# Department of Justice

ADDRESS BY

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I come this evening to talk of a gap in American law, a very wide gap that is doing irreparable harm to the working of law in this country.

I am referring to the deep emotional chasm that divides those on the one side who believe that public safety and protection of society are our paramount need and those on the other side who believe, with equal ferver, that the protection of individual liberties should take predominance.

The gulf between these two points of view is filled with bitterness--a bitterness that often boils over in the form of too-familiar epithets: "soft-headed court" and "coddling of criminals"--or "police brutality" and "hanging judge."

You are all aware of the gulf. Let me cite just one sharp illustration of its depths.

Four years ago, a man named Killough was arrested in the District of Columbia after his wife had mysteriously disappeared. He was questioned at length but said nothing. The next day, however, after further questioning, he admitted having strangled her. Ultimately, he confessed three times, but it was not until more than thirty hours after his arrest that he was arraigned.

His subsequent manslaughter conviction was upset by the District of Columbia Court of Appeals. The court declared Killough's confessions were inadmissible because they were obtained during a period of illegal detention. In a second trial, without the confession, Killough was acquitted.

Both of Washington's newspapers carried editorials commenting on his release.

This is what the Star said:

> "If ever there was a mockery of justice, this is it. . . . Why are so many people losing confidence in the administration of justice? Why are some of our higher federal courts looked upon by the public with contempt instead of the respect which they so long enjoyed? Read the Killough case--and others like it."

And this is what the Post said:

> ". . .American justice involves something more than just convicting and punishing the guilty. Its processes must be consonant with civilized standards of fairness--and with the law that governs citizens and public officials alike. Ends and means are intimately related. A trial can be lawful only if it is based upon evidence lawfully obtained. And only through such a trial can popular respect for the law be preserved."

Both the Washington Post and the Washington Star are highly responsible and respected newspapers. Yet they could look at the same case with the same set of facts before them and find completely opposite results--"public contempt" for law and courts in one case; "popular respect" in the other.

The most heated and angry debate in criminal law today stems out of the kind of questions presented by the Killough case and this is where polarization has been the most pronounced. What should happen to a criminal suspect in the hours immediately after he has been taken into custody? Should the police be able to question him? If so, under what ground rules? When should his right to counsel begin?

Certainly, I am not arguing against debate over these questions. They are complex and difficult, and it is only through debate and discussion that they can be resolved. What I am opposed to is the emotionalism that attends the debate, the tendency to take extreme views, the contrifugal movement of both sides away from the middle so that sensible discussion becomes impossible.

For the fact is that as we polarize ourselves, so we paralyze ourselves. The issues are not being settled and the public, which often does not understand the technicalities of the debate, is fearful, confused and frustrated.

This confusion manifests itself in the kind of irresponsible attack on the courts that we have witnessed all too often in the last few years. Last year, even the candidate of a major political party for the nation's highest office blamed the rising crime rate on decisions of the courts.

No less popular a figure than Dick Tracy now seems to blame violence in the streets on the Constitution. A few Sundays ago, Chester Gould showed a knife-wielding man assaulting a woman on the street while bystanders shrank into a corner. "Them cowards aren't going to involve themselves", the hoodlum announced, "and maybe get arrested for violating my constitutional rights."

That may be an extreme example. But it is this kind of suggestion--that constitutional safeguards of individual rights as supported by the courts are endangering public safety--which is undermining respect for legal processes throughout the country.

It is the historic function of the courts to preserve the procedural safeguards embedded in the Bill of Rights. To state, as some have, that this indicates an "obsessive concern" for the rights of criminal defendants is to slander the courts and betray indifference or ignorance of constitutional protections.

Federal judges are among the ablest men and women in our society. Each judge is appointed by the President and confirmed by the Senate. Since 1952, the American Bar Association has been consulted on every appointment. If we blame so carefully selected and distinguished a group for the increase in the crime rate, then whom are we going to trust--Dick Tracy?

Recurring public cynicism about constitutional protections and judicial procedures, whether manifested in comic strip outbursts, political speeches, or fiery editorials, cannot be easily dismissed. They are the surface manifestations of a public uneasiness that must be put to rest. And it seems to me that the place to start is to bridge the gap between our polarized views.

The dichotomies that have been created are largely artificial. There is no need to choose between the protection of the individual and society, nor between civil liberties and sound law enforcement, nor between the rights of the accused and the rights of the public. The false distinctions now drawn will dissolve when a new dialogue is established and the facts dispassionately examined.

Happily, the process of erasing the lines drawn between the two positions has now begun. Experiments are underway and facts are being laid out that can serve as the foundation for centripetal forces.

Last August, we created within the Department of Justice a new office to participate in building this foundation--the Office of Criminal Justice. We were fortunate to get Professor James Vorenberg of Harvard, an able and imaginative authority in the field, as director of the office. He has a full-time staff of strikingly competent and enthusiastic attorneys working under his direction.

The office has no operational case responsibilities. Its sole function is to provide neutral ground for the study of criminal procedures, to act as a catalyst and condenser for new ideas, and to calm and draw together the oposing camps.

After only eight months its work has already produced visible results. One particularly encouraging area has been in the field of bail reform. Unlike reform in some other areas of criminal law, the pressures for bail reform are not derived from court decisions upsetting old balances. They stem from a healthy alarm by conscientious citizens over the injustices of the existing system.

Reform of a system so deeply rooted in tradition could not be easily achieved. At the outset, philosophies concerning such reform gravitated to the same extremes which characterize so much of public attitudes toward criminal justice.

But because of the vastly imaginative and effective experimental work done by the Vera Foundation in its pioneer Manhattan Bail Project, it was possible to show that bail reform could be demonstrably effective.

The operating phase of the project ended on August 31, 1964. During the three years of its operation, 3,505 accused persons were released on recognizance on the recommendations of its staff. Only 1.6 percent wilfully failed to appear for trial. During the same period, 3 percent of the accused persons released on bail bond failed to appear.

Given this hard evidence, it was then possible for the Department, together with the Vera Foundation, to conduct the National Conference on Bail and Criminal Justice. Now, just a year after the conference, bail reform projects are underway in some 90 cities in 40 states.

You have good reason to know about this activity here in Ohio, where Dan McCullough, a member of the Executive Board which is supervising the continuing work of the Bail Conference, has traveled all over the state enlisting support for bail reform. Mr. McCullough was instrumental in setting up the first regional conference on "Bail and the Right to Counsel" held in Louisville in January and also organized the pretrial release project in Toledo. I understand that a pretrial release program is also getting underway here in Cincinnati.

The success of experimental bail reform projects has also stirred activity in Congress. Senator Ervin has, with several co-sponsors, introduced an omnibus bail reform bill to authorize various types of pretrial releases in federal courts. Hearings are scheduled to begin shortly.

The work of the Office of Criminal Justice has already helped us to clear the air in a second, highly controversial area of criminal procedure--pretrial publicity. Views on this subject have sometimes been so exaggerated as to lead one to believe it was possible to favor a free press or a fair trial, but not both.

But we believe there is room in the Constitution for both the First Admendment and the Sixth. We believe the extremism of past views is damaging to both sides, let alone to the fair administration of justice.

As a result, the Office of Criminal Justice set out to determine whether there was some positive step the Department of Justice could take toward conciliation and toward a reasonable middle ground.

After six months of heated, internal debate, we finally came up with a set of guidelines regarding pretrial publicity. Since these guidelines apply only to Department personnel and not to the press, they were modest in their aim. But they still had to be put to the test. Thus, three weeks

ago, I appeared before the American Society of Newspaper Editors, a potentially hostile audience, suspicious of any effort to inhibit press freedom, and presented the new guidelines. I survived the meeting. In fact, the reception given by the editors and by their newspapers is warmly encouraging evidence that we can conquer emotion and extremism in the entire field of criminal justice.

Alfred Friendly, chairman of the editors' press-bar committee, said that the Department's policy "conforms about 1,000 percent with the ideas" his committee tried to put forth. Of the score or so editorials I have seen, only two were unfavorable. The Roanoke Times said the guidelines were "eminently fair." The Toledo Blade said "fair and reasonable." The Philadelphia Evening Bulletin said "reasonable and equitable."

Meanwhile, we have secured comment in a similar vein from State Attorneys General, local prosecutors, and attorneys in all parts of the country.

Reasonable, fair, equitable, responsible . . . these are the kind of words that can ultimately bring press and bar toward a common meeting ground.

We have by no means exhausted the research that needs to be done on the subject of pretrial publicity. An American Bar Association committee is also studying pretrial publicity and we look forward to its report.

Bail reform and pretrial publicity are not the only subjects that the Office of Criminal Justice is now examining. There are the problems arising out of the Criminal Justice Act and the right to counsel. We are evaluating the possible need to authorize federal public defender offices in busy districts to supplement representation by compensated private counsel. And there is the troubling problem of disparate sentencing. But in no area is there a greater need to close the emotional gulf than in the debate raging about the Mallory case.

As a result of the Supreme Court's Mallory ruling that confessions obtained by police during a period of "unnecessary delay" cannot be introduced as evidence, the District of Columbia police have been charging suspects almost immediately after arrest.

Because this hinders questioning of suspects, opponents of the decision believe that the decision is damaging effective law enforcement in the District. They believe that police should be able to question a suspect, before he is charged, without any restraint, except the constitutional one against coercion.

The extreme view on the other side is that the constitutional privilege against self-incrimination extends to confessions whenever made. The proponents of this view argue that since a man cannot be convicted out of his own mouth, no police interrogation should be allowed.

We believe that the answer lies somewhere in the middle, that the police can be allowed to do some questioning and that the individual can still be protected.

The Office of Criminal Justice has joined with the District of Columbia police in making a detailed study of the effects of restricting questioning after an arrest. The results so far suggest that detection of crime and prosecution may be significantly hindered when interrogation is too severely limited.

Screening of suspects after arrest can protect an innocent person before he is charged. The suspect may be the victim of mistaken identify, or an accusation may be erroneous or exaggerated. A formal charge lodged too hastily on sparse evidence may do a serious injustice to the defendant.

In addition, experience indicates that there are legitimate and non-coercive ways to trigger a confession. A more precise inquiry than that needed for arrest may also be required to establish exactly how the suspect should be charged.

We are working to develop ground rules that guard against abusive or unfair questioning. Such ground rules may possibly require a greater degree of visibility than is now customary during police questioning. They may require the presence of a third party, or a transcript of the interrogation to assure that the rules were obeyed and coercion was avoided.

Once again, the work that we can do in this field is only a small part of the investigation that needs to be done nationwide. The Department of Justice can do no more than stimulate and provide leads for further fact-finding and research. It is the work done in local communities that will ultimately build the large bridge that closes the gap for the nation.

We need, in this debate, to be tolerant of the other man's view. The differences that separate the disputants are differences in means, not in ends. We all want to live in a society in which one can walk the streets in safety. We all want an accused person to receive the procedural guarantees for fair treatment and a fair trial which are provided in the Constitution and in all our traditions.

Schopenhauer wrote that "Every man takes the limits of his own field of vision for the limits of the world." The time has long since come when all of us, on all sides in this debate, must extend our field of vision.