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Counsel for the Defense

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COUNSEL FOR THE DEFENSE

In the presence of this company I have departed from my usual extemporaneous custom and have committed my remarks to writing.

The subject suggested—Counsel for the Defense—is here interpreted to refer to one who specializes in the defense of persons charged with criminal offenses.

There is in the title selected a subtle implication that one who so specializes is himself in need of a defense.

It appears to be the current fashion to discredit the practioner of criminal law and to regard such practioner as outside of the fold. The critics go further and invoke and exercise the social penalties so cogently defined by John Stewart Mill in his essay on Liberty: "The tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."

Suggestions have been made from time to time that criminal lawyers are often in Particeps Criminis. Unfortunately, this adverse criticism is not confined to the general public. It is all too frequently exercised by certain members of the Bar.

Now, agricultural communities like ours do not produce criminal lawyers, that is, lawyers who limit their practice to criminal law.

The experience of your speaker may afford an illustration. I think it may be fairly stated that I have tried as many criminal cases as any North Dakota lawyer now practicing, but for every such case I have tried ten or more civil actions.

It is indeed very doubtful whether the charges imputations and insinuations most frequently used with reference to criminal practice can withstand critical analysis.

It may be well to briefly review the most persistent of these charges by setting them forth here in the form of counts in an indictment.

Count One
The Practice of Criminal Law Is Distasteful

The notion here is that such practice brings the lawyer in constant contact with unpleasant and sordid persons and situations.

Of course there can be no debate concerning a matter of taste.

Generally, this objection is put forth by those who seek to ignore the existence of disagreeable social phenomena by closing their eyes.

One of the truly great trial lawyers produced by this state and who tried a great many important criminal causes had this to say with reference to this claimed distaste for the trial of criminal matters. I am quoting him substantially: "Trial lawyers are born, not made; of every hundred trial lawyers only a very few are capable of properly conducting a criminal trial." It was his thought that a successful criminal lawyer must possess a special talent for alert thinking and resourcefulness. Thus, he asserted that many lawyers do not try criminal causes because they are unfitted to do so, and they endeavor to rationalize and glorify their lack of capacity by belittling the practice.

The facts of crime, however distressing, should no more affect the sensibilities of the lawyer than the suffering and cruel physical defects of his patients affect the doctor or the grievous sins of his parishioners dishearten the clergyman.

Crime, regarded as a social phenomenon, exacts the utmost from those who endeavor to assist in its solution and in the protection of those caught in the coils.

Count Two

That Criminal Practice Is Largely Factual and Requires Merely a Superficial Knowledge of Law

This count is quite frequently charged by so-called civil practioners. The civil law is concerned largely with property rights, which are nothing more or less than personal rights which have been salted down. Criminal law, by way of contrast, involves human rights.

Criminal law, therefore, is basic in regulating the relation of the individual to government and to other individuals. It requires a deep understanding of the nature of man—of government—of liberty—of constitutional limitations—of due process and above all, of procedural safeguards which are the very substance of liberty.

Criminal trials have affected the course of history and the welfare of nations. It may be well to refer to a few of the outstanding criminal trials to illustrate the point:

The trial of Socrates charged with corrupting Athenian youth, with blaspheming the Olymphic gods, and with seeking to destroy the constitution of the republic, is a sublime chapter in the history of a wonderful people.

The trial and execution of Charles I of England sealed with royal blood a new covenant of British freedom, and erected upon the highway of national progress an enduring landmark to civil liberty.

The philospher of history may very well conclude that these proceedings against a Stuart king contribute to English consitutional growth which in turn has given to mankind the Magna Charta, the Bill of Rights, the Petition of Rights and habeas corpus.

The trial of Warren Hastings served notice that English conquest was not intended to despoil and enslave. The decision was prompted no doubt by the success of the American Revolution which had established the immortal principle that the consent of the governed is the true source of all just powers of government.

The trial of Aaron Burr for treason, his arraignment at the bar of public justice for attempting to destroy the republic had a great effect upon the solidarity and the future of this country.

The trial of Dreyfus in France, his conviction and banishment, was an oustanding example of the failure of government to extend protection to an individual and constituted one of the most pathetic epochs of a century.

The trial before the Great Sanhedrin whose judges were the high priests of a divinely commissioned people; in this trial were many issues of jurisdiction and procedure under the Hebrew criminal law. The result has been felt for over nineteen hnudred years.

The late attempt of the United States Government to prosecute a large number of unrelated persons under the so-called Conspiracy Law calls attention to the fact that by use of this criminal charge which was originated by the court of Star Chamber, government has been gradually attempting to import into our law the doctrine of collective rather than individual guilt.

Attention may also be called to the trial now proceeding in Nuernberg, Germany. This matter has given rise to wide diversity of opinion among lawyers, legal writers and jurists of renown. It is difficult to determine whether or not this trial may be called a fair trial under the doctrine of dynamic law or is as some believe, a negation of principles which have long been regarded as the heart of any system of justice under law. Even in the most trivial criminal cause there may be involved questions as to governmental power, individual rights, matters of jurisdiction, matters of procedure of the most intricate and complex type. In fact, it can truly be stated that human progress may be traced through the development of criminal law.

Count Three
That Preoccupation with Criminal Matters Tends To Destroy The Practioner's Respect for the Law

The theory here is that the criminal lawyer in time comes to adopt and to act upon the criminal point of view, namely, that law is somthing to be defied and broken rather than enforced. That ultimately this leads to various forms of malpractice such as perjury, subornation of perjury, suppression of evidence, corruption of jurors, etc.

That such criminal lawyers by a process of evolution become in time lawyer-criminals.

Some evidence may be found to sustain this count. It is, however, limited to a comparatively few isolated instances generally arising in the larger industrial centers. In such communities crime has been placed on an organized and corporate basis and certain lawyers have accepted regular retainers from such organized groups and have become employees therof rather than independent advisers.

Statistics are not available. The reports of such cases, however, indicate that the number or percentage of lawyers so employed are relatively few.

There arises a striking analogy in the development of the practice of law in this country. Through this development many lawyers appear to have lost the independence formerly enjoyed by the profession. A great many members of the Bar have been associated with large corporate interests on regular salaries and as employees. No doubt their views on social, economic and political questions have been in a large measure affected by their employment. This may account for the great loss in prestige of the profession in public affairs. The evil in both instances lies in the loss of independence. Independence of the bar experience shows to be quite as important for the general welfare and the administration of justice as the independence of the judiciary.

Count Four
That It Is Immoral to Defend the Guilty

This count arises from a confusion in thought. The problem presented to the practicing lawyer is legal, not moral in its nature. The question which confronts the practioner is whether the facts as developed under settled procedure authorize government as such to deprive the accused of his life or liberty. This is a matter of historical development in Anglo-American jurisprudence.

Mill puts it this way: "The struggle between liberty and authority is the most conspicuous feature in the portion of history with which we are earliest familiar, particularly in that of Greece, Rome and England."

Out of this struggle has developed the traditional liberal doctrine that government as such is evil per se, but of course, a necessary evil. Our notion of the law is that it possesses certain principles or norms which are anterior and superior to all government. From this has been derived the basic concept of Anglo-American jurisprudence that government may not reach out and deprive any individual, good or bad, of his life or liberty or of his property without what has come to be known as due process.

This is made manifest by the long chain of historical documents in which are set forth the foundation of individual rights as opposed to the naked force of government.

Attention is called to the Magna Charta granted June 15, 1215; the Petition of Rights accepted by Charles I on June 7, 1628;

the Bill of Rights enacted on December 16, 1689 in the reign of William and Mary; the Declaration of Indeepndence adopted on the 4th day of July, 1776, which among other things provides: "We hold these truths to be self-evident, that ALL men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness." The Constitution of the United States adopted in 1787 and the subsequent amendments which provide among other things, "The trial of all crimes except in cases of impeachment, shall be by jury." Article V providing that: "No person shall be held to answere for an infamous crime unless on the presentation or indictment of a Grand Jury or be subject for the same offense to be twice put in jeopardy, nor to be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law." The Sixth Amendment which provides as follows; "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committeed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Similar provisions may be found in the constitutions of various states.

To what purpose, it may be asked, should these matters of substance and of procedure be set down in these solemn documents if lawyers are to adopt the view suggested in the foregoing charge under this count? Guilt or innocence is incapable of simple and easy determination. Over-simplification of this question lies at the bottom of all lynch law. It involves investigation of such matters as intent, malice, premediation, matters in mitigation, justification, excuse, matters involving questions of environment and heredity and mental responsibility. All of these are pertinent and relevant to the inquiry as to guilt or innocence.

It follows that no man can be said to be guilty under the law unless he confesses his guilt in open court by plea or is convicted in the manner and form provided by the law.

Thus, the principle involved is a legal rather than a moral one. The lawyer who defends a person charged with crime is not only entitled to but is in duty bound to insist that government itself should abide by the salutary rules above mentioned.

The Defense rests.

—Francis Murphy

OUR SUPREME COURT HOLDS

In Presbytery of Bismarck, a religious corporation, et al., Pltfs. and Applts., vs. S. J. Allen, et al, and the First Presbyterian Church of Leith, N. D., Defdts. and Resps.

That where property or contract rights of religious organizations are concerned, civil courts will assume jurisdiction.

That where a local religious society, be it either an association or corporation, is a subordinate member of a general church organization,