

The Conspiracy of Law

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There is, of course, some irony in speaking of the law itself as a conspiracy, when the law so often hounds others as conspirators. But beyond that, there is sense in using a term that suggests a collective will, lending a systematic character to events. What is different about the conspiracy of law from that of men is that men are not initiators but executors; there is no overall planning by men, but men carry out acts which lead to certain consistent results.

The human intent in the long-term social development is missing, but there is human purpose on the individual level; the scheme of the social structure is internalized as a variety of individual motivations which, as they are acted out, realize certain consequences with remarkable regularity. We are familiar with such motives. Marx, Weber, Michels, Harry Stack Sullivan taught us something about them: the desire for profit in business, for power in politics, for efficiency in bureaucracies, for approval by “significant others.” Working in and around all these other motives is the social need for legitimacy, which reduces many of the complex requirements of modern society to a simple rule which, if followed, will maintain all results as before: Obey the law.

I use the term “conspiracy” therefore to retain the idea of systematic results. The word “systematic” avoids the extreme claim of inevitability, which has brought forth a fury of rejoinders (especially against Marx); it suggests, rather, strong tendencies and overall consistency. I use it also to retain the human element in our modern complicated system, even if this is diffused and differentiated, to insist on individual human responsibility. Otherwise, looked on as unmalleable monsters, such systems reduce us to impotency. We carry out the “will” of the structure by what we do. And it will take our action to thwart that will.

Radical critics of society (as well as the chief administrators of that society) have sometimes adopted “conspiracy theories” in which various groups of men have been accused of plotting against the rest of us. Radicals are led to this by their accurate perception of the repetitiveness of certain phenomena in modern society—war, racial hatred, political persecution, poverty, alienation—and by a false conclusion that this must be the work of a plot. The effect of this conclusion is to lose potential allies, who are properly dubious that there is evidence for a plot; it also misleads friends, because it turns them toward superficial actions aimed at particular plotters rather than at larger structural defects. (If anyone is innocent of exaggerating evil it surely must be the black South Africans, but I once heard a black man from Johannesburg say, “I don’t want to exaggerate our situation, because it will mislead me.”)

Since I am not defining “conspiracy” in the customary way, by whether or not it breaks laws, I must find an end for this conspiracy which is beyond the realm of law, and so I will find it in the violation of ethical goals. As a rough guide, I will use men and women’s equal rights to life, liberty, and the pursuit of happiness, and speak of law conspiring against these rights.

This is still a crude test, but it is better than “the rule of law,” which has no ethical content that I can see. What would seem to be an inherent ethic of stability turns out to be quite dependable, as we find the rule of law in practice creating certain kinds of stability at the expense of other kinds: national at the expense of international, civil at the expense of personal; or as we find that a “peace” enforced by the rule of law is purchased at the price of disorder.

In our general overestimation of the benefits of that modernization (industrialization, urbanization, science, humanism, education, parliamentary government) which followed the feudal era in the West, we have magnified the advantages of “the rule of law” supplanting “the rule of men.” Our histories show varying degrees of reverence for the Magna Carta, which stipulated what are men’s rights against the king; for the American Constitution, which made specific (and supposedly limited) the powers of government as against the people; and for the Napoleonic Code, which introduced uniformity into the French legal system. Writing to the new king of Westphalia in 1807, Napoleon enclosed “the constitution of your kingdom” to replace “arbitrary Prussian rule” with “a wise and liberal administration,” and urged him: “be a constitutional king.” The comment of historians Robert Palmer and Joel Colton on Napoleon (*A History of the Modern World*) bears out my point: “Man on horseback though he was, he believed firmly in the rule of law.”

The modern era, presumably replacing the arbitrary rule of men with the objective, impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. What was done before—exploiting men and women, sending the young to war, putting troublesome people into dungeons—is still done, except that this no longer appears as the arbitrary action of the feudal lord or the king; it is now invested with the authority of neutral, impersonal law. Indeed, because of this impersonality, it becomes possible to do far more injustice to people, with a stronger sanction of legitimacy. The rule of law can be more onerous than the divine right of the king, because it was known that the king was really a man, and even in the Middle Ages it was accepted that the king could not violate natural law. (See Otto Gierke, *Political Theories of the Middle Age*, Notes 127–134.) A code of law is more easily deified than a flesh and blood monarchy; in the modern era, the positive law takes on the character of natural law.

Under the rule of men, the enemy was identifiable, and so peasant rebellions hunted out the lords, slaves killed plantation owners, and radicals assassinated monarchs. In the era of the corporation and the representative assembly, the enemy is elusive and unidentifiable; even to radicals the attempted assassination of the industrialist Frick by the anarchist Berkman seemed an aberration. In *The Grapes of Wrath*, the dispossessed farmer aims his gun confusedly at the tractor driver who is knocking down his house, learns that behind him is the banker in Oklahoma City and behind him a banker in New York, and cries out, “Then who can I shoot?”

The “rule of law” in modern society is no less authoritarian than the rule of men in pre-modern society; it enforces the maldistribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered; he who traces back from cause to cause dies of old age inside the maze. What was direct rule is now indirect rule. What was personal rule is now impersonal. What was visible is now mysterious. What was obvious

exploitation when the peasant gave half his produce to the lord is now the product of a complex market society enforced by a liberty of statutes. A mine operator in Appalachia (in a recent film made by Vista volunteers) is asked by a young man why the coal companies pay so little taxes and keep so much of the loot from the coal fields, while local people starve. He replies, "I pay exactly what the law asks me to pay."

The direct rule of monarchs was replaced by the indirect rule of representative assemblies, functioning no longer by whim and fiat but by constitutions and statutes, codified and written down. Rousseau saw clearly the limitations of representation, saying, "Power can be transmitted, but not will." And: "The English people think that they are free, but in this belief they are profoundly wrong...Once the election has been completed, they revert to a condition of slavery: they are nothing." The idea of representation, he says, "comes to us from the feudal system, that iniquitous and absurd form of Government in which the human species was degraded and the name of man held in dishonour."

The conspiracy of law occurs in the age of literacy and makes the most of power of the printed word. Thus, the potential for hypocrisy, which is man's gift to the universe through symbolic communication, is enormously expanded. In slavery, the feudal order, the colonial system, deception and patronization are the minor modes of control; force is the major one. In the modern world of liberal capitalism (and also, we should note, of state socialism), force is held in reserve while, as Frantz Fanon puts it (*The Wretched of the Earth*), "a multitude of moral teachers, counselors, and bewilders separate the exploited from those in power." In this multitude, the books of law are among the most formidable of bewilders.

History, which comes of age in modern times and reaches the status of a profession, is used selectively, politically. In our histories, we make much of the great transition to "modern" times, thus obscuring the continuity of injustice from the pre-modern to the modern era, from the rule of men to the rule of law. And when it suits us, we become completely a historical for instance, when we talk as if liberal democracy really did have an immaculate conception out of some noble compact among men, rather than out of the bloody struggles of ambitious and profiteering revolutionaries. David Hume tries to straighten us out: "Almost all the governments which exist at present, or of which there remains any record in story, have been found originally, either on usurpation or conquest, or both, without any pretense of a fair consent or voluntary subjection of the people" (*Of the Original Contract*). Hume also neatly disposes of Socrates' talk of our "obligation" to obey the laws of the state in which we reside as based on some mythical original "contract" by saying, "Thus, he (Plato) builds a Tory consequence of passive obedience on a Whig foundation of the original contract."

The decade of the 1960s, as we know, has been marked by widespread disorders. This, even in the absence of other evidence, might make us suspect the nation's claim to be the leader of "the free world" and make us wonder if its staggering production (fifty per cent of the world's output) were being used in a rational way. We need not listen to the radical critics, only to government reports and other sources devoid of subversive intent, to reinforce our suspicions: the Kerner Commission tells us race prejudice is pervasive and virulent; the Statistical Abstract tells us that forty million Americans have trouble just getting adequate food and shelter; The New York Times tells us that the oil companies, through government quotas, extract five billion dollars a year in excess profits from the American consumer; the national television networks tell us enough of the war to suggest that Song My is not an aberration but one stark instance of that colossal atrocity which is American military action in Vietnam.

We have been through periods of national self-criticism before. But this one is different. Previous protests were limited, addressed to what were seen as unhealthy growths in an otherwise admirable society, and quickly remedied. Thus, abolitionist calmed down when slavery was made illegal, despite the persistence of semi-slavery and racism. Populists, and radicals of the 1930s, were cooled by Wilsonian and Rooseveltian reform legislation, and by the easing of hard times. The anti-imperialist movements died out when the glaring wrong of the Spanish-American War faded. The current disaffection of the ghettos comes not in a depression but in a period of "prosperity"; urban riots take place not in reaction to a wave of lynchings but shortly after a battery of "civil rights laws" has been passed by Congress; the protest against the Vietnam War has turned against national military policies in general; lack of faith in the political system grew while liberals (Kennedy and Johnson) were in the White House; disillusionment with the judicial system becomes most manifest during the era of the "Warren Court" and its expansion of procedural rights.

In short, the target of discontent is not an abnormal event: a depression, lynchings, a particularly brutal war, the Sacco-Vanzetti case. The target is the normal operation of American society. The problem of poverty is no longer one of hard times but of good times. The problem of race is not in the South but in the whole country. The problem of war is not a specific adventure but the entire foreign policy. The problem of politics is not conservative Republicans but liberal Democrats. It is no longer the norms, but the aberrations of American culture, which have come under scrutiny, criticism, attack. That is why the current movement of protest is so important, why it will not fade away; why it will either grow or be crushed in a frenzy of fear by those in power.

When it is the normal functioning of society which produces poverty, racism, imperial conquest, injustice, oligarchy—and when this society functions normally through an elaborate framework of law—this suggests that what is wrong is not aberrational, not a departure from law and convention, but is rather bound up with that system of law, indeed, operates through it.

History argues against the notion of aberrational wrong; it shows the persistence over centuries of the social ills that bother us today. The maldistribution of wealth in America goes back to the colonial era; Bacon's Rebellion, indentured servitude, and the labor struggles of the nineteenth century all testify to a class structure which spans our entire natural history. Mistreatment, to the point of murder, of blacks and Indians stretches from seventeenth-century Virginia and the Pequot Wars, through slavery and the extermination of the Plains Indians, down to the murder of black men in the Algiers Motel in Detroit. From the Sedition Act of 1798 to the Rap Brown statute of 1968, we have passed laws to jail protesters in times of tensions. And the war in Vietnam is only the most recent of a long series of acts of aggressive expansion by this country, from a tiny strip of land along the Atlantic to the point where our hydrogen missiles and our soldiers encircle the globe.

All this happened not in violation of law, but through it and in its unblinking presence. It is not a straight-line progression of identifiable evil. If it were, we would have caught on long ago. The persistence of the system's traits is hidden by ups and downs, backs and forths, and bewildering succession of bad times and "good" times, conservative leaders and "liberal" leaders, war and "peace." We are left somewhat breathless, and in the end persuaded of the basic kindness of the system (we who have time to think, talk, write about it have indeed been treated rather kindly). Only now have we suddenly awakened, startled by a new thought—that it is not just the

“bad” times and the “bad” leaders, and “bad” wars, that what is wrong is built into the whole bloody system, at its best as well as at its worst.

We have always been naive about what seemed like games of chance; we had eras of depression and eras of prosperity, times of war and times of peace, times of witch hunts and times of justice, times of lynchings and times of civil rights laws. “And so it goes,” in Kurt Vonnegut’s phrase. It is like roulette; sometimes you win and sometimes you lose; you win, you lose, you lose, you win. Indeed, no one can predict in any one instance whether the little ball will fall into the red or the black, and no one is really responsible. Yet, in the end, in roulette, you almost always lose. What keeps you from suspecting a conspiracy is that “almost” (sometimes somebody wins) and the fact that no one spin of the wheel has been contrived it is just the historic totality that has a predictable direction.

Thus with the social structure. There are enough times of reform, enough times of peace, enough reactions against McCarthyism, to make up that “almost.” And each event itself seems to come from a crazy concatenation of individual decisions, group conflicts, personality quirks, trials and errors, with no overall purpose or plan. It is just the results that, on inspection, show a pattern.

If the pattern is indeed as I describe it, there are important implications for our attitude toward law, and our willingness or unwillingness to disobey the law. Much of the caution against civil disobedience in the United States is based on the essential goodness of our society, whatever might be the admitted wrong of a particular law or partial condition. For instance, in the symposium *Law and Philosophy*, John Rawls says he assumes at the start, “at least in a society such as ours, a moral obligation to obey the law,” with the premise that “the legal order is one of a constitutional democracy.” In the same symposium, Monroe Beardsley urges caution against disobedience because of “every individual’s general stake in the whole legal structure...” In a paper delivered last year at the American Political Science Association meetings, Joseph Dunner writes:

I submit that while there is frequently not only a moral right but even a moral obligation to practice civil disobedience under conditions of political despotism, the advocacy and practice of civil disobedience in a democracy, far from “expressing the highest respect for law” might easily be one of the means used by totalitarians for the deliberate destruction of the democratic process and the establishment of their despotic rule.

This is the general presumption of most American writers on the subject of civil disobedience: that the United States, as a “constitutional democracy,” is a special case. In this country, presumably, the law works mostly for good; therefore, respect for the law is of such a value as to create a strong case against diminishing that respect by acts of civil disobedience.

The evidence on how good a society is seems crucial to any argument on civil disobedience. It was on this basic ground of fact that Hume challenged Socrates, for Socrates’ decision to submit to Athenian law was based on the supposition that when Athenians remained in the community it was a sign that they enjoyed its benefits; otherwise they could have left at any time. Hume argues: “Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires?”

For us too, our perception of the facts is crucial. Is it not time that we reconsidered the easy judgment, passed on in an atmosphere of self-congratulation from one American generation to the next, that we indeed have “democracy,” that there is such a polarity between our system

and other systems as to require a different attitude to law and disobedience? I am arguing here that the evidence on the functional realities of our system, as opposed to democratic theory and political rhetoric, does not justify such an overriding respect for the laws. Rather, most of these laws have supported, through vagaries and deviations, a persistent pattern of injustice through our history. How do the laws, and the accompanying culture of “the rule of law,” maintain that pattern of injustice? I would list a number of ways:

1. The idea of a system of law, to which we are asked to give general and indiscriminating support, disguises the differences among various categories of law. We are made aware of our constitutional rights, in the Bill of Rights and other provisions, from the earliest grades in school, with such fanfare and attention as to persuade us that these are the most important parts of our law; when we think of “respect for law” we are likely to think of these benign provisions of law which speak of rights and liberties. But we are told very little, so little as to escape our consciousness quickly, about the vast body of legislation which arranges the wealth of the nation: the tax laws, the appropriations bills (on the local level as well as the national level), and the enormous structure of law which is designed to maintain the property system as is—and therefore the distribution of wealth as is. One has only to look at the curricula of law schools, and see students staggering through courses titled Property, Contracts, Corporation Law, Torts, to understand how much of our legal system is devoted to the maintenance of the economic system as it now functions, with its incredible waste, with its vast inequities.

Consider the public relations job that has been done on the birth of the Bill of Rights in 1791, and how little attention has been paid to Alexander Hamilton’s economic program, promulgated around the same time. The Bill of Rights was hardly more than a showpiece for a very long time, but Hamilton’s program of tariffs, the assumption of debts, and the national bank were the start of a long history of federal legislation creating a welfare system for the rich. (See Charles Beard’s essay of 1932, “The Myth of Rugged Individualism,” for an account of the many ways in which the government in the nineteenth and twentieth centuries passed laws to aid big business.) From Hamilton’s “Report on Manufactures” to the current oil depletion allowance, this bias of national legislation toward the interests of the wealthy has been maintained.

It is not just the volume of legislation which is important, but the force of it. The existence of a law, or a constitutional provision, on the books tells us little about its effect. Is the law immediately operative (like a tariff) or does it require long litigation and expense and initiative (like the First Amendment) before it is of use to anyone? Is it given prompt attention (like the assumption of debts) or is it ignored (like the provision that “Congress shall make no law...abridging the freedom of speech, or of the press.”)?

We have a striking illustration from those early days of the Republic. The First Amendment was so little observed that hardly seven years after it went into effect Congress passed a law, the Sedition Act of 1798, which indeed did abridge the freedom of speech, and with such vigor as to send ten persons to jail for their utterances. One could hardly claim that the First Amendment was being enforced. On the other hand, the Excise Tax on whiskey (needed to pay off rich bondholders on the Assumption scheme) was so efficiently enforced that when small farmers in western Pennsylvania rebelled against the tax in 1794, Secretary of the Treasury Hamilton led the troops himself in putting them down. The government enforces those laws it wants to enforce; that fact is part of the American legal tradition.

Ironically (in view of the customary assumption that the legal system guards us against anarchy), it is the laws, either by what they provide as they are passed or by what they permit

when they are not passed, which contribute to the anarchy of the economic order. They either permit or subsidize the unfettered spoliation of natural resources; they permit, indeed pay for, the production of dangerous things—poisons, guns, bombs. The allocation of the nation's colossal wealth to the production of either weapons or junk takes place not contrary to law but through a vast network of contractual arrangements.

2. The idea of a system of law disguises another distinction in categories of laws: between laws which protect us against bodily harm and laws which protect property from theft. When we are cautioned against chipping away at the structure of law, what is usually uppermost in our minds is that the law protects us from the constant danger of assault, rape, and murder. But most law-enforcing is designed to protect property, not human beings. Most crimes, by far, are crimes against property, not against persons. (In 1966, there were 120,000 offenses against persons and 1,670,000 offenses against property.)

We are constantly reminded of the priorities of law enforcement—property over human beings—by the repetition of certain events: the policeman shooting someone who has committed a petty theft (a man who steals a million dollars in a price-fixing swindle is never personally harmed, but a kid who runs off with five dollars is in danger of summary execution): police cars killing or injuring people in mad chases after robbers (a recent report to the American Medical Association said five hundred people die each year as a result of police auto chases).

The quality of justice depends on who is the person assaulted, and what is the nature of the property crime. On the same day in February 1970, the Boston Globe reported the results of two trials. In the case of policemen who admitted killing two black men in the Algiers Motel in Detroit, and were charged with conspiring to deprive persons of their civil rights, the verdict was acquittal. In Texas, a man who stole seventy-five dollars from a dry cleaning store was given a sentence of a thousand years.

Most of our legal system is designed to maintain the existing distribution of wealth in the society, a distribution which is based not on need but on power and resourcefulness. Most criminal penalties are used not to protect the life and limb of the ordinary citizen but rather to punish those who take the profit culture so seriously that they act it out beyond the rules of the game. Property crimes are a special form of private enterprise.

3. Seeing the legal system as a monolith disguises the fact that laws aimed at radicals, while pretending to protect the society at large, really try to preserve the existing political and economic arrangements. The Espionage Act of 1917 (even its title deceives us into thinking its aim is protecting the community) sought to prevent people from communicating certain ideas to soldiers or would-be soldiers which might discourage their carrying on a war. The Act begs the question of whether carrying on the war is a blessing to the society at large or a danger to it.

The Smith Act provision against teaching the violent overthrow of the government assumes the government is not evil enough to deserve being overthrown. The Selective Service Act assumes the draft protects us all when indeed it may take our sons to die for someone else's privileges. This is a small class of laws, but its psychological impact on the right of protest, ("Watch your step, or else...") can hardly be overestimated. It stands ready for use any time dissidence threatens to become too widespread. The recent Chicago "conspiracy" trial is an example.

4. The three distinctions I have made so far are intended to illustrate how the general exhortation to preserve the legal system as if it were a benign whole glides over the fact that different kinds of laws serve different purposes. More justifiable laws (for free speech, against rape or murder) stand in the front ranks as a noble facade concealing a huge body of law which maintains the

present property and power arrangements of the society. Buried in the mass is a much smaller body of law which stands guard against those who would rebel in an organized way against these arrangements.

Underlying these distinctions is a more fundamental one: between rules of conduct, which are necessary for human beings in any social order to live with one another in harmony and justice, and those rules which come out of some specific social order, the product of a particular historical culture. H.L.A. Hart speaks of “primary rules of obligation” (The Concept of Law), which include restrictions on the free use of violence and “various positive duties to perform services or make contributions to the common life.” These rules are not enforced by the coercive techniques of modern society but rather by “that general attitude of the group toward its own standard modes of behavior.”

Bakunin distinguished between “natural laws,” created by the facts of human nature, and “juridical laws,” like the law of inheritance. What separates Hart from Bakunin is his acceptance of the need for “secondary rules” in more complex societies. I would claim that Hart accepts too easily the need for these secondary rules, but the distinction he makes is important because it enables us to examine more closely than he did himself the possibility of a society, even a modern one, that would be guided by primary rules. The distinction takes us out of our present social arrangements and back to an examination of what laws are necessary and just on the basis of human nature. We can look backward to primitive societies (as Hart does) but also forward, in a utopian (eu-topian) imagining about the future. The ideology of any culture tries to obliterate the distinction between what is humanly necessary and what merely perpetuates that culture.

5. We make a fetish of “obedience to law” (put more delicately by philosophers as the concept of “obligation”) without making it clear to all citizens of whom this obedience is demanded that government officials have an enormous range of choice in deciding who may and who may not violate the law. One person’s failure to honor the obligation is ignored, another’s is summarily punished.

The most flagrant illustration of this is in racial matters. When I speak of selective enforcement of laws on racial equality, I am not speaking of the South but of the national government. Before the Civil War, the legal prohibition against the importation of slaves was ignored by the national executive, but the Fugitive Slave Law was enforced by armed soldiers (as in the rendition of Anthony Burns in Boston). From 1871 on, with a battery of statutes giving the national government the power to prosecute those denying constitutional rights to the black man, every President, liberal and conservative, from Hayes through Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, John F. Kennedy, and Lyndon Johnson, refused to use that power on behalf of the black man. As one example, under Attorney-General Robert Kennedy, a series of violations of the constitutional rights of blacks in Albany, Georgia, in 1961 through 1962 led to only one federal prosecution—against black and White members of the civil rights movement in Albany who had picketed a local merchant.

Unequal law enforcement in racial matters is most obvious, but it is also true in economic questions, where corporations violating the law may be ignored or gently rebuked; note the light sentences given in the General Electric price-fixing case, where millions were taken from the consumer. We find it also where rank and status are involved, as in the military. In 1966, an American Army captain in Saigon, found guilty of fraudulently doing off with imported silk, military planes and Treasury checks, was allowed to retire with a pension; in 1968, various enlisted men who sat in a circle and sang “We Shall Overcome” to protest conditions in an Army

stockade in San Francisco were sentenced to years in prison at hard labor, on charges of “mutiny.” Selective enforcement of the law is not a departure from law. It is legal.

6. Also concealed from the public, as it is bidden sternly to honor the law, is the record of law enforcement agencies in breaking the law themselves. This includes wiretapping by the FBI (admitted by FBI agents in court proceedings at various times) and countless cases of assault and battery, up to murder, by local police.

7. A restricted definition of “corruption” in our culture leads to cries of outrage against politicians and businessmen who break the law for their private aggrandizement. What is thus hidden from the public is the larger corruption of the law itself, as it operates to distribute wealth and power. Thus, our history books draw our attention to the Teapot Dome scandals and other legal shenanigans of the Harding Administration, while ignoring the far more serious (not only because of its scale but because of its permanence) reallocation of wealth that took place legally, through the tax laws proposed by Secretary of the Treasury Andrew Mellon and passed by Congress in the Coolidge Administration.

Similarly, the headlines parade Adam Clayton Powell’s payroll padding, and bury the legal appropriation of the citizen’s money by contracts to General Dynamics and Lockheed, by huge subsidies to poor farmers like James Eastland and Herman Talmadge. Thus, one Supreme Court nominee is pushed aside because of acts of dubious legality, while another breezes through the Judiciary Committee because he is legally proper, though morally more opprobrious than the first. We forget that the problem is the structure of the roulette wheel, not the occasional appearance of a dishonest croupier. The responsibility for what we see around us belongs to the legal system itself, not the deviations from it.

8. The rule of law, whatever its effects, is restricted by our national boundaries. International law, being far weaker, permits even greater selectivity in adherence to it. Contracts, and compensation for expropriated property, are likely to be given strict attention, while prohibitions against the use of force to settle international disputes will be ignored, as in Vietnam. While at home it can be claimed that we get a modicum of order along with injustice, in the international arena we observe neither order nor justice.

9. Attached to the law in our culture is the notion of solidity as against transience, of the stable against the erratic. Hegel, in the preface to his *Philosophy of Right*, asks that we recognize the rationality in the state, as that in nature, rather than leaving us all “to the mercy of chance and caprice, to be God-forsaken.” But this attractive quality of “rationality” conceals the motive of thwarting change, the demand of “law and order” against reform and revolution. Thus, Hegel denounces his colleague J.F. Fries for a speech on the state in which Professor Fries said, “In the people ruled by a genuine communal spirit, life for the discharge of all public business would come from below, from the people itself.” Fries was punished by the German government for participating in the Wartburg Festival of 1817, and Hegel’s translator, T.M. Knox, comments, “This was a liberal demonstration in favor of German unity and Stein’s reforms. Hegel supported both of these but he held that enthusiastic demonstrations were no substitute for thinking and could only lead to immorality and anarchy.”

The claim of permanence and rationality has some truth, but its other side is the natural tendency of law (at its best) to represent past conditions, past needs. As Professor Richard Wasserstrom has put it (in his talk “Lawyers and Revolution,” given to the National Lawyers Guild in July 1968), “the law is conservative in the same way in which language is conservative. It seeks to assimilate everything that happens to do that which has happened.” In an age where change

has become exponential, this natural disability of law is especially marked. Granted, there is a value in acting on rules and principles derived from long-term experience as opposed to acting only on the ephemera of the moment. But that experience must not become an absolute; rather, it should be weighed constantly against the fresh perceptions of existential reality.

For such a mediation between past and present, Nietzsche is a better guide than Hegel, about whom he seems to be speaking when he talks (in *The Use and Abuse of History*) of “the historically educated fanatic of the world process” who “has nothing to do but to live on as he has lived, love what he has loved, hate what he has hated, and read the newspapers he has always read. The only sin is for him to live otherwise than he has lived.”

10. The law neither has to be violated nor does it need to do anything drastic in order to maintain existing inequities in wealth and power. It needs only to renew itself in the same basic patterns, to enlarge the scale but retain the same theme, to permit reforms, but within limits. At the time of legal codification (as in the United States Constitution, for instance), the basic pattern of modern life was set: the irrationality of a productive system driven by business profit; the concentration of political power in deputies, of judicial power in magistrates; the control of communication by schools, churches, and men of wealth. From that point on the system of law needed only elaboration, and it was resilient enough to absorb gradual reform. It performed as Madison predicted it would, to cool, through its political system of representation, any possible passion for tumultuous change, and to control any “rage” on the part of the propertyless. With the basic patterns set, it could afford a certain magnanimity in its pronouncements of equality before the law. Anatole France’s comment is still apt: “The law in its majesty draws no distinction, but forbids rich and poor alike from begging in the streets or sleeping in the public parks.”

11. So far, I have been talking of the passage of laws by legislatures and the enforcement of laws by the executive. By the time the law appears in the courtroom, to be applied by judges, juries, lawyers, and marshals, it has already been subject to enough of the social strictures mentioned above so as to make injustice probable even before the judge has taken his seat on the bench. But inside the judicial process, all of the built-in ordinary legal mechanisms act to reinforce what society has ordained.

The sociology of the judge needs to be considered. The awesome black robes conceal men who come to their posts through the most sordid corridors of local politics, or by political appointment. If cronyism appears on the Supreme Court (Truman and Vinson, Kennedy and Whizzer White, Lyndon Johnson and Abe Fortas), then how much more often must it be true on the local level, where most judicial decisions are made?

The judge is monarch of the courtroom: he decides the composition of the jury; he decides what evidence is admitted or excluded; what witnesses may be heard or not heard; what the jury may listen or not listen to; what bounds lawyers must observe; even what lawyer the defendant may have; what limits the jury must stay within in making its decision. He can dismiss a case, or so charge the jury as to make conviction certain. His background is middle- or upper-class parents, law schools, private clubs. His mind is in the past. His environment is limited: a splendid city apartment, a home in the country, the courtroom itself. The world of anguish, of social protest, is a threatening dark form on his window shade. In the play *The Chalk Garden* the old judge, off duty, muses about the man on the bench: “The line on the judge’s face is written by law, not life.”

Most law is decided on the local level, and while there are occasional exceptions, far more typical is the evidence of narrowness, class and race prejudice, and a hatred of social rebels. Judge Elijah Adlow, senior judge of the Boston municipal court, told a leader of a tenants’ movement

(who had helped a destitute family move—illegally—into a vacant apartment and was charged with assault after he had been beaten by police), that he would have to go to jail “unless you change your philosophy.” But behind the glamorous injustice of the occasional Adlow or Julius Hoffman there is a parade of obscure judges making obscure decisions for obscure defendants, putting them away and out of sight.

The sociology of lawyers—the socialization of law school, the practice of obsequiousness before judges, and deals with prosecutors—is too long a story to tell in detail. The sociology of juries includes a process of unnatural selection which turns up, again and again, white middle-class citizens of orthodox views, common prejudices, and obedient disposition, most middle-aged or old.

The economics of justice in America—the systematic prejudice against the poor at every stage—the arrest, the setting of bail, the trial, the choice of counsel, the sentence, the opportunity to appeal, the chance of parole is too well known to need documentation. (A newspaper item of last week: Dozens of inmates in one New York jail had spent from six months to two years behind bars, waiting for their trials, because they could not afford bail—all this while they are presumed to be innocent, and while whatever innocence they had is long gone.)

As one moves up from municipal courts to state supreme courts and federal courts, the basic sociological and economic facts of justice change very little, but this is concealed by a certain regal mustiness of the atmosphere which puts a coat of respectability on a fundamentally inhuman process. What Herbert Read described in British justice differs only in detail (see his essay “Chains of Freedom,” in *Anarchy and Order*) from the American judicial system:

“The independence of the judiciary is symbolized in various ways. By means of wigs and gowns, the participants are dehumanized to an astonishing degree. If by chance, in the course of pleading a hot and flustered barrister lifts his wig to mop his brow, an entirely different individual is revealed. It is as if a tortoise had suddenly dispensed with its shell. The whole business is carapaceous; a shell of custom and formality against which life, plastic and throbbing, beats in an effort to reach the light.”

12. The main decisions have been made outside the courtroom, by the society and the culture that brought this combination of persons to this place at this time. But this is made explicit by the deliberate attempt of courts to limit the scope of argument and decision, thus ensuring that court decisions will have minimum effect on the direction of society. On the appeals level, including the Supreme Court, this means deciding cases on technical or narrow grounds wherever possible, postponing fundamental questions as long as possible. It has been most difficult, for instance, in cases of draft resistance, to get the Supreme Court to rule on a question far more important to society than the disposition of one resister: Is the war in Vietnam illegal?

This attitude is expressed by one of the judges in Lon Fuller’s mythical case of “The Speluncean Explorers,” when he refuses to deal with the moral complexities of a community decision to sacrifice one person so that others might live: “The sole question before us for decision is whether these defendants did, within the meaning of NCSA Sec. 12A, willfully take the life of Roger Whetmore.”

Not so mythical are the actual cases of political protesters hauled into court on ordinary criminal charges and prevented by the judge from airing the political grounds of their actions. (Theodore Mommsen put it well: “Impartiality in political trials is about on the level with Immaculate Conception: one may wish for it, but one cannot produce it.” Quoted in Otto Kirchheimer, *Political Justice*.) It should make us all pause to know that within the space of a few months similar pronouncements were made in a court in Moscow and a court in Milwaukee. The Moscow

judge refused to let a group arrested for distributing leaflets in Red Square against the Russian invasion of Czechoslovakia discuss anything political; the only issue, he said, was: Did they or did they not break the law in question?

The Milwaukee judge similarly refused to let the priests who had burned draft records explain their motivation. The only question, he said, was: "Did the defendants commit arson, burglary, and theft?" When one witness began to discuss the ideal of civil disobedience, the judge interrupted him with what must be a classic judicial statement: "You can't discuss that. That's getting to the heart of the matter."

That is also getting to the end of my argument, which is always, of course, the beginning of another. A general "obligation to obey the law" is a poor guide in a time when revolutionary changes are needed and we are racing against ominous lines on the social cardiograph. We need to separate whatever there is in law that serves human ends from everything else that rides along with it, on the backs of so many people. We need to get away from pleasant abstractions and look at the functional reality of the legal structure which guides our society: its sociology, its economics, its human consequences.

Philosophical speculation tells us that civil disobedience may be necessary under certain conditions of injustice. Historical evidence, the facts of the lives of people around us, tells us that those conditions exist and that they are maintained by the present structure of law. To know this is only the beginning. I have tried here, by inculcating a proper disrespect for "the rule of law," only to put us at the starting point, in a mood to run. The same modern civilization which has given us unjust laws has given us great ideals. We need to learn how to violate these laws in such a way as to realize those ideals.

Each of us, depending on where we are in the social structure, must draw his own existential conclusion on what to do. In Tolstoy's "The Death of Ivan Ilyich," the proper, perfect, successful magistrate Ilyich agonizes on his deathbed about his sudden awareness that his life has been wasted, useless, wrong:

"Maybe I did not live as I ought to have done," it suddenly occurred to him. "But how could that be, when I did everything properly?" he replied. "If I could only understand what it is all for! But that too is impossible. An explanation would be possible if it could be said that I have not lived as I ought to. But it is impossible to say that"—and he remembered all the legality, correctitude and propriety of his life.

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Howard Zinn
The Conspiracy of Law
1971

The Rule of Law, edited by Robert Paul Wolff (New York Simon and Schuster, 1971)
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Books, New Brunswick, New Jersey, 1979, page 273 ff)

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