

PS 1281: SEMINAR IN AMERICAN POLITICS RACE AND THE CRIMINAL JUSTICE SYSTEM (INSIDE-OUT Fall 2017)

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Essay Question: “A crime is anything that a group in power chooses to prohibit.” Freda Adler. Do you agree? What does it mean in the context of the relationship between race and law enforcement?

Part One

Do I agree with Freda Adler’s quote that “[a] crime is anything that a group in power chooses to prohibit.”?

In the context of our American democracy, Adler’s quote is pretty close to an exact definition of how an act that is perceived to be wrong is codified into a body of penal laws.<sup>1</sup> An elected body of legislators, i.e. the “group in power”, determines what public wrongs should be deemed wrong enough to be labeled a crime and, as such, carry along with them punitive measures.

When Adler’s quote is viewed in this light, I not only agree with it, I cherish it. Choosing *who* the “group in power” will consist of is one of the reasons that prompted James Madison’s remark that “[America’s] revolution in the practice of the world may, with an honest praise, be pronounced the most triumphant epoch of its history.”<sup>2</sup>

However, there is also an undertone to Adler’s quote that the “group in power” may either in a very deliberate fashion or in a capricious manner coin an act a crime simply because the benefits of doing so lines up with their *own* interest, not those of the people they represent.

Worse yet, what happens when our “group in power” gives in to the emotions and

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<sup>1</sup> **Black’s Law Dictionary**, (9<sup>th</sup> Edition) defines a crime as an act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.

<sup>2</sup> **Jack Rakove**, ed., *James Madison: Writings* (New York: Library of America, 1999), p. 502.

prejudices of people at the expense of sound public policy? Do my patriotic passions for America's democracy still stand on sturdy ground when the elected "group in power" forgets about individual rights?

Certainly this has happened in the past. In 1923, it took a Supreme Court ruling to cool public passions and get Nebraska's elected "group in power" in line. In the aftermath of World War I, because of a public perception that teaching German in schools was *immoral*, the Nebraska legislature enacted a law forbidding the teaching of any language other than English until pupils passed the eighth grade.

The United States Supreme Court, in a forceful opinion, shot Nebraska's law down, finding that:

"[t]he liberty protected by the 14<sup>th</sup> Amendment to the Federal Constitution may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."<sup>3</sup>

But we do not have to go as far back as 1923 to see individual rights trampled upon by an overreaching legislative action. It may sound shocking, but it wasn't until 2003 that Texas' "Homosexual Conduct Law", was found to be constitutionally infirm. Paul M. Smith, the attorney representing the parties challenging the Texas statute, explained to our high court that:

"The State of Texas in this case claims the right to criminally punish any unmarried adult couple for engaging in any form of consensual sexual intimacy that the state happens to disapprove of."<sup>4</sup>

Once again the Supreme Court, in a powerful opinion, cast down the overreaching

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<sup>3</sup> See *Meyer v. Nebraska*, 67 L Ed 1042 (U.S. 1923).

<sup>4</sup> See **Damon Root**, *Over-Ruled, The Long War for Control of the U.S. Supreme Court*, (p. 125).

legislative action. While doing so, Justice Kennedy remarked that, “[t]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>5</sup>

This is where Alder’s quote strikes a more nefarious tone. As shown above, there is a flip side to our democratic system – the chances are at some point in time we each will find ourselves in the minority. Not everyone we vote for is elected.

The day Donald Trump was elected was a bleak day for me, indeed. My hopes for a commonsense-based United States Supreme Court were crushed. My expectancy of humane prisoner treatment legislation was extinguished. The person I wanted to win lost. However, a beautiful thing emerged from the rubble – a concerned electorate.

In the aftermath of Trump becoming President, more people than ever are involving themselves in the political process. Civil-liberty organizations are receiving record amounts of donations. Young people are more engaged than ever. My mother, who has never shown much interest in politics, has now made the subject the dominant topic of our conversations. As strong winds strengthen the roots of a tree, maybe the Trump effect will strengthen the roots of our democracy.

In closing, I agree *with* Freda Adler’s quote that “[a] crime is anything that a group in power chooses to prohibit.”, so long as the group in power is the one I voted for.

## **Part Two:**

What does “[a] crime is anything that a group in power chooses to prohibit.” mean in the context of the relationship between race and law enforcement?

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<sup>5</sup> *Lawrence v. Texas*, 539 U.S. 558 (U.S. 2003)

As I ponder this question, I think about the show *Bait Car*. You know the show. It's the one where the cops go into a predominantly poor black neighborhood and park an iced-out Escalade with the keys innocently left in the visor. Then, unsurprisingly, some poor schlub comes along and steals the car only to find it suddenly stalls out. Said schlub is then promptly bombarded by police as if he were *El Chapo*.

The show, while entertaining, always left me uneasy. I thought to myself, "'huh' didn't the police just create that crime?" What does this say about myself that I am being entertained by something that is obviously wrong? The police directly targeted black youths who they knew were already living in a dire situation. It just felt wrong. Furthermore, for a fictional crackdown, the whole ordeal seemed rather costly. Some episodes depicted the use of helicopters, multiple police cruisers, and numerous police personal. Couldn't that money have been better used to help, rather than humiliate, our poorer downtrodden citizens?

It wasn't until my own incarceration, where I was forced to learn the law, that I realized that *Bait Car* is just the tip of the iceberg. Federal law-enforcement has a version of *Bait Car* that is far more Machiavellian, and not at all entertaining. It revolves around the recruitment of individuals to partake in the robbery of a fictional crack cocaine stash house, with the prospect of a lucrative pay-off in drugs and cash. The controversy surrounding this tactic is multifaceted. The first of which revolves around the devastating ramifications of the Federal Sentencing Guidelines for anyone that takes the bait.

Here's how it works. After duping the perpetrator into agreeing to rob the fictitious stash house, a hypothetical amount of crack is posed to exist in the house, which has the legal effect of triggering a mandatory minimum sentence. Then the government agent persuades the person to

agree to use a firearm during the robbery which then triggers *another* mandatory minimum sentence. When it's all said and done, a defendant could be looking down the barrel of a 35-years-to-life sentence for a fictitious crime entirely invented by law enforcement.<sup>6</sup>

The second layer of controversy stems from the fact that these sting operations overwhelmingly target poor minorities. Statistical investigations have revealed that 90 percent of the defendants in these stash-house sting operations were racial or ethnic minorities.<sup>7</sup>

Judge Gerald McHugh of the Eastern District Court of Pennsylvania has appropriately questioned “whether these sting operations neutralize genuinely criminal ‘desperados’ or mostly ensnare the economically desperate”.<sup>8</sup>

The reflection of this law-enforcement tactic brings the question full circle for me. It appears that the poor, the black, and the minority are simply the catch-of-the-day in law-enforcement's favorite fishing hole. I have never seen an episode of *Catch a Corrupt Cop*, *Popping Prescription Pill Peddlers*, or *Bait an Insider Trader*. Why? Because, these people are part of the “in crowd”. They are the majority. They are white. They are mostly wealthy, and are as Adler said the “group in power”.

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<sup>6</sup> *United States v. Williams*, 547 F.3d 1187 (9<sup>th</sup> Cir. 2005)

<sup>7</sup> See **Brad Heath**, investigation: *AFT Drug Stings Targeted Minorities*, U.S.A. Today, July 20, 2014.

<sup>8</sup> See *United States v. McLean*, 85 F.Supp. 3d 825 (E.D. Pa. 2015).