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DISTRICT ATTORNEY ARLEN SPECTER URGES DRASTIC CHANGES IN SUPREME COURT PROCEDURES ON MAJOR CRIMINAL CASES

In the feature speech before the General Practices Section of the American Bar Association Convention, held at Noon, August 5, 1968, at the Civic Center, District Attorney Arlen Specter recommended a revolutionary change in the procedures of the Supreme Court of the United States before that Court makes revolutionary changes in the criminal law. The District Attorney said that the Court has made basic changes in the law without sufficient facts and without being fully informed on the police practices which they condemn or on the effect of the Court's decisions on law enforcement.

Before handing down such landmark decisions, Specter urged that the Supreme Court appoint "special masters" to find the facts on:

(1) What are the police practices in a given field?
(2) What are the effects of those police practices in producing unreliable evidence to convict the innocent or in otherwise subjecting suspects to unconscionable treatment?
(3) What would the effect be on pending matters or completed trials by a retroactive application of a new rule?

(4) How would a new rule limit the police in gathering evidence?

Specter cited several Supreme Court decisions, one going back to 1915, as a precedent for the idea of the "special master."

The D.A. pointed out that Court's decisions could be changed if they knew more about the facts. As examples, Specter then cited certain facts from the experience of law enforcement in Philadelphia:

1. The guilty are acquitted in many serious cases where evidence is excluded, because the rules are changed between the time the police investigation is completed and the trial;
2. A study covering some 23,872 suspects showed that 62% refused to give statements after Miranda compared to 32% who declined prior to that decision;
3. The crime clearance rate dropped from about 44% to 39% after the Escobedo decision.

Based on these facts, the District Attorney urged the Supreme Court to "get to the bottom of what really goes on in the precinct houses with police and in the streets with criminals."

A complete text of the speech is attached.

Excerpts from the speech follow:

"Safety on the streets is on everybody's mind - at least when they are on the streets, especially dark ones. And criminal law cases give the Justices of the Supreme Court of the United States their toughest problems, on or off the Bench, especially before the United States Senate. From the front page through the editorial page, the Supreme Court is chastised with regularity."

"I believe that it does not serve our nation for the Court to set sail on uncharted waters without improving its capacity to obtain factual bearings."

"Due process of law is a two-way street. It calls for notice, an opportunity to be heard and equitable procedures calculated to bring a just result. Those rules should be equally available to law enforcement officers who are vitally affected by the land mark decisions. The strength of our democracy and of our judicial system, which is a critical part of our form of government, is the willingness of a person to lose after he has had his day in court. Americans - even including prosecutors and policemen - will accept an unfavorable decision once they have had a chance to speak their piece."

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THE HORIZONS OF LAW ENFORCEMENT

The Tough Cases

Emotions, facts and law - those are the key ingredients which boil over during the course of the more than one hundred cases which are tried every day in the criminal courts of Philadelphia. Emotions color judgment; facts change minds; but it is the law which alters and affects the lives of many men.

The emotional factors are virtually impossible to control. The facts are hard to find; but with sufficient effort, we can determine what happened in most cases. Of the three, the law is the easiest to deal with, once we can separate off the emotional factors and find the facts.

The tough cases find their way to the District Attorney's Office - and I do mean the D.A.'s own inner office. The of-

fended - whether victims of alleged crimes or victims of alleged police brutality - are highly incensed. Their rage frequently exceeds their injury, and both are often substantial. The cases are, unfortunately, plentiful. Two are illustrative.

The Enraged Victims

One day a young man literally burst into my office, indignant over what had happened to his mother. She was walking down a residential street in Philadelphia and was allegedly indecently assaulted by a man who was on parole for a prior conviction. The son was even more outraged at the preliminary hearing where his mother was subjected to what he called brutal cross-examination by the defense lawyer. Before he was very far into his explosive narrative, he informed me that he believed in defendants' rights and was himself a member of the American Civil Liberties Union. No matter how splendid those constitutional rights appeared in the

abstract, in the context of this experience, they seemed to him to be an unnecessary and agonizing luxury.

Now he wanted a number of things done in a hurry:

He wanted positive assurance that his mother would never again be subjected to such questioning by the defense lawyer which made it appear as if she were the criminal; he wanted the accused immediately removed from the community because he had been released on bail pending the trial; and he wanted extra police protection to be sure no one else attacked his mother.

He had little interest in the presumption of innocence as applied to an accused parolee, and he could not at all understand a constitutional right to bail, which would subject his mother to the possibility of a repeated attack - especially in the light of her testimony against the man. The son of the alleged victim thought the suspect had too many rights.

On another occasion an attorney brought a client into my office with a serious charge of police brutality. His client had been arrested after an argument with police which originated with the issuance of a traffic ticket. One word led to another and more, and the man was charged with assault and battery on a police officer and resisting arrest.

The lawyer made it plain that his client was no angel; he had several convictions for crimes of violence. But he said that the police had suspended him in mid-air by handcuffing his hands together after placing them through a ceiling fixture. He complained that he had been left in that dangling condition for some time and displayed two badly bruised wrists. This suspect said he needed the protection of his constitutional rights in order to give him fair treatment. It was quite a shift in emphasis from the victim's son in the other case.

The Constitution Is What The Court Says It Is

A first term law student learns that there are few absolutes in constitutional law. The Supreme Court of the United States undertakes a continuous balancing process symbolized by the blindfolded goddess of justice holding a delicately calibrated scale, weighing the interests of community order on one side and the rights of the individual suspect on the other. Charles Evans Hughes, one of the Court's greatest Chief Justices, could not have put it more simply or candidly when he declared the Constitution is what the Supreme Court says it is.

But the scales do not weigh indignation, outrage or emotion. Both the victim and the accused are entitled to the protection of the law. Once the emotion is discarded and the facts are found, then the rules of law can be applied and refined.

The Supreme Court's Toughest Problem

As I see it, the law's toughest problem today is what to do with the person accused of crime. Safety on the streets is on everybody's mind - at least when they are on the streets, especially dark ones. And criminal law cases give the Justices of the Supreme Court of the United States their toughest problems, on or off the Bench, especially before the United States Senate. From the front page through the editorial page, the Supreme Court is chastised with regularity.

The legal profession has struggled valiantly to promote respect for law. An avalanche of public criticism follows many Supreme Court decisions, handed down each year on criminal law. With monotonous regularity, prosecutors and police chiefs blast the Court. I have opposed such criticism by law enforcement officials for a number of reasons. First, it undermines respect for the law which law enforcement of-

ficials are constantly trying to persuade people to follow. It also makes the prosecutors look like poor losers and undermines their effectiveness on other matters because the criticism is customarily so extreme. Their often overstated and sometimes unwarranted attacks on the Supreme Court only add heat when light is what is necessary in the pursuit of justice.

But even if the prosecutors and police were silent, the criticism of the Court would still be clear and present - and perhaps dangerous as well. For those who get through the majority opinion, it is evident that the fire of the most outrageous criticism is ignited in the dissenting opinions. Even the most vocal of the Court's critics do not ordinarily dare to castigate with the vehemence of the dissenting Justices. The police, prosecutors, pundits and the public take over on the criticism from there.

But the dark image of the Supreme Court may not be the most serious problem. Of even more importance is the issue of whether the decisions are the best ones to promote the objectives of justice. On this subject, I believe we should always bear in mind a few basic truths: men are not perfect, and courts are not perfect, and all decisions are not correct, and justice is not always done. All we can do is our best to establish procedures and methods to seek the truth and to dispense justice.

A Key Institution For Change

Historically the Supreme Court has reflected and implemented our national moral conscience in most cases. The Court has provided the medium of change on many of the crucial issues of our era such as desegregation and apportionment. Neither the legislative nor the executive branches of government have responded to the problems which have been

swept under the rug for decades. The Supreme Court has been a progressive institution of government.

I say that fully aware of the fact that the District Attorney's job has been made enormously more difficult by new constitutional requirements on search and seizure, right to counsel, confessions and line-ups. Even where I disagree with the Court's specific decisions, I do agree that the Supreme Court of the United States has the constitutional authority and responsibility to make ultimate decisions.

Let's Find The Facts

However, I think the Court should be much better informed on the facts before it makes sweeping, fundamental changes in constitutional law governing criminal procedure. From what I have seen, the Court is not fully informed on the police practices which they condemn, or on the treatment of suspects, or on the effect of their decisions on law enforcement. The records before the Court and even the best Brandeis

brief do not give them enough of a basis to balance the scales of constitutional law. The Court needs to know more of the facts before making its decisions for the innocent to be protected, for the guilty to be convicted, or for the Court to acquit the guilty with deliberation in the interests of a paramount rule of constitutional law.

I believe that it does not serve our nation for the Court to set sail on uncharted waters without improving its capacity to obtain factual bearings.

The crucial decision in Miranda illustrates a sweeping change in constitutional law on what was, I believe, an insufficient factual basis. The Court's opinion, representing the conclusions of five Justices, identified police practices from a handful of litigated cases, several books and a number of law journal articles. Many of the authorities cited ranged in age from a decade to more than a quarter of a century. As a basis for its findings on current police practices, the

Court relied heavily on a single text on criminal interrogation and confession citing it ten times. As for the effect on law enforcement by limiting the use of confessions and admissions, the Court referred to the way that many had "speculated" on the Escobedo decision.

Although I doubt it based on a decade of experience in law enforcement, it may be that the Court was entirely correct in its characterization of police practices; but the records before the Court and the facts available could hardly be exhaustive or really conclusive on the crucial issues. It would obviously be desirable to substitute statistics for speculation or at least develop some empirical data as the cornerstone for such a far reaching decision.

The Mastership Precedent

I suggest that the Supreme Court of the United States revolutionize its procedures to find the facts before it again revolutionizes constitutional law in the field of

criminal procedures. There are fact finding procedures available, or the Supreme Court can fashion a new procedure to meet the need.

While not an exact precedent, the Court could appoint a master to gather the evidence and recommend findings of fact. This procedure has been used in cases of original jurisdiction where states are parties. A state is no less a party in a case like Miranda v. Arizona. Realistically viewed, the interests of state government are much more broadly affected since the rule in that case applied not only to Arizona, but to the other forty-nine states as well.

There are precedents in the decisions of the Supreme Court of the United States for the appointment of a "master" or a "competent inspector" to summon witnesses, issue subpoenas, hear oral testimony, examine documents and then submit to the Court a report with suggested findings of fact.

In a controversy between Colorado and Kansas, decided in 1943, the evidence taken by the Master consisted of 700,000 pages plus 368 exhibits covering several thousand more pages.[1] The Supreme Court appointed a master in the 1963 case of Arizona v. California, where the proceedings before the master lasted for 26 months during which 340 witnesses were heard in a transcript totalling 25,000 pages with thousands of exhibits.[2]

Over fifty years ago, the Supreme Court of the United States appointed a "competent inspector" in Georgia v. Tennessee Copper Co.[3] In that case, Georgia tried to stop a copper company from polluting the air over its states. The Court stated that it was unable to come to a decision based on the record, so it appointed an inspector to investigate

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[1] Colorado v. Kansas, 320 U.S. 383, 64 S.Ct. 176 (1943)
[2] Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468 (1963)
[3] Georgia v. Tennessee Copper Co., 237 U.S. 474, 35 S.Ct. 631 (1915)

the situation for six months and then file a report.

Certainly the cases like Mapp v. Ohio[4], Escobedo v. Illinois[5], and Miranda v. Arizona, are no less important. The Supreme Court can always render its decision in a specific case without establishing new rules to change criminal procedures. Where a case is brought before the Court which raises fundamental constitutional questions, I suggest that a sweeping factual inquiry be made before the sweeping decisions are handed down. Such inquiries would seek to determine:

(1) What are the police practices in a given field?

(2) What are the effects of those police practices in producing unreliable evidence to convict the innocent or in otherwise subjecting suspects to unconscionable treatment?

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[4]Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961)

[5]Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964)

(3) What would the effect be on pending matters or completed trials by a retroactive application of a new rule?

(4) How would a new rule limit the police in gathering evidence?

A new mastership procedure would give everyone notice that a change was coming and would give interested groups the chance to be heard. To the extent practical, a master could hear witnesses who asked to be heard. Where those efforts did not bring forth the inside story, the master could summon police, prosecutors, suspects or convicts to provide the whole story.

With that kind of a factual record, I believe that the Supreme Court of the United States would be in a much better position to decide broad questions of constitutional law. Perhaps equally important, I think such decisions would find much greater acceptance in the nation.

The Facts On Retroactive Application

There are some hard facts available to show the effect of Supreme Court decisions. For example, the records of our Philadelphia courts reveal that many serious cases have been lost by retroactive application of new constitutional rules which excluded crucial evidence at trial. Obviously, all the police can do by way of constitutional warnings is to give the ones which are required as of the time a suspect is questioned.

A confession, coupled with corroborating evidence, may present a conclusive picture of guilt. It is all washed away by a decision which establishes new warnings to be applied to cases whose trials are begun after the Supreme Court's decision.

One such Philadelphia case is illustrative, and it produced a loud cry of anguish, not only from the victim's family, but from the general community. A few weeks before

the Miranda decision, Philadelphia police investigated a brutal killing of a cab driver. The evidence led to a sailor named Ronald Hickey, who was given extensive warnings as required by the existing law. In confessing, he led the police to the clothes which he had worn and to other tangible evidence establishing his guilt. After taking the confession, the police re-traced the itinerary of the cab ride as given by the defendant and were able to verify it with witnesses who saw the cab driver.

At trial, the confession was excluded and so were the fruits of the confession. The jury knew nothing of Hickey's admissions or of the clothing or of the witnesses who saw the driver along a route already admitted by the defendant. Hickey was acquitted.

The victim's brother and his two sons came to see me to find out what happened. I explained the principles of constitutional law as best I could, but they did not under-

stand. And I understood why they did not understand. I recall well a Yale professor explaining to our first term class the lawyers' duty of advocacy. He told us to make every reasonable argument we could, but to stop short if we were to blush in arguing a point. Thereafter in our classroom discussions, he would frequently chide a student by asking if he could really make that argument without blushing. When I tried to argue the principle of Miranda to the victim's family as it applied to the robbery-murder of their father and brother, I could not do so without blushing. At some point you recognize that the doctrine of retroactivity was never meant to be a "freedom train" for any arrested criminal who could beg or borrow an unanticipated technicality.

My Office could produce numerous other cases like Hickey where the guilty were acquitted because the decision was applied retroactively. Certainly the Court should at

least consider these facts in deciding on the effective date of a brand new rule of constitutional law.

A Sharp Reduction In Statements

Statistics compiled by the Philadelphia Police Department show a sharp reduction in statements from suspects as a result of the new warnings. For almost eight months before the Miranda decision, the figures show that 1,550 suspects refused to give statements out of 4,891 interrogated. In the two year period after Miranda, from July 1966 through July 1968, some 18,981 suspects were given the Miranda warnings. Of that number, 11,858 refused to give a statement. This study showed that 32% declined to give a statement before Miranda compared with 62% who refused after Miranda v. Arizona was decided. Both periods involve the same kind of reporting method and cover the most serious offenses such as homicide, robbery, rape, burglary and some other offenses such as aggravated assault and battery and larceny.

A Lower Crime Clearance Rate

Philadelphia's crime clearance rate suggests that the Escobedo decision caused a significant reduction in the percentage of major crimes which were solved. The Escobedo decision preceded Miranda and required certain less stringent warnings. The crime clearance rate means the percentage of reported crimes where the police gather sufficient evidence to mark the case cleared through arrest or other solution to the offense.

Statistics compiled by the Philadelphia Police Department show the crime clearance rate was 42.4% in 1962 and 44.9% in 1963. For the first six months of 1964 the crime clearance rate was 44.2%. Escobedo was decided in June of 1964. For the last six months of 1964, the crime clearance rate dropped to 40.4%. In 1965, it was 38.4%; in 1966, 38.7%; in 1967, 38,3%.

Such statistics are obviously not conclusive, but they

are worth considering. On the other hand, the statistics on the crime clearance rate show little variation before and after the Miranda decision. When gathered and projected on a national basis, such facts might well shed substantial light on the path which the law should follow.

The Way To Agreement

Once there is agreement or at least further exploration of the facts of life in the police station and the facts of life on crime on the street, we are much more likely to find agreement on the constitutional law which should govern criminal procedure. From our own repeated daily experiences, we find deep-seated disagreements vanish when we can agree with our opponents on what the facts really are in a particular situation.

This point was brought forcefully home to me recently when my Office sought to issue guidelines on Rights & Limita-

tions on Speech & Assembly. We sought to set down in a booklet the range of appropriate police action in the face of picketing, demonstrations or general civil disorder. My Office circulated a draft to the Court Administrator, police officials, defense attorneys, the American Civil Liberties Union and the Human Relations Commission. Some of the responses were virtually violent. The task of reconciling such views appeared almost hopeless, but we all sat down together.

When the meeting started, many of the views were poles apart. When two opposing views were expressed, each would set forth the facts which led to his concern. An exploration of the facts led both sides to concede that there was merit in the opposing views. Once a general understanding was reached on the facts, there was relatively little disagreement on the applicable law. A long meeting ended with opposing positions coming much closer together. While there was

not unamimous agreement on all points, there was agreement on many issues once there was agreement on the facts.

Conclusion

The facts are findable if the Court is willing to expand existing mastership procedures or fashion new ones to get to the bottom of what really goes on in the precinct houses with police and in the streets with criminals. Too often, far-reaching decisions are made which do not give all interested parties, across the nation, their day in court on decisions which affect many beyond the litigants of a specific case.

Due process of law is a two-way street. It calls for notice, an opportunity to be heard and equitable procedures calculated to bring a just result. Those rules should be equally available to law enforcement officers who are vitally affected by the landmark decisions. The strength of our democracy and of our judicial system, which is a critical part of our form of government, is the willingness of a per-

son to lose after he has had his day in court. Americans - even including prosecutors and policemen - will accept an unfavorable decision once they have had a chance to speak their piece.

If the Supreme Court would improve the fact-finding process, it is very likely that more agreement could be reached among the nine justices, with fewer hairline decisions by a single vote. That would do a great deal to enhance public confidence in the Court, and it would be a big step forward in improving the administration of criminal justice.