Chapter 6

DOMESTIC TRANQUILLITY AND LAW ENFORCEMENT

INTRODUCTION

Laws too gentle are seldom obeyed; too severe, seldom executed.

BENJAMIN FRANKLIN

Good men must not obey the laws too well.

RALPH WALDO EMERSON

No man is above the law and no man is below it, nor do we ask any man's permission when we require him to obey it.

THEODORE ROOSEVELT

THE WORDS "LAW" AND "ORDER" usually go together in common speech. "Order" here conveys the notion of "peace"; specifically, conformity to law and constituted authority. "Law," then, and its enforcement insure "domestic tranquillity" — peace within the national confines. The discussions of law and obedience to law throughout American history stress this note of peaceful order and of law as the sole safeguard of social stability, in contrast to the anarchy of a lawless state of society.

The relation of public law to private interests is twofold, according to these discussions. On the one hand, law is the only alternative to the use of private force to express mere arbitrary whim or revenge for injuries. On the other hand, law is the sole shield protecting individual rights and liberties against private and social forces that would otherwise violate them. Law in this view, in constitutional language, secures "the blessings of liberty" to the citizens of the republic.

Few peoples, if any, have shown such a devout reverence for the law and the processes of the law as the Americans. But also — in another of those paradoxical polarities of the American character — few peoples have been so indifferent to, and disrespectful toward, the prescriptions of the law. Lawlessness — including private and group violence and a tradition of direct action — has been just as much a characteristic of Americans as respect for the law.

Aside from the practical pressures of concrete social situations on the frontier or other unsettled areas — and the opportunities they presented for unrestrained private action — there has been a principled advoca-

cy of disobedience to the law in the name of justice or of constitutional government. Sometimes this has stemmed from resistance to the use of federal power in matters considered exclusively within the jurisdiction of local or state governments, and sometimes from refusal to assent to laws enforcing social institutions or customs regarded as absolutely evil — such as slavery or racial segregation. Those who have resisted in such cases have usually claimed to act in the name of a transcendent principle, such as limited government or the establishment of justice, which they have seen as the essential purpose of law.

Despite these various sources of antagonism to the written "positive" law, Americans have displayed a remarkable tendency to multiply laws and regulations on everything that men are inclined to do. They have attempted to use laws and law-enforcement agents to control and reform private morals and habits. In 1932 Walter Lippmann saw one of the sources of American lawlessness in the contradictory combination of a preference for weak (limited) government and a crusading drive toward moralistic legislation, notably in the national prohibition of alcoholic beverages in the post-World War I era.

The existence of an allegedly schizoid national attitude toward law raises the essential issue of the scope and limits of the police power.

1. THE POLICE POWER

THE TERM "POLICE POWER" has unfortunate connotations in the American mind, because of the common uneasiness about or hostility toward the very idea of political power or authority. Actually the word "police" has the same origin as the words "polity" and "political." The police power is simply the recognized and established function of maintaining *public* order, safety, health, and morals in the civil community. Traditionally, the police power has had just as much to do with providing for public sanitation and hygiene as with collaring suspected criminals or quelling riots. Police power is not essentially a matter of physical force; that is merely the ultimate means of accomplishing its objectives.

In American history, in the context of the dual-power federal system, the police power was at first allocated to the states. It was so designated officially by Chief Justice John Marshall in 1827 in the case of *Brown* v. *Maryland,* and contrasted with the federal power over interstate commerce. Chancellor James Kent, in his legal commentaries at that time, referred to the government's power to intervene on behalf of "the lives, or health, or peace, or comfort of the citizens." A later editor of Kent's work, Oliver Wendell Holmes, Jr., noted in 1873 that this was "now called the police power."

In the second half of the nineteenth century a series of state and federal court decisions defined the police power in terms of the conflict between governmental authority and individual rights. In that era the common law freedom of contract and also the constitutional rights to liberty, property, and due process of law were opposed to the power of any government — local, state, or federal — to act in social and economic matters.

The U.S. Supreme Court decided the Slaughter-House Cases of 1873 according to the tradition of Kent and Taney, that the power "to promote the happiness and prosperity of the community" supersedes private (and corporate) rights. Similarly, a New York Appellate Court ruled in 1904 that child labor laws are well within the police power to "promote the health, safety, or morals of the community," which overrules private interests and even the requirements of "natural justice and equity." However, such cases were not typical. The whole thrust of Supreme Court decisions from

about 1880 to 1937 was to disallow such legislation on the grounds that it was a deprivation of property without due process.

The controversy over the scope and limits of the police power of the states has extended to the present day, involving cases of minimum wages, fair trade practices and prices, open housing, and other social legislation. More significant, however, was the increasing claim to police power by the federal government, a development that would have seemed strange to traditional holders of the view that the power is a specific function of the states. In the twentieth century the federal government not only moved into the fields of social and economic legislation, which had previously been considered the peculiar preserve of state and local governments, but it also entered such more commonly recognized police areas as censorship, narcotics and alcoholic-beverage control, kidnapping, organized crime and gambling, and prostitution. It acted to protect purity of mind and morals as well as of food and drugs, to prevent industrial accidents, and to deal with other matters affecting public health and safety.

Thus in modern industrial society the term "police power" has been extended to include the whole scope of public welfare, and thereby, a purist might say, it has been returned to its original meaning. At the same time, the national government has tended to take over more and more of the police power previously exercised by the state and local governments — under the general welfare, interstate commerce, or other clauses of the Constitution. Tensions and conflicts have accompanied both developments.

One important source of conflict between the police power and individual liberty arises in the sphere of opinion — religious, political, literary, etc. Essentially, the American system of law, like most others, makes overt acts, rather than the public expression of thoughts, accountable before the law. Yet there have been many borderline cases where such expressions might be, and have been, interpreted as harmful to the public interest.

Thus, although Oliver Ellsworth proclaimed in 1787 that "civil government has no business to meddle with the private opinions of the people," he held that it may legitimately prohibit and punish "profane swearing, blasphemy, and professed atheism" as "gross immoralities and impieties" that are detrimental to the community. Similarly, H. M. Brackenridge held in 1819 that "opinion, when merely such, when prompting to no act inconsistent with the laws and peace of society," could not be subjected to the police power, but he insisted that such opinion should not "disturb the good order, peace, or safety of the state, or . . . infringe the laws of morality."

This conflict between the necessities of public safety and morality and the individual freedoms of speech, press, and assembly continued to be a source of intense public controversy throughout the next century and a half. The whole question of the nature and purpose of law enforcement has also been the subject of considerable discussion and dispute, although the discussion itself has often been obscured by outcries about "the need for law enforcement." All laws, however, have not been considered equally enforceable or worthy of being enforced — by law enforcement officials, prosecutors, judges, juries, or public opinion. [For further discussion of some of the topics mentioned in this section, see Ch. 15: Freedom of Enterprise.]

2. LAW ENFORCEMENT AND RESPECT FOR LAW: THE PROBLEM OF CIVIL DISOBEDIENCE

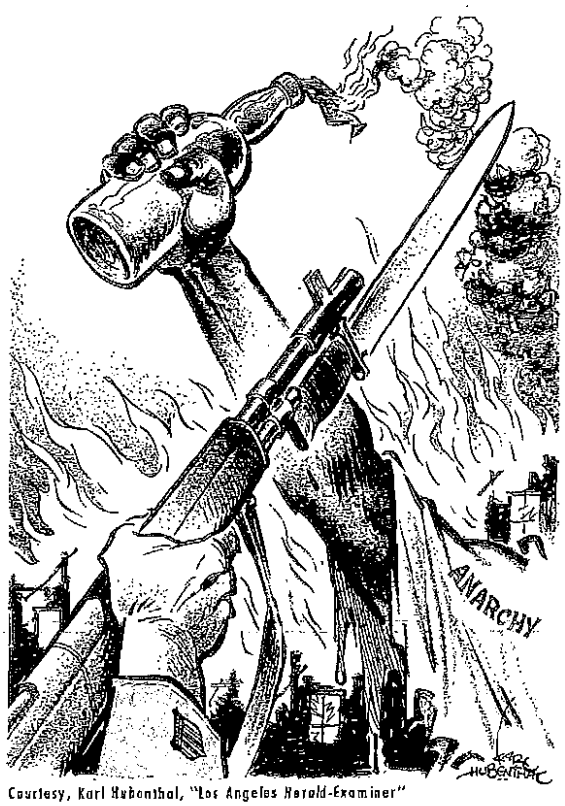
The word "enforcement" with regard to laws and court judgments means simply "execution" — that they are or should be

applied and carried out, kept "in force." The "force" used to accomplish this objective is usually symbolic or moral, and the armed force of the community is used only exceptionally. "The moral force which courts of justice possess," Tocqueville noted in 1835, "renders the use of physical force very rare and is frequently substituted for it; but if force proves to be indispensable, its power is doubled by the association of the idea of law."

The call for "law enforcement" and "respect for the law," it would seem, should apply to all laws and all types of laws, including the civil laws dealing with controversies and injuries among private persons, such as damage cases and breaches of contract. Public order in a civilized community, it can be argued, is as dependent on respect for and execution of the civil laws as of the criminal laws, such as those against robbery, arson, rape, and murder.

Thurman Arnold contended in 1933 that "the prestige of the state might logically be more involved in the enforcement of such [civil] laws than in the incarceration of an occasional bootlegger." Yet, he pointed out, lawyers who are adept in helping clients to evade criminal laws are highly respected, and it is only the criminal law that the press, the public, and its political leaders have in mind when they call for law enforcement. Arnold's explanation was that criminal cases more vividly dramatize "the moral notions of the community" and serve as a ritual enactment of the "mystical and abstract" cult of law enforcement, as distinguished from the practical job of "the keeping of order in the community."

The most obvious challenge to public peace and order, and also the most dramatic one, occurs when citizens oppose execution of the laws and court judgments by force or other overt actions. Such a dramatic challenge occurred in Shays's Rebellion of 1786-1787, when the debt-ridden farmers of Massachusetts used armed force against



Courtesy, Karl Hubenthal, "Los Angeles Herald-Examiner"

"America at the crossroads"; cartoon by Hubenthal

the state supreme court, the state arsenal, and other public facilities, in protest against an onerous tax system and foreclosures on their homes and farms. Another such challenge occurred in the Whiskey Rebellion of 1794, when the backwoods farmers of western Pennsylvania broke out in armed revolt against the federal excise tax on distilled liquors — a product that provided them with the only means of transporting their rye and corn to the market.

The Whiskey Rebellion — the most famous and best-organized resistance of ordinary American citizens to the federal "revenooers" — furnished good examples of the arguments for and against law enforcement. Leaders of the rebellion, such as "Tom the Tinker," demanded "suppression of the execution" of the excise tax and called for armed resistance to federal inspectors, on the grounds of the "virtuous principles of republican liberty" — as against far-off federal impositions and courts. President

Washington, on the other hand, called out the militia to suppress the rebellion and "to cause the laws to be duly executed," declaring that "the very existence of government and the fundamental principles of social order are materially involved in the issue."

Alexander Hamilton, who originated the tax that was the occasion of the revolt, and who accompanied the troops that suppressed it, insisted that law and order is the very foundation of constitutional government and individual liberty, and that its defense by force is necessary if anarchy and despotism are to be avoided. Since the Constitution clearly gives Congress the power to levy such taxes, Hamilton argued, "until you shall have revoked or modified that act, resistance to its operation is a criminal infraction of the social compact." He brushed aside as without merit the contention that it is "intemperate to urge the execution of laws which are resisted."

Hamilton's statement contains all the essentials of the argument for respect for law and law enforcement. According to this view, if we do not respect and aid in the enforcement of particular laws that we oppose, we undermine the whole fabric of law and civil government. Not to respect the law means to refuse to accede to its execution. Such disrespect leads to disrespect and nonenforcement of all laws, and hence to anarchy and the rule of private force. The only legitimate way to deal with a law we find obnoxious or unjust is to work for its repeal in the legislative chambers or for a judgment of its unconstitutionality in the appellate courts — while "respecting" it and cooperating with its enforcement until it is legally repealed or rendered null.

Hamilton and those who agreed with his position did not lay down an absolute claim for all laws, no matter how they had been enacted or executed. Hamilton allowed for exceptional cases where laws or their execution were clearly unconstitutional or oppressive to a large part of the community, and where resistance to constituted authority might be justified. Similarly, James Madison in 1830 foresaw possible occasions where "every constitutional resort" might fail, "rendering passive obedience and nonresistance a greater evil than resistance and revolution."

Even constitutionality could not ensure respect and enforcement of the "fugitive slave" clause of the Constitution and the Fugitive Slave Law of 1793. The Constitution, in Article IV, Section 2, clearly put the authority and power of the federal government behind the right of the slaveholder to retrieve his property, superseding any contrary state laws or regulations. Yet from the first years of the republic, citizens who were opposed to slavery as a moral evil assisted fugitive slaves to escape to freedom. The Underground Railroad, established about 1830, enabled as many as 50,000 slaves to escape in the thirty-year period before the Civil War. Moreover, many Northern states passed "personal liberty laws" in the period from 1820 to 1840, with the intent of obstructing enforcement of the federal Fugitive Slave Law.

The Fugitive Slave Law of 1850 — part of the bargain in the Compromise of 1850 — tried to deal with these attempts to evade and nullify the constitutional clause and the law of 1793. Heavy penalties were laid down for citizens, marshals, or deputies who refused to cooperate with the federal commissioners in apprehending the fugitives, or who assisted them to escape. Theodore Parker commented bitterly on the way the new law was being enforced in Boston in the early 1850s by the municipal authorities, by the militia — "volunteers in man-stealing" — and by U.S. troops. "It was the first time I ever saw soldiers enforcing the decisions of a New England judge of probate," he declared in 1856.

The only right way, said Thoreau in 1849, to deal with constitutionally sanctioned, "legal" iniquity — such as slavery or aggressive, "unjust" war by one's own nation against another — is to disobey, to

refuse to cooperate, to oppose the iniquitous system with all of one's power. Obedience, he declared, would mean collaboration in doing "the wrong which I condemn." Where matters of moral right and wrong are involved, according to Thoreau, we cannot wait to amend the laws and especially not the basic law of the land — "the state has provided no way: its very Constitution is the evil." We cannot wait for the mathematical majority of 50 percent plus one to arrive; each of us who adheres to the right, he maintained, "constitutes a majority of one already."

Thoreau, however, qualified his doctrine of lawbreaking, as Hamilton did his doctrine of law observance. "If the injustice is part of the necessary friction of the machine of government" — a mere detail or instrumental means for the necessary operations of government — he counseled, then "let it go. . . . but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law."

Thoreau thus lays the groundwork for a distinction (though he does not draw it himself) that has been made recently with regard to civil disobedience. Civil disobedience occurs in three ways, depending on the circumstances. If a given law is held to be unjust, he who disobeys it on the grounds of conscience or justice is civilly disobedient if he is willing to take the consequences of his action. (Otherwise he is merely a rebel or a criminal.) But it is not always the given law that is disobeyed; sometimes it is another law, which may itself be held to be just, that is disobeyed in order to call attention to the injustice of the first law, which cannot be directly disobeyed for some reason. (For example, a white man cannot disobey a segregation law by illegally performing acts forbidden to Negroes but legal for white men; an over-age male cannot "evade the draft.") Finally, civil disobedience may take the form of disobeying a law or even a whole series of laws that are held to be unjust because the first law is unjust. In all three cases, however, it is not civil disobedience, strictly speaking, unless one is willing to take the consequences. Hence riots and looting, for example, are not properly civil disobedience because the perpetrators ordinarily are not willing to take the consequences; but the burning of draft cards is civil disobedience, because the perpetrators are (usually) so willing.

Another famous example of disrespect for and willful violation of law occurred in the twentieth century in the response of a large segment of the American public to the Eighteenth Amendment and the enforcing Volstead Act (1919). This national attempt to prohibit the manufacture, transportation, and sale of alcoholic beverages aroused "the most violently explosive public issue of the nineteen-twenties," according to that era's historian, Frederick Lewis Allen. Again came the call for law enforcement and "resounding platitudes on the virtues of law observance," even from many of those who opposed Prohibition, and probably also from some of those who privately collaborated in its violation.

Although at first, according to Allen, "the country accepted it not only willingly but almost absentmindedly," and "took the short cut to a dry utopia," it soon became clear that Prohibition did not fulfill Hamilton's requirement for a law that could be respected — that it be "acquiesced in by the body of the community." The few thousand federal Prohibition agents, even with the aid of other government services, proved hopelessly inadequate to the task of enforcement; and rum-runners, illicit distilleries, bootleggers, speakeasies, and the criminal gangs that controlled and profited from this illegal business became a familiar part of the American scene.

In the propaganda war between the "drys" and the "wets," the "drys" pointed to the material prosperity of the '20s and to the alleged greater sobriety of the working classes as direct benefits of Prohibition. Herbert Hoover called it "a great social and

economic experiment, noble in motive and far-reaching in purpose," and running in the presidential campaign of 1928 as a dry, defeated Al Smith, who ran as a wet. In 1932, in a time of national economic depression, Franklin D. Roosevelt, running as a wet, defeated Hoover in the race for the presidency, and the Volstead Act, the Eighteenth Amendment, and the whole attempt at national Prohibition were soon abolished.

Walter Lippmann declared at this time (1933) that Prohibition was defeated by the moral indignation of individual Americans against sumptuary laws, rather than by their thirst for alcoholic beverages. They resented being treated as incontinent drunkards whose personal habits needed to be controlled by governmental restraints, he contended, "so they rebelled. The law was at odds, not only with their appetites but with their consciences. They made Prohibition unenforceable. They encouraged the bootlegger and the speakeasy by patronizing them. They nullified enforcement by discrediting it."

The Negro rights revolution of the 1950s and 1960s was the occasion for another clash between those who advocated respect for and enforcement of laws and court decisions, and those who advocated circumvention, resistance, or disobedience in the name of a superseding right or law. The latter occurred among both the opponents and the proponents of the Negro's fight for equality.

The U.S. Supreme Court's decision in *Brown* v. *Board of Education* in 1954, requiring the desegregation of public education, was hailed by its supporters as "the law of the land" that must be enforced and obeyed unequivocally, even by those who resented it bitterly. Its opponents, on the other hand, condemned it as a grossly unconstitutional violation of traditional state and local rights, and as an attempt to impose alien ways on a distinctive region and culture.

Southern legislatures tried to prevent execution of the Court's judgment through "nullification" and "interposition" resolutions, Southern courts issued injunctions against public school integration, and Southern governors used their powers in a vain attempt to prevent even token racial integration in the public schools and colleges. Actual or potential federal force was summoned to counter these moves.

President Eisenhower defended his dispatch of federal troops to Little Rock in 1957 as necessary "to aid in the execution of federal law" and enforce "compliance with the law of the land," especially federal court orders. Respect for law, he contended — that is, "respectful obedience" to the law or "respect for observance of the law" — is "the cornerstone of our liberties" and of the American way of life.

During this period, supporters of the Negro struggle for civil rights participated in demonstrations, sit-ins, and other "direct action" that violated state and local ordinances and private property rights. The charge was made that those who were calling on white Southerners to obey the Supreme Court's decision of 1954 were themselves guilty of breaking the law and offering resistance, however nonviolent, to public law and civil authority. It was in response to this charge that Martin Luther King, Jr., wrote his famous "Letter from Birmingham Jail" in 1963.

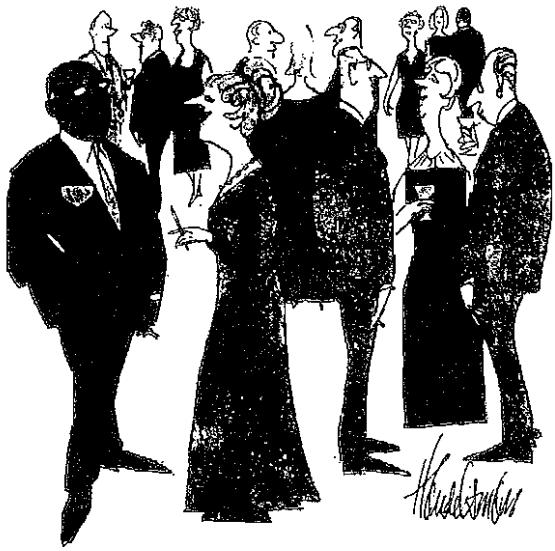
King, citing St. Augustine and Thomas Aquinas, contended that "one has not only a legal but moral responsibility to obey just laws; conversely, one has a moral responsibility to disobey unjust laws." He defined "justice" in terms of equality of treatment and the effect of laws or court orders on human personality and dignity. "Thus it is," he argued, "that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong." And

he contended that sacrificial disobedience — a willingness to suffer imprisonment as the price of arousing "the conscience of the community over its injustice" — far from being lawless, expresses "the highest respect for the law."

King declared that the "moderates" who opposed civil disobedience were "more devoted to 'order' than to justice" and preferred "a negative peace, which is the absence of tension, to a positive peace, which is the presence of justice." There is such a thing as bad law and order and peace, he insisted — after all, Hitler's injustices and cruelties against the Jews were perfectly "legal" under Nazi law, while resistance to these iniquities was "illegal" and a "violation" of peace and order. Law and order, he declared, were good and right only if they served the purpose of establishing justice.

King's epistle met a good deal of opposition, mainly on two grounds. It was pointed out that many white Southern segregationists *also* claimed to be following natural moral law or divine law, which King cited as the basis of just human law. However, their interpretation of what God and the Bible said directly contradicted that of King and his supporters. It was also pointed out that, according to some of the very thinkers mentioned by King, for example Thomas Aquinas, a prudential decision must be made in each case as to whether public order or moral right is the overriding requirement and tips the scales to either obedience or disobedience. The Founding Fathers of the American republic, such as Hamilton and Madison, had also stated these alternatives. Thus, some opposed King on the grounds that, although right in principle, he had misapplied the principle in this case.

A few years later, in 1967 and 1968, the leading area of civil disobedience seemed to be not the Negro civil rights movement but rather the agitation over the draft and the war in Vietnam. Young men burned their draft cards in public and otherwise indicated their decision not to be drafted, and older persons, themselves not liable for the draft, were charged with aiding and abetting draft resistance and evasion. Moral questions were involved here, too, mainly the question of whether the government could rightly ask young men to serve and perhaps to die in a war that seemed to the objectors to be not only immoral but also illegal. Extremely serious questions of policy were raised by these actions and by the actions of the government in response to them. [For further discussion of some of the matters treated in this section, see Chs. 4: GOVERNMENT BY THE PEOPLE, 7: COMMON DEFENSE, and 12: MINORITIES.]



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"I'm so glad you're opposed to looting"

3. LAWLESSNESS, VIOLENCE, AND VIGILANTES

THE AMERICAN "LAWLESSNESS" that so many commentators, both native and foreign, have decried has a dual connotation. It signifies the American disrespect for, indifference to, and violation of rules, laws, and court decisions. It also signifies a disposition

to act outside the law to protect life, property, or whatever else an individual or community considers worth protecting. Both tendencies, and the long record of armed violence against fellow citizens, law officers, and those considered a danger or vexation to the community, have usually been ascribed to the frontier situation and the pioneer character. Whatever truth there may be in this explanation, the fact remains that lawlessness and the use of violence continued down to the second half of the twentieth century — when the frontier had become a mere metaphor, the inspirational staple of political orators and commencement speakers. The American tradition of lawlessness and violence was a constant factor that affected considerations of law enforcement and the administration of justice in every era.

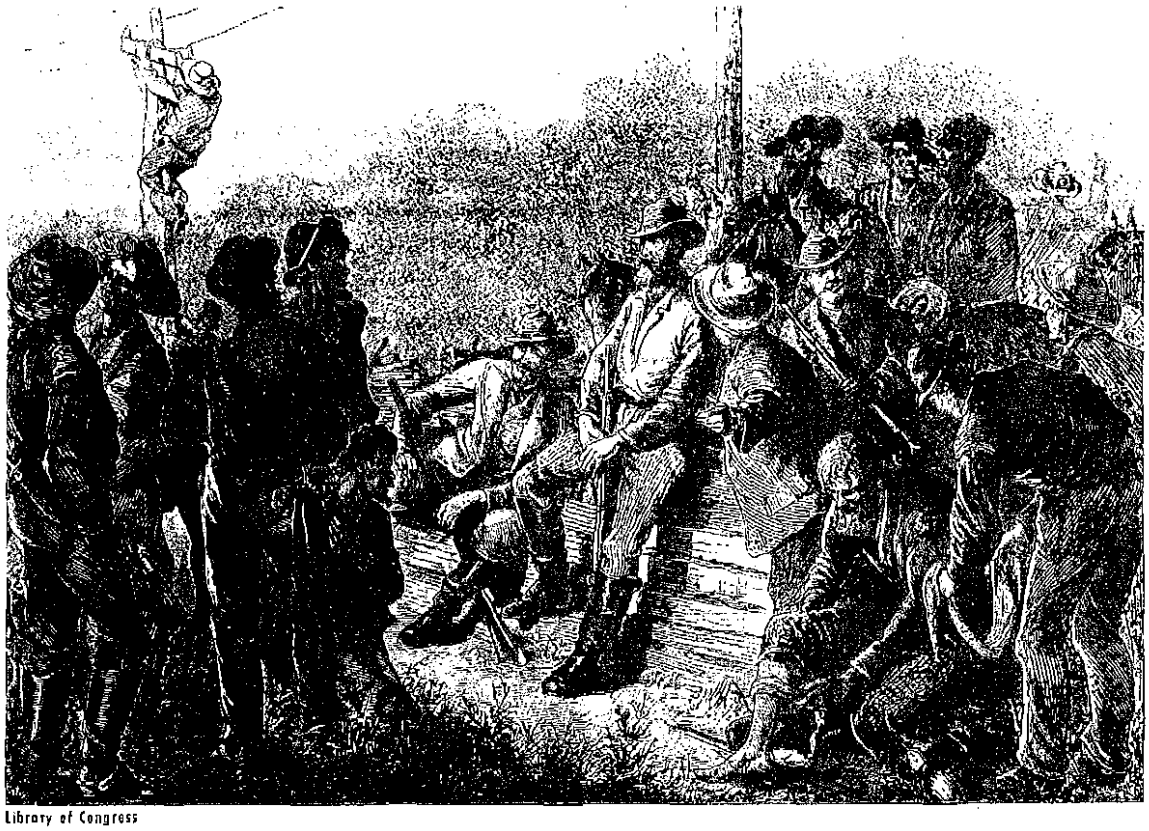
Approbation, as well as condemnation, of lawless violence has been expressed by many eminent Americans, and some of them have both approved and disapproved at different times. Benjamin Franklin, for instance, denounced the sickening, unprovoked massacre of the peaceful Conestoga Indians by a mob of white settlers in 1763 as "an atrocious fact, in defiance of government, of all laws human and divine," and called for the punishment of "the murders." But he also asserted, in 1789, that "a good drubbing" was the only proper response to offensive newspaper articles and called for "the liberty of the cudgel" as a counterforce to "liberty of the press."

In 1832 President Andrew Jackson castigated the South Carolina nullification ordinance as striking at the very base of national law and order, but in the same year he supported Georgia's defiance of the Supreme Court's order regarding the Cherokee Indians, reputedly remarking that "John Marshall has made his decision, now let him enforce it." As commanding general at New Orleans in 1815, Jackson had jailed a critical newspaper writer, the judge and lawyer who were involved in the habeas corpus action in the case, and a citizen who criticized his action as "a dirty trick." And Lincoln, for all his professed devotion to legal procedures in normal times, declared with apparent approval in 1863 that "even in times of peace, bands of horse thieves and robbers frequently grow too numerous and powerful for the ordinary courts of justice."

According to author and journalist Asa Greene, the mob violence against abolitionists, flour monopolists, and other objects of popular wrath in New York City in the 1830s — hardly a frontier community — was attended by effective connivance, or at least indifference, on the part of the authorities. "When the city is threatened with a riot," he noted, "they strenuously keep their own peace until the mob is completely organized, the work of destruction commenced, and, in general, pretty well finished." A similar cooperation of law-enforcement officials with mob violence against civil rights demonstrators was exhibited in the 1950s and 1960s, when sheriffs and their deputies "looked the other way" and allegedly participated in the murder of civil rights workers.

Sometimes extralegal violence has been defended on moral grounds and on grounds of self-preservation. In 1836, for example, that keen moralist and fervent Abolitionist Theodore Parker defended the use of "Sharps rifles" by the New England emigrants to Kansas as a necessary defense against the "border ruffians" who, he charged, had been let loose by the President to scalp and kill them. "But now, also, there are tools of death in the people's hand," declared Parker. "It is high time. When the people are sheep, the government is always a wolf."

On the other side of the Mason-Dixon Line, violence was similarly defended by the



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Vigilance court in session in the West; engraving from "Harper's," 1874

Ku Klux Klan as necessary "for purposes of legitimate and necessary defense" on behalf of racial purity and white supremacy. "We shot them, we killed them, and we will do it again," declared "Pitchfork Ben" Tillman in a remarkable speech in the U.S. Senate in 1907, defending his participation in lynchings of Negroes in that era as "protection of civilization against barbarism." He confessed that as governor of South Carolina, bound by oath to enforce law and order, he had vowed to "lead a mob to lynch any man, black or white, who had ravished a woman, black or white."

Tillman argued that opponents of such extralegal action make "the law into a deity which must be worshiped regardless of justice" and ignore "the fundamental principle of this government: 'Law is nothing more than the will of the people.' There are written laws and unwritten laws, and unwritten laws are always the very embodiment of savage justice." Tillman's defense of "Judge Lynch's court" made law an instrument of the popular will, of the "natural impulses" of the community, and appealed to the popular sense of justice as retribution for the offender.

Stripped of its racist overtones and animus, this kind of direct action and popular justice had precedents in the frontier era. The painter John James Audubon, in 1835, described justice "on the extreme verge of civilization" in the early decades of the nineteenth century. A group of honest men chosen by their fellow citizens and called "Regulators," he said, were "vested with powers suited to the necessity of preserving order on the frontiers." Investigation and determination of guilt was followed by a warning to leave the country for first offenders, by severe whippings and the burn-

ing of cabins for repeaters, and by death by shooting for repeated serious crimes, "after which their heads have been stuck on poles, to deter others from following their example." The aim of the Regulators was to inspire dread of certain punishment for misdeeds.

Similarly, Frank Soulé and others defended the activities of the Vigilance Committee (whence the name "vigilante") in San Francisco in 1849-1851 on the grounds that they were intended to aid the authorities, to support the law by "bringing the guilty to justice" speedily and certainly, and thereby to serve "the general good of the community." Admittedly, "they had hanged four men without observing ordinary legal forms, but the persons were fairly tried and found guilty." These extralegal measures were made necessary, said Soulé, by "the weak, inefficient, and sometimes corrupt courts of law," with their intricate legal technicalities and loopholes.

Far from being "a lawless mob, who made passion their sole guide and their own absolute will the law of the land," declared their defenders, the members of the Vigilance Committee acted on "the plainest principles of self-preservation." Just as an individual is justified in killing a robber or assassin to protect his life or his property where legal protection is not immediately available, so may the community defend itself against threats to public peace, order, and safety. "Their will and power form new *ex tempore* laws," argued Soulé, "and if the motives be good and the result good, it is not very material what the means are."

The same type of unofficial "auxiliary action" by private citizens took place in the 1960s in the Bedford-Stuyvesant area of New York City, where a group was organized by Hasidic Jews to guard against nighttime muggings and robberies, and was equipped with a central headquarters, prowl cars, and radio communication to alert regular police authorities. Although the group claimed historical precedents in the Maccabean movement in ancient Palestine under the Seleucid dynasty, their association in the public mind with the old-time "vigilance" committees of the American West was quite natural.

Violence or defiance of legal authorities has played a role in economic and social struggles from Shays's Rebellion in the 1780s to the Negro ghetto riots in the 1960s. The Kentucky tobacco growers, for example, resorted to a campaign of terrorism and destruction in an effort to defeat the American Tobacco Company in 1907-1908. Armed "Night Riders" ruined crops, killed stock, burned warehouses, and whipped or shot down opponents in a "reign of terror" that destroyed an estimated $50 million worth of property. Iowa farmers in the 1930s used clubs, pitchforks, and fists against sheriff's deputies and police guards, and dunked the latter in horse troughs, in a struggle against tuberculin testing of cattle; and they used similar methods to enforce the Farmer's Holiday movement against the sale of farm products. They even dragged a judge from his courtroom, abused and humiliated him, put a rope around his neck, and threatened to hang him if he refused to swear to order no more farm-mortgage foreclosures.

Violence has also played an important role in the struggle between labor unions and employers throughout much of American history. Strikers have used force against nonstriking fellow workers or hired strikebreakers — "scabs" — and against the armed private police forces of the employers. Strikers have in turn been subjected to beatings and killings by the latter and by ostensibly neutral public police forces. Leaders of the United Automobile Workers of America were severely beaten by a force of guards from the Ford Motor Company in the 1930s. Four strikers and spectators were killed and eighty-four wounded by police in the Memorial Day Massacre at the Repub-

lic Steel Company plant in South Chicago in 1937. Bombs, bullets, clubs, and tear gas, as well as naked fists, marked labor-capital relations until the middle of the twentieth century and long preceded the "Molotov cocktails" and other devices and tactics used during the Negro riots of the 1960s.

One of the traditional factors in American violence — apparently unique in the civilized world — is the penchant for owning and using firearms. According to one estimate, 750,000 persons were killed by firearms in the United States between 1900 and 1966, considerably more than the 530,000 dead in all U.S. wars during this period. In 1964, 5,100 persons were killed by guns in the United States, as compared with 24 in England and Wales, a fantastically disproportionate number even when population differences are taken into account. Advertisements in U.S. newspapers and magazines in the 1960s offered a wide assortment of pistols, revolvers, rifles, shotguns, and other arms at moderate prices, on easy credit terms and no money down. President Kennedy was assassinated in 1963 by a mail-order rifle, according to the report of the Warren Commission.

Considerable argument ensued in the 1960s about whether federal regulation of the sale of guns — in addition to state and local gun-license laws — was a violation of the constitutional right "to keep and bear arms." Some critics of unrestricted gun sales to private citizens noted that the constitutional guarantee is in the context of "a well-regulated militia being necessary to the security of a free state" rather than of merely individual rights. In a time of organized peacetime defense forces, national guards, and municipal and state police forces, this concern might be outdated. However, the National Rifle Association, speaking for sportsmen and for small-arms manufacturers, held differently and continued to fight against federal restrictions on "the right to bear arms"; and in May 1967 the Association urged rifle owners to become vigilantes against alleged "violent" elements in the community. [For further discussion of several of the topics treated in this section, see Chs. 1: NATIONAL CHARACTER, 2: FRONTIER, 12: MINORITIES, and 17: WORK AND WORKERS.]

4. JUSTICE ACCORDING TO THE LAW

THE MACHINERY OF LAW ENFORCEMENT and the administration of justice in the United States run from the cop on the beat and the neighborhood police station to the President, the Department of Justice, and the Supreme Court in Washington, D.C. The immediate ends of this constellation of agencies, procedures, and offices are public safety, order, and peace, qualified by considerations of justice, humanity, and individual rights, which are assumed to be prime values of American society.

The rules governing the procedures for the apprehension, detention, trial, and punishment of violators of the law have been derived from the long tradition of "common law," based on custom and judicial precedents and written laws and codes. The most important written rules regarding just and proper procedures are laid down in the Constitution of the United States.

First, the Constitution states that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed" (Article III, Section 2). So important did the Founding Fathers consider this right, derived from English common law, that they placed it in the body of the Constitution, not waiting for the "afterthoughts," as it has been called, of the Bill of Rights to mention it. It was one of their grievances against the British Crown that the right to be tried by a selected cross section of one's "peers," instead of by judges or other representatives

of state power in cases where life, liberty, and property were at stake, had been denied them. The Sixth Amendment further specifies that the jury shall be impartial and that the trial shall be in the "district" as well as the state where the crime was allegedly committed.

Second, the body of the Constitution states that "the privilege of the writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it" (Article I, Section 9). This venerated legacy of the common law requires that any person who is being held in custody shall be brought before a court and charged with a specific crime or released immediately. It is intended to prevent arbitrary and illegal detention by the authorities.

In addition to these two key rules of procedure in criminal cases, Amendments IV-VIII of the Bill of Rights lay down important guarantees and specifications. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and requires that search warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This Amendment is intended to prevent arbitrary and oppressive entry into private premises, which goes against the Anglo-American tradition that "a man's home is his castle," as well as to prohibit humiliating and unwarranted searches of one's person.

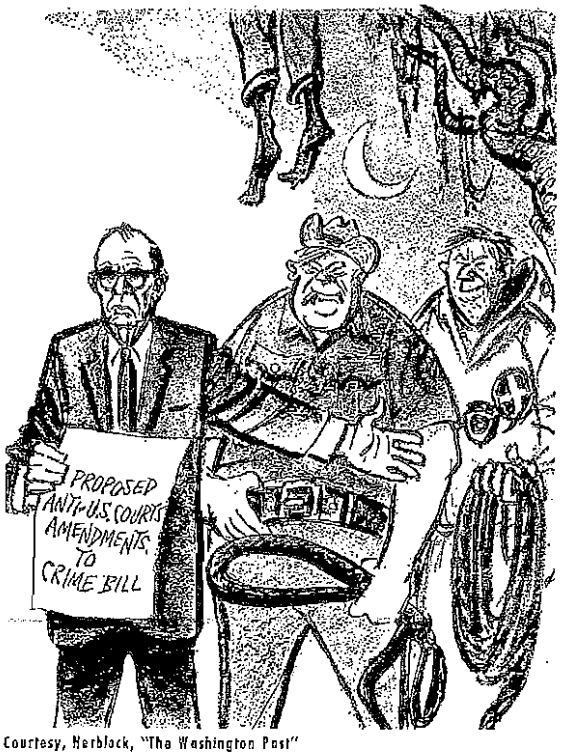
The Fifth Amendment requires that in cases of serious crimes a "grand jury" shall decide whether the state has sufficient evidence to justify a trial — a requirement designed to prevent mere malicious harassment by the authorities. It also guarantees a defendant against being "twice put in jeopardy of life or limb" for the same offense; otherwise, the prosecution could keep trying until it found a judge or jury that would find the accused guilty. Moreover, it states that no person "shall be compelled in any criminal case to be a witness against himself" — to prevent the brutal coercion of defendants that had a long and bloody history — "nor be deprived of life, liberty, or property without due process of law." The latter requirement — another legacy of the common law tradition — has become the constitutional prescription for the substantive justice of a law. The phrase, which is repeated in the Fourteenth Amendment, has been cited many times in cases involving both personal and property rights.

The Sixth Amendment — in addition to the jury rights already detailed — requires "a speedy and public trial" for the accused and that he be informed of the nature and cause of the accusation, confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

The Seventh Amendment extends the right of trial by jury to defendants in civil suits, in cases involving values of over $20, and requires that reexamination of the facts in appellate courts be "according to the rules of the common law."

Finally, the Eighth Amendment prohibits excessive bail, excessive fines, and "cruel and unusual punishments." This is in addition to the prohibition of "bills of attainder" (Article I, Section 9) and the consequent penalties of attainder for the heirs of the accused (Article III, Section 3) in the body of the Constitution. (Attainder amounted to outlawry and affected the property of the accused and of his descendants, as well as his life and liberty.)

The prohibition of *ex post facto* laws requires that persons may be punished only for violations of already existing laws. This eliminates the possibility of retroactive pen-



Courtesy, Herblock, "The Washington Post"

"All we want is old-fashioned law and order like we used to have down here 30 years ago"; 1968

alties, and, like the prohibition of bills of attainder, with which it is coupled, bars the singling out of disliked individuals or groups, as opposed to the prescription of certain classes of crimes.

The foregoing includes the basic rights, guarantees, and procedures laid down in the basic law of the land, which is supplemented and reinforced by state constitutions and rules. How they are to be applied in specific cases has been the subject of considerable dispute. There has been a wide latitude for interpretation and prudential judgment. Ours is undeniably a government of laws — but the laws are administered by men who vary widely in capacity, conscientiousness, and responsiveness to community moods and prejudices.

Exactly where some of these rights begin was not clear until certain decisions — sharply criticized — of the Supreme Court in the 1950s and 1960s. Do the guarantees against self-incrimination and to defense counsel, for instance, apply only to trial procedures, or do they apply from the time a man is first contacted by law-enforcement officers?

The Wickersham Commission's reports on law enforcement procedures in the 1920s revealed widespread, long-prevailing, and accepted abuses of the rights of detained or accused persons. Robert M. Hutchins remarked in 1966 that he had been unable to provide his law students at Yale in that era with any practical counsel as to how to cope with "third degree," "sweating," and other current police methods of inquiry that might be used on their future clients. As for the initial, preliminary examination or "booking" before the police-court magistrate, Ernst Puttkammer has called this the stage where there is the greatest discrepancy between the theoretical ideal, as laid down in the Constitution, and everyday reality.

On a higher level of courts and judges, the temper of the community may affect the judgments and procedures of even those with a professional commitment to law, reason, and justice. The witchcraft trials in colonial Massachusetts provided an outstanding example of such influence long before the republic was founded. In later centuries the odium of political and social radicalism — often coupled with foreign birth — has figured as a factor distorting judicial findings and court procedures.

In the case of the condemned Haymarket anarchists of 1886, for instance, one of them, August Spies, declared that the death sentences were an act of judicial murder, performed by "the alleged representatives and high priests of 'law and order,' to silence the anarchists' radical opinions and prevent the attaining of their social aims." Governor John Altgeld of Illinois, who pardoned three of the men, contended in 1893 that the state had frankly rested its case on mere probability — not on proofs "beyond

a reasonable doubt" — and without any identification of the person who had committed the criminal act, simply "to appease the fury of the public" and gain a conviction.

Heywood Broun, in a blistering attack on the administration of justice in the Sacco-Vanzetti trial in 1927, included the people of Massachusetts, their governor, and Harvard University ("Hangman's House") among those he held responsible, and maintained that this was the normal kind of justice in the state and nation — which condemned men to death without solid evidence, simply because they were hated foreign radicals.

In these and similar cases, in addition to the various kinds of corruption and bias operative at the different levels of law enforcement and the administration of justice, there was also at work the requirement of public safety, order, and welfare, balanced against and sometimes overweighing the constitutional guarantees in particular situations. Public officials, from the neighborhood policeman to the President of the United States, have to make prudential judgments, and often, because of their particular function and duty, they are inclined to count the public safety as the weightier factor. [For further discussion of some of the topics treated here, see Chs. 3: CONSTITUTIONALISM and 12: MINORITIES.]

5. PUBLIC SAFETY AND PRIVATE RIGHTS

AMONG THE RECURRENT OCCASIONS for conflict between public safety and private rights in U.S. history have been times of troubled international relations, conjoined with sympathy (alleged or real) of a segment of the public with the ideas or interests of a foreign regime, or its intense opposition to the policy of the administration in power.

The Alien and Sedition Acts of 1798 are among the most famous, or infamous, of administrative attempts to deal with such situations. The Alien Act gave the President practically dictatorial power over aliens that he deemed "dangerous to the peace and safety of the United States," leaving to the courts only the power to try an alien who disobeyed the President's orders. The Sedition Act, while it was directed against the writings and words, as well as the acts, of citizens, did leave to the accused person the right of trial by jury, to determine both law and fact; required the prosecution to demonstrate malicious intent; and made the truth of the writing a sufficient defense.

To some at the time — especially the Jeffersonian Democratic-Republicans who considered themselves to be the targets of the legislation — the Acts seemed to condemn but vaguely defined offenses and to be inspired more by political expediency or intolerance than by zeal for the public safety. Similar charges were leveled against executive and legislative actions against alien radicals or their ideas during the "Red" scares of the 1920s and the 1950s.

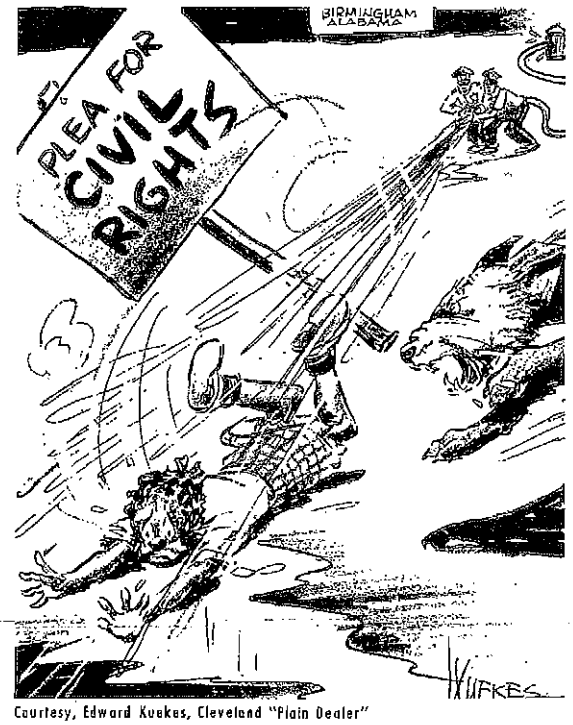
The standards of loyalty for government employees in 1947, at another tense period of American history, included mere "sympathetic association" with various organizations or groups designated as subversive by the attorney general as grounds for rejection. J. Edgar Hoover, head of the FBI, contended at the time that "sympathizers and fellow travelers" were at least morally accountable as "innocent, gullible, or willful allies" of the alleged Communist conspiracy to overthrow the government of the United States. Such critics as correspondent Alan Barth, however, maintained that it was the loyalty-program "Americanists" who were disloyal to the American tradition and subversive of the national security by reason of their use of dictatorial means, similar to those of the Communists, to enforce assent.

Periods of "hot" war — of real armed conflict, insurrection, or rebellion — as opposed to those of "cold" or undeclared wars in the 1790s and 1950s produced much more serious abrogations of constitu-

tional safeguards. The Constitution defines treason as "levying war against them [the United States] or . . . adhering to their enemies, giving them aid and comfort" (Article III, Section 3). An outstanding casualty of many such conflicts has been the right of habeas corpus, for the suspension of which there is a constitutional escape clause, "when in cases of rebellion or invasion the public safety may require it" (Article I, Section 9).

President Lincoln defended the suspension of habeas corpus and the military arrest of civilians in 1863 on the grounds that they were required by the extraordinary situation confronting the government. The Civil War, an unprecedented "case of rebellion," he contended, could not be dealt with by ordinary legal rules and safeguards, since the offenses that presented an imminent or potential danger to the Union did not fall under the constitutionally defined rubric of treason, nor under any other clearly defined crime. "Courts of justice are utterly incompetent in such cases" (of talking against the war or inducing men not to enlist), he maintained, for a "hung" jury might fail to convict a flagrant offender. In such emergencies, arrests must be made, not so much for what had actually been done as "for what probably would be done," or might be done — for "preventive," not "vindictive," purposes.

However, in 1866, in the Milligan case, involving an armed conspiracy against federal arsenals in Indiana and Illinois, the Supreme Court ruled that the President could not empower military commissions to try civilians in areas remote from military operations. It concurred with Lincoln's view that the right to habeas corpus may be suspended during grave national emergencies, such as the Civil War. But, in a unanimous decision, it denied that any of the other basic rights and liberties specifically guaranteed in the Constitution "can be suspended during any of the great exigencies of government."



Courtesy, Edward Kuekes, Cleveland "Plain Dealer"

"— With liberty and justice for all!!!"; 1963

A civilian retains the right to a trial by jury and all other constitutional rights in criminal cases "at all times and under all circumstances," the Court declared, whenever the civil courts are open and the ordinary operations of justice are not actually impeded by invasion or rebellion. "Martial law cannot arise from a *threatened* invasion," said Justice David Davis. "The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." To leave to the military commander in an area the discretion "to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will,*" he maintained, means the end of constitutional government.

During the war itself, Alexander H. Stephens, vice-president of the Confederacy, made an eloquent attack on Jefferson Davis' request for power to suspend habeas corpus and to arrest and imprison suspected persons deemed inimical to public safety and the carrying on of the war. This power, if granted, Stephens charged, would remove

all constitutional rights against unreasonable search and seizure and give the executive dictatorial powers, usurping those that belonged solely to the judiciary. "If there be traitors," he argued, ". . . let them be constitutionally arrested, tried, and punished."

Military conflicts with foreign enemies have also presented outstanding examples of conflicts between the government's judgment of the requirements of public safety and constitutionally guaranteed personal rights. In World War I, for example, the federal government and the federal courts, as well as local bodies, were charged with violations of civil liberties. Woodrow Wilson, a special target of criticism, had predicted privately, on the eve of the declaration of war against Germany, that the war would mean the end of constitutional liberties. "He thought the Constitution would not survive it," according to a friend, Frank Cobb, "that free speech and the right of assembly would go." But Wilson saw no alternative to entering the war and risking a result that he could only hope would not ensue.

Senator William E. Borah of Idaho, in a plea in 1923 for the release of the political prisoners of World War I, termed a "vicious and un-American doctrine" the theory that "as soon as war was declared the Constitution of the United States was in a sense suspended, that the Congress could pass any law it saw fit to pass." It was in accordance with this doctrine, he charged, that men had been unjustly and tyrannically jailed for their expressed thoughts and beliefs, not for any actions punishable under the criminal law. "Every clause, every line, every paragraph of that great charter," he insisted, "obtains in time of war just the same as in time of peace."

The most important conflict in World War II between public safety and personal liberty involved persons of Japanese ancestry who were removed to detention centers by military orders, on the grounds that racial descent and affiliation implied potential disloyalty and danger to national security. The majority of the Supreme Court in the Korematsu case, in 1944, refused to question the military's judgment of potential danger, whereas the minority maintained, as had the majority of the Court in the Milligan case, that the military could not have absolute discretion in a constitutional government, and that the ordinary rules of evidence, specific charges of crime, and individual — not group — responsibility were essential criteria of proper procedure.

The comment by Justice Hugo Black, in his majority opinion, that what the Japanese had to endure was just one of the hardships of war, was condemned by Eugene Rostow in 1945 as a disregard for "the rights of citizenship and the safeguards of trial practice which have been the historical attributes of liberty." Law Professor E. S. Corwin called the Japanese relocation program "the most drastic invasion of the rights of citizens of the United States by their own government that has thus far occurred in the history of our nation."

Yet those whose rights were allegedly violated were still able to appeal through the ordinary courts of law, in a process that might have resulted in a nullification of the military orders. In one case, in fact, the Supreme Court ruled that the government could not intern a demonstrably loyal Japanese-American and granted a writ of habeas corpus freeing her from custody (*Ex Parte Endo,* 1944). However, in 1966, Justice Tom Clark, who had been involved in the government procedures against the Japanese-Americans in World War II, publicly avowed that, in his later judgment, the action had been unjust and unconstitutional.

Other important instances of the exercise of federal action outside the regular procedures of the courts have involved the use of injunctions or the dispatch of federal troops where public safety, interstate commerce, or carrying the mails were allegedly endangered. In the famous case of the Pullman boycott of 1894, the federal government

used both judicial injunctions and military troops simultaneously. A federal court injunction was issued against the American Railway Union leaders, Eugene Debs for one, and federal troops were sent to Chicago by President Grover Cleveland in July 1894.

In the case of *In Re Debs* (1895), the Supreme Court ruled that the national government had constitutional powers to safeguard interstate commerce and the U.S. mails on "every foot" of American soil. It could do so, according to Justice David Brewer's opinion, either by armed force or by a writ of injunction, or by both. The obtaining of a writ of injunction, he pointed out, evades the necessity for jury trials and other legal safeguards. It makes disobedience of the order an issue of contempt of court, decidable only by the judge involved, and "not open to review on habeas corpus in this or any other court."

The sending of troops to Chicago was defended by President Cleveland as a strictly constitutional measure to protect the U.S. mails and interstate commerce against demonstrated conspiracies to obstruct them. However, Governor Altgeld of Illinois protested that such unilateral action, taken without the request of local authorities, was a gross violation of the constitutional principle of local self-government. Furthermore, he contended that there was not sufficient violence to justify such intervention and that it amounted to an action against the striking workers and on behalf of their employers. Cleveland responded that he had acted properly "to restore obedience to law and to protect life and property." Altgeld retorted that to make the national executive the sole judge of when an emergency exists is to render our government a military despotism.

The same controversy on "emergency powers" arose later when federal troops and marshals were dispatched to Arkansas and Mississippi to enforce Negro rights during the Eisenhower and Kennedy administrations. The Constitution states that the federal government shall protect the states "on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence" (Article IV, Section 4). It also empowers Congress to summon the state "militia to execute the laws of the Union, suppress insurrections, and repel invasions" (Article I, Section 8) and makes the President the commander in chief of the militia "when called into the actual service of the United States" (Article II, Section 2).

The question, as Lincoln saw in 1863 and Altgeld in 1894, is who decides, or who decides to decide, that there is a sufficient emergency to justify extralegal measures. Presidents — such as Lincoln, Cleveland, Truman, Eisenhower, and Kennedy — have decided that it was their responsibility, and theirs alone, to make the decision, without waiting for the calls of local and state governments. Governors — such as Altgeld, Faubus, Barnett, and Wallace — have usually contended that the federal government must wait for the request of the local authorities for aid.

The federal government seems to have judged, in most of the important historical cases, that public safety, law enforcement, or certain property or personal rights transcend the constitutional requirement to wait for the invitation of local officials, who might be indifferent to or connive with the alleged disobedience or violence. [For further discussion of some of the topics mentioned in this section, see Chs. 11: INDIVIDUALISM, 12: MINORITIES, and 17: WORK AND WORKERS.]

6. THE POLICE, THE PUBLIC, AND CRIME PREVENTION

AN ORGANIZED, UNIFORMED POLICE FORCE first appeared in the United States in 1844, in New York City. Before that time, it was the duty of the private citizen to detect and

apprehend the suspected criminal; police powers, such as that of arrest, were distributed throughout the society. When police powers were placed in a regular civil body, a new problem arose, along with the opportunity for more effective law enforcement. The shift of power from citizen to citizen's representative was viewed with suspicion, and it is still true that the police must struggle against a derogatory public stereotype. In addition to the traditional American disregard for rules and laws, the police have had to contend with a hostile public image of them as corrupt, brutal, unscrupulous, tyrannical, meddlesome "cops" or "fuzz." Yet they are called on by that same public to keep down crime and apprehend criminals — to protect the public safety.

Actually, the work of a municipal police force includes a good deal more than coping with crime and criminals in the ordinary sense. Anything from licensing dogs to censoring movies may fall within the scope of police duties. In an automotive age their role in traffic regulation brings them into close, and sometimes annoying, contact with the public. Conversations between traffic policemen and motorists whom they stop and ticket often furnish models of uncivil speech on both sides. Although some experts have criticized the plethora of auxiliary duties thrust on police departments as lessening their effectiveness in dealing with crime, others have contended that the various community "household" duties give departments a wholesome, intimate relation with the community in its normal, everyday life.

Even dealing with crime in a modern urban community is a far more complicated matter than apprehending and arresting the lawbreaker, or discouraging criminal acts by the presence or potential presence of the man on the beat or in a squad car. In addition to the task of crime *repression,* "which is intended to reduce the *opportunity* to commit crime," the San Francisco Police Department noted in 1966, the police are entrusted with the function of crime *prevention,* which "is intended to reduce the *desire* to commit crime." All kinds of juvenile and adult activities, rehabilitation programs for delinquents, and neighborhood improvements projects fall within the scope of what has come to be called "police-community relations." Many municipal police departments have instituted sections with this designation, which endeavor to inculcate a constructive and "professional" attitude on the part of the police in their dealings with the public, including offenders or suspects whom they apprehend. They also try to induce the public to take a more positive and helpful attitude toward the police, to see them as necessary aides, and even friends, rather than as annoying meddlers or enemies. The aim is not merely to project a good public "image" of the police in the public's mind but also to gain the latter's assistance in keeping law and order, preventing crime, and creating a more harmonious and livable community or neighborhood — in short, to bring the citizen back into the law-enforcement picture.

Civilian review boards have been instituted in some major cities. Such boards are empowered to hear charges against policemen for improper or inhumane conduct and to reprimand or discharge those found guilty. Police administrators dislike the whole idea of an outside hearing board and prefer to rely on an internal investigative division, whereby the police supervise themselves, and on prosecutions of offenders by the state's attorney's office in serious cases. The Committee on Criminal Law and Procedure of the California State Bar suggested in 1954 that citizens subjected to illegal arrest and search by overzealous policemen be entitled to "a substantial money judgment" against the community whose officers violated their rights. O. W. Wilson, former superintendent of police in Chicago, supported this proposal as a practical means of inducing communities to select and train police personnel more carefully without im-

pairing public security and aiding professional criminals.

Police administrators have opposed the recent strict construction of the constitutional safeguards of civil rights as harmfully restrictive of the police functions of detecting and apprehending criminals. Wilson referred in 1960 to "antiquated rules governing the questioning and detaining of suspects, searching them for weapons when police safety is jeopardized, arresting them when conditions warrant such action, and the right of the suspect under some conditions forcibly to resist arrest by a uniformed policeman." He called for the legalization of certain "common police practices," such as questioning persons whose actions arouse "reasonable suspicion" of potential crime, searching such a person for weapons, and arresting him if he is illegally armed or taking him to a police station for questioning for a two-hour maximum if he refuses to answer satisfactorily on the spot.

Wilson also demanded that the police have the authority to hold a person for twenty-four hours without charging him with a crime (extendable by a magistrate to a longer period), and to arrest and search persons without a warrant in certain instances (on-the-spot misdemeanors and convicted narcotics offenders). Moreover, he wanted suspects to be "denied the right to resist illegal arrest by a person the suspect has reasonable grounds to believe to be a police officer." He considered that any inconvenience caused to innocent persons in cases of police error was "a small price to pay for the privilege of living securely and peacefully."

Most of these proposals were included in the Uniform Arrest Act, drafted by two law professors, but adopted by only three states at the time Wilson spoke. "On view" arrests without a warrant are permissible in certain jurisdictions, under certain rigorously prescribed conditions. So are "stop-and-frisk" actions on "reasonable suspicion" under certain circumstances, and "no-knock-and-enter" procedures where "probable cause" is established and a search warrant has been obtained. What police officials find particularly objectionable are restrictions on police authority for questioning suspects for a certain time before they are charged with an offense or have an opportunity to consult an attorney. Supreme Court decisions have made invalid, under the law, statements or even confessions obtained in such circumstances.

Libertarians, on the other hand, contend that the police must be rigorously restricted in their actions in order to preserve our system of constitutional liberties and to protect the poor, weak, and ignorant against the powerful machinery of the state. So-called liberalization or modernization of arrest and investigation procedures, they say, will only further penalize the people at the bottom for being there, which is now already done through bail-bond, vagrancy, and other poverty-punishing legislation. Even the right to defense counsel at every point of the law-enforcement process is an empty one for the indigent and not really fulfilled by state-paid "public defenders." Furthermore, the libertarians argue, police and investigative agencies, all the way up to the FBI, are already using all kinds of illegal, unjust, and unsavory methods, such as wiretapping, bugging, lie detectors, mail-cover prying, and public-toilet peepholes. Why encourage them further, they ask, in irregular activities that endanger liberties and violate privacy?

It was obvious that police departments had become much more careful during the 1960s in respecting the rights, as interpreted by the courts, of suspects and in informing them of these rights at the time of contact or arrest. In some cities, suspects were handed printed cards stating their rights at the time of initial approach by a police officer. The purpose of such devices, according to the California attorney general in 1966, was "to ensure that criminals do not escape punishment because of constitutional legal errors made by the arresting and interrogat-

ing officers." It was not immediately apparent what effect the Supreme Court and state court restrictions on police procedures would have on the number of arrests and convictions.

The major problem in law enforcement, as the nation approached the 1970s, was the problem of crime itself — what the President's Commission on Law Enforcement and Administration of Justice in 1967 called "the challenge of crime in a free society." In a report under this title it concluded that crime had become a major social problem, menacing the "basic quality of American life" through the fear, anxiety, and bewilderment it elicited among most Americans living in urban areas.

It found two main sources of crime in an increasingly urbanized nation: (1) the youth (between fifteen and twenty-four), who were becoming a disproportionately large part of the population and less and less responsive to traditional moral and social controls; and (2) the poor, deprived slum-dwellers and racially segregated ghetto-inhabitants in a society whose "affluence" was continuously publicized and evident. Hence, its first major recommendation for crime prevention was to eliminate or alleviate the social conditions that are conducive to crime, so as to enable the individuals in such situations to assume moral and social responsibility — to want to and to be able to do right.

Second, it called for a strengthening and reformation of the system of law enforcement and criminal justice. It recommended not only more financial resources and technical advances in crime detection and apprehension but also the devising of creative alternatives to incarceration and segregation of offenders, particularly of the youthful criminal, who was the main source of crime. It urged making correctional institutions really "correctional" instead of custodial enclaves. Moreover, it recommended a creative willingness to change traditional ways of procedure among the police and the courts in order to accomplish the major aims of law enforcement: the good of society and the requirements of justice.

"The inertia of the criminal justice system is great," was the report's doleful observation. The "scandalous" state of the lower courts observed by the Wickersham Commission during the Hoover administration still prevailed. Systems of police recruitment and promotion, as well as the failure to recognize the important discretionary role of the policeman in law-enforcement policy, were much the same in 1967 as in 1927. "Plea bargaining" between defense and prosecuting attorneys, without public acknowledgment or much concern for justice or social safety, was still going on. Fantastically heavy and inequitable, and perhaps unnecessary, bail requirements were still being imposed on the poorer defendants, who were forced to await trial, like caged animals, not subject to rehabilitation procedures nor credited with time — as in European legal systems — to be deducted from their sentences. Drunks were still being arrested and thrown in "the tank," in fact, they accounted for a third of the arrests and convictions in the nation — although it is disputable whether drunkenness falls into the category of essentially criminal acts or is amenable to treatment through the process of criminal justice.

Finally, the report called for public support and involvement in the process of criminal detection, prevention, and rehabilitation — a community-relations program on a nationwide scale. Ridding the system of judicial administration of the great numbers of offenders who should be handled through alternative means had to be dependent in the long run on the cooperation of the public. It was the hope of the members of the commission that their report would serve to awaken the American people to the near-catastrophic problem of crime in their society and to their own responsibilities for achieving an intelligent, just, and humane solution.

The Commission's report, and other official and unofficial statements during the 1960s, did not solve the problem of crime in America, of course — a problem that, on the contrary, bids fair to become more rather than less acute as the nation approached the end of the twentieth century. Particular problems, too, aside from crime in general, seem likely to increase rather than decrease in intensity.

For example, it is clear that the country is going to have to decide, once and for all, which is more important: stopping crime or protecting privacy. The reason is the tremendous advances that have been made, and are promised for the near future, in technical and electronic equipment for observing the private lives of citizens. Experts claim that no house or office can be made "bug-proof," and that no activity of life can escape scientific surveillance. If the police are allowed to make use of every modern device for these purposes, crime may come to an end — but will the people want to pay the price?

Another problem area is that of the changing social definition of crime. Is drunkenness a crime if the drunk is in no way disturbing the peace? (It might be if he owned a car — for the drunken driver may well be the most dangerous citizen in present-day America.) Are homosexual relations between consenting adults criminal? They are in many U.S. states, but in some circumstances they are not in Great Britain, and here is one realm where changing public attitudes may change the laws in the next few years. The same would apply to other sexual practices that are perhaps not "normal" but are nevertheless engaged in by a large proportion of Americans. Here again the people will have to decide which more important — the prevention by law-enforcement bodies of actions considered immoral, with all its obvious injustice to those who do not consider such actions immoral, or the upholding of the right of social as well as political dissent to accepted moral canons and laws, with its concomitant unpleasantness for many persons.

Finally, it will have to be recognized that crime in America has become to a large extent — of course not entirely — a matter of poverty and race, and that the problem of crime must be seen in that context. Many of the specific proposals to improve the administration of justice — the guarantee of a lawyer, the elimination of the necessity for bail for certain classes of offenses, and so forth — are really proposals to make it possible for the poor to take advantage of constitutional and legal procedures that are now open to all in principle, but only to the relatively well-to-do in fact. Contrariwise, proposals for stop-and-frisk laws are usually bitterly opposed by Negro organizations and the poor in general because they are viewed as exacerbating the already difficult problem of police harassment. Fifth Avenue dwellers are not the ones who are going to be stopped and frisked — people in Harlem are, or Negroes on Fifth Avenue.

Once again the American people will have to decide what they most want: the prevention of crime and the safety of cities, with the possible consequence of injustice to segments of the population that are already subject to many kinds of injustice, or justice for all, with some possible decrease in public safety. The question is a difficult one to answer for almost everybody. But the attainment of domestic tranquillity has never been easy, nor free from inequities, in any society created by men. [For further discussion of some of the matters treated here, see Ch. 5: General Welfare.]