Department of Justice

ADDRESS

BY

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PREPARED FOR DELIVERY

BEFORE THE

THE NEW ENGLAND CONFERENCE ON THE

DEFENSE OF INDIGENT PERSONS ACCUSED

OF CRIME

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I am very grateful for the chance to be here tonight to participate in the final affair of your Conference on the Defense of Indigent Persons Accused of Crime.

This is one of the most challenging problems confronting the legal profession and I am glad that the 10th Annual New England Law Institute has been devoted to this subject.

I would like to pay my respects particularly to Mr. Schneider who, as President of the New England Law Institute, has made a distinguished contribution not only to the legal profession here in New England, but throughout the land.

The kind of volunteer work that people like Mr. Schneider have undertaken is really the strength of America--the fact that individual citizens will give so much of their own time and effort for the benefit of their fellow citizens, and particularly those less fortunate than themselves.

Anatole France once cynically remarked:

"The law in all its majestic equality forbids the rich as well as the poor to sleep under the bridges of Paris."

Equality of justice in our courts should never depend upon the defendant's wealth or lack of resources, but in all honesty we must admit that we have failed frequently to avoid such a result. It was many years ago that Chief Justice Taft observed:

"Of all the questions which are before the American people, I regard no one as more important than the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact."

As you know, it wasn't until March of this year, with the Supreme Court's decision in Gideon vs. Wainwright, that the poor man's right to appointed legal counsel was held to be applicable to all courts in the land, at the state as well as the Federal level.

I think the story of the Gideon case gives us a profound insight into the nature of our judicial system at its best--and into the basic sense of human justice on which it is founded.

If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the court had not taken the trouble to look for merit in that one crude petition, among all the bundles of mail it must receive every day, the vast machinery of American Law would have gone on functioning undisturbed.

But Gideon did write that letter, the court did look into his case; he was retried with the help of a competent defense counsel, found not guilty and released from prison after two years of punishment for a crime he did not commit--and the whole course of American legal history has been changed.

I know of few better examples than that of a democratic principle in action.

Yet the broad sweep of the Gideon decision seems to have aroused an atmosphere of crisis in many legal quarters. The Department of Justice recognizes that in its role as the criminal prosecutor for the Federal Government it has a special responsibility for the development of procedures that will result in an adequate defense of all indigent persons accused of crime.

We have endeavored to look at the problem in its broadest aspects and determine all the elements involved in the concept of an adequate defense.

Early in 1961 I appointed a committee of distinguished judges, lawyers and teachers under the direction of Professor Francis A. Allen of the University of Michigan Law School to study the problem of poverty and the Administration of Federal criminal justice.

In March, 1963, the Allen Committee filed and published its report and I am sure many of you are familiar with its contents.

As a result of this study the Justice Department prepared a draft bill which has come to be known as the Criminal Justice Bill of 1963.

This Bill was transmitted to the Congress by the President with a strong message urging its enactment.

It was introduced with bipartisan support in the Senate by Senators Eastland, Hruska and Erwin and by Congressman Celler in the House.

The stated purpose of the bill is "to promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."

Several features of the bill deserve particular emphasis.

First, the local option provision confers upon the district and circuit judges broad discretion to select the plan by which their courts will furnish compensated representation to qualified defendants.

Four choices are authorized:

Private attorneys; the public defender; legal aid societies or local defender organizations; or any combination of these.

The relative advantages of the various systems for a particular locality are weighed and determined by those best qualified to judge them--the local judiciary. Depending upon local conditions and philosophies they may elect the system best suited to their community.

Second, the bill establishes an adequate defense standard under which representation in a criminal case is recognized as involving more than a lawyer alone. It requires making available to counsel those auxiliary investigative , expert and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case.

Third, the provision guaranteeing counsel at every stange of the proceedings, commencing with the initial appearance before the commissioner, is designed to afford representation to each defendant throughout his involvment in the judicial process.

It insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest.

Finally, the proposal limits the benefits of the statute to persons financially unable to obtain an adequate defense. The term "indigency" is avoided because of its implication that only an accused who is destitute may need appointed counsel or services.

Experience demonstrates that many persons have resources sufficient to defray part but not all of the expenses of their defense.

In order that representation may be furnished to the extent of each defendant's need, we have proposed that partial payments may be required and that the statute shall become operative at whatever stage of the proceedings the accused is found financially unable to obtain counsel or services necessary to an adequate defense.

The Criminal Justice Bill (S.1057) passed the Senate substantially in the form introduced. Provision was made, however, to limit the public defender option to those judicial districts in which the appointment of counsel is required in 150 or more cases a year.

In the House, the Bill (H.R. 4816) has been reported by the Judiciary Committee. The most significant change by the Committee was the elimination of the public defender option.

I am hopeful, however, for enactment of the Bill substantially in the form passed in the Senate.

I want to emphasize that the Criminal Justice Bill is drafted to permit close cooperation between the state and the Federal judiciary in the appointment of counsel for indigent defendants wherever this is practical and desired.

For example, the Bill would not prohibit the use by the Federal and state judiciaries of the same legal aid society or other legal defender organizations.

I anticipate, in fact, the development of a very close relationship between the Federal and state courts in the entire area of poverty and the administration of criminal justice.

The Allen Committee recognized that the concept of an adequate defense involved more than the mere appointment of counsel to appear on behalf of a defendant when he is tried. The Committee recommended that the Department of Justice undertake to study the problem of bail procedures as they relate to the fair and equal administration of justice to rich and poor alike.

In acting on this recommendation I recently asked Mr. Justice Brennan of the Supreme Court, Louis Schweitzer, President of the Vera Foundation of New York, and 18 other law enforcement authorities to meet at the Department of Justice for a planning conference for the National Conference on Bail and Criminal Justice scheduled for next spring. It will be sponsored by the Department of Justice and the Vera Foundation.

The studies of the Manhattan Bail Project show the tremendous influence of pre-trial freedom on a defendant's eventual acquittal or conviction.

For example, a recent survey of defendants charged with simple assault showed that of those who had been free on bail only 22 percent were found guilty while 71 percent of those who had to remain in jail were convicted.

Again in petit larceny cases, 51 percent of those at liberty before trial were convicted while 83 percent of those behind bars were convicted.

In unlawful entry cases the same pattern showed 23 percent convictions of those at liberty and 75 percent convictions of those in jail.

These studies also indicate that many defendants are unable to post even a modest bail. In a study made in New York 28 per cent of the defendants could not post $500 bail and 45 percent were unable to make bail set at $2,000.

The primary purpose of requiring a defendant to post bail is to insure his presence before the court whenever required. Studies indicate, however, that there is little if any correlation between appearance or non-appearance in court and release with or without bail.

A recent survey in the Northern District of California (San Francisco Division) revealed that only 2 percent of persons released without bail failed to appear.

In this same District in California recently 41 persons were released without bail and none failed to appear.

During the course of the Manhattan study 800 defendants were released on their own recognizance. Of these, 99 percent appeared in court when required. Only 8 individuals failed to appear.

An aspect of this problem which requires study and will be considered by the National Conference on Bail and Criminal Justice is the role of the professional bondsman. Often the defendant has money and collateral and is unable to purchase a bail bond because the bondsman refuses to write it.

In a recent opinion of the Court of Appeals for the District of Columbia Judge Skelly Wright said:

"The effect of such a system is that ... professional bondsmen hold the keys to the jail in their pockets ... the bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail.

"The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail .. encouragement to appear (in court) should not be in the form of loss of the bondsman's money, but rather in loss of the defendant's liberty."

The consequences of pretrial detention are obvious. The defendant who is free on bail or released on his own recognizance has the advantage of being able to participate actively in the preparation of his defense.

Last March, I instructed all United States Attorneys and their assistants to recommend the release of defendants on their own recognizance when no substantial risk is involved and this has been done throughout the country without any problem.

I know that your conference has been a meaningful and effective one and that it will lead to a greater awareness here in New England of the dangers which poverty imposes upon our system of justice.

But I hope that your conference will be even more--a beacon which will keynote increased action to help indigent defendants throughout the country.

Lord Acton said:

"Laws should be adopted to those who have the heaviest stake in the country, for whom misgovernment means not mortified pride or stinted luxuries, but want and pain, and degradation and risk to their own lives and to their children's souls."

So I hope you will support with deed and word the criminal justice legislation now before Congress and any other steps that can be taken.

But effective legislation is only part of the story. Furnishing counsel to the indigent accused will only pay lip service to the Constitution if lawyers are not competent to perform their service--and no one can legislate professional competence or professional dedication to duty.

If the principles laid down by the Gideon decision are to become a meaningful standard in our nation's courts, a deep and widespread resurgence of interest in the practice of criminal law is essential.

The vitality of our adversary system--the very survival of our belief in democratic justice--will depend to a greater and greater extent on the infusion of skilled advocacy in our criminal trials. That, it seems to me, is our major challenge.

To you of the courts, the law schools and the profession, I offer the Justice Department's pledge of full cooperation in meeting that challenge.