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PERSONAL FREEDOM IN A TIME OF CHANGE

JOHN V. LINDSAY*

With the publication of *Rights in Conflict*, the assessment of the confrontation between police and demonstrators in Chicago last August, we find ourselves freshly engaged in the momentous issues of civil order and personal liberty that dominated the year 1968.

We are far from seeing the end of this debate. In many respects, it was just this debate—between the power of the state and the rights of the individual—that initiated the American Republic. Today virtually the same contest is going on in new and possibly more dangerous arenas. Witness the summary of the report submitted by Daniel Walker, director of the Chicago Study Team to the National Commission on the Causes and Prevention of Violence, which concluded:

Although the crowds were finally dispelled on the nights of violence in Chicago, the problems they represent have not been. Surely this is not the last time that a violent dissenting group will clash head-on with those whose duty it is to enforce the law. And the next time the whole world will be watching.¹

Yet from the moment of confrontation in Chicago right down to the controversy surrounding the Walker report and its conclusion that the confrontation was, in some measure, a “police riot,” we have seen a reaction among large segments of our population against the “protestors” and in favor of the police. This is a reaction which a careful examination of the facts is not likely to alter.

In short, there is a disposition, fostered in part by the rhetoric of the recent campaign, toward letting the police handle these matters unilaterally—a disposition to equate every kind of illegal, semi-legal, or openly dissident action under the same heading: crime. And there is the growing disposition to believe what is implicit in these attitudes—that it is only the lawbreaker against whom police power is used, that

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1. WALKER, *RIGHTS IN CONFLICT*, xxviii (1968).

the law-abiding citizen will find none of his rights infringed upon because, by definition, he is law-abiding.

It is difficult to combat these popular suppositions—fed, as they have been, by a year of assassination, riots, illegal strikes, and rising crime. We must conclude, those of us who are committed to a proper balance between order and individual rights, what many lawyers and governors of this country have concluded at other periods in our history: as the times change, the stresses placed upon a rule of law that will guarantee individual rights also change. As Justice Frankfurter observed of a “due process” decision in 1949:

Basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.²

The Supreme Court, in particular, has become the focus for modern discontent from those who favor repression. One of the crucial cases was the *Miranda* decision, which required police to inform suspects of their constitutional rights before questioning them. In its wake, we have had two exhaustive studies on the decision's effect. Both of these studies, taken in two large cities, have come to the same conclusion: *Miranda* had no adverse effect on the conviction rate. Either suspects had confessed to crimes anyway, or the police had enough evidence to convict without a confession.

In essence, what we are dealing with is a myth. Like all myths, it exerts an hypnotic power. It takes diverse and often troubling phenomena and phrases them in an assertion, an allegory, a conclusion that needs only the barest resemblance to fact. Our current myth is the simple one that there is a direct connection between *Miranda* and *Escobedo*, or even a decision as seemingly harmless as the one banning prayers in schools, and the slow, terrifying disintegration of a largely urban society. For those who can detect conspiracy, who are victims of what Richard Hofstadter has described as the “paranoid style”

². *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

in American politics, it seems that the courts, far from securing the country, are jeopardizing its stability with their decisions.

Can we counter a myth which is so potent, which explains so much to the average citizen who is uncertain and insecure? I think we can. I think we must believe, and attempt to prove, that American democracy, with its instruments of change and its guarantees of personal freedom, is finally the base upon which real order, desired by all and supported by economic and social justice, will finally stand.

In doing this, we, as lawyers, legislators, and executives, must insist in our day-to-day workings on three principles which underlie our judicial system: first, that there are varying degrees and kinds of lawlessness; second, that the firm basis for the rule of law is voluntary compliance; and third, that the heritage of our legal system is the protection of the individual as he exercises every prerogative given him to protect his own freedom.

Concerning the first principle, what of those acts which are labelled "lawless" and which contribute to the average citizen's sense of a breakdown in social order? By far the most dangerous and widespread lawlessness is that of syndicated crime which, despite an on-going attack by federal, state, and local authorities, continues to prey on those who want to place a bet, make a contact for narcotics, or purchase an expensive car at a very low price. The multi-million dollar business of organized crime, supported by decent wagerers, or hopeless addicts, supported often by those who can least afford it, represents a potent force in American life.

Yet it is the second class of crimes—casual, individual, numerous—which attract more attention. These are the muggings, robberies, and homicides performed under a variety of compulsions which, when reported day after day, create an atmosphere of fear in our large cities.

Finally, and I think most influential to the discontent which has manifested itself in our country, has been the combination of peaceful and militant protests which became almost commonplace occurrences in American life during 1968. We must always keep in mind the variety of these movements, of their members, and of their goals. Arising from early civil rights protests and marches and student dissatisfaction with the war, different groups representing different causes, including of late the reform of American society itself, have commanded our attention. Recently, some of these demonstrations have unfortunately become ends in themselves, obscene, tyrannical, and self-defeat-

ing. Yet, as the Walker Report on Chicago indicated, many protest gatherings are mixed, the motives of the participants varied, and only with superhuman care can the right judgments about threats of violence and use of force be made at the moment of provocation.

Were it not for this last group of the "lawless," there would be little occasion for anyone to protest against a crackdown on crime. But the young, the blacks, those who have initiated the tactics of mass protest and "confrontation" have confused and alienated a majority of the population which, no matter how deep its grievances, would not have chosen large demonstrations as a means to give voice to its dissatisfaction.

A measure of the complexity of this issue—so rightly called "Rights in Conflict"—was given by Justice Black, a man known for his liberal record in the Court. In a recent television appearance, he indicated his own uncertainties about the limits of dissent:

I've never said that freedom of speech gives people the right to tramp up and down the streets by the thousands, either saying things that threaten others, with real literal language, or that threatened them because of the circumstances under which they do it. I've never said that.

Now the Constitution doesn't say that any man shall have the right to say anything he wishes, anywhere he wants to go. That's agreed, isn't it? Nothing in there says that. All right.

It does not say people shall have a right to assemble to express views on other people's property. It just doesn't say that. It says they shall have the right to assemble, if they're peaceable, but it doesn't say how far you can go in using other people's property.³

It is clear, or ought to be, that much must be done to clarify the confusion about "lawlessness" in this country, to separate "crime" into manageable categories and to treat each category with precision.

The second principle concerns compliance with the law. Unless there is a large measure of voluntary compliance in any country, there will have to be a countervailing exertion of police power in order to force compliance. Each time large numbers of people refuse to obey a law, either with the willful intent to commit a crime or because they believe the law is wrong, the hand of the possible oppressor is

3. N.Y. Times, Dec. 4, 1968, at 30, col. 1.

strengthened. It was Jefferson who noted that as government grows, personal freedom diminishes.

The final principle is that the American legal system has grown up, despite its English Common Law roots, as a system free of the paternalism which marked the advancement of individual rights in older countries. The old view of the law, as the noted philosopher of the law, Edmond Cahn, observed, was that the system belonged to the *processors* of the law, while our evolving view has been that it belongs to the *consumers*. Cahn once wrote:

In sum, adopting a consumer perspective involves investigating a transaction, a principle or a concept through observations of the specific human target it touches and the times and occasions when it affects them. One asks concretely, whom does it concern and when, who needs it and why, who uses it and how, who gains from it and wherein.⁴

We must agree with both Cahn and Justice Black that these are the most difficult questions, for the strength of our social order, its very stability, has become every bit as valid a matter for concern as individual liberties. And, as always, a balance must be struck. But such a balance cannot, and must not, be found under conditions of misapprehension about the causes of domestic trouble, or under coercion from those who do not discriminate among "the lawless," who do not realize the dangers of force applied redundantly in the name of order, and who do not grant the individual—the consumer—his full guarantee of due process under the law.

What I have said thus far is perhaps what has been thought before by many who have concerned themselves with the age-old struggle between the merits of individual freedom and the needs of the community. I want to add what I believe to be two hopeful notes.

In the past few years, a growing number of young lawyers have turned away from the relative security of private and corporate practice to counsel the poor, to participate in direct pioneering programs for community self-help, or to take on a host of other tasks which, if they are to be well served, require the discipline and background of men trained in the law. It is to be hoped that this tendency will continue and that in the future young lawyers will find political activity an even more attractive and rewarding undertaking.

4. CONFRONTING INJUSTICE: THE EDMUND CAHN READER 397 (L. Cahn ed. 1966).

Equally as fundamental, it is to be hoped that the interest which will surely drive a new President and new Congress into the issues of order and justice will lead them to help those of us in the cities to improve the quality of our police departments. Better training and newer equipment and procedures—these are the only means we have to insure that when the exercise of force is necessary, it will be minimal, highly professional, and humane.

Finally, none of us can be content with less than disinterested professionalism at every level in the maintenance of the law if we hope to see the boundaries of justice expanded without destructive upheaval. Our experience of the last year has shown us that the remarkable resiliency of the American Constitution is not unassailable. Violent confrontation in particular has affirmed an observation made in 1928 by Justice Brandeis in his dissent from a Supreme Court decision which upheld wiretapping:

Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.⁵

We dare not forget this. Those of us who believe in this country ought to join the raging debate and begin to speak in support of that law and that kind of order which has kept America vital for almost two centuries.

The basic law of this land guarantees the right of free speech and peaceable assembly, in time of crisis and of tranquility.

American law and our legal order presumes a man innocent until proven guilty; it insists that punishment be imposed in a court by judge and jury, not on the street by armed officers.

The Constitution provides that the law shall be made and changed only by the elected representatives of the people assembled in the legislatures, and not by those who take the law into their own hands.

Let us remember this heritage of law and order—and the heritage of liberty that we have built for ourselves and our children. It is a foundation that has served us too well and too long to be destroyed now.

We must never forget how this great nation came all this way—how hard we have fought to achieve equal justice under the law, how long

5. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

we have had to struggle to develop an order which protects individual rights and permits dissent. And we must never forget that we must go on from here, that there is much work to be done.

For if we forget, we will have security, and we will have order. What will be missing is liberty. What will be missing is the quality which sets the life of the free man so far above the life of the slave.