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BASIC ASSUMPTIONS OF BAIL REFORM AND PRETRIAL DIVERSION-----
SOME ALTERNATIVES

An address by Dr. Michael J. Lowy delivered at a Conference in Bail sponsored by the Pennsylvania Pretrial Justice Federation, October 21, 1972, Harrisburg, Pennsylvania.

I want to raise a fundamental issue underlying our efforts to establish bail agencies and pretrial diversion. That is to talk about crime. All of us, one way or the other, believe that we are doing something about crime. I think many times we begin to discuss programs and tactics and build bureaucracies without addressing ourselves to what is underlying our efforts and more importantly how our definitions of crime affect what it is we are doing.

Definitions of Crime

I want to share something with you that is usually on my office wall. It is from the Westinghouse Security Systems Inc. It says, "Dear Concerned Citizen; If the life of your wife and child is not worth one minute of reading to you, then destroy this paper. J. Edgar Hoover, of the FBI said recently, 'All of us are going to be a crime victim sometime, and the rate crime is increasing It is something to worry about now.'" Take a look at these statistics. There is a little clock that shows you how important the seconds are ticking by. "Every 36 minutes there is a murder, every 14 minutes a forceful rape, every 10 minutes a robbery, every 2 minutes there is aggravated assault." "Westinghouse has developed a fascinating alarm system giving 24 hour automatic protection against burglary, rapists and fire."

That is one view of crime. Crime is on the increase. We hear it in the election campaigns, we hear it on all sides. Obviously a part of that all of us must believe it because we are here and we have been involved with trying to do something relating to this phenomenon. What I want to try to bring up is an alternative view of crime. That is that crime is often a matter of definition. A lot of us know that behavior that we all do throughout the day, could be labeled crime or could be labeled fooling around or could be labeled a whole host of other things. Therefore, you have to consider an alternative idea of crime as being nothing more than someone labeling a particular behavior and calling it a crime and shooting it through a system that we are all supposed to be dealing with.

The second idea of crime is that the increase in crime stems from this idea of labeling. It is something which we all have to consider very seriously since we are all involved in one way or the other in building a bureaucracy or in building an organization, hopefully not a bureaucratic one. We are all geared to build some kind of structure to deal with the problem. There are some serious problems with that approach. There is some evidence to suggest that crime is nothing more than the building of institutions to cope with it. That is to say crime increases because we have more police. Let's look at it this way, if you hire a man to be a policeman he has to have a job to do. He has to make arrests. He has to meet the goals of the bureaucracy in which he is working. If he is out on the street, he is going to have to label some of the behavior that he sees around him as crimes in order to meet his own goals in the bureaucracy. Thus, one could argue the more policemen you put on the street, the more crime you will have; that is the rates will go up.

I'll just read this quote from a historian, she says,

"The establishment of a police society in the U.S. made possible a new conception of law and order in which more effective control of the population was feasible. Central to this conception were laws governing the private behavior of citizens where no self defined victims are involved-the vice laws. Thus, the growth of police was necessary for growth of law and crime. (Parkes, E. "From Constabulary to Police Society," Catalyst, Summer Issue 1970)

Another example of this phenomenon is in the late 19th century women's rights was a burning issue. The feminist movement was begun 80 or so years ago in parallel to a new form of crime.

"Women now had more leisure time, but a limited choice of careers. Child-saving was a reputable task for women who were allowed to extend their housekeeping functions into the community without denying anti-feminist stereotypes of women's nature and place." (Platt, Anthony, "The Rise of the Child-Saving Movement: A Study in Social Policy and Correction Reform, The Annals of the American Academy of Political and Social Science--January 1969, pp. 21-38.)

What they are saying is that this whole tremendous bureaucracy of juvenile court, the whole tremendous industry of child saving, was nothing more than or at least was greatly influenced by the fact that there were women who were pressing for rights. They were pressing for piece of the action and the only action that dominate people in that society, namely white males, were willing to give them was "take care of these kids." What they in fact did was to define a whole new way of behaving as criminal; that is juvenile delinquency. Are we doing the same thing here? That is really what I want to talk about. We ought to consider are we not all at least to some extent defining new ways of behaving as deviant or in need of control only to give ourselves jobs. It is a tough possibility but it is one we must realistically look at.

Alternative Forums of Conflict Resolution

Another issue I want to get to in my discussion is an alternative to this pretrial diversion idea. Any of you that have read Struggle For Justice (American Friends Service Committee,) or any of you who come in contact with psychologists, psychiatrists, and other individuals who believe that they can sort out individual behavior as normal or abnormal deviant or non-deviant, correct or incorrect probably have begun to wonder, can these individuals really make this discrimination? On what basis are they deciding that someone is sick or someone is not? On what basis do they decide someone is a criminal and someone is not? On what basis do they decide someone is incorrigible or not, and all these other labels that are applied to people? Well Struggle For Justice comes out very strongly on the side that we cannot do it. Therefore any attempt at rehabilitation, the concept of rehabilitation defining behavior not as criminal but as sick, is perhaps more of a crime than defining it as a crime. At least if you define the behavior as a crime you have to see safeguards built in. If you define something as an illness, well we have shades of Siberia. We have shades of behavior control like in Clockwork Orange. If we begin to question the utility of this treatment model of behavior, then we are actually again questioning what we mean by crime. What is underlying all of this? Further we are questioning whether or not the institutions that we all participate in that we all are building can be dealt with. What I want to try to spin out here is the relationship between how we see that the generation of crime and on the other hand how we see the way of solving that problem.

Let me switch the focus a bit and ask a question. How come we have the criminal justice system we have? Why is it that we have a criminal justice system in which there are adversaries, the prosecution and the defense? Why do we have a criminal justice system which is based upon an institution called the court which is a rarity in the world?

As we look through time and space and we find that institutions that are like our court are very rare? Why is it that these things exist? I'm going to give you an idea that I have and others have that is for you to think about and not necessarily to agree or disagree with because we need to have to a lot of facts to back it up.

Assumptions of Court System

I think the reason that we have institutions we do is because about 100 years ago some old guy that none of us have heard about wrote a book, an intellectual, he was even a Sir, a knighted English lawyer named Henry Maine.

In 1861 this guy wrote Ancient Law. In that book based on reviewing ancient codes of law, he saw in society an evolutionary movement starting from those societies, called primitive which had relationships based on status. By that he meant the ways people interacted with one another was because of family relationships. In other words if I had an argument with you we would not settle. You would go to the head of your family, I would go to the head of my family and the heads of families would settle the dispute. He said as we get too much more "civilized" society this drops away. Status relationships are no longer important. Rather we have a way of acting with other people called contracts. That is you and I have a fight. I am responsible for my actions. You are responsible for your actions. I can make an agreement with you as an individual which will not affect other people and will not affect my family. This book, that idea, underlines a lot of what we are all doing today.

You talk to lawyers. You talk to judges. You talk to people within the justice system as I have. They believe that we are living in a contract based society; that in urban America people are anomic. People are not part of families, not part of other kinds of groups. They think we are all floating around unattached, capable of making contracts with one another and therefore you need a court. They see a need of an agency which will settle disputes objectively without any understanding with the context in which the problem arises.

Richard Danzig wrote a plan for the decentralization of the criminal justice system in New York City, for the Bar Association in 1970. I want to get at what was underlying the plan. That was the idea that society is not full of people going around making contracts. Rather society is made up of individuals who were involved in multiplex relationships. That is people are friends, neighbors, related to each other through marriage, through kinship, through occupational roles, through a whole host of types of relationships such that you can locate somebody in 10 minutes if you want to use the networks of the system. If you take the view that society is made up of individuals, who are floating in space then you have problems. If you take the view, as does Community Release Agency, that society is made up of individuals who form communities then you can find them.

I did an experiment with one of my classes which Earl Harris and I taught. We tried to sell this idea to students and they just said, "No, what you are saying is not true, people are anomic." All we did was we gave them names of people who were not in the phone book, who in many cases were new in town or were difficult to find. We had names like James Jones. They were identified by ethnicity, race and sex if the name was inconclusive. That was all. Each person on the list was given a message. The conclusion of the assignment was for the student to get the message.

We gave the students a situation like, "Okay, this guy is before a court, how do we decide if he is a good risk to let him out?" How do we identify somebody in a social space?

What they did was really instructive. Most of them right away went to the big bureaucracies. Some of them have friends on the police force and they went downtown and went through the missing persons files. Some contacted the FBI. Some of them went to the University and looked through all the lists of names of people in the university.

Only a couple of people found their subjects.

The people who found them did a very simple thing. Instead of thinking through the bureaucracy they came up with the idea that if we gave them the names then, we have to know them. Once they knew that we knew them they went to a friend of ours or our wives or people who knew us and asked them if we knew James Jones.

I hope we are zeroing in now on the point I am making. That if we begin to think that society is made up of floating individuals then the court structure is right. Perhaps for settling those kinds of conflicts that are obviously crimes or behaviors which take place in our society which are between people who don't know each other and who will not know each other in the future. In those kind of cases perhaps all we are doing here now with pretrial diversion and community bail projects may be appropriate for those kind of cases involving those kinds of people.

I want seriously to think about how frequent those kinds of crimes are and let us not put victimless crimes, that is behaviors which individuals have labeled as immoral with no victim, into the same category. Let us not put into the same category offenses that occur between individuals like husband and wife, disputes like theft or burglary of neighbors, like juvenile offenses, like cases in which the parties know each other and can reconcile or have the case mediated.

In those kind of cases and I would bet that is probably a very large number, let us think about alternatives. Let us think about building a moot like structure which is part of Danzig's Plan. I have seen it work in Africa, which can work in urban areas. It can work in areas of heterogeneous populations. I have seen it work and know it can work and I think rather than to focus all of our attention on building more and better ways of controlling individuals let's let individuals, non-professionals, non-specialists settle their own disputes. Damn right!

In answer to a question Mike Lowy described the system of the administration of justice in Ghana which includes moots.

There is a system--a four part system. Most people have a choice of where they take criminal cases. I bet the same thing happens in the United States although we don't recognize it and we don't legitimize it. If you get into a fight with a friend there are all sorts of things that you can do besides call the police. In Ghana, for example, if you are having a fight with your wife or a neighbor or someone stole your belongings it would be very appropriate for you to go to a shrine and cast a spell on someone such that whoever took that property would get sick and die. You may chuckle and say what does that have to do with what we are talking about now. Do we do that here?

For example, we curse thieves and some people use spiritualists. We have our supernatural institutions working for cases that cannot be resolved like theft of belongings you just can't get back.

The second part of the system in Ghana is semi-judicial agencies, and we have them too: rent control board, welfare, land bureaus and those kind of things. A lot of cases are brought there.

A third track in Ghana which is legitimate but is illegitimate in our society is the area I think we have to work on. It is the one we call in the Ashanti language Afisa (household cases), it is a moot. Household cases are held all over not necessarily in the house. It consists of a triadic relationship rather than when a third party with coercive power like a judge comes in. That is a diadic situation. It is legitimate for a person who is the victim of an assault to ask the party who has committed the offense to come to an arbitration, to come to have the case settled in Afisa or moot. Now another party, a third party is contacted, but that party does not have coercive powers. That party is someone that is respected by the two individuals and that can take in a very large number of kinds of people. Characteristically in any society employers are very important. In other words if you and I are working for the same organization and we have a dispute or someone that you know and someone that I know have a dispute they may go to our employer, the boss, and ask him to sit on the case and listen to it and help us solve it. Religious leaders are also important. If I said a respected Elder in Ghana in context people would understand me, but if I said a respected Elder here people would have a little more difficulty understanding me, but I know and you know that in our communities people who we can identify to as respected Elders. They are people down the block in our own neighborhood who people take their troubles to anyway. Now we don't give them any legitimate basis. In fact we are going in the opposite direction. In Pittsburgh we are trying to do away with Justices of the Peace saying that JP's are biased and are making money out of the whole thing etc. Fine, but we are throwing the whole thing out with the bath water rather than leaving a respected person in the community with a chance to settle disputes between people. You can design a system where these people wouldn't be making money from sending cases on to court and leaving them in there to help people settle their disputes.

The fourth group in Ghana is the court. At the court level there is a higher court. The lowest court is also like a moot although there is coercive power. The procedure is very much like a household case allowing people to air their grievances and not focusing in on the specific legal issues. It allows people to air their grievances in the context of community life. It is the kind of thing that we all know everyday. The neighbor makes noises, turns up his radio up loud and I want to strangle him; the garbage is left out in the hall, etc. These kinds of problems underline a lot of behavior that gets identified as criminal. That kind of stuff has no business going to court and has no business being treated as guilt. It must be treated as a normal deviation that all of us understand and it has to do with all of us taking the responsibility for each other to help people when relationships get strained.

Now when I talk about this to Americans they say well somebody is going to cheat in this kind of system and take advantage of it. We are not saying do away with court structure as we have now. We are just saying legitimize some of the existing ways of settling disputes and make them legitimate and allow people to care for each other. Only if they can't settle disputes between themselves then send them off to court.