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OPEN COURT

PLAN FOR SURVEY OF LYNCHING AND THE JUDICIAL PROCESS

Three lynchings in the first three months of 1931, negroes in Missouri and Mississippi and a white man in North Dakota, bear solemn witness to the fact that mobbism in America remains a perennial problem. Figures for the two preceding years make manifestations of lynch law so early in the new year doubly foreboding. A record of ten lynchings in 1929 was in 1930 increased to twenty-five. One of these was North Carolina's first in nine years. The situation challenges thoughtful consideration.

Cannot the judicial process be shaped into an effective deterrent? The University of North Carolina School of Law, in conjunction with the Commission on Interracial Cooperation, has undertaken an elaborate project to facilitate this result. The problems confronting the law as a result of the prevalence of lynching are to be comprehensively studied. The investigation will continue for a year and a half, and at the end of this time a written report suitable for publication will be prepared. It is contemplated that definite suggestions for specific legislation can be included. Necessary funds have been made available by the Interracial Commission, and the work will engage the full time of one salaried research worker. Among the members of the Commission who are actively interested are Dr. W. C. Jackson, President; Dr. W. W. Alexander, Executive Director, and Mr. G. F. Milton, Chairman of the Sub-Committee on Lynching. An advisory committee of deans drawn from the leading southern law schools will assist in the work.

As an approach to the prospective study just outlined, the January meeting of the class in the Administration of Justice, supervised by Professor R. H. Wettach, was devoted to a consideration of the legal problems incident to lynching. Dr. Jackson and visitors from the Department of Sociology were present. Six papers were prepared and delivered:

1. Effect upon Mob Action of a Change of Venue or a Postponement of Trial, by W. A. Johnson.
4. Liability of City or County under State Legislation, by L. J. Giles.
5. Removal of Sheriff for Failure to do Duty, by J. N. Wright.
These studies are too lengthy for publication in full. However, the timeliness and importance of the material thus far collected indicate the desirability of an abridgement. The present writer makes haste to disavow any credit or responsibility for the collection of this material. An attempt will be made in reporting them to emphasize the points which were most provocative of discussion at the reading of the papers.

Prevalence of the Evil

The valuable study by Walter White, *Rope and Faggot* (Knopf, New York, 1929), sets out full and authentic figures indicating the prevalence of lynching. In the forty-five years following 1882, 4799 persons have been lynched. Three-fourths of the victims are chargeable against the record of the south. Georgia and Mississippi lead with over 300 apiece. North Carolina ranks thirteenth with a record of 101. Of the 4799 figure, 96 were women and the majority negroes. Murder is the cause assigned for 35 per cent, assaults on white women for 25 per cent, and miscellaneous causes for 40 per cent. Of all the states the honor of only four is unsullied by the disgrace of mob murder—Vermont, Rhode Island, New Hampshire, and Massachusetts.

Change of Venue and Postponements: Stimulants for Mob Action

The psychology of mob action is complex, but experience in at least two instances demonstrates what common sense would foretell. A change of venue often incites a mob to immediate action. A recent Georgia case is a good example. Defendant was charged with assault on a white woman. The first trial was so dominated by mob intimidation that the appellate court ordered a new trial in an adjoining county. Defendant, a young white man, was lynched before he reached the next county for trial. A similar effect is often produced by delays in a trial. To such a cause Delaware's one lynching is probably attributable. The Governor was petitioned to set a special date for trial in advance of the regular term, then four months away. A burning at the stake was the mob's answer to his refusal. Likewise taking exceptions for an appeal recently proved the final signal for mob action in Georgia.
Summary Trial as an Alternative

An escape from exciting mobs to final action by changes of venue and postponements is presented by the summary trial with immediate execution of its sentence. It is believed, however, that such trials in effect result in legal lynching. This conclusion is fortified by an examination of specific summary trials. Moore v. Dempsey (261 U. S. 86) is a striking illustration.

In 1919 in Arkansas a number of negroes assembled in their church and were attacked and fired upon by a body of white men. One of the latter was killed in the affray. The report of this killing caused great excitement and was followed by the hunting down and killing of many negroes. There was one further white casualty, and for this certain negroes were arrested. The governor appointed a committee to investigate the lawlessness. It sought to avoid imminent mob action by promise of an immediate trial for the defendants. The grand jury which returned the indictment contained many of the men who had formed the posse to fight the negroes. Counsel appointed by the court to defend them did not demand a change of venue, challenge a juror, or have a preliminary conference with the accused. No witnesses were called for the defense, and in three-quarters of an hour a verdict of guilty of murder in the first degree was returned. According to affidavits no juror could have voted for acquittal and continued to live in the county.

This case and others which could be cited show that summary trial is so open to abuse and unfairness to the accused that it is little better than the lynching law that it seeks to supplant. Indeed, perhaps even this gesture of due process in trying the accused may not assuage the passions of the mob. In a Texas case, although a summary trial was had and immediate execution of the sentence was contemplated, the assembled mob burned the convicted negro forthwith on the pronouncement of sentence.

Manifestations of Mobbism at Trial: Effect on Due Process

A further difficulty of summary trials is the possibility that the proceedings will be set aside as wanting in due process. Appellate courts are not agreed as to when mob intimidation causes this result. The problem may be presented by a composite picture of such intimidation.

There will be excited cries from members of the mob—"Hang him"; an excited relative of the deceased will attack the accused be-
fore the jury. Demonstrations are planned to destroy the effect of defense counsel's argument. While the jury is considering the case, men outside in the court house yard swear and use threatening language to the jury, "If the jury does not hang him we will," and again, "We will give the jury until ten o'clock to convict him, and if they don't we will take him out and hang him." The court naively admonishes the jury that they are not to consider such demonstrations, and in the same spirit jurors make affidavits that their verdict was not influenced.

It is doubtful whether the results of the cases can be formulated into any generalizations of practical worth. A great deal depends on the philosophy of individual judges. The reader is referred to the United States cases of Frank v. Mangum (237 U. S. 309) and Moore v. Dempsey (261 U. S. 86) and the North Carolina case of State v. Newsome (195 N. C. 552). Although two of the cases refused a new trial, the dissenting opinions show how the course of such decisions will be shaped by individual ideas of what constitutes substantial justice for the accused.

Types of Legislation

In general legislation seeks the eradication of lynching in three ways: 1. By facilitating the prosecution of lynchers. 2. By imposing liability in damages on the county or city which is the scene of the lynching. 3. By removing sheriffs for failure to perform their duty in the premises.

To supplement the common law of crimes which a lynching may involve, statutes often provide severe and specific penalties for members of the guilty mob. North Carolina, West Virginia, Virginia, Kentucky, and Georgia, among others, have such laws. The provisions of the Georgia statute are effective when any person has been lynched "without due process of law." The implication would be laughable, were it not so grim.

A specific study of the North Carolina statute shows that it has not been without effect in bringing about the prosecution of lynchers. It recognizes lynching specifically as a crime, provides for change of venue for cause, and gives concurrent jurisdiction to counties adjoining the one alleged to be the scene of the crime. It provides, however, only for punishment when the accused has been taken from a jail, and conspiracy or intent to kill or injure must be shown.
In 1919 fifteen members of a mob which stormed the Forsyth County jail for the purpose of lynching a negro were sent to prison for terms varying from six to fifteen years. Again, in September 1925 the Supreme Court refused to interfere with the conviction and sentence to thirty years’ imprisonment of the leader of the mob which mutilated Joseph Needleman in Martin County. In the same week the authorities of Buncombe County arrested twenty members of the mob which stormed the jail in Asheville seeking to lynch a young negro boy. Special terms were called by the Governor to try the would-be Lynchers and their intended victims. Twenty were punished.

North Carolina, South Carolina, Ohio, and West Virginia impose pecuniary liability on the county which is the scene of a lynching. The penalty is recoverable in a civil action by the lynched party, regardless of his guilt, or, in case of death, by his personal representative. Illinois and Kansas impose a similar liability on cities. In North Carolina and West Virginia the statute has the undesirable provision that it is applicable only when the person lynched was in the custody of the law. These statutes generally have been successfully invoked to compensate aggrieved parties. There is no evidence, however, that the North Carolina statute has been so used. It may be noted that this legislation represents an honest attempt to make amends to those who suffer from the lawlessness of mobbism. But is the broader purpose of retarding lynching accomplished? Is it fanciful to make the twofold assumption that would-be Lynchers know of such laws and that, knowing them, they are thereby appreciably halted in their purposes?

It is not to be doubted that in many cases custodians of prisoners are responsible for mob crimes. By remaining alert to the spirit of the community and by intelligent removal of their charges before a crisis actually occurs they can often checkmate the mob. The third type of legislation seeks to create such a responsibility. Alabama, Illinois, Kentucky, Kansas, Minnesota, and Indiana have statutes providing generally for removal of the sheriff where a prisoner in his custody is lynched. The Alabama statute provides for impeachment in such a contingency. Illinois makes such an occurrence prima facie evidence of negligent performance of duty and provides for discretionary removal by the governor. The latter feature seems better handled by the Indiana statute, which provides for compulsory removal by the court. There are recorded examples of the suc-
cessful use of these statutes to remove delinquent sheriffs. The desirability of such legislation is further illustrated by a comparatively recent failure in Georgia to remove a sheriff, in the absence of a specific statute of this nature. At the present writing a bill introduced in the North Carolina Senate, providing for compulsory imprisonment of those charged with capital crimes in the state penitentiary or jail of adjoining county, has received an unfavorable report by a House committee.

No record has been found of the successful use, for the purpose of removing sheriffs in the particular instance of a lynching, of statutes providing in general for the removal of delinquent county officers.

The Dyer Anti-Lynching Bill

Attempts to curb lynchings by means of federal action began in 1902. As an aftermath of large indemnities paid to foreign governments because mobs in several states had lynched citizens of these countries, a bill was suggested to protect aliens. No action was taken on it.

In 1920 Congressman Dyer of Missouri first introduced a federal anti-lynching bill designed to protect citizens as well as aliens. In 1922 the bill passed the House, but was defeated in the Senate by a filibuster of southern senators. It provides in brief for jurisdiction of the federal courts to punish county officers and lynchers, and for the forfeiture to the United States of $10,000 by any county which is the scene of a lynching.

One of the strongest arguments urged against the bill was its alleged unconstitutionality. Under the orthodox interpretation of the Fourteenth Amendment, it is probably subject to this attack. The amendment, it is said, operates only to prohibit certain state laws or certain actions by the state through its various agencies. "Individual invasion of individual rights is not the subject matter of the amendment." Would federal legislation in this field be constitutional? Its probable efficacy makes this a question of no small importance.

Conclusion

The damning figures of previous years and the early outcropping of lynching law for this year show that as yet the solution has not been found. More lynchers may be punished, more counties fined, and
more sheriffs removed; but no legislation will have solved the problem until lynching is virtually eradicated. Then only will the necessity for investigation and experimentation end.

JAMES H. CHADBORN.

"COMMERCIALISM" IN THE BAR*

It has become a commonplace that the great danger to the bar today is commercialism. What is commercialism in the bar? It is not the organization of large law firms, not the adoption of efficient office methods, not the earning of large incomes. A man may earn $100,000 a year at the bar and keep his professional soul; he may eke out a pittance, and sacrifice his soul on the altar of Mammon. Commercialism, as was said of Boston, is a state of mind.

As a man thinketh in his heart, so is he; and where a man's treasure is, the thing that he values and that makes life worth living to him, there will his heart be also. So long as a man loves the history of the law and the stories of the great lawyers whose deeds and words form the traditions of the bar, so long as new legal problems arouse interest and a desire to solve them, so long as an honorable victory in the courts brings joy apart from the fruits of it, so long as legal aid given a deserving client brings a satisfaction not measured by the fee, just so long is that man a lawyer and a member of a great and honorable profession. But the moment that he loses interest in the law as a science, that his work becomes merely a means to money, that he looks upon his client only as a customer to be sold something to the financial advantage of the seller, at that moment does he cease to be a professional man and become a mere huckster at law.

In our times, when the standards of commercial life are being raised, and many kinds of business are approaching the ethical plane of the learned professions, the ancient profession of the law is called upon to face and fight the threatened loss of the very characteristics that have made it great and honorable. It will be death to the legal profession to lose its professional standards. If these fall, with the inevitably consequent loss of public respect and self respect, whence will come the wise leadership in affairs of state, the learned, impartial and incorruptible judiciary, and the assurance to every man, rich or poor, of equal justice before the law, that only a high minded and able bar can furnish?

*Extract from an address by Hon. Henry T. Lummus before the Middlesex Bar Association, January 23, 1929. Reprinted in 16 MASSACHUSETTS LAW QUARTERLY at p. 22.
It is with such thoughts in mind that the matter of requirements for admission to the bar must be approached. Obviously this matter is more important than ever before. Doubtless in the old days many imperfectly trained men were admitted to the bar. We hear the story of the explanation given by an old-time bar examiner for the admission of one youth. "We asked him," said the examiner, "what the rule in Shelley's Case is. He answered that the rule is that if a poet becomes an Atheist the court will take the custody of his children away from him. That was wrong. Then we asked him what the rule against perpetuities is, and he answered that he didn't know. That answer was right; he didn't know. So we gave him a mark of fifty, and admitted him." It is very likely that the average applicant in those days was not as well prepared as now. But once admitted, how much greater than ours was his opportunity to become steeped in the best traditions of the profession! The bar was small, men were less hurried, the trial of cases occupied a larger part of a lawyer's attention, and the lawyers often went on circuit after the English fashion. Think what it must have meant to be a fledgeling at the bar to hear James Sullivan and Lemuel Shaw, it might be, argue against Nathan Dane and Joseph Story, before Chief Justice Parsons and his court, and then listen to the conversation among all of them at the tavern after dinner! Merely to listen must have been a liberal education. Think what it meant to Abraham Lincoln, whose scanty education at the time he was admitted to the bar is always referred to when requirements are discussed, to ride the circuit with Judge David Davis, to whom in admiration and gratitude Lincoln later gave a seat upon the Supreme Court of the United States!

Now all is changed. Men are busier, and the leaders of the bar avoid the court room. There is little fellowship among the newcomers at the bar and those who could guide their courses aright. Unless a man, when he is admitted to the bar, has made his own the soul and spirit of the profession, he is in danger, for he will find little opportunity to absorb it later.

It is therefore more important than ever before to see to it that those who are admitted to the bar are worthy in character as well as in acquirements. Unfortunately the character of a young man in his early twenties is usually unformed, or at least untested. But so far as possible it should be investigated, and notwithstanding all discouragements the character committees established by the Board of Bar Examiners should continue to function.