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Law and the Quality of Life

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SYNOPSIS: The use of sophisticated methods of criminological investigation and fact determinations, coupled with advances in forensic sciences and in criminal law and with the extensive procedural safeguards and mechanisms available to prosecutors and defense attorneys alike are, more often than not, taken for granted. Yet, it was not long ago that our legal system functioned on relatively rudimentary procedures, and the tools available to investigate crime and to determine factual matters were little more than very basic scientific principles crudely adapted to the needs of the criminologist. Criminology itself is both a relatively new concept and a distinct branch of forensic sciences. This paper will examine some of the more interesting historical developments in the fields of jurisprudence, criminology, and forensic sciences in order to gain an insight into the contemporary quality of our legal system.

KEY WORDS: plenary session, jurisprudence, quality assurance

An article in the Sunday, 9 Sept. 1979, edition of the Atlanta *Journal-Constitution,* posing the question, "Is Crime Rate on the Rise?", caught my eye. The article was a synopsis of some previously published papers by Mr. Eugene Doleschal, the director of the Information Center for the National Council on Crime and Delinquency. This was of interest to me for a number of reasons, not the least of which was the fact that it posited a thesis which, to a large extent, goes against the grain of commonly accepted beliefs about crime in our contemporary society and of the ability of our criminal justice system in all its aspects to deal with crime.

In essence, this article reflected a good deal of sound research leading to the conclusion that the incidence of crime in the United States is not as bad as seems to be commonly perceived. Further, I believe that the ability of our criminal justice system to cope with crime is, although far from perfect, better than most people would believe if polled on the street tomorrow.

When I speak of our "criminal justice system," I include not only members of the legal profession and the judicial branch of our governments, but police, forensic scientists, criminologists, pathologists, and those others of us who are intimately and professionally involved with some aspect of crime, its detection, its solution, and justice. I believe it is important for all of us to spend a few moments focusing on the manner in which the quality of our life is both reflected in and, to a significant degree, determined by the quality of our criminal justice system.

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In discussing "Law and the Quality of Life," I should like to share some historical notes concerning advances that have been made in law and the forensic sciences. I should also like to look very briefly at where we stand today in terms of our criminal justice system and to draw some brief comparative notes between our system and those of other countries.

Although lawyers have borne perhaps the brunt of journalists' and writers' barbs throughout the centuries, as evidenced in the oft-quoted remark by a Shakespearean character that one of the first steps toward a more perfect society would be to "kill all the lawyers," much of the public discontent with our criminal justice system—and there is discontent—is also leveled at our police, our judges, and our government. Nevertheless, I will not, in this presentation, act as an apologist for any person or particular group; I believe that, although our system is not perfect and we have much to learn, both in terms of experience and ideas from other Western countries, we do not have to apologize for our criminal justice system. Indeed, I believe strongly that we have in years past made great strides forward in improving the quality of our criminal justice system, that we will continue in this vein, and that the quality of our life as reflected in and through our criminal justice system is good.

Advances in Criminology

Although I, as an experienced lawyer, harbor some serious doubts as to the perfection of the lie detector or polygraph, the fact remains that these instruments of scientific detection are and will continue to be widely used, and they can, when used and interpreted by properly qualified and experienced people, yield positive results both in terms of proving innocence and indicating guilt. Still, no matter how imperfect the polygraph, I am in no small degree greatly gladdened by the fact that we have moved far beyond one earlier method of proof that might be called the "original lie detector": trial by ordeal.

Although the trial by ordeal, by which, in summary, an individual was adjudged guilty or innocent by virtue of his body's reaction to certain physical stimuli, was formally abolished by the Fourth Lateran Council of 1215, its use as a "judicial" tool continued well into the 17th century in England and, in certain areas of the globe, such as prerevolutionary Russia, even into the early 20th century [*1*].

According to the rules of trial by ordeal, the accused who floated to the surface of the body of water into which he was thrown, bound, was adjudged guilty because the water would refuse to "accept" a guilty body; conversely, the innocent accused would be received by the body of water because he was clean and therefore innocent. In many instances, I am sure, the person who was thus proved innocent would take little solace from that fact because those witnessing his "trial" were probably more often than not too slow in pulling him back out of the water after he was proved innocent. According to another method of trial by ordeal, the accused was proved innocent if he could successfully prevent burns from appearing on his hand for three days after it was bound up in cloth after it had been inserted into a vat of boiling water or some other substance to retrieve a certain item; the unfortunate accused who was unable to prevent some evidence of burning on his hand or arm was guilty. Even if an accused were proved innocent in this manner, under old Anglo-Saxon law, he might still, depending on the severity of the crime with which he was charged, be banished from the kingdom.

In Europe and England, the trial by ordeal, as a method of crime detection, gave way over the centuries to the so-called law of proof. The law of proof reflected an important and very basic change in the Western world's precepts of law and judgment. Trial by ordeal revealed not the fallible judgment of mortals, but God's law. In other words, the accused was deemed guilty or innocent not on the basis of a human being's interpretation of facts or law, but because God, through the medium of the ordeal, revealed the true

decision. The law of proof, on the other hand, deriving from Roman-Canon law and based on human interpretation of evidence, forever altered the direction of Western law in criminal justice. One of the fundamental rules of the law of proof was that a person could not be convicted of a serious crime solely on the basis of circumstantial evidence. This placed a premium on the need for a confession in those great number of cases where no eyewitnesses existed or would come forward. Unfortunately, as things developed, this need for confessions gave way to the concept of judicially sanctioned and accepted torture [*2*, pp. 3–6].

Judicial torture was, for many years and even centuries, a distinct branch of Western jurisprudence, with its own set of rules, treatises, and learned doctors of law [*2*, p. 3]. As alien and as abhorrent this concept of judicial torture is to us today, it is one of the strange quirks of history that it gave rise to an early concept of "probable cause." This concept of probable cause developed because, as a check of sorts on the unbridled and undisciplined use of judicial torture, torture could not be used unless there was present some threshold amount of circumstantial evidence; if this "half-proof" was present, then a "confession" could be elicited by the use of torture. In this context, judicial torture was used not so much to elicit a true confession in the modern sense but rather to obtain details of the crime charged, which, it was believed, only the guilty person would know. Thus, the rules of judicial torture dictated that there could be no suggestive questions and, further, that the information so obtained must be verified by the authorities, insofar as was possible.

Thankfully, in the British Isles, from whence our system of common law developed, the jury system, rather than the Roman-Canon law of proof, replaced the trials by ordeal, and an English jury could convict an accused on the basis of circumstantial evidence, without the need for these other methods of crime detection and fact-finding. This is not to say that British law never employed the use of torture in earlier centuries, because it did, primarily as regards crimes against the state, but the jury system and its ability to rely on circumstantial evidence meant that the thrust of British common law was in an entirely different direction from criminal law as it developed on the continent of Europe in the 13th through 18th centuries. One historically interesting offshoot of judicial torture in England, however, was legislation passed in 1275 that provided that a defendant who refused to plead to an indictment could be subject to severe physical torture that would either elicit from him a plea or kill him; this was the *peine forte et dure* [*2*, p. 75]. As a practical matter, for a guilty person who possessed an estate that he wanted to pass to his heirs, death as a result of the *peine forte et dure* was preferable to being convicted and sentenced to death as a felon, since conviction for a felony in England operated as a forfeiture of the felon's estate, whereas a person who died under *peine forte et dure* was not considered a convicted felon and his heirs therefore could succeed to his estate [*2*].

Frequently, nowadays, trials, whether civil or criminal, will incorporate the use of the expert witness. This may be particularly important in a criminal case involving ballistics or toxicology, for example. Perhaps the early roots of the use of expert witnesses in our judicial system might be found in the concept of wager of battle, which was introduced into England by the Normans after the invasion of 1066. Under the concept of wager of battle, the champion chosen by each side, rather than the parties themselves, did battle, with the side represented by the victor winning the case. Although some critics and observers of contemporary American litigation might claim that the use of expert witnesses represents a form of wager of battle, the last known instance in which the concept of wager or trial by battle was raised in an English court of law was in 1818, and the law allowing trial by battle was formally repealed in 1819 [*3*].

The same critics who might attack the use of expert witnesses in modern-day litigation might also view some of our more lengthy trials involving many witnesses as a continuation of the old Anglo-Saxon use of "compurgators." Under old Anglo-Saxon law, a party

won a "lawsuit" not on the basis of a preponderance of the evidence but because he was able to muster more persons than his adversary who would do nothing more than swear that the person attesting to the gravamen of the lawsuit was speaking truthfully.

At any rate, we have indeed come a long way from these early aspects of our criminal justice system in terms of our ability to determine the guilt or innocence of accused persons scientifically and humanely. Our ability to detect crime and marshal scientific evidence to buttress circumstantial evidence in criminal cases has made great strides in the past 100 years.

It was, after all, just one short century ago that Professor Lombroso in Italy gained widespread popularity and distinction among the learned professions and the populace in general for his thesis that crime was necessarily and solely the product of certain "born criminals." The work of the criminal justice system was, therefore, to detect, locate, and punish only those unhappy persons who happened to fit the indices of the "born criminal." Thankfully, Dr. Lombroso's thesis was overshadowed in the late 19th century by the development of Alphonse Bertillon's science of anthropometry and, shortly thereafter, by the science of dactylography, or fingerprinting.

Although cumbersome and highly susceptible to bureaucratic error, the concept of anthropometry, or classifying and detecting criminals through the use of certain constant physical measurements, was an important cornerstone in the development of scientific techniques of criminology. One of the most important milestones in the development of forensic science and criminology, however, was the solution of a murder in 1891 by the use of fingerprints. Although few of us ever have heard or ever will again remember the name of Francisca Rojas, that Argentinian woman was the world's first murderer who was caught by the finding of a fingerprint at the scene of the crime; the place was Argentina, and the year was 1891 [*4*, pp. 51–56]. Truly, the realization of the importance of using the technique of fingerprints to detect and solve crime was one of the singularly most important advances of all time in the field of criminology.

Yet another technique of crime detection in common usage today, ballistics, was developed only some 55 years ago. Surprisingly, because we tend to think of terrorism as a modern-day phenomenon, one of the early successes of ballistics was accomplished by Sidney Smith in his effort to track down the assassins of Sir Lee Stack, who was gunned down by Egyptian terrorists on 19 Nov. 1924, in Cairo, Egypt. Based on his knowledge and use of ballistics, Sidney Smith was able, for the first time, to confront terrorists with definitive and accepted proof of guilt based on ballistics tests [*4*, pp. 453–455].

These and other advances in the field of criminology and forensic science are but a prelude to the new and ever more exciting advances that I anticipate will be forthcoming very shortly in such areas as laser beam technology, blood evidence technology, odontology, and voice prints. As a lawyer, although I have found and always will find these areas of forensic science exciting, and although their use in crime detection and judicial proof may be positive and beneficial, I would continue to caution all of us who are concerned with forensic science to use these techniques and the results they produce with an appropriate degree of scientific skepticism and hold them to an appropriate standard of proof. In many instances, the use of the scientific techniques and their presentation to judges and juries will in very large part determine the fate of men and women on trial for their freedom and their lives.

Advances in Criminal Law

Perhaps more than any other single case the one case name that would mean something even to the person who has never come face to face with any formal aspects of our criminal justice system is *Miranda.* Since the mid-1960s, the concept of "Miranda

warnings" and, perhaps more importantly from the layman's standpoint, what happens if those warnings are not given to a suspect by the police, in one regard has come to signify a serious flaw in the American criminal justice system, namely, that a suspect who is in fact guilty of a crime will nonetheless be released to once again endanger the lives and property of others simply because of a "technicality." Notwithstanding the fact that the requirement that police officers provide an arrested suspect Miranda warnings or else risk the suppression of key evidence has *not* resulted in a diminution of the ability or success of police departments to solve crimes, the myth somehow seems to persist that innumerable guilty criminals are returned to our society outside of prison walls simply because their lawyer was able to get them off the hook on a technicality.

The notion that technicalities are responsible for the government's losing certain criminal cases is grossly simplistic, but it is a real concept that must be recognized and addressed. Meeting this problem necessitates some understanding of the history of our criminal justice system and how it differs from those of other countries.

Our criminal justice system, like that of England, and unlike those of many other Western countries that are based on civil law, is founded on the concept of common law and the requirement that judges adhere to legal precedents based on certain fundamental constitutional rights. Unlike the Soviet system of criminal law, based as it is on furtherance of socialism and helping to build communism, the American criminal justice system is based on a constitution that is oriented toward securing certain fundamental rights to each individual citizen rather than, again as is the focus in the Soviet system, toward enumerating certain duties of individual citizens toward the state.

Many of the precepts of our criminal justice system are, of course, very familiar to all of us. For example, we all know that an accused may not be convicted of a crime except on evidence beyond a reasonable doubt, that an accused may not be forced to testify against himself, and that an accused in this country is entitled to a public trial in which he has advice of counsel on his behalf and may require the testimony of witnesses in his behalf.

What many of us do not realize is that many of the refinements and advances in implementing these basic concepts did not spring forth contemporaneously with our constitution but developed, as did the British common law system, slowly and painfully over the years. Thus, it is interesting to note that until 1898 in England an accused, although he could not be required to testify against himself, did *not* have the right to be sworn as a witness in his own defense. Furthermore, the concept that a person convicted of a crime has the right to appeal that decision, which is in this country secured by the constitution and federal law, did not exist in England until 1907. In our own United States, the concept that a person accused of a crime should have the benefit of an attorney, whether or not he can afford one, at all important stages of the proceedings against him, has only become truly accepted and implemented since the end of the second World War; the limits of this concept are even today undergoing important and hard-fought distinctions. We are also well-schooled in the concept that a defendant has a right to a preliminary hearing in those instances in which there has not yet been an indictment presented by a grand jury. However, even today in certain counties in the State of Georgia, for example, a defendant is not able to secure as a matter of right such a preliminary hearing.

Technicalities in the sense that defense attorneys may use and interpret statutory provisions and case law precedent to require the state to meet its fundamental burdens of proving guilt are not detrimental. Such provisions and results reflect the manner in which our criminal justice system translates fundamental concepts of criminal justice into practical protections for the individual accused and for society in general in insuring that innocent persons are not unjustly convicted. To be sure, as was portrayed in the recent movie *The Onion Field,* there are those who improperly would take advantage of procedural safeguards in our criminal justice system. That this occurs, and will inevitably

continue to occur, should in no manner afford justification for condemning our criminal justice system or the role each of us plays in that system.

Quality of Our Criminal Justice System

This brings us face to face with a key question all of us, I am sure, continually must address: What is the quality of our life as reflected in and as affected by the quality of our criminal justice system?

Although statistics, in my view, can be infinitely manipulated and will reflect whatever proposition one sets out to prove, they can be revealing in establishing certain general standards for attempting to evaluate the quality of our criminal justice system. For example, we are constantly (and particularly each year when the FBI's *Uniform Crime Report* is issued) bombarded with statistical proof that we are engulfed in an unprecedented rise in the crime rate. A closer examination of the statistics, however, reveals that in fact we are not so engulfed. Data compiled by the U.S. Bureau of the Census reveals that the overall rate of personal violence in the years 1973 through 1976 was 32 per 1000 persons aged twelve and over; to be sure, this is an unacceptably high rate, but it is remarkably stable [5].

Perhaps, more than anything else, what we seem to be observing over the past several years is not so much a tremendous increase in the rate of crime, since that seems to have remained fairly stable, but a great increase in the rate of reported crime, as our technology and ability to communicate information improves and expands [5]. Indeed, studies have revealed that even as far back as the 17th century the colonists in Massachusetts maintained a roughly constant level of crime and punishment; this apparently little-realized phenomenon has continued throughout our history [6].

The experience of the past several years, in which political forces at the state and national levels have dictated, alternatively, either a tightening or a loosening of police emphasis on victimless crimes, bears out the proposition that the level of crime that a society is able or willing to endure is more or less constant. In other words, increased police emphasis on apprehending one class of criminals will mean that more criminals falling into that category are arrested and fewer criminals in other categories will be arrested; the statistics will reflect this. Likewise, shifting our focus to the punishment aspect of our criminal justice system, efforts by the legislature to tighten sentences for drug offenders, for example, will result and have resulted in the use by judges, lawyers, and prosecutors of alternative methods for maintaining a fairly constant level of sentencing. Put another way, removing discretion from one aspect of the criminal justice system simply displaces it to another [6].

These statistics give rise to what one writer refers to as "homeostasis in crime" [6]. The theoretical underpinnings of this concept are that crime in a society reflects the bounds within which that society chooses to operate and beyond which individual members must not be allowed to go. The society's crime level will vary qualitatively over time but will remain constant in terms of the relative amount of deviant behavior that the society can tolerate. Also, criminal behavior reflects not only the bounds of a society's norms but also the necessary change and variety of that society. In this sense, a society without crime would be either one in which the government wields absolute power over each and every citizen or one in which each and every citizen behaves absolutely identically. In either case, it would not be a society reflective of or based on the democratic and free enterprise ideals of this country.

Viewing our criminal justice system in this light does not lead to the conclusions that we will always have crime, that crime is good, and that there is nothing we can do about it. Rather, it helps us recognize that there are limits beyond which our criminal justice

system cannot cope. Also, it should help us realize that our limited resources are better channeled toward those areas of criminal behavior that are truly destructive of our society.

Comparative Quality

In the same manner that statistics afford us one way of gauging general trends within our criminal justice system, statistics can help us gauge the manner in which our criminal justice operates in relationship with the systems of other countries. Brief mention of some available statistics reveals to us some rather surprising comparisons.

Contrary to what I would believe the popular myth to be, the United States does not have the highest crime rate in the world. Based on admittedly imperfect statistics, but which nonetheless must be afforded some degree of reliability, the rate of reported crime in 1977 in the United States (5055.1 per 100 000 population) was below that of West Germany (5355 per 100 000 population). The 1973 homicide rate in Mexico was 31 per 100 000 population, more than three times that in the U.S.

The Netherlands, which has a rate of imprisonment substantially lower than the United States, had, in 1976, a surprisingly similar rate of personal violence compared to that of the U.S. (23 per 1000 population in the Netherlands as opposed to 32 per 1000 population in the U.S.). On a city-to-city comparison level, the assault-with-injury rate in the Norwegian city of Oslo is not all that much lower than the rate for the city of Atlanta (8.5 per 100 000 population in Oslo as opposed to 11.0 per 100 000 population in Atlanta). (Statistics provided by the Information Center of the National Council on Crime and Delinquency.)

The rate of imprisonment can be used as one index of the amount of crime in a society; the Republic of South Africa has the highest rate of imprisonment of any country—400 per 100 000 population. The rate of imprisonment in the United States at the end of 1977 stood at 208 per 100 000 population, substantially less than the rate in the Soviet Union of 391 per 100 000 population. The imprisonment rates for other countries of Western Europe are substantially lower. (Statistics obtained from several sources, as reported by the Information Center of the National Council on Crime and Delinquency.)

Yet another apparent myth—that judges and juries in the United States hand out very lenient sentences—can be discarded if one looks at some of the statistics. These statistics, without going into additional detail, reflect that the length of prison sentences in the United States is among the highest in the world and certainly higher than almost any other Western country [7].

Statistical comparisons, as noted, do have limitations, and this is particularly true when one attempts to use statistics for comparisons among different countries. For example, although the imprisonment rates in South Africa and the Soviet Union are higher than in the United States, these gross statistics do not reflect the fact that in both of those countries many of the prisoners are political prisoners, unlike the situation in this country.

Moreover, it is exceedingly difficult to obtain or compile statistics on the criminal justice system in the Soviet Union, for a number of reasons. In the first place, the Soviets do not provide accurate figures on crime in their country, on the number of persons imprisoned, or on the length of sentences. Attempting to discover this information is even more difficult than uncovering and analyzing the Soviet defense budget; for this latter task, we have intelligence organizations and technical means to discover military secrets, but we have no crime verification satellites. For another thing, since criminal law in the Soviet Union serves not so much to protect individuals (although, on paper, a Soviet defendant enjoys many of the procedural safeguards of his U.S. counterpart) but rather is designed to further political and economic socialism, the types of crimes in the Soviet Union and the United States do not in many instances compare. Moreover, certain economically

oriented crimes in the Soviet Union, such as "speculating," may not even be considered criminal activities in the United States; the penalties handed out to those engaging in speculation are deemed administrative and not criminal in character, and thus would not be reported as criminal statistics [*8*]. Also, a deviant in the Soviet Union, rather than being tried and found guilty as a criminal, might be adjudged mentally insane and sentenced to an insane asylum; this also would not be reported as a criminal statistic [*8*].

As I have noted, at least on paper a Soviet defendant enjoys many of the procedural safeguards to which his U.S. counterpart is entitled. These include, among others, the right to defense counsel, a presumption of innocence, a fair trial, and a definite indictment. However, as I have also noted above, many Soviet deviants are disposed of through administrative or quasi-medical procedures, and, although they are incarcerated or otherwise deprived of liberty, they are not considered criminals and are therefore not afforded even these paper rights.

In those criminal cases that do go through the Soviet criminal justice system, the courtroom methods of proof and detection are similar to those with which we are familiar. For example, in *Kafarov's Case,* the accused Kafarov won a remand of his conviction of killing one Rzaev by strangling the latter because the state failed to introduce sufficient forensic science evidence of a properly performed autopsy to clearly establish death by strangulation [*9*]. However, unfortunately for a Soviet citizen disposed to antisocialist activity, he may find himself all too easily accused and convicted of "hooliganism," which can mean anything the state wants it to mean, without even the niceties of having competent forensic science or criminologic evidence presented against him.

Conclusion

In light of all this, it is still disturbing to me, at least, to find not so much that the public may harbor a largely inaccurate impression of our criminal justice system and the important work being done by its representatives but that our national government continues to direct its limited resources more toward expanding areas of government intrusion rather than improving the quality of our criminal justice system.

Although I have neither the inclination nor the time to wade through the latest federal budget, it is entirely consistent with every previous federal budget in recent years in that the monetary resources earmarked for our criminal justice system—police, courts, prisons, and so forth—are but a small fraction of the money destined for federal regulatory and manipulative activities. I find it truly disturbing that it sometimes seems more important to our leaders in Washington that a small or medium textile manufacturing company have properly labeled and lighted restrooms for its employees, or that the diving board at the local motel be properly labeled with warnings against diving into a pool with no water in it, than it is concerned with improving the quality of our prisons or with upgrading the quality of our courts.

If we could take but a fraction of the amount of money that is lost to our economy through the singularly unproductive business of filling out and submitting forms to the federal government and apply it to upgrading the quality of our criminal justice system, we would, I believe, make a quantum leap in our continuing effort to better that system. We have made great advances in the scientific and legal aspects of that system, and we will continue to do so, but even a slight positive redirection in the thrust of government activity would greatly accelerate these beneficial changes.

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