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George H. Dession

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GEORGE H. DESSION

The death of Professor George H. Dession deprives us of a uniquely keen and persuasive exponent of the rights of man at a time of crisis, a man dedicated "to placing a prime value on the individual—any individual, be he citizen or alien, useful or harmful, sane or mad,"¹ and laboring zealously toward the world-wide attainment of this end.

He left a model for the effective and humanitarian treatment of the social deviate in the democratic social order. In areas largely neglected by the conventional civil libertarian and academician, he resisted the violation of human rights on both a practical and theoretic plane. His contribution can, without hyperbole, be described as monumental.

"The function of criminal (or other negative) sanctions" as he saw it, was "to insure public order in the areas where realization of the values of society . . . [required]. Given a democratic orientation and a legal system which . . . [placed] a prime value on the individual," this criminal law function was, in his view, subject to rational performance only "with the least possible infliction of severe deprivations upon individuals, and with the widest possible participation in the process of decision throughout all phases of administration."² In other words, the "policy objective in the use of criminal or other negative sanctions . . . [could] be described as the economical use of value deprivation to achieve a net value gain . . . , [the economy principle being] implicit in any cultural rank order of values which . . . [assigned] primacy to the dignity and well-being of the individual."³

With rare insight, he recognized the "criminal" as "the low man on the social totem pole and as such the most eligible scapegoat,"⁴ and perceived the ease with which the heretic could be substituted for the "criminal" under the impact of social tensions. In doing so, he laid bare for all to see the spurious character of "the conventional distinction between criminal proceedings in general and those deemed to present special civil liberties issues."⁵

"Punishment" in his view, was "never good in itself." He had in the course of his wide professional experience, noted that in the traditional process of infliction of punishment, the "low man on the social totem pole" was the frequent target of primi-

1. Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, *infra*, p. 31.

2. Dession, *The New Federal Rules of Criminal Procedure*, II, 56 YALE L. J. 197, 256 (1947).

3. Dession, *Sanctions, Law and Public Order*, 1 VAND L. REV. 8 (1947).

4. Dession, *op. cit. supra*, note 1, p. 39.

5. *Id.*

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tive emotional drives expressed within the body politic, albeit rationalized as "deterrence" or the "categorical imperative" of "absolute justice," and had hence observed that the end result achieved under such circumstances appeared incompatible with the ends of either individual or social reconstruction in a free society. With earnest eloquence he consistently advanced the plea for action founded upon understanding and not upon fear and hate.⁶ In focusing upon the roots of crime within personal as well as social pathology, he sought and justified a departure from the medieval rigidity of punishment. He championed the use of "sanction equivalents," i.e., "non-depriving ways of coping with the actual or threatened flouting of a prescription,"⁷ such as a "welfare program" or socially imposed "therapy" or "rehabilitation," and in so doing conceded the necessity of individualization of approach under expert guidance—not, however, without appropriate procedural safeguards. In this context he recognized the possibility that a consciously or unconsciously entertained retributive legislative intent could be concealed in ostensibly non-criminal legislation, formally designed to "cure" rather than "punish."⁸

Keenly aware of the fact that the legal safeguards of the accused in formal criminal proceedings are "still but precariously established, and by no means fully introjected in the personality of contemporary man,"⁹ he urged an interpretation of the present law consistent with the realities of the times. A member of the United States Supreme Court Advisory Committee on Criminal Procedure, entrusted with the draft of the pioneering Federal Rules of Criminal Procedure, he saw the "prime values sought to be served . . . [in that task] as declared in Rule 2, [to be] 'simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.'"¹⁰

Perceiving "the safeguards upon which the ambivalent traditional confessions rule depends . . . [to be] illusory,"¹¹ he gave his unstinting support to the perpetuation of the McNabb Rule¹² providing for the exclusion of the confession

6. *Id.*, p. 45-6

7. Dession, *Deviation and Community Sanctions in PSYCHIATRY AND LAW*, 9 (Hoch and Zubin ed. 1955).

8. See, e. g., DESSION, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER*, 43-44, 78, 93, 113 (1948); cf. *People v. Tower*, 308 N. Y. 123, 123 N. E. 2d 805 (1954), in which defendant unsuccessfully asserted his "right" to be sentenced under the punitive, as distinct from the ostensibly rehabilitative, law of sentencing upon the theory that he was "beyond redemption."

9. Dession, *op. cit. supra*, note 1, p. 32.

10. Dession, *The New Federal Rules of Criminal Procedure*, I, 55 *YALE L. J.* 694, 699 (1946).

11. *Id.*, 708.

12. *McNabb v. United States*, 318 U. S. 332 (1943). While in the *McNabb* case the standard of illegality in delay in arraignment was statutory, the Federal Rules succeeded in establishing a judicial criterion.

obtained in the course of an illegal delay in arraignment by Rule 5(a) of the Federal Rules.¹³ This he viewed as justified "not merely to protect the innocent but to secure 'conviction of the guilty by methods that commend themselves to a progressive and self-confident society' and to outlaw 'easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection.'"¹⁴ He was not deceived by the ostensible propriety of the numerous "waivers of the accused of . . . [their] right to representation by counsel."¹⁵ He urged effectuation of the right of counsel in fact as well as in name at the earliest stage of the criminal proceeding, noting that Rule 44 did "not entitle an accused to have counsel assigned to represent him in preliminary proceedings, and . . . [did] not meet the practical problems which . . . [arose] from the circumstance that assigned counsel (appearing only at a later stage) to date at least must serve without compensation . . ."¹⁶ He championed the right of the defendant to pre-trial discovery in the criminal case as dictated by a decent respect for the spirit, if not the letter of the Constitution, rejoiced in the pre-trial discovery accorded under Rule 16 as "intended to reduce the role of surprise in criminal proceedings," and deplored that fact that the "climate of opinion . . . [did] not yet permit an advance comparable to that achieved on the civil side in this respect . . ."¹⁷ In so doing, he proceeded not only from the perspective of fairness and reason in the abstract but from that of the practicality of the thing as gained in his extensive experience as Government Prosecutor and Defense Counsel, and beyond that as a student of comparative law. Like Justice Jackson, Professor Dession could not suppress a shudder of embarrassment at the disclosure that the defendant in a non-political criminal case in the Soviet Union was, in consonance with the Civil Law tradition, afforded a measure of pre-trial discovery in excess of that afforded to his counterpart in, say, New York.¹⁸

13. FED. R. CRIM, P. 5 (a) declares: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest with a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." (Emphasis supplied). Confessions obtained in the course of "unnecessary delay" enjoined by the Rule are inadmissible, without more, in the Federal courts as "fruits of wrongdoing." See *Upshaw v. United States*, 335 U. S. 410 (1948).

14. Note 10, *supra*, at 709.

15. *Ibid.*

16. Note 2, *supra*, at 247. Cf. *People ex rel. Burgess v. Riseley*, 66 How. Pr. 67 (N. Y. 1883).

17. Note 2, *supra*, at 218-219.

18. See e. g., comparative law materials in DESSION, *op. cit. supra* note 8, 313-314, and cf. JACKSON, THE NURNBERG CASE, vi vii (1947), as quoted in Dession, *op. cit.*, 314: ". . . It was something of a shock to me to hear the Russian delegation object to our Anglo-American practice as not fair to a defendant. The point of the observation was this: We indict merely by charging the crime in general terms and then we produce the evidence at the trial. Their method requires that the defendant be given, as part of the indictment, all evidence to be used against him—both documents and the statements of witnesses. . . . Our method, it is said, makes a criminal trial something of a game. This criticism is certainly not irrational."

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While hailing the Federal Rules as an advance, he regarded them as but the first step on a long road toward the humanly achievable goal of "equal justice."¹⁹

Professor Dession did not, however, rest content with the securing of legal safeguards to the accused in formal criminal proceedings. Rejecting the "conventional assumption that 'criminal' and 'civil' sanctions differ in nature as well as in purpose,"²⁰ he insistently strove toward the widening cultivation of awareness of the insufficiency of existing procedural safeguards for deprivations of great severity under other than "criminal" auspices. Time and again his work furnished irrefutable proof that "in some situations the applicable 'civil' sanctions (denaturalization, deportation, or indefinite commitments of individuals, decrees of divestiture, divorcement or dissolution addressed to industrial or commercial organizations)," could in fact be "far more depriving than any applicable criminal sanctions . . . [and that the formal classification of such sanctions as 'civil'] automatically . . . [tended to deprive] the person against whom . . . [they were] invoked of the special constitutional and procedural safeguards accorded one against whom a 'criminal' sanction was invoked."²¹ Could it be doubted under these circumstances that if reason and fairness were to emerge triumphant, sanction classification had to proceed in accordance with a realistic evaluation of the extent of the deprivation which was actually, as distinct from formally, imposed by the contemporary social process? As he saw it, the true deprivational character of the sanction appeared to furnish the most significant measure of the necessary procedural safeguards. It was thus that his work established the first significant scientific foundation for the claim that such severe yet nominally "non-criminal" deprivations as the loyalty and security dismissal in government (comporting the obloquy of near or potential treason)²² merited at least the procedural protection available in the revocation of a driver's license, if the recognition of the nature of "punishment" by the courts was not to lag behind that of the social and behavioral scientists or perhaps even that of the public at large. "And there comes a point," it might be observed in this connection, "where . . . [the] Court should not be ignorant as judges of what . . . [they] know as men."²³

Professor Dession was well aware of the fact that next to liberty and security, prevention and rehabilitation, as dramatically exemplified by recent totalitarian experience, were words in whose names some of the worst crimes have been com-

19. Note 2, *supra*, at 256.

20. Note 3, *supra*, at 14.

21. *Id.*, 14-15 Cf. Dession, *op. cit. supra*, note 1, p. 26-8.

22. For studies of the severity in deprivations inflicted under such auspices, see, e. g., BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM*, 101-156 (1953); Jahoda and Cook, *Security Measures and Freedom of Thoughts: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 *YALE L. J.* 295 (1952).

23. Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U. S. 49, 52 (1949).

mitted,²⁴ and he keenly sensed the potential of the concentration camp regime in the loosely drafted procedure of the indefinite commitment of the deviate for prevention, rehabilitation or therapy. Legislative conferral of large-scale discretionary powers in the commitment of the mentally ill, juvenile offenders, and alien expatriates, or in the detention of adjudged "criminals" under the "truly indeterminate sentence," glibly supported by many²⁵ as consistent with "the most advanced penological objectives of individualization," was seen by him as a two-edged sword as readily available for the destruction as the protection of democratic values.²⁶ He incisively appraised the value deprivation imposed by such measures as occasionally greater than that of traditional punishment and at the same time as devoid of much of its procedural protection.²⁷ He knew that the "preventive," "rehabilitative" or "therapeutic" label could conceal the baser metal of vindictiveness. He needed no reminder of the ease with which a "scientific criminology" could be transformed into the handmaiden of totalitarian government. His dynamic contribution to the integration of criminal law and the behavioral sciences was thus enhanced by his effective recognition of the deprivational potential inherent in the "sanction-equivalents" of the social imposition of "psychotherapy" or "preventive" custody upon psychiatric counsel. In his own words:

(L)et us imagine a situation in which there is no patient-physician relationship, but in which the psychiatrist is called upon to examine and report on a person he has never previously seen, as, for example, where the issue is court commitment. And let us further assume that after an examination typical under the circumstances, the psychiatrist is satisfied that this person qualifies as a potentially dangerous and aggressive psychopathic sex offender—though, to be sure, the person has thus far committed no overt offenses beyond indecent exposure. Here . . . we have problems of conflicting values. The community, if it has enacted one of the recent types of sex offender laws, has manifested some interest in the prevention of seriously aggressive sexual offenses and some willingness to rely on expert prophecy, but it may be assumed that the same community would, generally speaking, be very loath to authorize the infliction of severe negative sanctions on suspicion, however well-founded the suspicion might appear to be. The Common Law requirements for conviction of an attempt, e.g., not merely proof of intent to commit the crime, but also of overt action reasonably adapted to that end and carried

24. See, e. g. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 50-60 (1947). Cf. materials in Dession, *op. cit. supra*, note 8, 66-73, 93-99, 105-113, 142-145 (1948). Cf. Mr. Justice Jackson's observation in his dissent in *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 551 (1950): "Security is like liberty in that many are the crimes committed in its name."

25. See, e. g., OVERHOLSER, *THE PSYCHIATRIST AND THE LAW*, 51 (1953). Cf. Webster, *The Evolution of Probation in American Law*, 1 BUFFALO L. REV. 249 (1952); Crane, J., dissenting in *People v. Lewis*, 260 N. Y. 171, 183 N. E. 353 (1932).

26. See Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L. J. 319 (1938).

27. See, e. g., Dession, *op. cit. supra*, note 3.

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to a point where there is a dangerous probability of success, manifest this second interest in civil liberty. In such a situation (assuming that commitment, even though coercive and indeterminate, is to be to a 'hospital' for 'treatment'), I can imagine that many medically-oriented might be less troubled than many litigation-oriented.²⁸

In our own culture, he recognized the deprivational potential in all matters of socially imposed "rehabilitation" or "therapy" to be particularly high in the absence of truly adequate facilities for such ends. He therefore inveighed against the random extension of individualization in the disposition of the deviate in line with the "most advanced penological objectives" as replete with the possibilities of abuse inherent within the *Lettres de Cachet* of the *Ancien Regime*.²⁹ Again in his own words:

We have set up reformatories and correctional homes for the supposedly less hardened offenders; but we have not thought of equipping them for their much more difficult educational task on anything like the scale of the public schools which deal with relatively well-adjusted young people. Some extremely ambitious and social-minded policies with respect to the handling of child offenders have graced our statute books for many years. State Courts have vied with one another to sustain these Juvenile Court Acts in terms of the broadest and most advanced penological objectives of individualization and rehabilitation. But when the smoke cleared away it developed in many jurisdictions that the extremely ambitious and exacting function of administering the Acts had devolved as an incidental and almost ex officio duty upon part-time judges or pre-existing "inferior" tribunals who had neither the time, training or equipment to qualify for the novel and highly specialized work which the Acts and supporting constitutional decisions purported to contemplate. Much the same theme has predominated in the realms of probation and parole . . .

The healthy penal adjustment unless, indeed, our culture can still afford the privileges of infancy—would . . . consist in professing policies looking toward the rehabilitation of offenders, and employing such professed policies as a premise, only to the extent to which we may be willing at the same time to assume collective responsibility for the welfare of that whole segment of human subnormality, wreckage and underprivilege, which we experience as crime or delinquency. Let us make no mistake about this. Given such cultures as we know, the welfare in question would have to include material as well as spiritual elements. Any very extensive program of rehabilitation would require an assumption of responsibility of a degree to which our communities are unaccustomed.³⁰

He thereby definitely rejected all demands for continuing individualization of disposition in the absence of an adjustment in public attitudes and facilities to the

28. Dession, *op. cit. supra*, note 7, at 11.

29. Dession *op. cit. supra*, note 26.

30. *Id.* at 328-339.

needs created by such a development. "Failing the adjustment outlined," he declared in his early masterly summary of the problem, destined to serve as a classic in this field, "the professing of policies of rehabilitation coupled with the pressure for increasingly indeterminate sentences (like the far-removed maxima and minima of many existing penalties for which the creation of parole boards has served as an excuse, and like commitments authorized by the Juvenile Court Laws) can mean nothing more nor less than a scrapping of the rather precious, if imperfect, guarantees of individual liberty which represent a substantial percentage of the profit of centuries, and which are summed up in the maxim 'Nulla Poena Sine Lege.'"³¹

It has since been well put in the light of Professor Dession's teaching:

Aristotle observed years ago that "punishment is a sort of medicine." We have considerable cause to observe that medicine can be a sort of punishment, *sans* due process of law.³²

Significantly, however, Professor Dession did not withdraw from his quest for enlightened individualization in the service of a preferred system of "sanction-equivalents." The destruction of human resources inherent in the pitfalls confronting society in the rejection of the principles of traditional punishment seemed to him to be fully counterpoised by the destruction of human resources inherent in the retention of the present penal law. With infinite daring and yet with caution and patience he sought to chart a passage between Scylla and Charybdis—toward the goal of a system of "sanction-equivalents," secured by procedural fairness and prepared to reject retributive justice in practice as well as theory. His untimely death deprived us of a more explicit solution to the apparent conflicts of interests involved in such an approach. This much can be said: he favored the scrapping of the "penal" law in favor of "a civilized Code of Correction."³³ It stands to reason that he would have welcomed a system of "sanction-equivalents" comporting individualization of disposition under a truly advanced scientific administration, against a background of truly adequate rehabilitative and therapeutic facilities, conditioned upon the observance of rational procedural safeguards, designed to secure the rehabilitative and therapeutic target against both unfairness and incompetence. His recently completed preliminary draft of the *General Part* of the

31. *Id.* at 340.

32. De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 355 (1955).

33. Dession, *op. cit. supra*, note 1, p. 46.

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Code for the Commonwealth of Puerto Rico bears this out. It presents the first significant model for the realistic reconciliation of several seemingly conflicting demands of this kind in the light of the existing resources of the social order.³⁴

It is a measure of the stature of the man that while drawing the behavioral scientists closer to meaningful collaboration with the lawyers, he continued to highlight the dangers inherent in existing modes of "sanction-equivalents," particularly those exemplified in the contemporary operations of forensic psychiatry, and that he did so without animosity or self-righteousness.

He created a model for the effective and humanitarian treatment of the social deviate in the democratic social order for those who would carry on, placing as he did,, "a prime value on the individual—any individual, be he citizen or alien, useful or harmful, sane or mad,"³⁵ and laboring zealously toward the world-wide attainment of this end.

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34. Section 6 appears reflective of the fundamental orientation of the work. See preliminary draft of *General Part of Code of Correction for the Commonwealth of Puerto Rico*, Section 6 (Unpublished manuscript, University of Buffalo Law Library): "Constitutional provisions and limitations applicable to crime, criminal proceedings, punishment and the administration of punishment are assumed and intended to be applicable to all situations, measures and proceedings comparable or substitutive in function to those with which the former penal law and procedure were concerned. They are also assumed and intended to be applicable to situations, measures and proceedings formerly deemed outside the penal law but not expressly included in or governed by this Code, except as otherwise expressly provided by this Code or other subsequent law."

35. Dession, *op. cit. supra*, note 1, p. 31.