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## Symposium: The Criminal Defense Practice: Introduction

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# CRIMINAL LAW

## SYMPOSIUM: THE CRIMINAL DEFENSE PRACTICE

### INTRODUCTION

TERENCE F. MACCARTHY\*

The deserving and well known ability of the three contributing authors to this symposium, George J. Cotsirilos, Thomas P. Sullivan and Sherman C. Magidson, all accomplished criminal practitioners, suggests that their articles, consistent with their reputations, are worthy of reading, digesting and retaining for future and continual reference. Because the reader's interest should properly focus on the articles themselves, no attempt will be made to obfuscate that focus by reviewing or commenting specifically on the articles. However, the articles can be eagerly commended as to their general content and immeasurable value to those interested in the practice of criminal law—particularly those attorneys who have occasion to defend one accused of a crime.

Though not abandoning the pedantic approach, the authors, comporting with their own expertise, inculcate in the reader the cogent and trenchant observations of a trial attorney. Theirs is a contribution more to methodology than scholastic achievement. The observation is made that although law reviews and general legal publications do devote many pages to criminal law subjects, most of the commentators are not personally concerned, as the authors of these articles are, in the day-to-day involvements of the criminal practice. It follows then that most writing in the field of criminal law is noted by the absence of "how to do it" material. This issue of the *Journal* serves as a rare and much needed exception. The ultimate evaluation of these articles is left to the interested reader with the confidence that the final analysis will result in significant appreciation of the authors' contributions.

The inclusion of material with practical relevance to the criminal defense counsel marks an

important milestone in the history of legal publications which have long served the philosopher but have left the practitioner wanting. This change should be welcomed by the defender and the prosecutor alike. By embracing the criminal defense bar, or more appropriately by coextensively serving both prosecutors and defenders, the *Journal* might well spawn some introspection on the part of both. The presence of well written articles may well be too tempting to resist reading them—notwithstanding their primary contribution being intended for court room opponents. This exposure alone would in turn occasion a broader analysis—by both prosecutors and defenders—of the problems besetting the administration of criminal justice today.

The English system—though in all probability untenable where, as in most courts in the country, the volume of criminal cases requires specialized administration—has much to be said for it. This is specifically true with reference to the constant interchange of positions wherein one attorney may be a prosecutor of a particular case and several months thereafter find himself defending against the same attorney who represented the defendant in the case he earlier prosecuted. This exchange of hats does much to improve the respect and relationships observed between attorneys normally engaged in adversary circumstances.

On the other hand, in this country, the trend seems to be moving in the opposite direction. The emphasis now is on prosecutorial or defender programs purposely exclusive each of the other. Admittedly certain seminars, particularly at the less advanced levels, of necessity must be tailored only to one group or the other. However, to the extent this division attenuates the potential professional relationships which should, indeed must, be maintained between practicing members of the criminal bar—between prosecutors and defenders—it should be eliminated where possible. A constant interchange, a potpourri of opinions and suggestions, between prosecutors and defenders is neces-

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sary to avoid much of the friction which presently obtains. Speaking of the English Inns of Court, Shakespeare poignantly and praisingly observed in lawyers the ability to "strive mightily and then eat and drink together".

The point is made then that there exists today a tremendous need for a closer bond of unity and more professional intercourse. It behooves criminal attorneys, as custodians of our criminal justice system, to turn their interests to the entire spectrum of the administration of criminal justice—not only their own specialty. It remains then the responsibility of a united criminal bar to separate myth from reality in evaluating the present system of criminal justice. It is optimistically hoped that the interchange of ideas through the *Journal*—read as hopeful it will be by prosecutors and defenders alike—will assist in educating both to the problems and concerns of the other.

The need for a unified criminal bar was never so pressing as it is now. Today it is all too fashionable to voice not only criticism but out-and-out physical attacks against our courts and system of criminal justice. The bombing of court houses, the obstructing of court proceedings and even the brutal murder of a judge, have tragically become all too common.

The bombers, the obstructors, and the murderers are matters best left to clinical discussions by psychiatrists and not lawyers. Abhorrence of their actions is hardly a matter left to debate.

On the other hand those critics of our courts and criminal justice system who have not yet resorted to violence—though by their actions they may be encouraging and popularizing the conduct of their violent followers—deserve reproach. Least there be any mistake, this accusation encompasses those on both extremes of the political spectrum. Though their methods may differ, both seek to undermine the courts and our system of criminal justice.

The purpose here is not to apostatize the courts and our criminal justice system. Our criminal justice system is by no means perfect. As is the case with all man-made institutions, improvement is always possible. As a matter of fact, to the credit of the courts and the organized bar, we have in recent years witnessed and are now witnessing many positive efforts to improve our criminal justice system. The following examples will serve to illustrate the point.

The American Bar Association through its Committee on Minimum Standards for Criminal Justice has issued and is now attempting throughout the

country to implement minimum standards touching on the most significant areas involved in the practice of criminal law.

Former Supreme Court Justice Tom C. Clark, in his most active retirement, is heading up a center in Washington intended to improve court administration throughout the country.

Under the distinguished chairmanship of the former governor of California, Edmund G. Brown, the National Commission on Reform of Federal Criminal Laws has undertaken the monumental task of rewriting the substantive provisions of the Federal Criminal Code. The Commission's work product presently exists in the form of a tentative study draft which has been promulgated for the purpose of eliciting comments thereon.

Recent salutary legislation will provide sufficient funds to create federal defender offices, such as that in the Northern District of Illinois, throughout the country.

On the state level, the Illinois Supreme Court recently appointed a distinguished committee of judges, lawyers and law professors to reconsider the incorporation of discovery procedures into the practice of criminal law.

Not unmindful of the fact that sweeping generalizations leave much to be desired, it would appear fair to suggest most defense attorneys tend to lean to the liberal side and, conversely, most prosecutors are distinguished by a more conservative bent. Environment in part certainly explains and rationalizes these leanings if it does not fully justify them. These divergent philosophical leanings, when added to the conflicts usually created by and associated with the heat of battle, make the American practitioner, unlike his English brother at the bar, suffer the shortcomings of a criminal bar more inclined to traduce than praise opponents.

In this posture the temptation is always great to bemuse audiences, however small, by urging the unfairness of the system as it is applied to one's personal position. This not only makes for a captive audience but additionally serves the purpose of explaining away one's losses or disappointments as a trial lawyer.

The point and purpose then is to urge prosecutors and defense attorneys away from the always present temptations to serve as spokesmen for or even encourage the actions of those who seek the total destruction of our system of criminal justice. On the positive side, much could and should be done to bring prosecutors and defenders together

to work first for the preservation and second for the constant improvement of our system of criminal justice. The symposium appearing in the following pages, while on its face a defense counsel's handbook, presents a wide variety of the problems confronting the criminal bar. Only when the

prosecution is cognizant of the defender's problems and, in turn, the defender cognizant of the prosecution's can the adversary system unite to advance criminal justice. A symposium such as this should do much to contribute to the common understanding.