CASES AND OTHER AUTHORITIES

ON

LEGAL ETHICS

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CLARENCE S. DARROW'S COURSE OF CONDUCT IN THE McNAMARA CASES

At one o'clock in the morning of October 1, 1910, the Los Angeles Times building was blown up. It was just when the paper was going to press and twenty-one persons were killed. The Times was a newspaper which was regarded by the laboring people as opposed to organized labor. Then on December 25, 1910, the Llewellyn Iron Works at Los Angeles were dynamited.

In March or April, 1911, James B. McNamara and John J. McNamara, brothers, were arrested. Both were indicted for the Times building explosion murders, and John J. McNamara was indicted for the dynamiting of the Llewellyn Iron Works. Both were implicated by the confession of Ortie E. McManigal, a confederate, who confessed to having blown up the Llewellyn Iron Works at the direction of John J. McNamara and who stated that James B. McNamara confessed to him that he dynamited the Times building. Both of the McNamaras, who were prominent labor union men, employed as their attorney Clarence S. Darrow of Chicago.

In May, 1911, the American Federation of Labor officials, after the assurance was given to Samuel Gompers, its president, "that there was absolutely no case against the McNamara brothers," [43] concluded that it should undertake the matter of gathering funds for the defense.

"In accordance with our decision," says Gompers, "the officials of the Federation and its departments came together early in June, in Washington, in conference with Attorney Clarence Darrow of Chi-

crime. Here, though the ethical aspect is more clearly outlined, the same considerations apply as in civil cases. Although a lawyer may properly decline such employment, circumstances may be such as to impose upon him an obligation to undertake the case. Such was the obligation felt by William H. Seward, who, because he believed the prisoner to be insane, volunteered, in the face of strong popular feeling, to defend [Freeman] a friendless negro, indubitably demonstrated to have committed an atrocious murder. In his address to the jury, he thus expressed the sense of duty by which he was actuated: 'I am not the prisoner's lawyer. I am, indeed, a volunteer in his behalf, but society and mankind have the deepest interests at stake. I am the lawyer for society, for mankind, shocked, beyond the power of expression, at the scene I have witnessed here of trying a maniac as a malefactor.' The right of an advocate to defend a person accused of crime does not depend upon the guilt or innocence of the accused, but upon his right to be defended." Edward S. Oakes, *The Ethics of Advocacy in an Unjust Cause*, 17 Case and Comment, 433, 435, 436. On pages 453, 454, the same writer refers to William Green's application for a writ of error in behalf of John Brown after the latter's conviction and despite an inflamed public opinion.

For an account of William H. Seward's action in the Freeman case, see Frederic Bancroft, *The Life of William H. Seward* (1900) Vol. 1, pp. 174–180. Freeman, a negro, who was insane when he killed several people and wounded others, was convicted by one jury, but, after a new trial was granted, became too imbecile for the trial judge to consent to proceed with the case and a few months later died. Seward's defense of Freeman was in the face of great public clamor for Freeman's conviction and execution, and although it threatened his professional ruin it really hastened his professional success.

[43] 38 McClure's Mag. 371, 374.

cago, who had previously been engaged to conduct the defense. He informed us that a great sum of money would be required for the defense, some $300,000. The trial, or trials, he explained would take a year or a year and a half; the attorneys' fees would be large, for the attorneys would be obliged to give up their own business and move themselves and their families from their own cities to Los Angeles. A similar great expense would come with the high-priced experts and the host of witnesses.

"I confess that I, as well as my colleagues, was astounded by the amount of money required, and I was very dubious as to whether we could raise any such sum, and so expressed myself. But we went to work and we raised by contribution, entirely voluntary with organized labor, a sum approximating $225,000. * * *

"The McNamara defense money, when received, was forwarded by Mr. Morrison to Mr. Darrow, the attorney. * * *" [44]

In the late summer of 1911, Gompers visited the McNamaras and reports that J. J. McNamara, whom he knew fairly well, assured him that he was "absolutely guiltless" and said to him: "I want to send a message by you to organized labor and all you may meet. Tell them we're innocent—that we are the victims of an outrageous plot." Gompers adds:

"I believed him—I had no reason not to at that time—and I delivered his message.

"If he had told me in confidence that he was guilty, I will say this: I don't believe I would have betrayed him! I'm willing to stand by that—I don't believe I would have betrayed him. But I certainly wouldn't have declared my confidence in his innocence; and I certainly would not have gone out and helped to collect money for him." [45]

The trial began on October 10, 1911.

"The defense fought for delay. They raised the question of the legality of J. J. McNamara's extradition in the California courts; they moved for the quashing of the indictments on the ground that the grand jury was biased; they demanded a new judge. Clarence S. Darrow, their counsel, exhausted every possible technicality in his fight for his clients, but could not prevent their final arraignment on Oct. 11. Then the prosecution announced its intention of trying the two prisoners separately, and elected to take first the case of James B. McNamara, the younger brother, who is accused of having been the more active partner in causing the actual explosions. He was placed on trial for the death of Charles J. Haggerty, a machinist, who was one of the twenty-one killed in the Los Angeles Times explosion. * * *

"After seven weeks of continuous sessions only eight jurors had

[44] Id. [45] Id. 375.

been finally selected and the proceedings seemed interminable," [46] when, after some charges of jury bribing, and after an understanding that James B. McNamara should not receive capital punishment, the defendants, on December 1, 1912, pleaded guilty. James B. McNamara pleaded guilty to murder in the first degree, and John J. McNamara pleaded guilty to the charge of having dynamited the Llewellyn Iron Works.

After the pleas of guilty, there were newspaper interviews with both Clarence S. Darrow, the defendants' chief counsel, and with Samuel Gompers, President of the American Federation of Labor. In the Chicago Tribune for December 2, 1911, Clarence S. Darrow is quoted as saying:

"The Times building was blown up by James B. McNamara with nitroglycerin, to be sure, but the bomb touched off the gas, and gas really did it.

"As a matter of fact Jim McNamara did not mean to kill anybody. They have told me the whole story. * * * I reiterate that there was really no criminal intent.

"The bomb was meant as a scare to the Times and I doubt whether there was enough explosive to really do the damage that was done, but of course gas helped. But the crime is the same no matter what the intent." [47]

In the same issue of the Tribune, Samuel Gompers is quoted as saying:

"My associates and I have been imposed upon—terribly imposed upon—and I am overwhelmed, astonished and indignant."

And also:

"All laboring people have been imposed upon, and if we had known the McNamaras were guilty we wouldn't have raised money to defend them."

In the Chicago Tribune for December 2, also, M. J. Deutsch, secretary of the Building Material Trades Council of Chicago is reported as saying:

"Union labor does not countenance dynamiting nor murder. We raised a defense fund simply because we took the word of the accused that they were innocent and because they were entitled to an assumption of innocence until guilt was proved."

And Robert H. Hanlon, secretary of the Building Trades Council is quoted as saying:

[46] 24 Green Bag, 51.

[47] Clarence S. Darrow was later indicted for the alleged bribery of George N. Lockwood, a prospective juror in the McNamara case, and was acquitted. See 45 Literary Digest, 323. "Darrow's speech in his own defense * * * contained a justification of his advice to the McNamaras to plead guilty and the assertion that the blowing up of the Los Angeles Times building, though a criminal act, was done with no thought of taking human life."—Id.

"It is too bad they did not confess before they got union labor to organize a defense fund for them. Of course we would not have helped them had we known them guilty."

In the Chicago Tribune for December 4, 1911, resolutions of various labor unions denouncing and repudiating the McNamaras are reported, and in the Chicago Tribune for December 8, 1911, is found a similar condemnatory statement by the Ways and Means Committee of the American Federation of Labor.

In the Chicago Tribune for December 3, 1911, Clarence S. Darrow is quoted as saying:

"I never told Samuel Gompers or anyone else that J. B. McNamara was innocent. I always have believed, however, that John J. had nothing to do with the Times disaster, though I learned of his connection with the Llewellyn explosion."

In the Chicago Record-Herald for December 5, 1911, is the following:

"Another development of the day was the admission by Clarence S. Darrow that he had known from the beginning that the McNamaras were guilty. The only paper that supported the accused men in the months preliminary to the trial to-day published the following statement attributed to the chief counsel for the defense:

" 'When I took this case last March I foresaw this plea of guilt. I had hopes of saving the boys, but found it impossible. I wish the world could see the case as I saw it—the criticisms would not be so severe.

" 'My conscience is at rest, but it is hard enough to have to surrender in this fight, for the boys are not murderers at heart and thought they were just fighting a battle between capital and labor, but to have maledictions heaped upon my head for doing what I conceive was right is hard.' "

In the Chicago Tribune for December 6, 1911, Clarence S. Darrow is quoted as saying: "From the first there never was the slightest chance to win."

On December 5, 1912, the McNamara brothers came up for sentence, and a short confession by James B. McNamara was read. It is given in the Chicago Tribune for December 6, 1911, as follows:

"I, James B. McNamara, having heretofore pleaded guilty to the crime of murder, desire to make this statement of facts:

"On the night of September 30, 1910, at 5:45 p. m., I placed in Ink alley, a portion of the Times building, a suit case containing sixteen sticks of 80 per cent. dynamite, set to explode at one o'clock the next morning. It was my intention to injure the building and scare the owners. I did not intend to take the life of any one. I sincerely regret that these unfortunate men lost their lives. If the giving of my life would bring them back I would gladly give it. In fact, in plead-

ing guilty to murder in the first degree I have placed my life in the hands of the state." [48]

Judge Bordwell in sentencing James B. McNamara is quoted in the Chicago Record Herald for December 6, 1911, as saying in part:

"A man who would put sixteen sticks of 80 per cent. dynamite in a building * * * in which you, as a printer, knew gas was burning in many places, and in which you knew there were scores of human beings toiling, must have had no regard whatever for the lives of his fellow beings. He must have been a murderer at heart." [49]

The judge then proceeded to sentence James B. McNamara to the penitentiary for life and John J. McNamara to the penitentiary for fifteen years.

William J. Burns, the detective, had this to say after the confession:

"There's just one man in the crowd who comes out now and says he knew the McNamaras were guilty—Darrow, their attorney—the same man McNamara told McManigal [the confederate who confessed to Burns] to telegraph at once if he were ever arrested. He knew it from the time he took the case, and he was talking about it with his acquaintances around Los Angeles some little time before the confession; but he did not inform in any way his principals—the American Federation of Labor, the men who were paying him for his work. Gompers, especially, was astounded when he heard about it.

"All of that $200,000 of the Federation was handled by these men, you remember. It went to Morrison, the Federation's Secretary, who paid it to Clarence Darrow upon the order of Samuel Gompers, the president. * * * And not once did Darrow intimate to the other two men that their clients were guilty!

"It will be worth waiting for to see just how the three men account for the $200,000, according to the resolution of their council, to the contributors. Darrow will get, of course, with his $50,000 retainer and his hundred dollars a day and expenses, well toward one-half of it.

[48] In the Chicago Record-Herald for December 6, 1911, William J. Burns, the detective who accumulated the evidence that forced the pleas of guilty, is quoted as saying: "Why doesn't 'Jim' McNamara tell how he knocked off the gas cocks and flooded with gas the place where the suit case filled with dynamite was put? If he told that, then could he convince any one that he did not intend the entire destruction of the Times building and its occupants?"

[49] This last statement was the judge's contradiction of Clarence S. Darrow's statement as reported above in the Chicago Record-Herald for December 5, 1911. Here ought to be noted Ex-President Roosevelt's reiteration of a truism in reference to the McNamara case. In The Outlook, Vol. 99, at page 902, he said: "Murder is murder, and the foolish sentimentalists or foolish wrongdoers who try to apologize for it as an 'incident of labor warfare' are not only morally culpable, but the enemies of the American people, and, above all, are enemies of American wage-workers."

It will be interesting to see their detailed accounts of the remaining $100,000 or $125,000." [50]

At another place in the same interview Burns said:

"They got together—according to Secretary of the American Federation of Labor Morrison's last statement—nearly $200,000 and over $170,000 of it was handed over to Darrow. Really they got more, and they gave Darrow more—a good deal more." [51]

The ethical question as to Clarence Darrow's action in the McNamara cases was stated by Professor John H. Wigmore of Northwestern University under the title "The Limits of Counsel's Legitimate Defense" in 2 Journal of Criminal Law and Criminology, 663, 664, 665, as follows:

"Whoever did dynamite the Los Angeles Times building, crowded with human beings, did a brutal murder, did he not? He deliberately killed a score of defenseless beings, under circumstances which have never been regarded as anything but plain murder outside of the tenets of Machiavelli or the Hindu thugs or Stevenson's dynamiters. Now we know who did it. But Clarence Darrow knew it from the first. His interview published in the dispatches of December 5 says: 'When I took this case last March I foresaw this plea of guilt.' And yet he spent one hundred and ninety thousand dollars of laboring men's innocent money to secure at any cost the escape of men whom he knew to be guilty of this coarse, brutal murder—a murder which has been universally condemned by labor unions and all other classes from the Atlantic to the Pacific as placing its perpetrators beyond the limit of sympathy or protection.

[50] 38 McClure's Mag. 363, 371. The expense for the prosecution was also very large. "There were many weeks while the evidence was being gathered when a thousand men and more were working on the case under the direction of the district attorney. At no time since this investigation began did the daily pay roll drop below a thousand dollars."—Walter V. Worhlke in The Outlook, Vol. 99, at page 905. The editor is reliably informed that "while no separate statement of the expense incurred by the prosecution in these [McNamara] cases has ever been compiled, a fairly accurate estimate * * * shows the cost to the county was upwards of $240,000."

[51] 38 McClure's Mag. 363, 368. Under date of August 9, 1912, Frank Morrison, Secretary of the American Federation of Labor, issued a Financial Report of the McNamara Defense Fund which went into great detail as to receipts (which amounted at that date to a total of $236,878.39), but gave only meager statements of the disbursements of $227,911.85. The expenses merely show that $200,000 was paid to Clarence Darrow on account of attorney's fees and expenses; that two other lawyers received together a total of $13,500; and that the balance went for expenses of visiting meetings, printing and mailing literature, producing and exhibiting the McNamara film, etc. Mr. Burns doubtless got no comfort from that kind of a report.

In all fairness it should be stated that a number of the expenditures of the prosecution are represented by just as meager vouchers. In the county auditor's office in Los Angeles eight of the largest canceled checks of the county in the McNamara cases bear merely the notation "Secret Service" and were payable to John D. Fredericks, who was then district attorney. Those eight checks, which were only part of the expenditure for secret service were for amounts aggregating $72,000.

"Is this what the right of defense by counsel means? If so, then there is something rotten in the principle. It is useless to befog the issue by asking: May not a counsel act for a client whom he believes to be guilty? Of course he may; the best professional traditions agree to that, and no argument for or against it matters here. Nor do we assume here that Clarence Darrow was privy to the $4,000 bribe to a juryman; that part would look dark for him if he had the spending of the money in detail, which perhaps he did not. We do not assume that the hundred and ninety thousand dollars was used to bribe anybody. But we do ask whether the counsel's duty and right of securing a fair trial justifies him in setting himself as systematically and persistently as the expenditure of two hundred thousand dollars signifies to secure the acquittal of clients whom he knew from the beginning to be guilty of the worst crime recognized in law and morality alike. That is our question."

Mr. Darrow made no direct answer to this question, but in his testimony in the criminal action in which he was acquitted of the charge of bribing a juror and in his speech to the jury in that action he attempted an answer to similar questions. His whole argument is contained in the following passages from his speech as printed in pamphlet form. The first of these passages is:

"Mr. Ford [the Assistant District Attorney] said I knew these people were guilty from the beginning. Where is the evidence? I did not. I have practiced law for many a year. I do not go to a client and say, 'Are you guilty, are you innocent?' I would not say it to you. Every man on earth is both guilty and innocent. I know it. You may not know it; I know it. I find a man in trouble. In a way his troubles may have come by his own fault. In a way they did not. He did not give himself birth. He did not make his own brain. He is not responsible for his ideas. He is the product of all the generations that have gone before. And he is the product of all the people who touch him directly or indirectly through his life, and he is as he is, and the responsibility rests on the infinite God that made him. I do what I can for him, kindly, carefully, as fairly as I can, and do not call him a guilty wretch.

"I had no knowledge whatever about the McNamaras until it was borne in on me day by day that this man I knew who trusted everything to me could not be saved if he went to trial. Just as the doctor finds that his patient must die, so it came to me that this client was in deadly peril of his life. Do you think that if I had thought there was one chance in a thousand to save him I would not have taken that chance? You may say I should not. That if I believed he was guilty I should not have tried to save him. You may say so; I do not." [52]

[52] *Plea of Clarence Darrow in His Own Defense*, etc., pp. 50, 51.

The other passage is as follows:

"Nobody meant to take human life in the Times disaster and the position of the State in the settlement of the matter showed that nobody meant to take human life. I heard these men talk of their brothers, of their mothers, of the dead; I saw their human side. I wanted to save them, and I did what I could to save them, and I did it as honestly and devotedly and unselfishly as I ever did an act in my life, and I have nothing to regret however hard it has been. Gradually it came to me that a trial could not succeed.[53] Gradually another thing came to me. It was expensive—the money of the Erectors' Association, of the State of California, the power of the Burns Agency, everything was against us. It needed money on our side, and a great deal of it. It needed money that must be taken from the wages of men who toil—men whose cause I have always served, and whether they are all faithful to me or not, the cause, that I will serve to the end. I could not say to them that my clients would be convicted. I could not say to the thousands who believed in them, and who believed in me, that the case was hopeless. The secrets that I had gained were locked in my breast, and I had to act—act with the men whom I had chosen to act with me. I had to take the responsibility, grave as it was, and I took it." [54]

In closing this statement of the ethical problem presented by the McNamara cases, it seems desirable to note a smaller ethical problem revealed in Mr. Darrow's speech in his own defense in the bribery case. Mr. Darrow appears to have been accused of lack of frankness in persuading the McNamara brothers to plead guilty. The charge seems to have been that Clarence S. Darrow, knowing that J. B. McNamara was unwilling to have J. J. McNamara to plead guilty to anything, obtained J. B. McNamara's consent to plead guilty without revealing to him that as an integral part of the arrangement being made with the prosecution J. J. McNamara was to plead guilty. The problem is treated by Mr. Darrow as follows:

"Each brother was willing to suffer himself, but J. J. didn't want his brother to be hanged, and J. B. didn't want J. J. to plead guilty to anything. J. B. agreed to plead guilty and take a life sentence, and J. J. said to us that after his brother's case was out of the way he would plead guilty and take a ten years' sentence. Ford said that I should have told J. B. that J. J. was to plead guilty. Why? I was

[53] On July 30, 1912, Clarence S. Darrow testified, as reported in the Chicago Record-Herald for July 31, 1912, as follows: "I felt that, owing to the number of lives lost in the Times explosion and the bitter feeling in the community, it would be difficult to avoid the death penalty for both men." And as reported in the Chicago Tribune for July 31, 1912, he said: "We did it believing that the time would come when the sentences would be commuted or the men pardoned. I still cling to that belief," and "I wanted to save their lives if possible."

[54] *Plea of Clarence Darrow in His Own Defense*, etc., p. 52.

defending J. B., and it was my business to get the best terms I could for him. I was also defending J. J., and it was my business to get the best terms I could for him. I had no right to play either one against the other—no right, let alone what a man would naturally do." [55]

In view of the contemplated publication of the foregoing account of the McNamara Cases, Mr. Clarence S. Darrow on January 10, 1917, handed to the Editor of this casebook the following statement in writing:

"I undertook the McNamara case without any knowledge whatever as to whether the defendants were in any way involved in the destruction of the Times building with its incidental loss of life. At the time I went into the case I had never seen the defendants and had not visited Los Angeles and the matter had been under investigation and in progress for several months. I did not know the facts until weeks after I undertook the case. I then believed as I do now that no intention was in the mind of any one to kill any person; the purpose being only to scare the owners of the Los Angeles Times—a paper then conducting a hostile campaign against the strikers in the city. Sixteen sticks of dynamite (as I now recall it) were placed in an alley leading into the building. The explosion did not even stop the machinery, but unfortunately the sticks were hastily dropped near some barrels of ink which were converted into vapor, spread through the building, and thus set on fire the building, and the lives were lost through the fire. Legally the crime of murder was complete for the reason that the placing of dynamite was an unlawful act and the defendants were therefore guilty of the act whether the result was intended or not. Five lawyers were associated in the case and a large corps of investigators gathered information from many cities covering the whole United States. Most of the money to defray the expenses was collected before the real facts were known, but I then and now considered it my duty when in the case to give the defendant the best defense I could, and of course could not give out that I really believed he placed the dynamite. Under the laws of California one convicted of murder in the first degree could be punished by death or life imprisonment as the jury might determine, and in any event I felt it my duty to get the lowest punishment possible. I always abhorred the idea of the state taking life and then as always like the physician I felt it my duty to save life if I could. Then, too, I recognized that in labor and political cases the motives of men are far different than in cases that are generally designated as criminal. Neither did I ever believe in the doctrine of free will, but I think that every act is governed by conditions and circumstances which make the act absolutely

[55] *Plea of Clarence Darrow in His Own Defense*, etc., p. 54.

necessary. I judged this case, as I do all other acts in court and out, from what I consider uncontrovertible rules of logic and philosophy.

"As to fees, five lawyers were associated with me with numerous investigators and the necessary expenses involved in such a case were large. The amount collected for the defendants was less than that paid by the state and all lawyers' fees and most detectives' services for the state were paid through regular salaries and did not come from the fund. I closed my office and went to Los Angeles and was engaged in that case for six months and received less than $50,000 as a fee, which would not be mentioned as extravagant for a lawyer engaged in any important case. Especially is this true in my case, as much more than half my time that has been given to industrial and labor cases for twenty-five years has been without any financial reward.

"I have thought this case over from every angle and am sure that whatever the responsibilities involved no conscientious lawyer could have performed them in any other way.

"Chicago, Ill., Jan. 10, 1917."

ABRAHAM LINCOLN'S COURSE OF ACTION IN THE ARMSTRONG MURDER CASE

In 1857 William Armstrong, commonly known as "Duff" Armstrong, was indicted for the murder of a man named Metaker, and Armstrong's mother engaged Lincoln, who was a friend of the family and charged nothing for his services, to assist her son's lawyers to defend him.

Armstrong had beaten Metaker in a drunken fight on the night of August 29, 1857, the fight apparently being started by Metaker, and the same night another drunken man named Norris had hit Metaker with a piece of wood. The fights took place in a grove near a religious camp-meeting. Three days after these occurrences, Metaker died. Marks of two blows made by some instrument were found on Metaker's body, and either blow might have caused his death. Norris and Armstrong were indicted together for murder by the grand jury for Mason county, Illinois, but they were tried separately. Norris was tried in Mason county, and was convicted of manslaughter and sentenced to the penitentiary. Armstrong took a change of venue to Cass county, and Armstrong's trial took place in that county some months after Norris was sentenced.

The charge of the indictment was that Norris and Armstrong conspired to kill Metaker and that one of the blows which resulted in Metaker's death was given by Armstrong with "a certain hard, metallic substance called a sling shot." For the defense it was insisted that there was no conspiracy and that Armstrong used only his fists in hitting Metaker. The conspiracy theory was not supported by proof,