



JOHN JAY COLLEGE
THE CITY UNIVERSITY OF NEW YORK
OF CRIMINAL JUSTICE

Keynote Address

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On The Future of Community Justice in Wisconsin

**Building Communities with Justice:
Overcoming the Tyranny of the Funnel**

Delivered by

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I am honored to be invited to deliver this keynote lecture at this important conference on the future of community justice. The program that has been put together here at Marquette Law School is very impressive – it shows the range and depth of new thinking and innovative strategies that are making Milwaukee an important laboratory in the justice reform movement.

I am particularly pleased to be on the same program as my friend and colleague Tracey Meares. In my view, Prof. Meares is one of the most important voices in today's national conversation on justice. Her work on legitimacy and community safety represents the cutting edge of the new vision of justice I wish to discuss today.

I also wish to underscore Milwaukee's good fortune in having Ed Flynn as your new police chief. I have followed Ed's career from his debut as a police executive in Chelsea MA, to his tenure in Arlington VA when my family and I lived across the river in Maryland, to his highly successful stint at Secretary for Public Safety in Massachusetts, later in Springfield, and now here in Milwaukee. A month ago I had the pleasure of meeting with him and some of his command staff to talk about a national initiative to address issues of violence and drug markets. From that meeting it was clear that he has charted a course for major police reform in Milwaukee, with community safety as his touchstone. He and his staff were justifiably proud that 2008 saw a 10% decline in violent crime and a stunning 32% drop in homicides in Milwaukee. Of course I take some pride in the fact that he is an alumnus of John Jay College. But putting those bragging rights aside, I can say, as someone who has worked in policing for twenty-five years, that it is wonderful to watch Ed Flynn take his place among the nation's premier police leaders.

Our topic today is community justice. We should pause for a moment to reflect on these two words, "community" and "justice." Years ago, I spoke with Ronnie Earle, the progressive district attorney in Austin Texas who campaigned on a platform of "community justice" and was regularly re-elected by considerable margins. I asked him what those words meant. With a twinkle in his eye, he said that the beauty of the phrase was that nobody could define either "community" or "justice"—both concepts are elastic and complex – but everyone had good associations with both words. By committing his office to the concept of "community justice," he conveyed a break with the past, and a more positive vision of the future. And he got re-elected several times.

By campaigning on a platform of "community justice," Ronnie Earle was making an important statement, a statement – the same statement made by the Community Justice Council of Milwaukee -- that I will take as my starting point this afternoon. When we use the phrase "community justice," we are often distinguishing it from our concept of "criminal justice." We are trying to imagine a world in which matters of justice are treated differently. And, with the insertion of the word "community," we are imagining a role for communities in the pursuit of justice that, arguably, is new and different. This afternoon, I would challenge us to ask these two questions: First, when we imagine "community justice," how is that different from the "criminal justice"; second, what is the role for communities in this vision? This is a "tough love" talk – now is not the time to be self-congratulatory; now is the time to be ambitious.

Forty-two years ago, the President's Crime Commission, established by Lyndon Johnson following the urban race riots of the mid-1960s, issued a landmark report entitled "The Challenge of Crime in a Free Society." The Commission made a number of important recommendations, including the creation of a national capacity to collect data on criminal victimization and to conduct research on crime and justice issues. But perhaps its most important contribution was to argue that the agencies of justice – the police, prosecutors and defenders, the courts, probation and corrections – working together, constitute a criminal justice "system." The Commission actually prepared a graphic depiction of this "system" – a funnel-shaped chart that begins on the left with the number of crimes committed, then depicts those reported to the police (about half), then those resulting in an arrest (about 20%), then those moving to prosecution and conviction (about half), and finally those very few cases, compared to all crimes, resulting in sentences of imprisonment.

This image of the criminal justice "funnel" has dominated our thinking about issues of crime and justice for the past generation. We think of crimes as inputs on an assembly line, moving inexorably from the in-basket of one agency to that agency's out-basket, then on to the in-basket of the next. This mechanical depiction of the criminal justice system has led us to view justice as an engineer would view a complicated public water

system. We become fascinated with ways to improve the hydraulics of the system. Can we improve crime reporting? Can we improve the likelihood of an arrest? Can we improve the rate of successful prosecutions? Can we send more people to prison? Can we send them to prison for longer terms?

And, when the public is dissatisfied with the levels of crime in their communities, public scrutiny is often focused on the inefficiencies in this system. Why are so many cases dismissed? Why are conviction rates less than 100%? Why are convicted felons not sent to prison? Why do the courts throw out evidence that has been seized illegally? And, a question now resonating in Wisconsin, why, when a judge sentences someone to ten years, is the person released from prison in six? If your experiences in the criminal justice system are like mine, we spent inordinate energy and time pointing fingers at each other, trying to assess blame for system failures, and hoping that the reforms undertaken by our agency will bolster the productivity of our stop on the assembly line of justice.

In my view, our thinking about justice has been warped by the influence of the 1967 President's Commission picture of justice. I call this phenomenon the "tyranny of the funnel." Because our imagination has been stultified by this undue influence, we make four major errors in our thinking.

- First, we confuse the pursuit of justice with the successful adjudication of cases, without recognizing that justice can be achieved in ways that do not involve the justice system.
- Second, we too readily think that the proper response to crime is to improve the efficiency of the system of justice and the severity of system outcomes, without realizing that crime can be reduced in a variety of ways.
- Third, we believe that the only power of the agencies of our justice system is the power to arrest suspects, adjudicate cases, and sanction law violators, without recognizing the enormous moral authority these agencies hold.
- Fourth, we view this system – this funnel – as properly operating in a vacuum, that it should be far removed from the messy dynamics of interpersonal relationships and complex processes of community life.

My hope for the "community justice" movement – and for this conference -- is that we can develop a new view of justice that will free us from the "tyranny of the funnel," that we will be able to re-conceptualize our response to crime and our pursuit of justice. To do so, we must meet four challenges head-on.

The First Challenge: Justice is about more than adjudication. Our understanding of justice needs to begin with the recognition that most crimes never see a courtroom. As I just mentioned, the "funnel" tells us that only half of all crimes are reported to the police and, of those, about twenty percent result in an arrest. So, if our concept of justice is limited to cases that appear in courtrooms, we have already written off the 90% of crimes that have no arrest. We need to expand our thinking and embrace the challenge of pursuing justice for the crimes that never make it to a courtroom.

But, you might ask, how can we achieve justice if we have not arrested, much less convicted, a defendant? My wife, Susan Herman, who now teaches at Pace University and is the former Executive Director of the National Center for Victims of Crime, has developed a concept called "Parallel Justice," which envisions a pathway to justice for victims of crime that does not depend on the arrest of an offender. In this view, the commission of a crime typically affects two individuals, a victim and an offender, and society has an obligation to both. Regarding offenders, we believe we should arrest them and, where appropriate, prosecute them and, if appropriate, sanction them, and then support their reintegration into communal life, consistent with our constitutional values. Under Parallel Justice principles, the commission of a crime creates a distinct obligation – a parallel obligation – to help all victims of crime regain control of their lives. In this view, we should provide for their safety (particularly important given the high rates of repeat victimization), offer them a forum to describe what they need to recover from the crime, and support their reintegration into communal life. We have the same obligations to those victims whose cases are adjudicated, with the additional duty to provide them fair treatment in the justice system, and respect for their participatory rights.

This is a vision of justice that speaks to the needs of all victims of crime. It can form the basis for a national commitment to help victims rebuild their lives. Now being tested in communities around the country, the

concept of Parallel Justice is an example of how we can re-conceptualize justice when we are freed from the tyranny of the funnel.

Even within our system of adjudication, we need not be wedded to the logic of the funnel. Over the years, justice reformers have developed many alternatives to traditional prosecutions that should be part of a multi-faceted approach to justice. Two powerful ideas stand at the top of this list. The first is mediation, and other forms of alternative dispute resolution. Years ago, when I worked at the Vera Institute of Justice, we launched an experiment testing the value of mediation in felony cases where the victim and offender had a pre-existing relationship. We randomly assigned these cases; half were handled through traditional prosecution, the other half through mediation. The results were impressive: in the mediation cases, the parties had a much higher regard for the mediator, compared to the view of the judge in the traditional cases. In the mediation cases, the parties emerged with higher regard for each other, compared to traditional cases. In the mediation cases, the parties were able to restructure their relationships going forward, and the case outcomes involved much more restitution for the victims, compared to the traditional cases. Surprisingly, we found that the level of recurrence of conflict between the parties was no lower in the mediation cases, perhaps underscoring the complexity and volatility of these relationships.

Unfortunately, this experiment did not lead to full implementation of mediation for this category of cases. In Brooklyn, as in many communities, mediation is a service offered occasionally, rather than a core strategy for achieving justice. On the national level, we have never fully tapped the potential of mediation and alternative dispute resolution as part of our approach to justice. Yet imagine if we could obtain the results of our Brooklyn experiment in all eligible cases, in all jurisdictions around the country, with victims and defendants experiencing higher levels of satisfaction with the process, renegotiated relationships, and more respect for each other. Certainly, the quality of justice in the communities of America would be enhanced.

The second alternative to traditional prosecution – one supported creatively by Marquette Law School --is restorative justice, which seeks to address the harm caused by the crime and create more productive relationships between victim, offender, and other key stakeholders. Again, the research literature here shows enormous potential for enhancing respect for the process by all parties, improving victim-oriented outcomes, and reducing rates of re-offending. The restorative justice movement has taken hold in many other countries, yet only sporadically in America, and typically as a modest diversion program, not as a core justice strategy. I have been particularly impressed by the application of restorative principles to the reentry population in Milwaukee and the engagement of community members in the reintegration process.

If we put these reform ideas together, a very different approach to justice begins to take shape. We would pursue justice in response to all crimes, not just those resulting in an arrest, so that all victims – and by extension, their families and communities -- emerge from the crime with a sense that justice was achieved. For the small percentage of cases that come to court, we would apply alternative dispute resolution techniques, including mediation and restorative justice. Don't misunderstand me: these techniques do not apply to all cases, but I hope you will agree we could be doing much more, and that doing more would enhance the quality of justice. The main reason we do not implement this vision is that we live under the tyranny of the funnel – these approaches do not fit nearly in the model of the assembly line leading from arrest to adjudication to sentencing. A community justice vision would recognize that justice must be pursued in a variety of ways, inside and outside the system of adjudication.

The Second Challenge: Preventing crime without relying on the criminal justice system. As our nation has reacted to rising crime rates over the years, the response of many elected officials has been to turn to the funnel as a crime control strategy. We are told that, in order to reduce crime, we should make more arrests, increase the rate of successful prosecutions, sentence more people to prison, and keep them in prison longer.

We have invested enormous sums of money in these crime control strategies, with profound consequences. We are making more arrests. The rate of incarceration per arrest has increased. Most strikingly, the national rate of incarceration has more than quadrupled over the past generation so that America now has the highest rate of incarceration in the world. There is general agreement among the academic experts that this investment has also resulted in lower crime rates. Putting a million more people in prison over the past twenty years – most of whom were involved in some level of criminal activity when they were arrested – has

certainly had an incapacitation effect. Yet our reliance on the funnel of the criminal justice system as our major crime control strategy has also had enormous costs – both financial costs, and less tangible costs in the lives of those incarcerated, their families, and their communities impacted by high rates of incarceration and reentry.

A broader vision of justice would recognize that these investments represent opportunity costs. We should develop a menu of crime prevention strategies with proven effectiveness, and present them as alternatives to our current strategy of investing in a more efficient and harsher criminal justice assembly line. There is a substantial body of research literature that assesses the relative costs and benefits of different investment strategies, ranging from early childhood education to drug treatment for individuals leaving prison. Our nation has not been able to sustain a serious policy discussion about competing crime prevention investment strategies, in part because we labor under the tyranny of the funnel. When the public – and our elected officials – think of ways to reduce crime, the reflexive reaction is to turn to the criminal justice system for the answers. It is my hope that the community justice movement can help our nation escape this tyranny, and think more broadly about our investment options.

In particular, in this time of fiscal crisis, I hope that some brave governor, following the lead of your former Governor Tommy Thompson who pledged to reduce welfare rolls, will commit his or her state to a multi-year plan to reduce the size of its prison population. The Justice Reinvestment concept – which envisions that savings from a smaller corrections budget would be returned to communities facing high crime rates – provides a framework for this political strategy. Perhaps Wisconsin can once again provide national leadership.

The Third Challenge: Harnessing the moral authority, not just the legal power, of the agencies of justice. In our understanding of the assembly line of justice, the role of the workers on the assembly line – the police, lawyers, judges and corrections officials – is to move cases along efficiently, keeping a professional and objective distance from the cases and the litigants, and dispensing justice impartially. In my opinion, by embracing this view of the dispassionate justice professional, we run the risk of losing something very important, namely the moral authority inherent in the roles of these public officials.

Fortunately, we are now witnessing, in a number of unrelated pockets of innovation, the emergence of a moral voice for justice that I find very exciting. One of the most powerful reform movements in our field these days is the problem-solving court movement, which began twenty years ago with the first drug court in Miami Florida. Today we have a wide variety of problem-solving courts – mental health courts, domestic violence courts, community courts, gun courts, youth courts, and reentry courts. These courts have captured the imagination of both public and professional alike and are the leading edge of a very important idea, redefining the role of the courts in our response to crime.

These courts have many important attributes – they try to address underlying problems, not just adjudicate the legal issues in the case; they bring together a variety of services to assist offenders; they recognize the reality of relapse. But one of the most important dimensions of these courts is that they allow judges – and sometimes other professionals – to speak in a moral voice, without all the restraints of the assembly line. Judges speak to defendants as people; they speak openly to family members about the ways they can support the success of their loved ones; they recognize human weaknesses; they acknowledge the difficulty of the struggle with addiction; they applaud success and sanction failure; they talk about the importance of an individual defendant's success to the well-being of the larger community.

A quick story: years ago, I spent some time in a drug court in Seattle, Washington, and witnessed two remarkable moments. The judge was calling the docket when a woman entered the courtroom, and walked up to the bailiff with a big smile on her face, and asked if she could see the judge. The judge yelled out, "Of course." The woman had come to the court to show the judge -- and everyone in the courtroom -- pictures of her recent reunion with her child. She had lost custody because of the arrest, but the judge, as part of the drug court process, had written a letter supporting their reunification. She and the judge exchanged hugs. It was quite a scene. Then the first case was called, and a young Native American woman came forward. The judge asked her whether she had been smoking marijuana. She said no; he asked again, and she said maybe; she said she had been with friends who had been smoking. Then he turned the computer screen so she could see the results of her drug test. He repeated his question. After a long silence, the court officer reached across the table, held her hand, and said, "Here, you can tell the truth." The young woman then

spoke of her relapse, her high level of anxiety, and asked whether the judge could write a letter on her behalf – like the one he had written in the case before – supporting her reunification with her tribe so she could get the support she needed. He said yes.

These interactions – which occur every day in problem-solving courts – happen only rarely in traditional courts, working on the assembly line of justice.

Here's another example. In Brooklyn, NY, the District Attorney, Charles J. Hynes, has created a reentry program for prisoners returning to his county, called COMAlert, for "community and law enforcement resources together". He often addresses them personally, soon after they have come back home, and talks about his hopes for their future. His office coordinates services and job opportunities for them; he puts his reputation on the line, knowing that the risk of failure is high. Why does he do this? Their legal cases are long since completed; they are off the assembly line, as far as prosecution is concerned. But he has found a new voice, a voice of moral authority, one that resonates with the parolees, their families and the broader community, and elevates his standing as an official of the justice system.

The judges, prosecutors and other officials who are leading these important innovations have been freed from the tyranny of the funnel. Their programs are far removed from the cogs on the assembly line; they are anything but efficient; but I would argue that by speaking in this moral voice, these government officials are advancing the cause of justice in very powerful ways.

The Fourth Challenge: Connecting the agencies of justice with the dynamics of community life. In most American cities, courthouses are located "downtown," far removed from neighborhoods. Most prosecutors' offices are "downtown," far away from the places where crimes occur. Most prisons are located far away from cities; most probation and parole offices are in central locations, not where probationers or parolees live. Even traditional service providers are usually centralized, city-wide agencies. The systems of justice are traditionally far removed from the places where crimes occur, where victims and offenders live, where prisoners return after serving their sentences.

When I was last in Milwaukee, I was thrilled to learn about your community prosecution program in which involves the co-location of prosecutors in the City's seven police districts. When I was General Counsel of the New York City Police Department, we developed a similar program, called the Civil Enforcement Initiative, that placed police lawyers in police precincts, working on nuisance abatement actions, asset forfeitures, and similar civil remedies to criminal and quality of life conditions. The notion of providing a "counsel to the district commander" is a very appealing notion because it brings the talents of our lawyers closer to the communities where the problems are most clearly identified, and the solutions are most often found.

In many other ways, your city has moved the processes of justice closer to communities, beginning with Chief Flynn's strong focus of accountability at the district level. By creating community accountability for probation, and parole, and assigning caseloads on a geographic basis, these important functions are moving closer to the communities they serve. The restorative justice circles being led by Professor Geske are engaging the messy dynamics of community life to assist returning prisoners establish productive new relationships when they return home.

The community justice movement holds great promise in this regard. We can imagine a world in which community courts are located close to the places where crime occur; where criminal defense services are provided on a local basis, as pioneered by the Harlem Neighborhood Defender Service in New York City; where the supervision of those on probation or parole occurs close to the community, so supervision officers are intimately familiar with the risks and opportunities; where the work of restorative justice and parallel justice initiatives draw upon the strengths of communities.

But beyond these innovations – important as they are – we need to take one more step in harnessing the dynamics of communities to our pursuit of justice. Even the vision I just described can be critiqued as merely decentralizing the criminal justice system, creating many "mini-funnels" at the neighborhood level. That begs the question: can we rethink the role of the justice agencies in ways that produce even greater crime reduction results, without putting more cases on the assembly line, while enhancing the legitimacy of the justice system in the eyes of the community?

In my view, among the most exciting developments in the world of justice reform are the innovative strategies developed by Prof. David Kennedy of John Jay College to address the issues of gang violence and drug markets. I know that Prof. Kennedy has been here as your guest speaker on prior occasions, and am pleased to learn that Milwaukee has tested these strategies in some of your most challenging districts, Districts 2 and 5.

The call-in sessions (also called notification sessions or forums) that are the hallmark of David Kennedy's work represent a fundamental departure from traditional practice, and reflect a direct challenge to the premises of the criminal justice funnel. In a typical session, representatives of law enforcement and criminal justice agencies meet with the individuals involved in gang violence, or overt drug markets. This fact, by itself is remarkable, as cops and prosecutors sit with known criminals. In many forums, they then say they have the power to arrest every offender in the room – they show tapes of undercover buys, or signed arrest warrants, or potential parole or probation violations. But, they tell the offenders, they have chosen not to use that power, because they would prefer that the offenders stop the violence, stop the drug dealing, and choose more productive lives. Services and jobs are then offered for those who choose a way out. But the flip side of the message is also clear: if the violence and the drug dealing do not stop, all bets are off.

This scenario by itself is remarkable – the power to arrest and prosecute, the power to invoke the assembly line of justice, is held in abeyance to promote community safety. But the next part of the script is even more remarkable, and more powerful, as community voices reinforce the message that the community wants the violence and drug dealing to stop. Mothers and pastors, daughters and uncles, speak with a unified and passionate voice urging the offenders to change their behavior. The moral voice of the community is unleashed. These sessions often become resemble processes of racial reconciliation, as the police acknowledge that the traditional way of responding to crime – by making lots of arrests, essentially invoking the power of the funnel – has not worked, and has in fact caused damage; the community then responds by acknowledging that they have failed to say clearly that the violence and drug dealing are unacceptable.

A month ago, we convened at two-day workshop at John Jay with two dozen leaders (including Tracey Meares) implementing these strategies around the country to design an initiative to bring these innovations to scale. We are calling this the National Network for Safe Communities. We have identified 75 jurisdictions that are testing these ideas – including Milwaukee – that will be invited to join the National Network in the next few weeks. We are moving beyond the “proof of concept” phase into a phase devoted to changing the way we approach the problems of gang violence and drug markets. We believe we are witnessing a transformative moment, a tipping point in the nation's response to crime.

At the core of this innovation – and at the core of the community justice work underway here in Milwaukee – is a very different conception of justice, with communities as the focus of our efforts. We need to put our energies, talents, and resources where the safety needs are greatest, where respect for the rule of law is most threatened, where young people are at greatest risk, and where the impact of mass incarceration is most acute. These are the communities where the perceptions of injustice are most pervasive.

The people attending this important conference – and others of like mind around the country -- believe we can leverage the power of community to achieve safety and advance the cause of justice. In my view, we can achieve this new vision only if we think creatively, and free ourselves from the constraints of the assembly line, the funnel, that dominates our vision. We have formidable challenges, but the energy behind this work is sufficiently powerful to meet them.

Congratulations on the impressive work you are doing. Don't stop now. The nation needs your ideas, your commitment, and your success.