

LAWLESS LAW ENFORCEMENT

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Quis custodiat ipsos custodes?

Who will watch the watchman?

This is one of the basic questions that must be asked in any society that aspires to the protection of human rights. Who will make sure that those who wield governmental power will themselves obey the law? This question is of especial importance in the administration of criminal justice. There is now in this country a gigantic law enforcement establishment (police, prosecutors, prison officials, etc.) exerting the coercive power of the state to ensure that ordinary citizens obey the law. But how do we make sure that this establishment itself--and in particular the police, the most coercive and intrusive governmental agents of all--obey the law? How do we prevent them from disobeying the Bill of Rights, which prohibits police abuse of power, and from disobeying other laws, including criminal statutes?

Illegal behavior by the police is the most dangerous form of lawlessness in a democratic society. If illegal behavior by the police is not checked, the Bill of Rights is reduced to a form of words, and the road to tyranny is opened up. Lawless law enforcement makes a mockery of the Bill of Rights. Illegal behavior by the police breeds cynicism and despair. It creates precedents that democratic societies cannot tolerate. It means that whereas ordinary citizens are to be held strictly accountable for their illegal acts, police are not.

Over the last several decades there has been a breakdown in our country's ability to control lawless law enforcement. Increasingly, various forms of police illegality--including police perjury (called "testilying" by those who have studied the phenomenon), illegal arrests, searches, and seizures, the extorting of confessions of guilt, excessive use of deadly or nondeadly force, illegal electronic surveillance, abuse of forfeiture laws, entrapment, nefarious reliance on sleazy professional informers--are becoming routine, standard police activities, and no one seems inclined or able to do much about it.

Part of the problem lies in the "War on Crime," the cries for law and order at any cost. Just as all is fair in love and war, so many believe that all is fair in waging war on criminals--though this notion is antithetical to the Bill of Rights, which embodies the philosophy that the end does not justify the means and that there are some things more important than punishing the guilty.

Another part of the problem is the mentality of the police themselves. Increasingly, they regard themselves as paramilitary commandos who deem force and violence as the most legitimate part of law enforcement. With police roaming about in plainclothes--or strutting about in black uniforms, military-style boots, metal helmets, flak vests, sometimes even masks or hoods--carrying enough firepower to destroy a Vietnamese village and equipped with state of the art electronic and communications equipment, the notion of community policing and of crime

prevention is being subordinated to the concept of using police as a heavily armed occupying power with itchy trigger fingers and an alarming desire to shoot or club and ask questions later. Even police patrol cars are being turned into battlewagons.

Courts and prosecutors are another part of the problem. Right-wing politicians get elected to office these days; they appoint to the judiciary judges (Chief Justice Rehnquist is a loathsome example) who almost always side with the state when deciding cases involving the government against the individual, and who therefore give rubberstamp approval to lawless law enforcement; and all this only encourages more police illegalities. Prosecutors, who work daily with and depend on the police, are also increasingly part of the political right and hence more and more unwilling to move against police who break the law.

We, the citizens of this country, are also to blame. While we are more and more inclined to view government as a threat to our freedoms, we fail to treat police and prosecutors as part of the government. We act as though the threat of big government comes solely from OSHA inspectors or welfare workers, and as though hiring more police and giving them more power (e.g., the power to seize and obtain forfeiture of our money and property) does not add to governmental control over our lives. We have totally forgotten that police are bureaucrats.

We have been blinded by the crime control mentality and the hardliners who advocate maximum severity for citizens (but not police) who violate the law. We should wake up.

We must remember that American police have a long history of trampling on the Bill of Rights and of committing crimes. We must also remember that even though he is on duty and wearing a uniform and a badge at the time, the conduct of a policeman may be criminal. We must never forget that, just as it is true that even a prostitute may be raped, it is equally true that even a policeman may be a murderer, an aggravated assaulter, a robber, a thief, a burglar, a perjurer, a Peeping Tom, or a trespasser.

And, unfortunately, too many police are.