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# COMMENT

## RIGHTS IN CONFLICT: A BALANCED APPROACH†

FRANCIS A. ALLEN\*

To the founders of the American republic, "domestic tranquility" is not only one of the fruits of constitutional government, but is essential for the preservation of a constitutional government. The founders recognized that violence is the enemy of liberty, but also that liberty may be overcome by the efforts of state officials to suppress private violence. Because the founders were concerned both with liberty and order, they devoted great attention to the regulation and control of governmental power in criminal law enforcement. Thus four of the Amendments in the original Bill of Rights expressly regulate the administration of criminal justice and several others have relevance to the criminal process.

There is clearly much at stake here. No open society can retain its character as such or even preserve its liberal aspirations for very long, when large groups within the community are locked in violent combat, and when extreme applications of force are being brought to bear by one element of the population against another. The point is valid without reference to the "legal justification" for the imposition of the force. We in the United States have suffered from a "crime problem" of large proportions for a century and more. The social costs of widespread crime are many, but it has not been noted often enough that among the most serious of these costs are the maintenance of quasi-military organizations to suppress it and the production of public attitudes and anxieties that at times can fairly be described as a war psychosis. Frequent references to "the war against crime" by our public figures and the mass media illustrate and corroborate the point. Over forty years ago Clarence Darrow remarked, "The psychology of fighting crime is the same as the psychology of fighting wars . . ." A war psychosis does not provide an atmosphere in which a free society can be expected to flourish. I am, of course, not saying that substantial violations of the law can be ignored; I assert the precise contrary. But I am saying, in addition, that the launching of a large force by an organized society against its own citizens involves that society in costs which quickly become exorbitant; that the

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resentments and attitudes bred in consequence, both in those who apply and those who absorb the force, threaten the assumptions and essential character of a free society; and that today we face an acute need to devise techniques and strategies that will deescalate the uses of violence in the conduct of public controversies, both as an instrumentality of law enforcement and of social protest.

Periodically the American public discovers that it has a "crime problem." In these periods great concern and agitation are expressed; but public attention is not sustained and the reactions are rarely constructive. However unpalatable the fact, our history reveals that a nation can function, can develop and become great, in the face of rather high levels of law violation in all segments of society. Obviously, our attitudes toward crime are ambivalent; and we are capable of great tolerance of law violation so long as it is not too visible and does not threaten too drastically the interests of the dominant groups in our society. Riots and public disorders involving large groups or persons, however, are a very different matter. This is not because rioting is new to American history. One needs only to recall the conscription riots in the Civil War, the public disorders associated with the abolitionist movement and with the development of organized labor. What principally is new about the modern disorders is their enhanced visibility. The television screen has brought the violent confrontations of our time into the living rooms of America. For a great many persons these disorders have become symbolic of the erosion of public order and public morality and have increased concerns about law violations of all sorts. In short, television's graphic representations of public disorders are a primary source of public insecurity.

Public reactions to the issue of "law and order" are today of two principal sorts. Both, in my judgement, are dangerous and mistaken. The first asks too much of legal institutions, or, more accurately, relies too heavily on forceable repression by law enforcement authorities. The second concedes far too little to the law and may often deny to the legal order that degree of support essential to the performance of its vital functions. I shall consider each set of reactions in turn.

That a very large segment of the American population is seriously disturbed by the incidence of crime in American society and by overt resistance to public authority needs no elaboration. One might respond by saying that much that is producing fear reactions today has always been a prominent feature of American life or, at least, has been so since our population first began to become concentrated in cities a century-and-a-quarter ago. One may say that we do not really know whether, or how much, crime has increased over significant time intervals; and we do

not know because we have been unwilling to make the expenditures necessary to establish a reliable body of crime statistics. We are, in consequence, denied this basic information at a time when it has become of critical importance. We can point to the facts that not only has there been a rapid increase in the total population of the country, but that those age brackets in which most crime is committed have shown disproportionate gains.

For the problems we are discussing, however, these responses are of doubtful relevance. The stark and inescapable fact is that the *feeling* of security has suffered serious erosion in American society; and perhaps the most significant consideration is this sense of insecurity, whatever reality a valid statistical analysis might reveal. As insecurity has increased, indignation has intensified: hence the mounting denunciations of lawlessness and the demands for its forcible repression. That the phenomenon we are observing is far from simple is illustrated by the highly selective nature of the indignation that has been expressed. Perhaps the most massive instance of civil (and often violent) disobedience that has occurred in the United States since World War II is the calculated resistance of the southern states to the school-segregation decision and to other constitutionally defined rights of the black population. This resistance and non-action has, of course, been widely deplored; but it has not signalled the breakdown of law and order for most persons. Even the most offensive instances of extreme violence were borne by the population as a whole with remarkable equanimity—as when four little girls attending church school in Birmingham were blasted to Kingdom Come, or when the heroic black children of Little Rock braved the hate and barely controlled aggressions of the white mob.

If we wish to think seriously about the relations of law to order, we shall need to inquire into the factors that lead to widespread support for the law and those which erode or destroy that support. There can be no doubt, of course, that the law's contribution to order rests in part upon the public force. The very word "enforcement" testifies to this reality. But adherence to the law in a free society has never rested primarily on applications or threats of force by public authority. Perhaps the principal attraction of a political system that seeks order through law is that it promises to reduce the amount of force that the state would otherwise be required to employ against its citizens to obtain and preserve order. A legal system is viable when law violation evokes general disapprobation and disapproval in the community. Conversely, threats of even stringent penalties may be inadequate to prevent unlawful behavior when the offense does not deprive the offender of the esteem of persons or groups in the community who are important to him. There is no lack of examples.

We have discovered that the law's penalties will not be likely to deter a member of a juvenile gang from delinquent behavior if the illegal conduct elevates the young man's prestige and status among those whose good opinion he values. So also, in dealing with the habitual adult criminal we often find that a convicted offender, having already suffered apparently irreparable loss of status by reason of his earlier conviction and having little further to lose in this respect, is remarkably uninfluenced by threats of formal sanctions for his subsequent behavior. But the most acute and striking cases illustrating the general proposition are those that involve conscientious violations of law. Recent history has given us ample proof that persons persuaded that the agencies of justice are oppressive and the society of which they are a part is corrupt, will violate the law despite the application of penalties and retaliatory violence, and will do so without loss of self-esteem and without forfeiting the support of others in the community who hold similar views.

A large part of this complex matter can be fairly summarized by saying that persons tend to obey the law when the groups with which they identify withhold approval and acceptance from those who violate it, and that group attitudes about the importance and respectability of lawful behavior will depend, in turn, on widely shared views concerning the justice of the legal order and of the society which created it. If this is true, it will be seen that the justice and decency of the law and its enforcement are not merely desirable embellishments of the system. On the contrary, a widespread and confident conviction of the essential decency of the law and its agencies is an indispensable condition of "law and order" in a free society. If because of perceptions of injustice, substantial portions of the population are disposed to deny to the law their voluntary support, escalation of force will almost inevitably be employed by the state in its efforts to preserve the good order of the community. But as the state brings greater force to bear on its citizens, doubts of the justice of the system are intensified and fidelity to the law is eroded further. There is thus created a tendency for progressive increases in the amount of force administered by the agencies of law enforcement. There is no assurance that this process will result in the speedy reestablishment of order; but even if resistance is successfully overcome, the costs may include loss of the liberties of the people.

A response to the disorders of our time which calls for the application of massive force without concern for the justice and good reputation of the legal order is a prescription for disaster. This is not to say that losses in fidelity to the law by the disaffected groups within our society have been caused simply by defects in the administration of criminal justice. The declining sense of obligation to the law in these groups is

evidence of a much more fundamental alienation from the larger society. Clearly this alienation cannot be corrected simply by measures to improve and reform the criminal law and its administration. Nevertheless, reform of criminal justice is a necessary, if not a sufficient, measure in efforts to reestablish the good reputation of the law; and at a time when allegiances to orderly processes of social change are wavering and hanging in the balance, concern for the decency of the law and its enforcement becomes of critical importance.

It is my contention that those who seek not simply order but also the preservation of a liberal society, must concern themselves with the justice and good reputation of the law. This is true because the alternative to widespread voluntary compliance with legal norms is brute repression. When the problems of law and order are viewed from this perspective, much that is being said today, including much being said by persons of great public prominence, is revealed as fatuous and mistaken. The Supreme Court of the United States has been selected to bear the weight of culpability for the crime and disorders of these times. That the Supreme Court is "handcuffing" the police and that the police are thereby prevented from restoring public order are propositions repeated so frequently that they have gained the assent of even some persons of sophistication and good sense. Yet one need not be an uncritical admirer of all that the Court has done or believe that it has always revealed an infallible sense of timing, to conclude that there is no reliable evidence that the constitutional rules of evidence which the Court has announced in recent years have made the slightest adverse impact on American crime rates, or that these rulings have prevented the police from performing their routine functions of crime prevention and law enforcement.

If one were inclined to attribute the modern problems of crime and disorder to courts, he could with a much greater show of reason call to account, not the Supreme Court of the United States, but the host of trial courts of initial criminal jurisdiction in urban centers throughout the country. These are the courts that deal directly with members of our disaffected groups, and unfortunately they regularly damage the good reputation of the law with these groups. In part this damage is inflicted by judges sitting in these courts. Although there are men of ability and dedication on the criminal bench, the methods of judicial selection prevailing in most localities bring to judicial office many who are encumbered by political obligations, often of minimal competence and of even less sensitivity and compassion. But criticism confined to the hard-pressed judges would be unfair and inaccurate. The courts are simply representative of a system of criminal justice that is inadequate to cope with the problems that face it. It is a system of justice that in such

matters as bail and monetary fines quite explicitly discriminates against persons of meager financial resources and in many other ways disadvantages the poor and helpless. It encompasses a correctional apparatus that at times seems deliberately calculated to aggravate the alienation and antagonisms of those within its purview. It is a system of conflicting objectives and motivations, and one that staggers under the weight of overwhelming numbers. We as a society have shown no disposition to invest adequate resources of men or money in it. In consequence, the system fails in its basic obligations, including that of capturing the respect and allegiance of disaffected and disadvantaged groups.

Perhaps the best evidence of the present dangerous state of public opinion is provided by the widespread discussions of lawless conduct by police officers. A great deal of controversy that surrounds the recent events in Chicago has centered on the issue of whether the police were "provoked," as if this were the end of the inquiry rather than the beginning. I believe it can safely be assumed that in virtually all of these situations, the police have suffered provocation. But the justification for the use of extreme force requires a showing of more than provocation, even extreme provocation. The relevant inquiries are and have always been: Was there reasonable necessity for the force actually employed? Was the force necessary to effect the arrest of wrongdoers? Was it necessary to protect the life and limb of the peace officers? Was it necessary to prevent the commission of serious crimes? The principle of economy in the use of public force demands that these standards be satisfied; and it will be noted that the standard is not whether you or I would have been angered by the conduct of the hostile mob. These points are elementary, but they require restatement: The police have *not* been made custodians of the public force in order that revenge and satisfaction may be obtained for insults and injuries suffered by the police. The society has *not* designated the police as executioners of punishment on citizens who offend the law; allocation of punishment is a function still exclusively lodged in the courts. That much is asked of the police officer is clear; and, considering the niggardly investment of resources in law enforcement, our demands are perhaps unrealistic. Yet the dignity of the police officer rests precisely on the fact that we require more of courage, skill and restraint from him than we do from many other citizens.

How far we as a society have strayed from this elementary but vital understanding is revealed by the outcry that greeted recent remarks of the Attorney General of the United States, Mr. Ramsey Clark. This outcry was not confined to the ignorant and powerless segments of our community, but has been led by men of great political and public prominence. What was Attorney General Clark's heresy? He advanced

the following proposition: "Of all violence, police violence in excess of authority is the most dangerous." If this moderate statement is shocking, it is certainly not because of its novelty. The Attorney General was restating a perception at least as old in western civilization as Plato—Who will watch the watchers, who will guard against the guardians? Surely this concern is always indispensable to the preservation of political liberty and constitutional government. If the Attorney General is to be criticized it is for not going far enough. The reason for particular concern about police lawlessness is not simply (as the Attorney General observed) that the people have no place to turn "when the police violate the law." The larger point is that such behavior destroys the moral authority of the official agencies of society, teaches a lesson of lawlessness to the entire community and provides excuses and inducements for private citizens tempted to violate the law.

I do not doubt that the technical efficiency of many aspects of American law enforcement can be and should be improved. And yet I do not believe that the problem of "law and order" in the United States today is basically a problem of technical efficiency. Even if we were to make the enormous efforts and expenditures necessary to increase our rate of convictions and punishments by 25 percent, 50 percent or 75 percent, our basic problems would not be touched; and, indeed, they might be deepened and aggravated. This is true because the fundamental problem is one of the legitimacy of law and the society of which it is a part in the minds and hearts of very large groups of American people. That sudden increases in the level of police activity may in some circumstances increase, rather than decrease, the possibilities of disorder, may be illustrated by the outbreak of the Detroit riots in the summer of 1967. Thus Dr. Nathan S. Caplan of the University of Michigan's Institute for Social Research has pointed out that the riots erupted at a time of increasing police presence in the Detroit ghetto following a "blue flu" period when policing of that area was at a minimum.

There is no great mystery about at least some of the measures that might be taken to reestablish the legitimacy of criminal justice. Certainly we need to lessen the differential impact of the system on the poor and disadvantaged. We need to eliminate from our correctional system features that have been recognized as intolerable by dispassionate observers from the time of John Howard in the 18th Century. Very few communities have succeeded in fully implementing even such elementary measures as the separation of the young from the adult offenders. We need to do some effective work on the "we-they" syndrome of the police, which not only prevents many departments from ferreting out wrongdoing within the organization, but also induces some decent



police officers to protect and defend the wrongdoing of their colleagues when it comes to light. We need to make the law more responsive to the particular needs of our disadvantaged population and to provide legal services to the same groups in order that they may have access to orderly means of dispute settlement. Our problem, however, is not that of devising a program of reform. We have at hand the recommendations of the Commission on Civil Disorders and of the President's Commission on Law Enforcement and the Administration of Justice to guide our policy if we have the will to create new policy and make it effective. These recommendations have been largely ignored in current political discussions of law and order, despite substantial investments of time, money and talent in their production. Although the political process has failed to define the choice facing us, a choice exists. It is a choice between a policy that seeks order and at the same time the preservation of the values of a liberal society, and one that seeks order regardless of the consequences to our political values. Moreover, if the first alternative is not speedily embraced, we may even be deprived of the power of choice.

The threat to the rule of law, however, and to the kinds of order that are the product of the rule of law comes not only from those who place exclusive and unthinking reliance on force and repression. The danger also arises from those groups whose commitments to social reform and the eradication of injustice lead to the defiance of law and the creation of disorder. We are learning that the rule of law can be destroyed through lack of fidelity to the law by large numbers of citizens as well as through abuses of authority by governmental officials.

There is, of course, more than one way in which the vitality of a free society can be sapped. Public disorders are not the only threat to liberal principles. Injustices long ignored and solutions long neglected are another. If we are candid, we shall have to concede that the American society has been slow to perceive and react to its inequities and that the stridency of the protest movement is a fair measure of our inertia and resistance to necessary change. A failure to perceive the necessity and urgency of reform is a fundamental cause of the disorders of these times; and hopes for either law or order that are not accompanied by an effective resolve to eliminate inequality and injustice will falter and die.

Acceptance of the goals of reform, however, does not validate all the means that have been employed to achieve reform. The time has come for those participating in the protest movement, on and off the college campuses, to subject their measures to realistic appraisal. The question that needs to be put by young people of generous impulses all over the country is whether tactics relying on deliberate, symbolic and sometimes violent law-breaking are in fact contributing to the emergence of a

society that will show enhanced regard for human values—for equity, decency and individual volition. There are some persons in the protest movement for whom this is not a relevant inquiry, for their motivations are essentially illiberal and destructive. But this is not descriptive of most of those engaged today in social protest, including most who have violated the law in the course of their protest. I believe candid examination of what is occurring in the United States will lead to the conclusion that law-breaking as a tactic of protest is not contributing to the emergence of a more liberal and humane society, but is, on the contrary, producing an opposite tendency. The fears and resentments created by symbolic law violation have provided an opportunity and an occasion for the seizure of political power by the worst elements in American society. Only naivete and willful blindness can obscure the strength of these dark forces. There is an almost Newtonian process of action and reaction at work here. Fanaticism (even for laudable goals) breeds fanaticism in opposition. Just as “extremism in defense of liberty” does not promote liberty, extremism in the cause of justice may extinguish hopes for a just society. Occasionally young reformers seek to justify lawlessness and violence on the theory that “they have nothing to lose.” This radical failure of imagination may prove fatal not only to the interests of those who indulge it, but of all men who are striving for a society more productive of human values.

There is one point of basic importance which, if generally understood, would remove much confusion. Insofar as rioting and large-scale public disorders are concerned, the real issue is not *whether* public order will be restored to American society. It is rather, under what terms will order be restored and with what consequences to the character and aspirations of our society? The records of mankind suggest that the urge to escape from internal violence and disorder is one of the strongest impulses of men in society. “Thou shalt not be afraid of any terror by night: nor for the arrow that flieth by day,” says the Book of Common Prayer. The strength of this basic desire has on more than one historical occasion overridden all competing claims of personal liberty, rationality and justice. Recollections of the violent anarchy of the War of Roses induced generations of Englishmen, not only to tolerate, but to embrace the totalitarian rule of the Tudors. The presence of internal disorder has always strengthened the hands of repressive political regimes. “The anarchist,” says John W. Gardner, “plays into the hands of the authoritarian.” Surely there is little reason to believe that violent internal disorders will prove more tolerable in the infinitely more complex society of this day. Reason points to a contrary conclusion. Because men are today more vulnerable to breakdowns in the intricate machinery of

civilization than in earlier times, they will prove less tolerant of public disorders that threaten or appear to threaten the social arrangements on which they rely. The peril is that this threat may be perceived so clearly that we shall be induced to sacrifice those other values which our society has achieved or to which it has aspired.

Surely the path out of our present difficulties is neither that of brute repression or of anarchy. Indeed the one has often led to the other. Neither accords with the temper of a free society and the achievement of the goals to which such a society is dedicated.

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