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Do Police sometimes practice "Civil Disobedience," too?

by Prof. Yale Kamisar, University of Michigan Law School

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 that 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 warrants."

"Thus," he observed: "Without 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 condemning 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 Professor 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: "By 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-criminal 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 peacekeeper, 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 (Continued on page 54)
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dence that a citizen has a correlative
duty for every right he possesses.
Long ago the Massachusetts Declar-
ation 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 prop-
erty, according to standing laws. He
is obliged, consequently, to contribute
his share to the expense of his pro-
tection; 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 profes-
sional police officer....
A basic civic obligation and the
ought to be self-evident but unfortu-
nately 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 in-
cidental 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 "I" 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 technical-
ities 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 enforce-
ment.
Nevertheless, we must rise to the
demands of the hour. We must adopt
new methods that meet the tests estab-
lished 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 devel-
oped scientific advancements which
are so vital to crime prevention and
solution....
We cannot afford to accept condi-
tions 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 fid-
dle while would-be revolutionists put
a torch to a nation conceived in lib-
erty 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 under-
stand' 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 main-
taxed in televised debate on wire-
tapping 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 Ko-
rea." Chief Parker invoked the mil-
tary 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 man-
ner 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), Escobedo (1964), and Miranda (1966), newspa-
ner headlines and grief-stricken
law enforcement officers proclaim it
to be a "crippling"—if not a "death"—blow. Yet almost invariably subse-
quent 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); See-
burger & Wettick, Miranda in Pitts-
burgh—A Statistical Study, 29 U.
Pitt. L. Rev. 1 (1967); Interroga-
tions in New Haven: The Impact of
Miranda, 76 Yale L. J. 1519 (1967)
—reported in Yale 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 con-
siderable 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 "credi-
bility gap" in many a police head-
quarters and district attorney's office.
As Justice Samuel Roberts of the
Supreme Court of Pennsylvania re-
cently pointed out in an address to
the trial judges of the state: "If we
embraced 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 re-
ports 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 con-
duct than the very decision they
de-
ride.
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 con-
sist 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 conserva-
tive membership, certainly its most
remarkable one—is that basically
crime can only be reduced by funda-
mental social changes." Wilson, A
Reader's Guide to the Crime Com-
mission Reports, The Public Interest,
Fall 1967, pp. 64, 74.
It is no easy task, however, to re-
fute 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."