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Albert J. Harno

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THE AMERICAN LAW INSTITUTE PROCEEDINGS, MAY 20, 1954

I. Crime and Punishment

ALBERT J. HARNO

The following four articles by Dean Albert J. Harno, Professor Herbert Wechsler, Judge Gerald F. Flood and the Hon. James V. Bennett were read by their authors respectively before a conference of the American Law Institute which was held in Washington, D. C. on May 20, 1954.

Albert J. Harno has been Dean of the College of Law in the University of Illinois since 1922. Before that date he had already practiced law during three years in Los Angeles, had been Professor and Dean of Law in Washburn College and Professor of Law in the University of Kansas and the University of Illinois. He has been highly honored in state, national and professional councils. He is now a member of the Committee of the American Bar Association on Individual Rights as Affected by the National Security, of the Hoover Task Force on Legal Services and Procedures of the Federal Government, and a member, also, of the American Bar Association Committee on Administration of Criminal Justice.—EDITOR.

You have noticed that the title of the subject assigned to me is, "Can We Improve the Administration of Criminal Justice?" If I am not mistaken, that question was raised long ago when Cain killed Abel. Since then it has been asked many times, often with a brooding sense of futility. I am not sure that anyone has ever found a satisfactory answer to it, and here am I trying to answer it. I assure you that my title is not of my own choosing.

Ours is a special committee of the American Bar Association on the Administration of Criminal Justice. But first I wish to give you a bit of background.

The American Bar Association now has in progress the building of a great Bar Center in Chicago. I assure you that this is not going to be a propaganda talk for the Center, although I express the hope that all of you have made liberal contributions to the enterprise. It is a well-known fact that the American Bar Association for many years has been inadequately and undignifiedly housed. For years lawyers have talked about a new home for the Association. Finally, the time came when hope turned to action, and the Association decided to build a new home. A report of some of the discussions within the Association relative to the scope of this undertaking may be of interest. The Association needed a new and a bigger administration building. All individuals concerned with the planning of this project agreed on that. But said some of the group, "Let us not stop with the construction of an administration building. The need for it is obvious, but there is nothing very exciting about putting up the building. Let us establish a great law center in Chicago. We lawyers have long talked about law improvement and the better administration of justice. The time has come when we should back up our aspirations with more substance. Let us build, in addition to an administration building, a research and library building, and let us man it with a research and library staff."

This was a new thought and some of the group were aghast. "You are taking us," said they, "on an excursion of fantasy. We shall have enough trouble getting one building financed, and here you are asking that we erect two. This will ruin our program." Notwithstanding, the advocates for the research and library building persisted, and it was their view that prevailed. Now these two buildings are nearing completion, and it has been the research and library building that has captured the imagination not only of the lawyers of the United States but of the American public as well. Through this decision the American Bar Association had injected into its program of brick and mortar an idea, an ideal. This has been followed with the organization of the American Bar Foundation, the appointment of an Administrator of Research and Library, Mr. John C. Cooper of New Jersey, and the planning of various research programs.

It is significant that of the first two major research projects in this program, one has to do with Individual Rights as Affected by the National Security, which assignment is under the supervision of a committee of which Mr. Whitney North Seymour of New York is the chairman, and the other concerns the Administration of Criminal Justice, which is under the direction of a committee of which the late Mr. Justice Jackson of the Supreme Court was chairman. And this brings me to the topic assigned to me, "The Administration of Criminal Justice."

The membership of the Committee on the Administration of Criminal Justice and the tentative scope of the project were announced by the chairman of the committee, Justice Jackson, in the August number of the *American Bar Association Journal*. After the committee was organized, the American Bar Foundation sought and received a grant of \$50,000 from the Ford Foundation. This grant was not made to finance the principal study, but to project a plan for the study. One of the first actions of the committee, after the grant was made, was to organize a staff. The committee and its staff have now been at work for months setting up an operation plan for this program. The Director of the project is Mr. Arthur H. Sherry, of California. This phase of the program is nearing completion; the planning stage is about finished. The committee is now in the process of seeking funds for the major project, to make a factual study on the administration of criminal justice in the United States.

It is in the administration of criminal law, the administration of criminal justice, that popular discontent with the law centers. It is common knowledge that there is a startling discrepancy between the number of crimes committed and the number of individuals punished. It should be a primary purpose of criminal law administration to bring the crimes punished into closer accord with the crimes committed. In the words of our first chairman, Justice Jackson, "The time has come for a bold and exhaustive inquiry into the way we are performing our professional function of protecting life, liberty, and property in the complications of modern society and under our free institutions." In this study, the committee proposes to determine the causes for the discrepancy between the number of crimes committed and the number of individuals punished—the reasons for the heavy mortality. We propose to search out the weaknesses, and equally important, to search out the examples of strength of criminal law administration as it is administered in the various jurisdictions of the United States. The profession has never taken full advantage of the fact that we have

forty-eight jurisdictions and the federal system to draw on for purposes of comparison—for purposes of research; that we have forty-eight jurisdictions and the federal system showing varying degrees of performance in law enforcement. It is a known fact that some jurisdictions are functioning very well in the administration of the criminal law and that some are doing poorly, very poorly indeed. These facts and the reasons for this disparity have not been adequately highlighted. It is one of the purposes of the committee to do just that.

As the committee conceives its task, its first attack on the problem will be to get the facts about criminal law administration, and having secured the facts, the next step will be to project and recommend remedial measures.

In making this study, we should be mindful of the lessons of history. I refer particularly to the many crime surveys that were made in the '20's and '30's. During that period there was a veritable deluge of crime surveys. Between 1919 and 1925 there were nine of these surveys; between 1925 and 1931 there were 26; and between 1932 and 1940, there were nine. These studies in the main were state and local in character, but one under the chairmanship of George W. Wickersham, of honored memory in the Institute, was nation-wide. Through most of these studies, little of substance was accomplished. I often look at the reports of the Wickersham Commission resting, and I add, gathering dust, on the shelves of our library. I read them occasionally, but how many people, may I ask, make any use of them today? And yet this was a great national survey of the most censured phase of the administration of our law—the administration of criminal law. We hope to build on the experiences of these former surveys and take up where they left off.

The outline of the projected study, as stated by the Executive Director, falls into four main divisions:

- "1. The administration and operation of police agencies and officers and their interrelations with each other, with prosecuting officers and with the courts;
- "2. The administration and operation of prosecuting attorneys' offices and staffs and their interrelations with the police, the courts, defense counsel, grand juries, and other law enforcement agencies;
- "3. The procedures and operations of the courts in criminal cases from the inferior courts . . . to the courts of appeal.
- "4. Probation, sentence, parole and release procedures," and their effectiveness as instrumentalities of law administration.

The first step in this undertaking will be to make a factual study in various areas of the United States, touching the several divisions which I have just mentioned, to the end that we may evaluate the specific causes for breakdowns and delays in criminal law administration. Our studies will be started in selected areas but we expect to follow up with investigations in other areas. A study on gambling, for example, begun in New York or New Jersey might well lead, in its ramifications, to investigations in Chicago, Nevada, and California. These field studies will be under the supervision of the Executive Director and his staff of consultants working from a central office, but they will be under the immediate supervision of six field directors, each one of whom will have under him a research team. We estimate that this part of the study will occupy the committee approximately three years. These investigations should bring under review such factors as these:

- (a) The reasons for failures to report crimes
- (b) How and to what extent the police exercise their discretion not to report crimes
- (c) Discharges by magistrates on preliminary examination
- (d) The function and powers of grand juries
- (e) The prosecuting attorneys and the discretionary powers exercised by them
- (f) The jury and its function
- (g) Review procedures
- (h) Post-conviction remedies and the confusion often created through writs of habeas corpus and coram nobis
- (i) Probation and parole

After getting the facts, the field teams will report them to the Executive Director and his consultants at the central office.

This brings us to the next step in the committee's projected program—the classification and evaluation of the grist poured in by the field teams. It will be the responsibility of the Executive Director working with his consultants, experts in the field of criminal law administration, to classify and evaluate the data received and to project remedial measures. The final phase of this program, as the committee has conceived its assignment, is to make its report and recommendations to its parent organization, the American Bar Association. If the report of the committee and its recommendations are approved by the American Bar Association, the responsibility will then rest on the Association to execute the program—to carry out the recommendations through all the influences the Association can bring to bear—through its committees and sections, and through related organizations, through state and local associations, and through the various channels of communication.

"Can We Improve the Administration of Criminal Justice?" This topic highlights the critical question that is before the committee. We should not be giving our time to this task if we did not believe that there was some hope for improvement. But, can anything be done toward the improvement of criminal justice? The answer to that question is in the lap of the gods. Many of us here, perhaps all of us, have worked on programs of law improvement. We started with high hopes and often ended with failure. I spent many weary hours on a crime survey in Illinois in the late '20's. A fair evaluation of the results of that survey is that it accomplished nothing substantial. But is it not our responsibility as members of the legal profession ever to strive for law improvement and for the better administration of justice? If we neglect that responsibility, if we lose heart, what will become of our declared premise—the premise to which we Americans subscribe, and which is basic to the conception of all of our institutions—that ours is a nation governed by law? The answer is inescapable. We must ever be alert to the needs of a better legal order, and constantly striving for it—a legal order that governs well.

In conclusion I wish to repeat a story told by the late Mr. Justice Jackson in his address last November at the laying of the cornerstone of the new American Bar Center. You probably have heard the story or have seen it in print. It is about a man who visited the scene of the building of a cathedral. The visitor asked three workmen what they were doing. The first one said, "I am making a living." The second said, "I am laying this stone." When the visitor asked the third man, his face lit up and, as he looked toward the sky, he replied, "I am building a cathedral." "What," asked Mr. Justice Jackson, "are we doing today? We are building a cathedral to testify to our faith in the rule of law."