


1970

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### Recommended Citation

Sidney Hook, *Law and Anarchy*, 5 U. Rich. L. Rev. 47 (1970).

Available at: <http://scholarship.richmond.edu/lawreview/vol5/iss1/5>

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## LAW AND ANARCHY†

*Sidney Hook\**

THAT the United States is going through a crisis of law enforcement today goes without saying. The mass media in all their forms say it loud and clear. A few months ago Chicago was the eye of the storm. Some weeks later it was New York. Then came eruptions at Santa Barbara and elsewhere. Tomorrow mass violence may boil over almost anywhere. This crisis extends not merely to trust in, and acceptance of, the normal activities of agencies of law enforcement but to the authority of law and government as such. The planned and systematic degradation of the academy has been extended to the courts. Just as in the case of the universities, the efforts made to *prevent* disruption have produced as much criticism and, in some editorial quarters, even more criticism than the original violence that inspired the counter measures.

I wish to consider certain views and attitudes about law and government that seem widely held today, that encourage contempt for law and at least indirectly bear on current political behavior.

Does it really make a difference—one may ask—what human beings think about such abstruse matters as the nature of law, the state and the source and justification of political authority? John Maynard Keynes asserted that the most important determinant of social and historical affairs is the ideas men carry around in their heads. Certainly the ideas that sported in Keynes' head exerted profound influence. If we look at economic life today, it would require considerable courage to believe that the market place is free and that the consumer is king. The decisions of the Federal Reserve Board concerning interest rates—decisions that clearly flow from some large theoretical assumptions—seem to confirm the importance of ideas, even of very abstract ideas. Whether this holds to the same *degree* in other fields is an open question. What is not open to question, regardless of whether we try to explain human action in terms of causes or reasons, and of whether we distinguish be-

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† Public lecture delivered at the University of Richmond, April 22, 1970, celebrating the one hundredth anniversary of the founding of the T.C. Williams School of Law.

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tween good reasons, real reasons and mere rationalizations, is the fact that what people believe, or think they believe, makes some difference in their conduct. Otherwise they would not cling to their beliefs in the face of so much evidence to the contrary.

The ideas people carry around in their heads have various sources. Some are traditional and customary, acquired almost in the same effortless way as we acquire speech. Some are the result of schooling. In these days of exposure to the conditioning of mass media, they are absorbed from the professional commentators who are *makers* of opinion even when they pretend only to be *reporters* of opinions. Ideas and attitudes are sometimes transmitted through a kind of osmosis and contagion by ideological groups which are skillful in their capacity to command a hearing on any issue anywhere and to exploit the limelight of mass media publicity without cost. It used to be said that disparities in the ownership of the means of publication and communication gave an undue and uncompensated advantage to those who owned and controlled them, that points of view hostile to, or even different from, those of the so-called "Establishment" could get no hearing. A sober survey of the facts requires us to qualify and perhaps to reject this easy generalization. The nature of the mass media today, their intense competition for high ratings, and their consequent desire for scoops and spectaculars on radio and television, reinforce the tendency to exploit the sensational, the bizarre and the extreme. This opens up vast possibilities to reach multiple audiences to those who, on the basis of the intellectual or social importance of what they have to say, could hardly command a single audience.

Whether highbrow or lowbrow, strident or nuanced, ideas and attitudes so acquired have implications and ultimate effects not always understood by those who express them. For example, the impassioned groups that shout in our New York courtrooms today, "All power to the people" are unaware that they are calling for mob rule to which many of their forbears were victims. After all, how can we distinguish between the mob and the people, particularly when every mob speaks in the name of the people, except in terms of the rule of law—a rule of law by which the people themselves, even when they are the ultimate source of the rule, must be bound until the rule can be changed by procedures that also function according to rules. Without the rule of law, "the people" is a mob swayed by gusts of anger and passion that, as often as not, are contrived by shrewd and skillful demagogues. Probably that

is what Alexander Hamilton meant when he exclaimed, in a passage attributed to him but which no one has ever found in his writings, "The People, Sir, the People is a Beast." It is the "People" as "King Mob" that is a "Beast."

One cannot expect sophistication on the part of those who mouth slogans. But what shall we say of the new crop of radical activists who justify their desperate organized resistance to the present social order in the name of the classless society of the future in which the state—its armies, police, courts and all separate bodies of armed men—will have disappeared? When asked how in such a society they would deal with a person who brutally assaulted another or who committed some monstrous or outrageous action or was so charged, what reply do they make, these sincere idealists praised by some admirers of the "New Left" as the brightest students of our century? They either blandly deny that such behavior will be possible in the classless society—presumably it will be a secular version of the Kingdom of Heaven on earth!—or they fall back on Lenin's answer in his *State and Revolution*: that in the event of what we today call a criminal assault by one person against another, justice will in effect be done on the spot without police, court, or trial.<sup>1</sup> In their revolutionary innocence, they seem sublimely unaware that this is precisely what is meant by "lynch law."

It may seem odd, especially to the audience so many of whose members are professionally concerned with law, to give attention to ideas and assumptions that at first sound strike the ear as unfamiliar and crude. But if the importance of ideas is gauged by their impact on events, by the growing number of their adherents, and the intensity with which they are held, and if the force of ideas in human affairs is measured not by their truth but by the *belief* that they are true and by the readiness to act upon that belief, then it would be folly to ignore them, however unfamiliar and crude they sound. These ideas are not localized in any one area of the country. As I have indicated, they flourish among the most articulate of our students and also among some of their younger teachers.

In the literature of the philosophers and apologists of the so-called "New Left" and even more expressly in the justification of their attitudes, criticisms of the law are made on two grounds. The first regards the law as inherently hostile to human freedom, as merely a set of restraints which may justifiably be violated in behalf of one or an-

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<sup>1</sup>7 LENIN, *SELECTED WORKS* 83. (1940).

other variety of personal freedom. The second regards the law as basically a command whose ultimate authority rests exclusively on force. It is asserted that no authority can morally or politically justify itself or acquire legitimacy by power alone. Legitimacy can be rooted only in ideas of justice and reason of which the individual is the sole judge. Consequently no law, regardless of how it came into existence, whether by decree of a tyrant or decision of a democratic assembly after a free and open discussion, is binding on any individual unless *he* voluntarily approves of it. Every individual on this view has a moral right not only to disapprove of laws unacceptable to his sense of justice and reason but to disobey such laws without suffering any punishment. This is the logic of anarchy. Although few people are prepared to call themselves anarchists, all who subscribe to these and similar views are committed to anarchy. And if we listen, we shall hear an over-swelling chorus today, especially among the young, but not restricted to them, who echo these beliefs albeit in an inchoate form.

Let us consider the first of these views, viz., that law and freedom, where "freedom" means the power to effect one's wishes without let or hindrance by others, are intrinsically opposed; that law is always a curb or restraint on one's freedom, so that even when law is necessary, it is a necessary evil.

If it were true that law and freedom are necessarily opposed, it would follow that in the absence of law, men would be free, and that the fewer the laws, the greater would human freedom be. A moment's reflection will reveal the inadequacy of such a view. To be sure, Bentham in his classic analysis of legislation proclaimed that "every law is contrary to [someone's] liberty,"<sup>2</sup> *i.e.*, it is contrary to the liberty or freedom of those who would do what the law forbids them to do, and who would interfere with us in the enjoyment of our rights. It was Bentham who called attention to the fact that unless we place restraints upon the freedom of others to do what they please, especially their freedom to interfere with us, we cannot begin to exercise or enjoy our own freedom of speech, press, assembly, property, or life itself—the very substance of our Bill of Rights.

Because every law imposes some specific restraints on some freedoms of action of members of the community, it does not follow in the least that a polar opposition between law and freedom in the abstract can be drawn. Professor Morris R. Cohen, who supports Bentham on this point,

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<sup>2</sup> J. BENTHAM, *THEORY OF LEGISLATION* 94 (C. OGDEN ed. 1931).

says about legislation: "If it takes away the liberties of some, it thereby creates liberties for others."<sup>3</sup> Were anyone to doubt this, let him ask himself whether it would be true to say that the fewer the traffic laws, the greater the freedom motorists would enjoy in our crowded metropolitan centers to get to their destinations quickly and safely.

This conclusion seems to me to be strengthened when we recognize that every legal system contains not only commands and prohibitions but allows for choices and conditional actions. One need not make a will. The law does not compel one to do so. But if one decides to do so, a certain procedure is indicated if the will is to be valid. But every free choice that one possesses in a legal system is dependent upon the protection the law gives us against those who would coerce us into making one or another choice, in effect denying our freedom of choice. We cannot be free unless others are unfree to interfere with our freedom.

All this goes to show that things and affairs in society cannot settle themselves. Laws are unavoidable if we are to determine some priorities in the order and range of human freedom, and avoid the chaos that would result if everyone were free to do what he pleased—what *his* reason or *his* sense of justice or *his* conscience dictated to him. Behind the assumption that governments and laws are not necessary in human society, except as the institutional means by which one class oppresses another, is the view that the necessity for legislation arises only out of conflicts of material interests, and that if society were properly arranged or ordered in behalf of the common good, in which conflicting material interests presumably would be transcended, the state would be unnecessary.

Both James Madison and Karl Marx were aware of the complex relationship between property and power, and between power and law. Madison was more realistic than Marx in recognizing that conflicts of interest under *any* social system might give rise to tyrannies of faction—even tyrannies of the majority—whereas Marx assumed that once economic class conflicts were removed by socialization, there would remain only problems of technology, accountancy and administration. If Marx and Engels were right, once an economy was socialized, the computer would in principle solve all problems. The administration of things would replace the administration of men. The state and the need

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<sup>3</sup> M. COHEN, REASON AND LAW 5 (1950).

for sanctions to enforce laws would disappear, and with it politics as the exercise of power by men over other men.

But no economy, however organized, can ever solve or eliminate all conflicts of material interests, although it may moderate their expression and reduce the frequency of their occasion. In no society, whatever its productive potential, can more than enough of everything desired by men be produced at once. In consequence, there will always be problems of distribution—created by shifting distinctions between necessities and luxuries and by the tyranny of time that compels us to differentiate between those who get what they need *now* and those who get what they need, just as urgently as the others, *later* and much *later*. Even in the best run of communities there are problems of material distribution, such as whether one is to acquire his guaranteed housing now or some time before one dies, or whether one is to occupy the apartment with a pleasing view or one overlooking a parking lot or a river of noisy traffic. These are problems of potential conflict.

It is sometimes said that all this requires is the recognition of the necessity of rules, not of laws having the awful majesty of sanctions behind them. But there is a difference between rules and laws—and in matters of politics and social life we are dealing not with rules simply but with laws. We can draw up rules for *games* knowing that they have only conditional and not coercive force. Most games can be abandoned without suffering pains and penalties, if we do not fancy the rule, but to speak of the laws governing distribution of rights, goods, or services simply as *rules* is extremely misleading, because we cannot opt out of life and society as we do out of a game. “Rules of distribution” concerning property, or of who gets what when, are emphatically *not* rules of a game. It is even misleading in a society in which one must use his car in order to live and to make a living to refer to “traffic laws” as if they were merely rules—rules of a game.

Madison and his colleagues, I have said, were more realistic about the facts of power than were Marx and Engels in their utopian mood. They were not influenced by Rousseau but by Hobbes, Locke and Montesquieu. But one can argue that even they were not realistic enough. “If men were angels,” they tell us, “they would have no need of government”—the inference being that conflicts of interest and will are rooted *only* in material things, that without the passions and distractions of the body, the spirit could be pure, without concupiscence or conflict. How odd a notion! For on every known account of Heaven

where neither matter nor material interests exist, it turns out that it has a very complex form of government. The science or theology of angelology exhibits a highly complex hierarchical structure in which the duties, rights and powers of the angelic hosts are not reciprocal. Having read Milton, it is surprising that the authors of the *Federalist* did not ponder the fate of the fallen angel, Lucifer, who challenged the governance of Paradise. If pride, ambition, envy and love of power can move angels in Heaven where there are no riches or material scarcities, where there is no marriage or giving in marriage, they can also move men and women in the classless society.

We may therefore conclude that there will always be a need for law in any society, terrestrial or not, where only one man can be number one, whether in political office or in the heart of a woman, and where more than one man dearly wants to be that one. The existence of law is involved in the very existence of man as a *zoon politikon*.

This brings us to the second assumption behind current contemptuous strictures against the necessity for law and order, viz., that law rests purely upon physical force or the threat of force. If the end of law is justice, it is argued, or even if justice is one of its important ends, why does it require physical sanctions? One can no more *compel* a person to recognize or acknowledge to himself what is just than one can compel him to love or feel loyal to others. One can only convince him or persuade him by example. If authority is based on justice and reason, it is sometimes said, we need no state and its hangmen to enforce their injunctions. Justice and reason are all the patents of authority we require.

Here several considerations are in order. It is empirically false to assert that obedience to law is based on force and the fear of force alone. This is false, because laws are obeyed even when they are widely regarded as unjust or foolish. Laws operate largely in virtue of the acquiescence and inertia among those who are affected by them. It is obvious that large scale disobedience to law, almost any law, would make that law ineffective whether it was a tax law or a traffic law or criminal law, since it could not be enforced. Even if there were no active resistance to an unpopular law and those who violated the law passively accepted their punishment, it would be impossible to arrest or imprison multitudes. That is why it is safe to say that most of the time, except in circumstances where mass uprisings have been brutally repressed, the laws of the state are obeyed more out of habit and tradition than out



of fear. Even in most countries which are not democratic, it would be an exaggeration to say that the law rests on naked force. It would be more accurate to say it rests on the people's sufferance rather than on their genuine explicit consent.

It is all the more true that in democratic societies the existence of the legal order and obedience to it among the vast majority of citizens depend on respect for the law rather than on fear of its sanctions. Once that respect is destroyed, and the *presumptive* validity of law as the upshot of the democratic process is challenged or denied, we approach a state of civil war in which every man's hand is raised either in defense or aggression against his neighbor. Hobbes, to the contrary, notwithstanding the state of nature, taken historically, is not the *bellum omnium contra omnes*—the war of all against all—in which the life of man is “nasty, brutish, ugly and short.” All primitive societies known to anthropologists are organized societies, not anarchic societies in Hobbes' sense. The Hobbesian war of all against all is most closely approximated when the prevailing system of existing laws has broken down, when the principle of authority has been eroded and its jurisdiction fragmented, and private individuals or groups seek to impose their own will or demands upon the community.

Force as such, although not sufficient to explain the observance of law, is nonetheless indispensable in every society. For not *all* interests are common, and the interests that are common are not always strong enough to override the passions of human beings unequally endowed with powers of intelligence, foresight, discipline and the capacities for empathetic identification. When Edmund Burke says that “obedience is what makes government and not the names by which it is called,” he overlooks the other half of the truth, viz., the element of force, however concealed in the background or inexplicit in utterance, that checks the temptations and impulses to disobedience and cools the fire of errant rages of revolt. The use of force as such cannot be legitimately condemned by anyone except absolute pacifists, and even then at the cost of palpable inconsistencies. Without some force or threat of force, our Bill of Rights would be only pious aspirations, unenforced and unenforceable and, therefore, no danger to “the burly sinners that run the world.” The basic questions are: How and for what ends are the law and the force behind it to be used and controlled? To whom are they to be ultimately responsible?

There can be only three generic answers to this last question. Re-

sponsibility that sets the ends of law and controls the occasions and direction of force is to be entrusted either (1) to some élite groups, whether of Platonic philosophers or efficiency experts or a compassionate corps of social welfare workers who exercise an open or disguised dictatorship; or (2) to the private judgment or conscience of each individual citizen whose convictions are the final court of authority; or (3) to the delegated representatives of the majority of citizens in the community—where the delegation of authority rests upon the *freely given* consent of the electorate and therefore presupposes the presence of the civil and political rights whose operation makes it possible for a minority peacefully to win over and become a majority.

Our choice then is among three basic political alternatives—some kind of despotism or dictatorship, anarchy, or democracy.

We need not take much time to discuss the alternative of despotism, for we live in an age in which even those who secretly believe in its validity and scheme for its realization profess to be democrats. Nonetheless, the honest arguments for the dictatorship of the wise (or just or good) from Plato to Santayana are quite formidable. They all suffer, however, from the questionable assumption that one must be an expert in order to judge the recommendations of experts, that unless one knows expertly how to make shoes or soup, he cannot tell whether or where the shoes he wears pinch or whether the soup he eats tastes good.

It is the anarchist view which has recently become fashionable among the young and some of the younger teachers of the young. It asserts, in the words of one of its recent champions, that "there is not, and there could not be, a state that has a right to command and whose subjects have a binding obligation to obey."<sup>4</sup> "Each of us," says the anarchist, "must make himself the author of his actions and take responsibility for them by refusing to act save on the basis of reasons he can see for himself to be good."<sup>5</sup> The fact that a democracy is a form of self-government in which the citizens are both rulers and ruled, law-givers as well as law-obeyers, does not alter matters. "For neither majority rule nor any other method of making decisions in the absence of unanimity can be shown to preserve the autonomy of the individual citizen,"<sup>6</sup> *i.e.*, his right and duty to follow his own judgment.

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<sup>4</sup> Wolf, *On Violence*, 66 JOURNAL OF PHILOSOPHY 607 (1969).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

A similar view is expressed in a recent book on *The Problem of Crime* by Quinney which carries the crusade for politicalization, so to speak, from education and the university into the field of law, crime and the administration of justice. "In the end," he writes, "it is the individual's conscience that guides his actions."<sup>7</sup>

On the basis of a reference to the intellectual heritage of the American Revolution and a quotation from Staughton Lynd, Quinney implies that each person has the moral right to violate any law he regards as particularly oppressive. No reference is made to the relevance of the democratic or non-democratic character of the political system which enacts this law.

Following this view the individual not only has a moral right to violate any law he regards as unjust that represents an illegitimate *government*, but also of an illegitimate government *policy*.

In other words, even when the government is considered legitimate, if any policy of that legitimate government seems wrong, there is as much justification in violating the law that embodies the incorrect policy as in repudiating a wholly illegitimate government. This puts on the same moral and political level the law of the tyrant and the laws of a self-governing community when the individual finds himself at odds or disagreeing with either one or both.

Is there no difference between a law proclaimed by a tyranny or despotism, in whose making we have no voice or vote, direct or indirect, and a law in whose making we *have* played some part within a process that permits appeal from, repeal of, and therefore redress of grievances? In the end, to be sure, the individual's consent or conscience is decisive; but doesn't "in the end" mean different things in the two kinds of situation or context? Is there no difference in the *prima facie* validity of a law that comes from the iron hand of King George III and one that comes from a democratic representative assembly with an official and respected legal opposition? If we recognize no difference, if all laws, no matter what their source, derive their sole authority from the individual's conscience, how do we differentiate this position from the view *that a person is subject to a law in any society only so long as he chooses to be*? What does conscience mean here precisely? Can one have an authoritative conscience without being conscientious? Can one be conscientious without acknowledging that conscience too must be checked, that it must submit to rational controls, to evidence and to

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<sup>7</sup> R. QUINNEY, *THE PROBLEM OF CRIME* 185 (1970).

argument? If with respect to law, we are prepared to give our blessings to our fellow citizens merely with the pious injunction: "Let conscience be your guide!"—why should we expect consequences different—except in largeness of scale—from those that would ensue if we posted signs on our highways reading "let your reflexes be your guide!"

Nonetheless, today the reconstruction of social life on a massive scale is being advocated all along the line in the name of conscience and in behalf of a freedom which, behind the glitter of the rhetoric, is interpreted as a freedom to act as one pleases. In *The Problem of Crime* it is noted:

Without an explicit ideology, the new men of conscience have through intelligence and experience found the necessity of building a new society—a society that allows for the expression of human sensitivities and capabilities. We are attempting to create new forms of community, new family patterns, new kinds of livelihood, new artistic forms, and new personal identities. Since the law represents and embodies the ethos of the old institutions, an attack on these laws (*through their violation*) is a logical outcome of the social and personal changes that are currently taking place. Whether we intend them to be or not, our actions are indeed political. And the actions of the state—in the invoking of the laws to preserve its existence—are political as well. We are likely to experience a confrontation of old laws and new consciousness for some time to come. An increasing proportion of *crime* in American society will be a reflection of this political confrontation.<sup>8</sup>

The significant feature of this passage is not the recognition of the necessity of social change and the desirability of growth in social institutions before they become fossilized, but the acceptance of the *manner* by which these changes are to be welcomed. Laws are not to be changed by legislative reforms and other mechanisms of due process but by *violation*, not by political behavior but by *criminal* political behavior. A political confrontation in the legislative assemblies of the nation is one thing; a political confrontation through deliberate mass violation of law in the streets and public squares is something quite different. It is the beginning of civil war or a preface to social chaos that eventuates in civil war.

Whatever apparent plausibility such a view possesses rests on the untenable assumption that the only alternative view to it is juridicial

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<sup>8</sup> R. QUINNEY, *supra* note 7, at 186 (emphasis added).

absolutism, that no matter how evil a law is it should always be obeyed. It ignores the difference between a law which is a dictate of an arbitrary will and one that emerges from the reasoned give and take of argument and evidence in which the individual is free to persuade and convince others. It ignores situations in which there are irresolvable conflicts of human interest that cannot be harmoniously settled and in which the adoption of certain rules of due process is more important to the community, since it enables us to avoid bloodshed and violence, than any particular decision reached by due process. It overlooks the impossibility of guiding social action by principles of justice without reference to some utilitarian considerations, *i.e.*, to the *consequences* of applying principles rather than only to the *consistency* of principles. Even if the individual is resolved to obey only laws that are just and to disobey all others, is justice always enough? May there not be other relevant moral considerations to be taken into account, as, for example, human suffering? This is obvious if the principle of justice is defined in terms of equality of treatment since *formally* such an approach cannot distinguish between treating and mistreating human beings equally. Nor is it possible to reach determinate conclusions on the basis of universalizing any principle, since with some ingenuity *all* principles can be universalized without formal inconsistency. Consistency is at best a necessary and not a sufficient condition of justice.

The anarchist position overlooks the practical consequence that would result if each citizen recognized only the authority of his own conscience or his own reading of moral law as a guide to legal obedience. The authority of the positive law may be derived from reflection on the sufferings that would result if the presumptive validity of law was disregarded and every law became a matter of debate and dispute not only before it was adopted but even after it was adopted. The anarchist's own freedoms of action in many respects are made possible by the law which protects him against those who would interfere with him and which in several ways enables him to acquire and exercise certain powers of citizenship and to develop himself as a human being. In profiting from the operation of the legal system but refusing to abide by its results whenever his private conception of justice condemns these results, even when the legal system provides the means by which these results may be legally altered, the anarchist is behaving unfairly. He is acting as a "free-loader."

Practically, the demand that unanimity be at least a necessary condi-

tion morally for legitimate law or authority opens up a perspective of unlimited and chronic social disorder. Further, in any intelligent moral economy, as we have suggested, justice is only one value among others. If this be overlooked in the pursuit of a chimerical absolute justice, then other legitimate values may be ruthlessly and needlessly sacrificed. One cannot assess the obligation to obey a law without at the same time assessing the consequences of *not* obeying it. Many ethical, and especially political, choices must be choices of the lesser evil in relation to which the origin and source of authority of the law may be irrelevant and certainly not decisive. There is no escaping the ethics of consequences.

I have been assuming that despotism, anarchism and democracy are the three political parameters of social organization. But it is instructive to observe the tendency of those who subscribe to anarchism as an ideal in which freedom is to find expression under no control except completely autonomous reason and good will, and who attach this ideal to despotic means of achieving it. The anarchist who has not lost his sense of reality completely is aware that men and women as he knows them are not yet fit to live in a society where their own rational wills are sufficient guides. They must be made fit. Their motives or springs of action must be liberated from cramping institutional restraints, socialized, harmonized and humanized. This can only be accomplished by proper institutional change. To rely on existing possibilities and processes of political persuasion is hopeless because the will to change, as well as the capacity to grasp the truth and moral superiority of a society of perfect freedom, has allegedly been corrupted by the synthetically contrived needs to which existing selves have become addicted. Men and women who subscribe to this view are so enslaved by their present wants that they define felicity not in terms of the ideal society worthy of man but in terms of the gratification of more wants of the present variety—wants created as much by their society as by their biology. Moulded by their present society, how can they voluntarily accept the superior moral validity of an ideal which condemns that society?

The vicious circle, say the apostles of absolute freedom, must be broken! It can only be broken by a revolution led by those who know what the basic human needs of men and women *should* be, who know not only what these needs are but what they require *better* than those who have them or should have them. This leadership—in the nature of

the case an élite—pledges itself at the auspicious time and under auspicious circumstances, to engineer a political, economic, social, cultural, in short a total revolution, peacefully if possible, violently if necessary.

Once in political control the leaders face immense social and educational tasks. They must rebuild the economy and the institutional structure of society. They must see that the proper social values are inculcated and that there is no backsliding to the spiritual morass of the past. They must be cruel to be kind, discipline the dissenters and antisocial elements firmly and effectively. To do so, obviously, they must have *positive* laws—to make provision for the new future society in which laws will not be necessary, and, of course, *negative* laws forbidding certain kinds of action, especially of speech, press, and education—so that the masses will not again be corrupted. If tempted, they will know what to avoid doing in order to escape punishment and liquidation.

This conjunction of anarchism and despotism is found among certain kinds of Leninists. It is sometimes called the theory of “repressive tolerance.” Whatever guise it takes, it is a mixture of arrogance and ignorance. It is arrogant in denying the right of freedom of choice to those who are considered autonomous, rational persons, and in denying them the right to be wrong, a right without which there can be no genuine growth. It is arrogant in assuming that some self-selected élite can better determine what the best interests of other citizens are than these citizens themselves. It is ignorant of the historical truth that no dictatorial élite has ever voluntarily abandoned the power it has usurped ostensibly for the good of others. It is ignorant of the psychological and moral truth that our ends are determined not by our rhetoric about future freedoms but by the means used to achieve those ends. The Leninist view that a minority dictatorship based on ruthless use of force, force without stint or measure, will usher in a classless society so pacific that there will be no need of any state, gradually and inescapably is transformed into the Stalinist view that the stronger the state becomes, the greater the certainty of its *ultimate* disappearance—which is not only dialectical nonsense but plain nonsense.

These observations, rejecting the alternatives of anarchy and despotism, strengthen the case for resting the authority of law on the democratic process and procedures by which laws are made, amended and repealed and which provide for the possibility of airing and remedying the grievances of individuals and groups. Whatever other reason exists for

recognizing the *presumptive* validity of a law, it is strengthened when the law is the outcome or upshot of a genuinely democratic community.

This means that when authority is entrusted to the democratic process, it must be accompanied by the surrender of the power of private force to the democratic state which enjoys on various levels the monopoly of force. It requires that the use of force by some members of the democratic community against others to resolve their conflicts of interest be eschewed. It justifies the expectation that the democratic state will seek to make the exercise of force peripheral in social life, to use force, so to speak, only in defense of the due processes designed to prevent force from deciding issues. It means that the officers and agents of the democratic state must be subject to the same rules of law as other citizens. It means that insofar as one accepts the democratic system, private judgment may justify within certain limits civil disobedience, but not uncivil disobedience or the use of violence. To a principled democrat there are limits to civil disobedience, too. These limits are reached whenever civil disobedience becomes so widespread or contagious that it threatens the stability of the democratic process itself. A citizen or anyone else may invoke a moral right to revolution in a genuine democracy but he cannot legitimately or consistently do so in behalf of the principles of democracy. And when we speak of an *abstract* moral right to revolution, under any system, let us remember that it is on the same footing as an *abstract* moral right to suppress revolution, that one man's mandate from Heaven may seem to another man's horrified vision, the judgment of Hell.

In the light of this analysis I wish to turn to the contemporary scene to show that some influential attitudes and beliefs concerning the function of dissent in a democratic society, and their relation to the use of force and violence, are so confused that they lend a cover of legitimacy to actions destructive of the democratic process.

I shall take as the foil to my argument one of the most bizarre writings ever penned by a member of the highest body of the United States judiciary, *Points of Rebellion* by Justice William Douglas.

Its first serious confusion is between the nature and place of dissent in a democratic society, and the nature and place of violence. On our analysis, freedom of *dissent* is integral to any democratic society based on freely given *consent*. But violence is not a legitimate form of dissent in a democratic society, because, among other evils, it is coercive of consent.



Justice Douglas is not altogether clear about whether or not there exists significant freedom to dissent in the United States today. In one breath he tells us that "a black silence of fear possesses the nation"<sup>9</sup> and that "we have fostered a climate of conformity."<sup>10</sup> In another he comments that we have "a current regime of dissent," so much so that "dissent looms ominously" over the country after "a decade of protests that is in many ways unique."<sup>11</sup> The actual facts, if measured by the frequency of its occasions and the intensity of its expression, reveal that dissent has never been so free, so unrestrained and uninhibited, so widespread in the history of the nation as it is today.

Dissent in a democracy is one thing but violence is quite another, and Justice Douglas fails to distinguish them properly. Dissent that does not take the form of illegal action or incitement to such action cannot "loom ominously" over us. Only violence or the threat of violence can. Although Justice Douglas presumably is speaking from a democratic point of view, he seems to be identifying legitimate dissent with violence or regarding violence as a species of legitimate dissent. This compounds the confusion. Speaking of the use of violence in the United States, he tells us:

The historic instances of violence have been episodic and have never become a constant feature of American life. Today that pattern has changed. Some demonstrations go on for months; and the protests at colleges have spread like prairie grass fire.<sup>12</sup>

If this means anything, it explicitly asserts that today violence is no longer episodic but systematic. It implicitly acknowledges that the demonstrations and protests are instances of violence and embrace the assaults, vandalism, fire bombing, and other types of confrontation spreading "like prairie fire" from one campus to another.

Then, as if to mystify us further, Justice Douglas goes on to say that these "modern day dissenters and protesters are functioning as the loyal opposition functions in England."<sup>13</sup> Surely there must be some error here. The loyal opposition in England—whether it be Tory to Labor or Labor to Tory—does not resort to violence of any kind. If anything, the loyal opposition is a stickler for the niceties of tradition. Surely Jus-

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<sup>9</sup> W. DOUGLAS, POINTS OF REBELLION 6 (1970).

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 8, 9.

<sup>12</sup> *Id.* at 57.

<sup>13</sup> *Id.*

tice Douglas is aware that the violent dissenters "calling for revolutionary changes in our institutions" emphatically declare that they do *not* consider themselves a loyal opposition within the existing system but wish to bring it down about our heads.

This raises a fundamental question to which Justice Douglas gives an uncertain answer: Can a person or group of persons who profess allegiance to the democratic system and wish to function as a loyal opposition within it systematically or even recurrently resort to violence to impose their will on the majority, if and when they believe that the majority is too slow or torpid or stupidly mistaken? Not only has he become doubtful about the Holmesian doctrine of "the clear and present danger" as limiting dissent if it incites unlawful action, but he has explicitly endorsed an opinion in which the following sentence appears: "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."<sup>14</sup> A racist demagogue denouncing school desegregation, whose words incite to mob action, is certainly talking about public affairs. Factions of the "Black Panthers" and "SDS" that not only advocate but incite and passionately urge the use of violence always do so in the course of talking about public affairs. Morally, if an action is wrong, the incitement of the action is also wrong. In law, if an action is criminal, the incitement of it is also illegal although punishable to a lesser degree. In a democracy, political due process cannot prevail if dissent takes the form of direct action whenever a minority fails to persuade the majority. The "exceptional case"—where violence is used to bring about what subsequently is regarded as good—still signifies the breakdown of democratic authority. Every violation of due process, every resort to violence appears as an "exceptional case" to those who perpetrate it. Even then we must not forget that as Carlyle once put it, "violence done is always sure to be injustice done, for violence does even justice unjustly."<sup>15</sup>

There is a naiveté from which some of our Justices are not free in ignoring the fact that in a democracy every case of successful defiance of law by resort to violence tends to make successive cases of defiance more likely. "In a democracy," Justice Frankfurter once wrote, "the appeal from an unenlightened majority must be made to an enlightened majority." Justice Douglas feels, however, that the appeal from an

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<sup>14</sup> *Yates v. United States*, 354 U.S. 298, 340 (1957).

<sup>15</sup> 3 T. CARLYLE, *PAST AND PRESENT* 21 (London).

unenlightened majority may justifiably be to rebellion. Whether such counsel is wise, given the Anglo-American political tradition, is very doubtful. What is not doubtful at all is that it cannot be justified by any principle of democracy.

Just as surprising as Justice Douglas' ambiguities about dissent and violence and their place in democratic society is his conception of American society. It approaches the view sometimes characterized as "vulgar Marxism" to distinguish it from more sophisticated varieties of Marxism. According to this view the economic class differences among men are so basic that democracy can function only as an institutional device by which one group retains its power of control and exploitation over other groups. It is sometimes true that the differences among men, economic and non-economic, are so deep, or are conceived to be such, that they cannot be negotiated. Under some circumstances it is impossible to find some shared value or interest—whether of peace or survival—on the basis of which human beings can live in comity if not in community or fraternity. In that case political rule must rest on myth, fraud or force.

One cannot generalize for all countries, but the historical evidence, especially in the post-World War II period in Western Europe and America, shows it is possible for different economic classes to live, despite their conflicts, in relative peace with each other. This is achieved by virtue of the fact that the political process has jurisdiction over all issues—whether of wealth, status, power—that divide men. Economics does not merely determine politics but politics determines economics as well. A bold tax policy, for example, can redistribute wealth in a generation. Marx was right when he said that man's consciousness is determined by his social existence, but he failed to recognize that man's political consciousness can redetermine his social existence. Because he overlooked this, Marx's predictions went wrong.

This in effect is denied by Justice Douglas in his "slap dash" characterizations. He conceives of the United States "Establishment," as C. Wright Mills did, as one integrated power-élite, monolithic in structure, ruthlessly exploitative of men, driven only by quest for ever renewed profit, arrayed against the downtrodden and poor who are denied access to the political levers by which social change can be achieved. The fact that Justice Douglas and his colleagues are a powerful part of the "Establishment," that the organized labor movement plays a substantial part in reorienting the economy, that the standards

of living and civil liberties have risen very perceptibly—although they still have far to go to be satisfactory—reveals the shallowness and empirical inadequacy of this model of American power. To ask one out of a myriad of questions: What made the right to collective bargaining part of the law of the land; what changed the character of the pre-Roosevelt Court; what induced the Federal government to recognize the principle of social responsibility for the minimum welfare subsistence of its citizens, thus permitting escalation to more adequate levels—if not the democratic political process?

Here is how Justice Douglas sees the picture in the United States today: “On the one side are powerful lobbies such as the military-industrial complex, the agro-business lobby, and the highway lobby. These have powerful spokesmen.” Opposed to them are “the poor, the unemployed and the disemployed—and they are not well organized.”

But what has happened to the rest of us—the at least 70 or 80% who do not appear in this confrontation? Justice Douglas does not tell us, but he does comment on the opposition between the “Establishment” and the poor:

The use of violence as an instrument of persuasion is therefore inviting and seems to the discontented to be the only effective protest.<sup>16</sup>

However, the use of violence, especially in the white community, comes not from the poor, the hungry and the unemployed but from the affluent middle classes in the North, and from lower middle classes in all sections, especially the South, resisting measures aimed at desegregation. The violence which we have experienced is not so much inspired by hunger, unemployment, and similar physical needs as it is by ideology rooted more in psychological needs to find scapegoats and vent their frustrations on them, than in objective conditions. For when these objective conditions were far worse than they are today, the violence was far less. If it were true that the poor are confronted by the all-powerful panoply of military-industrial power, how can “the use of violence as an instrument of persuasion [appear] inviting” rather than as an invitation to disaster? Justice Douglas is a bad analyst of the plight of the poor and a worse counsellor. The poor, the hungry, the unemployed in coalition with other groups in the population can do much

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<sup>16</sup> W. DOUGLAS, *supra* note 9, at 78.

more to improve their lot, as they have shown in England and in some of our own states, by political action, by agitation, peaceful organization and demonstration, and by effective use of the ballot than by resorting to violence whose only certain effect is to feed the backlash against all reforms.

The most mischievous and irresponsible of Justice Douglas' views is his use of what I have elsewhere called the "Boston tea-party syndrome," which in some quarters is being used as a "patriotic" justification for violence against democratic society. One rubs one's eyes in astonishment when he reads:

We must realize that today's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution.<sup>17</sup>

What were the tactics of George III, against which the American colonists revolted? It was his refusal to give them adequate representation, his refusal to approve laws for the public good adopted by existing legislative bodies, his refusal to respect an independent judiciary, his refusal to submit tax laws and other requisitions to the consent of the people, in short, his refusal to permit the establishment of political mechanisms by which grievances could be peacefully redressed. But once the methods of registering and implementing freely given consent have been introduced, there is no longer the same moral basis for revolution that exists against tyrannies that deny political freedom. The American colonists were not self-governing when they made their revolution. And when they did establish self-government they placed all sorts of restrictions on the franchise. Today when the conditions of the American franchise are wider and freer than they have ever been in the past, when dissent is more institutionalized and protected than ever before, when despite its many shortcomings and imperfections, the level of human welfare is higher than ever in the past, and recognized for the first time as the moral responsibility of the government, Justice Douglas makes the preposterous comparison between our democratic political system and the brutal tyranny of George III. Actually, the only branch of the American government whose powers in certain respects are comparable to the despotism of the British crown is the judicial despotism, to use Jefferson's phrase, of the Supreme Court in its non-representative and non-responsible power (*i.e.*, responsible

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<sup>17</sup> *Id.* at 95.

only to itself) to nullify Congressional legislation, something that our British cousins, who recognize the Supremacy of Parliament as the highest elected body in the commonwealth, would not tolerate for a moment.

Apparently it makes no relevant difference in the eyes of Justice Douglas that, with all our failings, which are many, we are still a representative democracy, more so *today* than when only white men with property voted, or when only white men voted, or even when only men voted. The situation, according to him, is no different from what it was when George III, to quote from the Declaration of Independence, fomented "domestic insurrection" and launched "on works of death, desolation and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages."

Presumably the situation confronting dissenters today in the United States is comparable to that which confronted the American colonists when subjected to the despotism of George III. Otherwise he could hardly write:

Where grievances pile high and most of the elected spokesmen represent the Establishment, violence may be the only effective response.<sup>18</sup>

Whether violence is the most effective response in such circumstances is questionable. What is not questionable is that response by violence violates both the letter and spirit of democracy. If the elected spokesmen of the people have been properly elected and can be turned out of office, what is the objection to them? That they vote differently from the way Justice Douglas would have them vote? Then let us elect others if he can convince us that his program is better for the Republic. The crucial question is whether we are free to elect others. Although there are obstacles to that freedom, we are freer today than we have ever been before. Why, then, the resort to violence? Democracy is impossible if all who lose elections are prepared to recontest them by violence.

What Justice Douglas' *Points of Rebellion* indicates is that he is more concerned about specific programs of social change than he is about the methods and processes of change, that he is willing—as seen clearly through the pattern of his verbal confusions—to sacrifice democratic

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<sup>18</sup> *Id.* at 89.

due process for some specific social desideratum. I submit that whoever places greater emphasis upon the product rather than the process, upon the result rather than upon the methods of achieving them, upon an all-sanctifying end rather than upon the means of achieving it, is opening the doors of anarchy. Anarchy is just as much a perversion of democracy as is tyranny. Both Plato and Aristotle, the great critics of democracy, recognized that where human beings are compelled to choose between anarchy and despotism, they will more readily choose despotism because anarchy is the shifting and precarious rule of a thousand tyrants. Democracy is the only viable alternative that rejects both.

Faith in democracy is on trial today, even more so than it was during the Civil War when the existence of the Union was at stake. If every grievance, genuine or fancied, every demand, justified or not, is to be gratified by direct action if it cannot be rectified through the democratic process, then we are moving towards protracted civil conflict from which only the enemies of American democracy can profit. Those who are the victims of direct action, no matter in what righteous cause, will follow suit to redress their own grievances. "The villainy you teach us," they say, "we shall execute. It will go hard but we will better the instruction." These are the sentiments that guarantee escalation of violence.

Justice Douglas, among others, is much more concerned about the force used to contain or restrain violence than about the outbreak of violence itself. The usual ground is that this response neglects causes and treats only symptoms. It overlooks the obvious fact that the search and quest for causes cannot be undertaken unless the symptoms are properly treated. Confronted by mass hunger, what sensible or compassionate person would say, "Let us first deal with causes!" Suppose one of the causes is overpopulation. Shall we defer actions to relieve the immediate pangs of hunger while we seek to convince the population in question to limit its increase?

In the last analysis the future of democracy depends upon preserving the conditions of rational discourse. Any actions that disrupt its possibility cannot be tolerated if we really believe in tolerance. This is why the situation in our colleges and universities is so alarming today. The conditions of rational discourse are disappearing because of the acceptance of violence or threats of violence as legitimate methods of persuasion in the citadel of reason. If those who are trained to the life of mind resort to physical disruption, vile obscenities, vandalism,

assault and arson to settle their differences, what can we expect of those who have not had the benefit of the civilizing influence of our educational institutions? The fact that our campuses have become battlefields illustrates well the kind of civilizing education that goes on in them. If those who are the offspring of relatively affluent groups in society—and from whom the leaders of student rebellion are drawn—are so contemptuous of the rational processes open to them in the colleges and universities that have seen the worst disorders, what right have we to expect better conduct from those who are underprivileged and deprived of the comforts and amenities of affluence?

This is not the place or time to explore this theme. I have done so in a recent book entitled *Academic Freedom and Academic Anarchy*. I do, however, think it is fair enough to say in the light of recent outbreaks of violence among college students in our country, that our educational institutions have failed to develop a proper understanding and appreciation among student bodies of the meaning of freedom under law, of the relation between justice and intelligent due process, and of the achievements and promise of American democracy. If we define patriotism not as nationalism but, as Santayana puts it, as “piety for the sources of our being,” it is obvious that our universities have failed here, too—but not they alone.

It is unreasonable to expect our colleges and universities to reform or transform the society of which they are a part. They reflect the malaise of that society. But it is not unreasonable to expect them to defend and strengthen the *critical spirit* so that those who leave the classrooms and seminars are equipped to confront the issues and problems of social change with knowledge, intelligence and hopefully *moral courage*—that rarest of all virtues today.



