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JUDICIAL VERSUS ADMINISTRATIVE PROCESS AT THE PROSECUTION STAGE¹

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The age-old controversy that centers around the question of law enforcement and the prevalence of crime becomes more acute whenever the depredations of the antisocial classes become more evident; and at the present moment the various questions which are involved in this controversy are raised anew because we seem to be threatened, on the one hand, with being overridden by a group of desperate antisocial adventurers who would grasp the political power of municipalities and yield it for their own purposes, and, on the other hand, with what appears to be, if not a breakdown at least an inherent inadequacy on the part of the machinery of the criminal law to deal with this situation. The difficulty is as old as human society and no superficial consideration of the forces and factors involved will plumb the depths of the problem. Solutions of the various questions at issue, or even betterments of existing conditions, cannot be expected by hastily devised and emotionally motivated schemes. The forces that are involved and which have their origins in the depths of human nature need to be understood, and in devising methods of controlling these forces when they express themselves in conduct which is destructive man needs to be conscious of his own inherent weaknesses and to build a structure which will not only counteract antisocial tendencies in others but will protect him from himself.

The fundamental difference between the doctor, in this case the psychiatrist, and the lawyer, is that the doctor is primarily interested in the individual, that is, the actor, whereas the lawyer is primarily interested in the act. This is a perfectly natural division of interests and basically constitutes the reason for fundamentally different points of view by the two professions, and not only that but an entirely different background of training and tradition. Society has a right to protect itself from acts which are destructive of its integrity. The individual as a social unit is an important asset and constituent component of society, and very properly it is felt that, from the other

¹Delivered at the Attorney General's Conference on Crime, Washington, Dec. 11, 1934.

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point of view, as one of the Italian criminologists put it many years ago, "Every society has the criminals it deserves." The controversy between the two professions has continued largely along this line of separation and I am sure might easily go on, each in its separate way, indefinitely, so long as all the issues involved remain in the dialectic stage. It is similar with all such disparate points of view. The lawyers are familiar with such a polarity in the distinctions which are made between the theories of the origin of the law: On the one hand, Is the law man-made? or, on the other, Is the law, like natural law, something which man can only find, and, having found, formulate? These opposite points of view are familiar in every department of human thought and apparently can never be resolved by talking about them. The only salvation for such sterilizing impasses is action. The opposing theories as to the origin of the law certainly have never interfered with the enactment of laws by legislatures; and I feel sure that the different points of view of doctor and lawyer, as I have indicated, need be no serious obstacle but are rather only a challenge, to a meeting of minds upon methods of procedure which will advance the present situation.

In looking over the field of accomplishments in the past few years many observers feel exceedingly discouraged, some of them even feeling that no ground has been gained; but when we go back and realize the number of agencies that have been created, practically all during the present century, which are operating at the present time, we have grounds for real optimism: the juvenile court, the domestic relations court, night courts, suspended sentence, probation, parole, the indeterminate sentence, the immediate examination of felons upon arrest in accordance with the Briggs Law in Massachusetts, the creation of psychiatric services in connection with the criminal courts and of psychiatric departments in the prisons, the construction of special departments of the prison system for juvenile delinquents, the improved classification of prisoners; to say nothing of certain ancillary agencies which, while not directly related to the problem of crime in a restricted sense, are important and significant developments in relation thereto, such as the growth of the whole mental hygiene movement, the establishment of child guidance clinics, of psychiatric services for schools and colleges, and of all the various character-building agencies, and, still further removed but still related, the improvements in the whole educational system, the addition to the medical curriculum of more adequate training courses in psychiatry, the advancement and improvement in the teaching of psychology in the universi-

ties, and in general all those multitudinous influences that are gradually coming to mean man's better acquaintance and knowledge with and of himself.

All these various activities are unevenly distributed throughout the country, some of them being highly developed in one place, others in another, and functioning very unevenly, with all manner of differences, wherever found. The important fact, however, remains that they have all been brought into existence fairly recently, and in my estimation every one of them has decided values which I believe it is worth while to conserve and develop. We could undoubtedly get more rapid results by attempting to negotiate our difficulties by wiping the slate clean and beginning anew, but the objection which underlies any such method of procedure must always be that by so doing we would scrap the results of many years of hard labor and profound thought and accomplishment. We would lose all this and it would all be lost for a very doubtful gain, because what was set up in its stead might not successfully function, and this danger is an especially real one because it would come into existence under the motivation of strong emotions rather than of carefully calculated reasoning and judgment. If the parole law and suspended and indeterminate sentence methods of dealing with offenders are failing it is not necessarily because these are not worth-while methods or adequate tools for handling the problems. We all know, for example, that the parole law has failed in certain places just in proportion to its subordination to the necessities of creating vacancies for new prisoners. When this happens all the principles which govern the theory of parole are scrapped and the results should not be charged against the parole system. A careful evaluation, therefore, of all these methods, in my estimation, will show that each one of them represents invaluable possibilities for further development.

I should like to tell you in a few words some of my own feelings about the goal that we may look forward to in this whole matter. I should like to see the time come when the offender could be as dispassionately considered as any other social problem, when the hue and cry for vengeance should not influence juries, judges and district attorneys, when the political affiliations should be reduced to the vanishing point, when the conviction of criminals should not be made political assets for elective offices, when the whole matter of the protection of society from the depredation of offenders should become a serious problem handed over with all the necessary protection to those who are skilled and experienced and who have the necessary back-

ground of learning and training. Under these circumstances I can vision a time when punishment as such would be eliminated from the language of the criminal law, and when those who for any cause whatever were chronic offenders and constant menaces to the social order would be identified and segregated, as far as possible under circumstances which would make for their rehabilitation, for such periods as were necessary, in order that when they were discharged there would be a reasonable expectancy that they could function as assets rather than liabilities to society. Many technical changes would have to be made in our methods. A number of different points of view would have to come into existence and be adopted and adjusted to the problems in hand, and all of these would have to keep step within reasonable limits of deviation with popular opinion and feeling in this same category.

One of the most notable advances that have been made in the extra-judicial methodology of law enforcement is represented by the Briggs Law. I do not think that the Briggs Law, like Athena, came fully panoplied from the head of Zeus, but nothing does. It is infinitely more important that we should be on the right path than that we should be at any particular place on that path; and the value of the Briggs Law is, as I see it, that it permits development. For example, and to illustrate this point more definitely: It is generally held by lawyers, and I think rightly but perhaps too vehemently, that the public demand retributive justice, and that any scheme which resulted in what the public thought was a failure on the part of the state to exact a full and adequate penalty from the offender would be at least an unwise move to make. Now the Briggs Law undertakes to determine the responsibility of the offender in terms of his mental condition; speaking in legal terms, in terms of whether or not he is insane. Nothing, to my mind, could be more vague, speaking both scientifically and philosophically, than such an effort at determination. "Insanity" is a purely legal term, and its only definition is found in the verdict of a jury. "Responsibility," in my opinion, is a purely philosophical term which, again, comes up for its final test in the minds of a jury. The point, however, is that as the concept of mental disease and responsibility or its opposite slowly vary in the public mind, there is nothing to prevent the procedure under the Briggs Law from following, even perhaps preceding sufficiently to take the lead. These are the kind of extra-judicial devices that seem to me to be, therefore, most desirable: those that lend themselves, as I believe this law does, to interpretation and reinterpretation, to

change, development and evolution. Static formulations in the past have been the obstacles which could not be surmounted. In their place if we can formulate concepts in which something like a legislative body is responsive to the ideas and ideals of the electorate, then advance is assured. Herein I believe lies a principle of great importance and significance.

One of the suggestions that have been discussed from various angles during recent years has been that the trial court should be limited in its operations solely to the function of determining whether the defendant did, as a matter of fact, do the things charged in the indictment, and if he did then he should be turned over automatically to the state, which, through its agents functioning as a committee, consisting of such types as the criminologist, the educator, the psychiatrist, the physician, the psychologist, should study the individual, determine his assets and liabilities physically and mentally, and assign him to such a course of treatment and such a method of living as would be calculated for the best interests of himself both as an individual and as a possible future citizen. Such a suggestion in general, you will remember, was made by Governor Smith. Of course the obvious legal objection is that a determination of the mental condition of the defendant cannot be excluded from the original trial, as guilt involves a guilty mind and a guilty mind and an unsound mind are incompatible. In other words, if a person is of unsound mind he cannot be guilty. Whereas I believe these to be technical difficulties which ought not to raise insurmountable obstacles if the principle is believed to be correct, nevertheless the difficulty of modifying criminal procedure is so great that it is perhaps wise to take such difficulties into consideration: and in a recent meeting of a committee³ composed of representatives of the American Medical Association, the American Bar Association, the American Psychiatric

³The composition of the Committee was as follows:

Representing the American Bar Association, Criminal Law Section—

Mr. Rollin M. Perkins, Iowa City, Iowa.

Mr. Louis S. Cohane, Detroit, Michigan.

Representing the American Medical Association—

Dr. William C. Woodward, Chicago, Illinois.

Dr. Winfred Overholser, Boston, Massachusetts.

Representing the American Psychiatric Association—

Dr. William A. White, Washington, D. C.

Dr. V. C. Branham, Albany, New York.

Dr. Winfred Overholser, Boston, Massachusetts.

Dr. C. P. Oberndorf, New York City.

Representing the New York Academy of Medicine—

Dr. Israel Strauss, New York City.

Dr. Dudley D. Schoenfeld, New York City.

See article by Mr. Perkins, "Partial Insanity," *Journal of Criminal Law and Criminology*, Vol. XXV, No. 2, July-August, 1934.

Association and the New York Academy of Medicine, this, together with the previously cited contention of the lawyers that the people as a whole demand retributive justice, was considered and in their report they suggested that the trial court keep within rather narrow limits. They suggested that:

"Criminal incapacity by reason of mental disorder should be limited within very narrow bounds. The end to be achieved is to have only the most extreme cases of mental disorder recognized as grounds for acquittal.

"A defendant acquitted on the ground of insanity shall be committed as a matter of course to the appropriate state hospital for mental diseases; subject to release only on conditions applicable to the release of other committed inmates of the institution together with the approval of the trial court or other appropriate tribunal.

"Provision should be made whereby mental disorder which is not sufficient for an acquittal may result in treatment other than that provided for convicted persons who are not mentally disordered."

In other words, a verdict of not guilty would only issue where the mental disorder was so pronounced as to be easily within the understanding of an average jury. For those who might be mentally disordered in a more subtle way provision was made for their special consideration after conviction. This is, to my mind, not an ideal scheme, but it indicates one method by which existing difficulties may perhaps be circumvented. In any event I feel that a considerable number of the difficulties which seem to exist are, to some extent at least, imaginary, and that new methods of procedure devised along rational and scientific lines if they did not eliminate would at least modify many of them.

Up to this point, therefore, you will see that my idea of dealing with the criminal is that primarily he should be dealt with in an intelligent way with the object of salvaging him so far as possible and diminishing his destructive influences upon society, and that an intelligent way of dealing with the criminal means that those who are selected to deal with him and to administer the institutions and organizations that deal with him should themselves constitute a highly trained personnel. It means also a different sort of institution from the prison. Institutions can be made perfectly safe without the necessity of their degenerating into filing cabinets made of steel and cement; and I might suggest at this point that there are many developments in recent years in the care, custody and treatment of the so-called insane that might with great advantage be studied by those who have to deal with the delinquent. Time does not permit, however, the discussion of these points in detail. I only wish to add that when one considers the huge sums which delinquency costs and then

considers the practically negligible amounts of money that are spent in the endeavor to find out what sort of individuals delinquents are, how they can be intelligently dealt with to their own and to society's advantage, then it is not to be wondered at that little progress is made. Every appropriation for the building of prisons should be balanced by a certain proportionate amount of money for the pursuit of research activities in this field; and prisons instead of being simply places for filing certain individuals for arbitrary lengths of time during which they cannot prey upon society, ought to become laboratories for the study of the multitudinous problems involved, where all sorts of methods may be developed not only for crime detection but for the modification and conditioning of human conduct.

Thus you will see that what I advocate is in line with the slow processes of change which have been affecting this branch of the criminal law and its enforcement over a very considerable period of time. These tendencies have been manifested in a consistent trend toward departing from the older and more cruel methods of punishment. The pillory, the stocks, the whipping post, the branding iron, the amputation knife, the stake, the hangman's rope and even the electric chair, have slowly but surely during the years been passing into the oblivion of disuse and forgetfulness. In their place we need to be sure that we have intelligence, judicial-mindedness, correct scientific principles founded upon research, back of our efforts, and that all of the armamentarium of social and individual therapy are applied by those who are familiar with their uses. This means that sentences will cease to be predetermined even before the criminal act itself is committed, as if by some supernatural light it could be known how long a man had to reside under the rigors of prison life before he would be safe to resume his duties and responsibilities as a citizen. Minimum and maximum sentences, in my estimation, will also disappear, and delinquents will be taken over by the state for such necessary lengths of time and forms of treatment as may be indicated. This, you see, does not mean that the delinquent is to be returned to society to carry on his delinquencies indefinitely. That is the product of the present system. It means that if he is not capable of functioning in society at least safely, and particularly after adequate trial periods properly supervised, that he will have to continue indefinitely, perhaps for life, separated from his possibilities of danger. Under these circumstances I am sure the public mind would be more apt to accept institutions where such unfortunates could be housed decently and in reasonable comfort and under healthy conditions, and especially where they could be gainfully employed and thus at least help to reimburse the state for their care.

The nub of the whole situation as I see it, put into the form of concrete suggestion, is this, expressed in the form of a question: Why should an individual who has demonstrated over and over again antisocial tendencies, particularly if they have expressed themselves in a definitely stereotyped way showing that they have become an organized part of his personality, be given a definite sentence with the assurance that when that sentence is completed, usually much abbreviated by good time allowances, he will go back into society and continue his depredations just as he did before? The determination of whether an individual is a malignant type of social offender cannot be made at the time of trial unless we wish to introduce additional difficulties into this already too complicated field of action and make bad matters still worse. There is no use in determining it at all, if a definite sentence is going to be imposed which will terminate at a certain time no matter what sort of an individual the defendant may happen to be. Therefore it would seem to me that when it is determined that an individual has committed a serious antisocial offense he should thereby lose his self-determination and the future disposal of his case should be in the hands of the state and he should not be given his liberty again until there is some adequate reason of a positive sort, determined by competent individuals, to indicate that there is at least a reasonable prospect that he will be able to function in an acceptable way as a citizen, such discharge at the discretion of the authorities if needs be to be backed up by supervision for an indefinite period. Such a method would meet the demands of the lawyer, who requires the protection of society from certain types of acts, and would meet the demands of the psychiatrist, who insists that the individual be given adequate consideration. The act and the actor are no longer separate and distinct entities but are dealt with as they actually exist and for the good of all concerned. If such a system could be effectively administered I believe it would have the maximum beneficial results from every point of view.

Approached in the way I have indicated, I believe that the highly individualized point of view of the psychiatrist and the highly evolved social point of view of the legalist will meet and face common objectives, and will be able, therefore, to cooperate in details for a common purpose. My experience on various committees has led me to believe this; and in any case, as I have already stated, I do believe that action is too frequently "sicklied o'er with the pale cast of thought," and that dialectics can create difficulties which the necessities of action will dissolve.