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DRAMATIC FLIGHT IN THE COURTROOM†

IRVING BEN COOPER*

The special privilege accorded me to address those soon to be invested with professional status at the Bar is accompanied by a deep sense of responsibility. The occasion calls for plain, straight talk.

Let us consider together a throbbing problem—presenting an awful challenge as much to you as to me—affecting daily the peace, dignity and welfare of the national commonweal. How goes it with the courts of the nation with jurisdiction over the personal liberties and destinies of our citizenry? Who comes there nowadays, how are they dealt with, what abuses by overt action or by oversight take place? Who really cares? While we are inquiring, let us keep in the forefront two piercing observations: one by Chief Justice Vanderbilt of New Jersey,

“Most American lawyers show disdain for the criminal law and our law schools dispose of it in two or at most three semester hours, forgetful of the fact that it is ultimately on the enforcement of the criminal law that we must depend for the vindication of our private civil rights.”

As to the other, we hear from Mr. Justice Holmes:

“If the training of lawyers led them habitually to consider more definitely and explicitly the *social advantage* on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.” (Italics mine)

†The fourth Earl F. Nelson Memorial Lecture delivered at the University of Missouri on December 13, 1956.

*Chief Justice, Court of Special Sessions, City of New York.

What do you do with the brilliant college student who picks up a piece of jewelry in a store so that she can look pretty when she is married in a week or two? With the university boy who in a moment of silliness commits an act of exposure that brings him before the criminal bench? With the attractive young lady who has become a drug addict and wants to marry the source of her supply—a man with a long criminal record? What do you say to her parents standing before you wrung white with the anguish resulting from the arrest? Is it sufficient to rule “guilty,” “innocent,” “fingerprint,” “reformatory,” “prison”? Are we really coping with the broad problems of human life when we permit the community to believe that a criminal court handles only the “untouchables?”

These problems, these situations, this plea are succinctly summed up in two brief commentaries by two observers. They require no amplification. They constitute the challenge to all citizens who care. The first is contemporary testimony by a 19 year old city boy:

“Guys who don’t feel like they’re countin’ who are being shoved around, who feel like they are worthless to everybody, well, they’re the guys who go out and try to make names for themselves by being big stick-up guys. It’s on account of they feel like they are nobody.”

The other, by one of the greatest jurists of our land, former Associate Justice Benjamin N. Cardozo of the Supreme Court of the United States:

“Run your eyes over the life history of a man sentenced to the chair. There, spread before you in all its inevitable sequency, is a story of the rake’s progress more implacable than any that was ever painted by a Hogarth. The Correctional School, the Reformatory, Sing Sing, or Dannemora, and then at last the chair. The heavy hand of doom was on his head from the beginning. The sin, in truth, is ours—the sin of a penal system that leaves the victim to his fate *when the course that he is going is written down so plainly. . . .*” (Italics mine)

THE DETERMINED OFFENDER

I shall not discuss tonight the problems presented by the determined offender, except to say that the determined offender against the “peace and dignity of the people” presents a challenge not to be evaded. The right to move safe and unmolested through the city, to be secure at work

and at home, to be protected against frauds and schemers, is the supreme luxury of civilization. For it the community pays a huge price, and is intolerant of failure or lag on the part of its agents and instruments. It cannot be patient with or concerned about the welfare of offenders while they threaten its security and comfort.

THE YOUNG FIRST OFFENDER

According to F.B.I. recent predictions, in excess of 2,500,000 major crimes will be committed this year in the United States. They are not talking about the millions of traffic and other relatively petty offenses. The reference is to murder, robbery, assault, burglary, larceny, embezzlement, sex offenses, narcotics, etc. It is a matter of grave concern when the F.B.I. informs us that of all the persons arrested in our country and charged with the commission of crime in 1955, at least 50 per cent had not yet attained their twenty-first birthday! Most of these are first offenders, "little people" in the matter of possessions and what is commonly considered social importance. Most of them are decent, law-abiding human beings, who in a moment of excitement, strain, or depression gave vent to impulses whose strength they had rarely admitted to themselves, and became enmeshed in the criminal law.

Suppose we listen to a few of them. They are now responsible, well-established and prosperous members of their several communities. Said one, who as a youth had played with the idea of theft by force, "I had an attitude, 'Hooray for me and nobody else.' I always had a wrong attitude."

The second, who as a youth had been similarly inclined, put it this way: "Before I was arrested, I had bad company."

The third, who had committed criminal assault: "I came from a bad neighborhood. I didn't want to listen to anybody or to go to school."

The fourth, who had been convicted of stealing: "Well, I didn't actually have no plans for myself. I was thinking of no job. I probably would have turned out to be a no-good bum; in fact that is what I was just doing, bumming around."

The fifth, who had pleaded guilty to the charge of possessing narcotics, "My parents were pretty swell but at times lax. I was allowed to stray a bit. I didn't have too many wants. Quite a lot of fellows around me went about getting what they wanted in a rough way. I thought I knew right from wrong, but I found myself in trouble."

The attitude of the remaining two who had better than average education and prospects, was summed up this way: "My concern for what I was going to do was just a sort of formal thing which I thought everybody went through." And "I was just going to school and collecting my subsistence—the main thing."

In or out of Court, these are the marks of delayed adolescence, of failure to accept responsibility, of purposelessness in the face of life and destiny—the temper of generalized irresponsibility. Youth offenses, after all, follow in the main patterns of adult desires. Deep in the heart of many an average mature citizen, walled off as an incipient tuberculosis by protective tissue, are the prohibited acts he fortunately escaped committing or being caught red-handed at. To consider youthful crime as something foisted on an innocent, a high-minded and law-abiding community rather than as an aspect of its own thought of itself and its own action, is to be naive beyond sanity.

My plea is addressed to the plight of the young and adult first offenders whose numbers are legion. Generally speaking, every first offender is a potential recidivist. The stake which the community has in the legal process is that he should not actually become one. The object of sentence, then, should be to fit the punishment *not* to the crime, but to the offender.

Today we speak less of punishment as retributive, as deterrent, or as regenerative. We are more aware that the sickness of the soul that brought about the crime is not to be properly treated by a given number of dollars in fines or of days in prison.

Young offenders have a long potential for good as well as for evil. But the potential is in them—not in their act. Sentencing the offense rather than the person plunges certain young people headlong into hatred, revolt, community-repudiation—into something approaching self-destruction, *i.e.*, moral suicide. Society then has lost a son, and gained a wastrel whose depredations have been known to affect the lives of many and to cost millions.

And so they come before the court, month in and month out, day after day, an apparently unending line of human misery and tragedy. How are we equipped to handle them?

GROUPING IN THE DARK

These are issues that face judges as they approach the fateful act of sentencing. After interminable hours of listening to charges and counter-

charges, quibbling and evasions, painstaking establishment of self-evident facts, and the final officially established legal description of an act, judges often find themselves merely at the beginning of what they should know in order to act professionally.

What judges want to know at this point is:

Why did he commit his act? Others about him, somewhat similarly placed, have not so acted. What was there in his experience to turn him criminal? What of his home, his relations with parents, siblings, and neighbors? With social institutions? With peer groups? With friends and boon companions? Who has influenced him? After whom did he mould himself? What variety of activities did he participate in? What has work, love, marriage, parenthood meant to him and how has he behaved in these relationships? Most important of all, what variety of opportunities was open to him? Did he participate in his culture and cherish it? Was he proud to be an American, a Jew, a Catholic, a Negro? What interests does he now have? What skills? Whom does he love? Hate?

How normal, in physical health, mentality, emotional stability, capacity for sustained effort is he? What were the provocations provided by the complainants and by the community in which he was reared and which set the behavior patterns after which he moulded himself? Was strife and thievery, as with the Spartans, the "mode" of the neighborhood, a black eye a decoration and not a reproach? What of the cultural and civic resources of the neighborhood? The religious institutions in which moral values and codes are taught, exemplified, and highlighted with festival? The schools, playgrounds, political clubs, public libraries, police, sanitary and other services—how adequate were they to help form the defendant? How powerful are these upon him now? What capacity for sound living has he shown to date? What is his ability to learn to integrate new experiences? What is his moral potential? What resources will be needed to free this potential? Who stands ready to help him? Can he learn faster in the community or does he require to be withdrawn from associations and conditions in which he has been formed? What kind of community will give him support he must have? What incentives can the community provide to help energize his will?

It is inadequate answers to these inquiries that pose the dilemmas of sentencing. Not until the courts which deal with these perilous problems are adequately staffed with the professional skills will we be able to identify

the youthful offender with good moral potential, who can be safely returned to the community to line up with the orderly citizen, from the hair-trigger, perverted or psychopathic first offender who needs institutionalized care. Yes, "possibilities of murder and desperate love are inside all the least likely skulls." As things stand now, the courts can do little to minimize recidivism; they cannot complete their mission with assurance.

TYPES OF OFFENDERS

Offenders differ in their biological capacities, their family and community background, and how they have integrated these factors into a "character." In some instances their heritage has seemingly been a rich one and they have seemingly misused it. Other offenders seem to have suffered the spite of nature, family, and community and to be more sinned against than sinning. The court, in planning how much and what kind of reeducation is called for and where it shall take place, must concern itself with both these aspects of defendants' needs and the communities' blame.

There is a small but real minority of offenders who exhibit a considerable fund of moral understanding. They themselves reach eagerly for the rod and possess the will to acknowledge, accept, and use the lessons to be learned from their acts. They are eager to make restitution. The steps imposed by the law in bringing the case to settlement have in themselves been severe punishment. The act of apprehension by store detective or by police on warrant, with its inevitable publicity, is searing. The wait in a police station, the notification of family or friends to secure their help is always humiliating. The necessity to obtain bail, the task of obtaining legal help, of soliciting witnesses, of verifying facts about age, education, etc., of bearing the scrutiny and gossip of scores of persons who had not before been important to one, of hashing and rehashing the bitter details of the overt act and its aftermath, the long delays and disappointments which precede the appearance for pleading and a trial, the humiliation of a record, fingerprinting, etc., and their attendant publicity—this thorny and tearful path for some persons, has been far greater punishment than a sojourn in jail can be. The therapeutic impact of this experience may be, and often is sufficient to stabilize a defendant for the rest of his life against almost any temptation to overt action. He is literally "transformed." Reeducation has been completed almost before court begins. The job of the court may be to save the offender from complete despair.

THE MAJORITY—A TREMENDOUS PROBLEM

The great mass of offenders consists of persons who have not made very good use of their opportunities and who are prone to give vent to their feelings at slight provocation. They accept the easiest way out of trying situations. They have never really faced up to life as a challenge.

A common factor in most of these cases is that, set against the life situation, the criminal charge lacks major importance. Where there is so much deep-seated misery one additional increment does not seem to matter too much. The life situation may inhere in the defendant's relations to his mother or father, to his family tradition, to his neighborhood associates, to the social situation of his school or shop or other place of employment, to the standards of the community as these are reflected in the magazines, papers, movies, actions of important people, envy of others. Treatment involves dealing with these primary causes.

The need of these defendants for the help of society and the court is greater than that of the morally sensitive and the family-bolstered individuals. For these misguided defendants are in great peril—the peril of rejecting and being rejected by the community. Their own inner resources, often considerable if they can be reached, are blocked by widely publicized community standards which have been hammered into them by print, screen, and radio. In many cases the family, source of moral and sentimental education, has taught them to be immoral and hard. There will be no reinforcement to them or to the court from this source. The neighborhood, that social unit formed of the interaction of families directly and through the schools, churches, recreational activities, shops, and festivals which they initiate, support and patronize, is in effect nonexistent. Families live side by side, but do not function as families or as neighbors. There is no family or interfamily support of children. The contaminated child of the tainted family passes on his infection without other families knowing, caring, or acting.

Can lack of the understanding and discipline which a decent environment could have provided for the defendant be made up to him now, or is it too late? The best evidence of modern social science seems to indicate that failure to provide developmental interests and opportunities at the exact time of the emergence of biological needs can never be wholly compensated for. For the child who has not been properly cuddled at two, vibrated to the Lone Ranger at eight, played on a team at eleven, danced at

fifteen, has suffered losses which can be made up only at overwhelming cost in professional service.

THE PROBATION OFFICER

The probation officer, like the priest, teacher, doctor or lawyer is at his best both symbol and practitioner. His art is to integrate individuals in society. He meets his client as a friendly ambassador to the social order, accepting him at his own evaluation. He points out the resources and explains the rules of the house. He arranges meetings, makes introductions, facilitates acceptance.

He rejoices in his client's successes, consoles him in set-backs, points out new gambits and openings. The intensity of his expectations for his client become part of the latter's urge to succeed. He works in and through his client.

After all, the delinquent has defied the community. He is threatened both in depth and extent, and he is insecure of his own integrity. The probation worker who can help him must be prepared to participate in re-creations and discouragements, in false starts, failures, hard ascents and periods of slow gain. He must see his client to the point where he can keep pace with his peers.

Probation has come to its present importance in the treatment of offenders because it has demonstrated itself a valid instrument of moral re-education in a very considerable portion of cases in which it is used. Probation workers, following their charges into and through family, neighborhood, and community relationships, are accumulating a great body of knowledge and experience about the channels into which the community forces life to flow. Probation today is applying some of the new knowledge of sociology, cultural anthropology, case and group work, psychology and psychiatry to the social situations its workers must meet. The educational requirements needed for skilled probation workers and supervisors, and the length and severity of the internship called for to season them, demand superior mental and emotional equipment and a high order of moral purpose and devotion. Public recognition of their status as professionals, increased funds to provide scholarships for training probation workers, and more adequate salaries are long overdue.

We believe in probation, but we do not "hand it out." We prescribe it. We watch its effects on the delinquent with solicitude and hope. Our hopes are realized to an astonishing degree.

They take on a new sense of life's true values. Listen :

"He (probation officer) advised me to go to college, to church, etc. He helped me in the school . . . They weren't actually going to allow me back into the same school on account of probation. Q. But you went on? A. I went on through school . . . At the time I was put on probation, I missed some tests . . . Then I went all summer to high school just in order to get that diploma."

"My probation officer told me to *look* for a job—to look for a job. That is just exactly what I did. I went and I *looked* for a job."

"Well, you know, I thought of my family, and they felt ashamed, disgraced, but said they would stick by me this one time. And I remember my father . . . The first time I ever had seen him with tears in his eyes."

"I sort of obtained a more mature outlook toward life. My relationship with my family and the people with whom I came in contact had improved a great deal."

"Having been on probation, I saw that you just didn't go through life on a day-to-day basis. You actually had to plan; there were certain decisions you had to make in order to get where you were going. I didn't know that, that is what I learned while I was on probation through my relationship with the probation officer."

"The probation officer more or less put me on a course, a way to go, actually started my brains working, instead of just laying there dormant, he actually made me use them for a change, as they were meant to be and made me feel as though I could be useful."

If you go about it earnestly, really caring, here is what you get :

"I had wanted to stop the first time I took money, but I couldn't. I had presented myself to my friends and to my so-called friends as one who was able to lend them a buck, whenever they were in need of it. How could I stop being that ever-ready Joe? My emotional need was greater than the threat of punishment. But it had become all too clear that buying friendship doesn't mean that you really get friendship. I was alone on the paying end. And

here was the bill collector. I had always paid. What do they care—Mary, limping, fat, expendable—I'll pay."

"So I left the desk with the \$20 bill in my pocket and walked to the elevator. The detective followed. I think I could easily have slipped the \$20 bill from my pocket to the floor. I thought of it. But I didn't. I walked to the elevator—the detective fell in beside me and we walked to the manager's office. There he asked what I had in my pocket. I told him, and handed over the bill. A profound wave of relief swept over my body. I was thankful. At last, I didn't have to go on with this—the torture was over. I felt willing to accept whatever punishment was due me."

Indeed, the Court, in so far as it is able to reflect the immutable will of society to be protected against willfulness, and society's readiness to receive those healed of their moral infirmities back into the community, must be counted among our most important instruments of moral regeneration.

THE CHALLENGE

We can ignore these problems, these imperative needs, these challenges only at our peril. The warning is akin to that set forth with vigor more than one hundred years ago in *The Times* of London:

"The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity, and overbearing men tolerated with complacence, springs the tyrannical usage which generations of wise and good men may hereafter perceive and lament in vain. At present, common minds no more see a crushing tyranny in a trivial unfairness or a ludicrous indignity, than the eye uninformed by reason can discern the oak in the acorn, or the utter desolation of winter in the first autumnal fall. Hence the necessity of denouncing with unwearied and even troublesome perseverance a single act of oppression. Let it alone and it stands on record. The country has allowed it and when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compulsion."

This is a challenge no more invincible than many others that the Bar has met and resolved for the betterment of the commonweal. Only the legal profession can assure its success. The fervent efforts of some lawyers

have made whole communities their grateful beneficiaries. The time has come when the rest of us must lend a hand. If the profession wills it, an end can come quickly to abuses that outrage the sensitive and fragile area of personal life and liberty.

You realize, of course, that I refer only to the lawyer genuinely devoted to his profession, he who believes in the ministry of the law. Surely, you will not settle for cheap success. The deep inner satisfactions that come only from participation as a member of a profession are lost completely by those whose sole criterion for success at the Bar is healthy retainers and fat fees. At the organization meeting of the Association of the Bar of the City of New York, Samuel J. Tilden on Feb. 1, 1870 thundered (with as much justification then as now) :

“If the Bar is to become merely a method of making money, making it in the most convenient way possible, but making it at all hazards, then the Bar is degraded. If the Bar is to be merely an institution that seeks to win causes and to win them by back-door access to the judiciary, then it is not only degraded, but it is corrupt . . . The Bar, if it is to continue to exist—if it would restore itself to the dignity and honor which it once possessed—must be bold in defense, and if need be, bold in aggression.”

You will distinguish, I am sure, between the self-righteous breast-beaters, demagogues, boasters of their humanity, and those who out of a world full of human limitations, half-truths, comfortable rationalizations, eyes turned away from the galling facts of life, rise and say, “I go this way and not there. I am this and not that. I have no price but only value.” Indeed, for those who build their safety in things and things alone, there is no greater threat, no more incomprehensible danger than such a lawyer—a lawyer in pursuit of truth.

Let us put an end to such shoddy thinking as, “Why should I stick *my* neck out?” Why should *I* be the one to speak up?” “What’s in it for me?” “What’s your angle?” “You’ve got to get along!” And it is so easy to be cynical, pessimistic and run with the pack. We must throttle the growing conviction on the part of all kinds of people that whatever we hope for and whatever we do are irrelevant; that our individual efforts really make no difference in stemming the sweep of world forces. To me this mood of resignation is but a desire to escape from the problems of freedom, a fear of growing up and maturely accepting one’s responsibilities.

The have lost faith—if they ever had any—in the efficacy of effort. Because they believe they are suffering, they make others suffer; tormented by fear, they make others afraid.

They need to be shown that they are wrong by people who take their religion with them right into the thick of the world and put it to work there. Life has taught me that men serve causes not by exhortation or by rules solemnly pronounced, but because of their inner devotion to them. And so, the will to do justice is so very much more than a mental exercise. Never succumb even temporarily to the notion that intellectual advancement can become superior to ideals. As Santayana pointed out, it is “not wisdom to be only wise.”

Above all, my friends, character and courage! We assume these indispensable qualities abound. When on occasion our profession falls to low estate, you will find their absence the principal cause. Enter the open lists—to win or lose! Do not be dismayed by those who come charging with colors flying and shining shield raised. The fickle crowd may for a while cheer them as heroes, but the triumph is usually brief and they leave us nothing but “the echo of a name and a suit of rusty armor.” Always carry on, toughened in battle and hardened by victory and adversity. You will be heartily welcomed back again and again.

For your own contentment and peace of mind, line up with those at the Bar who grow angry in the cause of decency. Be it remembered it was Mr. Justice Oliver Wendell Holmes who wrote, “I have had to deal with cases that made my blood boil and yet seemed to create no feeling in the public or even in most of my brethren.” Associate with lawyers to whom a principle is not a thing you talk about but *do* something about; those who realize that it is difficult to fight for principles but much more difficult to live by them. Yes, men placed among us as standards against which we can measure our own integrity; men who serve *with* honor and not *for* honor; men, to paraphrase Judge Learned Hand, content to be themselves, confident that if they are faithful in that, their light will shine, steady and far; “unafraid before the unknown universe, indifferent to the world’s disparagements and uncorrupted by its prizes,” they are “ardent and secure in that faith by which alone mankind in the end can live.”

The true administration of justice becomes a reality only when the judiciary and the Bar join harmoniously in the solution of problems common to both. The issues presented this evening constitute a challenging

illustration. In 1846, it is related, Henry David Thoreau was jailed in Concord, Massachusetts, for refusing to pay his taxes as a political protest. Visiting Thoreau, Ralph Waldo Emerson peered through the cell bars and asked: "What are you doing in there?" Thoreau replied: "What are you doing out there?"