

# LEGAL ETHICS AND THE CRIMINAL LAWYER

In every criminal lawyer's life there comes a moment of realization when the fact that the 'system' frequently produces rather less than justice for individuals penetrates through the maze of nonsensical legal data he has accumulated in his work. His reaction to this fact will range from indifference through anger against the impersonal, one-dimensional, monolith of the law, to disgust and enduring outrage. In this brief paper, I wish to probe some of the ethical responses a person can make to what appears to be a system of injustice.

The indifferent person takes what I will call the 'conservative' approach or attitude. This is a simple rationalization formed within the conscience-settling guidelines incorporated in the system. The conservative accepts that criminal justice is imperfect. He sees his duty to help his clients as bounded by other duties; a duty not to mislead a court, of which he is an officer, a duty to follow the developing rules of law and evidence, and, above all, a duty to himself, his family, and his future, to protect his name and position from the attacks of fellow conservatives who may damage his prospects, professional or academic, if he does not conform to their views on the system being applied. His inability to find justice for his clients ceases to trouble him quickly; he does his 'best' in the Boy Scout tradition, and leaves it at that, with the occasional feeling of remorse for the more unfortunate persons under his care.

By contrast, the 'angry young man' will sometimes decide to stick his neck out, and adopt the vocal 'liberal' approach. His ultimate hope is that someday he will be in a position to right these evils if he plays the criminal law game according to the rules. The liberal sees clearly the injustices, and feels them deeply. He joins pressure groups like the Council for Civil Liberties, Prisoners' Action groups, Legal Aid, etc., and tries to make public comments about the inequity he feels. He will write 'objective' articles for scholarly journals seeking to arouse the sense of justice in other lawyers to support his cause. Unfortunately, since most of the journals are controlled by conservative elements of the profession, his opinions will rarely get much of a hearing. On the whole, this will only increase his disillusionment, when few rally to his banner, for these will usually be academics with personal axes to grind for their own self-aggrandisement, and with absolutely no impact on the theory and practice of law. He will gather with his fellow liberals, and the law may change slowly under their combined pressure, though the rate of change is comparable with the rate of

continental drift.

In court, the liberal lawyer makes impassioned pleas for justice and/or mercy, and watches them fall on deaf ears. This is especially true when the case being heard involves some contentious issue, such as conscription (in older days), drugs, or abortion, which will stimulate feelings of pompous moral superiority in the judge who is, by his very existence, an extreme conservative. Such cases are sought after by judges and magistrates alike as places in which to give free rein to the antipathy for the activity involved. The liberal lawyer's only consolation will be the feeling that he is trying and that, slowly, things are improving. The fact that neither he nor his clients are likely to live to benefit from those improvements is a pill too bitter to be swallowed, and he ignores it.

A third possibility, one rarely adopted and always covert, is the 'radical' approach. The radical refuses to accept that the system's ponderous rate of change is adequate but, knowing that, in order to get the appropriate public acquittals for his clients he must follow the



court-determined rules and, as the courts themselves do, make some vague pretence of 'applying the law', he finds practical avenues for achieving the desired results. Police officers can usually be bought or warned off, though this statement displays none of the subtlety required for the task itself. Unfairly, this valuable legal tool is only available to clients with money unless the lawyer has the altruism, and hard cash, to do this for them. But if you have that sort of money and connections and have not been in practice long enough to have had the concept of justice crushed out of you by financial pragmatism, you are probably from too conservative a background to use these talents for your clients. (I'm told the gling rate to 'square' a drug possession charge is \$1,000.)

Other methods abound. Why not create some 'evidence'? You will have realised that the police do it all the time and no-one in the judicial hierarchy seems to object, so why not get in on the deal? The old trick of denying a confession doesn't go over well these days; judges possess the naive belief that the police are truthful and always do the right thing and, if occasionally they don't, that should not interfere with their powers to harass some 'public enemy'. They probably have good reason to, anyway! The prize example of this must be *King v. Reg (1)* where, despite a police search of the accused that was in breach of the Jamaican Constabulary Force Law and the Jamaica Constitution, evidence illegally obtained thereby was admitted. It is possible that, if this had not been a drug case, the Privy Council might not have been so desperate to prop up blatantly illegal police action. But to mention the word 'drug' usually prompts the tiny judicial mind to blow fuses, and anything that can stamp out this immoral, wicked, etc., business will be used.

So the radical can produce his own evidence in such cases. Since in matters worth of such attention, it is unlikely that the court will be concerned with any true facts that do not agree with its view of reality (2), the scope for your 'evidence' is limited only by your ingenuity. Try harassing the police with malicious prosecution, assault, contest the legality of arrests and, above all, never plead guilty!

Before the radical approach is condemned out of hand (and you must at least be a liberal to have read thus far in this journal), consider whether other approaches to such things as police 'verbals', illegal searches and other devices have done anything to further justice. If you play the police-court-'society' games by its rules, you cannot win for your client, though you may well get rich. You will find the rules changed against you if there is any chance of winning under the old ones (3).

If you are a 'concerned' radical, with a conscience that rebels against concocting evidence, consider your dilemma:—

- i) Your client's story may not be true especially if he is guilty of breaking one of society's rules;
- ii) The prosecution 'evidence' will probably be doctored to suit

their case; if the matter is contentious, the 'preparation' of evidence will have been thorough;

iii) Thus the court, if it is actually one of the rare ones that cares about truth in some sense, will not be told a true, unembellished story anyway; and

iv) Therefore, if you fail to try and redress the balance of evidence, not only is your client led like a lamb to the slaughter, but this is so because your scruples permit the continuation of the injustices that inflame your anger.

After such a discussion, the 'objective' conservative or liberal writer, after a daring dalliance with forbidden fruit, should comment, 'Of course, this is a pure intellectual exercise, and I'm not for a moment advocating this 'radical' approach.'

Why not?

- (1) King v. Reg [1968] 3WLR391 (P.C.)
- (2) David Brown "Dope Busts and the Courts" Tharunka, 16th October, 1974.
- (3) See e.g. Angum & Cooke v. Thomas [1974] VR362.

