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B. J. George Jr.

University of Michigan

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The Imperative of Modernized Criminal Law Teaching

By B. J. George, Jr.*

Gideon v. Wainwright1 may prove to be not only a boon to the average state felony defendant, but a major service to the practicing bar itself. For the first time the judiciary and bar together are forced to consider how not only to afford counsel to the indigent, but to cure a serious condition in the legal profession itself—its inability to provide adequate legal services in criminal cases.

I. Symptoms of Inadequacy

This inadequacy is manifested in several ways. One is the fact alone of non-participation in criminal cases. No doubt any town has its share of attorneys who shy away from criminal cases, but the problem is acute in cities of a quarter million or more, in which the percentage of lawyers doing a significant amount of criminal law work is in inverse ratio to the population figure.2

This non-participation is rationalized in various ways.3 One is to say that there is no money in criminal cases. This is probably true, but money is not ordinarily the primary stated objective of one who considers himself a professional; the image of a professional, to himself if not to others, is of one who serves needs in the community, not of one who provides skills in return for pay.4

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*Professor of Law, University of Michigan. A.B., J.D., University of Michigan.
2 For example, in the 1964 Martindale-Hubbell Law Directory, there are 110 firm listings, of which 16 include "general practice in all courts", which might include practice in Recorder's Court, and only 1 lists criminal practice in federal courts. Of the 161 firms listed for San Francisco, 4 list criminal cases and 9 "general practice in all courts". My eyes gave out after this much "non-doctrinal" research, but I doubt that the situation would be much different in other large cities.
Furthermore, most lawyers do a fairly substantial amount of civil work without asking or expecting remuneration, which suggests that the financial issue is inherently spurious.

Another is to say that one cannot practice ethically. But the experience of the typical small-town attorney or of the English barrister suggests that the same ethical standards can be maintained in a criminal as in a civil practice. Or one may plead loss of clients because of the “guilt by association” attitudes of potential clients. Whether or not such a community attitude actually exists, popularity is not ordinarily a criterion of professionalism. None of these stated reasons is particularly persuasive when measured by the lawyer’s practice as a whole; non-participation must therefore be symptomatic of a basic antipathy toward criminal law.

Another manifestation of this inadequacy is the low level of professional standards in the practice of criminal law in metropolitan areas. While there are a few reputable attorneys who engage principally in the defense of criminal cases, many lawyers who appear day after day in the criminal courts cut corners in ways that hazard discipline or disbarment. They solicit clients in the courtroom and corridors, hire jailors and court attendants to steer defendants their way, have tie-ins with bailbondsmen, split fees for referrals from other lawyers and suborn perjury by witnesses. Some are in effect “house counsel” for criminal groups engaged in prostitution and the narcotics traffic. The persistence of these unethical practices is chiefly the responsibility of the bar itself. Bar association officers and members of committees on grievances and ethics rarely appear in or visit criminal courts and know little or nothing of the conditions under which counsel in routine criminal cases operate. Occasionally a disciplinary case arises from some particularly flagrant violation of professional decorum, but the result is usually only a feeling on the part of the lawyer disciplined that he is being picked on, because everyone else is doing the same thing. Shady practices are usually well

5 National Council on Legal Clinics, Joint Conference on Professional Responsibility Report 10, 11-12 (1958); Sacks, Defending the Unpopular Client.
6 Carlin, Lawyers On Their Own 105-09 (1962).
7 The marginal practitioner can be called the prostitute of the profession. Cf. Pike, Beyond the Law 2 (1963). In terms of random enforcement, mechanical imposition of punishments, sullen resentment on the part of the person punished
controlled when the leadership of the profession takes an interest; the lack of real concern is simply one more manifestation of non-participation which suggests an inability to cope with the special problems of criminal law practice.

Another symptom is the inherent irrelevance of the canons of professional ethics themselves to the problems of a modern criminal law practice. What may have been an adequate statement of ideas for early nineteenth-century Philadelphia or late nineteenth-century Alabama is hardly sufficient to cover practice before a special sessions court in Manhattan or recorder's court in Detroit. For example, the use of runners or steerers is prohibited, and any type of advertising directed to the public is a basis for discipline. The basic principle is acceptable, but it ignores completely the plight of the average person under arrest, not indigent but without a lawyer on retainer. The canons presume that he knows the names and reputations of local attorneys, but if he does not and no lists of criminal law specialists are available to him, he is forced to turn to the only source open to him—the policeman, turnkey or bailiff. Or take the instance of the lawyer who knows his client's whereabouts when the police do not or knows where incriminating evidence is when the prosecuting attorney does not. Some authorities assert that he is under a duty to tell or to turn over material, though without considering what this would mean to the concept of a defense through counsel if it were rigorously enforced. The canons offer

(Footnote continued from preceding page)

and projection of guilt on the agency which punishes, the prostitute and the marginal lawyer are strikingly similar. Cf. George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717, 753, 759-60 (1962), with Carlin, op. cit. supra note 6, at 163-84.

8 Drinker, Legal Ethics 23-26 (1953).

9 A.B.A. Canon 28; A.B.A. Op. No. 147. [These and other similar references appear in American Bar Ass'n, Opinions of the Committee on Professional Ethics and Grievances (1957)].


13 See Clark v. State, 1599 Tex. Crim. 187, 261 S.W.2d 339 (1953), which held a lawyer's overheard advice to his client, "Get rid of the weapon and sit tight and don't talk to anyone, and I will fly down in the morning", not a privileged communication. However, Harvell v. State, 395 P.2d 381 (Okla. Crim. 1964) suggests that the defendant commits no crime if he destroys evidence.
very little which is directly helpful, and the leadership of the bar
does nothing to establish guidelines for practice, which contrasts
markedly with their reaction when problems of contingent fees,
legal services by unions for their members or intra-firm con-
flicts of interest and the like arise. Inadequate canons of ethics
reveal inadequacy of the bar itself.

Finally, the inadequacy of the profession to represent criminal
defendants is revealed by the "guilt by association", "how-can-
you-defend-him-when-you-know-he's-guilty" attitude of a great
many citizens. The attitude is not new; the establishment of
most of what is labelled "the rule of law" has been in the face of
prevalent citizen reaction that safeguards are unnecessary or even
undesirable. Yet where defense of criminal cases is concerned,
the legal profession rarely takes a firm position affirming the
integrity of the attorney who represents unpopular defendants
and affording the citizen relatively little scope to discriminate
economically against criminal defense lawyers. This, I believe,
is because the legal profession itself displays the same "guilt by
association" attitude, though usually in more subtle ways, and
thus reinforces rather than counteracts lay prejudice. In these
and other ways, the aftermath to Gideon v. Wainwright will
almost certainly reveal the inadequacy of the profession as a
whole to provide competent counsel in criminal cases.

II. Cures for the Condition

With a generally debilitated patient, the physician is some-
times puzzled as to what to do first. A like dilemma faces the legal
profession. Perhaps one possibility is simply to let the patient
die, in this case by accepting an ever-diminishing role for the
lawyer in the administration of criminal justice. To a large extent
our profession is already excluded from vital areas of criminal law
administration like the sentencing process, probation and parole,

14 Judge Sharswood thought the contingent fee unethical. Sharswood, Pro-
fessional Ethics 85-92 (1854). Canon 13 permits the practice under certain
conditions.
15 Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,
similar problem, see Weihofen, Practice of Law by Motor Clubs—Useful But
Forbidden, 3 U. Chi. L. Rev. 296 (1936).
16 Note, Unchanging Rules in Changing Times: The Canons of Ethics and
Intra-Firm Conflicts of Interest, 73 Yale L. J. 1058 (1964).
17 See the materials gathered in Sacks, op. cit. supra note 5.
prison administration, release of the criminally insane and the
commitment, transfer and release of the mentally abnormal whose
activities pose a threat to the community and to themselves. We
have been substantially excluded from judicial processes affecting
children and adolescents, though there are some signs that our
function in that area is becoming a stronger one. But the
problem of crime in society remains and grows, and the clamor
by persons trained in other fields for authorization to solve it
increases. If the legal profession does not respond to the
challenge, others will. Unless there is a marked change in both
the attitudes and activities of the organized legal profession, the
patient will die; as a profession we will then largely content
ourselves with the practice of law in more antiseptic fields.

Perhaps, however, the judiciary can assist in forcing the
profession as a whole to come to grips with its ailments and try
to do something about them. I see at least two possibilities. One
is through insistence that the canons of professional ethics be
modernized and made adequate for modern practice. For this
to be accomplished, however, bar leadership will have to be
shaken from lethargy, and recommendations for change initiated
by those who know from experience what the criminal law
practitioner faces and how difficult it is for the typical criminal
defendant to make contact with and cooperate with him. A com-
mittee of corporation, probate and tax lawyers is not a likely
source for an adequate revision of the canons.

The second is that trial judges can require that every member
of the bar in the county or city assume his share of the burden
of defending indigent defendants. The reaction to this will range
from grumbles to roars of protest. Many experienced lawyers
will have to go back to kindergarten to found themselves in the
essentials of criminal procedure. Many of them will make errors,
though probably not major or irredeemable ones if they expend
the same care that they would in appearing for a corporate client.
But if each lawyer has to appear in three or five or a dozen cases
each year, he may develop a concern about criminal law ad-
ministration which he does not evince now.

10 Cf. Kubie, Research in Judicial Administration: A Psychiatrist's View, 39
Nevertheless, mere exposure to the problems of a criminal defense will not solve the problem completely, because the roots of the antipathy toward criminal cases which the bar evidences go deeper than mere economics or a low rate of exposure to criminal defendants. They rest in attitudes which take firm hold in the course of legal education, attitudes which stem from the conflict which exposure to criminal and family law materials engenders.

A perceptive person is aware that he has the same basic drives the typical criminal has, but that in the process of physical, psychic and social maturation he has succeeded in controlling most of them within acceptable bounds. It will take an unusual combination of circumstances before he is likely to commit an act so deviant as to warrant criminal prosecution. But this awareness of capacity to do the forbidden is not a particularly comfortable one to entertain, and so he represses his awareness by projecting on to others the capacity to do evil acts, by denying that evil acts exist, by deriving a (false) sense of security from the belief that the courts and other agencies are taking care of evil-doers, and the like. The average citizen has to be caught up in an event within his family or immediate societal group before his defensive armor is pierced by a sense of kinship with the offender.

But a law student is in a particularly vulnerable position, for he is forced into contact with at least vicarious recitals of criminal conduct which revive all the old resolved conflicts. He is faced by situation after situation in which people like himself, in circumstances which he either has experienced or recognizes that he might well experience, have killed, committed acts of sexual aggression, breached trust, stolen or even driven an automobile without an operator’s permit in possession. Some students are comfortable enough in adjusting to strains like this that they achieve the insight that while there is kinship, there are differences in ability to control impulses, that society has a claim to protect itself from injurious conduct, that there may be various ways to accomplish this protection, and that sometimes this is through criminal punishments and sometimes not.

Without help, however, a great many students relieve the stress in some other way. A student may revive his infantile attitude that if only the right words are said or the proper acts
done, the problem will be conjured out of existence. If this is the escape avenue chosen, he very probably will seek avidly after concrete propositions of law, commit them to memory, and resist suggestions that these propositions may be ineffective or even detrimental to crime control. This is a common lay and legislative attitude, but it characterizes large segments of the law student body and of the bar as well, typified, for example, by reactions when changes in the canons of ethics are proposed.

Or he may well carry on a process of projection, in which he persists in maintaining that only "they", particularly the "theys" who are the defendants in criminal cases, are bad, inherently bad, and commit criminal acts, and that the evil will be suppressed only if "they" are suppressed. The greater the subconscious awareness that the criminal is pretty close to the student, the harder this attitude probably will be. This is likely to lead to an insistence that harsh laws be enacted and rigorously enforced, and an attitude of tough cynicism toward all offenders.

But it is most likely that he will take flight from the source of discomfort. I suspect that a great many persons who leave law school voluntarily during the course of the first year are fleeing an internal conflict. Though I am unaware of any studies on the matter, this withdrawal may often stem from a failure to resolve satisfactorily an apparent conflict between personal standards of idealism and the self-image of a fledgling professional which the student holds, and the apparent preoccupation of the law with rules and specifics which the first-year curriculum so often suggests. If all of this threatens disintegration, the student drops out to resolve the conflict summarily.

Most probably, however, he will execute a partial flight by avoiding criminal and family law, where his awareness of his own involved humanity is greatest, and taking refuge in other areas of law where the appearances are that he can manipulate people as things without personal involvement. If any raw nerve endings of idealism remain, he can anesthetize them by stating that money is his goal. The attitudes of the faculty and influential alumni strongly reinforce the student's position and make it seem the

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20 I am confirmed in this belief by letters from law students and would-be law students in response to my article in Harper's Magazine, April, 1964, p. 183; all reflected this view.
right one. In brief, by the second or third year most law students are miniatures of their elders. If nothing is done to change these processes in law school, the bar ten, twenty and thirty years from now will show the same studied indifference to the administration of criminal justice and to the problem of crime in society that lawyers do today. The cure, if it is to come, must have its genesis in legal education.

III. TOWARD A METAMORPHOSIS

A. Interdisciplinary Instruction

Significant changes in the teaching of criminal law can occur only as faculty attitudes change as to what law is. Langdell's view of law as a "science", consisting of principles or doctrines, "the mastery of (which) as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer",21 still dominates much of legal education. It remains ensconced in a number of criminal law casebooks. Many law teachers continue to teach on the basis of nineteenth and early twentieth century case reports and such hypotheticals as whether a drunk who breaks a store window and tries to have intercourse with a display dummy is guilty of burglary and attempted rape. This type of teaching can only reinforce either a feeling that the manipulation of words will cause crime to disappear or that these "weighty" problems are time-wasters which anyone of intellectual and professional integrity should abandon for more satisfying pursuits. Until the law teacher's approach changes from an assumption that solutions lie in adherence to propositions of law to an inquiry into the probable roots of criminal conduct, the alternative means by which society might cope with it, the standards by which deviant behavior is to be officially identified and the procedural framework within which designated officials are to act, there will be little noticeable change in student reactions to criminal law. It is essential that we honor the question more than the answer.

If the emphasis is on the question and not on the pat answer, it is inevitable that the relationship between law and the be-

havioral and social sciences will manifest itself. Foreign observers of the American university invariably are struck by the wall of isolation between the law faculty and other segments of the academic community. While some blame attaches to both sides of that wall, it is to me principally the Langdellian approach and the sense of superiority it too often engenders which keep it in repair. Whenever criminal law and procedure are accorded a dynamic function rooted in the community, the criminal law teacher finds himself allied with and not opposed to anthropologists, economists, political scientists, psychiatrists, psychologists and sociologists, and able for the first time to talk with them. He then usually does so.

After conversations are well under way, the thought of collaborative teaching almost certainly arises. If professors are helped by conversation, students should be also. But there are several barriers to this. One is the deadly pall of administrative practice. Law schools are law schools and other departments other departments, and no lines of communication exist. Deans and department chairmen watch one another like hawks to see that not one dollar of the budget enures to the benefit of anyone else. Another is that faculty resistance is high to the idea that work done elsewhere in the university can count toward the prized degree offered by the school or department concerned. A third is the assumption by law teachers that an entering law student who holds a baccalaureate degree can make his own synthesis between what he has learned earlier in the social and behavioral sciences and what he will learn in law school. This, I submit, is a fallacy. Law teachers themselves have rarely succeeded in doing so, and I see no reason to expect that students will accomplish the feat unaided. A fourth is the feeling of comfort on the part of each faculty member concerned. It is much easier to continue in established patterns, talking with colleagues who “understand” and publishing for the small coterie of those who “appreciate”. The role of the herald who parleys with “them” is seldom attractive, since he may find himself cut off from his own adherents and surrounded by clouds of hostiles. All the forces of the university appear mustered against the subversives who would cooperate.

Yet cooperative teaching is both possible and immensely
rewarding. I have experienced it in at least three contexts,22 all
related to the basic criminal law course is that with Dr. Andrew
Watson, who holds a joint appointment in the Law School and
the Department of Psychiatry of the Medical School; we are full-
fledged partners in teaching one section of the criminal law
course. As our experience and confidence in each other have
grown, we have found ourselves achieving several goals during
the course of the year.23

One, of course, continues to be instruction in basic criminal
legislation and its interpretation. But we aim also at an analysis
of the assumptions which appear to underlie that legislation and
their validity when viewed from psychiatry, sociology and other
disciplines. The result is a somewhat fuller concept of criminal
legislation than is possible in a common law-oriented course.

A second is to give the students experience in handling
scientific material. To a degree this means ignoring traditional
curricular boundaries, since problems of expert witnesses are
supposed to appear in evidence and (civil) procedure, both third
year courses in our curriculum. But whenever we throw down
the fences between law and other disciplines by permitting a
questioning of the assumptions on which traditional definitions
of crime rest, the students invariably want to know what other
investigations have turned up. Dr. Watson's background in
biology, medicine and psychiatry permits him to act as an expert,
but the burden is on the student to ask the relevant questions
and develop the material he needs. These skills are particularly
necessary in coping with psychiatric evidence under whatever
substantive doctrine of insanity is established in the state. Law-
yers and judges who would instantly spot the problem if a ques-
tion were directed to a ballistics expert, "Now tell me, Doctor, in
your expert opinion is the defendant guilty of murder?", lie down,
roll over and play dead when a psychiatric expert witness gives
his opinion that the defendant is "insane", "knows right from

22 Including joint seminars with visiting foreign scholars and participation in
an area studies program in the University of Michigan Center for Japanese Studies.
of which have proven stimulating. The association most directly

23 See also Watson, Reflections on the Teaching of Criminal Law, 37 U. Det.
L. J. 701 (1960); Teaching Mental Health Concepts in the Law School, 33 Am.
J. Orthopsych. 115 (1963); and cf. Watson, Family Law and Its Challenge For
wrong”, “was irresistibly impelled” or whatever. Or they accept implicitly a statement that a person is “schizophrenic”, a “sexual psychopath” or a “sociopath”. In a year’s time, our students, we feel, become relatively well-skilled in probing beneath a conclusion in legal terms or a mere diagnostic label to the data, if any, on which the diagnosis rests, and in relating all the data to the issue of criminal responsibility.

A third is in permitting the student to gain insight into his reactions to criminals and criminal situations. This is the point at which I as the lawyer member of the team have had to make the greatest departure from tradition, since it takes only a little “cutting a man down to size” by ridicule or dismissal of an idea as irrelevant, non-legal or emotional in content to dry up any references to other than black-letter law; law teaching methods often appear to place a premium on these classroom methods. If, however, the student becomes aware that he is not decapitated verbally when he expresses his feelings about a problem, he will usually find that he and many of his classmates are reacting identically and, depending on how the instructors handle it, according to pattern. This is the first step toward insight into the way his own mind operates and why and how he needs to take account of and compensate for his own reactions. While this process at first seems a sacrifice of “coverage” for indefinable gains, Dr. Watson and I have found that after about the first half of the course we are getting more quickly at the heart of criminal law problems than had earlier been the case, because of developing skills of the students in recognizing what part of the problem is their own reactions and what part the externals of the problem at hand.

The fourth is the growing sense of professional identification which the class manifests as the year wears on. It may be that ethics, as morals, are “learned at mother’s knee”, but the primary problem is in deciding what is ethical in a problem situation. The attitudes of the professional ethicists of the legal world suggest that all that is necessary is to consult a handbook of the canons and ethics opinions. But anything capable of that easy a solution poses no real ethical problem. A man has an image of himself as a professional in which service is primary and livelihood secondary. Ethical conflicts most often arise when the
conduct called for suggests a hireling more than a benefactor or stresses sheer financial return over a sense of satisfaction through service. When the problem is perceived in terms of a conflict between what a man’s selfish instincts urge and his self-respect, based on his image of himself as a professional, requires, he is well on his way toward a satisfactory resolution of the conflict. If he recognizes also that uncertainty is always a part of the process, he can act and go on to other things. Whatever the actual reason, joint instruction appears to produce a more realistic attitude toward problems of professional ethics than do the traditional lectures on the subject.

One unexpected by-product of this is that we acquire a sprinkling of students who cross divisional lines from other parts of the University. This year, for example, we have acquired by means unknown to us two graduate students in the School of Social Work, a social psychologist and a sociologist. Because they have been encouraged to participate as auxiliary experts, we have found that we have also “acquired” experts in engineering, statistics and anthropology from within the law student group. Cooperative instruction appears to precipitate a synthesis between undergraduate specialties and law study which more traditional instruction does not.

Of course, some teaching materials are better for this type of instruction than others. Dr. Watson and I use the Donnelly, Goldstein and Schwartz materials, which are the most satisfactory for the purpose of the several casebook collections from which we have taught. No set of materials is ever wholly satisfactory to the man who did not compile them (or probably to the man who did), but we have found that very little supplementation is necessary for us to achieve our course aims.

One can legitimately ask whether collaborative instruction is feasible within the limitation of an ordinary budget. Experience at several schools suggests that it is. Most universities have medical centers, hospitals or clinics with qualified analysts on

24 From the student’s viewpoint, this is approximately the same problem that arises when his lurking awareness of how much he and the criminal share collides with his awareness that all the conduct in question is forbidden and therefore bad. He resolves or represses both problems in about the same fashion.


26 This experience confirms me in the favorable view expressed in my review of the book in 60 Mich. L. Rev. 672 (1962).
their staffs. One or more will very probably be responsive to overtures from a criminal law professor. Collaboration almost always begins with a discussion of shared problems, flowers during a period in which each partner familiarizes himself as a layman with the other's discipline, and bears fruit when the two share the same classroom. Missionary work helps. Dr. Watson, for example, usually has a resident in psychiatry attend each criminal law section, which can be a first step toward cooperation at a later time either at Michigan or some other institution. Visiting criminal law professors can be encouraged to make use of one of the medical residents. Graduate students interested in criminal law can be invited to attend and react to the method of joint instruction. One may even foresee professorial research grants which contemplate experimentation in interdisciplinary teaching. While budgetary and personnel problems cannot be dismissed out of hand, the chief hurdle is to find two people willing to forgo the comfort and security of traditional course content and teaching method for the perils and rewards of the explorer.

B. Comparative Law Teaching

As an adjunct to interdisciplinary teaching, law schools should consider increased use of comparative law materials. It is only the legal jingoist who is unwilling to examine another legal system with care. Other countries are faced with the same problems of crime and society with which we grapple. If we go beyond the superficial differences in the way in which the legal norms are stated, and in the organization of courts and prosecutors' offices, to examine what the foreign legislator or administrator has set out to accomplish and the results he has achieved, we may well find ideas capable of being utilized here at home. Even at the conceptual level the system of the civil law is in stark contrast to the typical disorder of American legislation. In short, one of the best ways to study one's own system is to study another's. Of course, what is foreign is not necessarily good. But we should be after is an idea already implemented and tested by experience in other countries which we may ourselves adapt to our own circumstances. The growing rate of faculty and graduate student exchanges in law attests the basic functionality of such study.
Each law school must decide for itself how to incorporate foreign materials into its curriculum. Sometimes translations of foreign code provisions can be included in a casebook. This may prove helpful in teaching criminal law, but presents pitfalls in the case of criminal procedure, because an isolated procedural statute can be terribly misleading if separated from the code as a whole and divorced from the actual scheme of administration. Seminars are more effective than random references in a basic course if the instructor has experience in another legal system. Here, too, joint instruction is invaluable, with the partner in this instance being a foreign lawyer or professor.

While there are practical problems to solve, there are more available means of solution than administrators and faculty generally realize. The Committee on Foreign Exchanges of the Association of American Law Schools often has the names of qualified foreign scholars receptive to a visiting appointment. United States Educational (Fulbright) Foundations and Commissions almost always can supply names of outstanding scholars in law, and may sometimes even cooperate materially by awarding a travel grant to the person selected, provided arrangements are cleared sufficiently in advance. The Asia Foundation occasionally cooperates in the same way. Schools operating within a limited budget but interested in trying the experiment should not overlook the products of the several foreign graduate programs in American law schools. At Michigan alone we have annually six to ten people among our foreign visitors qualified linguistically and professionally to cooperate with an adventurous American teacher in giving a joint seminar; the cost to the host institution might not exceed $2,500-$3,000 a semester. Another experiment might be a summer workshop program sponsored by the Association of American Law Schools or one or more law schools with experience in foreign and comparative law at which criminal law and procedure teachers without substantial acquaintance with foreign law could receive a capsule course in the substantive and procedural law of one or two other countries, and advice as to how to proceed to acquire more experience and knowledge. Whatever the means, comparative law has

27 The Foreign Exchange Bulletin issued by the committee is helpful in this respect.
a role to play in prying loose the teaching of criminal law and
procedure from its case system mold.

C. Integration of Law and Philosophy

A third area to which law schools should direct their attention
is the interrelationship between law on the one hand and philoso-
phy and theology on the other. Some philosophers and theo-
logians may occupy themselves some of the time with more
general and abstract issues than lawyers usually find themselves
involved with. But a philosopher or theologian worth his salt
wants to set the specific problems which men face in a larger
context; the specific problems from which he starts or at which
he arrives are the same problems with which the lawyer has to
cope. Nor can a lawyer or judge ever escape the broader ethical
and moral implications of what he does. For example, if there
is any difference between shutting a man up in prison as a
criminal and confining him for an equivalent period as a mental
incompetent or a sexual psychopath, that difference is as much
moral as legal or functional. If the law says that a woman can
be aborted if she has a heart condition which may kill her if she
goes into labor at term, but not if she has taken thalidomide
during the first trimester of pregnancy or conceived as the result
of rape, several moral issues are involved. To free an abortionist
to ply his trade until caught again because the police failed to
knock and announce themselves before breaking into his premises
to arrest him is more than a matter of judicial administration or
constitutional policy. Very few questions of importance can be
satisfactorily disposed of on a purely technical basis.

This does not mean, of course, that philosophy or theology
has pat answers to the lawyer's problems. In fact, with the
possible exception of Roman Catholic moral theology, no theo-
logical or philosophical school purports to grapple with the crimi-
nal lawyer's problems. Most Protestant seminary courses and
books on Christian ethics are at the "God is Love" level, and most
university courses in Ethics are historical surveys. In many
respects the lawyer has as much to contribute to a discussion as
the philosopher or theologian. To my mind, therefore, this is an

29 Cf. O'Meara, Natural Law and Everyday Law, 5 Natural L. F. 83 (1960).
area in which co-instruction offers great promise. Tentative exploration of the idea at Michigan suggests that philosophy and seminary faculty members are quite favorably inclined toward the idea and that money from outside sources is probably available to finance the experiment. Alternatively, most law faculties have one or more members well enough founded in philosophy that a jurisprudence offering can be arranged based on problems of criminal law policy. In this as in most other respects, the students are ahead of the faculty, so that faculty initiative is the chief need.

IV. CONCLUSION

Therefore, if the attitudes toward and practices of the profession in criminal cases are to change, the impetus is most likely to come through changes in legal education. These changes, however, are not simply pleasant options, but are absolutely necessary if criminal law is to remain a living discipline. The community manifests increasing impatience with traditional legal processes and archaic legal definitions as means to counter the growing problems of crime and delinquency. The legal profession does little to stem this impatience, and indeed feeds it, not by what it says about the desirability and adequacy of traditional practices, but by its collective unwillingness to give serious consideration even to the question of whether a problem exists. If lawyers and judges deny that there is any special problem of crime in society, if they treat as outcasts those lawyers who take criminal cases primarily or exclusively, if they persist in treating the canons of ethics as if they were graven on stone tablets, and if they characterize criticism from non-lawyers as irresponsible, uninformed or unworthy of notice, the result will not be to suppress the criticism. Instead, their indifference will serve to remove law and the legal profession as relevant factors in society’s effort to cope with a situation which non-lawyers know to exist even if lawyers do not. If lawyers become corporation tinkerers or tax law mechanics, while mental health boards, social welfare departments, “conduct supervisory officers” and other assorted administrative officials supplant the courts as instrumentalities for crime and delinquency control, they have only their own inactivity and insensitivity to blame. If the legal profession is to
play the role it should, its members must learn to work with and not in defiance or ignorance of other disciplines. A changed concept of criminal law teaching should permit it to play that role; to cling to the traditional patterns of teaching and practice probably means either professional suicide or the perpetuation of incompetence and injustice.