



12-1-1926

Dangerous Optimism

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Recommended Citation

Clarence J. Ruddy, *Dangerous Optimism*, 2 Notre Dame L. Rev. 95 (1927).

Available at: <http://scholarship.law.nd.edu/ndlr/vol2/iss3/2>

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A Monthly Law Review

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CLARENCE MANION, A.M., Ph.M., J.D., Professor of Constitutional Law at Notre Dame, has recently written a textbook on American History and is now engaged in the writing of a text on Civil Government. The article published in this issue was delivered to the members of the Round Table at South Bend, Indiana, December 1, 1926 and was the subject of editorial comment in the newspaper's of Northern Indiana for several weeks.

DANGEROUS OPTIMISM

No one who makes even a pretense of reading the daily newspapers can escape the conviction that there is something radically wrong with the law, and especially the criminal law. Every murder, every trial and every acquittal provokes vindictive editorials, on the decay of criminal law and the obvious unethical practices of attorneys. Magazines print long articles—some of them sincere, many of them utterly fallacious, and all of them expressive of a widespread public opinion—attempting to prove that the custodians of public peace have been derelict in their duty. Moving-pictures depict policemen as grafters, prosecutors as ignorant, and lawyers as smooth, suave men ready to go any length to prove a point providing sufficient consideration be tendered them. Everywhere the good public is told that something is radically wrong, and affairs must speedily be remedied.

The effect on the public is just what is wished. Business men at luncheons, women at sewing circles and workmen at the bench gather and exchange laments at the woeful condition of

modern justice. Sociologists hold conventions and decide to institute reform; educators decide that greater stress must be laid on the duty one owes to society; ministers forget their mission and join with the rest in decrying the spirit of the modern age. All classes are active—except one; all professions resolve to better affairs—except the one most vitally concerned—the legal profession. Alone of all intelligent men, the lawyers retain their calm and their optimism. Against the onslaught made by all sorts and all classes of people, the legal profession stands unmoved and unconcerned. Some attempts have been made, it is true, to alleviate the popular prejudice against modern trials, but they have been sporadic and have accomplished but little. The lawyers refuse to hurry; they take the comfortable position that matters will readjust themselves; they say that there really is no cause for alarm.

The reason for this indifference is easy to find; a lawyer, trained scientifically in legal matters, is unwilling to defer to the opinions of persons who have at most but a shallow appreciation of justice, and he prefers to remain apart from the mob, lest he too, become contaminated. He admits that there have been derelictions in procedure, some of which may have been flagrant, but he realizes that these cannot be cured by the hasty action of impetuous reformers. The common law with all of its ramifications is not the result of blind chance; there is a rational cause for everything, a cause which endures despite the rabid attacks of sentimentalists.

The layman is not sufficiently trained to appreciate the technical gradations that inevitably arise whenever any set of facts is presented to a court. To him a man is simply either guilty or innocent, and jurists are heartily cursed because they do not arrive immediately at the same conclusion. A common indictment against the legal profession is "everyone knows that man is guilty" and the lawyer is bitterly accused of perverting reason when he refuses to abide by the popular prejudice. Jefferson made the same accusation during the trial of Burr, asserting that the defendant should be convicted because the people believed him guilty. Yet after an impartial examination of the evidence it was found that in reality Burr was innocent. From technical matters public opinion should be excluded.

Thus the excuse for the lawyers' optimism and his refusal to answer his critics. The justification is another matter, and certainly much harder to prove. However satisfactory the cause for silence be to lawyers themselves, it is not nearly so manifest to others. Indeed, such a defense seems to smack of sophistry to the layman, and he will deliberately accuse the legal profession of corruption, malfeasance, and countless other insinuating offenses. That the layman is wrong is not sufficient reply; the answer must be supported by reason, and so far the lawyer has failed to give them. Silence is always ineffectual before a well-organized attack. The layman, fair as he usually is, is not easily satisfied that his opinion is worthless. He must be shown by well-considered arguments that our modern system of jurisprudence is as protective of individual rights as it can be. The people are not averse to argument, and surely will give a willing ear to anyone who sincerely combats prevalent meretricious doctrines. The lawyer has been given adequate opportunity to defend himself; the prejudice against him arose solely because he has not availed himself of the opportunity offered him. And when expert testimony is not at hand, the opinion of the inexperienced must be relied upon. The fault does not lie with the readers of newspapers nor the habits of motion-picture theaters, but with the lawyers.

Doubtless the jurist is right in believing that the province of criminal administration belongs to him, and not to the gentlemen of the press and their colleagues. But why not express this belief instead of letting the antagonistic public opinion spread and gain daily new believers? The current public opinion may reasonably be said to be wrong, but it is powerful, and cannot be ignored. Some intelligent, expressed rebuttals must be made to it, lest the opinion extend too far, and the legislators are swept away, and revolutionize the methods tested by learned judges over a great number of years. In view of the constantly growing power of the people in the country, they cannot now be lightly dismissed with the smug assurance that their ideas aren't worth anything. Lawyers cannot isolate themselves beyond the reach of those who clamor for justice. If they do not explain their position satisfactorily, they will be sought out and be made to comply with the popular will—whether they

like it or not. . . . Perhaps the sociologists are right; maybe there is something wrong with our method of administering justice. If evils do exist, it is the duty of the lawyers to adjust them; if evils do not exist, the misguided sociologists must be corrected. But if nothing at all is done to counteract the vicious opposition to present conditions, the people, mirrored in the legislatures, will institute reforms which, although temporarily expedient, will be eternally disastrous. And when that dismal time comes, the lawyer will find himself powerless to assert his claims to righteousness and will have to follow the new obnoxious methods. His arguments on the unfairness of it all will be too late then; he must do what is set down for him, and his smugness will give way to futile consternation.

C. J. R.