



Department of Justice

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ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE FEDERAL BAR COUNCIL'S LAW DAY DINNER
UPON RECEIPT OF
THE LEARNED HAND MEDAL FOR EXCELLENCE IN FEDERAL JURISPRUDENCE

7:30 P.M.
TUESDAY, MAY 4, 1976
GRAND BALLROOM, HOTEL PIERRE
NEW YORK, NEW YORK

To receive an award carrying the name of Learned Hand from this bar whose lawyers and judges have contributed so much to the jurisprudence of our country is a cherished honor. That this comes because of the position I hold at this moment is particularly gratifying. It is commonplace to speak of the skepticism which many felt toward our governmental institutions and offices because of the difficulties of years past. Skepticism has its uses, but the claims of our republic and of our democracy require an equally robust faith. You and I share and take most seriously the duty to justify and to help in the continuation of this faith. This is the calling of our craft. We cannot have a government of law without the belief in a government of law. So, as any fiduciary, I would hope a position representing the work of many, and charged with the enforcement of the rule of law, would be regarded as worthy of its trust. I do not claim this as a great accomplishment, but one which we must always make clear is to be expected.

So I thank you for myself and for my colleagues for this reminder. I should add, although it goes without saying, that the role which I have undertaken would be impossible

without the understanding, support and desire of the President, whose duty it is to see that the laws are faithfully executed.

It is particularly gratifying that this award should come to me from you through Harold Tyler, who left you to join me in this effort to fulfill an important trust and whose presence with me is surely the best assurance I can give you.

I find it entertaining to think of how Learned Hand would have reacted to a procession of men and women over the years singing his praises at an event such as this. I assume he would have been pleased. But that he would have exercised, as he often did, his right not to listen.

There was a realism about Learned Hand, placed in a setting of an awareness and knowledge of the limitations and values of our culture. When he spoke, we realized it was an authentic voice for the best in our civilization -- yet able to speak objectively. He was not afraid, and he asked no quarter, as he said, of absolutes. He knew the force of judicial power; he exercised it, but with an insistence that it was only one among many in the pattern which makes for governance. He put law in its place, proud of his craft, knowing the solution to many of our problems was not an easy matter. "The law," he wrote,

"is no more than the formal expression of that tolerable compromise we call justice, without which the rule of the tooth and claw must prevail . . . the best of man's hopes are enmeshed in its success; when it fails they must fail; the measure in which it can reconcile our passions, our wills, our conflicts, is the measure of our opportunity to find ourselves." He had the skepticism and he had the robust faith.

I think it is correct to say, and I rely upon my recollections of conversations with him, that much of the direction of our present law as created by the courts would not have been to his liking and would be contrary to his long-run prediction as to the role of the courts. He did not believe the courts should be the central forum for the discussion and resolution of social issues facing the country, and he thought that in any event the country eventually would not stand for this. He wrote of the compromises which "almost always must be in a free country," and warned that "if they are to be upset under cover of the majestic sententiousness of the Bill of Rights, they are likely to become centers of friction undreamed of by those who avail themselves of this facile opportunity to enforce their will." He thought there would come a time when the Supreme Court's handling of such issues under

constitutional rubrics would be much more limited. Of course, he knew of the active and special role of the courts throughout our history in the creation of law. I doubt if he would have expected the avidity with which lawyers have preferred judicial to legislative solutions. He would have thought, I believe, that the job at hand for the courts was to make our system for the administration of justice work more effectively and fairly, and he most surely would have included for our time the improvement of our system of criminal justice.

I propose to speak briefly about certain proposals for the improvement of that system--proposals well-known to you, hoping, I guess, that through this repetition I can move things along. I will not discuss the proposed new Federal Criminal Code, except to say that extraordinary compromises have been offered in the Senate. I believe the need for it is great, and I hope progress with it can be made.

Our system of criminal justice is not working well. It performs inadequately in the prevention of crime. While the rate of increase in crime has recently been cut in half, if one believes the statistics, the most current

data indicate: that since 1969, reported crime has risen by more than 30 percent while the population has grown only five percent. We are only now beginning to realize the magnitude of the differences between the amount of crime experienced and the amount of crime reported. The breadth of that gap is appalling. For 1973 it is estimated that only 44 percent of crimes of rape were reported to the police; only 43 percent of assaults; only 32 percent of larcenies. A study published by three M.I.T. researchers last summer projected--on the basis of current data and factors, and assuming that no changes in public policy toward homicide would be forthcoming--that "approximately two percent of those born now in large American cities will be murdered, and under not unreasonable assumptions the actual figure might reach as high as four percent." Thus at current homicide levels, the study points out that a randomly chosen urban American boy born in 1974 is more likely to die by homicide than an American serviceman in World War II was to die in combat.

We should not assume no change in policy. The present rapid rise in the prison population undoubtedly reflects present changes in attitudes. At the same time it denotes other problems. But we cannot ignore the warning of these figures.

We have considerably more violent crime than any other Western industrialized nation. But some of the nations of Western Europe in the last few years are experiencing even more frightening crime growth rates. Many countries on the Continent have seen two or threefold increases in robbery in the last three or four years. The explosion of violent crime is being shared. No doubt that the weakening of many institutions, including most particularly the family, is a factor in these results. But nothing good comes from this point if the conclusion is that, therefore, it is not the law's problem. It is the oldest problem which in one form or another the law has had. No doubt there are other factors: the size and mobility of populations, a distrust of the fairness, appropriateness and effectiveness of the criminal law, a lack of awareness that all segments of the population, including most particularly the poor, are deprived of an essential freedom as long as this breakdown persists.

The clear portent of this shared experience of the modern age is that the problem will persist until the law itself takes the measures necessary to stop it. Judge Frankel has noted that the imposition of sentence is "probably the most critical point in our system of administering criminal justice." Punishment is not swift; it is not certain, and it is often correctly perceived as unfair,

because it is unequal without reason. It has the attributes of a lottery. The evidence that there are unsupportable disparities among sentencing courts has to be taken seriously. As an example of the average imprisonment, sentence for forgery ranges from 25 months to 45 months among the ten circuits. The average sentence of imprisonment for an interstate securities conviction ranges from 25 months to 65 months, depending on the circuit.

There are major disparities between the granting of probation and requiring actual imprisonment. In two small districts of similar size, geography and population density, we find that in one, 71 percent of all convicted defendants go to prison, while in the other only 16 percent are imprisoned. In comparing two other districts of moderate size, the respective percentages are 72 percent and 16 percent. We are aware of no explanation for this based on the nature of the crimes.

The criminal justice system as it works has failed to impose sentences of imprisonment which are credible to either the public or the convict. The sentence of imprisonment which is imposed upon the defendant in open court has little likelihood of being, without translation, the sentence which the defendant will actually serve. Last year, the average adult federal offender served less than 50 percent of his actual sentence. Some years ago the figure would have been 63 percent. I have heard it argued

that this is a principal merit of our system. Particularly while a crime is fresh, so the argument runs, the public wishes harsh sentences. The system can supply these sentences but the defendant need not serve them. But I believe this deception--if that is what it is--only adds to our problems of gaining understanding and reform. Public opinion polls have repeatedly shown that the general public increasingly believes that the courts are too lenient.

A study published this year by the Twentieth Century Fund proposes a "presumptive sentencing" approach to ensure equal treatment and certainty of punishment. A committee funded by the Field Foundation and the New World Foundation also this year reported proposals for significant reform of the sentencing process. I know the Second Circuit is leading the way in efforts to reduce sentence disparity through the development of procedural rules and the development of benchmark sentences to be used as points of departure for sentences in similar cases. Because Deputy Attorney General Tyler was active in this endeavor as a district judge, and is a very persuasive person, you will not find it strange that the Department of Justice is very much interested in exploring the establishment of a Federal Sentencing Commission.

The establishment of a Federal Sentencing Commission

would complement enactment of the proposal by the President for a system of mandatory minimum sentences for a number of serious crimes. Under the President's proposal mandatory minimums would apply to extraordinarily heinous crimes, such as aircraft hijacking or major trafficking in hard drugs, to all offenses committed with a dangerous weapon, and to offenses involving the risk of personal injury to others when those offenses are committed by repeat offenders. The President's mandatory minimum sentence proposal also includes provisions to insure fairness by allowing a judge to find, in certain narrow categories or circumstances, that an offender need not go to prison even though he has been convicted of a crime normally carrying a mandatory minimum sentence. A mandatory minimum sentence need not be imposed if the offender was less than 18 years old when the offense was committed, or was acting under substantial duress or was implicated in a crime actually committed by others and participated in the crime only in a very minor way. Under proposals now before Congress, the trial judge's sentencing decision would be reviewable by appellate courts. One of the most significant of these proposals would permit a prosecutor to petition a federal appellate court for review of a sentence less than three-fifths of the statutory maximum and a defendant to petition if the sentence was more than one-fifth of the maximum. The appellate court would have the discretion to deny the petition or hear argument. The sentence could be overturned if it were held clearly unreasonable.

The Sentencing Commission, if it came into being, would be bound by these provisions, as it would be by the statutory maximum terms for any offense. There would be a large area, both where there are mandatory minimums and where there are not, in which the Commission could operate to insure greater certainty and equality. It would establish guidelines for all federal offenses within the limits of the criminal sanctions provided in the law. Building on the pioneering efforts of the United States Board of Parole, the guidelines would create categories based on offender characteristics, such as age and prior criminal record, and offense characteristics, such as whether or not injury resulted. The categories would provide the basis for establishing relatively narrow sentencing ranges for particular categories of offenders committing particular categories of offenses. If a sentence fell outside the approved range, the judge would be required to state the reason for the deviation. Any sentence within the approved range would be considered presumptively valid and immune from appellate review. A sentence above that range would be appealable by the defendant, and one below by the prosecution.

A second proposal in which the Department is much interested in exploring is the replacement of the federal parole system. At the present time every federal prisoner is eligible for parole after serving no more than one-third of the sentence imposed. Indeed, the latest statistics indicate that over 30 percent of all federal

defendants have been sentenced under a provision which provides for immediate parole eligibility. The discretion to grant parole is designed, in part, to mitigate unfair disparities in sentences. We believe the Sentencing Commission, however, would accomplish this purpose better and more completely. Parole has also been urged, as I have indicated, in order to mitigate the harshness of penalties. Sometimes the point is made that in the United States there are more people in prison, per unit of population, than in perhaps any other country in the free world. This argument forgets that our rate of serious crime is higher than that in these countries, that, compared to these nations, our rate of imprisonment to serious crimes is very low. Prison population figures indicate that in practice those convicted of serious offenses in other countries in the free world are much more likely to be imprisoned than they are in the United States. Moreover, the objective of the sentencing standards is not necessarily longer sentences, but much more certain sentences. As James Wilson has written, studies suggest that certainty has a significant deterrent effect on the crime rate, while severity has such an effect only on murder.

We believe that replacement of the existing parole system would add credibility to our sentencing process from the perspectives of both the public and the offender. Each would know that the sentence imposed would be the sentenced served, with only the possibility of a reduction in time served for good behavior.

I have not belabored you once again with a recitation of the purposes suggested as the aim and measure of punishment: rehabilitation, deterrence, incapacitation and just punishment. We know today, as perhaps we should have known before, how little we do know. I do not believe any enlightened society can give up the hope of accomplishing rehabilitation, particularly with young offenders. But we also know that rehabilitation has not proven to be the solution within our reach. We are forced to the realization that some of the primary functions of law in a civilized society are being slighted by our present practice. The law's candor, its fairness in application through equal treatment where discretionary deviation cannot be justified by predictability, and its certainty of application are all clouded. As Norval Morris has written, present sentencing practices are so arbitrary, discriminatory and unprincipled that it is impossible to build a rational and humane prison system on them. It is also impossible to give the society through this means the support it requires. The society must exist with trust, but a fair and determined application of law with a greater certainty of detection, a greater assurance of swift and less discretionary punishment, a simplification and standardization of measures can help secure that trust. It can help secure our cities and help restore rights to all our citizens.