

POLICE QUESTIONING OF LAW ABIDING CITIZENS

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For a member of one of the most staid occupations, I have had a disturbing number of encounters with the police. I can count nine or ten times that I have been stopped and questioned in the past few years -- almost enough to qualify me as an adjunct member of the Mafia. Most recently, when the officer told me he had the right to stop any one any place any time -- and for no reason -- I decided I had better write an article. Let me describe some of my adventures.

My problem is that I like to walk. In Chevy Chase, Maryland, a tree-lined suburb that smells of honeysuckle on spring nights, a police car swooped down on me about eleven at night. The officer wanted me to identify myself: where did I live, where was I going. He was not looking for anyone in particular; just on patrol. In Santa Barbara, California, where I had gone to give a paper on conservation, I was stopped on Main Street, about ten blocks from where I was staying. I was looking for a restaurant, a search which I was allowed to continue after giving a satisfactory explanation of my presence. In Belmont, Massachusetts, I was halted two blocks from my brother's house. I admit that it was very early morning. But my small niece had been up. In New Haven, about eleven at night, I was stopped a half mile from my own residence. Since this was home territory, and since the officers had summoned me off the sidewalk without even getting out of their patrol car, I protested. This was the only time that the police implied they were actually looking for someone -- a prowler, they said. Two more patrol cars and a sergeant arrived as I continued to stand my ground on the sidewalk. After ten minutes' discussion we all dispersed. In Long Lake, New York, an Adirondack vacation town, a state policeman stopped me on the main street about ten at night. I was walking on the sidewalk. He demanded I tell my age, occupation, and reason for being out on the street, and that I produce some identification. When I told him I had none, he was ready to arrest me -- for walking on the wrong side of the street, or for vagrancy, he said. I pointed out that my family has owned a house at Long Lake for sixty years -- and that there was no sidewalk on the other side of the street.

I should add that I have been stopped many times without cause while driving a car. It has happened in New York State, in Massachusetts, and as far away as Oregon; always in broad daylight; each time I asked why I had been flagged down with siren and flashing light; each time at first no answer was given; only when I was dismissed did the officer say "just checking." In each case the officer wanted not only to see my license, but also to know where I was going, where I was coming from, and my business. In all of my experiences, I have never been arrested, never told that I was committing an offense, and never told that I answered a particular description.

These circumstances define the problem that I wish to discuss. In this article, I am not concerned with police investigations after a crime has been reported, or with circumstances which suggest that the individual who has been stopped may be doing something illegal. My problem is this: no crime has been reported, no suspect has been described, there is no visible sign of an offense,

there is nothing whatever to direct police attention to this particular individual. I am concerned with what is called *preventive* police work.

Although the experiences I have had are in themselves trivial, the increasing preventive activities of the police present an issue of first importance. What happens when the person stopped is a Negro, or poor, or frightened? What intrusions upon privacy, what affronts to dignity, occur? How much discretion do the police have to invent an offense for anyone who objects to being questioned? May the police establish a regular routine of requiring pedestrians to carry identification and explain their presence, or of requiring motorists to stop and tell where they are going? I do not have answers, but I have some questions. Let us focus on the moment of contact between the citizen and the police.

The first issue that troubles me is whether the police have any power at all to stop a law abiding person on a public street. Of course any individual has a right to approach any other individual to ask him the time, to ask him how to find the Yale Divinity School, or to ask his opinion about foreign policy. But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police? Police officers tell me that they have a *right* to stop anyone in a public place, without having a reason. I think I have a *right* not to be stopped. So far as I know, reported court decisions do not supply us with an answer.

The next issue is what questions the police may ask. Name? Address? Occupation? Age? Marital status? Explanation of presence and destination? Documentary proof of identity? Many people might have no objection to giving out any or all of these facts about themselves. But I have a strong sense that however innocuous the facts may be, some things are nobody's business. I do not particularly like to be probed, and I like it much less when the probing is official. I certainly do not think that every police officer has a roving commission to satisfy his curiosity about anyone he sees on the street.

Closely related to questioning is the issue of the individual's replies. May he refuse to answer? May he demand to know the identity of the officer? May he demand to know why he is being stopped? May he lie to the officer about his age, or why he is out on the street? May he turn and go on his way? I submit that very few people know what their rights are under such circumstances. I do not even know how to find out.

The next issue is what *actions* the officer may take if the individual attempts to claim some rights. May the officer detain him? Frisk him? Search him? Take him to the police station? Hold him there for questioning? Here the law does supply an answer in general terms, for we know that arrests and searches can be made only upon probable cause. But concrete answers really depend upon what we conclude about the right to stop and to ask questions.

The last issue is what remedies are available to the citizen to test out the law in the circumstances I have described. There is always the right to defend against any criminal charge that may result. There is always a tort action for false arrest. Perhaps in some extreme circumstances there might be grounds for an action under one of the civil rights statutes, or for an injunction against a

continuing police practice. But these remedies are often costly, time-consuming, and ultimately unsuccessful. No one effectively "polices the police."

The questions that I have raised are difficult, but they should be faced. Let me suggest some of the fundamental issues that are at stake in these small encounters.

1. Tone. On one occasion when a patrol car flagged me down for a "routine check" on Route 2 near Boston, the officer, after ascertaining my name by looking at my driver's license, said "What were you doing in Boston, Charlie?" And he continued quite deliberately to address me in that fashion. The incident happened a couple of years ago, so that I do not think he mistook me for a teenager. On several of the other occasions I have mentioned, I was either called by my first name or addressed in a way that was intentionally familiar. Nor am I unique in having such experiences. My brother, a psychiatrist, his wife, and a lady friend, also a psychiatrist, were driving through Keene New Hampshire early on a Sunday evening after a weekend in Vermont. A policeman stopped them -- for no reason. He made all of them get out of the car and stand in the rain. He called my brother by his first name. After looking at identification papers belonging to their friend, he said, in a tone that carried insult, "What kind of a doctor are you, Ellie?"

I have read that when Negroes complain of "police brutality" in areas like the Watts section of Los Angeles, they are as much concerned with verbal tone as with physical violence. And this is understandable; incidents like those described cause a sense of injury to the person in a direct, visceral sense. Members of a minority group are likely to be especially sensitive to such address. There is something deeply offensive in familiarity which is deliberately used by a person in authority for the purpose of causing humiliation.

The crucial importance of tone may be demonstrated by a simple test: Imagine that in any of the ten incidents I have related the officer said "Mr." or "Sir" or "excuse me" as I would do when addressing a stranger. The average person's response would be quite different; perhaps I would not even be writing this article. I am not so unrealistic as to suppose that every encounter with the police can leave the ego unbruised, nor do I suggest that the police should practice obsequious manners. But we are dealing with the chief point of personal contact between the individual citizen and the law, and what is at stake is the respect and dignity due to each individual from his government. It is no small matter.

2. Discrimination. Although I have based much of what I have said so far on personal experience, it is not for myself that I write. For what is but a rare occurrence in my life may be a much more significant part of the lives of minority groups and of the poor. I suspect that the police are far more likely to stop a Negro than a white man; far more likely to question a shabbily dressed man than one in an expensive suit. I imagine that the tone of the questioning is different. I can get away with asking a policeman what right he has to stop me; could a Negro safely do this? Of course the crime statistics show that the crime rate is higher among Negroes and among the poor, but that is just what worries me -- that statistics and appearances will be held against individuals, and that the police in their contacts with the populace will treat some groups differently from others. It is a form of discrimination which is particularly baleful because it is so hard to prove and so hard to correct. And it is a form of discrimination which

must deeply affect the attitudes of minority groups toward the police and government. It is the raw material of alienation and rebellion.

There is one minority group that deserves special mention in connection with police questioning -- youth; in particular, teenagers. This is a group easily identified and easily harassed. It is a group with a special need for privacy in public, since they have insufficient privacy at home. It is a group acutely conscious of its dignity and resentful of authority. The boy humiliated by a police officer in front of others must surely feel his whole self threatened.

I recall one story told by a college freshman in California: police officers stopped a whole group of college boys and girls on their way by car to a picnic. The officers questioned everyone with an infuriating slowness, insisting that the boys call them "sir" and finally making everyone sit and wait for a long time. No charges of any kind were made, and finally the group was granted permission to go on its way.

Youth present a problem in every community, and many adults are ready to wish their responsibilities on the police. If the police are not scrupulous in their contacts with youth, the effect may be to aggravate just the cynicism, alienation and resentment which are already the sources of trouble. Here the use of authority to stop and question is likely to inflict direct harm to society in terms of a lasting disrespect for law.

3. Discretionary Laws. Discrimination and tone in questioning are important problems only because the questioner has authority. It seems to be customary in the retail automobile business to call everyone by his first name; if a buyer finds it annoying, he can lower his offer for the car. If the questioner is a government man but not a policeman, we are still in the realm of annoyance rather than a great issue; one can always talk back, or lodge a complaint. It is the police officer's power to arrest that makes his mode of address a matter of concern. That power raises the important question of discretionary laws.

The police officer who stopped me in Long Lake, New York told me that he could arrest me on any of three or four charges if he chose to. He mentioned vagrancy and walking on the wrong side of the road; he might also have mentioned disorderly conduct, refusal to obey an order, loitering and perhaps the catchall notion of "suspicion" used in some jurisdictions. Laws on the subject of vagrancy and disorderly conduct are so broad and so vague that a policeman has almost unlimited discretion; walking down the street might indeed come within the literal definition of vagrancy. It is small comfort that the person arrested for vagrancy might eventually be found innocent by a court. The source of an officer's power is not so much the possibility that he can bring about a conviction, but the fact that he can subject a person to arrest, delay, a night in jail, frantic calls to relatives and lawyers, the expense and trouble of a trial, and the undeniable uncertainty about whether a local magistrate's court might, in fact, convict. No one who refuses to "cooperate" with the police can be certain that the policeman will not arrest him. The motorist is still more vulnerable; he can always be charged with having faulty equipment or an obstructed window, or with careless driving, and his license can be revoked in some states even if he is not convicted of any charge. For either the pedestrian or the motorist, arrest, no matter how unjustified, can have lasting consequences. Many application, employment, and security forms

ask whether the "subject" has ever been *arrested*. And for most people, custody and jail can be a severe and disturbing shock.

My present concern is not with these discretionary laws as such. They present a separate issue which should be of major concern to lawyers. My point here is that this virtually unlimited sanction lurks behind the policeman's questions and the citizen's answers; it makes me think twice before I tell a policeman that my reason for going for a walk is none of his business.

4. Institutionalizing the Questioning Process. So long as police questioning remains genuinely casual and occasional, the problems it presents are comparatively limited. But when such a practice becomes accepted in theory, it tends to be made part of regular routine. We now have a number of police practices which are essentially institutionalizations of, or extrapolations from, the questioning process.

Most of these practices have grown up around the automobile. In Connecticut, the state police set up roadblocks and stop whole lines of cars in order to check drivers' licenses and registrations. Connecticut also uses roadblocks on holidays to check all drivers for signs of drinking. And near the New York border, Connecticut police have regularly placed roadblocks to stop teenage drivers to see if they have been drinking in New York State, where the minimum age is lower. Some states also use roadblocks to check for equipment such as faulty brakes and worn tires. Several years ago, I discovered that at toll booths on the Connecticut Turnpike and the New York State Thruway cameras were used to take photographs of vehicles passing through. The Acting Counsel of the New York State Thruway Authority wrote me that such photographic records were used to determine "if vehicles are being properly classified by our toll collectors." "With respect to the question of authority for making such records, if thereby you mean statutory authority, we need none."

It may be well to pause at this point to comment on the differences and similarities between stopping automobiles and stopping pedestrians, since I have talked about them almost interchangeably up to now. The differences are practical: automobile driving is much more hazardous than walking down the street, and illegal driving is especially hazardous to others, who can easily become innocent victims of someone else's recklessness or drunkenness. In addition, violations such as lack of a valid license, defective equipment and even drinking are hard to detect without spot checks. On the other hand, the similarities are ones of principle. Any roadblock in which the police are not searching for a particular offender, such as an escaped convict, is a general search of all law abiding citizens to see if any person is committing one of various crimes connected with driving; the purpose is *preventive*. Even in the case of licenses, although the law requires every driver to carry one and to produce it upon demand, stopping everyone remains a general preventive search for the crime of failing to carry a valid license. It is no different in principle than if large groups of college students, hurrying down the street to class, were stopped by the police to see if they were carrying their draft cards.

Questioning of pedestrians may also become institutionalized. This may happen informally if police make it a practice to stop every person walking on the street in a particular suburb after midnight. It may happen with the aid of statute as in New York, with its stop-and-frisk law, although this statute has not been interpreted to permit pedestrians to be stopped without cause

(reasonable suspicion that the individual is committing or is about to commit a serious crime). Here again there are practicalities to be noted; in some areas of a city crimes occur constantly and the police must be alert to every form of suspicious behavior.

Whether the stopping takes place on the sidewalk or the highway, it necessarily rests on the assumption of a general police authority to stop and question. The tendency to institutionalize is part of the normal urge to push any principle to its logical conclusion. In New Jersey, it was reported that police had used their power to stop and question in order to aid an effort to lobby for new legislation. According to the New York Times northern New Jersey police stopped at least 2,400 cars in roadblocks at night for the purpose of "seeking information to present to the New York Legislature in an effort to persuade it to raise the drinking age limit from 18 to 21." The assistant Prosecutor of Bergen County was reported to have said that the roadblock system will be continued until sufficient information to bolster the police appeal for a raising of the age limit is fully documented."

5. Unchecked Authority. Police questioning carries with it the inherent danger of any unchecked, unreviewable authority. What safeguards exist to prevent authority from being used as the instrument of malice, revenge, or even crime? Is it safe to incur a policeman's anger? In one case that reached the federal courts, a motorist in Colorado was stopped at a police roadblock for a "routine check of his car and driver's license." He exchanged "rather harsh words" with one patrolman. On a later date, this patrolman spotted the motorist, followed him for six miles, and then stopped him, accusing him of failing to dim his lights. The man had misplaced his driver's license and had tried earlier that day to get a duplicate, but the office was closed. The patrolman said he was going to arrest the motorist. After further words, the patrolman wrenched the motorist's arm, hit the unresisting man on the head, shoulders, hands and wrists with a blackjack, handcuffed him, and took him to jail. His clothing and other belongings were taken from him, and he was offered no medical attention for his injuries until late that evening. After spending the night in jail, the motorist found he now was charged with drunken driving, and bail was set at \$1,000. He was sent back to jail and told he must stay there unless he pleaded guilty. He said he would lose his job if he did not get out of jail by Monday, but the justice insisted that he plead guilty. Finally he did, and the justice allowed the patrolman to tell his version of the incident but refused to hear the motorist's version. The man was fined \$355, given a 90-day suspended jail sentence, and lost his driver's license for one year. Prior to the arraignment, the justice of the peace and the patrolman conferred, and the justice was heard to say if the motorist pleaded innocent "he would make it rough enough on him for him to change his plea." The man was 40 years old, married with five children, had been arrested only once before in his life, had worked as a miner in Leadville for the same company for 14 years, had contracted silicosis during that time, and had he lost his job he would have been unable to secure employment with another company. He paid a lawyer \$661 in an effort to appeal his case, lost one day's earnings, and had to pay a fee to get his car back. The federal court eventually held that he was entitled to damages under the Civil Rights statutes for arbitrary misuse of official power. *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963).

I cite this case as an officially reported instance of what *can* happen. Police are human, and there is a very real possibility that a person who stands on his rights one day may find the same officer "out to get him" another day. Moreover, we have all too much evidence that talking back to a

police officer can produce violence and perhaps serious injury to the individual, particularly if he is a Negro or an outcast. And as was previously noted, an ensuing arrest can set off a chain reaction of disasters, very rarely compensated by a successful damage suit.

Moreover, we know that impostors sometimes masquerade as policemen, that plain-clothes policemen do not always identify themselves, and that real policemen are sometimes guilty of crime, including extortion based on misuse of their authority. All of these are realistic dangers if the citizen cannot with safety demand to know who is stopping him, for what reason, and under what authority.

6. Constitutional Rights and Privacy. In the encounter between citizen and police officer, certain major constitutional principles are at stake. Among these are rights deriving from the Fourth Amendment's protection against unreasonable searches and seizures, and the Fifth Amendment's guarantee of due process of law. I shall not attempt a definition of these rights here, but will point out how in a general sense these values are threatened.

There is a very real danger of erosion of rights through failure to challenge possible invasions. If the average person is intimidated by an encounter with the police, if remedies for abuses are relatively unusable, it is likely that the constitutionality of police practices will go untested. Thus there are few cases on the validity of police roadblocks, although the practice is common. There are even fewer cases on the questioning of pedestrians who are not suspected of crime. With the constitutionality of these practices unsettled and a matter of debate and uncertainty among lawyers, the community, worried about crime, may readily accept whatever the police say is necessary. After all, what is "reasonable" in a constitutional sense rests to some degree on what is thought "necessary." Thus constitutional protections are likely to be abandoned by default. The First Amendment remains healthy because possible invasions of it can usually be challenged in a civilized, scholarly way in a dignified appellate court. Constitutional rights that must be defended, if at all, on a lonely street, on a highway at night, in a police station or before a justice of the peace are always in trouble.

In addition to the values specifically protected by the constitution, there is the more general right of privacy, recently recognized by the Supreme Court, but yet only gradually emerging as an accepted legal principle. In our society privacy and anonymity are increasingly hard pressed. Many police officers seem to think that everyone should carry identification papers to be produced on demand, a requirement which is common in Europe. Such requirements are at war with the notion that one should be able to go out, for an hour or for a month, and merge into the anonymity of a new street or a new city.

How shall we begin to develop guidelines for encounters between the police and the law abiding citizen? The primary sources of standards are the Constitution and the courts. I expect to see the constitutional right of privacy, recently enunciated by the Supreme Court in the Connecticut Birth Control case, expand to form a protective shield for the individual against an increasingly intrusive world. I also expect that the constitutional right to be free of arbitrary searches, seizures and arrests will grow, and that the Supreme Court will gradually limit any official right to question a person except in the presence of counsel. But although I strongly favor a judicial philosophy which constantly strives to keep the Constitution meaningful in terms of

contemporary problems and needs, I do not think that the courts should be the first line of approach in regulating police work. Policing is not imposed from above; it is a service to the community, and the community can take the initiative in seeing that police service is what we want it to be. Legislatively or administratively, it is possible for a community to establish guidelines for police and citizens as well.

The broad outline of a set of rules for the police can be suggested briefly.

- (1) The police should not be allowed to stop anyone unless something particular about him, as distinguished from the mass of people, gives cause to believe that he has committed a crime,
- (2) When a person is stopped, the officer should identify himself, and explain, with particularity, his reasons for stopping the person.
- (3) The person may be questioned, but the person cannot be required to answer. He may be asked, but not required, to produce identification.
- (4) The officer must conduct himself in a manner that would be proper in ordinary business relationships between equals.
- (5) The officer may search a person only if he reasonably believes that he (the officer) is in danger, or if he has probable cause in the constitutional sense.
- (6) If the person stopped desires to continue on his way, the officer may not detain him unless he has probable cause to arrest him for a crime.

These guidelines are a beginning; there is much room for working out details, but almost any rules will have the virtue of some certainty in an area where unlimited uncertainty now exists. Perhaps such instructions might be effectively enforced by a civilian police review board which could provide the sort of sanctions and remedies that the courts are unable to provide.

Perhaps this article sounds as if I have something against police officers -- as if I do not appreciate the difficulties and dangers they face, the impossible demands upon them, and how well most of them perform their duty. But this is not my meaning. My meaning is that everyone, including the police, must live under rules. All organizations, and all officials, get out of hand if they do not have rules to guide them, if they do not do their work within limits.

I should add that while I believe that prevention is a far more desirable way of controlling crime than apprehension and punishment, I do not think that prevention is primarily a job for the police. Highway safety is more a function of better engineering of cars and roads, and better training of those who drive. Neighborhood safety is to a large extent a function of social conditions. just as I do not believe that any amount of harsh punishment will significantly diminish crime, so I do not believe that any amount of surveillance will succeed.

We live in a society that is increasingly concerned with safety, but we give little thought to the price of safety. Suppose we had electric eyes and computers which could catch *every* traffic violation, *every* miscalculation of income tax, *every* instance of shoplifting. Would this really be the good society? Let me quote a letter to the New York Times on the subject of lifeguarding at public swimming places. The letter-writer protests that bathers, even good swimmers, are shepherded into small areas. "By such tactics the guards convert the great ocean into a wading pool and treat all bathers like children." The writer continues that at Cape May, he found that in a perfectly calm ocean bathers were rarely allowed beyond their depth, and were not even allowed to swim parallel to the shore beyond the lifeguard's station; the lifeguards mostly devoted themselves "to the castigation of bathers recalcitrant in obeying the whistle's orders." The letter ends, "I think, however, that in a free society I should be allowed to face my own dangers and challenges as long as I do not directly endanger others."

Overemphasis on safety also masks a great deal of hypocrisy and avoidance of responsibility. I think particularly of the attempts to put a stop to teenage drinking -- an effort to make teenagers conform to standards adults do not themselves observe and an effort to secure a surface appearance of the rightness of things to cover up the profound wrongness within. Some of the most extreme examples of police surveillance are likely to be found in just those neat suburban communities which push all turmoil down into some invisible place, where it is left to fester unseen.

But I have a larger point to make. I fully recognize that safety is important and that safety requires measures. But other qualities also require measures: I mean independence, boldness, creativity, high spirits. In a society that presses toward sameness and safeness these all too perishable qualities must be given some help -- they must be fostered and nourished. Otherwise their seed will fall upon asphalt and concrete, and die. The good society must have its hiding places -- its protected crannies for the soul. Under the pitiless eye of safety the soul will wither. If I choose to get in my car and drive somewhere, it seems to me that where I am coming from, and where I am going, are nobody's business; I know of no law that requires me to have either a purpose or a destination. If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight.