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Symposium Criminal Law and Procedure - Preface

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PREFACE

Jack G. Day

The devotion of an issue of the *Review* to major articles on criminal law is but another instance evidencing a revival of interest in the subject which has been enjoying a modest renaissance for the past several years. Rebirth suggests a death. What was the state of the corpse? It is a dismal fact that for decades past both the practice and practitioner of criminal law have been in eclipse in public esteem and even within the organized bar itself.

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The general public has at least triple vision when it looks at the criminal law. On the one hand, it is an irritation bedeviling good citizens over traffic and building codes or other minor violations, and on the other, a body of magic designed to induce inaction in evildoers, but so corrupted by police, law-

yers, courts, and criminals alike that it cannot function.

This view reflects a cynical distrust that is as unwarranted as the naive view at another extreme. Many of the good people in society, with remarkable unworldliness, act as though the criminal law were the pristine precipitate of natural law — the embodiment of immutable, because perfect, principles of human conduct administered by police officials, prosecutors, and courts whose purity of motive is matched only by their wisdom and single-minded devotion to the public welfare.

In point of fact neither view is accurate, and the improvement of the administration of criminal justice, including the practice of criminal law, is not apt to come from unreal assessments of fact. But such views pose a dilemma from which the criminal lawyer can hardly escape. If justice goes awry, the theorists of the "corrupt" view feel they have been vindicated. The criminal lawyer is, after all, in and of the system. On the other hand, if purity is defiled, *i.e.*, a patent villain is acquitted, the lawyer in charge of the defense is the obvious corrupting cause. Much, if not all, of the time neither of these interpretations is impeded by a knowledge of the facts.

So it is that in the public assessment, if discount is allowed for a few heroes of the bar who have captured the popular fancy as virtual Galahads (but nearly always with slightly piratical flavor alien to the pure knight), the criminal practitioner has, as often as not, come to be regarded as the

manipulator or perverter of justice rather than its redeemer. Frequently he has fared little better in the esteem of his fellow lawyers who know or should know better. Not infrequently lawyers will deprecate the criminal practice and its practitioners. While deploring the "condition" of the practice, these same lawyers will refuse to take a criminal case under any circumstances.

Perhaps that strain of our national ethos which glorifies commerce accounts in a measure for the decline of the reputation of the "criminal bar." Decline can be defined in terms of relative importance, and a society which puts such emphasis on material success quite logically gives primacy in respect and honor to those whose expertise involves the domain of business.

No doubt reflecting conditions on the outside, for years criminal law has been the neglected step-child of the law school curriculum. Oddly, while the years have maintained if not enhanced the respect and importance of its close relative — constitutional law — the emphasis on and interest in criminal law has declined. This is true despite the fact that constitutional questions, in everyday practice at least, find their principal incidence in the criminal courts. One wonders whether without bar examination requirements, criminal law might not have become an elective as permissive as a seminar in arbitration or debtors' estates.

This is not to say that commercial law, where the main concern is property and its related incidents, and for that matter tort law, which in the main seeks a venal equivalent for pain, suffering, and reputation, are unworthy. The law in these areas is of great importance, and those who practice honorably in any of them are deservedly of good repute. Nonetheless, there has been an imbalance in esteem between the monetary and penal legal categories which is a matter for concern and wonder.

Despite its preoccupation with financial success, this society is so centered on the innate worth of the individual that it is surprising a specialty exclusively concerned with life and liberty should ever have reached such low estate. In another season this was not so. The criminal lawyer has been highly regarded in times past as the proctor of due process — the technician who knowledgeably invokes the constitution and gives it meaning in its interposition between the individual and the naked power of the state.

While any specialty has its incidence of incompetent or merely uninspired exponents, the fact is that even in its period of lowest repute, the criminal practice has regularly witnessed minor wonders — small miracles wrought by due process of law and a competent attorney on hand to protect it. A little imagination can infuse that spectacle with grandeur. There is something awesome in the fact that any person accused of crime,

whatever his life station, can, armed with the right to counsel, the presumption of innocence, the privilege against self-incrimination, and due process of law, face down the power of government. That this is a reality is a tribute to the system of government. For the same reason, the legion of unsung lawyers whose daily participation is an essential ingredient in the success of the system, are entitled to a good report in the community. This is not an argument that the standards of criminal practice have ever been as good as they ought to be, that they cannot be improved, or that the pursuit of higher standards of competence and conduct should be neglected. But recognition of the importance of the practice will enhance it by attracting more and, hopefully, always better men to it.

There are many signs which point to a mounting interest in the rehabilitation of the reputation of the criminal bar. It is about as difficult to date the beginning of this development as it is to specifically mark that burst of intellectual growth which followed the Middle Ages (no presumptuous comparisons are intended). It may be, however, that the organized bar's determined and responsible action to see that unpopular defendants were provided competent counsel in the post World War II Smith Act cases marked the beginning of the rebirth. The Smith Act controversy re-sensitized the bar and helped educate the public toward an acceptance of the fundamental propriety and worth of the defense of all persons charged with crime, whoever the person and whatever the crime. The bar continues this work in its current concern that counsel be available for persons arrested in connection with integration efforts in the South. Other significant developments in recent years include the formation in 1958 of the National Association of Defense Lawyers in Criminal Cases, with the aim of improving the competence and the integrity of the criminal bar as well as its image. In addition, there has been a widely reported renewal of concern for an enriched teaching of criminal law and procedure in the law schools, a proliferation of "how to do it" seminars for practitioners, and, in a number of law schools, a student inn movement has begun to develop student interest in criminal practice. Appropriately, the Supreme Court of the United States has provided what is perhaps the greatest stimulus to interest in criminal law in the past several decades. It is commonplace that attention even to cardinal rights may lag when such rights are taken for granted. The Court's often expressed concern for the protection of civil liberties, and its declarations of the central part that counsel plays in assuring due process, have continually recalled to both the bar and the nation some fundamental propositions which might have been taken for granted but for the Court's reminder.

And now, a bow in the direction of the judge, the practitioners, and the teacher who have taken time to prepare the scholarly contributions

included in this issue of the *Review*. These efforts represent substantial contributions to an improved competence in the practice of criminal law and the administration of justice. The contributors obviously thought the purpose significant. The Editors of the *Review* agree.

Nothing remains but to launch an arrow in the direction of the Philistines. With all the ferment that is beginning in this field, perhaps the time is not far off when only the obdurately unenlightened will find humor in the paraphrase of a barb attributed to Samuel Johnson: "I don't want to speak about the gentleman behind his back, but I have heard it said that he is a criminal lawyer."