar reasons, but during the remaining two years of his term he is under the supervision and guidance of a trained officer, whose responsibility it is to see that he is regularly employed, that he is in good health physically and mentally and that he is not imposed upon by his old confederates, shyster lawyers or the lower type of police officers. Where parole is not properly administered, either by reason of poor training in the penitentiary, poor selection of parolees, or poor supervision following release, it too falls into disrepute. But at its worst, parole is no worse than the old system at its best. To the extent that it is not more successful, the ignorance, and indifference of lawyers or the outright abuse of the system, by lawyers, is largely responsible.

The most glaring reason for inadequate criminal law administration is the poorly trained and unprincipled personnel of enforcement officials. At a meeting of the American Bar Association, held in 1933, it was said that lawyers come together each year, comment on the disgraceful condition of criminal law administration and then waste their time fighting over trivialities of procedure, because they are too fearful or too respectful to put the blame where it belongs, namely on poorly qualified judges. This is no doubt true, but its truth would be increased by adding a reference to poorly trained prosecutors, police, probation officers and the rest of the official personnel. As has been already pointed out, we are not providing adequate training facilities for such officers; but worse than that, present methods of selection are filling our public offices with men least qualified by training or character. With all due respect to the many fine men who hold public office, it is nevertheless true that a police chief, selected in order than one politically organized group of racketeers shall have protection against another, is not apt to be vitally concerned with the interests of people generally. And it is equally true that a judge, or prosecutor or other officer whose standard of perfect performance consists in not offending the politicians who put him in office and whose major desire is to remain in office, will not be much concerned even by the remarks of a Chief Justice. So far as those shyster lawyers who prey on the inhabitants of jails are concerned, they and the bail bond brokers who conspire with them to defeat justice for a price are themselves criminals and racketeers of the worst type. It is more or less futile to talk about federal laws or national campaigns to eliminate racketeering, unless those laws and campaigns are directed at official personnel, and that means largely—at lawyers. Pallid platitudes about a noble profession, —accompanied by nervous unwillingness to act forcefully and positively in raising standards of legal education, admission to the bar, and the discipline of lawyers after admission, thus clearing the ranks of the profession of the unworthy members and raising standards of official personnel—will accomplish little, no matter how many new crimes are created or criminal procedures changed. The International Association of Chiefs of Police will be found ready and anxious to cooperate in any

intelligent movement to improve police personnel. Such a result can be achieved, however, only by intelligent cooperation, rather than by such ambitious schemes as the submerging of the state and other local police forces under a federal police system. There is much need for federal and state advice and supervision, and lawyers can assist materially in securing such action.

Not only in respect to the law of criminal procedure and administration is it important that a more friendly approach be made by lawyers and more sincere and honest efforts for improvement, but in regard to substantive criminal law itself. A process of education and a method of practice and administration which accepts blindly everything written into the law in years past without inquiring as to the conditions under which such laws developed, whether the reasons therefor still exist, or whether other methods or agencies are today better calculated to secure the desired ends, cannot achieve a decently effective administration of criminal justice.

Another large and challenging question has to do with the wisdom of extending the substantive criminal law, so widely as has been done, as an agency for curbing or controlling human activities. Each succeeding legislature enacts laws in considerable number which provide that acts which were lawful to commit yesterday shall be criminal if committed tomorrow. Usually these laws represent attempts to use the criminal law as a substitute for education, home discipline, actions in tort, or other forms of social control. It is well known by police and prosecutors that they cannot enforce such laws fully and it is well known by the legislators that they do not expect or intend such laws to be enforced fully. As knowledge of these facts spreads among the people they assume, as do the officers, to decide which crimes are really crimes and which laws should be enforced fully or otherwise. The recent fiasco in the attempt to enforce the eighteenth amendment and the supplementary acts of Congress is a sufficient example, although it could be multiplied many times by examples from the laws of the various states. Experienced legislators are coming to realize the importance of extensive research, comparative study and careful drafting of legislation. The American Legislators Association, headed largely by lawyers, has recently taken the lead in this work, not only in the field of criminal law, but generally. As lawyers largely dominate the various legislatures of the country, especially in the judiciary committees, they are largely responsible for the haphazard legislation which has flowed forth in the criminal law field and, by the same token, have it largely within their power to restrict and improve the stream of legislative criminal law.

Another question of large importance, which must be worked out by lawyers, is the extent to which the federal criminal law should be developed, the concurrent jurisdiction of federal and state courts, and the desirability of federal aid in law enforcement, previously alluded to. Certainly so far as the activities of criminals are concerned, county or state lines are of little importance. It is absurd to think of effective prevention or prosecution of crime in terms of county units. Undoubtedly the failure of the states, adequately to supervise and direct such work on a state-wide basis, has contributed materially to ineffective administration. Undoubtedly, lawyers are responsible for this failure, because as attorneys general, judges, prosecutors and frequently as governors, they have allowed the presently existing, unorganized, frequently antagonistic system to develop and continue. In a few instances the recently developed state departments of criminal identification and apprehension, state judicial councils and state supervision of probation have indicated the value of uniform high standards of selection, training and administration. Recent developments in federal departments of investigation, probation, parole and prison administration have indicated what can be accomplished by properly selected and trained personnel. Work is being done by these federal agents in states which have, up to the present time, failed to realize the importance of such methods. Lawyers have been largely responsible for these developments. Lawyers are responsible for determining just how far such federal work should go and to what extent federal aid on the one hand and local self-government on the other are most valuable.

From year to year impatient people cry for immediate results and drastic action. From year to year the situation remains largely unchanged, except for the results of carefully worked out plans, which speak in terms of fundamental principles and trained personnel. In the working out of such plans and in the selection and training of such personnel, lawyers have the greatest opportunity and the greatest responsibility. The problem cannot be solved by leaving it to "the people." The people as a whole never act other than as a mob, except as they are instructed and directed by their leaders. Leadership in the administration of criminal justice must be provided by intelligent, well-trained lawyers, fully aware of the broad scope of criminal law and concerned, not merely as counsel for the state or for the defense, but as representatives of the one profession which controls that administration and the only one by which it can be controlled or improved.

Practice of Law by Dead Men

(From Bar Briefs (N. D.) January Issue)

The California State Bar Journal has carried some interesting discussions of late concerning the practice of law by dead men. In those discussions we have read nothing that has caused us to change our view, namely: that dead men can not and should not practice law.

The practice of law is not a business. It is a profession. Lawyers do not sell goods or merchandise. They render personal, professional service. Lawyers are not tradesmen. They are officers of the Court.

Even laymen know that a partnership is dissolved by the death of one of the partners. Even laymen have discovered that it is unethical to advertise or to solicit legal business. And laymen have obtained that information from lawyers—and sometimes paid for the information as advice.

Yet, though lawyers admit that it is neither ethical nor honest to advertise or to solicit legal business, though they acknowledge that it is unethical and dishonest whether the advertising or the solicitation be directly or indirectly done, lawyers continue to permit the names of deceased lawyers to appear on office doors, in telephone lists, and on printed cards and letterheads. In fact, the names of dead men have been known to re-appear on such printed matter after actual dissolution of a partnership, and after the death of one of the partners.

How can we, as lawyers, then, expect to gain the confidence and respect of laymen so long as we fail to practice what we preach, and condone—by silence, at least—what we know to be wrong?