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THE RENAISSANCE OF THE CRIMINAL LAW: THE RESPONSIBILITY OF THE TRIAL LAWYER

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Criminal law, long the stepchild of the law school and the lawyer, is showing signs of a return to acceptability. Once law school freshmen dozed through this required course while freshmen law teachers, compelled by their lack of seniority to teach it, droned through their notes. Now bright-eyed young men and women, stimulated and directed by creative and provocative lecturers, debate the concepts of culpability, capacity, competence, equal justice, right to counsel, and the defendant's right to a fair trial in relation to the rights of television and the press to cover fully not only the trial itself but also the investigation which led to the trial.

This resurgence of interest in the criminal law is also reflected in the flood of law review articles pouring out of the law schools discreetly telling the bench and bar alike to become aware of new approaches to criminal justice. The annual applications for judicial clerkships confirm that criminal law is on the way back. The superior students, the only ones who make applications to be law clerks, seem to be deeply committed to the importance of criminal law. Many of them go on to teach it as law schools are reaching out for these committed young people with attractive offers. Thus, this renewed interest in the criminal law is transmitted from school to school.

One wonders what caused the change—what created all the interest. This author would like to think that the idealism in these young men has been sparked by the recent decisions of the Supreme Court in the area of the criminal law. For years we have professed equality before the law, reaffirming that our Bill of Rights is applicable to all our citizens and that it actually means what it says. However, those who are older in the law know full well that to the great majority of defendants in criminal cases, the ones too poor to hire competent counsel, these professions of equality have been a cruel hoax. The kind of trial a defendant received did depend on the condition of his pocketbook, and the quality of our justice did depend, to some degree at least, on who was receiving it.

The Supreme Court has sought to make good the constitutional promise of equality to rich and poor alike by interpreting the Bill of Rights as a code of law rather than as material for Fourth of July speeches. It is this new approach to equal justice that has made criminal law evangelists of bright young people and has brought about the renaissance of the criminal law.

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I

The birthplace of the renaissance was *Adamson v. California*,[1] decided by the Supreme Court in 1947. In an old case, *Barron v. Baltimore*,[2] decided before the Civil War, the Court had held that the Bill of Rights was binding only on the national government. The question presented in *Adamson* was whether the fourteenth amendment changed the rule of that case, making the Bill of Rights binding on the states as well. In *Adamson*, for almost eighty pages and in four separate opinions, the Justices debated whether or not the due process and equal protection clauses of the fourteenth amendment were shorthand for the first eight amendments containing the Bill of Rights. In that case, over a strong dissent by Mr. Justice Black, with Justices Douglas, Murphy and Rutledge also dissenting, the Court held that the fourteenth amendment was not shorthand for the first eight and that unless state action shocked the conscience of mankind or otherwise violated our concept of ordered liberty, it did not transgress the due process clause. Due process was to be spelled out on a case-by-case basis. Nevertheless, one by one the important portions of the Bill of Rights have been read into the fourteenth amendment.

The first amendment freedoms have no direct relationship to the criminal law. Understandably, however, they were the first to come under the umbrella of the fourteenth amendment. After some delay, the other portions of the Bill of Rights that do relate to the criminal law have followed suit. In *Betts v. Brady*[3] the Court limited the sixth amendment right to counsel to capital cases in the state courts. It is a well known fact that at the 1962 term of Court that limitation was swept away in *Gideon v. Wainwright*.[4] The fourth amendment protection against unreasonable searches and seizures was held applicable to the states in 1949 in *Wolf v. Colorado*,[5] but it was not until *Mapp v. Ohio*[6] in 1961 that evidence obtained in violation of the fourth amendment was ordered excluded from state court proceedings.

The fifth amendment protection against self-incrimination became part of the fourteenth in *Malloy v. Hogan*,[7] and by virtue of *Murphy v. Waterfront Commission of New York Harbor*[8] state immunity from prosecution resulting from compelled testimony became binding on the

1. 332 U.S. 46 (1947).
2. 32 U.S. (7 Pet.) 243 (1883).
3. 316 U.S. 455 (1942).
4. 372 U.S. 335 (1963).
5. 338 U.S. 25 (1949).
6. 367 U.S. 643 (1961)
7. 378 U.S. 1 (1964)
8. 378 U.S. 52 (1964).

federal courts. Finally, in *Robinson v. California*[9] the cruel and unusual punishment provision of the eighth amendment was applied to the states. Thus, with the exception of the fifth amendment's double jeopardy clause and the sixth and seventh amendments' right to jury trial provisions, most of the important protections of the Bill of Rights have been made applicable to the states.

Much of the above is not directly related to the right to, and the responsibility of, trial counsel. Nevertheless, these decisions are important to a full understanding of the dramatic changes which are taking place in the criminal law. Before undertaking a discussion of the present posture of the right to counsel in a criminal case, a few comments on the new approach to the right to bail provisions of the eighth amendment are in order.

II

Bail is a barnacle on the back of the criminal law. It is an archaic process with roots deep in history but with no attachment to current needs. Theoretically a defendant out on bail is in the custody of his bondsman. Thus the bondsman is allowed to charge a modest stipend, 10 per cent of the bond, for the service he renders and the risk he runs. Actually a defendant on bond is in the custody of no one, and the police or the FBI are much more familiar with his whereabouts than is his bondsman. Moreover, if the defendant fails to appear for trial, it is the FBI or the police who pick him up, yet the bondsman gets the fee. It is no wonder that the bonding business has been the source of scandal and unsavory conduct on the part of public officials who become too friendly with bondsmen. In short, the bondsman gets paid for rendering no real service, and something for nothing often spells trouble.

There are laws which make it a criminal offense for a defendant to fail to appear in court. Sometimes the penalty for violation is more severe than that for the crime originally charged. A defendant bent on absconding would certainly be more impressed with a prison sentence for failing to appear than he would with forfeiture of his bond. Consequently, it seems obvious that the fact the defendant makes bail is unrelated to the possibility of his non-appearance. Thus the process of bail serves no useful purpose. If the threat of prosecution for non-appearance is ineffective, the threat of bail forfeiture certainly will not insure the defendant's presence at trial.

In addition to being useless, the requirement of bail can work great injustice upon those unable to pay the bondsman's fee. The poor remain in jail where they are unable to support their families, find their witnesses, or otherwise assist in the preparation of their defense. Perhaps

9. 370 U.S. 660 (1962)

as a result of this inability to make bail, statistics[10] limited to first offenders show that 59 per cent of those unable to make bail are found guilty and sentenced to jail terms, while only 10 per cent of those on bond receive jail terms. The direct relationship between jail sentences and the inability to make bail seems apparent.

The uselessness and the injustice of bail is being demonstrated by the Vera Foundation Project. The project, manned by lawyers and social workers, screens defendants in jail who are unable to make bail and recommends the good risks for release on their own recognizance. The dramatic results of Vera's first efforts are told by Dean McKay of New York University:

> . . . [I]n the first group of 111 [most of whom would have remained in jail under ordinary procedures prior to a resolution of their cases] disposed of by the courts after recommendation for bail by the Vera study group, 66 were either acquitted or dismissed; 33 received suspended sentences; 7 received fines; *and only 5 went to jail.*[11]

It appears that we need an expansion of the Vera approach and an abolition of bail bonds.

III

As to the right to and the responsibility of counsel, *Gideon v. Wainwright* did not settle all the problems stemming from an accused's right to counsel. As a matter of fact, after *Gideon* the Supreme Court decided *Escobedo v. Illinois*,[12] in which the difficult question as to when the right to counsel begins was explored. *Escobedo* makes clear that if the right to representation is to be effective it must be provided early, and that the time commencing immediately after arrest, as far as the defendant is concerned, is one of the most critical stages in the criminal process. It is at this stage that the person arrested is brought to the police station to be booked and, if counsel representing the accused is not present, he is taken to a back room for interrogation. It is also during this time that the police bring in the complaining witness to identify the accused.

There is no way of knowing what goes on in the back rooms of police stations except through the testimony of those present. The proceedings conducted in those back rooms are not of record, and the only "transcript" of them is the policemen's testimony. Of course, the accused may take the stand and deny that he made the statements attributed to him

10. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641, 647 (1964).

11. McKay, *Poverty and the Administration of Criminal Justice*, 35 U. Colo. L. Rev. 323, 327 (1963).

12. 378 U.S. 478 (1964).

by the police, but there are usually three or four police present who swear to a single version of the proceedings so that the accused's version has very little chance of acceptance. In effect, the police have an unrecorded trial in the police station and then give their oral version of this trial when called upon to testify in court. It was with respect to this police station trial that Mr. Justice Goldberg, speaking for the Supreme Court in *Escobedo*, wrote:

> The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." *In re Groban*, 352 U.S. 330, 344 (Black, J., dissenting). "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" *Ex parte Sullivan*, 107 F. Supp. 514, 517-518.[13]

In order to eliminate this unequal *swearing contest* between policemen and the lone defendant as to what went on in the back room of the police station the Supreme Court held in *Mallory v. United States*[14] that Rule 5(a) of Federal Rules of Criminal Procedure requiring production of a person arrested before a United States Commissioner "without unnecessary delay" for instructions as to his rights to counsel and to remain silent must be strictly enforced. The only way to enforce Rule 5(a), as the Court held, is the prophylactic process of excluding confessions and admissions allegedly made by the accused during this period of unnecessary delay.

Escobedo was an attempt to apply in a general way the broad principle of *Mallory* to state proceedings. In *Escobedo* the police took the accused to one of the back rooms of the police station and refused to let him see his lawyer in spite of the fact that his lawyer was present in the adjoining room, demanding to see him. The Court held that Escobedo's confession obtained under these circumstances violated his sixth amendment right to counsel. The Court stated that the right to counsel arose when suspicion began to focus on the individual and, since Escobedo had already been arrested (presumably with probable cause), he was entitled to a lawyer.

The principle announced in *Escobedo* is a salutary one which, if faithfully followed in federal as well as state courts, could do much toward eliminating many of the recurring problems which arise in connection with the investigation and trial of criminal cases. *Escobedo* in

13. *Id.* at 487-488.

14. 354 U.S. 449 (1957).

effect says that no man may be arrested without probable cause and that from the time of arrest onward he is entitled to the advice of counsel. If the defendant wants to make a statement to the police with counsel present, there will be little question as to its admissibility in evidence. Thus, the uneven *swearing contest* between the defendant and the police and the allegations and the denials of third degree should all be eliminated from the criminal trial in state as well as in federal courts.

Of course, it is true that compliance with the principle announced in *Escobedo* could interfere with police investigations as they are presently being conducted, but there is no constitutional requirement that police investigations follow the present pattern of making the case out of the mouth of the accused. Ours is an accusatorial, not an inquisitorial, system of criminal justice. Police investigations should be focused on obtaining evidence from sources other than the accused himself. Requirements such as probable cause for arrest and issuance of search warrants, right to counsel and the like may indeed handicap the police. However, the Bill of Rights applies to police investigations as well as to the criminal trial itself, and to allow police investigations to proceed without respect for the Bill of Rights is to make a travesty and an hypocrisy of the criminal trial, to say nothing of our whole system of criminal justice.

The excessive unfavorable publicity given to recognition by the courts of the constitutional rights of a person charged with a crime has some people understandably concerned. Police chiefs complain that they are being "handcuffed" by the courts. These complaints are being echoed by commentators, columnists and cartoonists who charge that the courts are coddling criminals. Even a federal appellate judge recently wrote, "In our concern for criminals, we should not forget that nice people have some rights too."

This criticism of the courts reflects a basic misunderstanding of the purpose of the Bill of Rights. The Bill of Rights was designed to protect all of us from the oppression of the state, to protect the privacy of our homes and persons from the midnight knock on the door—the hallmark of the totalitarian state. The Bill of Rights allows us to be free in the fullest sense. It attempts to draw the proper line between the state's obligation to preserve order and the individual's right to be let alone. The Bill of Rights says to government, state and federal: "A citizen is presumed to be innocent of wrongdoing. If you have evidence of wrongdoing, proceed according to law, but don't expect, and don't force, the citizen suspected of crime to testify against himself."

Thus, the presumption of innocence and the protections of the Bill of Rights apply to all persons. Our system of criminal justice is based on the criminal act, of which the accused is presumed innocent, and not association, condition, or prior record. In the eyes of the law there is no

such thing in this country as "nice people" who enjoy the protections of the Bill of Rights and the so-called criminal element who do not. The Bill of Rights, under the presumption of innocence, protects all of us or none of us. There is no middle ground. The sooner the "nice people" realize this, the sooner the police will also. The police merely reflect the community consensus. When the community wants law enforcement according to law, it will have it. For its own protection the community should remember that today's "nice people" may be tomorrow's "criminal element," or vice versa, depending upon who is calling the names. For example, in some parts of Mississippi today the civil rights workers who are trying to assist the Negro in registering to vote seem to be the "criminal element" and their murderers the "nice people."

If, in addition to alarming the citizenry with dramatic and detailed accounts of street crime coupled with stories about handcuffing the police, the news media would also disclose the statistics relating to exclusionary rulings by our courts, the public would be reassured. If the news media would publish the fact that 75 per cent of persons charged with crime plead guilty, that only 12 per cent go to trial,[15] and in that 12 per cent exclusionary rulings occur only in a small fraction of the cases, perspective would be restored and the public would be in a better position to make a judgment as to whether the protection we all derive from the Bill of Rights is worth the candle. Unfortunately, too little publicity has been given the article by the Honorable David C. Acheson, until recently United States Attorney for the District of Columbia, appearing in the December, 1964, issue of the Journal of the Bar Association of the District of Columbia.[16] In discussing court decisions in criminal cases Mr. Acheson, the former chief prosecutor in the nation's capital, states:

> Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain. . . .[17]

IV

Police compliance with the protections of the Bill of Rights gives rise to no problem when the person arrested has sufficient means to obtain a lawyer immediately. When a person of means or a person connected with organized crime is arrested, his lawyer meets him at the precinct station. Such persons are not taken to the back room of the police station for interrogation unless the lawyer is present, and it has been my experience

15. See Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 693 (1964).

16. Acheson, *Crime and the Courts*, 31 J.B.A.D.C. 511 (1964).

17. *Id.* at 513.

that police generally do not proceed with interrogation of the accused in the presence of his lawyer. Thus, it is only with reference to the accused who is not in a position to have his lawyer meet him at the precinct station that the question of the admissibility of utterances and confessions arises. Should such persons be at a disadvantage because of their indigency? This is an important moral as well as legal question which all of us in the law and in society generally should face. If we are to profess equality before the law, the right to counsel at every stage of a criminal proceeding, the right not to be a witness against one's self, the right to be free from unreasonable searches and arrests, then we should make certain that these professions and protections apply equally to rich and poor.

It is with reference to the moral and legal commitment that the type of trial a man receives should not depend upon his pocketbook that Congress passed the Criminal Justice Act of 1964.[18] Provision was made in that Act for counsel to represent the indigent as soon as they are presented before the United States Commissioner. Since production before the Commissioner may not be delayed for purposes of interrogation and all persons are now not only entitled to but may have, irrespective of ability to pay, a lawyer to represent them before the Commissioner, the problem of secret interrogation of a lonely defendant in the back room of the police station should be eliminated. At least, statements made to or taken by the police after arrest but in the absence of counsel should be excluded from evidence.

Mallory, *Escobedo*, the Criminal Justice Act of 1964, and Rule 5(a) do not provide answers to all the problems which may arise in criminal proceedings. There will always be problems when the state has undertaken to charge one of its citizens with crime and to provide for his prosecution, but we are nevertheless making progress in eliminating some of the more serious problems in the more important cases which have plagued the administration of justice. It is hoped that the right to counsel, beginning at the time of arrest, will make a marked change in future state and federal proceedings, insofar as those proceedings relate to the investigation of felonies.

A difficulty arises, however, with respect to the right to counsel where the crime charged is of a lesser degree. In addition to felonies, there are misdemeanors and so-called petty offenses. It is clear, at least under the federal practice, that a man charged with a misdemeanor has a right to counsel under the sixth amendment. *Gideon* involved a felony, and consequently it is not authority for the proposition that the sixth amendment, insofar as it would extend the right to counsel to misdemeanors, is applicable to the states. Many states already recognize their obligation in

18. 78 STAT. 552, 18 U.S.C. § 3006A (1964)

this regard. One need be no prophet to predict that before long there will be another "*Gideon* case" before the Supreme Court in which the defendant, without benefit of counsel, is convicted of a misdemeanor.

In neither the federal nor the state courts does it seem that the right to counsel has been respected as to petty offenses, for it is indeed doubtful that the sixth amendment relates to such offenses. At common law there was a right to trial by jury with respect to felonies and misdemeanors, but petty offenses were tried only before a judge. Since the sixth amendment right to a jury trial is limited to felonies and misdemeanors, the sixth amendment right to counsel presumably is likewise so limited. Perhaps this limitation, in addition to having a foundation in law, has also a foundation in necessity. Petty offenders are brought in from the streets in great numbers and their cases are disposed of quickly, if not immediately. The assignment of counsel in each such case may involve keeping the accused in custody longer to await counsel than he would have to serve if found guilty. It would also be difficult to find lawyers to defend all the petty offense cases that are brought before all of the minor magistrates throughout the country.

Nevertheless, people do go to jail for petty offense violations, sometimes for rather substantial periods of time. Consequently, some thought must be given to legal representation even in petty cases. Perhaps a public defender present in the magistrate's court at all times could be the answer to the problem. It should be remembered that it is in the magistrate's court where the possibility of miscarriages of justice looms largest—miscarriages that often result from the ignorance or the outright corruption of the magistrate himself. Magistrates are often laymen appointed under circumstances not necessarily conducive to the interests of justice. In fact, some magistrates are still paid according to the number of persons they convict and the amount of fines they impose.

V

The right of the indigent to be represented in a criminal case at all critical stages is a subject of paramount importance in our administration of criminal justice today. By far the great majority of criminal defendants are indigents. While it is true that economic and social conditions may alone explain the preponderance of criminal cases involving indigents, former warden Lawes of Sing Sing had a slightly different explanation:

> If a wealthy man, or the son of a wealthy man, kills he is insane or deranged and usually either goes scot free or to an insane asylum. If a poor and friendless man kills, he is a sane man who committed wilful murder for which he must die.[19]

19. LAWES, LIFE AND DEATH IN SING SING 248 (1928).

Be that as it may, a word should be said about those cases in which the defendant is ready, willing and able to pay for counsel but, because of his personal unpopularity, the unpopularity of the cause he represents, or the crime with which he is charged, is unable to obtain counsel. It would be less than candid not to admit that the reputation of a criminal defendant very often rubs off on his counsel. This, of course, is an unspeakable situation, yet it is a fact of life about which very little is being done. Vignettes from the history of our own country make it crystal clear that a lawyer who undertakes to represent an unpopular client or cause runs the risk of losing his law business as well as his reputation. John Peter Zenger's two lawyers were disbarred. John Adams and his family were subjected to all manner of public abuse after he appeared to defend British soldiers who had participated in the Boston Massacre. More recently, Judge Harold Medina is said to have been vilified, even by some members of his own family, for representing a Nazi accused of espionage during the Second World War.[20]

Our brothers in the medical profession and in the ministry are accorded more protection than the lawyer. Under his hippocratic oath a doctor is bound to minister to anyone in need of care, and a clergyman must always act on the assumption that no soul is beyond redemption. But even as to these professions, the compulsory character of their service has not protected the doctors or the clergymen from public wrath where the public has disapproved of the beneficiaries of their ministrations. Nor has the compulsory nature of their calling always been respected by the doctors or the ministers themselves. For example, the following report of the funeral of accused presidential assassin Lee Harvey Oswald appeared in *Time*:

> Texas ministers, for all their talk about the shame of Dallas and the redemption of sin, seemed notably reluctant to preside. So the police chief telephoned the Rev. Louis A. Saunders, executive secretary of the Fort Worth Council of Churches, who left off watching Kennedy's funeral on TV and went to the cemetery. "Someone," he explained, had to help this family."[21]

In England, ". . . [a] barrister is always bound, except under very special circumstances, to accept, upon tender of a proper fee, a retainer in a case which merits the judgment of the court."[22] The British public understands the compulsory nature of the barrister's work and, consequently, the client's reputation is not confused with the reputation of the barrister. The tragedy in this country is that there is no tradition of compulsory service in our bar. As a matter of fact, ABA Canon 31

20. Medina, *Courage and Independence of the Bar*, 25 OHIO B.J. 381 (1952).
21. Time, Dec. 6, 1963, p. 33A.
22. Tuttle, *The Ethics of Advocacy*, 18 A.B.A.J. 849 (1932).

specifically provides: "No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."[23] Thus, there may be good reason for the public here to identify the lawyer with his client. According to Canon 31, a lawyer can refuse a retainer. Therefore, it would be inappropriate to attempt to educate the public as to the responsibility of the lawyer to accept employment until Canon 31 is expunged from the Canons of Professional Ethics. If we want the public to believe that lawyers must accept clients, lawyers should begin to do just that. Until the public is convinced of the compulsory nature of a lawyer's service, every lawyer representing an unpopular client runs the risk of being tarred with unpopularity.

Perhaps the tradition of the bar in this country with reference to accepting retainers should approach the position taken by Mr. Justice Brandeis. A member of the bar approached the great Justice and advised him that he had been requested to represent a most unpopular client. He showed the Justice many letters from friends suggesting strongly that he refuse the retainer. He asked for the Justice's advice. It was as follows: "Before you reject this cause, I suggest you consider resigning from the bar. On further consideration, you might even resign from the human race." With respect to the duty of the bar to represent unpopular clients, Mr. Justice Brandeis may not have overstated the position even slightly.

Therefore, with the resurgence of interest in the criminal law, sparked by the decisions of the Supreme Court, it has now become the responsibility of the lawyer to employ this new approach to criminal law. The bench and bar should take steps to educate the public with respect to the lawyer-client relationship. With public education the reputation of the client or the client's cause should not rub off on the lawyer.

23. Canon 31, Canons of Professional Ethics, American Bar Association.