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Do Police Sometimes Practice 'Civil Disobedience', Too?

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Do Police sometimes practice "Civil Disobedience," too?

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In a recent address, Mr. Joseph J. Casper, Assistant Director of the FBI, asserted that "a society living under the rule of law cannot permit persons to choose the laws which they will obey and the laws which they will break." But on reading the rest of his speech, one wonders whether he would strenuously object if *the police* were permitted to select the laws which they must obey and those they may disregard.

Mr. Casper stressed "the citizen's individual responsibility of cultivating a respect for the law so deep and constant that he becomes an example for all others to emulate," but one wonders whether he felt nearly as strongly about *the law enforcement officer's* need to cultivate a respect for the law so deep and constant that he becomes an example for all.

Mr. Casper manages to be a good deal less bedazzled by the mystique of "the law" when he comes up against a law *he does not like*. He protests, for example, that "criminals are freed on technicalities despite the fact that many of them are repeaters" and "some courts appear to be more concerned with rewriting the law than interpreting it."

I take it that when the Court sustains the power of the government to "stop and frisk" on less than the traditional "probable cause" to arrest and search, *Terry v. Ohio* (1968), or to deceptively place a secret informer in the quarters and councils of the defendant, *Hoffa v. United States* (1966), or to hide the identity of an alleged informer on the issue of "probable cause," *McCray v. Illinois* (1967) (why is it that the government's zeal for an unobstructed "search for the truth" diminishes rapidly when one of *its* "privileges" constitutes the obstacle?), or to extract blood over a suspect's protest, *Schmerber v. California* (1966) or from an unconscious person, *Breithaupt v. Abram* (1957), it is simply "interpreting" or "applying" the law.

I take it, on the other hand, that whenever the Court decides a case adversely to law enforcement (as its officers see it), as when it applies the right to counsel and the privilege against self-incrimination to the police station as well as the courtroom, *Miranda v. Arizona* (1966), *Escobedo v. Illinois*, it is "making" or "rewriting" the law—or invoking mere "technicalities."

(Who is to decide whether a constitutional right is a *real* right or only a technicality? Each police officer? Each police department? The FBI?)

"We must," Mr. Casper insists, "be allowed to enforce the law—all laws —every minute of every day of every week of the year." But it is evident that he feels somewhat differently about the duty of the courts: "When officers go before some courts they know what to expect. First, they and the prosecution will be tried. Guilt or innocence of the accused is secondary to matters of form. *Was* the defendant advised of all his rights? *Was* the search legal?"

Apparently the courts, unlike the police, are not supposed to enforce all the laws all the time. Indeed, Mr. Casper seems to be saying that it would be nice if the courts would *disregard* some laws *all the time*—those he considers to be "bad laws" from the viewpoint of law enforcement and dismisses as "technicalities" or "matters of form."

But it is unclear who—if not the highest court of the land—is to decide which constitutional rights are *real* or *important* rights and which are simply "technicalities" or "matters of form."

Mr. Casper is for calling "a spade a spade." So am I. Although law enforcement spokesmen have frequently preached that you cannot pick and choose among good and bad laws, according to each individual's or subgroup's concept of morality, without destroying the whole concept of the rule of law, too many of our law enforcement officers have engaged in just such picking and choosing when confronting "liberal" rules of procedure which might free persons who "ought to be" punished.

They have practiced "civil disobedience," if you want to call it that, to promote what *they conceive to be* worthy causes. Although Mr. Casper warns that "the first evidence of each society's decay appeared in the toleration of disobedience of its laws and the judgments of its courts," too many police chiefs and prosecutors (and their "supporters") have long tolerated, if not encouraged, disobedience of our laws and the judgments of our courts, which, in their opinion, unduly obstruct them in their pursuit of suspected criminals.

An example from the field of search and seizure should suffice:

• When—six years before the U.S. Supreme Court was to impose the exclusionary rule on state courts as a matter of federal constitutional law —the Supreme Court of California adopted the exclusionary rule on its own in *People v. Cahan*, (1955), Judge Traynor noted that police witnesses had freely admitted to making "numerous forcible entries and searches without search warants."

"Thus," he observed:

[W]ithout fear of criminal punishment or other discipline, law enforcement officers, sworn to support the [federal and state] constitutions, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted there-

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under. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them.

As Judge Traynor stressed some years later, prior to the imposition of the exclusionary rule the courts were condoning *not* "an occasional constable's blunder," but a *"routine procedure"* of "deliberate" and "flagrant" police illegality.

The police, of course, do not always frankly admit their misconduct. They sometimes resort to perjury to subvert "bad laws." As Profesor Irving Younger, a former federal prosecutor, recently observed in *"The Perjury Routine,"* 3 *Criminal Law Bulletin* 551, 552 (1967):

For the first few months [*after* Mapp v. Ohio], *New York policemen continued to tell the truth about the circumstances of their searches, with the result that evidence was suppressed. Then the police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable and the evidence is admissible. Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another.*

This is now known among defense lawyers and prosecutors as "dropsy" testimony.

The amicus brief of the National District Attorney's Association (NDAA) in *Miranda* touched upon the subject of police perjury in a curious way. In urging the Supreme Court not to require police interrogators to advise suspects of their rights, the NDAA argued: "[B]y establishing unworkable requirements do we not further undermine and demoralize the police officer, forcing him to 'stretch the truth'?" The NDAA then called the Court's attention to the experience of the English in the use of the Judges' Rules, quoting from Devlin, *The Criminal Prosecution in England* 47 (1960): "It is difficult to say to what extent the spirit of the Rules is infringed because . . . *it is the general habit of the police never to admit to the slightest departure from correctness.*" (Emphasis supplied by the NDAA Brief). "A rule for a rule's sake," the NDAA then warned the Court, "is not the answer."

Why are so many law enforcement officers so ready and willing to violate, or at least circumvent, laws that cramp their style? And to "stretch the truth" in a court of law? I feel the answer is because so many view themselves as "soldiers" waging war against the "criminal army"—and all's fair in love and war.

As James Reston once pointed out, "the more complicated life becomes, the more people are attracted to simple solutions.

It is not surprising that as the "crime problem" grows more complex, baffling and frustrating, the "war theory of crime control" becomes more attractive. But for the last century at least there has never been a time (according to the mass media) when we weren't experiencing a "crime crisis" nor a time when the "war theory" lacked real appeal.

Indeed, the most incisive description of it I have ever read was written by an ex-crime reporter named Ernest J. Hopkins in 1931 (*Our Lawless Police* 319):

Being the enemy, he [*the criminal, or more accurately, the person accused or suspected of crime*] *has no rights worthy of the name. He is to be met by the weapons of war. Individual rights, including those of non-combatants, are subject to invasion like the rights of non-combatants in wartime. The policeman is a peacetime soldier. If bullets go astray, if civilians are inconvenienced, if civil rights are suspended, those are accidents inherent in a warfare that is waged in crowded cities. Criminologists of the humanitarian class are to be scorned, because they are the pacifists in this war. Defense attorneys are to be frustrated and outwitted because they are the enemy's diplomatic corps. Citizens who would make objection to the excess of authority indulged in for the protection of the public are giving aid and comfort to the enemy. If the Constitution forbids internal war, then the Constitution is technical and pettifogging, and for its own good it must be protected against itself. Its makers in any case could not have foreseen the pass to which this war has come. The law of war is the law of necessity. There are certain rules of war, but they do not strictly bind, and atrocities are only to be deprecated because they may become public and hurt the cause—not because the enemy is entitled to the least consideration.*

Not a few people are disturbed that when criticism of the handling of the Vietnam war touches a nerve, high Administration officials snap back: "Whose side are you on?" But I would hate to count the many times law enforcement spokesmen have asked their critics (sometimes subtly, sometimes not so subtly): "Whose side are you on, the side of the law and order—or the side of the rapist, the dope peddler or the rioter?" Those caught up in "a war" find it much easier to question their critics' motivation than to answer their arguments.

Many law enforcement officials reacted to public disclosures of widespread wiretapping and bugging in government and industry, to the televised spectacle of Chicago police clubbing unresisting demonstrators and, a few years ago, to the dissemination of the gory details concerning George Whitmore's discredited "confession" with the same animosity the Pentagon felt toward the *New York Times* and Harrison Salisbury for the latter's dispatches from Hanoi on the civilian deaths produced by our air raids.

When you are fighting "a war" (whether it be against the enemy abroad or the "criminal army" at

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dence that a citizen has a correlative duty for every right he possesses.

Long ago the Massachusetts Declaration of Rights put this obligation squarely in the following words:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of his protection; to give his personal service or an equivalent, when necessary.

Thus, both in law and fact, the fight against crime and the keeping of the public peace is the joint-obligation, the mutual task, the common trust of the ordinary citizen and the professional police officer. . . .

A basic civic obligation, which ought to be self-evident but unfortunately is not, is the citizen's individual responsibility of cultivating a respect for the law so deep and constant that he becomes an example for all others to emulate.

This elementary attitude is just as contagious as the unhealthy disregard for law and contempt for authority of all kinds which permeates our society so widely today.

In America, the quest for truth is a recognized and honored principle. It is treasured as much as the freedoms which make it possible. Our beliefs and hopes rest on the premise that the search for truth shall help to keep us free.

Unfortunately, the search for truth in some legal jurisdictions today is incidental to the skirmishes which occur before and during trial. . . .

When officers go before some courts they know what to expect. First, they and the prosecution will be tried. Guilt or innocence of the accused is secondary to matters of form.

Was the defendant advised of all his rights? *Was* the search legal? *Is* the "t" crossed and the "i" dotted? *Was* the defendant's name spelled correctly, and *was* the search warrant valid? . . .

We need to take a long, hard look at the administration of justice in this country. It seems incongruous that our system of criminal justice should provide more and better protection for the guilty than for law-abiding citizens.

Criminals are freed on technicalities despite the fact that many of them are repeaters. Some courts appear to be more concerned with rewriting the law than interpreting it.

What is law enforcement to do?

We have no choice. Our position is clear. We are committed to seek the truth under the rules laid down by the courts.

One major need, however, is a clear-cut set of operating rules.

The high courts take months to reach a split decision on issues which they require the policeman to decide in a split-second.

Further, we also know that today's law may not be tomorrow's law. These changing conditions present a continuing challenge to law enforcement.

Nevertheless, we must rise to the demands of the hour. We must adopt new methods that meet the tests established by the many new decisions we face.

Aside from additional training and equipment, higher standards and more citizen cooperation, law enforcement must avail itself of the highly developed scientific advancements which are so vital to crime prevention and solution. . . .

We cannot afford to accept conditions as they are in our country today. We cannot afford to wait for someone else to take a stand for right over wrong and good over evil. We cannot afford to sit placidly on the mountain top of benevolent indifference and fiddle while would-be revolutionists put a torch to a nation conceived in liberty and built on the principles of freedom and justice for all. □

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home), "the hiding of ugly facts which the public 'might not understand' comes under the heading of war propaganda." (Hopkins, supra at 320).

The late Chief William Parker of Los Angeles, perhaps the nation's most famous police chief, once maintained in a televised debate on wiretapping and electronic eavesdropping that the police "are just like the U.S. Army in Korea which is limited by the Yalu River boundary, and the result of it is that they are losing the war just like we lost the war in Korea." Chief Parker invoked the military analogy more explicitly than do most of his colleagues, but it is not uncommon for law enforcement spokesmen to grumble about search and seizure, police interrogation and other restrictions in much the manner our generals complain about the "limitations" imposed on them.

Almost invariably, the day after a "liberal" Supreme Court decision has been handed down, *e.g.*, *McNabb* (1943), *Mallory* (1957), *Jencks* (1957), *Mapp* (1961), *Escobedo* (1964), and *Miranda* (1966), newspaper headlines and grief-stricken law enforcement officers proclaim it to be a "crippling"—if not a "death" —blow. Yet almost invariably subsequent intensive studies, *e.g.*, Medalie, Leitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 Mich. L. Rev. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study,* 29 U. Pitt. L. Rev. 1 (1967); *Interrogations in New Haven: The Impact of Miranda,* 76 Yale L. J. 1519 (1967) —reported in the back pages of the newspapers if reported at all—reveal that these expressions of horror and dismay and predictions of doom were grossly exaggerated.

In recent years there has been considerable alarm and agitation about the "credibility gap" in the White House and the Pentagon, but few Americans indeed seem to have any grasp of the dimensions of the "credibility gap" in many a police headquarters and district attorney's office.

As Justice Samuel Roberts of the Supreme Court of Pennsylvania recently pointed out in an address to the trial judges of his state:

[I]f we crumpled the entire Bill of Rights into a ball and threw it in the ocean, robbery, rape and murder would still stand tall on dry land; it would be justice, not crime, that would drown. Men do not read reports of litigation before they set out to violate the law. But they do read newspapers; and to the extent that people in public life falsely cry out that the courts of our land aid and abet the lawless to the detriment of society, these unwise utterances are more *likely to inspire criminal conduct than the very decision they deride.*

As Ernest Hopkins pointed out 37 years ago, "crime is not war," but "more nearly akin to disease in the blood," and "get tough" tactics constitute a sorry attempt "to drive crime back by hammering the external sores." As Professor James Q. Wilson recently observed, "perhaps the major conclusion of the [President's Crime] Commission—and, given its conservative membership, certainly its most remarkable one—is that basically crime can only be reduced by fundamental social changes." Wilson, *A Reader's Guide to the Crime Commission Reports,* The Public Interest, Fall 1967, pp. 64, 74.

It is no easy task, however, to refute the "devil theory" of social ills; to shatter "the illusion of American omnipotence"—the illusion, as D. W. Brogan put it, "that any situation which distresses or endangers the United States can only exist because some Americans have been fools or knaves." □