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Arthur Schafer, who chaired the panel on "Obedience to Law," offered a concluding synthesis of the ideas exposed in his colleagues' presentations, stitched with speculative threads of his own.

OBEDIENCE TO LAW:
A SOCIO-POLITICAL CONTEXT

Arthur Schafer

A PRELIMINARY QUESTION: WHAT IS CRIME?

SOCIAL ALIENATION AS A FACTOR PRODUCING DISOBEDIENCE

A PRELIMINARY QUESTION: WHAT IS CRIME?

It is widely accepted--both by criminologists and the general public--that our society is faced with a serious "crime problem." So great are the supposed dimensions of this problem that some refer to it as a "crisis."

Professor Albin, in his paper on the attitudes of organized criminals towards "law and order,"¹⁸ declares that we would be on our way to solving this crime problem if we could answer the root question of why some individuals in society--the ordinary, law-abiding majority of citizens--obey the law, while others--the criminal classes--do not.

Although Professor Albin's paper focuses, primarily, on his investigations into the varied motivations of one class of law-breaking individuals--the "organized criminal"--his discussion reminds us that it can be misleading to assume we can confidently distinguish between the criminal and the non-criminal. This point is of profound importance. Strenuous efforts of criminologists have been invested in the development of theories to explain crime--ranging from environmental to psychogenic to social-structural--almost all of which have presupposed that criminals and their criminal behaviour can be sharply distinguished from the law-abiding behaviour of the non-criminal majority. This presupposition is highly problematic.

One cannot begin to develop a satisfactory answer to the key question, "Why do people obey/disobey the law?", until one recognizes that the pro-

¹⁸Joseph L. Albin, "Organized Criminals: Some Observations Regarding Their Attitudes Towards Law and Order" included here at p. .

cessing of individuals through the mill of the criminal justice system is an intensely political and normative enterprise. An examination of the various processes involved in criminalizing behaviour--selecting only certain kinds of anti-social conduct for criminal sanctions, selectively labelling only some law-breakers as "criminals," and selectively processing only this chosen group through the criminal justice system--raises philosophical and political questions having to do with the distribution of wealth, power, and status in society.

Why should there be any special difficulty in attaching the label "criminal" to persons and actions? The answer to this question requires a recognition of the socio-political-economic context in which every system of criminal justice is embedded. It is often the case that significant portions of a society's criminal laws are simply disguised forms of class favouritism, promoting the interests and privileges of some ruling group rather than the universal interests of the society.

The public rationale for legal norms typically invokes ideas of the general good, social progress, and the public interest; but the reality is often otherwise. A few examples may be useful to illustrate this socio-economic bias of the criminal justice system. In most discussions of serious crime, the focus is on such crimes as robbery, burglary, and violent assaults. The criminal law provides heavy penal sanctions against such actions. By contrast, the business executives and professionals who are responsible for engineering unsafe automobiles are not thought of as "criminals," and their conduct does not usually attract criminal sanctions. Yet, hazardously designed products may well be the cause of death, injury, and economic loss that

vastly exceeds the harm caused by common assaults, robberies, and burglaries. Thus, the public image in Canada of "the criminal" is of a person who is: poor, native or belonging to some ethnic or racial minority, young, and urban. Diligent armies of sociologists and psychologists undertake careful studies of the residents of inner city slums and ghettos, and native reserves, in an effort to locate the causes of crime and the factors that produce criminal behaviour. But corporate boardrooms are not usually viewed as providing equally fruitful evidence on the topic of criminality.

Why are the white-collar perpetrators of such anti-social conduct as environmental pollution, price-fixing, and sub-standard housing not usually subjected by social scientists to close analysis when they are investigating the etiology of crime and criminal behaviour? There are several reasons.

First, much seriously anti-social behaviour has not been brought within the ambit of the criminal law. The loss (economic and personal) caused to victims of such "white-collar crime" may greatly exceed that caused by lower class crime, but if the conduct causing the harm has not been made illegal, it will not be recorded in official statistics. Since criminologists (and the media) have recourse to official statistics when they undertake to identify and analyze criminal behaviour, the omission of such "crimes" from official computations has the result of promoting a kind of class "blindness" with respect to crime and criminals.

Second, there is much evidence to suggest that a kind of "double standard" operates within the criminal justice system, creating a systemic bias in official approaches to arrest, prosecution, and criminal conviction. Thus, even when legislation exists which attaches criminal penalties to such seri-

ously anti-social conduct as the manufacture of hazardous products, or the creation of industrial pollution, the teeth of law tend not to bite so often or so deeply against upper-class offenders. This claim needs some explanation.

Victims of certain kinds of crime tend not to report them to the police. When a crime is reported, the police have a wide margin of discretion in selecting, from amongst those who have violated the law, which persons (or corporations) will be charged or arrested. And from the class of those arrested, crown prosecutors and Attorneys-General have a wide discretion in selecting which cases to prosecute. When a decision is made to bring a criminal prosecution against an offender, the courts (judges and juries), who tend to share the mores of the privileged strata of society, have considerable discretion in deciding whether or not to convict. And where conviction occurs, the choice between severe sanctions (prison, for example) or mild penalty (nominal fine, let us say) is likely to be similarly influenced.

The conclusion seems inescapable: if the sample of criminals who are fully "processed"--arrested, charged, prosecuted, convicted, sentenced to prison or imprisoned--is unrepresentative and biased against lower class offenders, then it follows that official crime statistics are likely to produce a seriously misleading image of the typical criminal and the typical crime. This, in turn, vitiates efforts to locate the conditions, causes, and cures for crime.

Moreover, to the extent that class bias in the legal system is recognized by the general population, it may contribute to disobedience of the law. This possibility will be examined next.

SOCIAL ALIENATION AS A FACTOR PRODUCING DISOBEDIENCE

There is, amongst many Canadians, a belief that without the general deterrent threat of punishment, social stability--which is generally viewed as a fragile achievement--would disintegrate, and society would relapse into a Hobbesian state of chaos and violent anarchy.

To those who accept this Hobbesian view, it ought to be conceded that there very likely does exist a class of potential criminals whose anti-social propensities are deterred primarily by fear of punishment. It would be foolish to deny that general deterrence plays some (difficult to quantify) role in promoting law-abiding behaviour. But there is evidence to suggest that the great majority of people abstain from serious crime (for example, murder, rape, violent assault, bank robbery) because of the socializing influence of such factors as parental training, education, social customs and mores, conscience, and so forth. This would seem to accord with Professor Podgorecki's findings that those who exhibit obedient attitudes ... tend to be well educated, socially integrated and psychologically secure.¹⁹

Those who adopt the Hobbesian view of society tend to regard human society as a competitive struggle between individuals and groups of individuals, each pursuing private aims and competing desires in a mutually threatening manner. Since the various goals and desires of competing individuals cannot be reconciled, the best society can do is to provide a set of

¹⁹A. Podgorecki, "Aspects of Public Opinion About Law in Poland" included here at p. .

rules, moral and legal, regulating the struggle for self-satisfaction. This view of society as Gesellschaft requires an emphasis on legal obligations, such as contracts, enforced by coercive sanctions.

As Professor Hogarth notes, however, in his discussion of the transformation of our society and legal system "from status to contract" and as Professor Podgorecki points out in his contrast of "official law" and "intuitive law," our political culture also contains an alternative model for conceptualizing the role of the individual vis-a-vis his or her fellows in society: society as Gemeinschaft. Professor Hogarth refers to the status of individuals; a political philosopher might refer to this as the conception of society as a series of communities. Political and moral life is viewed as the pursuit of common goals within the setting of such communities as the family, the workplace, or the neighbourhood. Other individuals may threaten one's interests, and some rules--moral and legal--are necessary in order to restrict some kinds of harmful behaviour. But the goals of both morality and legality are viewed primarily as the facilitation of common endeavours, rather than as negative restrictions on the pursuit of self-interest.

From the view of society as Gemeinschaft, the coercive instrumentality of the law, in its penal role, is viewed as a system of last resort. When community norms are functioning properly, the criminal justice system will be required only infrequently, and when required it will signal some sort of breakdown or weakening of the social cement that provides the normal basis for community life. From the view of society as Gesellschaft, by contrast, it is entirely normal to invoke the criminal justice system (or the law of contracts) to restrict invasive behaviour, to enforce obligations, and to restrict anti-

social conflict.

Although both these perspectives at present coexist in our society, Professor Hogarth is doubtless correct in seeing a shift, over time, and an accelerated shift recently, from Gemeinschaft to Gesellschaft (or, in his terms, from status to contract).

As Fred Hirsch emphasizes in his book, The Social Limits to Growth,²⁰ a competitive market society functions well only so long as it is supported by the social morality inherited from the precapitalist and preindustrial past. The corrosive effects of the culture of the marketplace--with its individualistic, egoistic, self-seeking, acquisitive values--have undermined the public-spiritedness necessary to hold the system together. "As individual behaviour has been increasingly directed to individual advantage, habits and instincts based on common attitudes and objectives have lost out."²¹ When to this is added the effect of such phenomena as increasing anonymity in large cities, a high degree of labour mobility, and intensified economic competition, the cumulative effect is a serious weakening of traditional social values, an increase of criminal behaviour (violation of legal norms when this optimizes self-interest), and increasing cynicism about individual motivation and about the ability of the criminal justice system to protect individual interests.

Sir Henry Maine's vivid phrase--"from status to contract"--effectively encapsulates the transmutation of social norms in the face of market economy and market culture. And it has meant the progressive withering of intern-

²⁰Fred Hirsch, Social Limits to Growth (1976).

²¹Ibid. at 117-118.

alized moral sanctions. This, in turn, has made it much more difficult for the state to fulfill its role in protecting individual rights to property and personal safety. This phenomenon is of sufficient importance to warrant further elaboration.

The experience of living in a society with a high level of fellow-feeling and altruism can be educative, and can produce a cycle of virtue and public-spiritedness. Conversely, the experience of living in an alienated society with little fellow-feeling and a high level of egotism can produce a cycle of anomic and anti-social behaviour. Public-spiritedness is an important social resource, one which can be enhanced or diminished by the nature of key institutions such as the criminal justice system.

An example may be useful here. Sociologists, testing the likelihood that people would return a lost wallet containing money and personal papers, found that on the day following the assassination of Senator Robert Kennedy in the United States, none of the wallets was returned. This deviation from the previous pattern which had prevailed for some months (during which about 45% of "lost" wallets were returned), may be explained by the hypothesis that immediately following the assassination people felt more cynical about social bonds. When people lose faith in the community of attitudes and values which bond them together, their concern for the welfare of others appears rapidly to diminish.²² A society in which most people feel alienated and powerless, and in which the state and its major institutions appear remote, mysterious, and indifferent to ordinary human needs will not likely

²²Sheleff, "The Bystander: Behaviour, Law, Ethics" (1978) cited by Hornstein, Ethics (1980).

produce a strong sense of moral commitment and citizenship from its people.

When a significant number of citizens regard legal norms as morally just, and as necessary for social life, their internal controls will promote a tendency to comply with legal norms, and the role of penal sanctions in promoting law-abiding behaviour will become secondary. Conversely, when legal norms are widely viewed as foolish or unnecessary, or as unjust and oppressive, then compliance can be induced, if at all, only by such means as the deterrent effect of criminal sanctions.

Amongst those in society who perceive that the enforcement of the law operates to the disadvantage of those with least access to power and other resources, an attitude of cynicism appears to have developed towards the criminal justice system. A system which is thought to victimize the most vulnerable and least advantaged members of society will tend to weaken belief in the legitimacy of authority, and not only amongst those selected for victimization. Instead of strengthening social integration and cohesion--a principal desideratum for any legal system--the presence of structural and procedural bias in the criminal justice system tends to promote cynicism and social alienation.

The criminal justice system is one of the major institutions of a society, and the way in which this institution brings people into relation with one another is a major factor influencing social attitudes, values and behaviour. One may plausibly hypothesize that the greater the extent to which societal institutions are arranged so as to promote fellow feeling and a sense of shared fate amongst the different classes and strata of society, the greater will be the strength of social bonds and the sense of social cohesion which

binds a community together and which inclines people to consider the welfare of others. When a major institution, such as the criminal justice system, displays class bias and differential treatment based on such divisive factors as race and age and economic status, the sense of shared interdependence is undermined. Shared experiences and fellow feeling are surely part, and a crucial part, of the social cement which enhances the tendency of citizens to obey the law and to provide positive support to those whom they recognize as sharing the same set of basic norms and values. The educational importance of living in a society whose basic institutions and norms elicit respect cannot be overly stressed. The level of fellow feeling and respect for law prevailing in any society, and the willingness to act, individually and collectively, to protect shared basic values, are precious resources that can be seriously eroded by treatment which citizens perceive as discriminatory, unfair or unjust.

It is not realistic to suppose that the biases and injustices of our present system of criminal justice can be easily or painlessly rectified. As the authors of Struggle for Justice aptly comment:

To the extent that equal justice is correlated with equality of status, influence, and economic power, the construction of a just system of criminal justice in an unjust society is a contradiction in terms.²³

This does not, however, entail the conclusion that all reformist efforts are bound to be futile or counter-productive. One may work to reduce, in

²³G. Richard Bacon et al., Struggle for Justice: A Report on Crime and Punishment in America (1971).

piecemeal fashion, the operation of bias and prejudice, at the same time as one recognizes that the criminal justice system is merely one aspect of the broader social organization.

June Tapp's study of the socializing impact of jury participation points towards the kind of social reforms which might effectively change public perceptions of the criminal justice system. Participation in the jury process appears to have a significant effect on citizens as a "vehicle to socialize more principled legal reasoning." When the public is given enhanced opportunity to participate in the law-making process, by means such as jury service, the socialization effects can be marked. Citizens who do jury duty are thereby enabled, in however limited a manner, to make and maintain laws. They become thereby "more autonomous, competent, and ethical in their judgments about personal and societal codes of conduct."²⁴

It appears reasonable to hypothesize that a society which provided greatly enhanced opportunities for its citizens to participate, directly and indirectly, in the formulation and application of the rules which govern all our lives, would be well on the way to diminishing the level of cynicism and alienation which afflict most social institutions, including the criminal justice system. One must recognize, however, that enhanced public participation involves power sharing and decentralization of decision-making, and these objectives are likely to be resisted, in some cases strenuously, by those currently in positions of authority, who benefit from the distribution of power under the status quo.

²⁴Tapp (leave out for now).