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Jack G. Day

*Court of Appeals of Ohio, Eighth Appellate District*

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# CLEVELAND STATE LAW REVIEW

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## *The Quiet Revolution in the Criminal Law — A Foreword*

Jack G. Day\*

### I

CONCERN ABOUT CRIME RATES in the United States is not a phenomenon properly associated only with the past decade or so.<sup>1</sup> However, burgeoning crime statistics cause public anxiety,<sup>2</sup> and the present concern with crime may have a unique dimension. It is not limited to small groups of specialists nor to singular phases of the criminal problem. While there is no easy way, if there is any way at all, to measure precisely the intensity of the unease over illegal threats to life and property, and over the incidence of social conduct formally declared illicit by the law, it is probably a safely conservative conclusion that seldom in our history has so much depth of concern coincided with so much breadth of interest and so much activity. By "breadth of interest" I mean all of this: the numbers of persons involved, the distribution of interest through all social classes, and a scope of interest that includes all elements in the criminal law process from investigation through probable cause for arrest, to sentencing alternatives, and the reception of convicted persons back to society. Not the least remarkable development is the challenge which a large number of lawyers, especially young lawyers, are finding in the practice of criminal law.

Trends begin unannounced.<sup>3</sup> However, the advent of the new case law expanding and putting in gear the constitutional promise of our

\* Judge, Court of Appeals of Ohio, Eighth Appellate District; Chairman, Section of Criminal Justice, American Bar Association, 1973-74; former President, National Association of Criminal Defense Lawyers.

<sup>1</sup> See Kamisar, *When the Cops Were Not Handcuffed*, N.Y. Times, Nov. 7, 1965, (Magazine) at 34. Apparently hysteria and "scapegoating" in the search for answers to the question "what causes crime?" are not a recent development.

<sup>2</sup> The improvement in record-keeping may itself be a factor in the statistical increase.

<sup>3</sup> Dating trends is an unusually imprecise exercise. For example, if one were to trace beginnings of the right to counsel in its present state, *Powell v. Alabama*, 287 U.S. 45 (1932), is one place to start. But, query, whether the date of the adoption of the sixth amendment to the Constitution of the United States is not even more appropriate. Certainly the right to counsel was not so universally acceptable in 1791 that the idea could be treated as not innovative.

society to underwrite individual dignity by fair criminal procedure can be roughly dated as turning from a trickle to a torrent sometime about 1960. Landmark cases such as *Mapp v. Ohio*,<sup>4</sup> *Gideon v. Wainwright*,<sup>5</sup> *Miranda v. Arizona*,<sup>6</sup> and others, plus the progeny of all, have resulted in enormous changes in the implementation of the body of rights which the Constitution of the United States established for persons charged with crime. The constitutional concern for those rights can only reflect a deep appreciation of the values of freedom and an understanding of the threat to those values posed by the operation of even the most beneficent of governments. The framers of the Constitution had reason to know well that the quality of government and law is profoundly affected by the quality of the men who administer it. The constitutional system of checks and balances was designed to contain the aberrations and excesses of men. And a number of the state conventions which approved the Constitution, aware of the frailties of even the best of governors, to say nothing of the worst, tendered their approval only on the promise of amendments designed to shape governmental conduct to insure the conditions necessary to any society both tolerable and free.<sup>7</sup> Among those necessities were fair procedures for determining the guilt of those charged with crime, and even punishment for those found guilty had to fall short of the "cruel and unusual." It has remained for time and the courts to detail the meaning of the constitutional generalizations on a case-by-case basis.<sup>8</sup>

Given the fundamental importance of procedural due process in criminal law, and conceding the impact of case law developments of the past decade and one-half, the movements manifest in decisional law, while spectacular, have necessarily been piecemeal and have tended to obscure the broad substantive and procedural reforms which have been initiated by that general address possible only through

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<sup>4</sup> 367 U.S. 643 (1961) (constitutional status for the exclusionary rule).

<sup>5</sup> 372 U.S. 335 (1963) (right to counsel in all felony cases).

<sup>6</sup> 384 U.S. 478 (1966) (right to be informed before submitting to custodial interrogation that one may have counsel, that counsel will be provided if indigency prevents private retention, that there is no obligation to speak, and that anything said may be used on trial as evidence against the speaker; and that having begun to talk without counsel, interrogation may be suspended while counsel is secured).

<sup>7</sup> See C. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 42-44 (1943).

<sup>8</sup> Though the judiciary, particularly the Supreme Court of the United States, is entitled to the credit for the vitalization of the Bill of Rights and especially those rights relating to criminal procedure, the line from 1791 to date is not unerringly straight. The advance has been marked by marches and countermarches. While the courts may be credited with many of the developments in criminal procedure, the current incidence of criminal activity cannot be laid at the judicial door. Only a lamentably simplistic knowledge of the causes of crime will support that conclusion. A far more fruitful search for causes will be found in poverty, racial discrimination and the crime inducing effects of current confinement policies. Moreover, there has been little or no attention paid to the effects of war on domestic criminality. The brutal, violent, and essentially irrational methods employed in war may have immeasurable effects, especially on the participating young.

legislation and the rule making processes. Nonetheless, quietly, and almost unnoticed outside a relatively small circle within the legal profession and related disciplines, a seismic reform has been going on.

The present symposium is devoted to the description and analysis of Ohio's part in that quiet effort toward more comprehensive treatment of criminal law reform. Only the broadest outline, omitting many details of the general movement, is possible here. That outline may provide some setting for Ohio's revamped criminal code and new criminal rules.

## II

The most important single development in the quiet revolution is the undertaking and completion of the American Bar Association's massive study of the administration of criminal justice. Begun in 1963, and concluded in 1973 with the last in a series of seventeen volumes, each contributes an in-depth study of a particular aspect of the criminal legal process.<sup>9</sup> Each of these volumes, known collectively as the *American Bar Association Standards for the Administration of Criminal Justice*,<sup>10</sup> sets out principles, horn-book style in black type, and supports and explains them with a commentary.

The standards have a dual objective: "To promote effective law enforcement and the adequate protection of the public and to safeguard and amplify the constitutional rights of those suspected of crime."<sup>11</sup> It is natural that such aims will find mainly a procedural expression. For the administration of criminal justice is essentially a matter of process and Mr. Justice Frankfurter's dictum in *McNabb v. United States*,<sup>12</sup> applies: "The history of liberty has largely been the history of observance of procedural safeguards."

The method adopted for the study and formulation of these new standards was unique. Each standard was initially drafted by an advisory committee. A balanced membership of lawyers, both pros-

<sup>9</sup> A list of the titles demonstrates the breadth of the study and will indicate the subject matter of the particular standard: APPELLATE REVIEW OF SENTENCES, CRIMINAL APPEALS, DISCOVERY AND PROCEDURE BEFORE TRIAL, ELECTRONIC SURVEILLANCE, FAIR TRIAL AND FREE PRESS, JOINDER AND SEVERANCE, PLEAS OF GUILTY, POST-CONVICTION REMEDIES, PRETRIAL RELEASE, PROBATION, PROVIDING DEFENSE SERVICES, SENTENCING ALTERNATIVES AND PROCEDURES, SPEEDY TRIAL, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, TRIAL BY JURY, THE JUDGES' FUNCTION, THE POLICE FUNCTION. All have been approved by the House of Delegates of the American Bar Association and represent the official policy of the ABA on the subject addressed by the standard. While there are seventeen volumes, one volume—on the prosecution and defense functions—contains two standards making eighteen in all.

<sup>10</sup> The original proposal for formulating standards referred to "minimum standards." "Minimum" was dropped in 1969 as the project developed and it became clear that final standards were more than minimal criteria. See Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 N.D. LAWYER 429, 431 (1972).

<sup>11</sup> The quotation is from the ABA brochure stating the nature and purpose of the standards project.

<sup>12</sup> 318 U.S. 332, 347 (1943).

ecution and defense, judges, and scholars, contributed to the final product. Eminent prosecutors and defense lawyers, as well as experts from related disciplines, by conference and comment enlarged the pool of information out of which the standards and commentary were drawn. Drafts and re-drafts were subjected to hours, even days, of intensive criticism and debate. ABA entities whose jurisdictions were relevant, such as the Section of Criminal Law<sup>13</sup> and the Division of Judicial Administration,<sup>13</sup> and special organizations<sup>14</sup> were asked for and gave critical comment. Tentative drafts were printed for submission for approval to the ABA Special Committee on Standards for the Administration of Justice. Passing the Special Advisory Committee hurdle cleared the way for presentation to the ABA Board of Governors, and thereafter to the Association's House of Delegates consisting of more than three hundred members representing the membership at large which, by 1973, included some one hundred seventy-thousand lawyers. The opportunity for House debate preceded approval, and in some instances debate was extensive and intense. Before approval of the standards on electronic surveillance, for example, there was a separate vote on each of three especially controverted points after debate participated in by a Deputy Attorney General of the United States (later Attorney General), three past presidents of the ABA, one future Justice of the Supreme Court of the United States, the Chairman of the Section of Judicial Administration, a law professor destined to become Chief Counsel for the Senate Select Committee on Presidential Campaign Activities, and two judges, one federal and one state.<sup>15</sup> On at least one occasion a proposed standard was rejected by the House of Delegates.<sup>16</sup>

Such attention indicates the care which attended the adoption of the standards. They represent perhaps the most intensive analysis of criminal justice problems ever undertaken in this country. The Chief Justice of the United States has said of the study:

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<sup>13</sup> The American Bar Association's programs originate in large part in units organized in terms of a particular area of legal interest such as criminal law, antitrust law, or judicial administration. There are many others. Each is called a "Section." The name of the Section of Criminal Law has now been changed to the Section of Criminal Justice.

<sup>14</sup> *E.g.*, representatives of the National Association of Defense Lawyers in Criminal Cases (now called National Association Criminal Defense Lawyers) and the National District Attorneys Association expressed themselves at length in a two-day session with the ABA Criminal Law Section at Houston, Texas, during consideration of the STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION. The STANDARDS RELATING TO THE URBAN POLICE FUNCTION were reviewed by the Special Advisory Committee of the International Association of Chiefs of Police. After some amendments the final draft was unanimously endorsed by the Executive Committee of the IACP in December of 1972. *See* Introduction to the Commentary on the approved draft of the STANDARDS RELATING TO THE URBAN POLICE FUNCTION, 21-22.

<sup>15</sup> This does not mean that nine participated in the debate. Some of the participants fell into more than one category. For a report, *see* 8 Cr. L. 2371-2372 (Feb. 17, 1971).

<sup>16</sup> Section 4.7 of the STANDARDS OF JURY TRIAL, allowing summation and comment on the evidence by the trial judge, was voted down in the House. The vote was 126 to 91. *See* addendum face page of STANDARDS RELATING TO TRIAL BY JURY.

This project will I think in its own time, emerge and take its place alongside the American Law Institute's Restatements of the Law — the creation of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and other matters of that rank.<sup>17</sup>

The effect of the standards on American criminal law reforms can be seen in hundreds of citations of various standards in appellate opinions,<sup>18</sup> in the heavy reflections of the standards' influence in the new criminal rules in Florida, Arizona, and Washington,<sup>19</sup> and the extensive implementation of standards programs now in the planning or later stages in thirty-five of the fifty states and the District of Columbia.<sup>20</sup>

The age of some of the earlier ABA *Standards* argue for review looking to possible revision and updating. The comparative analysis of the ABA standards with the newer standards developed by the National Advisory Commission on Criminal Justice Standards and Goals (1973) is underway and completion is probable before this is published. The comparison may prove to be a useful step in the direction of determining whether and where revision is necessary.

### III

Other evidences of the reform movement are the revised criminal codes adopted in seventeen states since 1962, the revised criminal codes in fourteen states presently awaiting legislative approval, and the revision studies in progress in sixteen state jurisdictions.<sup>21</sup> In addition, the report of the National Commission on Reform of the Federal

<sup>17</sup> *Proceedings at the 1969 Judicial Conference, United States Court of Appeals, Tenth Circuit — Minimum Standards For Criminal Justice*, 49 F.R.D. 347, 356 (1969).

<sup>18</sup> See Krishen, *Appellate Court Implementation of the Standards for the Administration of Criminal Justice*, 8 AMER. CRIM. LAW Q. 105 (1970), and footnotes to Erickson, *The ABA Standards for Criminal Justice*, 2 CRIMINAL DEFENSE TECHNIQUES App.-1 (R. Cipes ed. 1972).

<sup>19</sup> New evidence of the influence of the ABA Standards is available regularly. There are a few references to them in OHIO RULES OF CRIMINAL PROCEDURE, Publication No. 82-1973, OHIO LEGAL CENTER INSTITUTE. A line-by-line comparison between standards and rules might reveal a greater impact. As this is written North Dakota has announced new criminal rules. Source references keyed to the respective rules indicate heavy reliance on the standards.

<sup>20</sup> The figures with arithmetic correction are from CRIMINAL JUSTICE, Vol. I, No. 1 at 1, 4 (1973). CRIMINAL JUSTICE is a publication of the Section of Criminal Justice of the ABA. The proceedings at the 1969 Judicial Conference for the Tenth Circuit, 49 F.R.D. 347 (1969), indicate the whole program was devoted to the Standards. A National Judicial Conference on the Standards for the Administration of Criminal Justice was held at Louisiana State University in February, 1972, and attended by more than three hundred appellate judges, state and federal. Three ABA Standards — FAIR TRIAL AND FREE PRESS, THE FUNCTION OF THE TRIAL JUDGE, and THE PROSECUTION AND DEFENSE FUNCTION have been incorporated into United States Army legal practice. See ARM Regulation 27-10. I am indebted to Major Paul Weinberg, JAGC, Deputy Chief, Criminal Law Division, for this reference. CRIMINAL JUSTICE, VOL. I, No. 3 at 1, 6, 8 (1973), provides an up-dated summary of developments in ABA STANDARDS implementation.

<sup>21</sup> "Action by State Legislature," from *Where We Stand: The Fight Against Crime*, 25-36 (National Governor's Conference, Washington, D.C., May, 1973).

Criminal Laws (Brown Commission) proposes comprehensive re-vamping of the Federal Criminal Code. Two Senate Bills, S. 1400 (the Administration's bill) and S. 1 (the McClellan bill), contemplate extensive changes in the Federal Criminal Code but do not incorporate a number of the major proposals of the Brown Commission recommendations.<sup>22</sup>

These general observations by no means encompass all that is fermenting in the criminal justice system. It must suffice here to note that among many problems, criminal law bail reform is a matter of continuing concern,<sup>23</sup> that corrections and prisoners' rights are receiving much attention,<sup>24</sup> and that arbitrary restrictions on the employment of ex-convicts are the subject of continuing study.<sup>25</sup> It is obvious, too, that the *Argersinger* case<sup>26</sup> (requiring counsel in all misdemeanor cases carrying possible jail sentences) will put new strains on public defender and assigned counsel systems for delivering defense services to the indigent.

#### IV

New code and rule formulations provide the occasion to re-examine and reshape the entire range of substantive and procedural criminal law. This gamut<sup>27</sup> extends from investigation to indictment and trial, to sentencing alternatives, and to probation revocation and parole. It can reach the grading of offenses and sentencing objectives, provision for defense services, enlarged discovery, bail options, citation procedures in lieu of arrest in limited cases, grand and petit jury reform, procedure for the explanation of a defendant's rights, conditions for accepting pleas, implicit recognition of plea bargaining, and the enlargement of the State's right to appeal some orders usually considered interlocutory and not appealable (such as an order granting a motion to suppress vital evidence claimed to have been illegally seized).

<sup>22</sup> See Schwartz, *The Proposed Federal Criminal Code*, 13 CR. L. 3265 (July 4, 1973). There may be additional proposals by the time this symposium appears in print.

<sup>23</sup> See, e.g., Smith & Reilly, *The Illinois Bail System: A Second Look*, 6 THE JOHN MARSHALL J. OF PRAC. & P. 33 (1972), where the workings of a number of bail projects are summarized in conjunction with an analysis of the working of the Illinois bail system inaugurated in 1964.

<sup>24</sup> It is probable that the first case book on these subjects was published in 1973. See S. KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* (West 1973).

<sup>25</sup> E.g., the Work of the Clearinghouse on Offender Employment Restrictions, a service of the Section of Criminal Justice and the Commission on Correctional Facilities and Services.

<sup>26</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>27</sup> This reference is to combined statutory and rule reform possibilities. The initiation of substantive law changes ordinarily will find its authority in the constitutional responsibilities of the legislature. In some states rule reform is also primarily a legislative function. For a survey of rule making see, J. POWERS & C. KORBAKES, *A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES* (1973), a publication of The American Judicature Society.

Ohio has made a major effort to improve. A quantitative and qualitative analysis of the Ohio effort to determine what and how much Ohio has done is the objective of this symposium.

It is obvious, of course, that efforts to better, until the millenium, mark only a claim of progress and, in some fundamental aspects, only a beginning. Nevertheless, beginnings are vital. The articles in the symposium will assay the Ohio initiative and may map the future for part of the way. That there will be a future is certain. The orthobiosis of criminal justice is a continuing process.