Department of Justice

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ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

8:30 P.M.
ARNESON RIVER THEATER
LA VILLITA
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SAN ANTONIO, TEXAS

General Hill, General Summer, Fellow Attorneys General and Friends.

It is a pleasure for me to participate in this annual meeting of the National Association of Attorneys General. I know that the duties of office differ among you and that our responsibilities are in many respects distinct. But we are all quite clearly engaged in a co-operative enterprise. We share particularly, although duties differ among us, responsibility for a system of criminal justice which now is not working well. While it is encouraging that the rate of increase in reported serious crime was cut in half last year, we can hardly celebrate a 9% growth over a crime rate of record proportions.

The crime problem is an invitation to leadership which we must all accept. Historically, the states you represent have played the principal role in criminal law enforcement. This is appropriate and remains the case today.

The Federal government, however, is also increasingly active in this area. The President has recently proposed legislation establishing mandatory sentences for certain offenses. The Department of Justice has endorsed exploration of the value of sentencing commissions and evaluations of the termination of the parole system. All of these proposals are aimed at making punishment more swift and sure, thus making criminal justice more fair and effective. Each could be adopted by other jurisdictions.

The growing Federal involvement in law enforcement is also quite evident within the Department of Justice. When I was in

the Department 35 years ago, there was not a Law Enforcement Assistance Administration or a major counterpart to the Drug Enforcement Administration.

For the most part these programs are aimed at supporting, rather than supplanting, state and local initiative. The LEAA program, for example, is based on the premise that law enforcement is and should be primarily a state and local responsibility. Thus, LEAA relies principally on block grants, contributing some of the scarce resources necessary to meet this responsibility. Recognizing that in the Federal system the states are, as Justice Brandeis described them, valuable laboratories for experimentation, LEAA is an effort to be supportive of this diversity and to encourage new programs which might otherwise not be undertaken. Moreover, through support of organizations such as the National Association of Attorneys General, LEAA seeks to assure that we will be able to share our experiences, while maintaining our autonomy.

As you know, there are those who criticize LEAA for what they perceive to be failures or, at least, lack of tangible success. Some failure is inevitable. Some uncertainty is a necessary concomitant of a program which decentralizes decision-making and vests primary authority in those who are politically accountable. Perpetuation of such a structure is itself a benefit of the LEAA program. Accordingly, we should place a heavy burden of proof on those who wish to convince us to substitute Federal

auditors for this form of accountability. Moreover, this is an area which calls for new ventures tailored to the needs of particular communities. In this sense, if there were no failures, there would be no successes.

The Drug Enforcement Administration is also designed to complement, rather than compete with, state and local efforts. Drug abuse is a pervasive and particularly disturbing problem. While drug use may initially be a matter of choice -- often made by those whose judgment is immature -- it can be quickly converted to an addiction which itself may generate the commission of other crimes. Drug abuse is a problem of national importance which must be faced and fought in virtually every community. Yet drug abuse cannot be defeated in any one community alone.

The street sale of drugs is the end result of sophisticated international operations. Some criminologists believe that, unless it is attacked at its source, disrupting major trafficking networks, successful prosecutions do no more than open up attractive opportunities for other criminals. Thus, the Drug Enforcement Administration, with national jurisdiction, is an essential element in the national drug law enforcement effort. Its potential cannot be realized, however, without close cooperation with state and local law enforcement agencies.

For example, a North Carolina woman last year found a bag of powder. The local police turned it over to DEA which identified

it as heroin. In addition, a palm print was discovered on the bag. DEA was able to trace it to an individual in Jack's bar in Bangkok, Thailand. Working with eight North Carolina local agencies, the state police, the North Carolina Board of Intelligence and law enforcement officials in Georgia, Virginia, Maryland, Illinois, and California, DEA developed the case into the seizure of $100 million worth of heroin and 14 arrests. We must endeavor to make this experience more common.

We will be assisted in this effort by improved coordination of drug enforcement resources. As you know, many years ago there was relatively little drug enforcement activity on the part of state and local governments, except in large urban centers. Therefore, Federal drug agents routinely operated wherever drug traffic appeared and the evidence of drug addiction was clear.

Today, however, the situation is quite different. There are now ten times more state and local officials assigned to drug enforcement than federal agents. State and local officers are increasingly well trained and highly effective. Thus, it is now unnecessary and undesirable for the Drug Enforcement Administration to displace state and local efforts to develop local cases. In view of this, DEA should focus its efforts on matters which extend beyond any other law enforcement jurisdiction.

To make this allocation of responsibility work requires proper sharing of informants, intelligence and other resources by Federal, state and local officials. I realize this sharing must take into account the needs of local as well as federal enforcement. It is also true, and we might as well recognize it, that not all information can be shared. So we have problems and procedures to work out. DEA's new Administrator, Peter Bensinger, has recently noted that Federal, state and local task forces, such as those in New York, Los Angeles and Chicago can be a valuable asset in this regard.

Effective drug enforcement would also be promoted by the development of more formal, though flexible, understandings on the

appropriate Federal, state, and local role in prosecuting drug cases. Individuals who violate Federal drug laws usually are also violating state statutes. Uniform national standards relating to prosecution of drug cases are difficult, if not impossible, to develop because of varying conditions in different areas of the country. We have, however, asked the United States Attorneys to work with you and your local counterparts to develop appropriate guidelines suited to the jurisdictions in which you share responsibility. The guidelines should be designed to assure that investigative and prosecutorial priorities are compatible and that offenders who are apprehended do not find any cracks through which to slip in our Federal system. The Federal-State law enforcement committees which exist formally or informally in 20 states would be ideal forums for developing these standards; matters such as this, indeed, suggest the special value of these committees. We look forward to working with you in doing so.

As you are aware, there are occasions when we find ourselves, in our official capacities, on opposite sides of the table. In the civil rights area legislation has expressly authorized Federal involvement in certain state matters regarding employment, education, voting, and the expenditure of Federal funds. As the people of San Antonio know, this Federal activity extends to substantively reviewing all changes in the law which might conceivably have the purpose or effect of abridging the right of some citizens to vote in certain areas of the country. While history has made such measures seem appropriate, they are quite clearly inconsistent with the principles of separate spheres of responsibility and comity which are the philosophical foundations of our Federal system. The Department of Justice attempts to discharge its duties under these acts fully, but, I trust, with a sensitivity to their extraordinary implications.

Occasionally, our mandate raises rather peculiar questions. Last year, for example, we had to consider whether bilingual ballots were required for an Indian tribe in Virginia whose members all spoke English and whose other language was unwritten and virtually extinct. After due deliberation we decided they were not. More often, however, these efforts include more serious problems, particularly when the Federal courts become the mechanism for the federal presence in matters normally reserved for state and local governments. We all know this sometimes causes friction. But even in these situations we cannot help but be aware that ultimately our aims must be the same or compatible.

Our problems are interrelated and our responsibilities are interdependent, particularly, in the effort to reduce crime. Because this is true I propose to emphasize one facet of our needs and our cooperation, namely the sharing of criminal data and statistics. There is an obvious need for improved criminal justice information systems. Yet fear of misuse and invasions of privacy make them difficult to discuss, let alone develop.

As many of you know, the FBI proposed several years ago to alter the operation of its computerized criminal history program. Much of the debate on this proposal has been highly emotional, often starting with charges of "Big Brother" and ending with countercharges about "Red Herrings." It is more disappointing than surprising that the questions raised by the proposal are yet to be authoritatively resolved.

An improved capacity to retrieve and exchange criminal history information would, unquestionably, be valuable to every element of the criminal justice system. If special attention is to be given the career criminals, we have to know who they are and quickly. Better information would help in investigations, plea bargaining under appropriate safeguards, setting bail, sentencing and considering parole.

In addition, some of this information is of obvious interest to employers, both public and private. It is understandable, for example, that a college would like to know, as one in the District of Columbia did not, that it is a convicted rapist who has applied for a job as a security guard in a girls' dormitory.

Yet, if past error already paid for can follow an individual for the rest of his life, threatening employment opportunities and his acceptance in the community, our hopes of rehabilitating offenders through improved correctional services will be severely diminished Furthermore, there is obvious unfairness in the dissemination of criminal records which are inaccurate or incomplete. Arrests of innocent individuals can have a haunting effect if widely disseminated and are particularly punishing if they show only an arrest but not a favorable disposition.

The tension in this area is not simply between the needs of the administration of justice and the interests of personal privacy. As members of the media avidly argue, there is a strong public interest in information which may conflict with an in-

dividual's interest in confidentiality. Sealing or destroying records harmful to an individual may also conceal police abuses; restricted access to old records may help the average offender to adjust to a normal life, but also enable a political candidate or public official to escape examination of his past. There are competing interests and values which have to be balanced.

The hard questions presented in this area, of course, are not new. But the development of computerized criminal justice information systems gives them added urgency. Computers facilitate the centralization of information regarding individuals and afford broader and faster access to it. Thus, they can contribute to the achievement of speedy trials, equitable sentencing, and punishment which is more swift and sure. In the process, however, the computer eliminates what many have viewed as the primary protector of personal privacy -- inefficiency. Senator Sam Ervin expressed this view in 1974 when he said:

> If traditional Government record-keeping practices and record policies have not yet posed an intolerable threat to personal privacy or reputations, it is only because of the benign inefficiency of these file draw systems. Until very recently, significant amounts of information were not collected on individuals and therefore were not available to others. Use of information collected and kept on a decentralized basis is slow, inefficient, and frustrating. It requires an immense effort to collect

> information on a specific individual from a variety of different agencies and then to have it sent out to the agency requesting it. It is ironic but true that what has thus far saved much of our privacy and our liberty has been the complacency, inefficiency, and interagency jealousies of the Government in its personnel.

It is apparent, however, that inefficiency is no longer an adequate safeguard. We must face up to hard questions requiring resolution.

Our problems have to be met with or without legislation. In the absence of controlling legislation, for example, the U.S. Court of Appeals for the District of Columbia decided that the FBI has a duty to prevent dissemination of inaccurate criminal records and must take precautions to prevent inaccuracy and correct its records. Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974). The court expressed some reluctance in doing so, however, stating:

> We would welcome legislative action to meet these issues. . . The Congress has at its disposal the [necessary] resources and fact finding apparatus. . . Furthermore, Congress is the appropriate institution to determine whether established common law and constitutional interests should be limited in the service of other important interests.

In a limited way, Congress acted in this area. The Omnibus Crime Control and Safe Streets Act of 1973 requires LEAA to promulgate regulations to assure the privacy and security of information contained in manual and automated criminal justice information systems which it funds. Specifically, the Act requires that information in LEAA-funded systems include dispositions with arrest data; be kept current and secure; be utilized only for law enforcement and other lawful purposes; and be accessible to the individuals whose records are included for review and correction.

In 1975, the Department of Justice promulgated the required regulations, stimulating a renewed discussion on the proper balancing of competing interests and, particularly, on the appropriate roles of the Federal and state governments.

The LEAA regulations recognize that the interests of personal privacy and law enforcement are both served by records that are accurate and complete. Thus, as contemplated by the statute, they require prompt reporting of dispositions, prohibit dissemination to non-law enforcement agencies of arrest records without dispositions which are more than one year old, and provide a right of access to an individual who wishes to inspect and correct his criminal records. Recognizing that state records may have been disseminated, the regulations place the responsibility for their correction in the originating agency and require that it notify all recipients of the correction.

Two provisions of the regulations directly called into question the degree of discretion which the Federal government ought

to leave to the states. As you know, in order to protect the computerized records from unauthorized access, and with the strong support of the FBI, the regulations originally required that all automated systems funded by LEAA be "dedicated" -- that is used -- exclusively for criminal justice purposes. Many of you, along with other representatives of the states, protested this requirement. It was asserted that dedication is not the sole effective means of protecting computerized records, is inconsistent with programs to which some states are already committed, and is unduly expensive and wasteful. Upon further consideration, we found these views compelling. While the Department still believes that dedication is the preferable means of securing computerized criminal history data, the LEAA regulations have been revised to permit each state to establish its own procedures for protecting such information. Moreover, to achieve consistency of Federal policy in this area, the FBI is now conforming the conditions for participation in the National Crime Information Center to this approach.

Somewhat similar questions were raised regarding acceptable means of determining the appropriate extent of dissemination of state criminal records to individuals or organizations outside of the criminal justice system. It is our belief that these decisions should be made by politically responsible officials at the state level, rather than by the law enforcement organizations which maintain the records, the potential users, or the Federal government. There-

fore, the Department regulations require that each state shall, on the record, by its own statute or executive order, decide for what government and private purposes criminal records ought to be available.

In view of the importance of this question, the regulations originally prohibited any dissemination not expressly authorized by statute or executive order. This provision was intended to compel careful, formal attention to this issue. As many of you persuasively pointed out, however, this approach is inconsistent with that of the open record laws enacted by 45 states. These generally provide that all records are to be considered public unless expressly made confidential. We have revised the Department's regulations to conform with these strong statements of state policy. Nevertheless, I trust you will agree, that the unique problems involved in the dissemination of criminal records do require independent consideration. Inattention to these problems will only greatly increase public concern.

Regardless of where the limits on access are set, it is important that they be observed and enforced. Basic to this is a system of accountability. Accordingly, the Department regulations require that LEAA-funded systems, whether manual or automated, include maintenance of records. The individual who has made each entry, the recipient of each record and his reason for receiving it must be shown. Regular audits to assure that limits on dissemination

are being observed must be made and there are sanctions for abuse, including fines and termination of funding.

The computers which contribute so much to the apprehension about abuse of criminal records can provide the best protection for them. For the required record-keeping, audit trails, and corrections procedures present a formidable human task, but these can be much more easily and reliably programmed into a computerized system. The computer should be recognized as a potentially powerful ally of privacy interests.

There is one important issue not resolved by the Department of Justice regulations. This involves the interstate exchange of computerized criminal histories. The mobility of criminals has long made it desirable that law enforcement organizations be able to make a single inquiry to determine whether an individual has a criminal record in any other jurisdiction. Since 1924, the Federal Bureau of Investigation has rendered this service through its Identification Division. As you know, this Division provides a central depository for over 21 million arrest fingerprint records from which are derived the criminal histories known as "rap sheets."

It has become increasingly apparent that the value of criminal history information is greatly enhanced if it is readily accessible. In 1970, with the advice of several interested, outside groups, the Attorney General authorized the Bureau to include a computerized criminal history program as part of the National Crime Infor-

mational Center. Information available in days or weeks from the Identification Division could be obtained in minutes if included in the CCH program.

Although the program was intended to be ultimately decentralized, it was necessary to begin by collecting duplicate, computerized criminal histories in Washington. Since the inception of the program, the FBI has received approximately 800,000 records from 8 states. Cost and the continued availability of necessary services from the Identification Division, among other factors, have discouraged broader state participation and proportionally limited the immediate value of the computerized criminal history program. To facilitate fuller state participation, the FBI several years ago proposed to decentralize the computerized criminal history program by returning the records of offenders arrested only in a single state -- amounting to 70% of the computerized criminal history records -- to the states which originated them. The Bureau proposed to maintain only the records of Federal and multi-state offenders and an index of the computerized records maintained by the states. In order to implement this proposal, the Bureau requested from the then Attorney General the limited authority to switch inquiries-- or messages -- from the requesting state to the state in which the index indicated a relevant criminal record was maintained. This proposal was pending when I became Attorney General in February, 1975. It has evoked one of the most heated

controversies of my tenure. It has sometimes been hard to hear the words because of the strength and confusion of voices.

Advocates of the program argued, correctly, that the proposal would decentralize records and return them to the agencies responsible for keeping them up to date, thus promoting accuracy and completeness. The message switching capability would also permit the Bureau to check the accuracy of information in the index before disclosing it. Moreover, it would enhance the control of each state over its own records, permitting it to distinguish if it wished among other states which might request a record.

Critics of the proposal generally did not address the details of the proposal. Some were critical of the concept of exchanging computerized criminal histories as such. Others objected to the Bureau's proposed role, expressing the fear that authorization of limited message switching would give the FBI a capacity to monitor all criminal justice communications.

Some of this criticism reflected a measure of misunderstanding about the proposal. But it also reflected a genuine concern about the privacy of criminal justice information and the role of the Federal government in law enforcement today. It has been my view that it is important that the questions raised by the FBI proposal for limited message switching be authoritatively resolved before a final decision is made. Thus, in accordance with a request by Congress, I decided to defer this decision until legis-

lation regulating the program was enacted. We have been disappointed that despite our efforts, and the efforts of Congressional committees, such legislation does not seem imminent.

In view of the difficulties encountered in realizing the potential of the CCH program, the Bureau has now requested permission to terminate it. This request is now being studied by the Department. Judging by the mail, it appears to be as controversial as the request for limited message switching authority. The final decision will be difficult because of the potential value of the computerized criminal history program, and particularly, because of the steps which some states have taken in reliance upon the development of a national program.

You may be assured that the Bureau's proposal to terminate its computerized criminal history program does not represent a decline in its willingness to render important services to state and local criminal justice systems. The Identification Division, which is itself becoming increasingly computerized, will continue to be the primary provider of criminal record services nationally. The proposal does reflect, however, the understanding that the real value of a computerized criminal history program cannot be achieved without a broadly acceptable resolution of the questions the FBI program has evoked.

If the Bureau's request to terminate its program is granted, perhaps a decentralized computerized criminal history program will be implemented by another institution. However, the hard questions being asked about the FBI in this area must be addressed to and by

any other candidate for the responsibility This is to say there must be high assurances of accuracy and accountability.

The FBI's proposal to terminate its computerized criminal history program gives added urgency to the compelling need to thoughtfully, but decisively establish a national policy regarding criminal justice information systems. The Department of Justice has proposed legislation which would authorize message switching and, like the regulations, give substantial discretion to the states to determine the permissible use of criminal justice information. An alternative measure would prohibit message switching and more substantially preempt state discretion by strictly limiting the use of such information.

Regardless of how these questions are resolved, legislation is important. I believe its content can be influenced by how responsibly we deal with the issues we must now address in its absence. We should be encouraged in our efforts by the understanding that there is no single, perfect solution. As our experience with the Department of Justice regulations suggests, this must be an evolutionary process. But we must speed our progress.

Crime is at an intolerable level. The victims of crime will be ill served if in seeking our common goals we unnecessarily compete, rather than co-operate, or if we permit inevitable controversies to prevent us from making difficult decisions together. Federalism, after all, is important. It is one of the great inventions of our Constitution. And we have a strategic opportunity

and responsibility to make Federalism work. To that end, I pledge you my continuing support.