Department of Justice

Address by

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Before the

Annual Meeting of the

LAW ALUMNI ASSOCIATION OF THE UNIVERSITY OF CHICAGO

Ambassador West Hotel
Chicago, Illinois
8 p.m., Wednesday, May 12, 1965

Dean Neal, President Carton, Professor Mentschikoff, and ladies and gentlemen:

It is a pleasure to be back at the University of Chicago and to see so many of my friends and former colleagues.

I want to make it clear, however, that I am not here to conduct a teach-in. I do not intend to talk until sunrise.

Neither do I think I can equal the other extreme, displayed recently at another university--a picket marching militantly with a sign that was absolutely blank. I suppose there could be no purer expression of the ultimate in existential protest.

I hesitate to go too far in making light of the various demonstrations for, without passing on the merits of the views they express, many of them reflect serious involvement on the part of students concerning issues of widespread importance.

And often, this involvement has a visible impact. I doubt that the Civil Rights Act of 1964, for example, would now be law had it not been for the moral urgency generated by a number of demonstrations. Likewise, it can be said that the recent demonstrations in Selma lent similar urgency to the way Congress responded to the President's Voting Rights proposal.

The civil rights demonstrations came as a consequence of a century's evasion of constitutional guarantees of equality. The outrage they expressed was more than understandable; in some areas, the 13th, 14th and 15th Amendments had been ignored for 100 years.

Everyone knew--and knows that reality differed from theory, and practice from precept. But in the last few years have we been pushed by the weight of conscience to bring the two together. We still have a long way to go, but we are on the way.

The process of hard, honest looking has served another healthy purpose. It has opened our eyes to other discrepancies between law and fact, and made us re-evaluate the divergence of ideal and practice in other areas.

One such area is criminal justice.

Here, as in civil rights, the first step toward wisdom is a frank recognition of the discrepancy between the law books and reality. That is not to say that the consequences must be the same. I am not suggesting that it is imperative that practice in the field of criminal justice needs to fit the theory. I say only that we must give attention to the discrepancies.

We have, until now, paid more attention to the streamlining and rationalizing of court trials--the public, visible and symbolic part of the process--than we have to our actual use of criminal law as an instrument of social control.

There are reasons for this neglect. First-hand analysis of just how our criminal law operates can be disconcerting. The more we look from the formalities of the courtroom to what happens in the streets, the less it appears that our stated ideals fit our practices.

This is not entirely a revelation. We have long had the lurking suspicion that our legal ideals were being manipulated somewhat freely to meet reality. We had our cake of virtue and were happy to eat it in peace.

However, recent studies such as that on arrest by the American Bar Association, those on the bail system by the Vera Foundation, and that on the use of counsel and poverty by Professor Allen's committee, have illuminated our priggish ignorance.

We are forced to face up to what we are doing and make a decision--whether to change the ideal, the practice, or both; or whether to live with conscious dishonesty. If we decide on the latter course, we must provide articulate explanations of why dishonesty--conscious or not--should be necessary.

Consider the theory and the facts of arrest. The freedom to go our own way, at any hour, without accounting to authority, is as central to our happiness as freedom from official surveillance in our homes. They are both parts of that "freedom to be let alone" so eloquently defended by Mr. Justice Brandeis.

Consequently, many of us define as an "arrest" any involuntary diversion of a man from his path, no matter how slight or short, and we demand that it be on "probable cause." There must be sufficient grounds to support the belief that a crime has been committed and that the person stopped committed it.

In addition, many of us assume that the purpose of arrest is simply to trigger prosecution. The model for arrest is the warrant issued by a judge after consideration of the government's case, to require a named person to be brought before him to answer a criminal charge. Arrest is, therefore, the end of investigation.

But in reality, police stop individuals for a wide variety of purposes other than prosecution and on grounds which, according strictly to theory, would be unacceptable. Nevertheless, in many of these cases I am not certain we would wish them to desist.

A common example is the arrest of a drunk. It is made not to prosecute him for a crime, or even to prevent him from harming others, but very likely to keep him from harming himself. A similar example is the arrest for disorderly conduct of a man who is squabbling with his wife or girl friend. The victim in such a case seldom appears against her man as a witness in a prosecution.

The same holds true for the vast majority of domestic assault and other cases. The arrest provides an immediate solution or cooling-off period. It does not invoke the condemnatory criminal process.

Many arrests made on full probable cause and directed toward court are made without immediate prosecution in mind. One might even call these "normal" arrests, though not, I think, "model" arrests. They are followed by some form of in-custody investigation, to screen and test uncertain identification or accounts by witnesses or victims, to obtain additional evidence required for a charge, or to match a suspect with other crimes. Such arrests provoke present debate over changes in the so-called "Mallory Rule."

Another category of arrests is used to enforce laws that society regards ambivalently. The arrest of petty gamblers or liquor law violators, along with the seizure of their stock, falls in this category. Court cases are difficult to prosecute successfully, or sentences are so nominal as to be useless. Nonetheless, arrest sets back their activities for a few months.

Fines for liquor law violations often do not add up to the cost of a license. The arrest of prostitutes is another example. Although sometimes brought in for the purpose of a health check-up, successful prosecution is difficult. They are arrested mainly for purposes of harassment, to keep their activity invisible--and thus acceptable.

A similar type of arrest is made to recover stolen property. A patrolling policeman sees a suspicious person walking down the street at an unusual hour with a television set, or clothing, or a bicycle that very probably is not his. The policeman may even know something of the man and his background.

Almost invariably, the policeman will arrest him and retrace the man's steps. Almost invariably they will lead to a burglarized store or house. The property is returned, but the man is released, since prosecution is impossible on an arrest in which the policeman did not have sufficient cause as the law now stands to believe a crime has been committed.

Finally, there is the controversial stop and frisk, or "field interrogation", which is almost always made on less than probable cause. It is used for many purposes. One is prevention--a man ready to commit a crime who has just given his name, will think twice before going ahead. Other purposes are the gathering of information, and even to reduce the arsenal of weapons--the knives, brass knuckles and guns--common in any tough neighborhood.

This practice of field interrogation may plainly be essential. Certainly, it is used routinely everywhere, both here and abroad. But, as with the other practices I have cited, does it fit our model?

The issues raised by these practices are not issues of political or economic blocs. "Haves" are not here protecting themselves from "have nots" by tacitly sanctioning these deviations from theory. The majority of victims fall in the same economic and social category as the subjects

of these present practices. We read of friction involving police in neighborhoods with high crime rates; but we also hear very loud demands for police protection in these same neighborhoods. People living in dangerous neighborhoods do not mind being looked after.

Persons who have experienced crime know how important--and how precarious--is the balance between interference by officials and interference by criminals. Judgments in this area are deeply colored by personal experience.

Let me illustrate by a story--one that is quite true and not aprocryphal. It concerns a young law professor from New York, active in the civil liberties field, who drove up to Harvard to visit a colleague. He left his briefcase in his car and on returning was shocked to find it gone.

Terribly agitated, he called the police. Two patrolmen arrived, soothed him, and assured him that they would find the briefcase before it was thrown in some dustbin. They strolled up the shady street, past a decrepit car and nearby discovered a man peering into other cars.

The police stopped the man, frisked him, and ordered him to return with them to the old car, which he admitted was his. They made him open the trunk. Inside was the briefcase.

The agitated young professor grabbed the man and shook him, shouting "Why did you do this?" "Don't you realize there are months of irreplaceable work in that briefcase?"

To which the man confessed, "Sorry mister. Must have had a couple of drinks too many."

The professor's concern was understandable. In his briefcase was the only copy of a long paper he had written on New York's stop-and-frisk law--attacking the law.

Let me turn to another area where we wink at the inconsistency between our practice and our profession. We have long been concerned about the inequities of the bail system. We dislike its arbitrariness. We want to rationalize it, to use it for the purposes for which it was intended. But there we pause.

The only purpose of bail before trial which we admit in law is deterrence from flight. But what, for example, of the accused sex offender who might reasonably be thought to be dangerous <u>prior</u> to possible conviction and incarceration.

We are aware that judges now often set bail at a figure they know the defendant cannot make. The risk of flight in many of these cases is negligible. After trial and on appeal, where the law does not require resort to a fiction, the judges demonstrate a new and distinct concern. They explicitly detain some defendants because they think them dangerous and likely to commit further crimes.

This may sometimes be the case before trial as well. The judges are balancing, perhaps consciously, perhaps indirectly, the disadvantages to those detained against the possible suffering of innocent victims.

This is "preventive detention." It is used in every country, only in the United States we do not call it by that name, and in the United States we use it rather more liberally, disguised in the form of high bail.

Even in the bail reform movement, we continue the possibility of setting money bail for indigents. This is very important, for a large majority of criminal defendants are poor. Money bail set for an indigent bears no relation to the risk of flight.

A poor person cannot meet that condition of pretrial freedom any more than he could ask his stockbroker to lend him the money. Why then do we persist in dealing with indigents in the irrelevant terms of money? Is it because we cannot bring ourselves to face the issue of preventive detention, to admit what we are doing and then trust ourselves to strike a fairer and more precise balance?

There are other areas where a greater frankness is needed. Every day legislation establishes further criminal penalties based on absolute liability. We want the fright effect of a penalty which looks like moral condemnation in matters which actually involve no moral judgment. Or in cases where criminal intent is still relevant, we fear it will be too hard to prove and, while stating an irrefutable presumption, hope that the prosecutor will in some way select only willful violators.

The overwhelming majority of criminal cases are disposed of by guilty pleas--ninety percent in the federal system, eighty to ninety percent here in Illinois. Prosecutive bargaining for such pleas is something we don't talk about. But we know that when there is a plea to some counts of an indictment, or to a lesser offense, the other counts and charges are nolled--and we know that prosecutors have an interest in obtaining guilty pleas.

In fact, we can go so far as to say that the very operation of our courts and system of law enforcement depends on getting the guilty plea. Without it, law enforcement would become more costly than we can imagine, and--given the present level of cooperation of witnesses--perhaps even impossible.

There are certainly abuses in pleas wrongfully refused and pleas wrongfully accepted. But we have not given the process of plea bargaining the careful scrutiny and rationalization which has been lavished on similar processes in administrative law. We have hesitated to look, for fear that our ideals may conflict too much with an all-important practice.

An end to example. It is not my intention to answer these problems, but only to raise questions about whether this state of affairs should continue to exist inexplicit and unspoken.

For some people, reconciling these discrepancies is easy. Satisfied with the theoretical ideal they simply criticize any deviation. Yet the practices which might be said to deviate in fact exist as the result of decisions by responsible and reflective people. One may legitimately question the consequences of their being stopped. It may then be that the answers are not so easy after all. But that does not make achieving them any less necessary.

We do not tolerate such inconsistency and dishonesty in our securities or our tax laws. Is it because large law firms, full of the graduates of great law schools such as this, give these areas of the law their steady and best attention?

Large diversified firms must assume a widening responsibility in the criminal law. First, they must permit their younger men to spend more time on criminal cases. Even more important, they must play a central role in developing and refining the criminal process.

We must do so not merely for the sake of symmetry, but for the sake of social honesty--and, indeed, for the sake of better controlling crime.

It is possible that a case can be built for continuing the intellectual dishonesty involved in the disparity between practice and precept. There might well be areas of law that cannot be formalized without excess rigidity. We could not, for instance, provide legal rules for business enterprise, or police detection, or the life of the Senate. There are some aspects of justice that may have to be left to intuition, imagination and a complex interplay of personality.

For that very reason, some argue, there will always be the danger of unchecked abuse. But is it better to treat reality as a necessary evil? Is it better to use an incompatible ideal as pressure against abuse rather than endorse any part of practice, and then attempt to guide it, but without extinguishing necessary official discretion.

I am not impressed by the view that if you open the door part of the way for air, you must open it all the way to storm. The argument for dishonesty is one of despair and we will never know how strong it is until we have examined the alternative with our best efforts.

How can we deal with the problems of arrest, or the problems of bail, or any others, unless we examine what actually happens, and evaluate it with clear and open minds?

The answers may lead us outside the criminal law to experimentation with other, less blunt instruments of social control. But we must chart new paths and our direction must be that of consistency, openness and honesty.