A Comparative Examination of the Role of the Criminal Lawyer in Our Present Day Society

Harris B. Steinberg

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Harris B. Steinberg, A Comparative Examination of the Role of the Criminal Lawyer in Our Present Day Society, 15 W. Rsrv. L. Rev. 479 (1964)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol15/iss3/7

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
A Comparative Examination of the Role of the Criminal Lawyer in Our Present-Day Society

Harris B. Steinberg

More than a century ago, that astute observer of the American scene, Alexis de Tocqueville, remarked that the lawyer was the closest approximation to an aristocrat to be found in the fledgling society emerging in the New World.

Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them.¹

At the time he wrote, the new nation had only recently been separated from the mother country. Indeed, the bar in America consisted to a great extent of men who had learned their law in England and who relied upon English precedents in dealing with their cases. The character of the American bar was naturally much like that of the English bar, and both were significantly different from the bars of other countries.

This aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and England than in any other country. This proceeds not only from the legal studies of the English and American lawyers, but from the nature of the law and the position which these interpreters of it occupy in the two countries. The English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decisions of their predecessors. In the mind of an English or American lawyer a taste and a reverence for what is old is almost always united with a love of regular and lawful proceedings.²

What was "old" and entitled to reverence, for both English and American lawyers at the time was the set of firmly established liberties

---

¹ DE TOQUEVILLE, DEMOCRACY IN AMERICA 276 (1946).
² Ibid.
contained in the Bill of Rights. The English also had just finished the formulation of their police system, which was quite different from the gendarmeries of the continental nations; it was one which scrupulously respected the basic rights of the citizen. This was so only because the citizen knew his rights, insisted that they be respected, and was truculently ready to fight for them.

Power usually falls into the hands of those who love power, and it is not in their nature to be benevolent. Peel’s police had to be mild because it had to win the approval of the public. This was the reason for the striking difference between the British police and all other police forces at that time. Many of the gendarmeries had already found that popular support was a desirable advantage; but to them it was never a necessity. Ultimately they drew their strength from their power to coerce. They could be lenient as and when it suited them, but in the last resort they relied on being feared. The British police had to be liked. Its very existence depended on this.3

The English — and their close cousins, the Americans — chafed under authoritarian restraint of any kind and resisted it aggressively when it showed itself.

For all its many faults, pre-Victorian English society had one great virtue; it hated discipline. Only such a society could have forced Cromwell to abandon his military-police system, which if established could so easily have survived the Restoration. Only such a society could have thrown up the Fieldings and, where necessary, curbed their zeal. Let us not forget that the traditional mildness of our police was won by our ancestors not as a reward for being law-abiding, but as an unavoidable concession to their hatred of constraint.4

The American bar of the early days of the republic played its part sturdily and unhesitatingly when it became necessary to defend a citizen’s liberties. If lawyers were, as de Tocqueville observed, an aristocratic element, they honored the maxim, “Noblesse oblige.” In the celebrated case of the British soldiers charged with murder in Massachusetts because of the affray later known as the “Boston Massacre,” John Adams and Josiah Quincy, Jr., patriots and leaders of the Revolution, felt it to be their duty to furnish legal counsel to the hated redcoats accused of murdering their fellows. In a letter which is a great classic of the literature of the law, young Quincy wrote to his alarmed and aged father that he would persist in this highly unpopular cause because his duty as a lawyer required it.

I have little leisure, and less inclination, either to know or to take notice of those ignorant slanderers who have dared to utter their “bitter reproaches” in your hearing against me, for having become an advocate for criminals charged with murder. But the sting of reproach, when envenomed only by envy and falsehood, will never prove mortal. Before pouring their reproaches into the ear of the aged and infirm, if

4. PRINGLE, op. cit. supra note 3, at 209.
they had been friends, they would have surely spared a little reflection on the nature of an attorney's oath and duties; — some trifling scrutiny into the business and discharge of his office, and some small portion of patience in viewing my past and future conduct.

Let such be told, Sir, that these criminals, charged with murder are not yet legally proved guilty and therefore, however criminal, are entitled, by the laws of God and Man, to all legal counsel and aid; that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation . . . . I dare affirm that you and this whole people will one day REJOICE that I became an advocate for the aforesaid "criminals" charged with the murder of our fellow-citizens.⁵

For many years, this trait of readiness to spring to the defense of one thought to be the victim of an injustice at the hands of the powerful, heedless of the consequences to the lawyer himself, was a hallmark of the American bar. In that touching and affectionate memoir which Bellamy Partridge has given us of his father, a country lawyer practicing in upstate New York shortly after the Civil War, he made particular note of that quality in the lawyer.

Nothing so enraged my father as seeing the law used as an instrument of injustice, and he would accept the case of the veriest old vagabond against the mightiest if he thought there was any chance to uncover what he called "facial piety" on the part of the higher ups. He took particular delight in unmasking anything that had even a faint aroma of persecution, an attitude which first and last must have cost him no small amount of business.⁶

In the cities, too, no less than in the smaller communities, this willingness to tilt a lance for principle was a characteristic of the American bar of the last century. The late Judge James Garrett Wallace, in his Introduction to Rovere's Howe & Hammel, Their True and Scandalous History, noted that it was a group of leading lawyers in New York who rose against and slew the noisome dragon, the Tweed Ring.

In 1871, the Tweed Ring was exposed by public-spirited citizens, urged on by The New York Times and Harper's Weekly, which carried Thomas Nast's devastating cartoons. The City Bar Association was formed to fight the ring. It was led by a valiant fighter for civic decency, Samuel J. Tilden, aided by William M. Evarts, Joseph Choate, and others. The efforts of these and other citizens resulted in the indictment and conviction in 1873 of Tweed, Connolly, and others, the emergence of Tilden as a great political figure, and the election of William L. Strong, a reform mayor, in 1894.⁷

Nor was the role of these big city leaders of the bar confined to corporate and civil matters when they turned from their civic efforts to the practice of law; it was considered not at all unusual for these men to appear for the defense in criminal cases from time to time.

⁷. Rovere, Howe & Hammel, Their True and Scandalous History 6 (1947).
In the courts, many lawyers of the first rank appeared for defendants in criminal cases. Practice in the criminal courts was not avoided by the leaders of the Bar, as it is today. The trial lawyer, not the corporation lawyer, was the important figure in those days.8

DECLINE OF THE CRIMINAL BAR

But in more recent times this picture has changed quite radically. The advent of "Prohibition" and the public's horrified and disgusted view of the attendant violence and corruption probably marked the final turning point. The criminal bar, in numbers, effectiveness, and public esteem, seems to have taken a steep drop at that time. In 1953, when Professor Richard B. Morris wrote Fair Trial, which told the stories of fourteen notable American trials over a long span of years, he was impelled to note that "it is scarcely a matter of dispute that the quality of the criminal bar has in fact seriously deteriorated in recent generations.9

The rise of political machines in big cities around the turn of the century was often accompanied by seduction of the machinery of criminal justice. The autocratic leader of a machine often enriches himself and his associates, at least in part, from the proceeds of organized illegal gambling and vice. It needs little foresight to decide to lend safety to the enterprise by installing complaisant judges and prosecutors in office who will not interrupt the smooth and profitable functioning of the status quo. Conditions like these furnished scant impetus or encouragement for able young men to become involved in such distasteful doings. The best known and most influential lawyers were also drawn away from litigation to the greater rewards attendant on practice in the growing fields of corporate, business, and tax matters. The changing nature of American society furnished a challenge which drew many of our best men to practice which involved the problems of big business. Dean Eugene V. Rostow, of Yale Law School, points out that this direction of the American bar is not necessarily to be decried.

A comparison of the professional position of the lawyer in Britain and in the United States illuminates several problems which we should face, and solve, within the pattern of our own history. In defining these problems, we should accept the present functions of the lawyer in our complex society, and particularly those of the specialist in business and corporate law, as necessary and desirable. They represent a creative response to the special circumstances of American life. At its best, as Mr. Justice Brandeis once said, the role of the American corporation lawyer is an influence in the direction of professionalizing business. At its worst, to recall Chief Justice Stone's warning, it is a factor tending to commercialize the profession of law.10

Whether or not the American society is well served in the area of corporate and business law because of the attractions of those fields for our most brilliant legal minds, it is clear that we have suffered in the area of civil rights and civil liberties by virtue of the attrition of the trial bar. Comparison of the situation here in the past few decades with that prevailing in England brings this into focus.

**Developments in England**

In England, it has always been true that an able and respected lawyer can invariably be found for every defendant in a criminal case. Even defendants without funds can be sure of a well-conducted defense through the help of the legal aid system. In this country, the availability of defense lawyers in criminal cases has been so sparse that the recent decision of the Supreme Court in *Gideon v. Wainwright*, enforcing the constitutional right to counsel in state courts, has thrown our bar into a tremendous upheaval. The necessity of finding adequate numbers of lawyers able to try criminal cases has posed a problem of major proportions, to which no ready solution appears.

Several reasons suggest themselves for the widening cleavage between the English and the American societies with respect to the manner in which they have developed. Starting from a common heritage, what was until a few decades ago a common way of conducting the business of the administration of criminal justice has been split into two systems with significant differences of substance.

In the first place, the English have continued their division of the law profession into two separate branches, barristers and solicitors. The barrister is the trial lawyer. He is a member of a priestly caste, proud of his ancient forebears in the Inns of Court. The number of active practicing barristers only approximates 2,200. The respect in which they are held has been safeguarded by rigid customs of holding themselves aloof from the process of gathering evidence, interviewing witnesses, the setting of fees, and all matters which could conceivably expose them to the claims of soliciting business or suborning untruths.

True, the barristers are outnumbered almost ten to one by the solicitors who handle office work, commercial clients, tax matters, conveyancing, and advice on daily affairs. The average solicitor, however, makes a great deal more money than the average barrister. Again, the English judiciary is chosen from the ranks of the best barristers, regardless of political considerations. A man who aspires to the bench must win the favorable opinion of his knowledgeable fellows by being a good lawyer. He need not seek the approval of political machines, as in America,

---

where the judge's robe is too often the reward for services having little to
do with legal merit or integrity.

The public, too, is proud of its barristers, and would never think of
attributing to one of them the faults of his client or the hatefulness of
the client's cause. They know that a barrister does not pick and choose
his cases, but that he is in honor bound to take any case offered to him
with a proper fee. This "cab rank" principle is at the root of the law-
yer's ability to dissociate himself in the public eye from his client's un-
popularity and the heinousness of the charge. The rule was recently dis-
cussed by Lord Shawcross, in his capacity as Chairman of the General
Council of the Bar, in the following terms:

I have recently heard it said, although I believe incorrectly said, that
certain members of the Bar in one of Her Majesty's Colonies refused
to accept a brief to defend an African, accused of offenses of a quasi-
political nature against public order. The suggestion is that those bar-
risters made excuses and declined to act, their true reason being they
thought that their popularity or reputation might be detrimentally af-
ected by appearing for the defence in such a case. For the prosecu-
tion they might appear, but not for the defence.

I believe this report is incorrect. I profoundly hope it is, for if it were
true it would disclose a wholly deplorable departure from the great
traditions of our law and one which, if substantiated, both the Attor-
ney-General and the Bar Council, of which I happen to be chairman,
would have to deal with in the severest possible way.

It remained true that among laymen on both sides of politics there were
some foolish and shortsighted enough to think that a barrister might,
and should, pick and choose the cases in which he was prepared to ap-
pear. Socialist lawyers had been thus subjected to bitter attack in
Communist organs and by fellow travellers who did not like the sub-
ject-matter of cases in which those lawyers had been briefed to appear
or the politics of the clients who might have retained them.

It would be well if those gentry remembered how the present rule —
that a barrister must accept a brief on behalf of any client who wished
to retain him to appear before any court in which he held himself out
to practise — was finally established. It arose in 1792 over the prose-
cution of Tom Paine for publishing the second part of his Rights of
Man. The great advocate Erskine, who accepted the retainer to defend
Paine, and was deprived of his office as Attorney-General to the Prince
of Wales for doing so, said — and said truly — in a famous speech:
"From the moment that any advocate can be permitted to say that he
will or will not stand between the Crown and the subject arraigned in
the court where he daily sits to practise, from that moment the liberties
of England are at an end."12

Two more significant aspects of English practice remain to be dis-
cussed in this connection. One is the firm restraint against any intru-
sions by the press on the process of justice. Newspaper, television, or
radio reports which contain matter prejudicial to the fair trial of a crimi-
nal defendant will result in the prompt jailing of the offending publisher

for contempt of court. As a result, the public is not titillated or aroused to a lynch-mob fervor by gory details of crimes, the minutiae of confessions, prior criminal records of defendants, or editorials demanding "justice" while the case remains at issue. The second aspect is that there is no permanent cast of characters in a continuing morality play — the "good guys" against the "bad guys." There is no permanent official prosecutor, who appears always in the role of avenger of the oppressed victim of crime and who often seeks higher office on the strength of his appeal as a prosecutor; there is no complaisant grand jury to hand down "presentments" drawn up by the prosecutor's public relations officer; and the defense lawyer is not always on that denigrated side. In short, the system whereby a barrister for the prosecution and a barrister for the defense are briefed separately in each case results in consideration of the barrister as a cooperative part of the machinery of justice, rather than as a symbolic protagonist for good or for evil.

*Recent American Developments*

Let us contrast these conditions, which result from following the straight line of logical developments stemming from the Great Charter and the Bill of Rights, with those which obtain in our own country.

In America, there is, of course, no division into barristers and solicitors. We have already adverted to the fact that the more knowledgeable and able a lawyer is, the more nimbly he is likely to skip to the kind of work which will take him as far from the criminal law as possible. Inevitably, the moneyed society of which we are a part will offer to the lawyer enticing social and monetary incentives which will take him away from the trial court and point him toward serving business clients. The standards of the bar will be influenced by its leaders, and if those leaders are closely attuned to the thinking and attitudes of businessmen, they will reflect those attitudes in their dealings with their brethren at the criminal trial bar. The pecking order is never in doubt; the absence of a separate barristers' group, with its own traditions and standards, leaves the trial lawyer to an appraisal by others unsympathetic to his aims and his problems.

Second, our judiciary is chosen, not as in England on the strength of performance at the bar after appraisal by a lawyer's colleagues, but by such irrational systems as general elections and politically inspired appointment by executives who must seek election. One is infinitely more likely to find a prosperous lawyer without trial experience but with long political service chosen for the bench than to see a criminal lawyer for the defense chosen for such a post. Since many lawyers have the bench as their ultimate ambition, this situation acts as a further deterrent to the choice of criminal law as a career.
Third, the "cab rank" principle alluded to above does not obtain here. The American lawyer has maintained his freedom to pick and choose cases; it may well be a most illusory freedom, more binding than slavery. Even so well-known a trial lawyer as Louis Nizer was reported in the Harvard Law School Record of March 7, 1963, as saying that no ethical canon required him to represent a man for whom he could not argue with conviction. He stated that he was "unable to fragment his emotions in order to represent a Communist or some other man he despises." If this be so, who will be found to take the causes or clients who are justly looked on with revulsion and loathing? Why should a lawyer take on the defense of a Communist, a narcotics peddler, or a sexual pervert, if he is free to reject it? Is not the public justified in believing that a man who does so is motivated either by greed for money or by a sympathy for the things represented by the defendant? The attendant fears and confusions which lurk around these questions have all but deprived the "unpopular" client of a defense in this country.

Fourth, the press and other mass media of information are completely untrammeled in their reporting of news concerning criminal cases. Often a fair trial is impossible. A sobering recent example of the extremes to which this sort of thing can be carried are the sad events in Dallas which followed President Kennedy's assassination. The pressures built up by this type of intrusion on the concept of a fair trial are pervasive in their effect. Elected judges and prosecutors rarely have the courage to take a firm stand against what the public, as represented by the press, seems to want. The trial lawyer is either a willing performer, adding to the unseemliness, or a curmudgeon charged with seeking to keep the truth from the world if he attempts to adhere to the Canons of Professional Ethics.

Finally, the permanent separation of the protagonists in the criminal trial into two camps — elected prosecutors, who are always on the prosecuting side, and defense lawyers who are always for the defense — makes it easy for the unthinking to equate the two sides with "right" and "wrong," respectively. The growing tendency to identify lawyers with their causes intensifies the feeling that a defense lawyer probably must socialize with his clients, as the laymen knows his own business lawyer does. The consequent mental picture of a defense lawyer, roistering on an expense account with gangsters and their molls, is hard to erase when one acts as a juror or reads a newspaper account of a case. An added factor contributing to the cleavage is the fact that the prosecutor's office is often the best stepping-stone to higher elective office. Realizing this, many of them seek to stay constantly in the public eye, with statements and releases about pending cases, investigations, grand jury presentments, and statistics of law enforcement and convictions.
POPULAR MISCONCEPTIONS

It is not strange that, as we regress from good practice in our dealings with criminal justice, certain unreal or mythic ideas should be widely held by the public. One of the questions most often heard by a criminal lawyer is, "How can you bring yourself to represent a man you know to be guilty?" Many thoughtful lawyers have given answers to this question. Suffice it to say here simply that our system requires that a man charged with crime is presumed to be innocent until he is proved guilty; that it is not the lawyer's job to judge his client, but to defend him and see that his rights are accorded him. These are, admittedly, abstract concepts, not easy for laymen to grasp and respect. The hard facts of ruthless crimes and the bleeding wounds and cries of anguished and bereft victims are easier to understand; they unloose revengeful passions and emotions not lightly to be dealt with by reciting abstractions. But contrary to such ringing catch phrases as "crusades against crime" and "wars on racketeers," the business of justice is neither a crusade nor a war. It is, on the contrary, an attempt to bring calm and dispassionate reasoning to the solution of difficult problems; it is a peaceful skill, rather than a warlike one or a substitute for war. Objectivity on the part of the lawyer is a desideratum. Lord Shawcross, in his Cardozo lecture at the Association of the Bar of The City of New York, spoke as follows:

I have . . . always found it best to avoid forming any personal opinion on the merits of cases I have dealt with. Eventually that becomes rather a habit of mind. Of course, that may mean that one lacks the enthusiasm of an advocate firmly convinced that his cause is just: it also protects one from despair or hypocrisy when we feel the opposite.13

The most mischievous piece of folklore which obscures the true function of a criminal lawyer is the more basic misconception about the true function of a criminal trial. One often hears the magniloquent phrase, "A trial is a search for the truth." If it is really a search for the truth, and if the ascertainment of truth is the principal purpose of a trial, one can understand the reluctance of some lawyers to be on the "wrong" or "untruthful" side. It does seem logical to feel uneasy at being allied with a client who has the worst of it in anything so noble as a search for the truth. Can it be considered proper work for an honest advocate to make it his business to urge technicalities which get in the way of ascertaining the truth? Are not the presumption of innocence and the fifth amendment really only moves in a rather unreal game designed to obscure the truth, rather than to reveal it?

A policeman or an aggrieved victim of a crime may say, with some

---

justification, that it is certainly a queer kind of search for the truth which bars, at the outset, compelling the defendant to tell what he knows; certainly he knows more about the case than anyone else. It is a strange kind of search for the truth when you have absolutely incontrovertible evidence of what really happened, but you are barred from adducing it because you obtained it by breaking into the defendant’s home without a warrant. Is it not at odds with a dedicated search for the truth to prohibit tapping a man’s wire to hear him plotting with his confederates?

The answer, it seems, lies in the fact that in our society we believe that an individual’s human dignity, his right to be treated as a person of consequence, and his right to be treated as an individual rather than as part of an undifferentiated mass are important. Thus, we willingly have eschewed ways of learning the truth about a happening which are destructive of that dignity and human integrity. We no longer torture people to induce them to confess. Yet we know that for many centuries and in many lands torture has been used for that purpose. We do not stretch a man out on a table and inject truth serum into his veins or force him to take lie detector tests; yet we know that in some parts of the world that is a common practice. Other societies do not hesitate to do so, but it is precisely in that difference in respect for individual rights that we believe the superiority of our system lies. We firmly hold to the idea that it is less important to learn the objective factual truth about a happening, no matter how bad that act was, than to adopt methods of gathering facts which will lead us to live in suspicion, fear, distrust, and degradation. It may not be getting at the truth when a man who has committed a crime is let off scot-free, but it is good sound justice to throw out a case where the very persons charged, under oath, to uphold the Constitution and the laws have themselves violated it and disrespected it.

Dean Thayer of Harvard Law School said it well many years ago when he wrote:

In dealing with litigation courts are not engaged in an academic exercise; with them the search for truth is not the main matter. Their desire to know this and their ability to use it are limited by the requirements of their main business, that of awarding justice.

Our common law system, over a thousand years, has evolved certain rules and rituals which have proved themselves empirically, to be sound. The rules of evidence may sometimes work to exclude testimony which is “truthful,” but experience has taught us that in the great majority of cases they work well, and that they serve the cause of justice acceptably.

It is the lawyer’s function or role in our society to serve the cause of justice by wholeheartedly accepting the defense of a person charged with crime and asserting every defense in his behalf which is available to
him. He serves the system of justice in doing so, even more directly than he serves the individual client's interests. Important though the latter assignment may be, it is only made possible by acknowledging the greater importance of the former.

It is well to keep in mind that our system of justice and all of our beautifully phrased rights which appear in the Constitution and statute books do not work automatically. It requires the cooperative interaction of a complex cast of characters, an indispensable one of which is the defense lawyer committed as an antagonist to insure that those rights will live and be meaningful.

Another misconception often encountered is the attitude that true justice is to be achieved by an inflexible and uniform application of the rules to all people — "rich and poor alike." If that be truly the ideal, then the interposition of a hired champion to plead for leniency or to seek to avoid the consequences of one's acts seems rather unworthy and anti-social. Professor Edmund Cahn, in his stimulating book, The Sense of Injustice, provides a good answer to those who question a lawyer's role in this regard:

The standards of law provide our best pragmatic technique by which arrogant administrators and executives can be called to book. And when, on the other hand, legal rules are to be applied to the lowly, there is at least a modicum of discretion available to magistrates, juries, policemen, commissioners, and state's attorneys. General rules need not decide deviant particular cases, unless officials are dogmatic, stupid, corrupt, or inhumane. For, to the sense of injustice, an individual's peculiar qualities may be empathized as a constituent part of his predicament and thus they may influence the determination of his desert. We cannot abandon the conceptual man without jeopardizing many of the freedoms that the past has won. But the conceptual man is never quite the one in the prisoner's dock. The latter is as God and society have made him, with such alterations as he himself has been able to furnish. The composite impression conveyed by all the circumstances can sway the judge and the jury when they come to their final appreciation of his case. Then it is that a rule of law and a list of facts must be chosen conformably to the general denouement which is felt to be just. So as long as the sense of injustice proffers its imaginative interchange, law may be conformed in its individual applications to many if not all the special needs of nonconformists.14

The foregoing rather bleak appraisal of the extent to which the role of the criminal defense lawyer has deteriorated over the years is tempered by a number of recent developments which, hopefully, may reverse the trend.

Among them are the landmark decisions in Mapp v. Ohio,15 and Gideon v. Wainwright.16 Mapp, of course, held that evidence obtained

in an illegal search and seizure may not be received in a state criminal trial. This had always been true in the federal jurisdiction, but many states had followed the rule of People v. Defore, which held that such evidence would be admitted since the relevance of the evidence required its receipt, while the illegality involved in obtaining it would have to be dealt with in collateral proceedings such as a civil suit against the offending officer. The trend of state court decisions had been away from the Defore case, and Mapp v. Ohio dealt the doctrine a final blow. Ker v. California, in 1963, held that the body of federal law and standards developed in administering the federal doctrine of exclusion was imported into the state court administration of the Mapp decision.

There is ground for believing that the Mapp decision, in addition to being good public policy and good constitutional law, would not hamper a well-trained police force in its work. Thus, the Federal Bureau of Investigation, as well as other federal agencies which are compelled to work under the exclusionary rule, have compiled a creditable record of effectiveness despite the strictures of the rule.

But state and city police forces which had never bothered with search warrants or other constitutional safeguards, secure in the knowledge that Defore's doctrine made warrants a technicality which could be winked at with impunity, have been seriously discountenanced by the new rule. The reaction was a predictable one. Instead of welcoming an affirmation of an important constitutional right and turning promptly to the task of training police officers in the law which they are sworn to uphold and obey, the outcry was against the strictures of the new law. Attempts to avoid it have taken many forms.

Interesting are a number of laws adopted recently by the New York Legislature at the urging of law enforcement agencies. One permits stopping of persons on the street and "frisking" them in a search for weapons on mere suspicion. The law reads as follows:

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Another, section 791 of the New York Code of Criminal Procedure, effective July 1, 1964, provides that search warrants shall issue not only for well-understood categories of property subject to seizure, such as stolen or embezzled property, contraband, or instrumentalities of crime, but for evidence as well: "4. Property constituting evidence of crime or tending to show that a particular person committed a crime."\textsuperscript{21}

It remains to be seen whether such attempts to avoid a constitutional mandate by a statute directly at odds with it will be deemed effective when the courts consider them. While this author is of the opinion that they are unconstitutional, the aspect of these acts to which attention should be drawn is the nature of the public response to the publicized wholesale freeing of defendants under the \textit{Mapp} case ruling because the rights of those defendants had been violated. Instead of demanding prompt police reform to prevent the freeing of guilty men because of the "constable's blunder," the anger and fear of the populace has been directed at the Constitution, the Supreme Court which interpreted it, and the lawyers who espouse defendants' causes.

During "Prohibition" days, the wholesale liberation of defendants because of illegal searches and seizures had similarly aroused public reaction against the Constitution.

In 1925, so thoughtful and able a judge as Judge John Knox, of the United States District Court for the Southern District of New York, spoke at the Association of the Bar of The City of New York, and launched a strong attack upon the Fourth Amendment. He said, 'The Fourth Amendment is a terrible stumbling block in the way of justice.' If this sounds surprising from such a source, we ought, in fairness, to examine the surrounding circumstances. Judge Knox had then had almost a decade of service on the District Court. Prohibition was in force. Gangsterism, bootlegging, corruption and racketeering were rife. Everywhere, agents were breaking into homes and places of business, without proper warrants, finding illegal liquor, yet cases were thrown out, because of violation of the Fourth Amendment. In despair at what he felt were frequently unjustified verdicts, and results which protected the guilty people, the judge spoke. The fact that a trained, intelligent person felt that way (no doubt mirroring the feelings of many respectable people) at that time, shows that there is a certain virtue in the long-range view when we deal with basic constitutional safeguards. It was far wiser to repeal the Eighteenth Amendment than the Fourth. But most important, it shows us that governmental abuses of a basic right may stir up a great deal of resentment, not against the abuse, but against the unpopular person who stands in the way of that abuse, and claims his rights.\textsuperscript{22}

Other examples of dark periods in our recent history, when the assertion of a constitutional right called down the opprobrium on the heads of

\textsuperscript{21} N.Y. CODE CRIM. PROC. § 791 (effective July 1, 1964).

\textsuperscript{22} Steinberg, \textit{A Re-Examination of The Fifth Amendment}, N.Y.S.B. BULL. 230, 233-34 (1959).
the persons properly claiming the right, rather than on those who deni-
grated the right, are found in the McCarthy Committee hearings of evil
fame, and, more recently, in televised Congressional hearings where wit-
nesses were repeatedly forced to claim their privilege against self-incrimi-
nation in public.

But what do they [the Senatorial Committee conducting hearings] add
to the efficacy of their job when they learn, at private preliminary hear-
ings, that a prospective witness, whose misdeeds will be the subject of
a public hearing, intends validly to claim his privilege, but nevertheless
insist on his appearance, and the public claim of privilege? Again,
what purpose is served by asking that witness a score, two score, or a
hundred questions, knowing in advance that every one will be answered
by a claim of privilege? Certainly, the committee learns nothing from
the witness. If the witness' misdeeds are relevant, they are usually docu-
mented from other sources.

On the other hand, what do we lose from such a procedure? Wide-
spread publicity, motion pictures, television broadcasting, bring home to
the lay public that A has claimed his privilege 197 times, or 215
times, that he read his statement monotonously from a paper prepared
by a lawyer, and thus he has thwarted the government. The more times
the privilege was claimed, the greater the criminality; the more times
he asserted his undoubted rights, the more vicious the man. Ergo, let us
do away with the privilege, so we will have no more such unedifying
scenes. This is a dangerous logic. Much more valid, it seems to me, is
the conclusion that if a man has a right, and we know that he intends
properly to assert it, we should not force him to assert it, and thereby
impugn not only his own integrity, but the rights of all of us. I would
hope that now, five years after the turmoil of the McCarthy hearings,
in quieter retrospect, we have learned the lesson that self-restraint,
in matters like this, better serves the public interest in the long run
than heated, sensational dramas.

It is to be hoped that the tensions and uncertainties which require
resolution in the wake of the Mapp case will not start a trend toward ill-
advised panaceas which must inevitably fail, and, in their failure, call
forth even more fear and anger. A nation which does not welcome the
responsibilities and benefits of freedom is one which can easily lose its
freedom.

CONCLUSION

During our recent history, certain overwhelming events have made
their effects felt so shatteringly and so swiftly as to leave us wandering,
dazed, and uncomprehending for a time before we were able to adjust to
them. Such is the impact of automation on a multitude of comfortably-
situated wage earners suddenly made excess. Such is the emergence of
the atom bomb as a weapon and as a looming threat over life itself. Such
was the abolition of the long-time acceptance that men with dark skins

23. Steinberg, supra note 22, at 234-35.
may be discriminated against with impunity. Such, it is submitted, is the effect of *Gideon v. Wainwright* and the other threads in the shining fabric which our Supreme Court has woven in the past decade. We stand on the threshold of a new era in our history of civil rights and constitutional liberties. A golden vista of a society where every man is important, regardless of race, color, or religion, stretches before us for the taking. Not only is it offered, it is accompanied by an imperious command that it must be taken.

The priests in the old temple of justice, which was a flourishing institution in this country a century ago, and which is still a healthy one in England, come blinking out into the clear light of a new dawn. They are old, they are too few in number, they are often understandably discouraged, and for some generations their religious fervor, their standing in the community, and the purity of their rites and practices may have suffered. But they must be the nucleus for a strong, widespread effort by the entire bar to fulfill the duties enjoined on us by *Gideon* (an appropriate name, if we hark back to the Biblical story).

Civil trial lawyers will have to take their part in the administration of criminal justice; legal aid societies and public defenders will have to be organized and staffed with able, dedicated, young people. All varieties of part-time and experimental expedients will have to be tried. But we have no choice but to provide every man accused of crime with a competent lawyer ready to defend him, and to take an appeal if necessary. The criminal lawyer should welcome the challenge of the new colleagues and the new rivals. Higher standards will inevitably prevail as interest, talent, and dedication are added to the presently available inadequate forces. The criminal lawyer can either increase his skills and share those he has with the new men, or he will be left behind, grumbling, shaken, and telling of the "old days" to an unheeding world.

For all who take part in the new situation there is the exciting and heartening knowledge that they are the direct legatees of a great heritage.

Let us not forget that John Peter Zenger's case, and the Tennessee monkey trial, and the Southern sit-in cases, and every case which has established a landmark in our fight for civil liberties and constitutional guaranties were criminal cases.\(^{24}\)

It is unthinkable that we will not be equal to the challenge posed by the recent decisions of the Supreme Court.

---

\(^{24}\) *Steinberg, The Responsibility of the Defense Lawyer in Criminal Cases, 12 Syracuse L. Rev. 442, 447 (1961).*
fense attorneys, their hand-picked juries, and the judge. Men — within limits — can rise to great occasions. So, there is still cause for hope, though the first stages have not been propitious.25

So wrote Sybille Bedford, a sensitive and profound English observer, author of *The Trial of Dr. Adams* and *The Faces of Justice*, when she came to Dallas to report the Ruby trial for *Life Magazine*. Perhaps this hope was disappointed in a specific case; it is our job to make it generally valid in the future.