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THE PROSECUTING ATTORNEY'S OFFICE—DO MODERN CONDITIONS CREATE NEW DUTIES FOR THIS OFFICE?†

FRANKLIN G. DAVIDSON*

In attempting to answer the question constituting the title of these more or less rambling remarks one comes face to face with a corollary of the repeated observation that each person is necessarily bound by his own limitations, and finds that one must draw upon his own experience in these times and under modern conditions and have nothing but hearsay—to the law notoriously fallible, as a standard of comparison. I urge, therefore, that my limitations in this discussion be not overlooked in order that any disappointment may be discounted in advance.

It is a common tendency, not only in these times, but in all ages, if we can believe our history, for each succeeding generation to talk about modern conditions and their press of attendant new problems and new burdens. With this habit which seems to be unconsciously innate, we should be inclined, I think, all of us, to say, off-hand, why yes, never have the duties of a prosecutor been what they are today. Conditions are not the same today. Therefore these new duties arise from these conditions. But, if anything of profit is to be derived from this subject, it must have more than casual consideration.

The frame of mind in approach should be similar to that displayed by a classmate of a distinguished President of an old College in this State who chanced to meet the President one day and, after an exchange of greetings, said, "George, how are the young men getting along?" The President answered, "Just about as we did when we were in school," and his classmate then made this reply, "Well, George, is that so, it's too bad. I hoped they were doing much better." It is the unusual person who does not couple "good" with "old times" and who can keep a proper perspective when time has passed. So it is also a serious undertaking to analyze our present situation as to duties of the prosecutor's office without being drawn into the current of flowing verbiage about our times, and carried along without a true bearing and a course well laid.

* See p. 336 for biographical note.

†An address delivered at the 1928 meeting of the Indiana State Bar Association.

It is stated that there is more crime than there has ever been and, without any figures, apparently more crime where the perpetrators are not apprehended. But there are more around us than there have ever been before, and how much of this is caused by that fact instead of by changing conditions is difficult to say. Too, this element of the failure to apprehend criminals is something in which we may be interested as citizens, but only incidentally as prosecutors, since that certainly does not add to our duties. The condition that has caused unemployment of necessity and of choice, the automobile, hijacking, booze running (even by airplane now), disrespect for law, the break-up of the family, flaming youth, and numerous other names and labels, which will occur to you all, are designated modern conditions, and these we have been content to believe have increased our burdens and our duties, but have they?

Where are the murder cases of other days? For two prosecutors' terms in our court and half of another there has been no murder case, and no manslaughter case, and for a period of ten years back of that, only one murder case on change of venue from an adjoining county. I am not speaking of the circuits containing large cities with congested populations, but in the others, I believe that that famous test of a prosecutor's metal is no longer available.

In our circuit there haven't been any unsolved deaths, either, in the time of which I speak. That supreme duty has been lacking, and I speak of it in that way intentionally, since a murder trial embodies all the elements which, say what we will, do make it the greatest test and the most solemn duty that can be laid upon a servant of the state. Gone with that duty are also the attendant opportunities.

Just about the time I was born there was tried in our court a famous murder case which shot into the forefront of trial lawyers a now distinguished federal judge, who is still famous locally for drawing an inopportune *yes* and *no* answer from a medical expert, constituting the favorite anecdote of the community where it has been handed down from father to son. If we have more duties now in my circuit we are apt to collect more frowns than favors and more reviling than renown.

I do not wish to be understood as pining for a murder case, but the fact is that whether I do or not, there has been none, and from the present barometer measuring modern conditions, none is to be expected. Murder and killing of all kinds go with a

new country and, apparently like the star of empire, westward takes their way until even now that field has been harvested with no new crop planted. It is true that the automobile, in the way that it is driven, may be a fruitful source of indictments for involuntary manslaughter, but whether this will offset the decrease in other homicide cases is a nice question.

The theft of automobiles is, of course, an outstanding new condition, as we are inclined to view it. They are attractive to youth and to the hardened criminal alike, and, to those of us who can remember the days when speed was talked of in terms of the gait of a horse, most easily made way with.

But, of course, then there was horse stealing, and much of it, so much that a protective association was long honorably in existence for the sole purpose of making war upon malefactors of this persuasion. To the man on foot then, the man on horseback could most speedily make his getaway. To the man on horseback now, the man in an automobile can fairly fly, but, the answer is that none of us is now on horseback, save in the army or by doctor's order, and the automobile thief is now hunted by automobile of even greater horsepower, or should be if the administration is not asleep, and officers have with it all the aid of rapid universal communication.

An interesting study would be the number of thefts per thousand of horses a few years back, and the number of thefts per thousand of automobiles now. I venture to say that the figures would run neck and neck. In this I am talking of actual thefts, not joy rides. That is a new condition that could not exist when the family mare was in the pasture, or in the family lot, or livery barn. No flaming youth then thought of, or, if he did, put into execution, the idea of going out with a bridle and catching and harnessing and hitching the nag to the carryall to drive about for an hour or so, or maybe longer, with his friends, of either or both sexes, and leaving the conveyance finally abandoned on some roadside. Too many obstacles prevented, not to mention the work involved.

But the automobile, all primed and parked in the street is inviting, and the invitation is often accepted. This rarely adds to the prosecutor's duties, however, because the machine turns up and the joy riders have gone. Now and then they come up, but usually not, so, even on this score, the automobile does not in itself add so great a burden, and carries, at its highest rated capacity, few additional duties.

What has been said of the automobile, *per se*, is scarcely applicable to the automobile as an instrument in the hands of criminals. We have a new crime in recent years called automobile banditry, carrying properly, a rigorous penalty. The criminal is enabled to make his plans as he never did before. He is independent in his movements with this means of travel. He is the master of strategy and surprise. This has increased burglary insurance rates and created a wide market for alarms of all kinds. Trucks have enabled thieves to haul into the cities well nigh the complete stock of stores within a radius of one hundred and fifty miles (this I state from experience) and have caused gray hairs for all of us in our attempts to return these men, even when apprehended, so that they may be charged and tried. Automobiles have made possible the attempted holdups and holdups of filling stations and garages, both directly and vicariously, by making necessary these new places of business to be protected. Witness one instance where two men from Indianapolis drove the more-than-fifty miles to our town and held up a filling station. Fortunately they were apprehended by the fine work of an officer in a neighboring city and were convicted. An automobile was used in their arrest, and a better one than the one they had, which, incidentally, was a stolen car, stolen for the job, to be returned when it had served that purpose. This then, our great invention, in connection with other crime, has broadened our field of activities along with that of those whom we seek, in behalf of the State, to punish; and, in doing so, is undoubtedly, one modern instrumentality which is increasing our duties, because it lays open our communities to a relatively greater number of criminals.

The sex crimes are always with us. The legislature raised the age of consent, but even that does not seem to increase the cases that have arisen. And as for bastardy, that hybrid action where the prosecutor acts as referee and a sort of sublimated godfather, it is noticeable by its obsolescence.

This new freedom has done many things, and among others, it has inspired an independence, and a different philosophy, if it can be dignified by such a name. How many have had the experience of seeing a young lady look over with scornful eyes the admitted father of her unborn child, refuse his money and decline to marry him in spite of his ardent willingness? It is a novel experience, if not unique, to hear the maiden declare that she can't understand what she ever saw in him, and certainly

will not ruin her life by marrying that *big bum*, or *poor fish*, as the case may be. If modern conditions result in this, then let the moralizers and sociologists cogitate, but in the cold light of fact, this psychology does not make for bastardy cases.

The same spirit does not disclose the consent of one who cannot consent by law, and there go your cases never to see the light of day, and adding not a grain to the burden of your duties.

Of course we do perhaps flatter ourselves that we take better care of our children than we used to. That is, the law does, acting, if we can believe all we hear, in *loco parentis*, and we have the juvenile crimes that always come and always will; those strictly juvenile and those attendant, where certain evil-minded, senescent individuals seek actually to corrupt our youth. If I can read aright this sort of thing seems to be on the increase, but what modern condition brings it about? I know of none that puts the evil in these old heads more now than ever, and can only conjecture that, perhaps our youths are not looked after quite so well, in spite of the safeguards of the State, as they should be. It is a shame, it seems to me, that the contributing to juvenile delinquency, as we know it, is no more than a misdemeanor; and that depraved individuals, undoubtedly fit subjects for permanent lodgment in some institution, can be given at most a six months' period in confinement, and then return to the continuance of their evil operations. Here is one place that the law has not kept pace with science. Prosecutors, I believe, all will welcome increased duties in this connection if they come not from more widespread operation, but from the apprehension of more of those thus operating.

About the juveniles themselves, I believe that the law has there not kept pace with social science. It seems ridiculous to me that our machinery should be so clumsy. Take a boy, far, far better off in a state school, and consider that the only means to get him there is to charge him with a criminal act. I know that the record is to be destroyed and all that (that is so beneficent in the present acts) but the same man who charges the meanest swindler or boldest bank bandit appears against the boy. He is not a criminal, not malicious, would not recognize *mens rea* if he saw it, is a boy even as you and I, with perhaps no paternal yardstick to guide him, and, after all, I cannot help thinking over and over again when boys come up, and my hardest time in office presses upon me, *there* but by the grace of God might I have been. They must be taught. They must be made

to learn, but not as criminals. This is as wrong as it can be. Very little change should right it, and in the name of all children everywhere it should be done.

The school attendance laws have added to our burdens; and here let me make a nice distinction between modern conditions and modern legislation, the distinction between the common law increase of our burdens and the statute increase of them. To name a few examples offhand, we are called upon to play out part in the school laws already referred to, under the tax laws in several instances, from the failure to list property to the failure to pay for the dog. In fact, so numerous are these various obligations laid upon us that we can scarcely find out from one legislature to the next just what all of them are. We are accustomed to be recognized as a sort of glorified hired man of the law, paid for piece work at an average of five dollars per piece, counting the fees one never gets, which after all is pretty fair wages for a man without a team. New burdens there are, of course, under our legislation, but that is not the precise subject here.

New legislation cannot be passed by without some reference to the liquor laws. Prohibition has trailed in violence, masquerading under new names, such as hijacking, which is, after all, the outlawed crime of robbery, and in itself no crime except perhaps if accompanied by death or shooting out on the highway, or the theft of an automobile. It constitutes one more hazard in this age of rapid transit. Economically prohibition is a fine thing, but we are handling it so far as the prosecution of crimes is concerned in a fashion that would be ludicrous if it were not so serious. The old law of search warrants which it has emphasized has added to our duties, and of course, there are many more liquor cases for trial than before, so many more that our courts are overrun. All this is obvious and trite. But our records show that the old prosecutor on Monday morning used to sign the docket for a goodly sum at five dollars per case on pleas of guilty in drunk cases, and go on about his business until the next Monday when the same thing occurred again, and I have wondered if the Eighteenth Amendment has not had a double-barreled effect upon our office, in that it has not only increased our burdens, but has as well infringed upon our privileges and prerogatives.

It may be unconstitutional for this reason. Perhaps that was why the legislature fixed the fee at twenty-five dollars, and only slipped in that connection in the one section on drunken driving

as amended in 1927. That fee of twenty-five dollars in liquor cases I abhor. Let me be quite accurate and honest; that fee of twenty-five dollars in liquor cases, in theory, I abhor. I seem to hear the state saying to me, "All right, young man, you may not like to do this. It may be an unpopular thing for you to do, so we will make it worth your while, at the rate of from twenty to eighteen dollars extra in each case, to see that charges are brought under this particular act."

I'll admit I bring prosecutions under that act when I can, and that since the 1927 legislature slipped, a drunken driver is charged in two counts, with reckless driving in the first, and intoxication in the second, but all the time I feel that there is something unfair to me about it, as if the state thought I wouldn't be glad to try a man for being drunk without that additional premium. It does not do to think about too long, but let me make my point. I tried an arson case, a bad one, with bad people in it who had been terrors to their community; it took five days of hard battle. Conviction followed. My fee for that was twenty dollars, with two persons involved, if I get it, which I never shall. Compare that real crime, and that real service to the state, with fining one of the town canned-heat drinkers again on a plea of guilty and getting twenty-five dollars.

I am not content but impotent, and proceed to gather my twenty-fives with my fives, until the day that we all dream of, when the prosecutor's office will be put upon a *quantum meruit*.

I spoke of real crimes. Think that the town drunk can get as much for his jag in days as the persons already referred to who contribute to our children's delinquency! Surely no common law development could have brought this about. Something, whatever it may be, is out of focus.

Apparently thus far there is no answer to the question with which we started out. There are other crimes in the category that probably have increased our duties. Bank banditry, embezzlements, holdups, and all those violences and swindlings which we see about us seem to us certain to be among them but, if we look with a discerning eye they probably had their counterpart in former days. The whole matter boils down to the automobile and other means of rapid transportation, as a natural evolutionary condition, and to various legislative enactments, that are modern conditions in that they are a part of the modern plan, that have increased our duties. This we can recognize and then by way of demurrer to the whole pleading say, what of it?

It is, after all, a trite answer, and one that must have been guessed long ere this.

But we say, what of it? because prosecutors are a peculiar kind of people. They rather like these duties, for with something to do they have less time to cogitate upon their rather low estate. They are not concerned about money or they surely would not be prosecutors. Perhaps they like their many duties, too, because when and if they do them well, people can say, "That boy is good," and the more duties, the louder that will be. Which is by way of saying in vulgar parlance, that our meed of praise and our greatest compensation is one with that of a Christian's greatest recompense, "Well done, thou good and faithful servant."

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