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The Lawyers' Responsibility in the Administration of Criminal Justice

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THE LAWYERS' RESPONSIBILITY IN THE ADMINISTRATION OF CRIMINAL JUSTICE*

By Loyd Wright†

IN THE words of a respected and beloved justice of the Supreme Court, Robert H. Jackson, spoken shortly before his untimely death, "The administration of our criminal law, from one cause or another, is a humiliation and disgrace to our profession and our country." The extent of this disgrace of ours should be well known. In recent years the rate of crime has multiplied four times. The total direct cost of criminal activities in the United States is estimated by the Federal Bureau of Investigation at upwards of twenty billions of dollars each year. Approximately six million of our citizens make their living primarily from illegal activities, and this figure does not include the casual or occasional offender. Violation of the law has become a well-organized and well-financed business. Crime pays, and pays well. But the direct dangers and costs of crime comprise only a part of the humiliating picture. The hearings of the Senate and several state investigation committees have revealed the close ties between organized crime and government officials in large metropolitan areas throughout the country. The inevitable result of such connections is a loss of public confidence in the forces of law and order, undermining the foundations of our democratic system of government. The Kefauver Committee also disclosed that organized crime had successfully infiltrated some fifty types of legitimate business, bringing the morals and tactics of the underworld to the market place and striking at the roots of the American scheme of free enterprise. To allow these trends to continue unchecked would pose a grave question whether our traditions and our way of life can be preserved.

In the broadest sense, the responsibility for this disturbing situation must rest with the people of our country generally. In

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a free society, the collective character of the citizenry, the ethical standards they accept and practice, will determine the character of their institutions. But the wave of righteous indignation aroused by the public disclosure of the current state of crime shows that we have arrived at this state not because our people have tolerated the growth of organized crime but rather because they were ignorant of it. The need for strong measures is plain; public opinion demands improvement. What, then, needs to be done?

Great strides have been made in recent years in the enforcement of our criminal laws through the detection and apprehension of criminals. The development of scientific aids in the discovery of crime, combined with better trained, conscientious law enforcement officials, has made America's police forces the most efficient in the world without sacrifice of fundamental principles of fairness or adoption of the ruthless techniques of the misnamed "police" state. The new sciences of criminology and penology hold great promise that we may one day understand and deal with the causes of crime, and that we may find the way to rehabilitate society's offenders into contributing citizens. In this state of affairs, much of the blame for the crime problem has naturally been attributed in the public mind to the process which lies between these two functions of the prevention and detection of crime at one extreme and the punishment and rehabilitation of the convicted offender at the other. This vital center which bears the brunt of the blame is the administration of criminal justice in our courts.

Of course criticism of the quality of criminal justice is nothing unique to our time and place. But the fact that discontent has been perennial and is probably inevitable, should not blind us to the justified complaints directed at our legal system today. As lawyers, we can recognize and appreciate the gravity of our current situation.

As lawyers we cannot deny that our troubles are due in large part to the failures of our system of criminal law enforcement in the courts. And as lawyers we must also face the fact that this is our field of special competence. The cause of crimes may be

divided by the psychiatrist, the sociologist, the psychologist, or the criminologist. What conduct should be outlawed as criminal is a matter in which the moralist, the policy maker, and the social scientist are entitled to be heard. But when a crime has been committed, the machinery by which the culprit is brought to justice is the specialty of the lawyer, and of no one else. Our failure to bring about the needed improvements can only serve to discredit the legal profession, and our system of government of laws as well, in the public eye. It is not enough to say that public attitudes arise from misapprehensions, although many of them do. It is no answer to attempt to shift the burden by criticizing the police, the politicians, the press, or the administrators of our prison systems.

A major cause for present criticism of the administration of criminal justice is the hard fact that the machinery we work with is obsolete and outmoded. The system of criminal procedure we inherited from our grandfathers and still generally in force was designed for an earlier day, when the population was largely rural and dispersed. Probably the system was adequate for the rural and individual crimes with which it had to deal. But today's crime is a product of an urban society, and our horse and buggy machinery has proved unable to cope with the challenge of an atomic age. The concentration of population in the complex patterns of a modern city not only affords a greater opportunity for criminal behavior but also offers possibilities of organization, financial reward, and influence that were unknown a half century ago. Our system of criminal law enforcement is simply out of date. This hard fact does not of course mean that we must abandon our ideals of fairness and protection for the innocent, but it does mean that these ideals must be achieved through methods appropriate to the times.

One aspect of this obsolescence in the administration of criminal justice is the lack of uniformity which characterizes American law enforcement. More than any other aspect of our legal system, the criminal law is decentralized. Federal crimes are limited to a relatively small number of special offenses. Each of the forty-eight states has its own law of crimes and its own means

of enforcing it. In most states enforcement is left primarily to the counties, introducing additional variations and inconsistencies. But the modern criminal syndicate is not organized to respect these political boundaries, and the criminal is free to play upon local weaknesses in the enforcement machinery and to take advantage of divergencies. The situation defies the most determined, energetic, and resourceful efforts of our law enforcement officers. In a day when a criminal can cross the continent, commit a crime, and return within twenty-four hours, cooperation in enforcement and uniformity in administration become necessities. Unless we are to resort once more to the evil compromise of centralizing in the federal government the powers constitutionally reserved to the states, a means must be found to achieve uniform and cooperative law enforcement as a local responsibility.

I do not mean to suggest, of course, that there have been no advances in the administration of criminal justice since the days of the horse and buggy. The last half century has seen a number of commendable improvements. The Federal Rules of Criminal Procedure, the adoption of special methods for dealing with special classes of criminals such as the juvenile and the sexual psychopath, the systems of parole and indeterminate sentencing — all these mark forward steps of significant dimensions. The indictment leveled against criminal administration is not that we have stood still, but rather that we have failed completely in keeping pace with the criminal.

The responsibility for deficiencies in the administration is rightly laid at the feet of the lawyer. The rules which govern the practices and procedures are lawyers' law. It is lawyers who work with these rules, who can best see their shortcomings, and who have the technical competence to correct them. But we can take heart from the fact that the American lawyers have collectively laid hold of the problem and have embarked upon a plan of action which promises to carry us far toward a solution. Recognizing the responsibility of the legal profession, and once more demonstrating his foresight and ability, President Robert Storey, as head of the American Bar Association in 1953 appointed the distinguished Special Committee on the Administration of Crim-

inal Justice about which you have already heard. To serve as chairman of the outstanding lawyers and judges who make up this committee, Bob Storey wisely appointed Associate Justice Robert H. Jackson, late of the Supreme Court. A man who had reached the pinnacle of his profession but who still yearned for the integrity and satisfactions of the country lawyer, Bob Jackson freely devoted his abilities and his experience to supply impetus and direction to the work of this committee during the year and a half that remained to him. In large part our concern for these problems here today is but a reflection of his own deep and abiding concern for the practical operation of the law and its impact upon the fellow men he loved and understood so well.

At Bob Jackson's death last fall, he was succeeded by a chairman of equal stature, General William J. Donovan, a former district attorney and assistant to the Attorney General, an eminent lawyer, diplomat, and a distinguished military leader in both world wars. Under the capable leadership of General Donovan, the work of the committee has proceeded without interruption, and the first steps of the research project are well under way. The five-year study this committee has undertaken is an ambitious one. Its purpose will be to search for causes, not victims, to find facts, not faults. The goal, in the words of Bob Jackson, is to "Identify the weak spots in our system, the breakdowns from which it suffers, and, so far as possible, the reasons for them," to inquire "into the way we are performing our professional function of protecting life, liberty and property under free institutions and in the complications of modern society," and to produce a report "so thorough and fair it would be basic to the thinking of the next generation."

It should be apparent that a project of this magnitude will succeed only with the full cooperation and support of the members of the bar, collectively, and individually in their various capacities as judges, public officials, prosecutors, practicing lawyers, and as citizens. It is the responsibility of each of us, of you and of me, to do our utmost to assure the success of this test of the job our profession is doing. And without pre-judging the results of the survey, I think it is safe to predict that our obligation

will not be discharged with the publication of the final report. Whatever shortcomings may be revealed by the study will require the work of the lawyer in shaping and giving effect to the cures which the ills of the system require. Again it is our professional obligation to uphold the proud traditions of our calling by seeing to it that every feasible measure is adopted to improve the administration of criminal justice.

Somebody claims to have figured it out that we have thirty-five million laws trying to enforce Ten Commandments. I cannot vouch for the accuracy of the calculation, but I can still agree that the welter of criminal statutes in force in the typical state certainly exceeds by many the number reasonably required. The resultant confusion and uncertainty not only constitutes a waste of legal effort and violates the premise of our legal system that the citizen should be unmistakably warned of the acts which amount to crimes; it also requires the drawing of almost imperceptible lines between offenses, with the result that a clearly guilty defendant may be freed because he was indicted for the wrong crime, upon a ground which seems only a technicality even to a lawyer. Such a situation breeds no confidence in the legal order, and once more the obligation to find a cure falls upon the bar. But once more the bar has risen to the challenge. The American Law Institute has recently undertaken to examine the haphazard and random development of the criminal codes of our states, and to prepare a suggested model code to supply a brief, orderly, and clear definition of criminal acts. This study of the substantive law of crimes and the American Bar Association's Survey of the Administration of Criminal Justice will supplement each other to furnish the American people with the most efficient machinery of the criminal law that its legal profession can devise.

But in a larger sense, the improvement of the quality of criminal justice is not exclusively a matter of machinery, of procedures and statutes and agencies. It is also a matter of people. Of course, the weaknesses of inadequate and antiquated enforcement machinery will obstruct and frustrate the conscientious efforts of a good man, provide loopholes to be exploited and enlarged by the evil man, and force the well-intentioned but irresolute to

drift with the prevailing current. But even the best designed machinery will provide no panacea. A tool can be no more effective than the man who wields it, and the administration of criminal justice will not surpass the quality of the lawyers who, both before and behind the bench, bear the responsibility for its operation. It is here, I believe, that our obligations as lawyers, as professional men, become paramount.

It is to the everlasting shame of American lawyers that we have to a great extent allowed the practice of criminal law to degenerate into the slums of the legal profession. Until the close of the last century the ordinary successful lawyer was a court lawyer. He appeared in court regularly and accepted criminal cases as a matter of course. But with the culmination of the industrial revolution, men of business began to appreicate the force of the Chinese proverb which admonishes us to seek advice *before* we get into trouble, and successful lawyers were called upon to devote an increasing share of their time to advising business clients with a decreasing emphasis upon court work. Government, spurred by the evils of business concentration and abuses, by two world wars, an economic collapse, and paternalistic ideologies, has assumed a tighter and tighter control over business affairs, heightening the demand for the lawyer's services. To keep up with the rain of laws in the fields of taxation, corporations, and administrative regulation, the business lawyer has felt compelled to abandon the practice of criminal law altogether. Those who have continued to engage in court work have found civil litigation in fields like personal injury more inviting. It is of course no secret among lawyers that practice on the civil side of the courts is more lucrative than the defense of persons accused of crime. As a result, criminal law has fallen, with a few notable exceptions, into the hands of those on the fringes of the profession who are least able and least sensitive to their professional obligations, in short, to the mouthpieces, and alleged fixers who office in their hats and who may be found in the corridors of the criminal courts in any large city. More than we like to admit, financial reward is the criterion of success in the legal profession, and we as lawyers have accelerated the process of decay of the Criminal Bar by conferring

our professional honors and respect almost exclusively upon lawyers who have engaged in the more rewarding practice of civil law. As a result, most of our able young men are channeled away from the criminal courts, and the lawyer often counts it a mark of distinction that his practice has advanced to the point where he can keep away from the courts. Even if a lawyer is willing to make the sacrifice of prestige and of financial success which criminal practice entails, a kind of Gresham's Law of the profession tends to discourage him. As Gresham taught that bad money drives out good, so lawyers have learned that the shady tactics of many of the criminal practitioners have driven conscientious and ethical lawyers from the field. The consequence is that the bar as a whole is brought into disrepute. The only law known to a large proportion of our population is the criminal law, and prevailing notions about the administration of criminal justice will largely determine public respect for law and for government. You may have heard of the letter recently received by a collector of internal revenue containing twenty-five dollars in bills and an anonymous note describing how the sender had cheated on his income tax ten years ago and hadn't been able to sleep since, and that the payment was made to clear his conscience. At the bottom of the note was penned this postscript, "If I still can't sleep after this I'll send you the other seventy-five." I take it this is a not uncommon attitude toward the laws in our time. In this connection the disturbing thought prevails in my mind that it could be that our national moral concepts have given way and that any system devised, on whatever foundation, may be ineffective until you and I and all other citizens take more seriously our ethical responsibilities.

The law of crimes is the basic instrument through which human beings have been able to civilize themselves and to live together in comparative peace. Under the American system of limited constitutional government, of government of laws and not of men, the criminal law is the repository of our most cherished freedoms, the field in which the guarantees of life, liberty, and property are vindicated. To a profession devoted to the support and preservation of a system of orderly liberty, then, it would seem that the

criminal law should be the highest calling. If the correct standard of a profession is the generally accepted test of whether its members put the service of the ideals of the calling above the acquisition of monetary gain, the critics who claim that the law has become no more than a business have more than a germ of truth in their support. If we are to retain our standing as a profession, and our right to the exclusive privilege of practicing law, then it is our compelling obligation to give effect to our proclaimed principles and to furnish qualified and capable legal service to persons accused of crime. Whether it be voluntary donated service through the bar association, a lawyer referral service, a legal aid clinic, or a well-staffed and adequately financed public defender's office, an answer must be found.

If we are to fulfill our professional obligations and to restore public confidence in the administration of criminal justice there is another prevailing attitude among lawyers that must be altered. The bar as a whole in recent years has come to regard the trial of a law suit as a game of chess, to be won by any effective maneuver or device. Again in the words of Mr. Justice Jackson, the notion is "That a courtroom ought to be a cockpit without rules, the trial a free-for-all, into which the participants are free to throw anything they please." We have found it easy to ignore as pious platitudes our obligations as officers of the court, and to rationalize such tactics as the discharge of the duties we owe the client. But the lawyer's obligation has never been to succeed at any cost; his duty of loyalty to the interests of his client is discharged when the accused has received a fair and impartial trial, with effective presentation of his defenses, if he has any, or of mitigating circumstances if he has not. The notion that the lawyer must tolerate the perjury of his client or the subornation of the perjury of others, or that he must present half-truths to the court or to the jury, is a perversion of all the ethical standards of the profession, and has done much to foster the popular misconceptions about the role of the defense attorney which have brought the defense of unpopular clients to the verge of a professional crisis.

With a few notable exceptions, the quality of legal representa-

tion in criminal cases is a disgrace to the profession. And the blame properly rests where the public has put it, upon the bar as a whole. We are culpable not only because a majority of us have avoided criminal cases, but also because of the compromises with principle that many of our number have been willing to make in the interests of a valued client. Whenever a lawyer arranges to have a client excused from jury duty without justification, or fixes a traffic ticket, or, in what seems to me the height of hypocrisy, when he declines to engage in such dirty business himself but offers to refer the client to another lawyer who will handle it, he brings discredit not only to himself and to lawyers generally, but to the principles of ordered government underlying our system. If lawyers and the law can be reached in minor matters, the pubic reasons, they can be reached in important cases as well, and the difference is only a matter of price. Another professional disgrace which strikes at the heart of our ideal of equal justice for all is the favored treatment frequently accorded to powerful clients at the behest of lawyers and at the hands of judges and prosecutors.

Nor does the responsibility rest solely with the lawyers who engage in these activities. The prosecutor who refuses to press a charge for fear of antagonizing a political boss to whom he owes his job fails his professional brethren, but so does the business lawyer who fails to protest the miscarriage of justice because he fears the boss may deprive him of valuable business. The business lawyer's breach of faith may be more remote, but it is not different in kind from the prosecutor's misconduct. Unless the lawyers will lead the way in insisting upon rigid and impartial enforcement of the laws, high standards of public decency can never be expected.

Our professional obligations of uprightness and honesty cannot be put on and taken off like a judicial robe, and they do not cease when we leave the courtroom or the court house grounds. We lawyers are constantly on parade and by our actions and conduct influence public appraisal not only of us as professional men, but also by association of all things concerning the administration of justice—both civil and criminal.

It is little things which in the aggregate create major problems. The lawyer holding public office cannot discard his responsibilities by taking the oath of the executive or legislative department. By way of example, for years we have countenanced the race-wire services supplying the information essential to the operation of illegal gambling enterprises, and throughout this period we have had a lawyer in the Office of Attorney-General of the United States who could have requested the necessary legislation from the lawyers who predominate in both houses of Congress. I am pleased to be able to report, however, that something has finally been done about this deplorable situation, and a bill is now pending before the Congress to outlaw the transmission of such information. All these and similar situations have a bearing on our ability to furnish acceptable leadership.

The public officer most directly concerned with the administration of criminal justice is of course the district or county attorney or prosecutor. I was interested to learn that the office was an American innovation, unknown to English law at the time of the founding of the United States; and indeed prosecution for crimes in England is still theoretically at least left almost exclusively to counsel employed by the injured person, with the attorney for the Crown participating in an advisory capacity with the court. In this country, the uniformly low salaries paid to public prosecutors, the large discretion vested in them in commencing and conducting prosecutions, and the political nature of their offices all combine to subject the lawyer holding the office to unusual pressures, influences, and abuse. It is one of the bright pages in our professional history that the lawyers who have served in these posts have so successively resisted these temptations. Their devoted and effective work has traditionally brought them the honor of responsible positions of leadership in government and public affairs, and has reflected credit upon the profession as a whole. Their courageous battle, despite the lack of public support and of adequate machinery, against the forces of organized crime is exemplified by the notorouis history of the struggle to clean up Phenix City, Alabama, a fight which cost one valient prosecutor his life. The vigorous program of the National Association of County and Prose-

cuting Attorneys, under the able leadership of Harold W. Kennedy of Los Angeles, provides assurance that this worthy tradition will be continued.

Inevitably there have been exceptions from the generally good record of the prosecutors. One of the most common of the transgressions of the zealous prosecutor, and one that will bear close study in the American Bar Foundation Survey, is the publicizing of sensational information during the pendency of criminal trials. The problem is acute, and no ready answers are probable. It is no excuse that the modern newspaper is a commercial enterprise and commercial success, because we, the people, have come to demand the sordid and the sensational.

Our system of administering criminal justice has been fortunate in the calibre of the lawyers who have ascended to the bench to judge their fellow men. With few exceptions, our judges have been conscientious, able, and above suspicion. Perhaps the most serious criticism of the work of the judiciary lies in the disparities in the exercise of its generally broad discretion to grant probation and to suspend sentences, and in the severity of the fine levied and the imprisonment imposed. Judges of the same court may be notoriously lenient or consistently harsh with the same classes of offenders, and from county to county and state to state the variations and inconsistencies are even more marked. To deprive the sentencing judge of all discretion would preclude any adjustments for extenuating circumstances and unique considerations. But it does not follow that the judge must be left wholly without external standards in exercising this desirable power to accommodate rules to particular cases. I commend to your consideration whether judges might not profitably be educated for the job, as we educate other specialists in the profession, through the facilities of the Judicial Conference or some similar agency, where general principles of sentencing could be discussed, agreed upon, and made known to the judiciary at large.

In bringing my remarks to a close, I would like to quote once more from the words of the late Justice Jackson. In his address at the laying of the cornerstone for the American Bar Center in 1953, he said, "Our profession is duty-bound to supply bold and

imaginative leadership to bring and keep justice within the reach of persons in every condition of life, to devise processes better to secure men against false accusation and society against crime and violence, and to preserve not merely the forms of constitutional government but the spirit of liberty under law as embodied in our Constitution." To this may I add simply my firm belief that how well we discharge our responsibility to improve the administration of criminal justice will profoundly affect not only the future of the law as a profession, but the whole of this constitutional spirit of liberty under law.

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