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THE DISTRICT ATTORNEY'S HARDEST TASK

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It would be hard to get anyone to say that the criminal law ought not to be enforced. It is easy to get almost anyone to propose a dozen or more plans for more effective enforcement. However, the purpose of this paper is not to say the last word but to indicate a few considerations which must be kept in mind in any and every plan and which are generally overlooked. Listing a few of the suggestions already made for improvement in the administration of criminal justice will lead to our subject. These are: better methods and more modern organization for detection; improvements in procedure, especially the removal of "technicalities"; more scientific prisons and parole systems; elimination of graft and of inefficient personnel in police departments, in prosecutors' offices, in the courts, in parole boards and prison administrations; revision of the substantive law of crimes; new legislation defining new crimes and new legislation enabling officers to break the barriers of state lines behind which criminals hide; the introduction of psychiatric techniques into the processes of prosecution and into the processes of custody, care, and control of convicted offenders.

All of these proposals are admirable. But two things are lacking: First, with all of them in operation, an additional factor is needed. Second, none of these plans shows where the energy is to come from to secure its adoption and to push it through to sufficient and continuing success.

Enforcement of the criminal law is a problem of obtaining convictions. With the best of detection, prison and parole systems scientifically ideal, the most clearly defined laws, and the ablest and most courageous judges on the bench, convictions depend upon the fidelity and intelligence with which district attorneys bring cases before grand juries for indictment and then conduct, in the trial courts, the prosecutions of those indicted. If the D. A.'s work is ineffectively done, apprehension is fruitless, remedial agencies of punishment and reform never get a chance to operate, nor do the best of judges ever have the opportunity to apply the best of laws.

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Voluminous demonstration of these facts can be made but two quotations will suffice. As Mr. Dewey has said, "the modern police officer knows that without a willing District Attorney to supplement his own work, a well-planned case is likely to go out the window. More than that, he knows that he will never get beyond the little fellow, or reach up to the big shot in the background." As Pendleton Howard writes in The American Bar Association Journal for May, 1938: "Contemporary studies have shown the prosecutor's almost dictatorial control over criminal proceedings." This is admittedly true; and it will continue to be true. Whatever changes may be made, we are not going to make over in its entirety the present machinery of criminal justice; the improvements will be improvements of the existing system not the adoption of an wholly new system.

What then are the district attorney's functions? The orthodox view is: that there are certain laws which define certain specific acts as crimes and provide for the punishment of those who do these acts; that every person, who upon substantial grounds is suspected of having done one of these acts, is to be prosecuted (and, of course, punished if found guilty); and that every person is to be prosecuted for every one of these acts which he is, upon substantial grounds, suspected of having done (and, of course, punished if found guilty). It is submitted that this view is fundamentally unsound and that it is the district attorney's primary duty to select only the strategic cases for prosecution. Whether we consider the amount of grist coming to the district attorney's mill with present more or less inefficient detection and apprehension, or whether we consider the vastly increased amount of grist which it is suspected would come to his mill with more efficient detection and apprehension, still he must be selective in grinding that grist. What? Are some to be prosecuted and others not prosecuted? Is a single person to be prosecuted for some offenses but not for others? To say so is frightful. Let us see whether selectivity in prosecution is a wild theory, or just a theory, or an unavoidable fact.

Take a single person who has committed more than one offense. One who kills another in the commission of a robbery is guilty of both robbery and murder. Shall he be prosecuted for both? An offender may have committed a series of crimes, some minor and some major. Shall he be prosecuted for all? Would this manner of proceeding probably not weaken the prosecution by making the offender a martyr, by shocking a sense of fitness and justice by fool-

ing around with minor delinquencies in dealing with one who is guilty of a major crime, and by piling up needless public expense when the culprit can be adequately disposed of and the public adequately protected by his conviction on one serious charge? An offender may have committed two major crimes. Shall he be prosecuted for both, or for one, and, if for one only, which one? If the evidence in one case is strong and in the other weak, the answer is simple; and the disposition of the criminal on the one strong charge will doubtless amply punish him and protect the public at a saving in expense. But suppose the evidence is equally strong in both cases. Must we have two trials and two convictions? If so, what good would such a manner of proceeding do? One thing is certain: the expense would be increased. But might not one sure conviction be jeopardized by trying for two, when two are not necessary? Again, what is meant by one case being stronger than the other? Does this mean that the evidence is clearer so that a conviction is more certain, or are their other factors? It sometimes happens that taking the clearest case on the evidence may insure a conviction in that case, but cause a bad public reaction. There are those who are still outraged by Al Capone's being prosecuted for income tax evasion rather than for some other of his alleged crimes which are more hateful to the public mind. Thus, it can be that the case, weaker on the particular evidence, may be the stronger, because a conviction in it will be more consonant with the public sense of justice and will, therefore, enlist public support of future efforts, whereas the case easier on the evidence may provide a quick and sensational victory at the cost of diminishing confidence in and support of the administration of justice. Unmistakably we have the necessity of selectivity here.

Take the situation where there are several offenders, some "big shots" and some "little fellows." Prohibition provides the prime exhibit. What William Hale Thompson denominated "mattress fanning" did more than anything else to cause the breakdown of the "noble experiment." Even if one be completely soured on Prohibition, he can still learn from it. The same methods which failed with it will fail with another law upon the enforcement of which one may have his heart set. The multitude of petty cases clogged the courts so that the despatch of all prosecutions was slowed down to the general disgust and discouragement; and the Prohibition officers achieved for themselves the unenviable role of persecutors, at whose discomfiture the public applauded even when they had a "big shot"

in the toils of a strong case. Of course, one must not rush to conclusions. It might be possible to stem a big crime wave by making convictions of the little fry so sure and frequent that the higher-up could find no tools through which to work. But even more clearly than is necessary from him who runs to read, the inevitable problem of selecting, from all the cases, those of both "big shots" and "little fellows," those which will prove effectual in the larger strategy of enforcing the law—a strategy which is needful if the law is to be enforced at all—confronts the district attorney.

Prohibition does not furnish the only example. Back in the days when we were having trouble with banks, the writer had a conversation with a quite successful district attorney, whose estimate of the situation insofar as his office was concerned was something like this: One of the principal means of prosecuting those who have been dishonest in banks is under the law against false entries. He could procure any number of indictments for false entries made by tellers and bookkeepers. But what good would that do? How would those convictions protect the depositors against any real threat to their interests? A few dollars spent by a teller at the races, the abstraction of which was covered by a false entry in his books, could not jeopardize the bank's customers. It could mean only a little loss to the owners of the bank. The real danger to the depositors lay in the dishonest practices of officers who dealt with large sums. A higher-up usually did not make his own false entries; he called in some underling, who had his job at stake, and secretly ordered him to make the entry. Then the underling also was guilty and there was clear evidence against him; for the entry was in his books, perhaps in his handwriting. If the higher-up were put on trial, the prosecution's case was weak, because the decisive evidence, that of the underling, would be discredited since the suspicion would arise that he was trying to save himself by telling a perjured story. If the district attorney should start a campaign against the tellers and bookkeepers and fail to convict, he would jeopardize his chances of success when he tried to convict some higher-up who had callously looted the savings of his depositors. If the district attorney succeeded in convicting a list of tellers and bookkeepers, he would likely acquire the character of an ogre, whose defeat by an important defendant would seem deserved to the public and, perhaps, to those twelve good men and true selected from the body of that public to try that higher-up. This district attorney did wait for a strategic case against some higher-ups and convicted

them. Here again, selectivity; and who will say that it was wrong?

We have hitherto considered what might be called crime by wholesale. What of isolated offenses by isolated offenders? Three actual cases will be enough to show that selection here also is the primary and most important problem; that the effectiveness and justice of the whole process of administering the criminal law depends upon the wisdom of the D.A.'s selection of one of more than one possible way to proceed.

A woman was shot in a lover's quarrel. The victim was a coquettish but moral divorcee. In the immemorial manner of women she excited the jealousy of her youthful and callow admirer, who in a rage shot her unquestionably with the intention of killing her. He was indicted for shooting with intent to kill. If she had died, he would have had to be prosecuted for murder in the first degree. She recovered. They married. The district attorney waited. He thought that, if it were a subterfuge, the marriage would explode; and then he would prosecute. But the marriage went on and on with every appearance of success. The D. A. was solicited repeatedly by the wife, the victim of the defendant's act, to *nol-prosse* the indictment. When convinced that the marriage was a success, he did move to *nol-prosse* and the motion was granted. What would you or I have done, had either of us been in the district attorney's position? What good to society could have followed prosecuting the husband to counterbalance all the grief to the most interested persons and their families and to offset a possible public revulsion to the prosecution? Here is a case where selection resulted in person undeniably guilty of a major crime not being prosecuted. Nor is this the only such case that ever occurred.

Two defendants killed one or more persons by wrecking a train. One of the defendants was an older man, cold, brutal, and ruthless. The other was young, ignorant, slow witted, harmless of himself. He was related to the older man who for a long time had dominated him completely, the astounding and lurid details of which domination ought not to be repeated. Both were, or had been, employees of the railroad. The older man thought he had a grievance and determined to get revenge by opening a switch and thereby derailing a flyer. The younger man participated in this too successful scheme by giving to the older man, upon demand, his key to the switch with knowledge of what the older man intended to do. Legally both were equally guilty of murder. The older man richly deserved the severest penalty. If the younger man were not prose-

cuted along with him, an impression of unfairness might be given the jury from the effort to hold one offender only for the highest degree of the crime, which might militate against justice being done to the egregiously worse of the two offenders. Ought the district attorney in such a case prosecute both, let the chips fall where they may, and forget about the whole matter when the jury come in with their verdict? Or should he, without letting the younger defendant off, seek some means to bring out the extenuating circumstances existing in behalf of the defendant and at the same time strive to prevent the older man's receiving undeserved benefit from these extenuating circumstances? If the latter, how was he to accomplish that end? What happened was that both were prosecuted for and convicted of the same degree. Sometime afterwards, the district attorney joined in an application to the governor to commute the younger man's sentence. Here is a case of selection between two offenders both equally guilty in law of the same offense.

In a community there was a man, cruel and dangerous, who had grown up in and preferred to live in the most inauspicious surroundings and with the most unprepossessing companions. The district attorney had known of and had watched this man for some time. He was constantly involved in trouble, and the D. A. was under the undeniably well-grounded fear that he would kill someone. However, although distressed by the thought that he might have to wait until murder had been committed to prosecute this man, the district attorney was unable to get hold of enough evidence to proceed against him. Then, in a crap game in which the man took part, someone was shot. The evidence that the dangerous character did the shooting amounted to no more than strong suspicion; it might very well have been someone else. But the district attorney believed that a jury would convict him. This belief was correct; for the district attorney brought the case before the grand jury who indicted and before the trial jury who speedily convicted. The district attorney's conception of his duty was that the safety of law-abiding people demanded that this man be imprisoned; and that, since he had a chance to remove him, he ought to do so, even if the prosecution were more or less on general principles rather than specific guilt. This view goes pretty far; but the writer, realizing that things look different when one faces them himself, has never been able to argue himself into any real conviction that the district attorney was wrong. Here is a case of selection in which a person whose specific guilt was questionable was prosecuted, which can be

added to those in which selection was required as to whether or not and just how to prosecute the actually guilty.

It ought not to be necessary to argue further that selection must be made. The real question is, How is selection to be made? The quick answer is that the district attorney is to use his common sense; he has sought the office and draws his salary for answering just such questions. This response is unconvincing and essentially silly. True it may be admitted "that the successful operation of our criminal law machinery is dependent, in the final analysis, on the character of the public servants who operate it and on the social and ethical standards of our society." But the cry, for eliminating graft and political corruption from the administration of the criminal law and for putting the most able and honest district attorney in office, obscures one thing of greater importance. While the tremendous gain made in placing an honest and able man in the office cannot be too often pointed out nor too positively acknowledged, that fact may distract attention from the greater fact that the best of district attorneys must still winnow his cases in order to select the most strategic, if his efforts are to be successful in any measurable degree. The best district attorney no more than the worst can take every case which comes to his notice. If he did, he would clog the courts and, in trying to get too many cases through, would get few or none through satisfactorily. Besides he would create an adverse public clamor about *persecuting* so many cases instead of *prosecuting* the right ones. If additional personnel and facilities were asked so that all cases would be prosecuted, it would be charged that taxpayers' money was being wasted to make jobs for politicians. And justice, in a way, could well be on the side of his traducers. There is a long-known principle called economy of punishment. This principle is to the effect that, if a fine of a dime served all the attainable ends of prevention and punishment in murder cases, it would be enormously unjust to exact the penalty of death. If that proposition be true (and who denies it?), it would also be unjust, as well as needlessly expensive and cruel, to prosecute ten men, if the strategically placed prosecutions of two would attain all desirable ends. There must be selection. Ability and integrity on the part of the district attorney do not of themselves solve these problems. Nor can it be safely forgotten, in an effort, to clean out the personnel in his office, that when he has gotten able and honest trial lawyers to help him, they too cannot achieve any large success without wise selection beforehand of the cases upon which they are to work. The vagrant

thought, that the ineffective district attorney may be replaced by higher authority denotes no complete solution. The successor faces the same problems of selection.

An honest and able district attorney can do much. Mr. Dewey's career is enough to show this. He cannot run counter to public opinion, but his efforts can marshall public opinion which is scattered, disorganized, and inarticulate. The success of Mr. Dewey's efforts was possible because he selected for prosecution those cases where public opinion was ready to support him. By such lines of action, he has shown what can be done in the district attorney's office. It is the publicising and fearlessly pursuing those objectives enlisting public support that can generate the energy necessary to clean up personnel, make improvements in procedure, compel reorganization of the agencies of detection, and achieve all the other improvements in the administration of criminal justice which have been proposed. And the strategic selection of the cases for prosecution is the very heart of the movement. This is the great lesson Mr. Dewey's career teaches—and that achievement in the office is worthy of the best efforts of the highest intelligence. But the good sense of the best district attorney cannot do everything. He is not always confronted with a situation in which what the public mind wants done is clearly discernible. He often faces dilemmas and the guide of a public will, ready to back his decisive moves, is wanting. He can go far in divining public opinion but he cannot find a public will or implement its action when public opinion is deadlocked with itself.

Let us turn to a field in which the public mind has been greatly disturbed of late years, that is, traffic AND SUDDEN DEATH. Prosecution of the minor traffic violations falls, of course, to the police prosecutors; but the major cases go to the district attorney's offices; and anyway the same need of intelligent selectivity obtains with the police prosecutors. The success of what the police do depends on what happens in the courts; and what happens there depends on what the police prosecutors and district attorneys do. The "cafeteria" cases doubtless are determined in large measure by the results in the contested cases. Take the most honest and able district attorney, or police prosecutor, aided by an alert police force and appearing before the best judges and magistrates where no "tickets are fixed." What can he do about these traffic cases? Prosecute everyone to the fullest? If not, how is he to select those for vigorous action?

The regulation and supervision of traffic, we are thinking here of motor traffic on the public highways, proceed under diverse pressures. There is pressure against control. There is pressure for control. The pressure for control seems to divide into pressure for control of traffic to facilitate its rapid flow in order to expedite the transaction of business and to prevent congestion of the streets and highways, and into pressure for control of traffic to promote the bodily safety of those on or near the streets and highways. Since so much has lately been said about this subject AND SUDDEN DEATH, perhaps it is correct to assume that the safety objective is uppermost in the public mind. Let us approach the district attorney's or police prosecutor's task in traffic cases from the safety angle.

It ought to be obvious that prosecution of drivers will not diminish those traffic injuries which are caused by "death traps" on the highways, such as hidden grade crossings and the like. The remedy here is engineering not prosecution. Drivers have no control over these conditions. But there are causes of traffic injuries over which drivers do have control. Prosecution here may produce good results.

Every survey lists speed as one of the chief causes of traffic injuries. True it is that what causes injuries is the force of heavy steel bodies in motion. Cars traveling two or four miles per hour could collide with each other, with telephone poles, and even with pedestrians, and few serious injuries, perhaps relatively few slight injuries, would result. As the speed increases, when "something happens," there is force sufficient to cause serious damage to property and injury to persons. But cars are going to be driven faster than four miles per hour and so it is inevitable that there will be forces on the highways which, unless controlled, will cause serious harm. Can cars be driven fast and yet kept under control so that they do not hit each other, or telephone poles, or pedestrians? Is speed itself the cause of a large proportion of injuries? Or are the causes mechanically defective cars and reckless and incompetent drivers who may or may not be speeding? If the latter, speeding of itself is not the object to which the prosecutor shall direct his attention. If he is to select his cases to attain safety, he must look for cases of reckless and incompetent drivers and of defective cars; for then these are the causes, which must be eliminated, whether the driving is at low or high speed.

However, every survey lists speed itself as the cause of a very

large number of injuries. Doubtless, these figures are not exaggerated. If there be any tendency, it is to diminish the feeling that speed unaccompanied by other causes is the important source of danger. The presence of a jug in the wrecked car is always played up. Manufacturers do not want speed of itself anathematized; if a car is known to be slow, it does not sell. Nor does the public generally have an eagerness to condemn speed alone. To do so strikes too near home; too many people drive and almost every driver likes to go fast and takes pride in his car only if it can make over eighty without an effort. With the best of drivers and cars mechanically perfect, emergencies are always arising. If the car is going fast, frequently nothing can be done by anyone to avoid collision. If the car is going slow, usually at least a serious accident can be prevented. Then too, cars traveling in opposite directions pass pretty closely in the center of the road; and it seems that multiple-lane highways do not obviate this occurrence. A little dip in the surface of the road, a sudden gust of wind may cause them to "nip" hubs. If the cars are traveling at high speed that "nip" throws one or the other or both out of control. If they are traveling slow this danger is much reduced. There is no driver who does not occasionally have a moment of aberration. If he has one, when going very fast, at the wrong instant, a wreck results. No car will run with absolute mechanical accuracy in a straight line on the right side of the road; inevitably it will sometimes wobble around a bit. With everything at the best possible, cars will now and again get out of control; and, when they do, if they are going fast, serious injury to someone is inevitable.

Two views of speed as a cause in itself may be taken. The prosecutor may seek to determine his selection of cases by either. The first is that these injuries are in reality many; so many that little can be done, except nibble around the edges, to reduce the vastly too many injuries unless the problem of speed is tackled directly and solved. The second is that these injuries are in reality few; that, if the reckless and incompetent drivers and defective cars can be gotten off the roads, injuries will be reduced so tremendously that speeding will become a minor matter. This latter view does not appear to accord with the facts; and, anyway, if the prosecutor adopts it, he will not escape the problem of speed.

Take crashing traffic signals. What is the psychological background which will support vigorous and sustained enforcement in such cases? Is it not the fear that a slow driver running through a

light may be hit by a fast driver going the other way? Or that a fast driver will run through? If all cars moved slowly, where would the problem be? And can it be forgotten that, if the prosecutor's efforts run too much counter to the public's sense of the fitness of things, he can do little? His campaign will fade away.

Take defective brakes. How can a car with bad brakes be detected when going slow? Of course, road tests will do so. But, as a matter of fact, do not most of the cases of prosecution for bad brakes arise when a speeding driver is picked up? And again, if all cars went slow, where would the necessity for and justification of the bother and expense of road tests be found?

Take the incompetent driver, just one, the "slow-poke" driver. What can furnish a justification to the public mind for ruling him off the road, except that other drivers want to go faster? Just how much consideration can be given to these faster drivers? To determine who is a slow driver, it is necessary to determine how fast one may drive with legal approval.

Take the driver who weaves in and out of traffic. Is he not usually the fast driver? If we think that he is made to weave by the slow driver, we face again the problem of how fast is fast enough.

Take drunkenness. Can officers go around smelling every driver's breath? How frequently does a drunken driver become a menace unless he speeds? And what, in most cases, directs attention to him so that an officer can apprehend him except speeding?

In all these instances, efforts to deal with other causes leads inevitably to an involvement with speed as well. The prosecutor cannot escape the problem of speed as the great cause itself of injuries or as the chief way in which other causes manifest themselves for detection. His efforts, if vigorous and continued, must exert pressure to reduce speed. With what then is he faced? A very puzzling dilemma.

In the first place, he runs headlong into the purpose of those other traffic regulations which are designed to expedite the rapid flow of traffic. What can be done on the super-highways and on the boulevards where the lights are spaced far apart and the cars speeded up? Parenthetically, the relation of the prosecutor to the traffic police must be noticed. The police will bring in the cases which the prosecutor will prosecute. If he will not proceed, their efforts at detection and apprehension will slacken. If he calls for certain types of cases, they will make the needed arrests. The offi-

cers can arrest the light crashers and the weavers whether slow or fast. They will be able to catch a good many of the drunken drivers and cars with bad brakes at the lights. But the higher the maximum rate of speed, the less can they make use of speed as a means of detecting violators. If the maximum rate is set too high, it may be impossible to control traffic by any attack on the other causes of accidents. Even the grip on light crashing may be lost, because stopping in time for lights is impossible; to stop in time, speed must be reduced. But every reduction tends to defeat the end of expediting the rapid flow of traffic. Of course, it may be said that the objective is to let traffic flow rapidly but not too rapidly, to find the golden mean. But this objective itself presents the greatest problem. As traffic comes down from seventy, to sixty, to fifty, it may truly be said that the objective of all reasonable expedition of the flow of traffic is subserved at the same that safety is subserved by reducing speed. Suppose that, in order to have safety, speed must go down to thirty or twenty. Then the two objectives begin to conflict. No one can show that traffic can be permitted to go fifty and that rate is both safe and fast enough. How can it be held to fifty? And is fifty safe? There is a conflict and in the conflict, which objective is to be paramount? Shall speed be reduced to any point necessary for safety, or, at some point, shall at least some safety be sacrificed to speed? This problem, difficult enough in itself, is further complicated by the very fact that the building of modern roads encourages speeding. What is the sense of building invitations to speed and then prohibiting it? Why spend the money on boulevards and super-highways?

The honest and able prosecutor is impaled. If he relentlessly prosecutes in order to promote safety, he runs willy-nilly into speed. His efforts if successful must reduce speed. And then he is confronted with those other laws which also he must enforce and which encourage speed. He can follow both objectives sometimes but sooner or later, and doubtless sooner than later and in the most important cases, the objectives collide. The books do not tell him which objective is to have the right-of-way. Both are paramount. Nor does public opinion help him.

If prosecutors were simultaneously and continuously to clamp down on traffic in the sole interest of safety, they would slow down the automobiles. And then there would be a violent public reaction. A campaign—promoted likely by the automobile manufacturers and dealers, joined by gasoline companies, and having the sympathy of

every driver who is gratified with the memory of his car and his gasoline pictured on the billboards—would ensue directing attention to bad brakes, the jug in the wrecked car, and smart young things on joy-rides, and pointing out the errors of prosecutors' ways when they are deluded enough to attend to the hazards of speed rather than to these other menaces which do not raise any consciousness of wrong in selling cars by speed and driving them for speed. If the public wanted speed, the prosecutor would know what to do. If the public wanted safety, he would know what to do. But when the public wants both and either will not recognize a conflict or refuses to make a choice in that conflict, what can he do?

There is another field, of late known as labor relations, in which the public mind is latterly vastly disturbed. Here too the most devastating puzzles confront the district attorney. An illustration of what often faces a governor will introduce us to the district attorney's worries. In a mining district, there were rival unions. One had struck and the companies were trying to operate by employing the members of the other union. Much violence resulted on both sides. It was imperative that the governor take action to preserve the peace. If he closed down the mines, he would win the strike for the striking union. If he allowed the mines to operate with military protection, he would break the strike. He had to put in troops and he had either to keep the mines open or to close them. There are those, of course, who know exactly what to do in such situations; they are implacably for either "human rights" or "property rights." But the slightest objective reflection reveals that these people are partisans; and it is, seemingly with justice, supposed that the governor ought not to be partisan. But how can he help taking a side? The public mind generally is for both "human rights" and "property rights" but confusedly so and without a trace of patient and discriminating understanding.

The importance of the district attorney's actions in such a situation lies in the fact that promptness and vigor on his part at the first acts of violence may prevent any serious disorder, whereas, delay or indecision may lead to greater violence. To some his problem is crystal clear. All he need do is to enforce the law; and this ostensibly means that he should immediately prosecute to the full whatever person does an act of violence. But the problem as a fact, not a theory, is not so easy to solve. He may cause indiscriminate arrests but he cannot put a partisan of one side on trial at the same instant that he puts a partisan of the other side on trial. He must

press one case first. And the first case will likely be of decisive influence. Which partisan shall he bring up first? In making this unavoidable selection, he will in many instances in effect take a side. It is only the partisan or corrupt and, therefore, bad district attorney who knows just what to do. The honest and able district attorney is again impaled. Yet his action is necessary, selection unavoidable, and the effect possibly vital. Again, in order to prosecute, a district attorney must get clear and legal evidence. In the heat of controversy at its height, he may not be able to get sufficient and particular enough evidence against the partisans of either side, if he is relentlessly prosecuting both sides. Sometimes a little "cooperation" with one side is necessary to unearth the indispensable proof against the other, a fact witnessed by Mr. Dewey's necessity of working to some extent with crooks in order to reach the higher-ups. And so often there is no public will arising from settled public opinion to guide him; violence, violent persons and provocation exist on both sides and public opinion is in an uproar.

Thus the great American People put the district attorney in a position where he must make choices and all too often give him no principle of selection. He may want ever so much to give the people what they want, but they do not know what it is; and so he cannot find out even by divination. His own good sense is not enough. He muddles through as best he can; but about the only objective left to him which he can follow consistently is his own "personal preferment and professional eminence." He prosecutes enough to quiet public criticism but not enough to arouse criticism from other sources. He follows safely in the clearest cases instead of acting boldly to strike the dangers at their sources. Perhaps this is democracy; but, if it is, that fact ought to be kept in mind, when demands are made for more vigorous enforcement and the district attorney is pilloried for doing the only thing that the people leave for him to do—keeping an alert eye on his own political and professional future. Strikingly encouraging as Mr. Dewey's career is, it too exemplifies this actual consequence; for even he has not established success in the district attorney's office as a career in itself rather than a stepping stone.

Not only does effective enforcement of the criminal depend on "something outside the scope of penal codes and codes of criminal procedure"; not only does it depend upon able and honest personnel to operate the machinery; it depends also on clearly understood and approved objectives to be attained by enforcement. When this

fact and this need are realized, we shall have less of pollyana faith in piecemeal improvements. We shall know that wise selection of cases for prosecution alone can call out the energy necessary to compel the selection of proper personnel and the adoption of proposed improvements. We shall cease from satisfying our vague sense of justice or resentment by merely condemning the district attorney for keeping an eye on his own personal political and professional fortunes, about the only guide which we now vouchsafe to him. We shall direct our words and actions towards marshalling public opinion upon clear and sustained objectives. And thereby we shall help, instead of hindering, the district attorney in his hardest task.