OBSERVATIONS ON MODERNIZING DETECTIVE OPERATIONS AND CONFRONTING INJUSTICE.

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Here on this continent, and here in this country, the Fourth Amendment to our Constitution prohibits "unreasonable" governmental interference with the fundamental facet of individual liberty, which provides, for the right of the people to be secure in their persons, houses, papers, and effects. The element of freedom of speech prevails in our form of government, unlike the philosophies of totalitarian regimes.

It is a fundamental principle of our constitutional scheme, that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker.

For nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

It is disquieting in this land of ours when an individual policeman, through carelessness, or ignorance, or in response to the pressure of events, seizes a person or conducts a search without compliance with the standards prescribed by law.

It is even more disturbing, when law enforcement officers engage in unconstitutional conduct, not because of their

individual error, but, pursuant to a calculated institutional policy and directive.

The soon to be published American Bar Foundation Survey of the Administration of Criminal Justice, reflecting a recent study of criminal law administration in three major cities, show that the basic problems in this field remain basically unchanged. Some of the main findings include the wide discretion police officials have in enforcing the criminal law. The survey raises questions concerning the objectives involved in the police exercise of discretion. Another finding of the survey shows the autonomy of law enforcement agencies, raising questions about the responsibility of law enforcement "authority" itself. A related finding discusses the fact that achieving a high conviction rate is not necessarily the central aim of criminal law administration, raising questions as to its other purposes.

These findings generally correspond to those made 35 years ago by the Wickersham Commission and two years ago by the President's Commission on Law Enforcement and the Administration of Justice, which reported it was difficult to bring about fundamental improvement in the administration of criminal justice.

On the surface it seems to be a simple problem: more crime, more law enforcement. But it is not that simple. It is true that many of our police forces are understaffed, undertrained and underpaid. There is no doubt that in any case we need better law enforcement machinery and better law enforcement. But we also need to know more about the causes of crime, and we need to do more about the rehabilitation of criminals, for the two are inseparable. We must speed up the procedural aspects of our system of criminal justice; we must reduce delays between arrest and trial; we must reduce the length of trials; we must reduce delays between conviction and the completion of appeals. In the words of Chief Justice Burger: "We must make the system work. Justice means fair, honest and speedy determination of issues for both sides of the issue whether it be a civil or a criminal case." Such a reform, which would require little or no substantive change in our fundamental law, can be accomplished expeditiously if we put our minds to the problem with resolution and determination, coupled with a sense of urgency.

Certainly one of the most serious responsibilities that faces police personnel is to resist popular pressures, produced by public fears of the mounting crime rate, simply to launch a counter-offensive wholly unconcerned of the rights of the individual.

But that is not the primary issue. What is dividing Americans so badly from one another is the diagnosis and remedy too many of us seem ready to apply.

We have come to be enthralled by simplistic solutions which promise, but cannot deliver, a speedy end to crime; which proclaim that a greater use of naked force will restore domestic peace; and which hold that we can guarantee the safety of our future by denying the lessons of our past and the heritage of the Bill of Rights.

We would face a terrifying dilemma if these assumptions really reflected the truth. We might then have to choose between the random terror of the criminal and the official terror of the state. We might then have to concede, openly and candidly, that The Great Experiment in self-government died, the victim of violence, before its 200th birthday.

But we need make no such concession. For all the certainty of those who preach repression, it will never be an effective weapon in the battle against crime or violence. At best, it can only be a temporary sedative for the fear disorder breeds. The real struggle will be long and hard. It will require compassion and patience as well as determination and perseverance. It requires, also, the police's recognition that neither Supreme Court decisions nor civilian governmental restrictions against shooting looters are not responsible for the growth of crime and violence.

Does it help, for example, to gun down a 15-year old boy because he was looting a store? The men who run our police forces--the men who bear the brunt of the fight against crime--do not think so. According to a survey by the International Association of Chiefs of Police, the overwhelming majority of ranking officers in cities hit by rioting believe that deadly force should be used only as a last resort--in the face of a direct, immediate threat to life.

This reflects more than compassion. It also reflects a strong belief that more force would spawn only more violence; that more innocent lives, both police and civilian, would be lost; and that the overriding goal, restoring order in the streets, would be lost.

This was one of the major lessons of the bloody summer of 1967. It was one of the major findings of the Commission on Civil Disorders.

Many police officials, without a showing of statistics to substantiate the position, report through newspaper sources, and television exposure that the courts are coddling criminals; that the rights of suspects are being placed above those of society; and that, as a consequence, the crime rate is increasing.

What are the facts? Since the Miranda decision--which required police to inform suspects of their constitutional rights before questioning them--we have had two exhaustive studies on this decision's effect. Both of these studies, taken in two large cities, have come to the same conclusion; there has been no discernible effect on the conviction rate.

Either suspects have confessed to crimes anyway, or else the police had enough evidence to convict without a confession.

The policeman's real handicap is not the fact that courts today are implementing the Bill of Rights but that he is restricted by archaic technology. The capacity to deal effectively with more crimes lies not in force or deception but in new tools; voice prints, computerized information centers, single-digit fingerprint files. Our police officials also need the funds to hire and equip the men they need to prevent and detect crime.

And while it is true that the national crime rate has increased since recent controversial court decisions, it was also increasing before these cases--up 63% in the '50s over the '40s. It was increasing a hundred years ago, when a national magazine called the crime rate "shocking." It has been increasing because of the complex pressures and forces which drive men to crime, not because the Supreme Court has enforced our Constitution.

Thirty-five years ago, the Supreme Court was accused of placing property rights above other rights of the citizens.

Today, it is attacked for placing the rights of those accused of crime above the rights of the citizens to live under law and order.

But controversy is nothing new to the Court, which deals, as it has since the earliest days of the Republic, with the most difficult, the most baffling problems of a complex society. There are no easy answers.

There is much, then, that is simply irrelevant in today's frantic calls for repression. There is also something dangerous. For, what happens if we begin to yield to this kind of demand for "law and order"? What happens if recent Supreme Court decisions are overturned, if police are ordered to arrest without any restraints on their conduct, or if peace officers are instructed to shoot looters? What happens if, after this victory for "law and order," we find--as we will--that the crime rate is still going up, that the streets are still not safe, that more and more lives have been lost, and that America is being divided into armed camps?

The answer, I am afraid, is that these defeated hopes will escalate into new and more dangerous demands. We see now the consequences of unfulfilled promises of another kind: look to the angry streets of the ghetto, where some have simply abandoned hope of peaceful progress and preach violent insurrection. We might well see this process and preach violent insurrection. We might well see this process repeated among white Americans, who would call for further abrogations of fundamental legal rights.

The best advice I can offer to you men who are in command positions in your departmental detective divisions, is to educate yourselves and regularly communicate your policies and proposals to your staff members and officers at the patrolman level. Any police officer who seeks to lead his department effectively must regularly keep pace with the law and enforce the law. Do not adopt the attitude that only parts of the law will be enforced, and those aspects of the law dealing with individual rights of persons being investigated or suspected of wrongdoing should be ignored.

Each department should have a full time legal advisor, a lawyer who is an experienced individual in the criminal law and its processes and practical application at the field level. For those of you in police department operations unable to hire such a professional staff member, should insist that your local prosecutor make available to your department, trained prosecutors who are able to inform investigating detectives of the rules of law which will better insure properly prepared cases. This will lend itself toward effective prosecutive action and lessen the risk of violation of the law and the loss of a conviction because of police action, inaction, or error.

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

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 framework and a foundation which has served us too well and too long to be destroyed now.

Let us remember, too, what our adversaries have taught us. We have heard loud cries this year that we should insure our safety by placing bayoneted soldiers every five feet, and by running over nonviolent demonstrators who sit down in the streets.

You can now see the kind of society that would be. Look to the streets of Prague, and you will find your bayoneted soldier every five feet. You will see the blood of young men--with long hair and strange clothes--who were killed by tanks which crushed their nonviolent protest against Communist tyranny. If we abandon our tradition of justice and civil order, they will be <u>our</u> tanks and <u>our</u> children.

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 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.

Perhaps some would then look at criminal law and demand to know why we need a unanimous jury vote to convict a person of a crime? Why not declare a suspect guilty if he won't talk? Why not cast aside the privilege between clients and lawyers, between confessors and priest? And why presume a man innocent until proven otherwise? If the police arrest someone, isn't he probably guilty anyway?

What all this suggests is an old truth: that once the road to repression is taken, it is hard--very hard--to turn back. Each new loss of liberty, as it fails to bring instant peace, brings down a call for abolition of another right, until the most brilliant document for the protection of citizens ever conceived becomes a shell--while crime and violence go on.

We have already seen this process at work in this country. Many citizens have equated individual criminal acts and outbreaks of ghetto disorders with noisy but peaceful demonstrations in the streets. They have begun to assume that the exercise of

a constitutional right is no different from a crime or a riot--if those exercising that right happen to dress in unorthodox fashion or hold disagreeable beliefs.

Certainly it is a matter of concern when Americans find the ordinary channels of discussion and decision so unresponsive that they feel forced to take their grievances to the streets. And surely some who demonstrate are thoroughly objectionable, seeking confrontation and hoping for a brutal response to win sympathy.

But this is exactly why those who uphold the law must be wiser and calmer than those who seek to repudiate it. It is exactly why violent suppression of those who use--and seek to abuse--constitutional rights will, in the end, only increase the likelihood of more disorder and more conflict. It was, after all, a mob which taunted, jeered and physically provoked an armed force on our soil into what we now call the Boston Massacre--the British "over-reaction" we now regard as an assault on ideas and freedom as much as on people.

I do not minimize the dilemma that confronts us.

Nor is it a question of taking the wraps off the police. On the contrary, it means holding your personnel to a far stricter standard of conduct, appearance, deportment and discipline than now obtains in most American cities. It is a sad commentary on local police administration that in virtually every recent civil disturbance the relatively untrained National Guard has often displayed far better manners, self-control and discipline than the police.

The right to dissent is one of the precious assets of a democracy. It is the safeguard of minority rights and the guardian of our liberties. The guarantee of domestic peace is an inherent constitutional right, and a principal obligation of the state.

We have made mistakes. We have had difficulties. But we have shown that a well-trained, efficient police force can protect both the rights of the demonstrators and the peace of the city.

In spite of this evidence, some argue that the only way to insure peace and order in a city is to restrict demonstrations. What is next? Shall we keep order by refusing men the right

to hold peaceful meetings in large cities? Shall we uphold the law by suppressing controversial newspapers? Shall we forget what history has always taught us: that those who suppress freedom always do so in the name of "law and order"?

We dare not forget this. Those of us who believe in this country had better 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 following are examples of recent decisions of the Supreme Court, which should have been implemented in police operations throughout the country months ago. However, it is evident that the application of these principles of law at the front line level, in the day to day operation of the detective divisions throughout the States, is not being applied. As a result, the effectiveness of your departmental operations is being lessened.

In January 1969, in the case of Spinelli v. United States (393 U.S. 410) the Supreme Court laid down a fuller explanation of the proper conditions for issuing a search warrant than was given in Aguilar v. Texas, 378 U.S. 108 (1964).

In the Aguilar case, a search warrant was issued on an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were hidden in the place to be searched.

The Court held this inadequate on two grounds: First, the affidavit failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the conclusion that the premises contained narcotics, and, second, the officers did not support their claim by stating their reasons for believing that the informant was "credible" or that his information was "reliable".

In the Spinelli case, the affidavit that authorized the search stated in detail that the FBI had kept track of petitioner's movements for five days, that he was seen traveling from Illinois to Missouri, had parked his car in a lot used by residents of the apartment to be searched and had been seen entering and leaving the apartment. The affidavit went on to specify that the apartment contained two separate telephones, that the petitioner, Spinelli, was known to the police as a bookmaker and gambler, and that a

"confidential, reliable informant" had stated that the petitioner was operating a handbook in the apartment.

Spinelli was convicted under 18 U.S.C. §1952 of traveling from Illinois to St. Louis, Missouri, with the intention of conducting gambling activities illegal in Missouri. He contested the validity of the search warrant at every step of the proceedings, but the Eighth Circuit ultimately held it valid.

The Supreme Court reversed and remanded, speaking through Mr. Justice Harlan. The Court laid down a test for determining the existence of probable cause for the issuance of a warrant in cases where an informer's tip is a necessary element. First, the Court said, the tip must be weighed against the Aguilar standards, and if that proves it to be inadequate, then the other allegations that corroborate the hearsay information must be considered.

Applying the test here, the Court said that it was clear that the informer's information was not enough to support issuance of the warrant--there was no sufficient statement of the circumstances from which the informer

concluded that Spinelli was running a bookmaking operation. There was no suggestion of criminal conduct in the fact that the apartment to be searched had two telephones, the Court continued, and the fact that Spinelli was "known to be a gambler" was a mere assertion of police suspicion.

The Court contrasted this case with Draper v. United States, 358 U.S. 307 (1959), where the informer stated that Draper had gone to Chicago by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. There, the informer also described with particularlity the clothes that Draper would be wearing on his arrival in Denver. "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way", the Court observed.

Mr. Justice White wrote a concurring opinion which pointed out that if an affidavit rests on hearsay the informant must either declare that he himself saw facts alleged or that his information is hearsay and there is good reason for believing it.

In April 1969, the case of Davis v. Mississippi (394 U.S. 721) the Court held that fingerprints taken while a suspect is being illegally detained may not be admitted into evidence. So holding, the Supreme Court has reversed the rape conviction of a 14-year-old Negro youth in Meridian, Mississippi.

The rape occurred in the victim's home on the evening of December 2, 1965. The victim could give no better description of the assailant than that he was a Negro youth. The police interrogated a number of Negro youths and, without warrants, took at least twenty-four of them to headquarters, where they were questioned briefly, fingerprinted and then released without charge. One of those brought in was the petitioner, who had worked as a yardboy for the victim. He was questioned several times later, and on December 12, the police drove him ninety miles to the state capital and confined him overnight in the Jackson city jail. He was returned to Meridian on December 14 and again fingerprinted. Those fingerprints

were sent to the FBI along with those of twenty-three other Negro youths. The FBI reported that the petitioner's prints matched those taken from a window in the victim's home.

Petitioner was indicted and tried for the rape, and the fingerprint evidence was admitted over his objections that it should be excluded as the product of an unlawful detention. The Mississippi Supreme Court sustained the conviction.

The U.S. Supreme Court reversed, speaking through Mr. Justice Brennan. The Court began by rejecting a suggestion that fingerprint evidence, because of its trustworthiness, is not subject to the prosecriptions of the Fourth and Fourteenth Amendments. The court held, "...illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof". The Court had little trouble in deciding that the detentions at which the two sets of fingerprints were obtained were illegal. The December 12 detention was based neither on a warrant nor on probable cause the Court said, while the earlier detention on

December 3, during the "investigatory" stage of the case had no better legal standing.

A footnote to this opinion suggests that, since the victim had made a positive identification of the petitioner, there now exists ample probable cause to detain him and take his fingerprints.

The validity of a search incident to an arrest was the issue in a decision handed down in June 1969 in the case of Chimel v. California (395 U.S. 752). The Court held that such a search must be limited to the person arrested and to the area within his immediate control--that is, the area from which he might gain possession of a weapon or destructible evidence.

The case involved a Santa Ana, California, man who was arrested in his home under an arrest warrant for burglary, assumed to be valid for the purposes of this case. Although they had no search warrant, the arresting officers searched the arrested man's entire three-bedroom house, including the attic, the garage and a workshop.

The police found and seized a number of items--coins, medals and tokens--that they suspected had been stolen in a coin-shop burglary that they were investigating. The seized items were admitted into evidence at the trial of the arrested man, and his conviction followed.

The opinion of the Supreme Court reversing was delivered by Mr. Justice Stewart. The Court began by tracing the "shifting constitutional standards" dealing with search incident to arrest from 1914 to the present. The Court severely limited Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950), which upheld the right to search without a warrant the place where an arrest is made "in order to find and seize things connected with the crime". This rule had never had unimpeachable authority, the Court pointed out, since it rested, as Justice Frankfurther once put it, on a hint "loosely turned into dictum and finally elevated to a decision".

The Court declared that a search warrant is not "lightly to be dispensed with" and warrantless searches made during an arrest must be strictly limited to those that are necessary for the safety of the arresting officer and to prevent concealment or destruction of evidence. This meant that only the person of the arrestee and the area "within his immediate control" can be searched, and that area was limited to that from which the arrested person might gain possession of a weapon or destructible evidence.

There was no comparable justification for the search of the other rooms of the house in this case, the Court said, or for that matter for searching all desk drawers or other closed or concealed areas.

Mr. Justice Harlan wrote a concurring opinion that pointed out that the Court's ruling might have severe effects upon state officials who might not be able to administer the greatly expanded warrant system the court ruling will require. This was another result of the "incorporation doctrine", the opinion declared, which

frequently imposes the dilemma of choosing between vindicating sound Fourth Amendment principles at the expense of state concerns or diluting the Bill of Rights so as to leave some elbow room for the states in their methods of enforcing criminal law.

Generally, the courts give the police the benefit of the doubt when they first get a search warrant. So, develop a procedural policy in your police operation which will insure compliance with the law. If you have time, get a warrant. If you are in doubt, get a warrant. If you are not going to search or seize immediately in the person's presence, get a warrant.

As a final example of the progress of the law involving Miranda warnings, the United States Court of Appeals for the Seventh Circuit in July 1969 citing Orozco v. Texas, 394 U.S. 324 (1969) ruled that Internal Revenue Service personnel must give taxpayers under investigation the warnings required by Miranda, 384 U.S. 436 (1966), when they focus on them for possible criminal prosecutions.

In the case before the court the Government admitted that much of the information on which it based a prosecution for failure to file income tax returns was obtained from the taxpayer during interviews after IRS agents had failed to warn the taxpayer of his constitutional rights to remain silent and to have the assistance of counsel. The Government contended, however, that Miranda did not apply because the taxpayer was not in custody when the interviews were held and was not under coercion to answer questions or provide information.

The Court of Appeals for the Seventh Circuit turned down these arguments. While there was a factual situation of in-custody questioning in Miranda, the court said: "We cannot accept an interpretation of that decision which would restrict the implementation of the Court's overriding concern with the opportunity for intelligent exercise of constitutional rights to interrogations in police stations. Indeed, the opinion makes clear that the privilege against self-incrimination is imperiled when one 'deprived of his freedom of action in any way' is subjected to interrogation

without being apprised of his right to remain silent, the consequences of a decision to forgo that right, and the right to the presence of an attorney, retained or appointed, to assist in making that decision."

The court pointed out that the Supreme Court recently applied Miranda to the questioning of a suspect in his own bedroom when it appeared that he was not free to leave as he pleased, citing the case of Orozco v. Texas, 394 U.S. 324 (1969).

"Our conclusion", the court declared, "is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division (the police arm of the Internal Revenue Service). We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind."

The court gave its decision only prospective application because of the fact that the holding "represents a departure from the present state of the law and a new implementation of the Miranda policy".

The proper interpretation of the many opinions being developed throughout the country and how the reasoning of the law applies to police operations should be the subject of constant training to policemen, especially those of you in command positions in your respective detective division operations.

I urge all of you to become better informed police officers and assist your fellow officers in effective training programs utilizing lawyers trained in the application of law to the practical aspects of good police work. A lawyer's training and legal application of insight to police problems, can best insure prosecution-cases which will be in conformity with the law and withstand the full impact of testing in the courts. The validity of the arrest, interrogation, and related police efforts will be upheld

if you conform your conduct to the requirements of law.

It is your professional function to conduct an affirmative and objective investigation of all the facts and to pursue the prosecutorial effort to the best of your ability. The better the training the more effective men will be in law enforcement.

I can assure you of this: To the best of my knowledge, no idea has been put forward, no insight has been offered and no experience has been cited to repudiate or even to qualify the basic truism under which we have lived and prospered--that the lawful society is not only the best society but the only hope of mankind; and I can assure you that there remains no higher calling and no higher responsibility than the devotion of one's life to the sustaining and the advancement of the rule of law.

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