Remarks by Honorable Prank M. Coffin
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U.S. Court of Appeals for the First Circuit
at the
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Crime and Delinquency
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A great many people today are concerned about the effect of recent court decisions on law enforcement. You who deal with the far end of the law enforcement pipeline are particularly interested in this issue.

Are the courts weighting the scales of justice too heavily in favor of the individual at the expense of society? Are they placing too great a burden on the overworked and underpaid police?

Let me read from two eloquent judicial dissents which clearly set forth the dangers in a libertarian course. I suspect that it voices many of your own thoughts.

> ". . . . Questioning is an indispensable instrumentality of justice. . . . We cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal . . . . [And, in another but very similar case:] To bring in a lawyer means a real peril to solution of the crime, because . . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances . . . . I doubt very much if they [speaking of the protections of the Bill of Rights] require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it [sic] does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested . . . ."

What I have read is not a recent dissent from Justice Harlan or Justice White or Justice Clark or Justice Stewart. These are the words of Justice Jackson dissenting in two earlier cases; Ashcraft v. Tennessee, decided in 1944, and Watts v. Indiana, in 1949. In both cases confessions were held inadmissible because the suspects had been held incommunicado for periods of from 36 hours to four days, without sleep or rest, and questioned by relays of officers.

The people of that day were just as apprehensive over the impact of those decisions as they are today over Escobedo and Miranda. Then, as now, a popular vote might well have upheld the minority opinion. And yet the particular issue is dead. Few if any would have the decisions revoked. They are an accepted part of the law of the land.

This is not to say that controversy is unwarranted in the common field which all of us occupy - trying to harmonize the rights of the majority with the rights of the minority - including the smallest minority of one individual. Because this field sees the coming together of two of the basic principles of our society, it is ordained to be a source of controversy.

What is important is that we all approach controversy with the humility of perspective. I can think of five kinds of perspective that are relevant whether we are discussing the work of the courts or the effectiveness of corrective institutions or the workings of our probation and parole systems.

The first is the perspective of purpose. In the field of criminal law, the purposes are set forth in the various rights vouchsafed in the Constitution and its amendments. We tend to think of the Bill of Rights as consisting of the first eight amendments. If we make an accurate count, we see that there are some 27 specific rights in the original Constitution, 30 in the first eight amendments, 9 in the post-Civil War amendments - a total of some 66. If today we sometimes wonder if we are not being too libertarian, it is wholesome to recall how deeply libertarian this nation has always been, with the Founding Fathers accounting for eighty per cent of the rights explicitly set forth. And their preoccupation with individual rights was born not of academic interest but of six hundred years of English rule and misrule, including a century and a half of colonial rule. Smarting still from the memory of Tudor and Stuart times, with their Star Chamber, Court of High Commission, rack, gibbet, and Tower, our pragmatic, practical Constitution makers resolved to steer this nation on the twin course of majority rule and individual rights.

These courses at times seem to threaten collision. Indeed, some of the most important work of the courts has always been to try to harmonize the rights and powers of society and those of the individual. As you reflect on this continuing tension, you do so with some sympathy, for the work you pursue also has twin purposes: punishment (the protection or vindication of society) and rehabilitation (the rebuilding of the individual). Much of the difficulty of popular understanding of the entire field of the administration of criminal justice lies in judgments based on the assumption that courts and correctional institutions serve the single purpose of retribution. How simple our tasks would be if that were so.

A second perspective, in addition to that of our historic purposes, is that of our historic achievement. I began with a judicial controversy of another era which time has muted. The Supreme Court reports, nearly 400 volumes of them, are a running record of successive advances in civilized treatment of our citizens. Similarly, in the field of corrections, Mark Richmond of the Federal Bureau of Prisons has called this decade one in which "greater progress" has been made "in overcoming stereotyped prison traditions than at any time in history". The late Donald Clemmer, Director of the Department of Corrections for the District of Columbia hazarded the prediction that a new era in corrections had begun in the mid-1960's. New practices, experiments, and kinds of institutions dealing with offenders inside and outside prison walls are the object of increasing effort, interest, and hope as the pages of all the professional journals and the agenda for this conference amply show.

That there has been progress in criminal administration in fact as well as in theories about it is demonstrated by the decline in the rate of return to crime by federal prisoners. In 1937, two thirds of all released prisoners committed new crimes; in 1964, one half to two thirds of such ex-prisoners were staying out of trouble.

If the problems of crime and delinquency seem to be overwhelming, let us not lose sight of the fact that there is more to work with, more widespread interest and commitment at federal, state, and local levels than ever before. The question is: what do we do with this new concern?

This leads to a third perspective. If the first two - those of our historic objectives and our progress to date - should give us renewed determination, this one should give us greater humility. For this is the realization that we know all too little about crime, its extent, cause, and effects, and about the effectiveness of our ways of dealing with it. This problem is aggravated by the assumption of the layman that we do know the answers. Let me cite a few specifics.

We have only rough approximations of the extent of crime in general. Many crimes are not reported to the police. And much depends on specific policies of reporting crime. There are

some 40,000 separate police jurisdictions which can and do vary in their policies, aggressiveness and accuracy in reporting. We therefore cannot compare with confidence the present incidence of "crime" with prior records until both public willingness to report and administrative reporting become more adequate.

If there is uncertainty about the extent of crime in general, there is uncertainty multiplied as to specific kinds of crime. As Professor Vorenberg, the Executive Director of the President's Commission on Law Enforcement and Administration of Justice, has pointed out, it makes no more sense to regard crime as a single phenomenon than to try to interpret health trends without looking separately at figures on tuberculosis, lung cancer, and measles. Not only must we be more discriminating nationally if it is true, for example, that property crimes have increased far more than murder and rape, but regional differences may dictate a different allocation of enforcement resources.

If our basic data about crime leave room for improvement, so does what we know about our handling of crimes. The top of the iceberg consists of cases which find their way to trial. Even here we do not know the effect of court rulings throwing out cases based on confessions found to be coerced or evidence produced by illegal search. How many of such cases are retried, resulting in conviction? How many such cases could have been tried successfully without the confession or seized evidence? Following on the heels of the recent Supreme Court opinions, some officials were quick to predict a field day for defense lawyers and criminals. But there are other voices. There is the record of the FBI, which had initiated the warning procedures on confessions long before the Supreme Court spoke. And there is the testimony of Judge Edwards who left the Supreme Court of Michigan to take on the job of Police Commissioner of Detroit before being appointed a U.S. Circuit Judge. Michigan courts had anticipated the Supreme Court on Escobedo and other landmark civil liberty cases. Judge Edwards reports that the Detroit Police followed the new procedures - with a record of increased arrests resulting in prosecution. Confessions in murder cases actually increased. And in Essex County, New Jersey, after two years of advising suspects of their rights, no change in the confession rate was observed. And there is the recent experience of the Los Angeles County police, reported by District Attorney Evelle Younger. Of 2,780 felony cases studied this summer, he says, "only a small percentage" could not have been successfully prosecuted without a confession. And, of 790 suspects who were informed of their rights according to Miranda, 433 - over half - still confessed.

But the fact remains that empirical data are all too meager even on the cases most capable of documentation. On the 90 per cent of the cases which never see trial, we know even less. These are the cases where the practices of police and magistrates are never tested by court rulings on evidence. There is little data or analysis about conduct and effectiveness in this overwhelmingly major part of the administration of justice.

Going beyond the courts, there is the wide realm of the impact on crime, delinquency, and recidivism of poverty, schools, recreation programs, welfare agencies, prison training programs, community attitudes toward parolees, and a host of other forces.

This is all an old story to you. But it is one of the crosses you have to bear that the less a citizen knows of crime and delinquency, the more sure he is of his knowledge. And yet without a frank realization that, for all our knowledge, criminal administration is still shrouded by darkness, we shall labor with needless futility.

Having said all this, calculated to enhance our sense of humility, there is another perspective offering some confidence. That is the realization, in the words of Mark Richmond, that ". . . it is beginning to matter less that we cannot specifically identify the causes of crime and

delinquency than that a concerted effort is made to utilize the knowledge we have". He goes on, in the June issue of "Federal Probation", to spell out desirable directions for future action in amending certain criminal laws, in developing more effective and less costly alternatives for imprisonment, in bail reform, in building new bridges between correctional institutions and the community, and, always, in more demonstration and research.

So far we have discussed four perspectives which we share - a consciousness of our historic objectives, a sense of progress, an awareness of the lack of empirical data, and a determination to act upon such knowledge as we have. There is a final perspective which is as important as all the rest. It is that the "devil" theory is just not useful in helping the fight against crime and delinquency.

There are obvious candidates for devil. If the courts would not be so insistent on constitutional rights, perhaps convictions would be easier to obtain. If parole boards seldom granted parole, there would be fewer crimes committed by parolees. And if there were a great reduction in offenders granted probation, there would be less criticism of the probation system.

But any such simple course spells retreat for society. It is always easier for society to retreat than to advance. But advances in theory, law, technique, personnel, and institutions in crime prevention, law enforcement, custody, diagnosis, and rehabilitation are the cutting edges of a society whose thrust is justice.

By definition a cutting edge is a line of tension and resistance. And to cut forward across this broad front really means that an entire society is on the move. To portray the fight against crime and delinquency as anything smaller and simpler is to underestimate the magnitude of the task.