Department of Justice

ADDRESS BY

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I want today to talk to you about the great and healthy ferment going on in this country over every aspect of criminal justice.

We are a great, growing, changing society. We are facing many of the problems which beset a dynamic, industrial society -- problems of crime and delinquency, of education and over-crowding in housing, of poverty and ill-health.

Under President Johnson's leadership, we are moving forward energetically to overcome them. And since the law does not exist in a vacuum, our legal procedures also at times show signs of strain, and need to be reviewed and brought up to date.

The new Code of Criminal Prccedure you have recently adopted in Texas shows that you are well aware of this need. I want to compliment you on this excellent achievement and express the hope that other states will follow your example.

Just how much our notions of criminal justice have changed in the last century can be seen by looking back to 1837, the year the first grand jury met in Houston.

That grand jury brought forth three indictments at its first session. The indictments grandly, if somewhat grimly, show the relative value placed on life and on property in those rough days.

The first indictment was brought against one Whitney Britton for assault and battery; the second against John Beall for murder; the third against James Adams for theft.

Britton's case was dismissed as inconsequential; Beall was let off on justifiable homicide, the gentlemen of the petit jury evidently concluding that under the same conditions they would have acted similarly.

But when the villain who had stolen $295 came up for trial, he was given to appreciate the full weight of justice. He was ordered to make restitution of the money; was given 39 lashes on the back, and had a large "T" branded on his right hand.

Thus James Adams, having decided to steal money rather than merely taking life, was branded "thief" for the rest of his days.

Even now wealth and property sometimes distorts the even scales of justice. The renewed nationwide examination of criminal procedures stems, in part, from the realization that our legal system still sometimes weighs money as well as evidence.

The Gideon decision of the Supreme Court, requiring the appointment of counsel for indigent defendants in state as well as federal cases, first brought the problem of unequal justice for the poor to national attention.

The imaginative and effective experimental work on bail reform done by the Vera Foundation in its pioneer Manhattan Bail Project has also won deserved attention.

It demonstrated that prevailing attitudes toward bail were both cruel and illogical. Too often, only one factor determined whether a defendant stayed in jail prior to trial. That factor was not guilt or innocence, nor the nature of the crime, nor the character of the defendant. The factor was simply money.

The operating phase of the Manhattan Bail 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, the Department of Justice began a wholesale re-evaluation of bail practices. We instructed all United States Attorneys to recommend the release of defendants on their own recognizance in every practicable case.

The results of this practice are now coming in and they are extremely encouraging.

The rate of releases on recognizance has doubled since 1964, and at the present time 40% of all defendants are released without being made to post surety bonds. At the same time, the pretrial detention rate has been cut from 35% to 9%. This reform has been accomplished without any increase in the rate of bail jumping.

In short, all the evidence indicates that the basic premise of the bail system -- that money is a good criterion upon which to predict trustworthiness -- is not only unfair, but incorrect. A person's character, and not his wealth, is a far more useful guide.

The National Conference on Bail and Criminal Justice which we held in May of last year, together with the Vera Foundation, also gave a terrific impetus to bail reform throughout the country. Now, less than a year and a half after that conference, bail reform projects are under way in some 90 cities in 40 states.

Here in Texas there has been a fine beginning on bail reform. In Houston the Grand Jury Association and the Council of Churches are jointly sponsoring a bail project modeled after the Manhattan Project. I understand that bail projects are also being planned in San Antonio, Dallas and Austin. I hope that this impetus will be carried forward into other communities in the state.

The success of experimental bail reform projects has also stirred activity in Congress. An omnibus bail reform bill sponsored by Senator Ervin has been passed by the Senate and I am hopeful that it will be approved by the House before the close of this session.

The legislation makes available to U. S. Commissioners and judges a whole range of alternatives on pre-trial release. It requires that priority be given to releases on recognizance and other forms of non-financial release, preserving releases on bond only as a last resort.

A judge who imposes conditions of release which a defendant is unable to meet is required to set forth a written statement of facts justifying his action.

In addition, the statute revises and strengthens the bail-jumping statute to cover defendants who wilfully fail to appear regardless of the condition set for their release. And it eliminates any restriction on the statutory credit given the prisoner for time spent in custody, so that a convicted person can be given credit against his sentence for all the time he was detained. Finally, it provides for credit against any fine imposed on a detained defendant.

Passage of this legislation will be a significant step forward, bringing pre-trial release procedures into harmony with our stated belief in equality before the law and presumption of innocence.

Modernizing legal procedures to make them conjoin more closely with our ideals is not uniformly a simple task. But we have always prided ourselves in this country on facing up to problems, not in sweeping them under the rug.

Certainly this is what we seek to do in the difficult area of civil rights. We must also face forthrightly those areas of criminal justice where our practices bear little relationship to our ideals. And, as we attempt to bring the two together, we must also give frank recognition to the discrepancies between our law books and reality.

I am not suggesting that practice in the field of criminal justice must fit the theory in each instance. I do say that we must recognize the discrepancy, when it exists, and provide some articulate rationalization for it.

Consider, as an example, the theory and the facts of arrest. We regard the right to go our own way, at any hour, without accounting to authority, as central to our freedom.

Consequently, we generally define as an "arrest" any involuntary diversion of a man from his path, no matter how slight or short, and 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.

In reality, however, police stop individuals for a wide variety of purposes other than prosecution and on grounds which, according to theory, would be unacceptable. Nevertheless, in many of these cases, I question whether we would want them to stop.

A good example is the case of domestic assault. The arrest provides an immediate solution or cooling-off period, but does not invoke the condemnatory process.

Another example is arrests 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 but arrest sets back their activities.

A similar arrest is made to recover stolen property. A patrolman sees a suspicious individual 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 know something of the man and his background.

The policeman will arrest him and retrace his steps which lead to a burglarized store or house. The property is returned, but the man as often as not is released. Since the policeman did not have sufficient cause to believe a crime had been committed, prosecution may be difficult.

Finally, there is the controversial stop and frisk, almost always made on less than probable cause. It is used for many purposes: prevention, gathering of information, or even to reduce the arsenal of weapons common in any "tough" neighborhood.

It is a practice that quite plainly may be essential. Certainly, it is used routinely everywhere, both here and abroad. But does it fit the model?

Victims of crime are sensitive to the precarious 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 apocryphal. 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 attacking New York's stop-and-frisk law.

The examples I have cited, in which practice deviates from theory, exist as the result of decisions by responsible and reflective persons. The consequences of stopping these practices can be legitimately questioned.

But whether they should be stopped or not, they should be carefully examined and studied, and alternatives considered. How can we competently deal with the problems of arrest, bail, or any other, unless we take a look at what actually happens, and evaluate it with clear and open minds?

It is for this reason that President Johnson appointed the Commission on Law Enforcement and Administration of Justice.

Two outstanding Texas attorneys -- Leon Jaworski of Houston and Robert Storey of Dallas -- are among the distinguished Americans picked by the President to serve on the Commission.

The Commission will be the first official body ever to make a systematic, nationwide study of the entire spectrum of crime problems. Its studies will range fron an examination of the causes of crime to a detailed scrutiny of correctional practices.

The broad assignment of the Commission underlines our strong belief that an approach to crime must be unified and inclusive to be effective. As we proceed with its task, we shall depend very much on your help and support -- and that of your colleagues in other states.

The Commission is interested in doing more than just coming up with facts, valuable though those be. We want more than just a scholarly report. We seek new ideas and bases for action.

Your suggestions, your views, your courtroom experience, as well as your needs and expectations will, more than anything else, help us to find them.