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E. Barrett Prettyman

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Enforcement

By E. BARRETT PRETTYMAN *

Your Chairman assigned no subject except a general limitation to the field of taxes. So I had a whole fascinating world of intricacies, perplexities and complexities from which to choose a topic. But I could not shake off a compulsion to try to phrase a thesis to which I have long held, having begun to see it when I went into Internal Revenue in 1919 after World War I. It concerns law enforcement. To be sure, for some ten years I have had no contact with the subject in the executive field, and so nothing I have to say is new or modern. I dig back some thirty years or more for the initial material. But fundamentals are fundamentals, and my sideline observations confirm me in my notions. I have viewed the operation from the standpoints of a junior official on the firing line, of a practicing attorney, of an administrative policy-maker, and of a judicial reviewing officer.

Preliminarily, a couple of stories might be related to set the tone of the paper.

Judge Miller of our court hails from Kentucky, and he has dozens of homey stories of purported life and law in his native state. We derive much pleasure by inciting him to relate them. The other day the imminence of income tax return time reminded him of a story. It seems that out in a country community in Kentucky a certain family pretty well controlled the town. Among them they owned the bank, and the wholesale feed store, and the retail drugstore, and so on. One spring day the old man and a couple of his elder sons went to the city on business. While they were waiting in a lawyer's office for a secretary to

* E. Barrett Prettyman: Circuit Judge, United States Court of Appeals for The District of Columbia.

prepare some papers, the lawyer said pleasantly by way of chitchat, "Well, I suppose you gentlemen have prepared your income tax returns." After a moment's pause the old man replied, "No, we haven't done that. We have discussed the matter, and we think it is all right for people who go in for that sort of thing. But we don't care to have any part in it."

I recently read a book of memoirs by a lawyer, now over eighty years old, who has practiced a lifetime in Oklahoma, beginning in the territory. One chapter is the story of a delightful old Dutchman, who was father of a big family, successful in business, a pillar in the church, and generally one of the staunch and upright figures in the community; but he thoroughly disapproved of the way things are run in Washington. In particular he disapproved the income tax, because in his judgment it was merely an easy way for the bureaucrats to get a lot of money for what he deemed to be unnecessary expenditures. He got a newspaper summary of the federal budget and carefully figured out what part of it he approved and what he disapproved. He figured that thirty-two per cent of it was unnecessary. Thereafter every year he figured his income tax by the applicable rules and then struck thirty-two per cent from it. He gave the thirty-two per cent to the church. The balance he paid the Government. The Government finally got around to him, but he would not be embarrassed or scared. He just sat tight. So they indicted him. He explained to a jury of his peers his practice. They turned him loose. The author expressed the view that this was a protest against the way the matter was handled by the Government, and he pointed to the disaster which would occur if acquittal in tax cases were to become popular.

Some laws apply in actual operation to great masses of people, and some do not. For example, traffic rules apply in everyday life to hundreds of thousands of people, but the law regarding first-degree murder applies to relatively few people. Prohibition and price regulation affected almost the whole of our citizenry. But fraud by bank directors and criminal conspiracy in restraint of trade are rare occurrences. This vast difference in applicability creates similar differences in the problems of law enforcement in the two classes of laws.

In respect to laws of occasional applicability, enforcement is a matter of applying the statutory prescriptions to alleged offenders. There is police investigation, presentation by information or indictment, prosecution by a prosecutor, trial before a judge and perhaps a jury, and sentence in the event of conviction. The state must furnish enough police officers, prosecutors, judges, jurors and probation officers to handle all these accusations and to handle them expeditiously. The accused in each instance has a right to prompt clearance or conviction.

In respect to these laws there is no mass involvement on the part of people generally. No Government policy except strict enforcement is required. The problem of law enforcement concerns the outlaw, or the alleged outlaw.

On the other hand laws which constantly apply to the mass of the people in their everyday life pose quite different problems. Take traffic laws as an example. You cannot enforce traffic rules by arresting every person who violates them. To start with you could not employ enough policemen to arrest every person who exceeds a speed limit, or makes a turn without a signal, or inches over on the wrong side of the street. And if you did arrest them all you could not get enough prosecutors to make out charges or judges to hear them. In a few days juries would cease to convict and people generally would in rebellion take up the challenge and make a game of it. An enforcement program of that sort for that sort of law builds up a tiny irritation into an avalanche of self-destruction.

I recognize that what I am saying may not be a sound academic principle. As a matter of theoretical thesis or logistic thinking it may be untenable. But it is a factual truth, a verity of human nature. You simply cannot coerce the whole mass of people. You may jar them, startle them, momentarily perplex them, but in the long run people in the mass do not scare, they are stubborn, and they are indestructible. You must nurture with expert skill their natural inclinations to obey law.

In respect of these laws you start with a natural tendency on the part of the American people to obey them. They incline to obey any law which is on the books. But that natural tendency can be dissipated quite quickly by inept enforcement policies. It is quite possible for the people simply to refuse to obey a law. Sound enforcement of a law of mass applicability consists of the preservation, encouragement, and propagation of observance of the law on the part of the mass of the people. Sound enforcement measures cultivate voluntary mass law observance. This is an art. It is an art of delicate shadings and impressions as well as of stark lines. It is not a routine matter of investigation and prosecution.

There are in respect to these laws three classes of people, the outlaws, the venturesome, and the obedient. First, the outlaws. There are some outlaws in respect to every law. Initially they are a very small minority. They are deliberate, defiant fellows who for some reason intentionally refuse to recognize certain legal mandates. There is but one way to treat an outlaw. Devastating finality is the term. Enforcement officers must, as the saying goes, "throw the book at him". Once it is established that a person is deliberately defiant of a certain law, his spirit must be met with a like spirit. His will to disobey has to be

broken, or he has to be put where he is not a menace. Such a one cannot be persuaded or cajoled. He chooses the hard way; he should get it. He challenges the might of the law; he should feel that might. Dilly-dallying with this class of people is a waste of time and good official energy.

Two notes must be made by way of parenthesis about outlaws. The first is that extreme care must be taken to make sure that the person involved is an outlaw, before he is treated like one. The more he is suspected of being one, the more careful the determination of that fact must be; because the more devastating the result is to be. Sternness begins when the outlawry has been established. The second note is that outlaws can frequently be rehabilitated and so need not be summarily destroyed. But their cure comes from strong medicines and not from pink pills. Even to rehabilitate such people severity rather than indulgence is required.

The second class of people in attitude toward these laws is composed of the venturesome. They are more numerous than the outlaws but still not so very numerous. They are the ones who want to cheat a little bit but not enough to be hurt too badly. In part they are bold spirits, but in larger part they are the sufferers from a form of inferiority complex, driven by it to seek any advantage they think someone else is getting. They do not like to drive fast, but, if they think Jones is getting away in a dashing, bold fashion with fast driving, they must also drive fast. Their attitude is somewhat adolescent, at least immature, but it is surprising how frequently the phenomenon occurs in responsible adult circles. Such people should be treated with a swift, sure, costly, brief chastisement. Prompt, courteous fifty percent penalties plus interest make effective corrections in these people. Many a small boy has been transformed from a potential devil to an acceptable citizen by one quick, unexpected, but emphatically painful smack in the region designed by an omniscient nature for that purpose. Lectures, admonitions, appeasements, and, worst of all, compromises are useless in these dealings. Effectiveness comes from a combination of promptness, firmness, politeness and expensiveness.

I had a recent example of it myself. I parked my car facing the wrong way on the street in front of my house. It is out in the suburbs, my neighbors do it, so why not I? Next morning a ticket was on the car. I phoned the police station and announced that I was Judge Prettyman and had a parking ticket. A pleasant, friendly voice said, "Yes, indeed, Judge. You needn't come over. You can just put your check for \$3.75 in the mail, and it will be all right." A bit nonplused by the hearty cooperation, I said, "Thank you," and the voice said, "Not at all. Glad

to be of service, Judge." Now, what can you do with a law enforcement officer like that? Well, for one thing, I do not park my car the wrong way any more; the privilege is worth distinctly less than \$3.75 to me. And for another thing I think a great deal of good about our local police force. Somehow, for some reason, that experience left me with a pleasant glow of confidence toward that force. The venturesome must be chastised but not destroyed. They are easily cured of their appetite for law-breaking.

We come, then, to the third classification of people in this study. They are the ones who naturally obey the law. They are by far the most numerous class; indeed this class comprises almost all the people. The object of enforcement so far as they are concerned is to keep intact their natural inclination to voluntary obedience. How do law enforcement officers preserve this natural, voluntary law observance? They do it by the use of certain clear characteristics of mass psychology. These characteristics have to do with law enforcement itself. And here is a great oddity. The people's attitude toward a law, that is, their own spontaneous conformity to the provisions of a given law, is in large measure the product of wise enforcement policies. Of course, once in a while a statute is so inherently unpopular that nobody pays any attention to it no matter what you do about it. But such are rarities. In the vast majority of instances the public attitude toward a law, in the long run, springs from the nature of the enforcement program. And, again oddly, the mass attitude arises not only from the treatment given the mass itself but also in large measure from the treatment given small segments of the mass, *i.e.*, the outlaws and the venturesome. Mr. Average Citizen, who naturally would obey the law, derives his eventual attitude from his observation of the manner in which officialdom treats the outlaw and the venturesome and, of course, the way in which it treats him, Mr. Average Citizen.

Mr. Average Citizen requires that outlaws be treated as outlaws and that intentional but merely venturesome violators be chastised. To gain and retain the respect of the mass of people law enforcement officers must be drastic with the defiant law-breaker. This is one of the basic elements in the high regard in which J. Edgar Hoover is held. The F.B.I. simply does not let up on a known criminal. Sooner or later, somehow or other, it tracks him down, and when it prosecutes it presents the evidence with which to damn. The public believes this, and so the F.B.I. is supported by the people and by the Congress. Take the public gambling situation. You can arrest the little fellows all you please, but you will never get general public support for that law unless you annihilate the big-time outlaw heads of the operation. And, if you

are lenient with these few real outlaws long enough, mass violation of the law will most surely get completely out of hand. If it gets out of hand either the law or the administration has to go.

The second of these features essential to mass respect is that the venturesome fellow be properly punished but not too utterly condemned. Here the public passion for fairness comes into play. The public does not think a violator who is not a defiant one ought to be visited with devastation. But it does think he ought to be chastised promptly.

In the third place Mr. Average Citizen must be treated properly when he finds himself at variance with the law. He sometimes, by inadvertence or misunderstanding or from just plain stupidity, wanders across prescribed boundaries. He ought to be corrected, and he expects to be. As a matter of fact he thinks much less of officialdom if he is not corrected. But to keep his cooperation in continued law observance he must be handled properly. That propriety is composed of elements. I shall not attempt to catalog them but mention four. The first element is firmness. People simply do not like, do not trust, and will not cooperate with wishy-washy, uncertain enforcement officials. The same attitude exists in respect to superior officers in the military service. Men laugh with and perhaps enjoy an officer who glad-hands them, lets them disregard regulations, and is generally a good fellow. They curse constantly a tough disciplinarian. But, when the chips are down and the going is rough, they swear by instead of at the officer who knows what he has to do and does it. General Bradley in his book says that, whereas in every other outfit in the American World War II Armies the men described themselves as belonging to a division or regiment by official number, the men in General Patton's outfit always described themselves as Patton's men. The same was true of Stonewall Jackson. Yet these two generals were the toughest disciplinarians in their respective wars.

The second characteristic essential to the adherence of the average citizen is fairness. For some peculiar quirk in the nature of our people, we do not even like an official who is unfair in our favor. And we dislike even more one who is unfair and adverse to us. The home crowd has no respect for an umpire who cheats a little in its favor. They think he is a bum and will say so. They think an umpire ought to call 'em exactly as he sees 'em.

The third characteristic Mr. Average Citizen requires for himself is courtesy. You simply cannot handle the general public in any way except politely. Even when people have no manners themselves, they demand to be treated with manners. Surly salespeople simply do not get

business. And a surly patrolman will be bedeviled to exhaustion. There is no inconsistency between firmness and politeness. Indeed they are concomitants. The firm man is usually in control of himself, knows what he is doing, and so does it with manners. The churlish fellow is often that way because he is uncertain of himself and attempts to cover his own incapacity.

Another element essential in mass cooperation for law enforcement is simplicity. If you make regulations of mass applicability complicated or phrase them obscurely or abstrusely, people will ignore them. The point was dramatically illustrated on the Jackie Gleason Show last Saturday night. Millions of people heard Jackie conclude a long struggle with his income tax form by saying, "I can't understand it. The heck with it." The audience roared with appreciative laughter. Some people say that certain subjects cannot be covered in simple terms. Well, the Old Testament author did pretty well with the Ten Commandments. The Master's summation of the law is not cloudy even to modern readers. And the authors of the Code of Napoleon were crystal clear in the simplicity of their provisions. I greatly admire the learned gentlemen who compiled the Restatement of the Law, and I frequently cite them. But I sometimes contemplate with misgiving what would have been the course of human history if they had been with Moses on Mount Sinai. Of course, many problems, especially economic and business problems, are inherently complex, and regulations in respect to them must be complicated. But we are now talking about the huge mass of people, and their economic problems are simple. Simplicity is not only desirable but essential if law enforcement is to achieve mass cooperation in obedience to the rules.

In summary, then, to perpetuate mass observance of a law which applies to people generally, the objectives and pattern of law enforcement must be (1) to treat the outlaw with rugged finality, (2) to treat the adventurous trespasser with expensive impositions, and (3) to treat with firmness, fairness, courtesy and simplicity the ordinary fellow who by mistake or mishap strays across permissible bounds.

What happens when law enforcement in these matters fails to cultivate voluntary observance? The law is first laughed at, then scoffed at, then disregarded, and finally destroyed. This is no academic theory. We need go no further than our own lifetime for proof positive. Prohibition was one proof. Price regulation and rationing was another. Strange but true was the situation in respect to two laws that existed side by side, taxes and price control. Tax requirements are the most unpopular of laws. Everybody hates taxes. Price control was a most popular law. Everybody wanted price control in order to prevent the disaster of

unbridled inflation. And yet the administration of the tax laws was such that the Bureau and the Tax Court had the public support to weather every storm, while the enforcement of the price laws was such as to wreck the venture by public uprising culminating in congressional repudiation.

My thesis is that outlaws should be overwhelmed, the venturesome should be chastised, and the unintentional wanderer should merely be corrected. I absolutely reject the proposition that the same offense should always receive the same punishment. No proposition could be further removed from sound law enforcement. Punishment must be designed in part for the offense, but in much greater part it should be designed for the person. Three people each steal a hundred dollars from their respective employers. One turns out to be a five-times-convicted embezzler, recently employed. One is an old employee and a first-time offender, desperate because of family illness and the ensuing expense. One is a youngster who fell among thieves and lost money in a gamble. Are these to be sentenced alike? I venture to assert that no court in the country would do so. No, my thesis of treatment to fit the offender as well as the offense has sound basis in modern criminology.

What has all this to do with taxes? It has everything to do with taxes. The income tax law applies to the great mass of the people in their everyday life. It depends for its very existence upon mass observation. If it should become popular to violate the tax law, the Government could not hire enough agents and enough prosecutors to search out and litigate every violation that would occur. The taxes collected would be but a fraction of those due. This observance can be achieved only by sound enforcement policies. Those policies must be designed for that purpose—the purpose of cultivating mass public cooperation. To pay the full of taxes due must remain popular in all circles. To make it so is the practice of an exquisite art by the tax authorities. You cannot do it by prosecuting every violator or by litigating every dispute.

One more thought and I am through. This tax law enforcement I have been talking about must be by the administrators. It cannot be achieved by the Congress, and it cannot be achieved by the courts. It must be achieved by the Internal Revenue Service. And that Service has the men with whom to do it. That is the place, and they are the men who ought to dispose of tax disputes and tax problems. They know what they are doing. Given support and protection these career people will at one and the same time put more money into the federal treasury and satisfy more taxpayers than is possible to be done by any other group or tribunal. It takes courage at the top, but that is how it can be done.