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Editorial

EDITORIAL

TO ABOLISH PARTISANSHIP OF EXPERT WITNESSES, AS ILLUSTRATED IN THE LOEB-LEOPOLD CASE

In the course of a colloquy between counsel, over the testimony of a psychiatrist called for the defense, this passage occurred: Mr. D. "Let me ask you, doctor, what was Dick's attitude toward that compact?" Mr. C. "By 'Dick,' do you mean the defendant, Richard Loeb?"

Mr. D. "If necessary, I am willing to stipulate that 'Dickie' or 'Dick' means Richard Loeb, and that 'Babe' means Nathan Leopold, Jr."

This passage was evoked by the frequent instances of the expert witnesses' use of the endearing, youthful, innocent epithets 'Dickie' and 'Babe,' both in direct and cross-examination: thus:

Q. "Is Loeb the leader in this crime?"

A. "I should say that Babe has the more constructive component, etc. Dickie on the other hand is rather essentially destructive, etc."

1. This voluntary adoption of the endearing, attenuating epithets 'Dickie' and 'Babe' to designate the defendants reflects seriously on the medical profession. The whole evil of expert partisanship is exemplified in this action of these eminent gentlemen.

Most of the criticism directed against distorted and manufactured expert testimony has hitherto been based on the supposed bias due to the fees—the money taint. But in this case the fee was exactly the same on both sides. And in this case, also, the personality of the gentlemen refutes the possibility of such an influence. Two of the six experts testifying for the defense are known to me personally, and all the world knows that in the case of all six no question could possibly arise of the taint of money. Their standing, their whole career, has placed them beyond any such suggestion. And yet the sad spectacle is presented of these eminent scientists committing themselves to the cause of one side rather than the other, by adopting epithets calculated subtly to emphasize the childlike ingenuousness and infantile naivity of the cruel, unscrupulous wretches in the dock. It was the cue of the defense to impress this character on the judge, and the experts' well-chosen language lent itself shrewdly to that partisan end.

2. What then is the ultimate cause of expert witnesses' partisanship, if it is found even where character and reputation exclude the cause commonly attributed?

It is this; *the vicious method of the Law*, which permits and requires each of the opposing parties to *summon the witnesses on the party's own account.*

This vicious method naturally makes the witness himself a partisan. He is spoken of habitually as "my" witness or "our" witness. In the Loeb-Leopold case, where the experts devoted long hours to the study of the defense's case, consulted only with the defense's counsel, made preliminary reports to those counsel, cut down those original reports in their testimony, and answered only the questions that were asked by counsel, it was natural and inevitable that their testimony should take on a partisan color. Partly this would be unconscious. Partly it would be conscious, in that they came to sympathize with the only side of the case known to them, and in that they committed themselves to conclusions which it was hard to modify when grilled by hostile counsel.

This method of the law is inherently bad. Its badness has long been known or suspected. The Loeb-Leopold case merely gave a clear demonstration of it to the eyes of all the world.

What is the remedy? Very simple. *Let the expert witness be summoned by the Court himself.* Let all subsequent proceedings be based on this theory,—payment by the state,—consultations with counsel on either side if desired,—direct interrogation by the Court, and cross-examination by both counsel if desired,—exchange of views beforehand with other experts, if any.

This is the only method that will remove the scandal and mistrust that now attaches so often to expert testimony, whether in the medical or other sciences.

3. The medical profession has long complained of the present method. Yet the two methods commonly proposed as substitutes are quite impracticable.

One of these is to compose the jury of experts. This is out of the question; first, because the constitutional principle of jury trial will not permit it; secondly, because no case turns solely on a scientific issue, and two juries, one of laymen and the other of experts, would be unmanageable.

The other proposal has been to compile a standing list of official experts, and to limit such testimony to this list. This proposal is impracticable; first, because local partisan politics would make such a

list untrustworthy; secondly, because the variety of scientific questions is too great to have a list for each; thirdly, because no one judicial area contains all the best experts on all subjects; and fourthly, because it is and ought to remain a constitutional right of a party to secure any testimony which he deems useful, regardless of an official list.

4. No,—there is only one remedy, but it is sufficient, viz., to issue the summons from the Court on behalf of the Court, and to *place the witness on the stand as the Court's witness.* This leaves each party free to secure any witness he deems useful, by notifying the Court of the person's name and address; the Court issues and serves the summons and notifies both parties that the witness will be called; and the witness informs both parties whether and when he will consult with either or both of them before trial. This ensures impartiality, both subjective and objective.

In the Loeb-Leopold case, one of the experts called for the state refused originally to come as a partisan; he told the state's attorney that he did not want to be a partisan witness, that he wished to be free to form and to state any conclusions that he might reach. The state's attorney told him that he would be put on the stand whatever conclusion he might reach. On that condition he consented to study the defendants' personality; and the state's attorney never saw him again until the morning of the hearing.

It is a pity that the eminent gentlemen who consented to be engaged for the defendants by the defendants' counsel did not refuse to come unless and until they were summoned by the Court and *for* the Court, with freedom to lay before the state's attorney before trial every scrap of their conclusions. That would have been a fine service to the cause of Science and Justice, and they would have been applauded as pathfinders by both professions.

JOHN H. WIGMORE.

CONTROL BY MORALE

[The letter we publish below is pertinent, we believe, to the subject matter of the symposium that appears elsewhere in this number. We venture to say that the morale or spirit of a community is the strongest control over the behavior of individuals. If this is true every heinous act must be clearly recognized in its character. Such recognition is a means of developing and maintaining a morale that opposes crime. This control is endangered every time we excuse or tolerate a heinous crime (or any irregularity of conduct for that matter), and

when we pile Ossa upon Pelion *in re* "mitigating circumstances," we become blind to the forest by reason of our prating of trees.

We have before us a problem in social psychology. It is to solidify the population as one man—in this case—against the criminal. Our leaders must go promptly, even to desperate lengths, in dealing with those who commit heinous acts. This is essential that the attention of the people may be riveted upon the act of disapproval of the criminal behavior that we all hate. When this is done we will find a tendency to develop the morale we want: one that will be just as effective for control of behavior in peace time as our war-time morale was for control of the behavior of soldiers at home and at the front.

The war taught us many things, and among them this: if we want to get anything done, desirable or undesirable, leave no stone unturned to develop an appropriate spirit or morale. We could not have got contributions to the Red Cross and we could not have manufactured our heaps of shells without it. We are flouting this clear lesson in the psychology of social life when we permit partisan psychiatrists, as in the Loeb-Leopold case, to split doubtful hairs re the personality of self-confessed criminals and so divide the attention of the public.

The community has been "honeycombed with the wrong sentiment." We have too much short-sighted attachment to the individual narrowly considered, and we have not been wise enough to place him in his proper place of subordination to the spirit that makes an effective group.

ROBERT H. GAULT.

Editor, Journal, Institute of Criminal Law and Criminology.

Dear Sir: One of the most interesting questions in the Criminal Law today is the "Crime Wave" and its cure.

Many different suggestions have been made and still the solution does not appear to have been found. During an observation over a number of years in connection with criminal trials in a large city, the writer has felt that the real trouble is that the old adage "familiarity breeds contempt" applies.

"Crime," in our general conception, is a detestable, cowardly and most reprehensible thing. It carries with it general condemnation. He who would commit crime is outlawed, we are taught in childhood and deserves just punishment. By crime in these instances we mean something mean and despicable. The reaction, therefore, is to shun the

criminal and condemn the action. This is natural when we think of the taking of human life viciously, as in murder, or arson, or the stealing of another's property, or in any way intentionally injuring another. Few of us but look with aversion at a murderer, or thief; and all of us feel that the acts of murder or thievery are contemptible. A convicted criminal naturally arouses a feeling of loathing and a convict has our deep distrust.

These are our natural feelings. They exist in the child as in the adult. Paint the picture as you will, and when the true character is shown all people abhor him who is untrustworthy.

Now, let us see what crime is, that it produces such feelings in the ignorant as in the well-informed. The Penal Law of the State of New York describes Crime as "an omission forbidden by law and punishable upon conviction by

Death, or
Imprisonment, or
Fine, or
Disqualification to hold office in the state, or
Penal Discipline.

Crime is a
Felony or a
Misdemeanor.

A Felony is punishable by
Death, or
Imprisonment in a state prison.

A Misdemeanor is any other crime."

punishable upon conviction by death, or imprisonment, or fine, or disqualification to hold office in the state, or penal discipline. Crime is a felony or a misdemeanor. A felony is punishable by death, or imprisonment in a state prison. A misdemeanor is any other crime.

The description is clear and plain. Further on the law provides for the punishment of crime, and also describes some of the acts that are crimes. If the matter ended there, perhaps the criticism contemplated would not apply, for the penal law describes most of the serious unsocial acts.

It may be true that lack of adequate punishment, too much undeserved sympathy and maudlin sentiment has interfered with the administration of the criminal law, but it has appeared to the writer that one of the most important items in connection with the present apparent

breaking down of civil government, insofar as the control of unlawful acts is, that the whole structure has been honeycombed with the wrong sentiment.

The point in mind is that it no longer is very reprehensible to be a convicted criminal, for there is no adequate description of him.

The Penal Law provides that crimes are divided into felonies and misdemeanors. It clearly describes felonies and then says, "all else are disdemeanors." Certain civil disabilities follow one convicted of a crime. Now what do our laws describe as some of the crimes?

Every violation of police regulations is a crime, as for instance, parking one's car on the wrong side of a street, etc., violations of health, or sanitary ordinances; failing to record a marriage within a certain time, etc., and thousands of other simple acts, many times innocent in themselves but, because prohibited, then criminal. Does not "familiarity breed contempt"? If real serious offensive acts were charged as crimes, felonies and misdemeanors and properly dealt with, if acts seriously affecting the rights of others, or involving moral turpitude were treated as crimes, and if violations of prohibitions were only treated as such, is it not likely the criminal law would receive greater respect and the community be better protected?

If a person forgets to carry his license to drive his automobile, it is a crime, although he never has affected the rights of anyone, it still is a misdemeanor or a crime and he, if he is punished after being haled to court, is forever after a convicted criminal.

Now the point I desire to make is: Would it not be a real benefit to denominate those who have injured others as criminals and to make a legal distinction between them and those who have done only some prohibited act; innocent in itself, but still prohibited. The idea is not new, but it is relevant at this time when the criminal law seems to be tottering.

ROBERT J. WILKIN,
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