DA Vance Delivers Keynote Remarks at New York County Lawyers Association's Annual Law Day Luncheon

Remarks as Prepared for Delivery | May 12, 2017

Good afternoon. I'm delighted to be here and to congratulate Judge Scarpulla for your well-deserved honor today.

Thank you Catherine [Christian] for that warm introduction. Catherine was the first African-American, the youngest person, and the second woman to become NYCLA's President. Her presidency ran from 2007 to 2008 and she made the centerpiece of her tenure the establishment of *pro bono* programs to help formerly incarcerated New Yorkers successfully reenter society. She continues that work to this day in my Office, helping to guide our partnerships and investments in reentry services, like college education in prison and social enterprise funding for startups that hire New Yorkers reentering our community.

I would also like to thank NYCLA's Supreme Court Committee and your President, Carol Sigmond, for inviting me to speak today and for all that you do to bring resources and vibrancy to our profession in Manhattan.

Carol and Catherine are great leaders of the New York County Lawyers Association. They follow in the footsteps of NYCLA President Charles Evans Hughes, who as Chief Justice of the United States in 1932 approved the inscription of the phrase "Equal Justice Under Law" above the bronze gates of the U.S. Supreme Court.

That phrase, "Equal Justice Under Law," was adapted from a seminal, 1891 Supreme Court opinion, *Caldwell vs. Texas*. In *Caldwell*, the Court interpreted the recently-adopted 14th Amendment to mean that "the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law."

The *Caldwell* holding is particularly applicable to criminal law practitioners like Catherine and me, but the fundamental spirit of the Fourteenth Amendment − that we must treat disparate classes of persons equally – can also be found in NYCLA's DNA. It was only 110 years ago that a group of lawyers gathered inside Carnegie Hall to discuss forming a new kind of "great democratic bar association" where "politics were not obstacles to inclusion" and "any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of that circumstance, be eligible for admission," in the words of NYCLA's early President Joseph Hodges Choate.

Those are the founding and enduring NYCLA values that we celebrate today. We are here to celebrate the distinctly American principle of equal opportunity and justice under law, and to shine a light on places in our justice system where we can all do better to ensure that the fundamental promise of the 14th Amendment is fulfilled for every New Yorker.

In that spirit, I'd like to take you back to the presidential campaign days of 2016. During last year's Vice Presidential debate, Mike Pence raised the issue of implicit bias in law enforcement, only to dismiss concerns about implicit bias as disrespectful to those who serve in law enforcement. I appreciate the Vice President's support for all public servants who work to protect of our communities. But to acknowledge that we in law enforcement hold implicit biases is only to acknowledge only that we are human. Acknowledging the issue is not to condemn anyone; rather, it is the first step in a healing process that begins by examining our own attitudes, critically evaluating them, and working collectively to improve them. It is, in short, a way that we fulfill, as members of law enforcement vested with considerable discretion in our justice system, the 14th Amendment's promise of equal protection.

Over 30 years ago, I was a junior assistant district attorney in the office I now lead. And back then, as a rookie, much of my time was spent in a nearly-deserted courthouse representing the People in night court. All of humanity passed through that arraignment court, either as defendants or as family members or as victims. The crimes ranged from the most heinous murders to the most pedestrian petit larceny. But while the crimes were diverse, no thinking person could stand in that courtroom for very long, without noticing that the defendants being arraigned were overwhelmingly, and disproportionately, young men of color, and most often indigent. And no person with a conscience could stand there for very long without asking, how did this happen, and, more importantly, how can we change this? That question followed me when I became a criminal defense attorney, and it motivated later, when I became District Attorney.

And so, one of the first things I did when I became DA in 2010 was to have the Vera Institute of Justice, one of the country's most highly-respected criminal justice think tanks – independent and non-partisan – come into my office, observe what we do, collect data, and reach quantitative conclusions about whether and to what extent race affects our decisions. The shame, I felt, was not in finding we might have bias in our handling of cases; the shame was not knowing and understanding it and then not being able to do something about it.

We allowed Vera access to our attorneys, as well as to data about nearly a quarter of a million cases. Vera took several years to collect information, analyze it, and issue their report, which has been made public online. The process was complex, as were Vera's conclusions. In a nutshell, Vera found that there were no significant racial differences in how we made charging decisions, or in the plea offers we conveyed to defendants. Vera did find some statistically significant racial differences in the amounts of bail judges set, in our sentencing recommendations, and in the sentences judges imposed.

The question then arose, what would I do with that information. I decided to do two things. One – we would take steps within our Office to confront implicit biases head-on. And two, we would exercise our discretion as prosecutors to end the criminal prosecution of low-level violations which do not compromise public safety – and by virtue of such policy – end the perpetuation of racial disparities underlying those arrests.

Step one was internal changes. We have instituted mandatory, comprehensive implicit bias training for everyone – every assistant district attorney, and every member of our support staff. We selected a facilitator from the psychology faculty of Harvard University who is a national leader both in experimental research and in effecting institutional change, to lead everyone in our Office through two lengthy, practical courses – one on recognizing implicit bias, and one on interrupting it. I suspect that in twenty years, concepts that we are learning in our trainings and using to evaluate our handling of cases – in-group favoritism; power, privilege, and unearned advantage; leniency bias; confirmation bias – will not sound like a foreign language to a District Attorney's Office. I am encouraged by many anecdotal reports of attorneys who told us that the sessions sensitized them, in practical ways, to biases of which they had previously been unaware. And already, we have committed to undertake a second racial bias review of case outcomes in Manhattan.

Those are some of the internal changes we made, but it turned out that the most important fact revealed to me by the Vera study was that the overwhelming majority of arrests made by the police were finding their way through our complaint room – often, I believed, without an adequate, independent assessment of whether the conduct charged, or the person charged, endangered public safety such that that the matter needed to be handled in criminal court.

In 2010, we prosecuted about 100,00 cases each year. 20 percent of those were felonies, more serious crimes like rape, robbery and murder. But 80 percent of the arrests that came to our complaint room we prosecuted as misdemeanors and violations, and of those, very many were of people with little or no criminal record, for offenses like petit larceny, criminal mischief, offenses that, in and of themselves, did not implicate public safety. Those cases would enter a misdemeanor court system that is so overburdened that the defendant received literally nothing: no rehabilitative services, no punishment, no drug treatment. One judge commented to an assistant district attorney in my office that for many defendants who appear in criminal court, the system *is* the punishment. That would be senseless – maybe even Kafkaesque – but when you add the fact that a disproportionate number of those defendants were young men of color, the result was, I believed, wrong.

So now, by agreement with the NYPD, people who are caught in Manhattan doing things like littering, publicly consuming alcohol, possessing marijuana, or taking up two seats on the subway, are given summonses – as opposed to being arrested on a violation – and spared from unnecessary arrest, detention, fingerprinting, and mug shots, greatly reducing accompanying employment or other consequences of that arrest.

Through that Manhattan Summons Initiative and our Project Reset diversion programs, which focus on diversion of certain misdemeanor cases at the precinct – as opposed to diversion *after* arrest and arraignment – we are keeping tens of thousands of New Yorkers out of the justice system, and enabling police and prosecutors to focus our resources on more serious and violent crimes.

We worked for two years with the NYPD to secure their support for this important change. Already, since 2012, we have reduced the number of incoming cases of misdemeanors and violations from 90,000 to 66,000, or by roughly 35%. And I believe we can, and will, drive down that number further without any negative impact on public safety. Our adult diversion problem, for first-time arrestees on non-violent misdemeanors, will further reduce our intake by another 10,000 cases, which will be diverted before arraignment at the stationhouse.

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I'd like to close with one final point about extending the promise of equal protection in the criminal justice system. I am speaking to you in a venue in which you can literally see the Statue of Liberty behind me, so I can't help but make this point.

In our work to extend equal protection to all who come before the court, all of us must adapt – continually and vigilantly – to developments which threaten to erode that promise.

It was the *Caldwell* court who in 1891 applied the equal protection clause to criminal justice, but it was much later, in 1982, when the Court held in *Plyler vs. Doe* that the equal protection clause applies not only to citizens, but to undocumented persons as well. The *Plyer* Court reasoned that, unlike the 14th Amendment's first two clauses concerning citizenship and interstate privileges and immunities – which explicitly pertain to "citizens" – the latter clauses, concerning due process and equal protection, explicitly protect "any person" within a state's borders.

I submit today that if two New Yorkers commit the same low-level violation, and the practical consequence for one of the New Yorkers is a ticket or a couple of days in jail, while the consequence for the other New Yorker is to be taken from her family and shipped off to a foreign country, that is not equal justice under law.

I believe that District Attorneys have a role to play in protecting all New Yorkers, including the defendants we charge, from unnecessary deportation. I believe that officers of the court like yourselves have a role to play as well.

Last month, we created a new position within our office – Collateral Consequences Counsel. We recognized a sudden and urgent need to develop our in-house expertise in immigration law and ongoing federal enforcement trends. Working alongside other ADAs and city agencies, our Counsel will assess the immigration consequences of our plea and charging decisions, and advise on available dispositions which reduce or eliminate a defendant's risk of deportation. That could mean offering pleas to alternative, non-deportable charges. It could mean that we agree to seal a case early.

Hiring an immigration lawyer is not going to turn the back the tide of unfair deportations, and it is not going to repair a situation in which entire communities of New Yorkers are being scared away from collaborating with law enforcement to keep their neighborhoods safe. But it's the type of step that we can and must take in 2017 to administer equal justice under law.

This is a moment, unlike any in my memory, when it falls squarely on our profession to defend and fulfill the 14th Amendment's equal protection guarantee. It's on us. Let's remember that every day.

Thank you for listening. It's been an honor to join you today.

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