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Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenbach Letters

Nicholas Katzenbach

COMMENTS

EQUAL TREATMENT IN THE ENFORCEMENT OF THE CRIMINAL LAW:

THE BAZELON-KATZENBACH LETTERS

One of the difficult and recurring problems in the administration of criminal justice is that of ensuring a continuing and meaningful dialogue between those persons, of whatever persuasion or philosophy, who occupy positions which enable them to significantly influence the course of the law.

Two such positions are those of the prosecutor and the appellate court judge. Ordinarily, however, the mainstream of communication between them is the government's brief in the appellate court and the responding collective opinion of the justices. As those versed in the intricacies of appellate procedure know full well, the limitations of these documents as vehicles of expression are many. The writer of the brief is bound to the facts of his case and he must, in addition, express the advocate's position. The writer of the opinion has only slightly more freedom. True, he may stray from the complaint of the particular appellant before him to express individual views on the present and future state of the law, but, in so doing, is likely to draw not only dissent from his brothers, but cries of "dicta" from the lawyers and law reviewers.

During the summer of 1965, however, a most extraordinary exchange of correspondence, examining the future course of the American criminal-constitutional law revolution, occurred between the highest law enforcement officer of the nation, the Hon. Nicholas deB. Katzenbach, Attorney General of the United States, and the Hon. David L. Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia. The Bazelon-Katzenbach letters, as they have come to be known, gave fresh and imaginative consideration to some of the root problems of the criminal law now undergoing intensive re-examination by groups of scholars, judges and legislators across the country.

The letters were first published in full by the Washington, D.C. *Evening Star* on August 4, 1965, and were given extensive, but only partial, quotation in much of the nation's press. Since we believe that the Bazelon-Katzenbach letters constitute a significant contribution to the literature of this "revolution," they are presented herewith in their entirety.—*J. R. T.*

Following is the full text of an exchange between Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia and Atty. Gen. Nicholas deB. Katzenbach expressing divergent views on detaining and questioning suspects and other police procedures:

Dear Mr. Katzenbach:

In light of our recent discussions about the administration of criminal justice, it was with particular interest that I read your very fine speech to the University of Chicago Alumni. You have rightly pointed to the needs to examine how theoretical legal rights work in practice and to "re-evaluate the divergence of ideal and practice." In line with this concern, I believe you may share my misgivings about portions of Preliminary Draft Number 1 of the proposed American Law Institute Model Code of Pre-Arraignment Procedure.

The Code proposes twenty-minute detention of a citizen to "aid in the investigation or prevention of a crime" and dragnet arrests where "it is likely that only one or more but not all of the persons arrested may be guilty of the crime." The Code also approves police questioning of a suspect from four to twenty-four hours after his arrival at a police station. These provisions would, in my experience, primarily affect the poor and, in particular, the poor Negro citizen. I doubt that police would, for example, arrest and question the entire board of directors of a company suspected of criminal anti-trust violations although it might be "likely that only one or more but not all . . . may be guilty of a crime." It is not apparent to me, however, that prosecuting authorities have had notable success in detecting or combating such "white collar crimes" as anti-trust violations or tax frauds. I cannot understand why the crimes of the poor are so much more damaging to society as to warrant the current hue and cry—reflected in the proposed Code—for enlarging police powers which primarily are directed against those crimes.

Availability of Counsel

It is also likely that, in some instances, professionals who engage in organized crime may be held and questioned by police. But these suspects know their rights and counsel is ordinarily available to them. Thus the discriminatory working of the proposed Code is most graphically revealed in the provisions regarding availability of counsel during police interrogation.

The proposed Code permits a suspect to retain counsel during interrogation but it deliberately fails to provide counsel for those who cannot afford it, or for those too ignorant or inexperienced to understand their rights and their need for counsel. The Code provides that retained counsel may be present during police interrogation, though the Reporter suggests, as an alternative proposal, that retained counsel may be excluded from the interrogation though he would be permitted to consult with his client prior to the interrogation.

In the teeth of *Gideon*, *Griffin*, *Coppedge* and *Hardy*, the Reporter's Commentary argues that neither proposal regarding counsel works an invidious discrimination between rich and poor on the ground that the state has no "affirmative obligation to insure that persons in custody will not incriminate themselves" but rather that the "state must remain neutral." But the proposed police detention and interrogation are not "neutral" state acts. Their primary effect, unless counsel is provided, is to elicit damaging admissions from suspects. (The Commentary suggests that detention and interrogation may also permit the suspect to exculpate himself. But the presence of counsel would aid rather than inhibit this purpose.) If the state subjects all suspects to detention and interrogation, it is only a pretense of "neutrality" to permit those able to retain counsel to protect their rights effectively while refusing to provide equal protection to the poor and inexperienced.

Alternative Proposal

The Code's alternative proposal—that retained counsel be excluded from the interrogation—would partially eliminate one blatant discrimination between rich and poor by impeding the ability of the rich to protect their rights. But a major distinction between rich and poor would remain: those who could afford it would have some support from counsel; the poor would have none.

In any event, elimination or curtailment of counsel's role in the interrogation procedures raises grave doubts about the fairness of those procedures. The source of these doubts is revealed in the Commentary's rationale for the Code's refusal to appoint counsel during police interrogation: "The expenditure of large public funds is not justified to assure that in all cases in-custody interrogation can be effective only for purposes of exculpation and never for inculpation." The clear premise of this argument is that no one, if advised by counsel, would volunteer inculpatory statements. Since the Commentary cannot assume that counsel would coerce a suspect to remain silent, I think this argument is an implicit admission that counsel's presence militates against the confusion or fear or insufficient understanding of his rights which prompt a suspect to speak.

"Atmosphere of Confusion"

Indeed, the Commentary itself admits that the "atmosphere (of a police station) tends to be one of confusion and indeterminacy" and it is, I think, coercive to many who are accustomed to view the police as hostile. In such atmosphere, the Code's intricate provisions for police warning of rights will be ineffective. Counsel, unlike the police, has no transparent interest in eliciting self-incrimination, and he ordinarily is more detached and knowledgeable than a relative who may, according to the Code, be present, or consulted during interrogation. Since the Code refuses counsel to those most likely to be detained and interrogated, its claims ring hollow that "the suspect retains a meaningful choice as to whether and how much he will cooperate in the inquiry" and that it "provide(s) equal access (for rich and poor?) to sufficient information to make choice meaningful."

Moreover, these Code provisions fail to take account of a vital consideration set out by the Allen Committee in its "Report on Poverty and the Administration of Federal Criminal Justice."

"The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows

that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system."

The police interrogation procedure approved by the Code requires "constant, searching, and creative questioning" to insure its fairness and even its compliance with the elaborate Code provisions. The Code's failure to see the need for counsel "at all stages" of the criminal process is at sharp variance with the philosophy of the Criminal Justice Act of 1964, and with the Allen Report and the policies of the Department of Justice which led to that landmark act.

The proposed Code would in practice diverge greatly from the ideal that the administration of criminal justice should avoid invidious discrimination based on wealth. But the Code and the Reporter's Commentary fail to follow your injunction in the University of Chicago speech: that we must "admit what we are doing . . . not merely for the sake of symmetry, but for the sake of social honesty, and, indeed, for the sake of better controlling crime."

I hope you share my concern, and I welcome your comments in the same spirit of openminded investigation which characterized your University of Chicago speech and our recent conversations.

Unless you see some objections, I would like to furnish a copy of this letter to some of those with whom I have discussed this problem from time to time and to the interested people at the American Law Institute.

DAVID L. BAZELON

KATZENBACH'S ANSWER

Dear Judge Bazelon:

The kind references in your recent letter to my remarks in Chicago were most gratifying. I am happy you agree that we cannot continue public discussion of problems in the administration of the criminal law without recognizing our actual practices and inquiring into the reasons for them. A viable resolution of the issues we face is indeed possible only if we pull all the considerations into the open and honestly attempt to balance the competing goals of our society.

The underlying assumption of your approach appears to be some conception of equality. No one, of course, would argue with "equal justice under law" or any other formulation. Nor do I propose to argue that purely formal conceptions of equality may have unequal impact in law as they do in virtually every aspect of our life. The poor are disadvantaged in many ways as against the rich; the ignorant as against the educated; the sick as against the healthy, etc. To what extent and by what means legal processes should take into account such inequalities raises difficult questions. I would suppose the answers, insofar as we can discover them, lie in other values which are sought within our system. It would be ridiculous to state that the overriding purpose of any criminal investigation is to insure equal treatment. Obviously, criminal investigation is designed to discover those guilty of crime. We limit both investigation and criminal prosecution in various ways both to protect the innocent and the personal rights (for example, privacy, freedom of movement and speech) we enjoy in our society. It is entirely proper to limit what the police may do in the course of an investigation, even if those limitations result in some of the guilty avoiding conviction. For example, we do not permit confessions to be tortured or beaten out of people, rich or poor—not because such confessions are necessarily unreliable but because these things are incompatible with decent law enforcement, and because—inevitably—the rack would be used on the innocent as well as the guilty. All this is obvious. But what may be forgotten is that each such decision to impose a limitation involves a balance of the values thus promoted against the value of discovering those guilty of crime.

NOT A WELFARE PROGRAM

In recent years we have taken steps to make the process fairer to the poor—by providing counsel, by revising bail procedures, etc. But in none of these efforts has equality been our overriding objective—nor should it be. We provide counsel in order to insure that the innocent are not wrongly convicted, that they may raise defenses which help preserve the integrity of the judicial process. We do it for our sake, not for theirs. And we are providing bail procedures because we believe that in many instances financial condition is irrelevant to the purposes sought to be promoted by bail. Again, it is not a welfare program, but one designed to better effectuate the purpose of bail.

In short, I do not believe that regulation through judicial decision or statute of investigatory procedures should have as its purpose to remedy all

the inequalities which may exist in our society as a result of social and economic and intellectual differences to the exclusion of all other purposes and values sought to be achieved in the criminal process. I do not believe that any decision of the Supreme Court, nor of any court of appeals, has been explicitly based on such a premise of equality. The courts have been attempting, in the cases before them, the same difficult balance of goals, a balance all the more difficult for lack of an adequate public and legislative discussion of the issues.

In general, over the past quarter century, ap pellate decisions marking off broad new areas of reform in criminal procedure have gained public acceptance and the full support of law enforcement officers, prosecutors, and judges alike. But as the cases have presented more and more difficult questions of fairness and propriety, I believe the judges have left the public behind, and, even among judges, the margins of the consensus have been passed. The most basic investigatory methods have come to be questioned in the contest of specific cases and unique factual situations, rather than after review of all of the considerations which might be thought relevant in designing rules for the system as a whole. As a result, policemen, district attorneys, and trial court judges have become increasingly unsure of the law with respect to arrest and post-arrest procedures, often differing vigorously among themselves. In your own court of appeals, the result is too often determined by the particular panel which hears a case. Thus the consistency, the efficiency, and consequently the fairness of justice have suffered.

Suggestion 'Irrelevant'

Your suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, strikes me as particularly irrelevant. The simple fact is that poverty is often a breeding ground for criminal conduct and that inevitably any code of procedure is likely to affect more poor people than rich people. For reasons beyond their control, in Washington many poor people are Negroes; in Texas, Mexicans; in New York City, Puerto Ricans. A system designed to subject criminal offenders to sanctions is not aimed against Negroes, Mexicans, or Puerto Ricans in those jurisdictions simply because it may affect them more than other members of the community.

There are, of course, inequities in our society resulting from differences in wealth, education, and background, and these inequities are sometimes reflected in the outcome of the criminal process. Poverty, ignorance, and instability produced by wretched living conditions may make an individual's criminal acts more susceptible to discovery and proof. But I am sure you will agree these same conditions are major causes of crime. So long as they exist and lead an individual to victimize his fellow citizens, government cannot and should not ignore their effects during a criminal investigation. Otherwise, so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled.

This would in fact increase the suffering of the less favored in our society, for it is they who live in the high-crime areas and they who are the usual victims of crime. Investigation is not a game. It is a deadly serious public responsibility, whatever the crime. Losses and injuries which may appear small are often crushing to the victims involved. We are not so civilized that we can afford to abandon deterrence as a goal of our criminal law.

Thwarting detection and prosecution would also close the door to the rehabilitative correctional system, which is appropriately designed to ameliorate the effects of social injustice.

Acquittal of the Guilty

Indeed, it is questionable whether similarity of outcome is even relevant to the design of a process which seeks to separate out the innocent before charge and to make possible the trial of those who appear guilty. The elimination of disabling discrimination is the primary goal of the Poverty Program, the Civil Rights Act, and numerous and expanding services in vocational rehabilitation, school assistance, and medical care. It is one of the goals of the Criminal Justice Act, which recognizes that counsel make a positive and essential contribution to the further separation of the innocent from the guilty in adversary proceedings and to appropriate dispositions. Society gains in all these. But absolute equality of result could be achieved in the investigatory stage—after a crime has been committed and before a trial is possible—only by deliberately foregoing reliable evidence and releasing guilty men. Acquittal of the guilty does not promote social justice.

Moreover, acquittal of the guilty in the name of equality of treatment may prevent our achieving other, more fundamental goals also contained in

the ideal of equal justice. Fairness is owed to those who obey the law, and to those guilty who are convicted. Many undergo hardship and rigorous self-discipline while observing the restraints of the law, and are unjustly disadvantaged if some are permitted to break the law with impunity. And to a man convicted because he was careless in leaving a fingerprint, or too poor to change his tell-tale clothes after a crime, there is no more galling governmental act than the release of one who betrayed himself because he was careless in answering a question. Furthermore, in the elimination of questioning a high price would be paid by the innocent who are exculpated early in the criminal process by police questioning, and by those who appear at first to deserve a more serious charge than is eventually filed after questioning. The introduction of counsel at this early stage would not, as you suggest, promote this screening, for there must be the possibility of an incriminating as well as an exculpatory outcome if there is to be imaginative and energetic investigatory questioning.

Simply Not Comparable

The interests are subtle and complex. When analyzing our system in terms of the concept of equality, it seems to me wholly arbitrary to choose as groups for comparison only some of the poor guilty and some of the rich guilty.

In any event, I do not think the dissimilarities in outcome for rich and poor are so great as you suggest. The failure to arrest a Board of Directors for questioning about an antitrust violation does not strike me as an example of unequal treatment. The investigations of antitrust violations and of violent urban crime are simply not comparable, and the anonymity and mobility of modern urban life often do not permit postponement of arrest when crimes of violence are involved. Moreover, when any crime is in issue those who have respectability at stake, and who could have a lawyer at their command, cannot afford to appear guilty. Calling a lawyer for protection from investigation, or refusing to answer questions, does often give the appearance of guilt, and as a consequence the rich will often talk, and, if guilty, will often provide incriminating evidence.

You are right, I fear that "professionals who engage in organized crime" frequently succeed in avoiding conviction under our system. But I have never understood why the gangster should be made the model and all others raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap. I see no reason to distort the whole of the criminal process in this fashion. Because we cannot solve all crimes and convict all criminals is no reason to release those guilty whom we can convict.

Discussions such as ours, now stimulated by the American Law Institute's draft code, are being generally undertaken with regard to the design of our whole system of criminal law. My chief concern is that in seeking to achieve the freedom, security, legal and social justice that are at stake in our conclusions, we do not permit the real issues to be obscured. If the issue is conviction of the innocent, then we must specifically examine that. If it is the coercion of the socially disadvantaged, then we must discuss that carefully and realistically. If it is the meaning of the privilege against self-incrimination, or the likely effect and proper function of counsel, then we must turn to that on its merits. But we cannot afford merely to draw out the logic of unexamined assumptions. The stakes are too high.

I have no objection, of course, to your releasing your letter to anyone you wish, and should you desire you may append this reply to it.

Nicholas deB. Katzenbach