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The Citizen's Role in Law Enforcement

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COMMENTS

THE CITIZEN'S ROLE IN LAW ENFORCEMENT*

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Recent events have conspired to make law enforcement more difficult and uncertain. Unless we can reverse the present trend toward lawlessness, disorder, and uncertain justice, too long delayed, we run the grave risk that loss of respect for the law and for officers of the law may lead to measures which are alien to our way of life and the promises of our constitutions.

In Chicago you have done much to reverse the trend toward a breakdown of law enforcement. Largely because the Chicago Crime Commission has focused public attention on how law enforcement machinery is actually operated, Chicago has shown a great improvement in the solution of major crime. And the Legislature has enacted some laws which should strengthen the prosecution of criminal cases, such as permitting the state to appeal from the suppression of evidence by lower court judges. Your part in the improved administration of your police department and in the reorganization of the Cook County police force is well known. Your close scrutiny of the work of the criminal courts and the delays in prosecutions has been beneficial. Your annual reports show that the most important part of the citizen's role is everlasting and every day vigilance in observing the administration of criminal justice.

* Address before the Chicago Crime Commission Annual Public Luncheon Meeting, Chicago, Illinois, on October 15, 1964.

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It is my purpose to develop three suggestions regarding the citizen's role in law enforcement.

First, citizens, as well as lawyers and judges, must recognize the dual purpose of our administration of criminal justice—which is to protect society against lawbreakers and at the same time scrupulously safeguard individual rights. I believe this dual purpose can and must be achieved. Our people will not support law enforcement which fails to protect individual rights. On the other hand, without effective law enforcement by officials who themselves obey the law, individual rights cannot be properly safeguarded.

Second, we must completely overhaul the machinery of criminal justice. In many of our states there has been no thorough re-examination for almost 100 years. Many local agencies with untrained personnel, inadequate powers, limited budgets, and no supervision are operating as local police units, but they can play little part in any important investigation or prosecution. In addition, many recent court decisions have further curtailed the powers of law enforcement agencies. To correct this deteriorating situation in law enforcement, the American Bar Association has launched a major three-year project for the formulation of minimum standards for criminal justice for the dual purpose of making law enforcement more effective and at the same time protecting individual rights.

Third, even if these efforts should provide improved machinery and better laws and rules for criminal justice, we must look to the great body of citizens, led by groups such as this Commission, to see to it that the criminal courts, the prosecutor's offices, and police departments have the leadership of men with an undivided devotion to the public interest, men who are independent of political pressure and the demands of the public and the press.

First, as to the dual purposes of law enforcement —the protection of the public against lawbreakers and the assurance to the accused that they will receive the protections of due process of law. There

is no better measure of the real nature of a society than the manner in which it treats the person accused of crime, determines guilt, and enforces its judgments. Anyone who doubts this need only look at how Communist countries treat those suspected of misdeeds. Under totalitarianism the individual has no rights against the state, he has little chance to defend himself, he is compelled to give evidence against himself, his home may be ransacked, he may be arrested on any official's whim, his punishment is severe, and there is virtually no appeal. To symbolize his helplessness, when he is formally accused his head is shaved bald. By contrast, we make every effort to withhold our judgment of guilt or innocence, and we presume the accused to be innocent until found guilty. We know that unless we insist on fair treatment at every step of a criminal proceeding, the accused's chance to prove his innocence may be seriously endangered. We cherish our constitutional guarantees against illegal searches and seizures, self-incrimination, and all the other forms of oppression which are outlawed by the guarantees of due process of law; we believe that it is the business of the courts to protect these rights.

Indeed, since 1923, and increasingly in recent years, Supreme Court decisions have clarified individual rights in criminal cases by applying stricter standards to determine whether the defendant has enjoyed due process of law in the state courts as well as in the federal courts. I need only remind you of three of the most recent decisions which have required drastic re-examination of state practices and procedures. In 1961 in the *Mapp* case[1] it was held that Ohio could not use evidence which had been obtained through an illegal search. Although the Illinois courts have long barred such evidence, until the *Mapp* decision most of the states permitted its use.

In 1963 in the *Gideon* case[2] from Florida the Court held that a defendant who is financially unable to hire a lawyer must be given counsel when he is tried for a serious crime. This has been given retroactive effect, and hundreds of state court convictions have been nullified.

Lastly, in June, 1964, the Court reversed the Chicago murder conviction of Danny Escobedo[3] because the state used a confession obtained from him after he had requested and had been denied the right to talk with his counsel. Before this the test of due process had been whether the confession was voluntary, as it concededly was with Escobedo. Four judges dissented vigorously. Justice Harlan said that the new rule was "most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement." Justice White said that law enforcement "will be crippled and its task made a great deal more difficult." Of course police authorities are greatly disturbed over the seeming disposition of five of the justices to limit more and more the right of the police to talk to suspects unless they have been advised of their right to counsel and clearly wish to waive that right and talk without counsel.

For these trends in federal decisions the states have themselves to blame. Many of them have done little or nothing to curb illegal detentions, coerced confessions, and illegal searches and seizures; and there are very few instances where police officers have been disciplined for deliberate violations of individual rights.

Furnishing counsel to defendants who are financially unable to hire a lawyer is an elementary requirement of fair dealing. Yet according to an American Bar survey in July, 1964, in 2,900 of this country's 3,100 counties, where 70 per cent of the serious crimes are prosecuted, inadequate methods of assigning counsel were still in use. For the federal courts, the Criminal Justice Act[4] became law on August 20, 1964. It requires the federal judges or commissioners to assign counsel to indigent defendants at all stages of serious criminal cases, from arraignment through appeal, and it provides for payment of limited counsel fees and reimbursement of expenses. I understand that in Cook County, and in most of Illinois' more populated counties, there are public defenders, and in other counties counsel are assigned and paid up to $150 in non-capital cases. It is to the advantage of the state to make sure that means for an adequate defense are provided and that competent counsel are assigned. In addition, funds should be provided so that necessary expenses can be paid, and there should be some discretion to pay counsel more than $150 if the defense is complex or the trial is long. Future convictions may be open to constitutional attack if counsel do not have the means for proper investigation and defense because of lack of funds. We should leave no stone unturned to make sure that in the federal and in the state courts defendants who are financially unable are given

[1] Mapp v. Ohio, 367 U.S. 643.
[2] Gideon v. Wainwright, 372 U.S. 335.
[3] Escobedo v. Illinois, 375 U.S. 902.
[4] 78 STAT. 552, 18 U.S.C.A. §3006A (Supp. 1964).

competent counsel who are provided with necessary means for a reasonable defense. The risks of reversal and retrial will be minimized, and competent counsel, carefully selected by the court, will waste less time. I believe that proper administration of the public defender and court assignment systems should greatly reduce the number of incompetent and unethical lawyers who now infest the criminal courts in most of our large cities; it should be the means of bringing more competent and scrupulous lawyers into our courtrooms.

Even where a defendant admits his guilt it is imperative that he be represented by paid counsel. Usually the sentence of the court is the most important step in the case for the defendant, and in seeking a proper plea and arguing for sentence the defense counsel renders an invaluable service which no man can perform for himself.

The extension of individual rights by the Supreme Court has made it seem to many people that the federal courts were solely concerned with the rights of criminal defendants and that they understand little about law enforcement. These questions are brought before the courts almost entirely by defendants who have been convicted, as the states seldom are able to appeal from an acquittal. Another important factor has been that in some states the great majority of criminal defendants have been treated brutally and summarily. Thus the law has been developed in passing upon many cases where the facts have cried out for judicial correction.

But case by case development of the law governing criminal justice has its serious limitations. Seldom does either side point out to the judges the possible long-term effects of their opinions. There has been almost no way in which the judges could obtain some impartial and authoritative view of the necessities and the practicalities of present-day law enforcement—for example, the problem of policing and protecting large metropolitan areas in view of the widespread use of automobiles and firearms. Another obvious example is the difficulty of investigating many murder cases because the best witness and perhaps the only witness is unavailable. Methods of investigation which were good enough 50 years ago are wholly inadequate today in many situations. Despite this, most state legislatures have given woefully little attention to criminal law problems, and there has been little guidance and information to support broad action.

The American Bar Association is deeply concerned about these trends which seem to protect individual rights at the expense of law enforcement. In August, 1964, the Association authorized a three-year project for the purpose of formulating minimum standards for criminal justice. Advisory committees consisting of experienced and expert lawyers, judges, and legal scholars will review law enforcement practices from the beginning stages of investigation through all the proceedings which may take place after conviction; they will consult with all responsible and representative groups who are concerned with these problems; and they will attempt to state affirmatively how criminal justice ought to function. We hope that the minimum standards resulting from this joint study and consensus of opinion will spur legislative and executive action and that it will guide the courts toward a constructive balance between the protection of society and the safeguarding of individual rights.

In further developing my second point about overhauling the machinery of criminal justice, let me mention briefly some of the areas where standards might be appropriate.

Almost every community needs better qualified and better trained police, selected on merit and adequately paid. The police may need additional and clearer powers to question suspects, to detain and question persons who cannot identify themselves and give a reasonable explanation of their activities when officers have reason to suspect illegal conduct. They may need broader powers of search and seizure, under supervision. Two recent New York laws, called the Stop and Frisk and the No-Knock laws, are examples of what might be done.

The English constables have devised some unique methods which at least show they have a sense of humor. You may have heard how the constables of Southend, England, deal with the teenage hooligans known as the "Mods" and the "Rockers" when they visit that seaside resort. Chief Constable McConnach says: "Anything which reduces their egos is a good thing. I do not encourage any policemen to arrest them. The thing to do is to deal with them on the spot—we take away their belts. We have a wonderful collection of leather belts. They complain that they cannot keep their trousers up, but that is their problem entirely."

The other side to police activity is the need to find suitable methods for disciplining police who violate the law, even though they may be merely over-zealous. Nothing shakes public confidence in law enforcement more than the arrogant and

illegal abuse of power by the very officers sworn to uphold the law. Responsible executive authority must make it clear that transgressions by the police will not be tolerated—not only because public respect and cooperation are thereby lost, but also because illegal police activity jeopardizes the orderly and successful prosecution of cases.

In our large cities the most frustrating police problem concerns the difficulties of investigating organized crime and securing evidence of its activities. Superintendent Wilson has recently pointed out that the chief operations of organized crime are in gambling, prostitution, narcotics, and illegal loans, known as the "juice" racket. Organized crime operates secretly and through numerous agents, over wide territories, by telephone, automobile, and airplane. It leaves little trace of its higher-ups, and by threats and violence it attempts to seal the mouths of its victims. How can there be any sound objection against legalized wiretapping, under court supervision? Why should there be any reluctance on the part of legislatures to give prosecutors the power to compel witnesses to testify by granting them immunity from prosecution for any crimes regarding which they may testify?

As organized crime operates across county, state, and even national borders, means must be found to enable the thousands of law enforcement agencies to exchange information and cooperate with each other with minimum loss of time. Today such cooperation is laborious, piecemeal, and entirely voluntary. In New York's investigation of the underworld convention at Apalachin in November, 1957, it took over a year to assemble all the available relevant information about the 58 men who were known to have attended. New York is now experimenting with means whereby such information could be sent to any one of its 3,600 law enforcement offices within a few minutes.

After arrest and the retention or assignment of counsel, the defendant's chief concern is getting out on bail. Recent studies have shown that in many large cities thousands of persons each year have been held in jail because they could not furnish bail, although in a large majority of such cases (leaving out murder, narcotics, and certain other cases) careful investigation would have revealed that only nominal bail, or even no bail at all, would have been enough to insure the defendant's presence. As you know, Illinois has recently enacted a bail statute[5] which meets this situation, in large part, by allowing a defendant to be released on his own bond, or, where bail is set, by depositing only ten per cent with the court as bail security. As the defendant eventually gets back 90 per cent of this deposit, bail costs him only 1 per cent, which is only one-tenth of what the bail bondsman gets in most cases. In New York City the state courts started a somewhat similar system last year, after a study by the Vera Foundation. Such bail reforms recognize the right not to be imprisoned without good cause. They should also accelerate the disappearance of the professional bondsman who steers the defendant to a lawyer who splits his fee with the bondsman—the kind of bondsman who frequently gets additional money from the defendant on the representation that he can "fix" the case. These recent developments would seem to show that the time is ripe for minimum standards for bail practices.

The tragic murders in Dallas last November are vivid reminders that standards are badly needed with respect to publicity regarding criminal investigations and prosecutions, the custody of prisoners, and their right to privacy so that they may receive a fair trial by jury in a community which has not been poisoned by publicity concerning matters which the jury may not hear. You will remember that Lee Harvey Oswald was frequently subjected to questioning by newsmen, and this was witnessed on nationwide television. Hundreds of news representatives overran the police headquarters, where they interviewed numerous officials who told what they knew and also some things they did not know. Even the district attorney held a press interview and gave out information, some of which turned out to be erroneous. The transfer of Oswald was arranged for the convenience of the news media, and in the confusion Jack Ruby shot and killed Oswald, who at the time was surrounded by at least 70 police officers. Later at Ruby's trial the judge admitted television cameras to broadcast the verdict, and defense counsel, descending to a new low level of professional misconduct, castigated the jury and the community before cameras which carried the scene to the country. The conduct of the police, the prosecutor, the newsmen, the broadcasters, and to some extent even the judge, in the Oswald and Ruby cases was a shameful and inexcusable interference with the

[5] ILL. REV. STAT. ch. 38, §§110-1–110-15 (Supp. 1964).

proper administration of criminal justice. The repetition of such wholesale violations of individual rights, in flagrant disregard of professional ethics so far as members of the bar were concerned, must not be permitted to occur again. What can we do to put a stop to such practices?

Recommendation number 12 of the Warren Commission, which investigated President Kennedy's assassination, was that "representatives of the bar, law enforcement associations, and news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."

Of course such codes can be effective only if all concerned scrupulously observe them—and that all the news media would do so in a case of great public interest is highly doubtful.

I suggest that we also explore the alternative method of court rules which would bind all attorneys and all police. If the newsmen can't get in and the news can't get out, the problem will be solved. If the attorneys and the police know that the court rules will be enforced by the judges, then the newsmen will not get in and the news will not get out until it can be made public without improperly prejudicing the rights of an accused. On numerous occasions federal judges have issued specific instructions to counsel and to the news media regarding cases about to be tried. In every case that I know of these instructions have been scrupulously obeyed. Would trial judges, who are elected for short terms, be willing to do this?

In Massachusetts the bar and most of the news media, with the exception of some Boston newspapers, last year agreed upon a code governing news about criminal cases. The code forbids almost all such misconduct as took place in Dallas. But it is important to note that before the Massachusetts code was agreed to, a Massachusetts trial judge had fined a newspaper for contempt for printing during trial the criminal record of the defendant, which record was not before the jury. In Massachusetts judges are appointed and not elected.

In any event, standards governing the conduct of prosecutors, defense counsel, and judges in criminal cases would be a giant step in the right direction. We also need to clarify the duty of the prosecutor to disclose to the defense relevant evidence which may not be known to the defense, the circumstances when that should be done, and how it should be done. And for defense counsel, we should re-examine his duties to the defendant and to the court.

Speed in prosecution, disposition without unnecessary adjournments, and the certainty that there will be a day of judgment, are essential if criminal justice is to have any real deterrent effect. The Chicago Crime Commission has been much concerned with this, and your reports call attention to cases where numerous and unexplained adjournments have jeopardized prosecutions. Can we formulate standards which will serve to reduce delays? Should courts and prosecutors be required to make periodic reports which set forth the reasons for all postponements which delay disposition of a case for more than a few months after it is commenced? Ought courts be required to try criminal cases ahead of civil cases, and judges be shifted to criminal trials until criminal calendars are reasonably current?

After the judge has sentenced the defendant, should there be some way of appealing from the sentence? As you know, this cannot now be done in the federal courts or in any state, except Illinois, Massachusetts, Connecticut, and New York. Why shouldn't a defendant who has received a long sentence be able to point out to some reviewing court that the judge has given him a much longer sentence than such offenders customarily receive? On the other hand, should not the state be permitted to appeal where a judge has given a suspended sentence to felons who have brutally assaulted a police officer or have committed some other grave offense?

But whatever standards we have, and however much they may promise, the most important factor for effective law enforcement will always be what kind of men are running the machinery of criminal justice. If they lack integrity, if they are susceptible to political pressures, if they look upon such public office as a means of personal aggrandizement, even if they are merely weak and ineffectual, the best standards, statutes, and rules in their hands will yield poor results.

At the very least we need the leadership of men of integrity who are independent of political pressures. We need men who will wisely decide how to use the large discretion which their offices require them to exercise. At every step there must be some exercise of discretion. Do you arrest the hoodlums

or just take away their belts? Where the speed limit is 50 miles per hour, for what speeds should the traffic cop give a summons? Should the prosecutor seek to indict the college freshman who during vacation works in the Post Office but punches the time card, sneaks out to study, and does no work? Is every shopkeeper who violates a Sunday law to be arrested? Should a prospective defendant be invited to appear before the grand jury? Or if he asks to be heard, should the request be refused? When should the prosecutor recommend lenient sentences and when harsh sentences for the same offense? Under what circumstances should the prosecutor initiate his own investigation into complaints of criminal offenses? Altogether the prosecutor wields the most terrible and far-reaching powers of government, and the exercise of this discretion may cause grave consequences to many persons By what means does the judge arrive at a five-year sentence for one defendant and a one-year sentence or a suspended sentence for a co-defendant?

Surely it is hard enough for an honest public servant to decide such questions in the public interest. If it is implicit in his gaining and retaining public office that he stay in the favor of local politicians, who can know when and to what extent the prosecutor's judgment has been overborne in any case? Your last annual report mentions by name five judges whose activities you thought were open to question. I gather all of them were elected for short terms.

Nothing is of more fundamental importance to the administration of criminal justice than making judges independent of political suggestions and the pressures of the public opinion and the press. I single out judges because from the nature of our judicial system they exercise in some degree a supervisory power over the actions of the police and the prosecutor. On the whole the system best calculated to protect the public interest is one which provides for the appointment of judges by the highest executive authority, and their retention in office during good behavior, and the appointment of prosecutors by a high executive or judicial authority. Illinois has recently taken two steps towards judicial independence—a system calculated to retain judges in office after they have served one elected term, and the establishment of a Judicial Commission for the removal of judges. I gather the recent retirement of one judge who was unfavorably mentioned in your last annual report was accelerated by the creation of this Commission.

I think it is fair to say that states where judges and prosecutors are appointed have over the long pull provided criminal justice far superior to that in states where officials are elected. They have also given better protection to the rights of defendants.

Needless to say, where judges and prosecutors are elected, the individual citizen has a far more difficult task. I congratulate you upon your forthrightness in giving praise and blame where you find it is due, and in naming judges and seeing that their actions, or failures to act, receive public attention. You also fearlessly praise and criticize the police and the prosecuting authorities. I should think that every large city in our country would profit from your example in having at work throughout the year an active commission such as yours.

I have tried to give a balanced account of the problems of law enforcement which are of special concern to the citizen. But my suggestions about the citizen's role would be somewhat out of focus if I did not also point out that all of us as citizens have other obligations. We can never expect any real progress toward a more orderly society unless we also give attention to the social ills and inequalities which may give any of our fellow citizens reasons for feeling they are unjustly treated and unfairly discriminated against. While we work toward more effective criminal justice, we must lend our support equally to all those measures, public and private, which strike at the causes of crime and the conditions which breed contempt for law and order.

Let us now move forward together, citizens, lawyers, and judges in a united effort calculated to rejuvenate the entire machinery and operation of law enforcement in this country. Our effort must be on a national scale and, in order to bear fruit, it must win the consensus of all citizens who believe that orderly government is the indispensable basis for individual liberty and the reasonable enjoyment of our cherished freedoms.