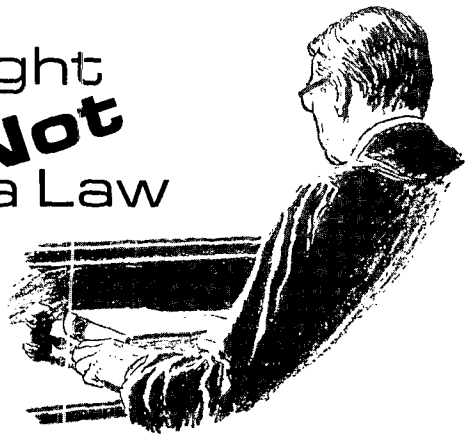
There Ought Not to be a Law



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PREMIER GEORGES CLEMENCEAU of France is supposed to have remarked, probably out of exasperation, about Woodrow Wilson's peace settlement proposals after World War I: "That man Wilson has fourteen points when God Almighty had only ten." Clemenceau's sentiments probably have been shared by generations of students who have had the onerous task of memorizing or trying to remember Wilson's Fourteen Points. It must be admitted, however, that by comparison with the multiplicity of laws, regulations, restrictions, prescriptions, court orders, and what not that Americans live under today Wilson's points were brevity and conciseness itself. Americans live under municipal ordinances or rules set forth by county commissioners, under a vast assortment of state laws and regulations, and under the assertive umbrella of Federal laws and administrative rule making bodies.

A few years ago, a student came to me after class to ask what he had to do in order to go into business. The student was a man, possibly in his thirties, for it was an evening class, and the question was not an academic one. He and another man were thinking of forming a partnership to manufacture components for something or other. Truthfully, I did not know the answer to his question,

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but I tried to be helpful by suggesting what came to my mind. They would need a license, I said, and then they could – well – just go into business.

My innocence and ignorance were exceeded only by my audacity in attempting to answer such a question. What they needed, of course, was a lawyer, or a battery of them, a Certified Public Accountant, a number of political friends in high and low places, an inordinate amount of audacity and tenacity, and a considerable bankroll. In that state, they would need to register the name of the company and, if it was made up, advertise it as a fictitious name in the newspapers. Their location would need to be checked for compliance with zoning ordinances and pollution controls. The fire department would need to inspect the building and its contents. A bookkeeping system would have to be set up that would satisfy the various tax collectors. If patents were involved, they would need to be researched, applications made, or whatever. But why go on, for who could really say all that ought to be done before going into business?

Social Reform

For a good many years now America has been more or less under the sway of the notion that society should be reconstructed, controlled, and directed by government. There are many sources of this notion, but there is no better way to get to it quickly than in the writings of two fledgling reformers of the early twentieth century, Walter Lippmann and Walter Weyl. Lippmann said, "We can no longer treat life as something that has trickled down to us. We have to deal with it deliberately, devise its social organization, alter its tools, formulate its method, educate and control it."[1] Weyl described how it was to be done: "To accomplish these ends the democracy will rely upon the trade-union, the association of consumers, and other industrial agencies. *It will, above all, rely upon the state.*"[2] That, of course, has been what was done, rely upon government, for that was his meaning.

This notion has now been implemented in hundreds, or thousands, of ways. Acts have been passed by legislatures, court orders issued, administrative rules promulgated, and vast bureaucracies created with the object of controlling the behavior of Americans. Massive efforts have been

[1] Walter Lippmann, *Drift and Mastery* (Englewood Cliffs: Prentice-Hall, 1961), p. 70.

[2] Walter E. Weyl, *The New Democracy* (New York: Macmillan, 1912), p. 297. Emphasis added.

made to break up what were called monopolies, to take over and control the money supply, to regulate the operation of businesses, to train the young in the new "sociality," to renovate the cities, to supplement the income of farmers, to subsidize businesses, to license, prescribe the training for, and adopt behavioral policies for occupations and professions, to support labor union organization, to change our behavior by spot announcements on radio and television, to oversee some of the media of communication, to regulate transportation, to integrate the races, to provide "free" goods and services (of the kind they "should" want and use) to indigents, to the young, to the aged, and to whoever might be in need. The state – the government – has been relied upon to pass laws that are wondrous and awesome in their variety and detail with the purported object of achieving the good society.

One might suppose – one from another planet, that is – that all these boons from the state would have inspired in the citizenry such gratitude toward government that they would hasten to obey its will and hold in utmost contempt any who were truculent toward its powers. Not so, however, for lawlessness is rampant, and contempt for those who govern appears to be at a precarious level. The number of criminal prosecutions and civil suits is growing. The newspapers say that what they label as "white collar crime" is increasing more rapidly than any other. There is widespread opinion, informed and uninformed, that the number of people caught and prosecuted is only the exposed tip of the iceberg of lawlessness.

It is common to hear someone say, particularly when a politician is charged with some violation of the law, that what separates him from most of the rest is that he got caught. The number of policemen on the New York City force increased from a bit over 18,000 in 1950 to just under 31,000 in 1972, in Philadelphia from 4,889 to 8,183, in Chicago from 6,961 to 13,125, and in Los Angeles from 4,124 to 7,083. Some resistance to the law is open, as in rioting, obstruction of the police, and flouting of the law, but most of it is more or less covert. The more government attempts to do by law the less it achieves by way of compliance.

Support for the Law

There are many reasons why it is a mistake to rely upon government to direct and control social development, but there are two that are directly tied to law and law enforcement. One is that for

a law to succeed in its object it must be widely accepted and generally complied with voluntarily. Violations need to be exceptional, and even then it is desirable when the criminal knows or accepts the fact that what he did was wrong. (It may be that law enforcement can succeed by continual terroristic tactics, but American reformers, at least, have usually eschewed such methods.) Reformers may have accepted this notion in theory, but in practice they have sought to give their reforms the color of law whether or not there was a consensus behind them.

They have used presidential decrees when Congress or the states would not act. They have made changes by simple act of majorities in Congress rather than getting constitutional amendments. Supreme Court decisions have been used to do what Congress would not. Administrative bodies with only a tincture of popular support have put into effect a vast assortment of rules and regulations, often in defiance of restrictions written into law by Congress. They have proclaimed that court decisions were "the law of the land," when court decisions were only the law of the case. In short, reformers have frequently, if not regularly, ignored the requirement that laws to be effective need general and, at some point in their background, consensual acceptance. It is not enough that some body be found which will proclaim them to be law; whatever is promulgated must be generally accepted as such.

Problem of Enforcement

The other fatal error arises out of the failure to understand or focus attention on what is involved in the enforcement of a law that does not have general acceptance, or, for that matter, the *enforcement* of any law (enforcement implying that there are violators). Law can be thought of in terms that make it noble and majestic. It can be visualized as a classic statue of Justice, blindfolded, on a pedestal, with balanced scales held in the hand. It can be thought of as what is going on when nine Supreme Court justices assemble within marbled splendor to contemplate some case. There are elegant phrases by which we attempt to express our respect for law: "A government of laws and not of men," "The rule of law," or even just plain "law and order." Probably, no one ever put the case for law in more exalted terms than did Thomas Paine when he declared that Americans should let the world know, "so far as we approve of monarchy, that in America *the law is king*. For as in absolute governments the king is law, so in

free countries the law *ought* to be king; and there ought to be no other."[3] Nor should what follows be interpreted so as to detract from the importance of rule by law.

But there is a face of the law which rarely if ever excites admiration or beautifully phrased accolades; it is law enforcement or, to be more precise, what takes place as law is being enforced. There is good and sufficient reason for this. The enforcement of the law is a squalid, sordid, sometimes violent, often brutal, frustrating, discouraging, and brutalizing undertaking. Much of the work of doing it is by the toughest, least sensitive, and more violently disposed of those among us. It is enforced against a motley throng composed of petty thieves, cheaters, losers, violent and disenchanted people, and some who do not differ noticeably from the rest of us. We often think of law enforcement as being what the police alone do, but in fact it includes also the whole process from investigation through the last day of incarceration.

In earlier times, most phases of law enforcement took place in public, some portion of them, at least. Hangings were once public spectacles. When corporal or other forms of summary punishment were widely used, the public witnessed much of it. Until very recently, some states used convicts for grass cutting and other kinds of clean-up work along highways. Nowadays, however, the public rarely gets more than a glimpse at what goes on in enforcement, sees someone stopped on the highways, may view a trial (but few do, and only a few can), or see prisoners being transferred from one place to another.

Laws Proliferate when Enforcement Is Hidden

The practice of passing laws to achieve all sorts of purposes has increased in almost direct proportion with the decline of public contact with the grisly aspects of enforcement. It is easy enough to pass laws, or accept its being done, for all sorts of things if we can succeed in averting our gaze from what is entailed in enforcement. Those who say that reliance upon government is reliance upon force are right, of course, but it is not simply a reliance upon nice, clean, hygienic force, it is reliance also upon distempered, petty, mean, and brutalizing force.

A book has lately come to hand which makes these points authoritatively and in appropriate detail.

[3] Thomas Paine, *Common Sense and Other Political Writings*, Nelson F. Adkins, ed. (New York: Liberal Arts Press, 1953), p. 32.

The book[4] was written by Judge Lois G. Forer of the Court of Common Pleas in Philadelphia. The Court of Common Pleas in Pennsylvania is at the same level as district courts, superior courts, and circuit courts in most other states. That is, it is the court of origination for the trial of most criminal cases and many civil suits. The judge in such a court is the fulcrum of those pressures which arise in law enforcement. The court is, to use another figure of speech, the main sieve to which most of those accused of some violation of the law must come. Those who go through the holes of the sieves, which is most of them, are either placed on probation or go to prison. Those who do not are set free.

No Time for Reform

Whether hers is a court of justice or injustice Judge Forer does not, indeed, as she describes it, cannot, know. She is too busy. There are too many cases. There is too much that there simply is not time to find out. She is inundated with cases, and back of those are many, many more that should have had an earlier hearing. On a typical day in court, she had three extradition cases, four applications for bail: one accused of rape, a fourteen year old accused of the murder of a child in a street rumble, a heroin addict who killed three strangers, and a middle-aged man accused of sodomy, a petition for a second psychiatric examination by a lawyer for his client, an application for an extension of an extradition warrant, and, as she summarizes, "The parade of accused muggers, robbers and thieves continues."[5] Each day, it seems, is its own slice of hell for this sensitive judge. She says:

> At the end of a day in which as a judge I have taken actions affecting for good or ill the lives of perhaps fifteen or twenty litigants and their families, I am drained. . . .
>
> Was Cottle really guilty? I will never know. Fred made bail. Will he attack someone tonight or tomorrow? One reads the morning paper with apprehension. It is safer for the judge to keep them all locked up [the accused, that is, not the newspapers]. There will be an outcry over the one prisoner released who commits a subsequent offense. Who will know or care about the scores of possibly innocent prisoners held in jail?

Here is a description from another source of how harried a courtroom may be. In this instance, it is a court located in Brooklyn and is a division of the New York City Criminal Court:

[4] *The Death of the Law* (New York: David McKay, 1975).

[5] *Ibid.*, p. 92.

Pleas were taken. Decisions were made on whether the accused should be held for grand jury action. Bail was set. There were some brief trials. Probation reports were heard. Sentences were imposed. The courtroom was crowded, with constant flow and eddy of patrolmen, detectives, lawyers, courtroom attendants, district attorney's men, complainants, people freshly arrested, and people brought in from jail. . . . The entrance to the courtroom was a pair of swinging doors, and they banged back and forth like a corner saloon on Saturday night. Among the constitutional guaranties being violated was that of public trial. The public was there all right, but it could not witness the trial; the noise made what was going on at the bench inaudible to all but the participants. The woodwork was scarred. The plaster was peeling. It was a huge and grimy bargain basement of the law. . . .

. . . The judge worked on his feet, pacing back and forth and handing out justice right and left, probably with what was, under the circumstances, a good deal of accuracy. But the circumstances were wretched, and they made real justice impossible....[6]

But it is not only by harried judges in dingy courtrooms amid a cacophony of sounds that injustice takes place. Judge Forer maintains that the whole system of administration of justice is ringed about and shot through with injustice. It begins with the policeman, sheriff, patrolman, detective, or however the law enforcement officer may be styled. The policeman, Judge Forer points out, "acts as spy, militia, judge and jury,"[7] to which might be added, accuser, prosecutor, defender, and executioner. He can, and probably must, frequently look the other way when some crime is being committed, adjudging it to be too petty to bother with, too difficult to prove, or for whatever reason or unreason may lead him to ignore it. Or, he may, because of his mood or the pressures of a quota system or because his shoes hurt his feet or he had a quarrel with his wife, bring in everyone he suspects of wrongdoing, making for unevenness, hence injustice. He is equipped with gun, blackjack or nightstick, and handcuffs, and may use whatever force is deemed necessary to apprehend and subdue miscreants. Summary justice is sometimes dealt out by fist, by stick, by boot, or by gun. All of this he may do, of course, in the line of duty.

But let us stick as close as may be to the norm. Ordinarily, the law enforcement process gets underway with an arrest. No violence may ever occur in a particu-

[6] Charles Rembar, *The End of Obscenity* (New York: Random House, 1968), pp. 213-14.

[7] Forer, *op. cit.*, p. 180.

lar case, but from that point until the accused is finally set free compulsion is at work. The arresting officer may have seen the offense, may suspect one has been committed, may be acting on information provided by someone else, or may be serving a warrant issued by a court. In any case, a halt, and, for those unaccustomed to it, a dramatic halt, is brought to normal life. The accused is separated from family and friends, taken away from job or position and whatever else sustains him in dignity and self-esteem, brought bound, as it may be, to be searched, interrogated, photographed, fingerprinted, and locked up in jail. He has become an alien, to at least some degree, from society, and is surrounded by the paraphernalia of shame.

Everyone knows, of course, that a man is innocent until proved guilty, that a presumption of innocence, as it were, shields him from punishment and disgrace. What everyone knows, however, is in this instance simply not true. The presumption of innocence is a venerable and noble concept of Anglo-American jurisprudence, admirable and correctly highly valued. But everyone, and especially anyone contemplating getting a law passed, needs to understand that it is a concept with only a most limited application. The punishment of a man who has been arrested has already begun, whether he is guilty or innocent. There is only one time and one place in the whole extensive process of law enforcement where a presumption of innocence is supposed to prevail according to our law, and that is during the trial in a courtroom after the accused has pleaded his innocence. At all other times and places there is a presumption of guilt, most likely, and it probably could not be otherwise.

Whatever Happened to the Presumption of Innocence?

It needs to be understood, too, that most of those who come into the toils of the law never receive the benefit of a presumption of innocence. The arresting officer almost certainly believes him to be guilty. It is much easier for him to assume guilt. If he *assumed* innocence (to get away from the terminology of the law, which speaks of presumption) it would mean that he was taking away the liberty of an innocent man, that he was doing something unjust and even probably illegal. Jailers and all those who have to do with holding people in custody need to believe them guilty for like reasons.

Little enough is known about what takes place in interrogation, but it is safe to assume that if an

arrest has preceded interrogation the interrogator is likely to assume that the accused is guilty. Certainly, any interrogation proceeding under any but the most respectful and polite circumstances will have an underlying assumption. Quite often, the accused will be asked questions which place on him the burden of proving that he is innocent. Guilt is implied by any pressure which the interrogation applies.

The judge who sets bail cannot assume innocence at that point, for if he were innocent it would be improper to require any bail for him to be loosed. The most extensive injustice arising from this tacit assumption of guilt occurs, however, for those who cannot make bail. They are then held in jail, ordinarily, until a trial is held. Judge Forer speaks of six to eight months in jail prior to trial as if it were commonplace. Circuit Court Judge Richard Kelly testified in this fashion about some of the injustices of lengthy incarceration prior to trial before a committee of the United States House of Representatives. He did not assume that the jailed person might have been innocent, which may have been revealing or only indicated that his testimony was pointed in a particular direction because the committee was investigating prison conditions. He said:

> Most of the people that go to jail are poor. . . . They are young, frequently they have wives and children, and if you put them in jail and you keep them there for 4 or 5 months while you are processing their case, the refrigerator is repossessed, they lose their car, they may lose their wife. . . . And when you finally turn that man loose . . . it would be a hopeless situation for a strong person, and it is just completely hopeless for a weak person.[8]

Cf conditions in jail, he noted:

> So there is a lot that can be done in that area about expediting the cases, because a lot of tragedy takes place in these county jails. It does in my circuit. There are sexual assaults and other types of physical assaults. There is nothing in the way of recreation or relief for these people. . . .[9]

When a grand jury is brought into play prior to the trial, there may be a modicum of presumption of innocence, but it is only a modicum. The members of the grand jury hear only one side of the evidence, that presented by the prosecutor, and he may present only so much as he judges to be most beneficial in making his case. The grand jury is called on only to

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8 *Hearings Before the Select Committee on Crime House of Representatives*, I (Washington: U. S. Government Printing Office, 1972), 251.

9 *Ibid.*, p. 239.

determine whether or not there is sufficient evidence against the accused to warrant a trial; it determines neither guilt nor innocence.

Most criminal cases are never tried. Judge Forer says:

> Few defendants are able to survive, financially and emotionally to utilize all the procedures which due process mandates. If any appreciable number of persons did exercise all these rights, refused to plead guilty and demanded a trial, the entire system of criminal justice would grind to a halt. Approximately 80 to 85 per cent of all accused persons plead guilty to some charge and avoid trial.[10]

But this by no means includes all who are accused of a crime who are never tried. Some are judged mentally incompetent or are otherwise unable to defend themselves and are not tried. Many, many others avoid trial by forfeiting fines, paying off their accuser and getting the charges dropped, or skipping bail. Indeed, the prosecutor may decide not to prosecute at some stage after arrest but before trial, and the charges will be dropped. For all these people, no presumption of innocence may have been brought to bear in any significant way.

But, it may be objected, if one has forfeited bail, paid off his accuser, skipped bail, or pleaded guilty, he must have been guilty indeed. It does not follow, though in the eyes of the law it may be the only possible conclusion. Trials are costly, and the outcome is always uncertain. Even those who plead guilty may be innocent of the crime they plead guilty to, or of any crime for that matter.

Guilty pleas frequently result from plea bargaining. The accused agrees to plead guilty to a lesser charge, and he may hope or have been told that he will receive a suspended sentence or fine rather than the extended prison sentence that awaits him if he is tried and found guilty. It takes no great amount of sophistication to understand that a guilty plea is a favor to the prosecutor, probably to the judge, and enables the court to get on with its business. To insist upon a trial is to court the wrath of these powerful officials. Would they not be expected to "throw the book at" anyone so obstinate? Would it not be better to please the prosecutor and plead guilty when a man has trouble enough already? In any case, all plea bargaining entails great likelihood of injustice. If the man is guilty as accused but let off on a lesser charge, he has not been punished as the law requires. If he was innocent, whatever penalty he received would be too much.

There are many areas that need

[10] Forer, *op. cit.*, p. 120.

investigation by those who would rely on the state to reconstruct society, but there is one area that is absolutely essential. It is the arena in which law enforcement is completed. It is prison. Those who are convicted of a crime in America today are usually punished in one or more of three ways: by fine, by being placed on probation, or by imprisonment. Imprisonment is the ultimate resort to force that is normally sanctioned in the United States today. The reliance upon government is ultimately reliance upon prisons, for all who resist significantly the decrees of government may be imprisoned.

The Stigma of Prison

Prisons are notorious places, and those who have served time in them have a stigma attached to them. The tales of horror that may be heard from them during any investigation are such that it would be appropriate that the benediction which judges have ordinarily said for those sentenced to execution should be extended to those sent to prison as well. It might go something like this: "You are sentenced to x number of years in prison. May God have mercy on your soul." There is no need here to recount the horrors, for they involve everything from having to eat dog food (as punishment) to beatings to sexual assault to solitary confinement to denial of medical care.

Imprisonment begins with indignities, such as the search of the genital area for contraband, and ends by release with some or many rights curtailed. In between lies loss of liberty, subjection to the commands of others, economic deprivation, deprivation of normal sex, separation from society, and many experiences which are brutalizing in tendency. The use of force unredeemed by love and affection or noble purpose is brutalizing both on those who wield it and those on whom it is exercised. There is a consensus that both the guards and guarded are so affected in prison.

Imprisonment may not be unjust, but there are many injustices entailed in it today. The greatest injustice is one that is rarely, if ever, mentioned. It is the deep divisions that exist over the purpose of imprisonment, divisions that are found among voters, among legislators, among policemen, among judges, among lawyers, among wardens and guards and that afflict the prisoners themselves.

Is the purpose of imprisonment to punish? If so, does the imprisonment constitute punishment enough or should it be added to by incivilities and deprivations not

inherent to prison? Is it the purpose of imprisonment to remove dangerous persons from among us? If so, minimum security prisons are probably a sad joke, and who has certified them safe when they are let loose? Is the purpose to rehabilitate the prisoners?

Now all these may be proper purposes of imprisonment, but if injustice is to be avoided they need to be arranged in a hierarchy to which we can generally subscribe. It is unjust to have one judge punishing and another rehabilitating, one parole officer removing dangerous persons and another punishing, all for the same or like offenses. It is a noble purpose to reform evil men, but the state is committed to justice, and when it embarks on reform it commits injustice after injustice.

How this occurs is told over and over by prisoners. Probably, the most common complaint of prisoners is the inequity in sentencing. Here is testimony on the point by a prisoner at Attica in New York:

> So, what happens? You come to Attica, and then you figure you will get a cellblock with somebody else who has the same crime as you, maybe, and he maybe gets 3 years and I get maybe 20. I get 10, somebody else gets 5. This disparity in sentencing. Certainly some remedy has to be found for the disparity in sentencing of the same identical crime.
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> Down from my cellblock there's a young lad about 25 years old, married, with two children, smoking marihuana cigarettes. . . . That man got 7 years . . . for smoking or delivering some marihuana to an undercover policeman in Jamestown, and he got 7 years for that crime, and the next guy to him got 3 years for first-degree manslaughter. The original charge was murder, and he got 3 years.[11]

Whether the facts were as claimed in this case really does not matter here. They are recited only for impact. Everyone associated with law enforcement today will admit that the differences in sentencing exist and are common. They are the result, mainly, of differences over the purpose of prison. A man might reform himself or be reformed in prison if he thinks he is justly there, but he is unlikely to do so if he is consumed by resentment over the injustice of the sentence in the first place.

There are those who believe that one or another or all aspects of law enforcement can and should be reformed. The movement for prison reform in America is almost as old as the general system of imprisonment is alive and active today. There have been some recent efforts at modifying the bail-bond-jailing system for dealing with persons accused of commit-

[11] Hearings, *op. cit.*, II, 497.

ting some crime. Large expenditures of money are being made to "upgrade" policemen. There is considerable talk and writing about speedier trials. Meanwhile, however, court dockets grow longer, many prisons are more crowded than earlier, and most people accused of crime go through the same unsavory processes as before.

A Harsh Process

This brief excursion into the nether world of law enforcement has not been made, of course, for the purpose of proposing reforms. It has been rather to show that it *is* a nether world, which it has always been so far as the present writer is aware of any history of it. So far as prison reform goes, reformers succeeded some while back in proscribing corporal punishment in prison. Yet, examples still occur of quite brutal physical treatment. The following is from an affidavit by a prisoner at Attica:

> Officer Burns then moved behind me and struck me on the left side of my head. I was then attacked by several of the officers who grabbed me by the throat, threw me down to the floor, and proceeded to kick me in the head, chest, and testicles. A stick was then jammed under my arm, and my arm was completely twisted around. . . . I was then dragged down the floor, pulled by the manacles which were on my wrists and kicked as those officers threw me into a cell.[12]

The trouble with prisons, someone has observed, is the character of the inmates. It might be added that part of the trouble with them may be attributed to the actions of the guards and other personnel. But there is an underlying trouble with all of law enforcement, a trouble which makes it belong to the nether world whatever success may attend particular reforms which can be conceived.

The trouble arises from the use of *force,* a word which is surely not accidentally embedded in law en*force*ment. It is the presence of force which makes it necessary to arrest and confine people accused of crimes, or have them post bond to secure their presence in court. It is the power of the court to take life, liberty, and property which makes men dread to come before it and requires drastic measures to assure their presence, even when these measures necessarily are productive of injustices. The fear of these things naturally enough results in lying, evasion, and hiding out, and such truth as is ever obtained much of it will come by an assumption of guilt.

If men are to be held against their will, there are some inescap-

[12] *Ibid.,* 491-92.

able accompaniments: strict rules, punishments for violators, and indignities. Jails require jailers, prisons require guards, and force is in some ineradicable degree brutal. Prisons do not stay reformed; policemen tend to behave as they always have, and crime and punishment retain their seedy, unsavory, and oft times grisly character. Because, well, because the use of force is man's lowest form of activity.

Even so, law enforcement can have a high purpose. Government is necessary, and that is just another way of saying that there must be a body charged with the exclusive power of exercising force within its jurisdiction. Those who enforce the law need the respect, awe, and even sympathy of the citizenry. Theirs is a difficult, dangerous, and often demoralizing activity which inescapably involves some injustices. The high purpose of law enforcement is to minimize the use of force in society. To that end, it must establish the best approximation of justice possible, given its inherent limits.

Restrict Government to Defensive Force Only

What this means can now be put simply and directly. If government is to minimize the use of force, it must not be the *originator* of force. Government must restrict itself to the *defensive* use of force. The origin of government's exercise of force is the law. The laws must be restricted to defense against force arising from individuals and groups. We cannot rely upon government to transform society, to reform it, remake it, or whatever. When we do, government becomes the originator of force, and, instead of minimizing force it spreads it and makes it endemic. "Social justice," as it has been called, cannot be achieved by government because the more it attempts to do the more it spreads injustices inherent in the exercise of force. Reformers might well wish to make prison more attractive, for the thrust of the general reform effort is to confine all of us within strict rules, provide punishments for violators, and heap indignities upon us.

There used to be a newspaper cartoon entitled "There ought to be a law." It dealt, as I recall, with those annoyances and aggravations which we encounter in our daily rounds. Probably, it was meant to be humorous, though it would make a good study to review the cartoons to see if many of the suggestions have not been made into law today. In any case, the monumental task confronting us today can best be described in the opposite way: "There ought *not* to be a law." Many of the ills afflict-

ing law enforcement today – the huge number of arrests, the crowded jails, the lengthy wait before trial or disposition of cases, the crowded prisons, the lawlessness and loss of respect for the law – are directly attributable to the plethora of laws on the books.

Solutions Other than Laws

That there ought not to be a law against many things is the appropriate conclusion that Judge Forer has drawn from her survey of the state of the law today. She says, in part,

> . . . The overuse of law and legal methods has failed to solve the problems. Instead it has resulted in an endemic contempt for all law. . . .
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> Equal justice under law is, I believe, a goal worth pursuing. It can be achieved only if the legal structure is simplified and made accessible to all people, if the courts are limited to the resolution of conflicts and disputes within their capacity to decide, and if the aim of justice to treat similarly situated individuals equally is adhered to. *The law should abandon its efforts to restructure the economic and social order and modify behavior of individuals.* The limited aim of securing equal justice is a difficult and taxing goal to attain. It is a task sufficient for any single institution. . . . Equal justice cannot be even dimly approximated if law is utilized in an effort to provide all or a major part of the correctives, changes and controls required by our complex and diverse society.[13]

If one may venture to supplement so eloquent a plea, its direction is this: Wherever possible, means should be sought to resolve conflicts, inhibit offenses, and deal with problems without recourse to law. Law should be the last resort, and then only on matters with which it can deal. The law is not suited, for example, to settling labor disputes, to running businesses, to laying down rules for schools, or thousands of other things. All the time spent on cases in which courts are not really competent is time taken away from those who must look to the courts for justice.

There ought not to be a law, then.

There ought not to be a law to govern matters which have their own natural order, as in economics.

There ought not to be a law when other organizations or agencies can deal more effectively with the issues involved.

There ought not to be a law in which government originates the force.

There ought not to be laws with stiff penalties for petty offenses.

There ought not to be laws attempting to reconstruct society.

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[13] Forer, *op. cit.*, pp. 335-36. Emphasis added.

There ought not to be a law fixing interest rates on loans.

There ought not to be a law prescribing box sizes for corn flakes.

There ought not to be a law compelling school attendance.

There ought not to be a law requiring employers to pay women the same as men or men the same as women for equal work.

There ought not to be an antitrust law.

There ought not to be a minimum wage law.

There ought not to be a law prescribing the distance between rungs on ladders.

There ought not to be a law compelling the bussing of children to distant schools.

There ought not to be a law compelling "contributions" to social security.

There ought not to be a law restricting the amount of political contributions.

There ought not to be a law requiring the use of metal pipes for plumbing.

There ought not to be a law. . . .

IDEAS ON LIBERTY

Majority Approval

LIBERALISM realizes that the rulers, who are always a minority, cannot lastingly remain in office if not supported by the consent of the majority of those ruled. Whatever the system of government may be, the foundation upon which it is built and rests is always the opinion of those ruled that to obey and to be loyal to this government better serves their own interests than insurrection and the establishment of another regime. The majority has the power to do away with an unpopular government and uses this power whenever it becomes convinced that its own welfare requires it. In the long run there is no such thing as an unpopular government. Civil war and revolution are the means by which the discontented majorities overthrow rulers and methods of government which do not suit them. For the sake of domestic peace liberalism aims at democratic government. Democracy is therefore not a revolutionary institution. On the contrary, it is the very means of preventing revolutions and civil wars. It provides a method for the peaceful adjustment of government to the will of the majority. When the men in office and their policies no longer please the majority of the nation, they will – in the next election – be eliminated and replaced by other men espousing different policies.

LUDWIG VON MISES, *Human Action*

Adam Smith and the Invisible Hand

EDMUND A. OPITZ

WE CELEBRATE in 1976 the bicentennial of two significant events, the signing of the American Declaration of Independence, and the publication of *The Wealth of Nations* by Adam Smith.

Smith had made a name for himself with an earlier volume entitled *Theory of the Moral Sentiments,* published in 1759, but he is now remembered mainly for his *Wealth of Nations,* on which he labored for ten years. *The Wealth of Nations* sold briskly in the American colonies, some 2,500 copies within five years of publication, even though our people were at war. This is a remarkable fact, for there were only three million people living on these shores two centuries ago, and about one-third of these were Loyalists. In England, as in the colonies, there were two opposed political factions—Whigs and Tories. The Tories favored the King and the old regime; the Whigs worked to increase freedom in society. Adam Smith was a Whig; the men we call Founding Fathers were Whigs. There was a Whig faction in the British Parliament and many Englishmen were bound to the American cause by strong intellectual and emotional ties.

Adam Smith's book was warmly received here, not only because it was a great work of literature, but

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