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PROSECUTORS AND POLICE—THEIR COMMON BOND

STEPHEN P. KENNEDY

The author has been Police Commissioner of New York City since 1955. His appointment as Commissioner climaxed a career of 26 years as a member of the police force. Among his many other accomplishments, Commissioner Kennedy is a law school graduate of New York University and a member of the New York Bar. In fact, his career has been so colorful and his professional reputation so well established that *Time* Magazine, in its July 7, 1958 issue, carried an extensive account of Commissioner Kennedy and his work on the police force of New York City. The present article by Commissioner Kennedy is based upon a speech he delivered in Atlantic City, New Jersey, on July 29, 1958, at the annual meeting of the National Association of County and Prosecuting Attorneys.

Law enforcement functions best when police and prosecutors work in harmony for the public good. Though our spheres of authority in the field of law enforcement are separate and distinct, we still have a common bond: the proper and effective administration of the criminal law.

I would like to think of this meeting of the National Association of County and Prosecuting Attorneys as being in the nature of a law enforcement "Summit Conference," aimed at combatting the national upsurge in crime. The common enemy is that small hard core composed of those who refuse to abide by the rules laid down by society and who demand, often by use of force and violence, unconditional surrender of their victims.

The criminal law attempts to prevent socially undesirable behavior that has been labeled crime by providing sanctions against transgressors. In other words, it attempts to substitute rules of civilized society for the law of the jungle. Year by year, however, we see this concept being thwarted by a growing philosophy that everyone else is responsible for the criminal act but the one who committed it. The evil effects of this pervasive theory of guilt transference on good government must be made manifest to all.

In attempting to bring the violator to justice, law enforcement is at a great disadvantage, as it always is in a democracy. The odds are weighted heavily in favor of the criminal. He can, and usually does, make careful plans before executing his criminal schemes. He selects his own time to strike on a battleground of his choice. Invariably the element of surprise is his. Therefore, as you gentlemen know from bitter experience, few counterattacks can be launched by police or prosecutor until an overt criminal act has been committed. Then the onerous task of tracking down the perpetrator is begun, often without the aid of a witness or a clue. In a large city, such as New York, that might mean any one of some eight million people. Questioning each of them would be a physical impossibility; and even if this were possible, each would have the legal right to refrain from answering questions.

Where we develop information pointing to a suspect, he must and should be accorded the many important legal rights that safeguard him. Before

an arrest can be made, probable cause must be shown. There are also many other restrictions, including those against entrapment and unauthorized searches and seizures to obtain evidence. But what is or is not legally permissible as an investigatory technique frequently turns on hairline court decisions.

Too often the public, and the courts, too, if you please, fail to realize the grave responsibilities and problems that confront the police officer in the daily performance of his duties. He is required by law to preserve public peace, protect life and property, to prevent crime and to arrest those who violate the law. This is a large order.

A recent New York case is indicative of one of the problems encountered by an officer on patrol. A police officer observed a stolen automobile proceeding along the avenue. When the car stopped for a red light, the officer approached the stolen vehicle and ordered the driver out. The driver responded by starting the car in motion and at the same time appeared to be reaching for a weapon at his side. The policeman shot him. The car then veered to the right and struck a pedestrian who subsequently sued the city *and the officer* for damages. He based his cause of action on allegations of reckless and unreasonable conduct on the part of the police officer! Fortunately, an understanding judge appreciated the officer's predicament. Mr. Justice Coleman of the New York Supreme Court had this to say: "Reasonableness is not to be determined in retrospect from the vantage point of the security of a courtroom and with time for taking thought. It must be determined by reference to circumstances almost instantaneous in sequence. And just as 'detached reflection cannot be demanded in the presence of an uplifted knife' so the police officer was not called upon to make nice calculations of the consequence of his act when confronted with an automobile thief attempting to escape who also seemed ready to do him harm. The officer was required to act, and to act quickly, and he cannot be held responsible for all that followed."[1]

Consider another situation. An officer on a late tour observed a man who aroused his suspicions. After searching the suspect, the officer found a loaded revolver in his overcoat pocket and arrested him. This officer had *no actual legal grounds* on which to search the criminal. Had he been wrong in his suspicions, instead of the suspect being a defendant in a criminal action, it might well have developed that the officer would find himself the defendant in a civil or, possibly a criminal, action. On the other hand, if the man were not searched by the policeman (who knew his law) because of the restrictions on search and seizure, and the man murdered one or more persons, what opinion would the community have of that officer? What other course of action was available to a conscientious policemen? And yet we find such language as this in some court opinions: "The officer has no judicial immunity for errors in judgment. He must be right or suffer."[2] In other words, the policeman is expected to be infallible. On the other hand, however, it frequently happens that the learned judges of the Supreme Court of the United States, in reviewing the actions of a police officer, divide by a five to four vote in determining whether he was legally right or wrong. But the policeman must always be right!

In many situations the officer cannot indulge in the luxury of a leisurely consideration of whether or not he is proceeding in accordance with the most minute provisions of the Code of Criminal Procedure and the latest judicial decisions. Should he fail to take prompt, decisive police action, and delay for the purpose of deliberating upon the niceties of the legal problem involved, an innocent person may be maimed or killed. The officer has no margin of error!

Law enforcement officers abhor dictatorial power and the oppressive methods of the police state. They are dedicated to the preservation of our human liberties and to the basic concept that it is the duty of government to assure maximum protection, in an ordered society, with minimum restrictions on personal freedom. The problem that is presented is how to reconcile the opposing desires of the individual for unlimited liberty on the one hand and, on the other, the desire of society for protection from the criminal.

"We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases .... The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty .... Plainly the sheep and the wolf are not agreed upon a definition of the word

[1] Engesser v. City of New York, New York Law Journal, Nov. 21, 1956.

[2] People v. Esposito, 194 N. Y. Supp. 326 (1922).

liberty; and precisely the same difference prevails among us human creatures . . . and all professing to love liberty!" These are the words of Abraham Lincoln, from an address delivered in Baltimore in 1864.

The position of law enforcement is further complicated because of the dual control stemming from our federal system of government.

Prior to 1923, The United States Supreme Court did not disturb state criminal convictions on constitutional grounds except those involving a denial of equal protection of the law because of discrimination in the selection of jurors. Since that time, there has been a gradual increase in the court's willingness to review state criminal proceedings. This has been particularly noticeable in connection with the use of confessions in state prosecutions. And in federal cases the Court has gone the full limit. For instance, in the celebrated case of *Mallory v. U.S.*,[3] the Court reversed the conviction of a rapist solely on the ground that there had been an undue delay in arraignment. Although this case involved a federal prosecution, the handwriting may be on the state courthouse wall.

The language in the *Mallory* case indicates that when an arrest is made, the police are powerless to do little more than to arraign the prisoner before the court. He may be taken to the station house for booking, but your case may be in jeopardy if you ask him any question designed to elicit damaging statements.

Do the courts have implicit faith in the ability of the police and prosecutor to develop sufficient legal proof to obtain a conviction without questioning suspects? The details as to how this clairvoyance shall be accomplished are not readily supplied.

Police and prosecutors welcome guarantees of increasing fairness in the disposition of criminal cases. But there must be a judicial recognition of the fact that there is a responsibility to show fairness to the individual, law abiding citizen whose life, liberty, and property are endangered by the predatory criminal. The potential victim must also be protected by guarantees of fairness in criminal procedure.

In 1949 the Supreme Court of the United States held that the provisions of the fourth amendment of the federal constitution, securing privacy against arbitrary intrusion by the police, are basic to a free society and apply to the states by virtue of the due process clause of the fourteenth amendment. The court, however, explicitly left the states free to admit or exclude evidence unlawfully obtained.[4] The rationale of the position of the majority of states in admitting illegally seized evidence is perhaps best expressed by Judge Cardozo, writing for the New York Court of Appeals 22 years ago when he said: "The pettiest peace officer may have it in his power, through overzeal or indiscretion, to confer immunity upon an offender the most flagitious."[5] However, the Supreme Court of California recently overruled long-standing precedent by excluding evidence which was the fruit of an unlawful search and seizure.[6]

In a recent case a New York City policeman, in the course of another investigation, came upon information disclosing the violation of federal law prohibiting the possession and transportation of distilled spirits on which no tax had been paid. Accordingly, he turned this information over to the federal authorities. At the ensuing trial in a federal court, the officer testified that the discovery of the crime was obtained through the use of a wiretap, which had been authorized by court order, as was permissible under New York law. The petitioner moved to suppress the evidence. The motion was denied and the petitioner was found guilty. The United States Supreme Court reversed the judgment of the lower courts. It did not base its decision on constitutional grounds, but, rather, on the fact that Section 605 of the Federal Communications Act had been violated by the officer when he divulged the intercepted communication, and, consequently, the information was tainted and not usable as evidence.

There has been considerable controversy in the press, as well as in legal circles, as to the full import of this case, *Benanti v. U.S.*[7]

The Supreme Court in the *Benanti* case inferred that a police officer, by testifying to the contents of an intercepted communication, commits a crime—a violation of federal law. Thus, though such evidence may be properly obtained by authority of a state statute and admissible in state courts, it might put the police officer in an extremely precarious position in that he may be subject to federal prosecution. Might not this bring about a

[3] 354 U. S. 449 (1957).

[4] Wolf v. Colorado, 338 U. S. 25 (1949).

[5] People v. Defore, 242 N. Y. 13, 150 N.E. 585 (1926).

[6] People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).

[7] 355 U.S. 96 (1957).