# Department of Justice

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I

That we live in a time of commitment is very much the result of the drive for equality for the American Negro to which ADL has brought so much energy. Once loosed, however, that commitment has not stopped at racial bounds. We are the children of an enlarged spirit of justice which goes well beyond civil rights, which is social as well as racial, national as well as local.

And there is no area in which this spirit has greater relevance than to the very administration of justice itself. The time has long since arrived for us to amend the old French dictum that every society gets the kind of criminals it deserves, and to say, now, that every society gets the kind of criminal law it deserves.

At present, our attention to criminal law is expressed in a kind of elephantine adversary procedure. On the one side are those who believe law and order are our predominant need; on the other side are those who believe that without protecting the rights of the individual, we have no society left to protect.

The difficulty with this kind of adversary procedure is that it has not produced answers, but rather emotionalism, repetition, denunciation, and a near-breakdown in communication between the very schools of thought on which society should be able to depend for solutions. In the field of criminal law, as we have polarized ourselves, so we have paralyzed ourselves.

The particularly unhappy aspect of this gulf is that it is largely artificial. There should be no need to choose between protecting the individual and protecting society. There should be no need to arbitrate between the rights of the accused and the rights of the public.

Considering the depth of the gulf, this may seem naively optimistic. But I base my hopes not only on optimism, but on experience, the experience of our new Office of Criminal Justice -- established eight months ago. This Office, independent of prosecuting responsibilities, has sought to probe into the specific areas of controversy. Professor James Vorenberg, the head of the office, and his five-man staff, have done so with striking competence and enthusiasm.

I believe the lesson of these efforts has relevance to the way we can approach and conquer the deeply divisive and deeply significant issues of criminal justice in the nation. Let me tell you about two of these areas.

II

One of the areas in which the results have been honestly remarkable is the field of bail reform. The work of the Vera Foundation of New York and of the Department have, indeed, been so successful that the public is now very much aware of the injustices and abuses inflicted by a classic system of bail.

Poor men are forced to remain behind bars pending trial because they cannot afford to buy their freedom. In the meantime, their poverty increases and so does their bitterness, particularly for those who turn out to be blameless.

Reform of a system so long and so unthinkingly rooted in tradition could not easily be achieved. But because of the imaginative experiments of the Vera Foundation here, it was possible to show that bail reform could be effective.

You may remember that last May there was a conference in Washington, sponsored jointly by the Vera Foundation and the Department of Justice, attended by more than four hundred people from all over the country. At that conference, the American bail system was scrutinized and shown to be full of discrimination, arbitrariness, and abuses.

Attention was focused on the fact that, although the purpose of bail is only to assure reappearance in court, the effects of bail are in fact to penalize the poor man for his poverty.

In New York City, as the conferees and the rest of the country learned, the Vera Foundation's Manhattan Bail Project since October 1961 has been recommending to city criminal court judges that they release on recognizance defendants unlikely to flee because of home, job or family ties.

At the end of the project's three years of experimental operation, only 1.6 percent of the 3,505 defendants released on their own recognizance after a Vera recommendation failed to reappear. During the same period, about 3 percent of those released on money bail failed to reappear. In other words, poor defendants can be released in many cases without the slightest loss to effective law enforcement.

Since the Bail Conference, we have been able to measure the impact of both the federal government's capacity for leadership and the federal government's ability to serve as a focus and a clearing house for ideas and activity.

As an illustration of leadership, in the past two years we have sought to accelerate the release of defendants without bail wherever practicable. A just-finished survey shows that the release on recognizance rate in federal courts is now 38 percent. Two years ago it was 6 percent.

And as a dramatic illustration of the other federal role, there is a large map in the Office of Criminal Justice, adorned with colored flags which mark bail reform projects now underway in 90 cities in 40 states.

These gains in the field of bail reform illustrate one lesson for our larger efforts in the field of criminal justice: the need for facts. Without facts, reform of so deeply rooted a system as bail, would have been impossible. Without the factual bases provided by the Vera Foundation's work, it would not have been shown that law enforcement would not suffer.

Beyond the clearing house role, however, there is a second significant role we believe the federal government can play -- that of example, of model, and of leadership. Again, we now have tangible evidence of how successful that role can be -- in the area of pretrial publicity.

III

I think the issue of pretrial publicity can be summarized in two statements, one by a reporter and one by a judge, both from the same television documentary, dealing with pretrial publicity rules in Philadelphia.

"This attempt to gag the press," the reporter said, "is another attempt on the part of the law to let our criminal element getaway with something."

The judge's view was that "If I or any other lawyer or any citizen tampered with a jury in the way that the newspapers do. . .he would be thrown in jail summarily. . .most newspaper editors wouldn't know a Constitutional right if they fell over one."

I don't think that I need to cite other instances. The issue of pretrial publicity is a familiar one to all lawyers. Indeed, there may be no topic of criminal justice which has involved more emotion, more energy, and more extremism, than this.

Nevertheless, it was our feeling that some sort of resolution must be found, that the interests of bar and press may sometimes be competing but that they do not need to be incompatible.

For us, this feeling was not merely the product of a pro bono publico attitude, but of direct responsibility. As prosecutors, we have a duty to help insure a fair trial for every defendant. As public officials, on the other hand, we are at all times publicly accountable as to the wisdom and effectiveness of our law enforcement efforts.

Thus, while I believe the Department of Justice has reconciled these responsibilities in the past, the accelerating national attention given to this subject prompted widespread Departmental interest in more explicit guidance as to how to strike the balance.

Consequently, the Office of Criminal Justice initiated a painstaking, six-month study and drafted a set of policy guidelines governing pretrial publicity. Since these guidelines referred 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, I appeared before the American Society of Newspaper Editors, a potentially hostile audience, to announce the new guidelines.

The result, to judge from the reaction of both bar and press, was warmly encouraging evidence that we can conquer emotion and extremism in the entire field of criminal justice. More than 30 newspapers have commented on the guidelines favorably; at the same time a number of prosecutors and law enforcement agencies have adopted the guidelines as their own.

I cite this reaction not as praise for the Office of Criminal Justice -- although the Office surely deserves it. I do so to stress the apparent reason for the success of the guidelines. It is because the review and evaluation underlying the guidelines concentrated on specific types of pretrial information. It was in a discussion of specifics and not a weary rehearsal of general arguments that we sought a rational approach to the bar - press problem.

Whatever one's philosophical starting point, it is not sensible to suppose that a debate over disclosing prior criminal record can be resolved in the same terms one would apply to disclosure of information about fugitives.

Thus, where it would have been perhaps impossible to achieve consensus on a single philosophical policy, I believe the publicity guidelines have been mutually acceptable because they represent eight policies, each dealing with a specific, factual problem.

There is a substantial lesson in this experience. I think it is proper to ask now whether the same attention to specifics cannot offer us a path through the increasingly hazardous topography of some of the critical problems of criminal law yet unsolved.

IV

For there are much harder problems ahead. None is more explosive, for example, than the debate over criminal confessions and police questioning. This is a debate which in the past has struck sparks; now it threatens to explode into a conflagration.

As with other problems of criminal law, the extremes have been reached. One side stresses the soaring crime rate; the other talks about the real meaning of Constitutional liberty.

And yet, as with other problems of criminal law, the differences that separate the extremes are differences in means, not in ends. We all want to live in a society in which one can walk the streets safely; we all want to insure that defendants receive the procedural guarantees of fair treatment and fair trial.

We are working now with the ABA and the American Law Institute to see how both these aims can be achieved. It is in these forums, among men of experience and reason on both sides of the debate, that we may well be able to achieve these aims. We should, as civilized men, be able to do so.

I began by talking of the spirit of commitment to civil rights. The same spirit which impels our feelings of social justice in that field must now impel us to urgency in this one.

Just as in the field of civil rights, we are passing, in the field of criminal law, from the age of the spectacular and the shocking to the age of the routine and the dogged. In civil rights, our attention is passing from the inflamed circumstance surrounding the education of a single Negro at Ole Miss to the quality of education secured by millions of Negroes across the country.

It is just so in criminal law. We have come to that level of civilized justice when our concerns and our outrage are generated not merely by the rare, sensational case, but by the repeated, ordinary problems of law enforcement.

As we press on to this new level of concern, our work becomes harder because ordinary problems are harder. Because our attitudes are deeply entrenched in tradition, emotion, and unexamined reflex, it is very difficult to take a fresh look. Because of the very ordinariness and volume of these problems, it is very difficult to take a long look.

But the time for vision has arrived.