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CRIME CONTROL—WHOSE RESPONSIBILITY IS IT?

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Only when the law—that is the judicial branch of the government—takes over the crime control program shall we ever have efficient law enforcement, a sound correctional program including probation and parole, and effective crime prevention.

When Cesare Beccaria wrote his famous essay "Of Crimes and Punishments," 200 years ago,¹ he enunciated what Gilbert and Sullivan made popular a century later in the phase "make the punishment fit the crime." It was almost the end of a long era in which the judiciary had dominated the entire crime control process often in a ferocious exercise of justice. It was an era which began with Hammurabi and which was characterized in more modern times by the infamous "Bloody Lord Jeffries."

During this era of judicial domination, the judge convened the grand jury and returned the indictment. The sheriff as agent of the court apprehended the accused and confined him in the jail attached to the court. The judge and his petit jury tried, convicted, and sentenced the culprit after which the sheriff took him out and hanged him—or otherwise carried out the order of the court. Now when as a result of Beccaria's famous essay, punishment became regulated, all this was very neat and tidy—and, please note particularly, *entirely under the judicial branch of the government.*

* Remarks made at the Annual Banquet of the George Wythe Chapter, Phi Alpha Delta Law Fraternity, College of William and Mary, Williamsburg, Virginia, January 11, 1964.

¹ BARNES, HARRY ELMER, AND TEETERS, NEGLEY K., *NEW HORIZONS IN CRIMINOLOGY*, 3rd Ed., Prentice-Hall, Inc., New York, 1959; pp. 322-323.

An Historical Note

During the one hundred years following Beccaria's proposals there occurred events which had a profound influence on the whole administration of the criminal law.

In 1777, John Howard published his "State of Prisons" which greatly influenced both British and American thinking with regard to the treatment of prisoners.²

In 1779, the English parliament passed the Penitentiary Act enabling sheriffs to create out of the jails places where convicts could "do time."³

In 1785, Sir Thomas Beevor under the Penitentiary Act, remodeled the jail in Norfolk County England, as the first modern penitentiary.⁴

In 1790, Pennsylvania authorized the remodeling of the Walnut Street Jail as a "penitentiary house."⁵

From 1790 to 1830, many states followed Pennsylvania's example and the famous Auburn and Pennsylvania Systems were established.⁶

In 1830, Massachusetts courts developed the doctrine of judicial reprieve;⁷ and in 1841, John Augustus began

his work with prisoners released under this theory which finally resulted in the first probation law of 1878.⁸

From 1840 to 1844, Captain Alexander Maconochie set up a parole system for prisoners on Norfolk Island, which

² *Ibid.*, pp. 331-335.

³ *Ibid.*, p. 335.

⁴ *Ibid.*, (2nd Ed. 1951); pp. 397-398.

⁵ *Ibid.*, (3rd Ed. 1959); pp. 335-337.

⁶ *Ibid.*, pp. 337-347. See also, Attorney General's Survey of Release Procedures, Vol. V., *Prisons*, Federal Prison Industries, Inc., Leavenworth, Kansas, 1940; pp. 1-39.

⁷ *Commonwealth v. Chase*, Thacker's Criminal Cases 267 (1831); recorded in Vol. XIX of the Records of the Old Municipal Court of Boston, p. 199. See also, Attorney General's Survey of Release Procedures, Vol. II., *Probation*, U.S. Gov't. Printing Office, Wash-

⁸ BARNES AND TEETERS, *Op. cit.*, 3rd Ed. 1959; pp. 553-554.ington, D.C., 1939; p. 19.

became elaborated in the Irish System from 1850 to 1870 and which in turn inspired American prison authorities to establish parole in this country beginning in 1876.⁹

With these events during these hundred years, the major programs of dealing with criminals after conviction had been taken out of the hands of the judiciary and transferred to the executive branch of the government.

During this same period other significant events took from the courts their function of apprehending the offender. In 1829, Sir Robert Peel created the first police department in London, and in 1844, the city of New York established the first organized police force in America.¹⁰ Both of these police forces were placed under the executive and the investigation of suspected offenders was gradually transferred from the sheriff to the detectives of the police departments. In fact in many jurisdictions, the sheriff who had by now become an elected official, abandoned most of his participation in criminal law activities in favor of the more lucrative civil processes. In some states the office of sheriff was abolished.

Disastrous Results

What were some of the results of these events? In general, it can be said that police, prisons, and parole, and to some extent probation became the football of politics, unprofessional administration, and often corrupt and venal practices. In a single American city of approximately 750,000 inhabitants recently, there were 10,000 illegal arrests. Throughout the United States, the proliferation and fragmentation of the police function in thousands of ineffectual units due to political influence have produced a situation in which fifty per cent of the people of the United States have little or no effective police protection. The underworld operates sometimes with police connivance in every large American city and professional "white collar" criminality almost completely eludes law enforcement officials.

⁹ *Ibid.*; pp. 417-426.

¹⁰ *Ibid.*; p. 213.

The abuse of prisons for private profit until recently, and the corruption of the offices of sheriff and wardens and their personnel as political plums and as centers for political rings, hang like mill stones around the hopes of professional administration. The granting of paroles by politically dominated boards ignorant of professional procedures at best and corrupted by the outright sale of pardons and paroles at worst, makes a farce of justice.

The public documentation of these charges is well known to every serious student of crime control.

Judicial Erosion

However, another and perhaps more subtle weakness in the crime control process has resulted from the gradual erosion of the power and the influence of the judiciary. The courts, themselves, and indeed almost the whole legal profession, have come to believe that the sole function of the judiciary in crime control is to hear the evidence, adjudicate the law, and sentence the offender. Before and beyond this, they have disclaimed all responsibility for the administration of the criminal law.

One has only to suggest that members of the Bar should assume direction of police departments or that they should be concerned with the treatment of convicted offenders, and then watch the legal profession smugly wrap their robes of office around them and disappear into their panelled chambers. As for crime prevention, they are quite content to leave this to the home, the school, the church, and the police whose futile efforts to deal with the causes of juvenile delinquency and adult criminality are perhaps the most amateurish of all civic activities.

If one wishes to trace the origins of this apostacy, one might also correlate the development of law schools during the latter half of the 19th century with the rise of great corporations and their \$100,000 retainers. Too often any law student who might have the temerity to specialize in the criminal law is looked upon as either a failure or a crook—a knave or a fool.

A National Disgrace

The significant result of all this was succinctly stated by the late Chief Justice William Howard Taft when he said, "The administration of the criminal law in the United States is a national disgrace."¹¹ The current efforts of the

American Bar Association and of the American Law Institute further testify to the growing concern of the Bar itself over this problem. The legal profession is all too familiar with judges assigned to the criminal bench who have never handled a single criminal case in their careers, who have never visited a prison or a jail, or young lawyers assigned as juvenile court judges who know little or nothing of the sociology or psychology of child development and who often have never even read the Juvenile Court Act. Imagine a physician who never served an internship or a residency in a hospital or who never had a single day of medical practice being appointed chief medical officer of a large city!

A Leaderless Mess

In general the crime control process today is an uncoordinated, ineffectual, leaderless mess often conducted on the one hand by the most ignorant, arrogant, untrained, political hacks, and on the other hand, by a conglomeration of futile or over-zealous social workers, religious conformists, work-shop technicians, academic sociologists, and budding "head shrinkers." And where are the lawyers and the law schools—they whose responsibility it is to lead wherever the rights of citizens are involved? Except in the courts, they are notable for their absence!

Instead of a unified, coordinated crime control process including prevention, law enforcement, courts, prisons, probation, and parole under professional leadership trained in the rights of individuals and in precise methods of treatment, we see a collection of isolated constellations whirling in space, sometimes paralleling each other, often

¹¹ SEAGLE, WILLIAM, QUEST FOR LAW, Alfred A. Knopf, N. Y., 1941, p. 245.

colliding head-on, overlapping or spinning off in opposite directions. The police fight the courts and the parole authorities. The prisons, probation and parole agencies seldom if ever cooperate. The courts nol-pros the efforts of the police and shun any responsibility for treatment. Prevention falls down between the home, the school, the church, and the police. There is no leadership.

Whose is the Responsibility?

Whose is the responsibility then for this low esteem, this confusion, this lack of leadership, this sorry state of affairs in the practice and administration of the criminal law? The responsibility lies squarely on the shoulders of those trustees and faculties of law schools and those members of the Bar of the United States whose failure in imagination, whose lack of concern for human values, and whose myopic leadership cause them to ignore the problem.

True here and there we find a John Wigmore, a Roscoe Pound, a Holmes, a Brandeis, a Darrow; but for each of these there is a galaxy of tax experts, corporation lawyers, and legal pundits. Now, we are not going to make humanitarians out of corporation lawyers. But we can propose a program for making lawyers out of young humanitarians.

To achieve this, three questions must be answered:

1. Why should the burden of this problem be laid on the shoulders of the law schools, the Bar Associations, and the judicial branch of the government?

2. And if the responsibility does lie with the law, how can the law schools and the Bar do anything about it?

3. Specifically, what part can a law student specializing in the criminal law play in such a program?

A Natural Concern of Law

There are five reasons why crime control in all its phases is the responsibility of the law and of lawyers.

1. *Crime and criminals are historically a natural concern and responsibility of the law.* Law arises out of the

customs governing both property and persons. Certainly the present over-emphasis on the law of property, corporations, and business is a temporary characteristic of an age of intense industrial and commercial development. Is it too much to expect as the 20th century turns more and more towards human values that the law will also re-assert its ancient responsibility for human beings in their relations with one another?

A Primary Concern of Law

2. *The law is the only professional discipline in which the offender is of primary concern.* In education, social work, medicine, psychology, religion, sociology, economics, the criminal is only incidentally involved. More often he is completely ignored. In the law, on the other hand, the criminal is the *raison d'être* for a whole segment of the field. In the last analysis, although all other disciplines ignore him, the criminal *must* be considered and disposed of by the law. He is your baby!

Whom the Public Trusts

3. *The law (as represented by the police and the courts) is the only agent which the public will trust ultimately in dealing with so fearful a threat to peace and security as crime.* While the psychologist, the physician, the educator, the sociologist, the social worker, or the minister may advise and assist, in the last analysis, society looks to those representing the law to control crime.

After many generations of experiment in which each of these disciplines has sought to dominate the process of crime control, society still fears the criminal, and wants him controlled by the law first, and understood afterwards. Society has repeatedly indicated that it will only support the recommendations of the doctor, the teacher, the social worker, the minister, or the scientist in handling criminals, especially in new and untried methods essential to progress, if supported by those in whom society has ultimate and complete confidence in dealing with such criminals, namely, those who know and represent the law.

In all this, there is need for the help and wisdom of the physician, the psychiatrist, the psychologist, the educator, the social worker, the minister, the priest, the counselor, the keeper, and any other agent involved in the human relations of crime and criminals. However, for all of these there must be an understanding, intelligent arbiter who will interpret and decide in accord with the rights of the individual as well as the needs of society as expressed in the law. It is clear that this arbiter is the law—the judicial power.

Right to Freedom and the Law

4. *Both the freeman and the convict—the innocent and the guilty—must always rely on the law (and on little else) when so precious a right of the individual is involved as freedom.* The law exists to protect the individual from both ill-advised and well-meant invasion—from both the over-bearing police and the over-bearing social worker, from the professional “head shrinker” and the political headman.

The law must always be at the controls of any process dealing with the rights and the freedom of the individual. In all procedures affecting offenders whether it be arrest, arraignment, trial, sentence, imprisonment, probation, or parole whenever the question of freedom is involved, only those endowed with an understanding of the law will ultimately govern.

Let me repeat. This is as true in procedures involving arrest and collection of evidence as it is in indictment, trial, and presentation of evidence. It is as true in determining extension or suspension of imprisonment under probation or parole as it is in the imposition of sentence itself. It permeates the whole treatment procedure because this treatment itself hangs entirely on the extension or suspension of legal restraints.

Law as Center of Control

5. *Finally, the law is the only discipline which can and actually does dominate all the other disciplines in dealing*

with the criminal. This is strange doctrine in these times, but let us examine it.

There are three basic elements in any social process whether it be business, medicine, law, or what-not. These elements are distinction of function, coordination of function, and centre of control.

It is hardly necessary to define distinction of function; what lawyers call "the separation of powers doctrine." Reference has already been made to the erosion of the judicial function by the executive during the past 200 years in which the control of human rights and freedom—an obvious judicial function—has been usurped by the executive with disastrous results in law enforcement, penology, probation, and parole. The argument, often advanced, that the return of this control to the judiciary would be a violation of the separation of powers doctrine, is to ignore the very essence of the judicial function in Anglo-Saxon jurisprudence which recognizes the judiciary as the free man's protection again the king.

As for coordination of function, as previously stated, this is so notable for its absence in the crime control process that we need not belabor it. The only point worth noting is that coordination is lacking because there is no leadership. And this brings us to the third essential in any social process, namely, the centre of control.

It has been categorically stated above that the law is that center of control. What is the proof of this statement?

Sir Charles Sherrington, eminent British physiologist, has given the answer. Seeking the center of control in the human organism, Sherrington supplies the keys to the center of control in any social process. They are two:

- (1) that which provides the common path, and
- (2) that which has the power to interfere with all other elements in the process.¹² Applied to the human organism,

¹² SHERRINGTON, CHARLES S., *THE INTEGRATIVE ACTION OF THE NERVOUS SYSTEM*, Archibald Constable & Co. Ltd. London, 1906; pp. 308-313.

the central nervous system meets the requirements exactly. In business, it is obviously the financial powers who provide the common path and possess the power to interfere. In crime control it is the judiciary.

No other agent in crime control satisfies these two requirements except the law. It is the court alone through whose path every criminal must go. It is the court alone who can interfere with the police function and who can determine through the sentencing power how the functions of probation, prisons, or parole shall be exercised. It is the judiciary therefore which becomes the natural center of control in every phase of the administration of the criminal law from the moment a crime is committed until the convict himself has completed his sentence.

Time and again, during the past 175 years since "doing time" was substituted for summary execution of sentence, the public has rejected the leadership of religion, of education, of industry, of medicine and psychiatry, of social work in handling criminals in favor of the almost naked "force of law." To be sure, outside the courts, this force of law has consisted chiefly of police-minded leadership tempered now and then by the contributions of these other disciplines. The results have not proved satisfactory because the confusion of disciplines without strong professional leadership has neutralized the very forces seeking to handle the problem. They have lacked that center of control which could insure distinction and coordination of function. But the one agent in the crime control process which can supply these essentials has so far evaded its responsibility. That agent is the law.

Law Schools and Crime Control

If then the responsibility lies with the law, how can the law schools and the Bar do anything about it? It has been proposed that a program should be developed for making lawyers out of young humanitarians.

Such a program could begin with the pre-law course which now usually emphasizes economics, accounting, and

business management, and might well add as an alternative such courses basic to the criminal law as psychology, sociology, anthropology, and the social sciences. Probably not too much change could be made in the basic law school program as yet unless it might be to add some clinical training in criminal court work or in corections. The important innovation would be the recognition of specialization in the administration of the criminal law as a goal of law school instruction. Possibly the addition of advanced courses in clinical criminology (now being conducted in some law schools) and the addition of special, intensive training through institutes supplementing the usual three year law course, similar to the institute training in psychiatry now offered medical school graduates, would provide for such specialization in the administration of the criminal law. Such special training with internships, residencies, and fellowships in law enforcement, correctional, and other crime control agencies would soon provide the field with well-trained operators qualified for supervisory, administrative, and executive positions.

Bar Association and Crime Control

The Bar also could play a most important part by supporting such programs in law schools and by creating in their own associations committees or commissions for putting the law back into law enforcement and for promoting effective legislation or other action toward putting trained lawyers at the helm of other crime control agencies. Every professional discipline is jealous of its prerogatives and of the qualifications of its personnel for proper certification and assignment in its field. The law is jealous of such prerogatives and qualifications only for judges. Why should not the same concern be shown for every position of importance in the whole crime control process? Such committees of the Bar might well make themselves responsible also for the proper coordination and functioning of all crime control agencies. Taken seriously, such action by the Bar could not be left only to volunteer committees unless such committees were given professional help in carrying on their work.

Opportunities for Lawyers in Crime Control

The one question remaining then is, what opportunities exist for legally trained men and women with specialization in the administration of the criminal law?

The opportunities for such professionally trained persons is practically unlimited. Not only are existing openings available, but such a joint program by law schools and Bar associations itself would create the personnel for an attack on crime and delinquency unparalleled in this country.

Fortunately the day when non-professional politicians can qualify for the top positions in police, prison, probation, and parole work and in crime prevention is fast disappearing. The demand today is for professionally trained leaders. The top pay will not equal that of the \$100,000 corporation lawyer, but the returns in professional satisfaction are great. A recent college graduate who specialized in correctional administration and became a probation-parole officer is today writing the pre-sentence reports for three criminal court judges. If he had a law degree, he himself would be in line for a judgeship in the near future. Such openings are not rare, and they will become commonplace when more judges realize the importance of the pre-sentence or post-trial report. This is particularly true in the juvenile and youth courts, under the Youth Authority Acts, and in the nationwide drive on juvenile delinquency.

Such positions will include not only those of prosecuting attorneys, public defenders, and judges in juvenile, domestic relations, municipal and criminal courts, but also such allied positions as those of police commissioners, directors of departments of correction and correction authorities, prison wardens, sheriffs, jailors, members of boards of parole, chief probation officers, clerks of courts, executive and other officers of State and Federal bureaus of investigation and crime prevention agencies as well as criminologists in teaching and research. If proper training and qualifications for such positions are established by the legal profession, the field is open to literally thousands of

young, specially trained lawyers in positions of tremendous responsibility.

The problem, as previously stated, is not one of trying to make humanitarians out of corporation lawyers. It is rather one of restoring to the law its ancient interest in human rights and in attracting to the law those persons interested in human welfare who should have the status and security of the professional lawyer.

Modern Legal Concepts

In an article entitled "Behavioral Science and Criminal Law," published in the November issue of *Scientific American*, a Boston psychiatrist tags the criminal law with those old shibboleths of "free will" and "punitive justice"—one supposedly the basis of legal responsibility; the other the result of the doctrine of "deterrence."¹³ It is true that there are still some pre-historic courts and maybe some law schools who are still preaching these doctrines, but one has only to observe what is going on today to note how the law is broadening its concepts and moving over into every phase of crime control.

Reference can be made to four examples as illustrations.

1. The restriction being placed on police investigation by such decisions as the Mallory case have brought all law enforcement agencies within the jurisdiction of the courts.¹⁴

2. The extension of the doctrine of diminished responsibility, as in the Durham decision, has destroyed the doctrine of "free will" and "punitive justice" and brought treatment within the purview of the court.¹⁵ This doctrine of diminished responsibility is now recognized in the British Commonwealth, Belgium, Denmark, France, Italy, the

¹³ Sachar, Edward J., M.D., Behavioral Science and Criminal Law, *Scientific American*, November 1963, Vol. 209, No. 5, New York; pp. 39-45.

¹⁴ Mallory v. United States, 354 U.S. 449 (1957).

¹⁵ Durham v. United States, 214 Fed.2d 262 (D.C. Cir. 1954). But see also, Stewart v. United States, 214 Fed.2d 879 (D.C. Cir. 1954).

Netherlands, Norway, Sweden, and Switzerland¹⁶ and in at least seven of the United States including Indiana, New York, New Mexico, Ohio, Utah, Virginia, and Wisconsin.¹⁷

3. New sentencing procedures such as those under the model Youth Corrections Act of the American Law Institute,¹⁸ now adopted in many states, have extended the considerations of the judge far beyond the rules of evidence and questions of law on into the realm of diagnosis and treatment. One may note here with what vigor the judiciary withstood the attempts of other disciplines to take this sentencing procedure out of their hands.

4. Finally, of tremendous significance in this evolution of the criminal law has been the development of the Uniform Code of Military Justice.¹⁹ It is not too much to predict that the enlightened concepts and the reformed procedures of this Code will ultimately change the whole nature of criminal law administration in this country. The recent retirement of Charles Decker, Judge Advocate General of the Army, to accept the leadership in the Public Defender movement is a case in point. The legal philosophy of Albert Kuhfeld, Judge Advocate General of the Air Force, in administering the Code marks a new era in criminal law procedures in the United States.

The implications underlying these four examples support the thesis that the law already is reaching out into every function and every agency in the crime control process. It remains only for the law schools and the legal profession to recognize what is happening.

¹⁶ Report of the Royal Commission on Capital Punishment. Cmd. 8932, at 14.

¹⁷ *Hopkins v. State*, 180 Ind. 293, 102 N.E. 851 (1913); *People v. Moran*, 249 N.Y. 179, 163 N.E. 553 (1928); *Pigman v. State*, 14 Ohio 555 (1846); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931); *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910); *Dejarnette v. Commonwealth*, 75 Va. 867 (1881); and *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959).

¹⁸ Ellington, John R. *The Youth Authority Program*, in *Contemporary Correction*, Paul W. Tappan, Ed. McGraw Hill Book Co., N.Y., 1951; pp. 124-135. See also Tappan, Paul W., *The Youth Authority Controversy*, *Ibid.*; pp. 135-140.

¹⁹ Uniform Code of Military Justice, Title 10, U.S. Code, Sec. 801-935.

Conclusions

In conclusion it may be simply stated that only when the law—that is the judicial branch of the government—takes over the crime control program shall we ever have efficient law enforcement, a sound correctional program including probation and parole, and effective crime prevention. To this end, two immediate steps are proposed:

1. That Bar Associations throughout the United States assume the leadership in the crime control program by setting up local and state crime control commissions with paid directors and staffs whose duties it shall be to promote by every means possible a better coordination of all agencies engaged in crime control including police, courts, prisons, probation, parole, and prevention, and to promote the employment of men and women trained in the law and the humanities in all these agencies.

2. That the law schools (beginning, shall we say with the School of Law at the College of William and Mary) establish a program in the Administration of the Criminal Law which shall be open to third year law students, lawyers and other professionally trained specialists who propose to engage, or are actually so engaged, in any phase of crime control activity. Such a program might begin with regular semester courses in crime control or in highly intensive instruction through short term institutes combined with field training under supervision for certification in the Administration of the Criminal Law.

Within the past fifty years, there has developed in the field of medicine a whole new art of healing which bids fair to equal the practice of medicine and surgery without in any way denying the importance of these ancient skills or diminishing their place. The development of psychiatry and psychoanalysis based on the new and established concepts of psychology has added greatly to the practice of medicine. At first ignored by the medical schools, psychoanalysis has created institutes and disciplines of its own supplementing the basic training offered in the traditional

schools of medicine. Is it too much to propose that the same sort of thing will happen in the field of law?