

THE RULE OF LAW*

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It is tempting to present to a university audience a lawyer's brief in support of law's claim to be classified as one of the liberal arts. Too many laymen think of the law as a set of dull black-letter rules reiterated by dull black-robed figures—hardly a matter of interest to the philosophers, scientists, and poets who constitute The Class of 1956. Too often laymen think of the law in the aspect of a recent cartoon in *The New Yorker*: two men huddled over the desk in a lawyer's office, a room lined from floor to ceiling on all sides with calf-bound volumes, one lawyer saying to the other, "And to think that the answer to our problem lies in this very room!" If I were writing a lawyer's brief, I would remind the philosophers among you that the very idea of personality is drawn from a legal concept, the *persona* of Roman law, which was not necessarily a human being but a legal entity; and I would argue that the cultivation of personality, and respect for it, depend on a legally ordered society—in the words of the Harvard commencement citation for the LL.B. degree, on "those wise restraints that make men free." To the scientists I would recall that the uniformities of nature have been assimilated to the laws of men, as when Sir Isaac Newton presented his theorems on motion as Lex I, Lex II, and so on. To the poets I would quote the testimony of one of the best of the moderns, Archibald MacLeish, who left a State Street

* This is the text of an address delivered by Professor Freund at Washington University's Ninety-Fifth Commencement, June 6, 1956. Professor Freund's opening remarks were:

When a mere lawyer is called upon to address a company of scholars such as this, he must ask that your generosity in inviting him be matched by your charity in listening to him. I know that this community is congratulating itself, and rightly, on having converted a lawyer into a Chancellor; but if in the flush of delight at the success of this experiment you were led to conclude that Chancellor Shepley's qualities are really common to his profession you would be harboring an illusion, flattering to the profession, but an illusion none the less. For Chancellor Shepley's qualities would be rare in any profession, and may not even be universal among university presidents: a happy blend of efficiency and humaneness, a deep appreciation of academic freedom and the courage to defend it, and an image of a university as a place where there is not one way, or a preferred way, to a single goal, or many ways to many goals, but many ways—called for convenience schools and departments and subjects—converging upon the common goal of understanding.

As a teacher of law, I too have dwelt in the groves of Academe, but near the outskirts, in the intellectual suburbs, as it were. And so when I find myself returning to the very heart of the University and undertaking to speak to those who for four years or more have trod the very innermost groves of Academe, I feel like the uncomfortable truant schoolboy, and must ask that in receiving the returned prodigal you show the measured justice of Dr. Johnson remarking on the dog who walked on its hind legs: "The wonder is not that he does it so badly, but that he can do it at all."

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legal partnership for a Left Bank poetic apprenticeship, and who avows that for him the best preparation for the craft of poetry was the study of law, for there he learned to see the variety, complexity and disorder of life, and to search for some principles of order that could be imposed without stifling the concreteness and vitality of the disorder. This is the task and the secret, is it not, of the scholar, the artist, and the lawyer alike.

This is the function, too, of the "Rule of Law," which is my main theme today—this imposing of order on disorder while preserving the creative and spontaneous and nonconforming impulses that prevent stagnation in our society. The Rule of Law is a threadbare subject, and my only excuse for airing it now is that an astonishing contempt for the Rule of Law is threatening to lay hold of us, or so at least it seems to me.

The Rule of Law, as every schoolboy knows (or certainly every graduate of this University), is that principle of our Western tradition which teaches that ours is a government of laws and not of men (as some would have it, of lawyers and not of men); that not even a king is above the law; that there is a higher law against which laws and ordinances must be measured if they are to be treated as legitimate. It is a law which governs the governors. In form it has frequently taken the shape of a compact or covenant and so it reveals its Scriptural origins in a Covenant with the Almighty. When the English feudal barons wrested concessions from their King seven centuries ago they embodied the agreement in a charter—the Great Charter. When the Pilgrims arrived at an agreement for their governance they framed it as a covenant—the Mayflower Compact. When the victorious American colonists determined to form a Union they did so by means of a compact—the Federal Constitution. And when the members of the United Nations today strive to set standards to which governments must measure up in the treatment of fundamental liberties they too cast their handiwork in the form of a compact—a Covenant of Human Rights.

The Rule of Law, I have said, is a law to govern the governors. How then stands the Rule of Law among us today? We have the spectacle of a western state governor (this is not merely a play on words) announcing that because he disapproves of certain objects of Federal expenditure he will refuse to pay his federal taxes. We have heard the former governor of a southeastern state proclaim that the Supreme Court has usurped authority when it decided that local laws requiring racial segregation in public schools are not consistent with our fundamental compact which is the higher law and which sets the standard of equal protection of the laws. This kind of attack has set off a chain reaction. When the Supreme Court decides that Congress

has apparently occupied the field of sedition legislation and state laws must then give way, the same chorus of critics again shout usurpation, ignoring the fact that the principle applied by the Court goes back to the decisions of an eminent Virginian named John Marshall and that Congress can still have the last word by simply making its intention clear. And when the Court decides that Congress was within bounds in permitting railroad unions to contract for a union shop, the critics, now in full cry, berate the Court for approving fascism in labor relations, overlooking the fact that their grievance is against an Act of Congress which had been in effect for a number of years, which had provoked no such outburst against Congress, and which could be changed tomorrow by Congress itself.

Do not misunderstand. My purpose is not to defend or debate the merits of each of these decisions. My purpose is to suggest that when virtually no voices are raised in the forum of public opinion to challenge criticisms so ill-tempered, so irresponsible in their accusations of usurpation, and so subversive of good order, then indeed the principle of the Rule of Law may be corroded.

But—I hear some of you protesting—surely this is a gross oversimplification. Surely the judges are not above reproof; surely indeed there is a tradition of civil disobedience in the lives of some of the noblest spirits of the human race. Did not Henry David Thoreau earn his glory by refusing to pay his poll taxes to his state of Massachusetts while the fugitive slave law was enforced? Did not Abraham Lincoln boldly reject the decision in the Dred Scott case? Did not Socrates himself defy his judges? These would be impressive precedents if they were truly parallel to the resistance which we see today. But on inspection their differences from our own situation will be found more significant than their resemblances.

When Thoreau refused to pay his tax he merely took a short route to his real end, which was to lodge himself in jail. After a night in a cell he was rescued, you will recall, by a disapproving aunt, who bailed him out by paying the tax, much to Thoreau's disgust. The brief episode is rescued from high comedy by the moral simplicity of the man. Turning the night's adventure to literary advantage in his essay on Civil Disobedience, he wrote:

Under a government which imprisons any unjustly, the true place for a just man is also a prison. . . . [I]t is there that the fugitive slave, and the Mexican prisoner on parole, and the Indian come to plead the wrongs of his race, shall find them . . . the only house in . . . which a free man can abide with honor.

The moral authority of this voice is as far removed from current resistance to the decisions of the Court as a hard cot in a prison cell

is from the swivel chair of a governor's mansion. The one is an appeal to the Rule of Law; the other is its negation.

What, then, of Abraham Lincoln? Did he not counsel those in public office to disregard the Court's decision in the Dred Scott case? His counsel was of two kinds, and therein lies its meaning. As a principle to guide the future policy of Congress, he maintained that the decision did not bar Congress from seeking a new test in the Court, and for that purpose Congress could legislate anew. But he left no doubt that the decision, or any decision, was binding in the specific case and in that sense must not be resisted. This he made clear in his Springfield address in 1857:

We believe as much as Judge Douglas (perhaps more) in obedience to, and respect for, the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

If the current critics were as scrupulous as Lincoln, if they counseled obedience to the law of the Constitution as interpreted by those charged with the task, until by constitutional amendment or an overruling decision the law of the Constitution might be changed, then they would command the respect which we are bound to feel for the moral fastidiousness of a Lincoln. Between the position of Lincoln and the current critics there lies, once more, the Rule of Law.

And finally, what are we to say of the case of Socrates. He did, to be sure, defy his judges, prophesying that there would rise up after his death a new generation of teachers and accusers who would scourge the Athenians more harshly than ever Socrates had done. But when, awaiting execution in his prison, he was offered a sure means of escape in order to carry on his agitation from abroad, he resolutely refused the offer and rebuked the friends who made it. The moral grandeur of Socrates is revealed not so much by his self-defense as by his ultimate submission to the mandate of the law and, for his vindication, to the power of ideas and the processes of democratic change. In the dialogue with his old friend Crito he put it thus:

And when we are punished by her [our country], whether with imprisonment or stripes, the punishment is to be endured in silence; and if she lead us to wounds or death in battle, thither we follow as is right; neither may any one yield or retreat or leave his rank, but whether in battle or in a court of law, or in any other place, he must do what his city and his country order him; or he must change their view of what is just

In the American system the appeal to a higher law is to the law of the Constitution, and we have asked our judges to interpret it to us. But the Rule of Law is not authoritarian; there is room for an appeal to a still higher law, to change the judges' view, as Socrates said, "of what is just." There is room for an appeal to the second thought of the judges, as Lincoln urged; and there is scope for the sentiment of the nation to be moulded and tested by proposing a constitutional amendment. We have no right, in the name of the Rule of Law, to demand silence from spirits more sensitive to injustice than the common run of judges; but we do have a right to insist that their criticism be responsible and not subversive of the very institution of judicial review. And in judging these current critics of the judges we are entitled to measure their pronouncements and programs against the moral simplicity, the scrupulousness, and the grandeur that mark off the genuine from the bogus in the noble tradition of dissent.

Why, you may ask, have I chosen to speak on this theme at this time to this assemblage? Because the threat to the judiciary is potentially more serious than any of the specific crises which have produced the threat; because the real menace, if not the purpose, of the threat is that we will be led to look for supine mediocrities for the Bench, distrusting judges of intellect and character; and because in the end we will have the kind of judges that assemblages of this kind are taught to demand. Criticism of judges, including our highest judges, is proper and indeed essential if the Rule of Law is not to become atrophied; but reckless charges of usurpation, and encouragement of disrespect, will sap its very roots. It is you who will set the standards for such criticism by determining what is out of bounds, just as it is the spectators who have determined that to rail at the umpire is good form in baseball, and unpardonable in tennis. A spirit of cynicism about our highest judges is a deeply insidious thing just because it is not a dramatic phenomenon like lawlessness or juvenile delinquency. These are serious enough, but far less menacing because all right-minded people are against private lawbreakers and in favor of private virtue. But contempt for the highest law which is fostered by public figures is likely to become pervasive just because its effect is not so conspicuous. There is much wisdom about private and public disrespect for law in the old jingle:

We prosecute the man or woman
Who steals the goose from off the common;
But the greater felon we let loose
Who steals the common from the goose.

And finally, I speak here of these things because the future of this **Class** may hinge upon them. We are entering a time when to live **under** a cloud is more than a casual figure of speech; it is a literal and **dreadful** reality. If the inhabitants of this planet are ever to emerge **from** the shadow of destruction and the paralysis of fear, it will be **through** an extension of the Rule of Law. We shall have to enlarge **our** sense of community by creating a higher law and establishing **institutions** to interpret it, institutions which must enjoy respect **whether** this or that decision is pleasing to us. That will be a test of **maturity** for all peoples. And so it behooves us not to weaken our **sense** of attachment just when that attachment has become most **crucial**. I hope that when this Class reassembles for its fiftieth reunion, **your** Commencement speaker will congratulate you on having emerged **from** the darkness by preserving and extending the Rule of Law. **Until** that happy day—June 6 in the year 2006, to be exact—may **Fortune** smile upon you.