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THE HIGHEST LAW

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, Hofja 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-

(Continued on page 17)
If the Constitution forbids internat­
ion, then the Constitution is techni­
cal and pettifogging, and for its own
hot it must be protected against it­
self. Its makers in any case could not
ave foreseen the pass to which this
war has come. The law of war is the
law of necessity. There are certain
ules of war, but they do not strictly
ind, and atrocities are only to be de­
reca­ated because they may become
public and hurt the cause—not be­
cause the enemy is entitled to the
least consideration.

Not a few people are disturbed that
hen criticism of the handling of the
Vietnam war touches a nerve, high
Administration officials snap back:
“Whose side are you on?” But I

late, or at-least circumvent, laws that
ump their style? And to “stretch the
truth” in a court of law? I feel the
swer is because so many view
hemselves as “soldiers” waging war
gainst the “criminal army” — and
all’s fair in love and war.

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

It is not surprising that as the
“crime problem” grows more com­
plex, baffling and frustrating, the
“war theory of crime control” be­
comes 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 descrip­
tion of it I have ever read was writ­
ten by an ex-crime reporter named
Ernest J. Hopkins in 1931 (Our Law­
less Police 319):

Being the enemy, he [the criminal,
on or more accurately, the person ac­
cused or suspected of crime] has no
ights worthy of the name. He is to
be met by the weapons of war. In­
dividual rights, including those of
on-combatants, are subject to inva­
sion like the rights of non-combatants
in wartime. The policeman is a
peaceful soldier. If bullets go stray,
if civilians are inconvenienced, if civil
ights are suspended, those are acci­
dents inherent in a warfare that is
aged in crowded cities. Criminolo­
gists of the humanitarian class are to
be scorned, because they are the paci­
fists 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.

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under. It is clearly apparent from
their testimony that they casually re­
gard 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 “flag­
grant” police illegality.

The police, of course, do not al­
ways frankly admit their misconduct.
They sometimes resort to perjury to
subvert “bad laws.” As Profesor Irv­
ing Younger, a former federal prose­
cutor, recently observed in “The Per­
jury Routine,” 3 Criminal Law Bulle­
tin 551, 552 (1967):
For the first few months [after Mapp
v. Ohio], New York policemen con­
tinued to tell the truth about the cir­
cumstances of their searches, with the
result that evidence was suppressed.
Then the police made the great dis­
covery 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 testi­
fies 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 Na­
tional 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 interroga­
tors 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 experi­
ence 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 vio­

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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 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 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), Mapp (1957), Jencks (1957), Escobedo (1964), and Miranda (1966), news­paper headlines and gripes-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 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 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 "crib­ility 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: "If we crowded 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 de­lide.

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."