

The Crisis of Liberal Legalism

Lester Mazor†

Is Law Dead? Edited by Eugene V. Rostow. New York: Simon and Schuster, 1971. Pp. 416. \$8.95 (clothbound), \$3.95 (paper).

The Rule of Law. Edited by Robert P. Wolff. New York: Simon and Schuster, 1971. Pp. 254. \$6.95 (clothbound), \$2.95 (paper).

The crisis of law is a given. The nature of the crisis is a matter of some controversy. The cause of the crisis is a subject of serious concern. The real point at issue is what will follow the crisis.

I

Both books under review belong to the genre of the current crisis.¹ The essays within these collections take their place alongside the works of those who perceive the threat of change and seek to bolster the old order against it or among those who intone the dirge for the dying age and welcome the transition to a new one. Early in the century the ominous predictions of Spengler sat silent on the bookstall tables;² by 1955 Toynbee's alarm rang true to millions.³ The intervening years have given us good cause to count the destruction of humankind a possibility at any moment. But what is the prospect if Armageddon is somehow avoided? A growing body of thought rejects the notion that the principal lines of modern Western civilization can be sustained or expanded to embrace the world. Instead, a new age is seen as emerging, whether in the awful prospect of a brave new dystopia or the hopeful image of a new consciousness.

How one appraises the essays in these two books will depend greatly upon one's view of the nature of the change the world is experiencing. I take the principal features of the change to be these: (1) A basis for

† Henry R. Luce Professor of Law, Hampshire College; Professor of Law, University of Utah. A.B. 1957, J.D. 1960, Stanford University.

1. See, e.g., J. ELLUL, *TECHNOLOGICAL SOCIETY* (1964); D. MEADOWS *et al.*, *THE LIMITS TO GROWTH* (1972); W. THOMPSON, *AT THE EDGE OF HISTORY* (1971).

2. O. SPENGLER, *THE DECLINE OF THE WEST* (1926).

3. 9 A. TOYNBEE, *A STUDY OF HISTORY* 406-644 (1954).

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a way of life that can only be described as affluent exists in the technology of production and distribution. The fact that the possibility has been realized by a mere handful of the earth's people calls into question the capacity to universalize this affluence, but does not in the least reduce the demand by those excluded to share in it. The achievement of affluence, however, has a dry and bitter taste in the mouths of many of those who are supposed to enjoy it. (2) Instead of delighting in the earthly paradise of material goods, the affluent society has discovered a whole new set of human problems, centering in the realm of the interpersonal, which seem to have the same urgency that the problem of achieving economic growth once did. We have discovered adolescence, sexuality, alienation, old age, and a host of other conditions which challenge our ingenuity. (3) The entire globe is involved in the process. Although local conditions are extremely various, they are no longer isolated from each other. The basis for this new factor in the human experience is a technology of communication and transportation whose consequences are just beginning to be fathomed.⁴ (4) The reality base through which we experience the world is itself in dissolution. The premise of the continuous nature of reality has been shattered. The spatial and temporal dimensions of life have been shaken fundamentally in the arts, the sciences, and, increasingly, in our perception of commonplace experience.

None of these developments is complete, and we seem far from the firm establishment of a new culture, whatever its terms might be. A large part of the difficulty in analyzing any particular phenomenon to determine whether perhaps it is a symptom of dissolution or the harbinger of a future social form is to find the appropriate reference period in which to place it. There are some who believe that the new culture is near at hand and may be reached without great strain or violence. It is difficult for many to be so sanguine, however, given the distance to be travelled and the many life-ways which must be disturbed and rebuilt in such a process. We are still discovering how much of the past we have brought with us into modern society. Undoubtedly a great deal of the modern as well as what preceded it will be carried into the new age.

Such platitudes are little comfort. What concerns us is the potential of any particular life-form. Should it be supported and expanded for its relevance and value to the new age, or has it outlived its usefulness? More likely the question must be faced in more muted tones: should

4. See J. Carey, *Harold Adams Innis and Marshall McLuhan*, 27 *ANTIOCH REV.* 5 (1967).

the role of any particular form be limited and narrowed, while yet new ones are fostered? Questions of this type which seem appropriate and at least somewhat manageable when applied to very specific forms—monophonic phonograph records, intercollegiate athletics, juvenile courts—become more problematic when applied to larger ones. Yet the assumption of the constant relative strength and absolute vitality of even such large forms as organized religion, institutionalized government, or formal schooling rests uncomfortably in the sight of the evidence in history and archaeology of their rise and fall—and sometimes rise again.

Law cannot escape this type of scrutiny. Though there is much evidence that at least some characteristics of legal ordering are cultural universals, the degree to which litigiousness is encouraged, legitimacy is venerated, and legalization is achieved varies greatly both among and within cultures. It is even a matter of dispute how much any of it should be desired. We have been warned against the strait-jacket of legalism, a law-worship which makes law into ideology, stilling the spirit.⁵ Legalism is to law what scientism is to science, with equally destructive consequences in each case for the object of worship. Efforts to question the paramount position of law, however, often are rejected out of hand as a heresy which would prefer to inflict social incoherence rather than achieve a just and ordered society. The ellipsis in the argument is too often overlooked. Law is equated with justice and order or it is at least assumed to be the principal vehicle of their accomplishment. But a perspective which takes as its premise that we are in transition to a new age cannot ignore the ellipsis. It must ask whether law or some other means of seeking justice and order—an old means to be reactivated or a new one to be discovered—is most appropriate to the needs of a humane existence within the terms of a new culture. It must ask what role there is for law in the century or more of transition whose dislocations we must yet suffer, and it must answer that question, in large part, by asking what place law should occupy when the transition is over.

II

As a reaffirmation of the faith, the Association of the Bar of the City of New York celebrated its centennial with a symposium on the prospect for law, the proceedings of which are now published

5. See generally J. SHKLAR, *LEGALISM* (1964).

under the title *Is Law Dead?* Eugene V. Rostow asked the participants to address two issues: "first, the citizen's moral relation to the law in a society of consent; and, second, the capacity of the American legal and political order to meet the felt needs of our people for social justice."⁶ These questions are also the concern of *The Rule of Law*, a dialogue on paper put together under the editorship of Robert Paul Wolff,⁷ no doubt occasioned by many of the same circumstances that suggested Rostow's two inquiries. Both books are filled with declarations, as if they were needed, of the existence of a crisis of law. Rostow finds the crisis in the "waves of riots and of disobedience to law which have become the most critical problems of our time."⁸ For Wolff, the crisis of our age is the question of "the authority and legitimacy of the secular political order."⁹ This larger view of the nature of the crisis, as one which calls into question basic habits of authority and obedience, motivates the inquiry of his volume into the history, nature, institutions and rationale of the law. It is this difference of perspective, rather than the character of the contributors or the circumstances under which their essays were delivered that fundamentally distinguishes the impact of the two books.¹⁰

Rostow, whose introduction and long paper dominate the first 100 pages of *Is Law Dead?*, lives in a society in which "there are no issues of greater urgency" than the questions "What is law, what is it for, and is it up to its tasks . . . ?"¹¹ Rostow's society is threatened by cataclysms—student riots and college-presidential doubts of the integrity of the judicial process. It is a society moving rapidly to achieve "equality for the Negro," coping with accelerating urbanization, experiencing "doubt" about its foreign policy. It is a society demanding

6. Rostow, *Introduction*, in *IS LAW DEAD?* 14 (E. Rostow ed. 1971) [hereinafter cited as *ROSTOW*]. On seeing the book on our kitchen table, my daughter voiced the title question. Her brother replied, "No, but it has a bad case of Richard Nixon." "Social justice," said the White House official who asked to remain unidentified, "is not a panacea for the world's problems." Shabecoff, *The Poor Charge that Phase 1 and Phase 2 Perpetuate the Status Quo and Social Injustice*, N.Y. Times, Jan. 9, 1972, at 37, col. 1.

7. He put the book together "without the artificiality of committee meetings, memoranda, and weekend conferences!" Wolff, *Introduction*, in *THE RULE OF LAW* 9 (R. Wolff ed. 1971) [hereinafter cited as *WOLFF*].

8. Rostow, *Introduction*, in *ROSTOW*, *supra* note 6, at 13.

9. Wolff, *In Defense of Anarchism*, in *id.* at 110. He was speaking here as a participant at the City Bar symposium. He and Ronald Dworkin are the only persons whose work appears in both books.

10. Wolff chose his authors, he says, on the ground that they were "scholars distinguished by the originality of their minds and the provocative force of their previous writings." Wolff, *Introduction*, in *WOLFF*, *supra* note 7, at 9. The symposiasts before the City Bar, selected on Rostow's advice, were described by the presiding officer at the meetings, Whitney North Seymour, as "a broad spectrum of experts, legal and lay . . . representing all major schools of thought." Seymour, *Foreword*, in *ROSTOW*, *supra* note 6, at 8.

11. Rostow, *Introduction*, in *ROSTOW*, *supra* note 6, at 9.

better education, even though its youth, having lost consciousness of good and evil in idealism, contains a faction which feels frustrated or alienated.¹²

The frame of *Is Law Dead?* is closed by William H. Riker, who defines a twofold crisis, "a practical crisis in public peace," and "an even deeper theoretical crisis."¹³ Looking back upon the symposium he sees in it a pervasive ideology which fails to meet the need for a new jurisprudence. His own contribution in that direction is an analysis of public order as a commodity which leads him to define the subject of the conference more broadly in terms of "how to reconstruct the social situation so that fewer and fewer people wish to adopt the noncooperative strategy."¹⁴ In his view, the situation is one in which the emphasis must shift from reprisal to redistribution and the action from the legal to the political arena.¹⁵ If law is not dead yet, perhaps legalism ought to be put out of its misery.

The much wider space within *The Rule of Law* is bounded by the opening and concluding essays of Howard Zinn and Richard Barnet. Zinn doesn't live in the same kind of place as Rostow. In his country, government reports proclaim the existence of "pervasive and virulent"¹⁶ racial prejudice, millions suffer poverty, corporations plunder the public, and the nation is engaged in the massacre of women and children as part of its commitment to a genocidal war. Imperial conquest, injustice, oligarchy are the products of "the normal functioning of society,"¹⁷ and they, along with poverty and racism, are produced by law. Barnet's closing essay, *Twilight of the Nation-State*, describes a worldwide crisis of authority¹⁸ in which "because of its inherent structure, the nature of its dominant constituencies, and its system of values, the nation-state cannot promote development, only dependency."¹⁹ In a time of developing moral perspective on an emerging world culture, he sees the network of human interaction as transcending national boundaries and historical time. Not only does this put the matter in a global context as distinguished from the merely national setting of the City Bar symposium, but it also clearly locates the action in the present, on the edge of the future.

At least two centuries separate Barnet's sunset scene from the dawn

12. *Id.* at 11-13.

13. Riker, *Public Safety as a Public Good*, in *id.* at 370.

14. *Id.* at 382.

15. *Id.* at 383-85.

16. Zinn, *The Conspiracy of Law*, in WOLFF, *supra* note 7, at 20.

17. *Id.* at 21.

18. Barnet, *The Twilight of the Nation-State: A Crisis of Legitimacy*, in *id.* at 221-22.

19. *Id.* at 229.

established by Peter Gay's paper, *Law, Order, and Enlightenment*.²⁰ Despite the valiant efforts of a few contributors and commentators,²¹ the City Bar symposium never really succeeds in pulling away from an eighteenth century legalism. The symposium was based "on a premise of unabashed faith in the potentialities of reason, and in the goodness of man,"²² says Rostow. He could not have known that the Governor of Ohio would call the National Guard to the campus of Kent State University on the same day the symposium concluded, but there is no ready explanation for his apparent obliviousness to the Holocaust, Hiroshima, My Lai, and the other events, political and intellectual, which led Jan Myrdal to exclaim, with characteristically twentieth century dissonance, "we are not the bearers of consciousness. We are the whores of reason."²³ Gay baldly states the eighteenth century premise of liberal legalism: "while not all societies under law are good societies, no society *not* under law can be a good society."²⁴ Rostow accepts the premise and returns to the lectern to state the issue at hand in a way that begs all the crucial questions and misconceives the issues. His discussion of civil disobedience is in terms of "modern history," "the liberal state," and "the moral autonomy of the individual."²⁵ But the question, as a few participants in *Is Law Dead?* struggled to make clear and many of the authors in *The Rule of Law* recognize, is whether we are still in modern history, whether there is a place left for the liberal state, and whether it is adequate any longer to use a moral vocabulary grounded in the dichotomy of the individual and the state.

It is precisely Rostow's way of posing the issues which limits the force of Wolff's argument, *In Defense of Anarchism*. Beginning with a postulated moral autonomy of the individual, Wolff examines the ways in which Kant, Rousseau and, in general, democratic theory, seek to reconcile that autonomy with the authority of the state. The conclusion he reaches is that "the theory of democracy is wrong"²⁶ in suggesting that such a reconciliation can be accomplished, except in the extraordinary situation of decision by unanimous consent. This direct attack on democratic theory by an American academic philosopher is itself a sign of the intensity of the crisis. Wolff admits that if

20. Gay, *Law, Order and Enlightenment*, in ROSTOW, *supra* note 6, at 21.

21. Notably Riker, *supra* note 13. Cf. Currie, *Sociology of Law: The Unmasked Questions*, 81 YALE L.J. 134 (1971).

22. Rostow, *Introduction*, in ROSTOW, *supra* note 6, at 11.

23. J. MYRDAL, *CONFESSIONS OF A DISLOYAL EUROPEAN* 201 (1968).

24. Gay, *Law, Order and Enlightenment*, in ROSTOW, *supra* note 6, at 22.

25. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, in *id.* at 39.

26. Wolff, *In Defense of Anarchism*, in *id.* at 121.

the notion of an obligation to obey the law were abandoned and everyone acted on moral conviction "there would be bitter conflict between men of opposed moral dedication."²⁷ But the gain in individual freedom would be worth it, for "the whole level of private and public life would be raised to a new level of personal responsibility."²⁸ Lawyers characteristically reply: "If men were angels."²⁹ To Rostow, Wolff has made a fetish of individual freedom to the neglect of equality, happiness, justice and other social values.³⁰ To Carl A. Auerbach, commentator for Wolff's paper, the anarchist argument is "absurdly irrelevant to any discussion of the adequacy of our legal system to cope with the urgent problems of our day,"³¹ because it ignores the problem of peaceful adjustment of interests among a large population in a complex industrial society.

Yet Wolff's position is secure so long as the argument is cast in eighteenth century terms. He begins his anarchist defense by rejecting an a priori legalism. "[S]urely no sane man can have so slavish a respect for all law *as such* that he would argue for submission to any *de facto* legal command, irrespective of the circumstances."³² Next, he argues that the consent of the governed cannot be a warrant for the exercise of authority over those who did not both directly participate in the decision and concur in it. Neither the principle of majority decision nor the practice of representative government can be reconciled with the absolute moral autonomy of the individual which is his starting point. The ultimate recourse of eighteenth century thought was the Social Contract. But this conception no longer carries sufficient metaphoric weight to bind together a society sophisticated in the meaning of "freedom of contract" and its susceptibility to coercion by monopoly power holders and manipulation by image makers.³³

The inadequacy of the contract model is rooted in its false premise of the state of nature—false in its implication that a situation of complete atomistic individualism is a plausible starting point for a theory of social co-existence. The consequence of that premise in the sphere of law generally, as it was shown earlier in the century to be for the position of the laboring class, is to exclude the recognition of group

27. *Id.* at 118.

28. *Id.*

29. Auerbach, *Comment*, in *id.* at 133.

30. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, in *id.* at 54-60.

31. Auerbach, *Comment*, in *id.* at 130.

32. Wolff, *In Defense of Anarchism*, in *id.* at 113.

33. Stone, *Comment*, in *id.* at 100-01.

interest. This is the point which underlies Patricia Roberts Harris' reply to Rostow that his position puts on "the minority the full burden of the majority's refusal to change the *status quo*."³⁴ As she sees it, civil disobedience, like violence, has the capacity to spread "the cost of social neglect of the expressed needs of a minority."³⁵ It can be viewed as an example of the choice of a redistributive rather than a reprisal mode of response.

A conventional analysis of the obligation to obey the law, premised in eighteenth century individualism, is likely to miss this point. Thus, Ronald Dworkin's approach to issues of civil disobedience ignores the factor of group interest. It is cast entirely in terms of individual legal moral rights, in terms of "the dissenter," "God," and "conscience."³⁶ In discussing the problem of rights in conflict, Dworkin is at pains to insist that any balancing must exclude the supposed "right" of the majority to work its will and must be done exclusively in terms of the rights of individuals;³⁷ thus inviting the parry that in cases of conflict a social mechanism (*i.e.*, law) must be invoked as arbiter, the only other alternative being anarchy.³⁸

Gidon Gottlieb objects to Dworkin's position on just these grounds. Gottlieb sees the most salient feature of recent civil disobedience to be its group character.³⁹ It is the activity of "veto-communities," and anticipates a new multi-cultural politics.⁴⁰ This comment anticipates the principal thrust of Hannah Arendt's paper on civil disobedience. For her, the distinction between conscientious objector and civil disobedient is crucial.⁴¹ The one tradition runs from Thomas Becket and Thomas More to Howard Levy; the other from Gandhi and Martin Luther King to the Berrigans. Civil disobedients are organized minorities—a new manifestation of an old American tradition, voluntary associations⁴²—distorted into an individualistic frame by the law's characteristic individualization of the question of guilt. In the classic legal phrase, responsibility is personal. Thus the defendants in political trials despair of ever having the opportunity to present their essentially group position. "It is as though the legal process were an autopsy."⁴³

34. Harris, *Comment*, in *id.* at 104.

35. *Id.*

36. Dworkin, *Taking Rights Seriously*, in *id.* at 171.

37. *Id.* at 180-81.

38. Auerbach, *Comment*, in *id.* at 208.

39. Gottlieb, *Comment*, in *id.* at 194.

40. *Id.* at 197.

41. Arendt, *Civil Disobedience*, in *id.* at 220.

42. *Id.* at 240-42.

43. D. BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* 114 (1970).

This note of the law's neglect of group rights resonates throughout Harold Cruse's paper, *The Historical Roots of American Social Change and Social Theory*. Cruse calls for solutions predicated "upon group survival"⁴⁴ within a polity structured on a "multi-group, multi-cultural basis."⁴⁵ As it stands, the Constitution, in good eighteenth century fashion, "does not safeguard, and never has safeguarded, the rights of outgroups."⁴⁶ (Arendt concurs in the need for constitutional recognition of group rights, by specific amendment if necessary,⁴⁷ but neither of them explains what form this protection could take and yet fit within a constitution framed in terms of individual rights and majority rule.) Cruse here enters his denial to Rostow's claims that the law is moving rapidly to establish equality for the black⁴⁸ and that the internment of persons of Japanese descent during World War Two was "cured" by "the normal procedures of democratic law and politics."⁴⁹ It is not enough for Cruse that Rostow takes "the view that the long resistance of the South to the Fourteenth and Fifteenth Amendments, was morally wrong,"⁵⁰ so long as those words are allowed to mask the reality of Jim Crow and Judge Lynch or to equate the Freedom Riders with those who perpetrated the Orangeburg massacre. For Cruse, the question put by the title of the book is more than a rhetorical gambit, more than merely ironic—it is downright insulting, since "from the very outset, the law was always dead or ineffective for blacks."⁵¹

Cruse's fellow historian, the late David Potter, implicitly agrees.⁵² The philosophic argument sketched in the papers by Rostow, Gay, Wolff, and Dworkin is shown to be an historical sequence as well. Eighteenth century liberal thought, in supplanting divinity and tradition as a source of law, exposed the dilemma of law in a society of less than perfect homogeneity.⁵³ Consent became the keystone of the liberal arch. The Social Contract was the agreement to keep conflict

44. Cruse, *The Historical Roots of American Social Change and Social Theory*, in Rostow, *supra* note 6, at 329.

45. *Id.* at 322.

46. *Id.* at 327.

47. Arendt, *Civil Disobedience*, in *id.* at 242.

48. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, in *id.* at 69.

49. *Id.* at 80-81.

50. *Id.* at 86.

51. Cruse, *The Historical Roots of American Social Change and Social Theory*, in *id.* at 326.

52. Potter, *Changing Patterns of Social Cohesion and the Crisis of Law Under a System of Government by Consent*, in *id.* at 260.

53. *Id.* at 261.

within bounds.⁵⁴ In fact this could be accomplished only by a ruthless exclusion of certain groups from membership in the polity and by a socially enforced conformity of basic values, attitudes and outlooks.⁵⁵ (Thus, Rostow reveals the true character of the social contract in his attempt to refute the argument for participatory democracy: "children . . . have always been regarded as members of the community, protected by its laws, and bound by them as well. So were women, during the centuries without number before they were accepted legally as the equals of men.")⁵⁶ In short, the Social Contract is a set of terms dictated by the powerful to the powerless and endorsed by "reason," which means the prevailing view of society maintained by those in power. Consent, says Charles Dyke in his paper for the symposium, is "part of a flimflam designed to divert attention from the actual distribution of power . . ." ⁵⁷

Social conformity could operate in this powerful way so long as the society was a structure of small communities. But change in the scale of society has allowed the formation of new communities, not necessarily located in particular territory, which are in conflict over values, attitudes and outlook.⁵⁸ These "veto-communities" cry out for a multi-cultural polity. Since "law is a uniform system of social control for the entire population living within a given jurisdiction,"⁵⁹ this development has seriously undermined the foundation of the legalistic nation-state. In the face of this, we still turn to law for remedy, from national habit, but find it unable to answer the call. As Edgar S. Cahn says, after hearing Arendt, "As a profession committed to the rule of law, we have no forum, no means to accommodate, to cope with, the realities to which she has addressed herself."⁶⁰ Civil disobedience is thereby revealed to be, not a scourge, nor a problem, but a "sign of the inner instability and vulnerability of existing governments and legal systems."⁶¹

III

On this challenging ground the opening essay of *The Rule of Law* begins. Saved from the burden of struggling to escape the eighteenth

54. *Id.* at 266.

55. *Id.* at 273-74.

56. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, in *id.* at 70.

57. Dyke, *Freedom, Consent, and the Costs of Interaction*, in *id.* at 157.

58. Potter, *Changing Patterns of Social Cohesion and the Crisis of Law Under a System of Government by Consent*, in *id.* at 281.

59. *Id.* at 260.

60. Cahn, *Comment*, in *id.* at 243.

61. Arendt, *Civil Disobedience*, in *id.* at 220.

century context established by Gay and the questions loaded by Rostow, the book moves rapidly and forcefully to come to grips with the deeper issues with which only a few of the authors of principal papers in *Is Law Dead?* seem ready to engage.

In *The Conspiracy of Law*, Howard Zinn fires the opening salvo of the attack from the Left. Zinn directly denies the major claims usually made for the virtues of the rule of law. Against the claim that law brings needed order to society, he argues that it creates as much disorder as it does order, only at different levels of experience.⁶² Against the claim that law is an instrument of social justice, he contends that the rule of law has brought no fundamental change in the distribution of wealth and power.⁶³ It is the law which supports "the anarchy of the economic order";⁶⁴ gives priority to the protection of property over person; suppresses radical critics of the privileged and their power; countenances a broad discretion in the control of the lives of the powerless; ignores illegality of government actions; ties us to the past in the face of the need for exponential change; forecloses major social restructuring by absorbing social energy in pursuit of minor, incremental reforms; discriminates in practice on the basis of locally narrow, class and racial prejudices; recognizes explicitly its subservience to the structure of power by denying the justiciability of fundamental attacks upon that structure; and, in general, serves primarily to shield the predator from his prey.⁶⁵

Because it is a collection of essays, *The Rule of Law* has no commentators to interject a quick nod of approval or a sharp jibe of criticism before the main dialogue continues. Edgar Z. Friedenberg swiftly picks up the cudgels. He agrees with Zinn that the relationship between law and justice is unambiguous: "if Law is to perform its social function, Justice must yield to Law."⁶⁶ But he finds ambiguity in the relations of law and order and of law and liberty. He is willing to concede that law contributes to social stability and continuity. Yet he sees law as legitimizing some forms of order at the expense of others, and he contends that nearly all the violence done in the world is done by the agents of legitimate authority.⁶⁷ Thus, in the net, his view of the relationship of law and order is not fundamentally different from that of Zinn. And, although he concedes that the courts sometimes are

62. Zinn, *The Conspiracy of Law*, in WOLFF, *supra* note 7, at 16.

63. *Id.* at 17.

64. *Id.* at 25.

65. *Id.* at 24-35.

66. Friedenberg, *The Side Effects of the Legal Process*, in *id.* at 37.

67. *Id.* at 42-43.

defenders of liberty, even if their defense often has been reluctant and unduly parsimonious, Friedenberg warns that at best legal liberty may be a trap, because it legitimates “only a political style that is manifestly archaic and irrelevant.”⁶⁸

There is more than a little irony in the fact that *Is Law Dead?* raises the spectre of violence in its title yet proceeds to emphasize the relatively peaceful phenomenon of civil disobedience, while *The Rule of Law* moves swiftly to declare, if not entirely to embrace, a situation of revolutionary violence. For Zinn and Friedenberg, the question of civil disobedience is no longer of great consequence. “A general ‘obligation to obey the law’ is a poor guide at a time when revolutionary changes are needed and we are racing against ominous lines on the social cardiograph,”⁶⁹ says Zinn, while to Friedenberg, civil disobedience, insofar as it assumes fidelity to law, is nonsensical under contemporary conditions.⁷⁰ The argument that the civil disobedient should “take his punishment” in order to make a moral point is, from a revolutionary perspective, to concede the essential fairness of the rules of the game and thereby to give away the whole matter at issue. Winning is the only moral victory, and there is little chance of that in the state’s own courts, since even an acquittal comes at an exorbitant price in time, money and energy.⁷¹ And the distinction between the use of legitimate force and resort to violence evaporates completely in the heat of Wolff’s anarchist analysis. Violence, says Wolff, implies the illegitimate use of force. But since state power cannot be justified against the moral autonomy of the individual, all use of force is violence, whether or not it purports to be in the name of the state, the commonwealth, or the people.⁷² It is in this sense that Friedenberg has meant his argument that most violence in the world is done in the name of the state—arrest, punishment, and war.

Thus, these three authors describe a situation which Daniel J. Boorstin and Anthony F.C. Wallace seek to explain. Both see the crisis as the product of an imbalance between two tendencies. Boorstin’s distinction between a time of belief in law as instrumental (a tool subject to our shaping) and a time of belief in law as immanent (outside human control)⁷³ parallels Wallace’s distinction between a period of procedural morality (of faith in the ability to achieve wants,

68. *Id.* at 47.

69. Zinn, *The Conspiracy of Law*, in *id.* at 35.

70. Friedenberg, *The Side Effects of the Legal Process*, in *id.* at 47-48.

71. *Id.* at 50.

72. Wolff, *Violence and the Law*, in *id.* at 59-61.

73. Boorstin, *The Perils of Indwelling Law*, in *id.* at 78.

including justice, by following established procedure) and a period of teleological morality (of conviction that substantive goals must be given precedence, that ends do justify means).⁷⁴

Wallace identifies the danger, as many of the authors did in *Is Law Dead?*, as being that the zeal of the revitalization movement, with its teleological morality, will push the fearful proceduralists into repression, culminating in a cycle of heightening tension that bursts into destructive violence.⁷⁵ The argument is similar to the liberal's familiar assertion of the evil consequences of a radical moralism which is impatient, harsh, puritanical and unwilling to compromise.

Dworkin, who had argued in *Is Law Dead?* for a strong view of the rights of citizens against their government,⁷⁶ and who had suggested that the general duty to obey the law becomes almost incoherent in the face of that concept of rights,⁷⁷ attempts to provide a corrective to the imbalance and a means whereby law can avoid the threat of death "by fire or ice."⁷⁸ He thinks that radicals and conservatives have divided themselves unnecessarily by their acceptance of a positivist view of law. The positivist view leads to a sharp separation of law and morality, individual rights and social obligations. If the source of commitment to its underlying principle of obligation to obey the law is rejected—for example, because of the law's injustice—loyalty to social norms crumbles.⁷⁹ Dworkin proposes an alternate theory in which legal institutions are seen as being enmeshed in other social practices and conventions. On this view ideological division which threatens a crisis of violence may be lessened if both sides can recognize their common commitment to the convention of social obligation and the practice of principled argument.⁸⁰ Only the renunciation of social obligation altogether or the rejection of principled argument stands between us and a means of *rapprochement*. If the convention of social obligation and the practice of principled argument are accepted, all that remains to separate people in society is the content of their faith in particular social conventions or principles of criticism. The argument of eighteenth century liberalism has been restated, but not fundamentally improved.

Dworkin's liberal analysis does not satisfy, in part because it is

74. Wallace, *Violence, Morality and Revitalization*, in *id.* at 100-07.

75. *Id.* at 107-09.

76. Dworkin, *Taking Rights Seriously*, in Rosrow, *supra* note 6, at 168.

77. *Id.* at 179.

78. Cahn, *Comment*, in *id.* at 390.

79. Dworkin, *Philosophy and the Critique of Law*, in Wolff, *supra* note 7, at 166-67.

80. *Id.* at 168-69.

precisely the loss of confidence in the validity of our major social conventions—marriage, the industrial corporation, the nation-state, representative government—and the lack of agreement upon the nature and priority of the principles of social criticism—equality, liberation, participation—which defines the present moment. Dworkin's analysis also assumes that Wallace and company have correctly identified the danger to law as being the threat of a crisis of violence. Boorstin, however, has a more sophisticated view of the danger. Because of its sophistication, it can be accused of being too intellectualized, too removed from the brute facts of violence or garbage in the streets. Yet if civil disobedience, and rebellious violence, are an index of a deeper social malaise, Boorstin's diagnosis deserves careful examination. For the danger he sees is that law will be pressed into service beyond its capacity, not merely to facilitate social life but as a substitute for it. He fears that in our quest to know the facts of social life and to make law consistent with them that we will reduce law to an affirmation of the status quo, and will succumb to the temptation to make social science the means of making law into a mirror of society, a mere tautology.⁸¹

This discussion has at last reached the point portended by Charles Dyke's important observation in *Is Law Dead?*, that while some technique of controlling the costs of social interaction is needed, there is a paucity of proof that any particular technique is essential.⁸² Law is merely "a particular technique." Thus, Dyke's point directly contravenes the eighteenth century premise that a good society must be a society under law. Yet we require "a framework of stability"⁸³ within which change can occur. Where can we find a framework adequate to support social interaction yet able to tolerate even the "exponential change" which may be needed? The outlines of an answer are found in the metaphor of a framework itself. If a framework is too tightly built, with supporting members drawn close together, it ceases to be a framework, it becomes a wall, an enclosure. This is legalism. If the framework is too loose, it may collapse. This is chaos. If the framework is supportive but spacious, stable but open, it can fulfill its function of providing a structure of support for change and for life.

The design of the framework is in large part the function of the

81. Boorstin, *The Perils of Indwelling Law*, in *id.* at 92-97.

82. Dyke, *Freedom, Consent, and the Costs of Interaction*, in Rostow, *supra* note 6, at 147.

83. Arendt, *Civil Disobedience*, in *id.* at 228.

materials available with which to build. Law is one such material. But what are its characteristics? How flexible is it? How strong? How well does it combine with other materials to form a complex structure?

Stanley Diamond addresses these issues in what is both literally and figuratively the central essay in *The Rule of Law*. Diamond begins by reasserting a distinction drawn by nineteenth century anthropology between law and custom. We have lost sight of the distinction, in his view, because "we live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts."⁸⁴ The problem with law is not that it is sickly, but that it is overgrown and cancerous, blocking out the normal life processes of society. Law is that "particular technique" for controlling and distributing the costs of interaction which befits the development of the nation-state, in which service and for whose profit it exists.⁸⁵ State and law seek to objectify their existence, to take a position outside of, above, society—society *under* law. The issues earlier posed are turned on their head. Not civil disobedience, not violence, but *law* is a "chronic symptom of the disorder of institutions."⁸⁶ The struggle for civil rights is a struggle, within law, against law.⁸⁷ And since substantive law can approach congruence with morality only at the extreme price of legalistic enclosure, civil rights—in the due process sense of fair procedure—must serve instead as the "assurance of whatever justice can be obtained under the rule of law."⁸⁸ Shades of Felix Frankfurter, Learned Hand, and Henry Hart! A strange synthesis of Rostow and Zinn, Dworkin and Friedenberg has been achieved.

Where does this synthesis lead? If law befits the nation-state, and the nation-state is in its twilight, where shall we turn for a framework? Lon L. Fuller offers a clue by directing us once again to some larger features of law. Law, in his conception, can be viewed as a "language of interaction."⁸⁹ This can be seen in the phenomenon of customary law, misperceived in the literature of jurisprudence by an undue emphasis upon its character as formed in habit and maintained in tradition. Fuller sees this as a misdirected focus on the phonemes of custom, the repetition of particular items of behavior, to the neglect of the vocabulary and grammar of social interaction which he calls

84. Diamond, *The Rule of Law Versus the Order of Custom*, in WOLFF, *supra* note 7, at 117.

85. *Id.* at 120-31.

86. *Id.* at 135.

87. *Id.* at 138.

88. *Id.* at 139.

89. Fuller, *Human Interaction and the Law*, in *id.* at 173.

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customary law.⁹⁰ Through its ritual communication, customary law gives rise to obligation within a set of “stable interactional expectancies,”⁹¹ most of which lie beneath consciousness.

The relations of parties under a contract have a similar quality of “stable interactional expectancies.” Even enacted law, the most formal type, is both dependent on the existence of a structure of such expectancies between state and citizen and itself serves law’s central purpose of providing “base lines for human interaction”⁹²—the framework of social interaction. Fuller approaches the question of the appropriateness of different types of frameworks with sensitivity and discrimination. He distinguishes social contexts of great intimacy or great hostility, in which enacted law and contract can play no useful role, from the “habitat of friendly strangers, between whom interactional expectancies remain largely open and unpatterned,”⁹³ in which contracts and enacted law function best. He is in close agreement with those in *Is Law Dead?* who saw the challenge to law in the disintegration of that habitat into the culture of veto-communities. But some of those participants saw not only the need but even the desirability of a multicultural organization of the polity, a point which escapes Fuller. And Fuller’s analysis ultimately turns around against his starting point. For whereas he had begun by seeking to escape a too narrow equation of law as a general phenomenon with the legal system of the nation-state, he ends by demonstrating that law shows its greatest capacity to order interaction in a “large and impersonal”⁹⁴ society. Thus does law embrace alienation.

In this light, Fuller’s struggle with the meaning of the term “law” reveals its significance. He had sought to establish that “customary law” is an appropriate term by showing that there is a systematic language of social interaction even in societies in which contractual, enacted or decisional law are known little if at all.⁹⁵ He had admitted, in seeking to describe the practices under contracts as “law,” that this represents a “considerable departure from the conventions we ordinarily follow”⁹⁶ in using the term “law.” Does his expansive definition of law help to fulfill the call for a new jurisprudence or to furnish an adequate concept of law? Or is the depth of his fi-

90. *Id.* at 172-77.

91. *Id.* at 187.

92. *Id.* at 201.

93. *Id.* at 207.

94. *Id.* at 215.

95. *Id.* at 180-86.

96. *Id.* at 187.

delity to law so great that it obscures his vision of the limits of legal capacity, as a "particular technique" to be a language of social interaction adequate to the emerging age?

In concluding his essay Fuller restates the familiar jurisprudential wisdom that to retain its character as a framework of flexible and open texture, law is forced to deal with acts, not attitudes, and to measure behavior against rules, rather than applying broad principles directly to individuals. The symbolism of the law's objectivity thus achieved is fundamental to sustaining those moral attitudes of both citizen and government toward each other that maintain the rule of law.⁹⁷ One source of difficulty in sustaining those attitudes is evident to Fuller. Dramatic events may belie the image of legal objectivity and undermine faith in law's ability to establish justice, ensure domestic tranquility and protect the right to life and liberty. This is another version of the spectre of the crisis of violence. Another way in which the symbolism of the rule of law may lose its compelling force is that the fabric of cultural myth of which it is a part may be rent by fundamental alterations in our perception of the human situation.

Wolff is witness to one form of that perception. He is puzzled to explain why belief in the authority of the state persists, and he calls such belief "superstitious."⁹⁸ The myth of the social contract has lost its power as a metaphor for our existence, just as the myth of the Great Chain of Being had lost its vitality at the beginning of the modern age.⁹⁹ Wolff, however, is driven increasingly toward the realization of the awful prospect of social life without an adequate framework of interaction grounded in cultural myth and symbolism. At the close of his paper for *Is Law Dead?* he asks whether if "the theory of legitimate authority" is indeed a myth, it is nonetheless "a myth which men cannot easily do without."¹⁰⁰ Here he faces the awesome question of the relation of truth and politics, knowledge and freedom. The Grand Inquisitor haunts his dreams, urging again that men are weak, and that Plato was right in claiming that they must be told a "noble lie" because their eyes cannot stand the bright harsh light of reality. Wolff wishes that this were not so, but he is able to offer no proof, only the observation that "we have survived the death of God, and we may yet survive the death of the state."¹⁰¹

97. *Id.* at 213-15.

98. Wolff, *Violence and the Law*, in *id.* at 62.

99. See generally A. LOVEJOY, *THE GREAT CHAIN OF BEING* (1936).

100. Wolff, *In Defense of Anarchism*, in ROSTOW, *supra* note 6, at 129.

101. Wolff, *Afterword*, in WOLFF, *supra* note 7, at 248.

There is a coldness and austerity in Wolff's discussion because in its respect for sober truth it threatens to exclude recognition of the function of myth as the basis of culture, of symbol as the ground of all experience that is peculiarly human. There is no need to despair belief in myth as such, but there is a great and yet unanswered need to find a structure of myth and symbol suitable to the new age which lies beyond our time of crisis.

IV

These twenty essays contribute little to the discussion in contemporary social criticism of the question whether the breakdown of the old order and the creation of the new one can be accomplished by peaceful means. What they do reveal is that there is scant evidence of any capacity in law to be the instrument of peaceful transition. Law appears instead as a source of violence, as one of the institutions in decay.

Wallace ends his essay with a plea for the discovery of "the cultural means for making violence unnecessary as a tactic for revitalization,"¹⁰² and he sees non-violent civil disobedience as a modest example. But unless the conditions of underlying moral consensus which make civil disobedience effective can be realized on a global scale, it cannot serve as the vehicle of change. Gottlieb thinks that "what is dying is a set of expectations accompanying the simple vision of law as superior power."¹⁰³ A new system "may look to mediation, collective bargaining, negotiations,"¹⁰⁴ and other non-coercive settlement procedures. But this solution, via another form of procedural morality, also depends on the existence of and belief in a basic level of common interest stronger than the divisive forces of exploitation, injustice and oppression. Justification for such belief in the present distribution of wealth and power is miniscule. How troubled the course of transition in the next century or two will be is in part a function of the development of new "cultural means" or the renewal of old ones, but it is also a function of the extent of the dislocation of present power that must occur, the size of the gap between the dying and the emergent cultures that must be closed, and the speed with which a new set of "stable interactional expectancies" can be established. Understanding the transition—and thereby improving our ability to act wisely during

102. Wallace, *Violence, Morality, and Revitalization*, in *id.* at 113.

103. Gottlieb, *Comment*, in Rostow, *supra* note 6, at 201.

104. *Id.*

our time—requires not only that we comprehend the character of the dying age, that we understand our transitional state, but also that we clarify as much as we can our vision of the new age, so that we may be guided by our hope for the future as well as our anguish for the present and our dissatisfaction with the past.

What we are seeking then is a framework of social interaction, within a context of myth and symbol which adequately voices a perception of the human situation and speaks a language whose vocabulary and grammar can convey the subtle range of the color, texture and rhythm of that situation. In search of that framework we must first define the situation itself, then state the contours of the language of social interaction that befits it, outline the myth structure that would sustain a framework of interaction in that situation in that language, and thus gain a glimpse of the character of the framework we seek. It is a formidable task, a task whose urgency is established by both these books, which both have helped to define, but whose fulfillment neither offers. For myself, following Auden,

Although I can at least confine
Your vanity and mine
To stating timidly
A timid similarity,
We shall boast anyway:¹⁰⁵

The situation is *apocalyptic*. We are at war with the elements. We live in the shadow of the fire of the bomb, in polluted waters, gasping for air, on earth depleted of its nurturing resources. We are driven to a consciousness of our mortality. The situation is *global*. No longer can we escape to a new frontier, colonize another people, steal Lebensraum from our fellows. No longer can we find safety within the walls of our cave, our village, our castle, our city, our nation. We are forced to recognize that we all live in the same ghetto. The situation is *ecological*. We cannot continue to exploit nature, to consume life, to feed on others. We act and we alter the world around us. We are aware that the situation is not just the human situation but the situation of life as part of the processes larger than life. We are compelled to realize that we are one with nature. The situation is *technological*. We cannot avoid the imperative of the machine. Our tools are an extension of our selves; they are part of us and part of our situation. We cannot justify a renunciation of their potential even

105. Auden, *Law Like Love*, in *THE COLLECTED POETRY OF W.H. AUDEN* 74, at 76 (1945).

though we understand that it is a power that can be used for evil as well as for good, and that a worship of its power surely leads to evil. We are constrained to admit that we are human beings, the toolmakers. The situation is *psychological*. We are in a crisis of identity, seeking a new consciousness, trying to set our minds straight. Our obsession with rationality has proven unreasonable, pure reason has become irrational. We cannot deny our senses and our emotions. We must act as well as know, experience as well as understand. The situation is *evolutionary*. We cannot live in the past, we cannot even grasp hold of the present as it drifts through our fingers, we must live for the future. The context of time cannot be limited to a generation, a lifetime, a century, a millennium. We are in process, not stasis. We live in all time, now and forever.

The contours of the new language of social interaction are becoming more distinct. Because it must be global in scope, capable of creating a bond of communication across cultures, yet able to live alongside of the particular languages of each culture, its symbolic system must have a universal character. Both the work of structural anthropologists and the efforts to establish extra-terrestrial communication suggest the possibility of the clearer definition of universal symbolic patterns. If these can become part of our vocabulary, they can be transmitted through electronic media which are capable of reproducing not only sight and sound, but, ultimately the full range of human sense experience. As in traditional cultures, there can be great capacity for symbolic interaction in the communication of this large range of sense data variables. Technology can provide the vast information handling capacity which is critical to coping with a high order of complexity and a rapid speed of change in the global situation.

Just as law is a particular species of language, a set of linguistic categories and, at any given moment, the particular literature they have yielded, so in this new language must there evolve a set of concepts and categories of social interaction, the structural timbers of the new framework. Looking at law allows us to anticipate some of the general relations which will be expressed in this new language, even if we cannot yet fully apprehend the form they will take. Contract, for example, is a particular legal manifestation of a more general principle of social relationship: reciprocity. In modern contract law, the emphasis is on promise, expectation, voluntarism, and exchange. But reciprocity has many other social manifestations, both in and beyond the law. Similarly, litigation is a particular stylized form of organized conflict. Its limits increasingly are being charted, and our

awareness of those limits is drawing us toward a renewal of the understanding that the resolution of conflict is a more general activity.

The particular content of the behavioral directions in any language of social interaction is a vector of its values. That is to say, the sentences in the language of social interaction which happen to be considered valid sentences by those who use it are neither all the possible sentences which might be generated in it nor a random selection from them but instead a selected set, chosen in the light of purposes, goals and values. For many traditional societies the primary goal was group survival, dictated by the fragility of group existence. The starting point for the social myth of such a culture is in an original moment of moral subjection. (The expulsion from the garden.) For modern liberal culture, faced with the challenge of conquering new territory, the chief goal was growth, progress. The starting point for the social myth of such a culture was the compact forged in an original state of moral autonomy. (The state of nature.) The emerging global culture has integration as its goal, at all levels of existence. A social myth for this culture must begin in an assumed moment of moral interdependence. (Spaceship earth.) A renewed understanding of our common humanity, our common peril, can lead toward a definition of freedom which is not merely liberty from, but liberation to; a definition of equality which does not rest with the evenhanded administration of opportunity to unequals, but demands a distributive justice which compensates for inequalities, whatever their origin; a definition of participation which is not satisfied with representation, but claims the right to direct involvement in the determination of the common good.

The framework for social interaction which we are seeking, whose emergence we await at the end of the present period of crisis and transformation, will satisfy only if it can embrace these values, employ this language, fit this situation. It must be subtle and complex enough to communicate in a structure of time which is no longer linear, unidirectional, and evenly measured and in a frame of space which is no longer two dimensional and bounded. It must establish a multi-dimensional network, a truer replica of the web of life than the model of law can be expected to achieve. Within this network, no doubt, law will continue to serve in those spheres of human relations where a mediation of the distance between principle and particular instruction can be measured by a rule, governed by a rule, stated in a rule. But the situation will not allow us to rely nearly so much as we do now upon hurling law into the breach of ignorance. We will be pressed

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to have knowledge, in advance, of the particular consequences of particular decisions in particular situations as we seek the kind of choice which is alone meaningful in a situation of complete global interdependence. The mode of social decisionmaking must be able to render advisory opinions in "polycentric" situations,¹⁰⁶ and render them continuously and instantaneously. The tyranny that such a situation of urgency might bring to us has been foreseen by many who have prophesied the direction of our culture. Protection against that tyranny, the analogue in the emerging culture to civil liberties, must be evolved, as was the case with liberty under law, within its own terms. In the process of that evolution, we may have to experience some sharp reversals. It will be difficult to accommodate to the notion that security does not reside in exclusivity of possession, identity does not find its strongest protection in a wall of privacy. And if the new concepts are not to smother, in each there must be a commitment to openness, to change, to a receptivity to newcomers.

These, at least, are the shadows on the wall of our cave. Through them, perhaps, we may yet find a way to a world beyond the crisis of law.

106. See Fuller, *Adjudication and the Rule of Law*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1 (1960). See also Fuller, *Collective Bargaining and the Arbitration*, 1963 WIS. L. REV. 3, 18-42.

