

Spring 1966

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Recommended Citation

Harvey, William B. (1966) "The Rule of Just Law," *Indiana Law Journal*: Vol. 41: Iss. 3, Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol41/iss3/1>

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Bloomington

INDIANA LAW JOURNAL

Volume 41

SPRING 1966

Number 3

THE RULE OF JUST LAW †

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By a joint resolution of the United States Congress and annual proclamations of the President, the first day of May in each year is designated Law Day, U.S.A. The President's most recent proclamation reminds us that "the great individual rights we value so highly carry with them corresponding obligations of citizenship: to obey the law—recognize the rights of others—resolve grievances by lawful means—support law enforcement agencies—encourage law obedience by others—practice and teach patriotism—and defend our country." It also emphasizes "the fundamental truth that our liberty, our rights to pursue our individual destinies, and our very lives are dependent upon our system of law and independent courts. Only under the rule of law, and obedience thereto, can we rightfully claim our heritage of individual freedom."

A principal purpose of our gathering and fellowship this evening is to participate in this national observance and thus, in the words of the President, "strengthen our national commitment to the rule of law." It is especially fitting, I think, that such a celebration be held in the law school of a great university. For here, the pervasive spirit of inquiry may temper the rhetoric of formally honored ideals with searching questions and dispassionate assessments. What do we, on this occasion, celebrate? And do our professional work and daily lives during the rest of the year keep faith with the great ideals of Law Day?

On this day we are asked to re-affirm and renew our commitment to certain fundamental values that have, in the main, guided the development of this nation during the past 190 years, values whose roots lie deep in the ancient soil of Judeo-Christian civilization. Thus, we value the individual human personality and its claim to liberty and equality in which to develop and express its full potential. But we value also the society whose richly-diverse texture and complex demands are essential conditions for full individual growth and development. The implementation and reconciliation of these values have produced the remarkable

† Speech delivered on Law Day, April 30, 1966, at Bloomington, Indiana.

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variety of our institutions, including prominently those of the law. These institutions that implement and protect the basic values we cherish include clearly articulated legal norms to channel and control private conduct, and to provide both the guidelines for official action and the standards by which the legitimacy of applications of official power is determined. These institutions include independent and competent tribunals to determine the fact and apply the law to the vindication of private right, the protection of public interests, and the assurance that the application of public force finds warrant in the law. These same institutions include, as well, a legal profession learned in the law, faithful to its ideals of service, and always ready to counsel and to guide to peaceful resolution the inevitable conflicts of social life.

On occasions such as this, these institutions of the law are frequent and proper objects of our praise. They are essential to that system of wise restraints which is the indispensable support of ordered liberty. Equally essential, however, are legislative bodies deeply sensitive to our tradition and responsive, not only to the clangor of organized interest, but also to the often amorphous aspirations of our people for social justice within the entire community. Finally, this survey of institutions critical to a regime of government under law must not omit an executive establishment vigorous in its execution of the law of the land, imaginative and humane in recommending and guiding changes in the law, and ever aware, as it perceives the enormous reservoir of power at its disposal, that no aspect of power is more impressive than its restraint.

Particularly in the years since the Second World War, we have come to express our devotion to these fundamental values and institutions in terms like those used by the President in his proclamation of Law Day, 1966, when he spoke of "our national commitment to the rule of law." I trust no one will think me cynical or captious if, on this occasion of solemn and proud affirmation of our legal heritage, I should express certain serious misgivings. These misgivings, I must emphasize, do not relate to our legal institutions themselves. Like all human creations, these make no claim to perfection; yet in the main the legal heritage of this richly-blessed land reflects much of the noblest striving and accomplishment of the human spirit. My misgivings go, rather, to the way we speak of this heritage and to some of the possible implications of the phrase "the rule of law."

The first of my misgivings may be stated in the form of a question: When we speak of the "rule of law" or advocate "government under law," what implicit qualifications of "law" do we have in view? Must positive enactment, judicial decision or executive decree reflect the basic humane values of Western civilization in order to qualify as "law" within

the meaning of the phrase? Many thoughtful people, adhering to a natural law view, have answered this question affirmatively. I confess my own inability to accept this semantic escape from a persistent and perplexing problem. Consequently, I am compelled to ask: when we venerate "the rule of law," does not this phrase claim something of our respect, something of our allegiance and sense of obligation, even for the grievously unjust law, for applications of the official monopoly of force that may do violence to the most compelling claims of the individual personality and of social life?

I realize that I am raising one of the most perplexing problems of legal philosophy. It is an ancient question: St. Thomas Aquinas raised it when he asked in the *Summa Theologica* whether law binds in conscience. Yet no problem is more contemporary: Martin Luther King asked it in his letter to certain clergymen written from a Birmingham jail. While I want to raise the question, this occasion does not permit an attempted answer. My purpose now is far more modest. It is merely to suggest the fear that when we extol "the rule of law," we may be tempted to gloss over the fact that not all law is "just law" or "good law." We need not reach back for examples to the Nazi brutalities implemented by law. Positive legal enactment today denies fundamental decencies of human existence to the majority of the people of the Republic of South Africa. In our own country, much state law, if unaffected by the noble demands of the Constitution, would do the same. I therefore fear that praise of "the rule of law" may lead us to accept mere positive enactment or judicial pronouncement, the mere status of a rule as law, as a sufficient moral *imprimatur*. If we do, necessary and desirable moral criticism of law will in some measure be stilled.

My second misgiving about the phrase "the rule of law" is more subtle, for it depends upon that often unnoticed reflection of attitude that can be revealed by a study of ordinary language. Without extended and tedious analysis, let me merely suggest that I find in the phrase something disturbing. It suggests to me that the power to decide, to choose and to govern has been moved out of ourselves and the society in which we live, that this power has been ascribed to an external, materialized entity with an independent existence—the law. If I am right in seeing this attitude reflected in the phrase, and if the use of the phrase carries any danger that it will nurture that attitude, then I feel entitled to indict the phrase itself as a mischievous distortion of the relation between law and society.

Perhaps I can make my point clearer by an analogy. Consider that remarkable instrument that has become almost the symbol of our advanced technological society—the electronic computer. Capable of ab-

sorbing almost unthinkable masses of data, and, on request, organizing, correlating and returning those data for use, the computer has an enormous potential for supplementing human energies and expanding man's capability to use fully and rationally his accumulation of knowledge. So impressive is this product of modern technology, that some, at least, of its votaries sometimes speak as if the computer might render mere mortals redundant in all their functions, including the making of value choices and policy decisions. To such persons, a solemn occasion for declaring their commitment to "the rule of the computer" probably would seem entirely appropriate.

I take it to be clear, however, that, whatever its usefulness, the computer is incapable of producing anything that has not been put into it. It must be programmed, and that program must be designed and given content, either proximately or remotely, by human hands and minds, by those who intend to utilize it to perform tasks important to them.

A legal order, I would suggest, is, in some important respects like a computer. A good legal order can expand vastly human capability, by organizing and releasing through desired channels the knowledge, energies, and creativity of men in society. But like a computer, a legal order must be programmed and, at least in a democratic society, that program is designed, shaped, and colored by the social group, by you and me, as we express our value choices in our individual and communal life.

This viewpoint is not novel—Holmes expressed it when he said that "the law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." But the view needs constant emphasis. Such emphasis may help to obviate the danger I see in the phrase "the rule of law." This is the danger that we will shirk *our* moral responsibility for the moral content of the law. This is the danger that we will depend unduly on official agencies—legislators, executives, and judges—to eliminate racial discrimination, further social justice, and protect the legitimate claims and aspirations of individuals. To achieve these ends, sound legal institutions are necessary but not sufficient. It was, I believe, to stress this view that one of the most distinguished American judges, the late Judge Learned Hand, once said:

that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

Judge Hand's insistence on a broader, social responsibility for nurturing and protecting our basic values, in which I fully concur, does not

discount unduly the critical role of our legal institutions. It provides, however, a needed caution against the externalization of that responsibility in "a rule of law" or a "rule of the courts." If we fail, in this rich and beautiful land, to create or preserve a free and just society, the fault is ours—yours and mine—ours alone.

I am grateful for the opportunity to share this occasion with you in the School of Law with which I soon will have the honor to be associated. It is, I think, especially appropriate that in the law schools we should celebrate Law Day by reflecting on our common enterprise. If I may again invoke the computer analogy, I might suggest that it is the graduates of the law schools who bear a special responsibility to assure that the circuits of our delicate instrument are properly wired and that the program is well followed. But important as is this craftsmanship of our profession, the provision of technical skills is only a part of its role. As a result of historical causes far too complex for exploration here, the legal profession has acquired in our society a special responsibility for leadership. As the searching light of moral criticism is directed at our legal institutions, the community looks to the legal profession for directions on the way toward improvements. As that responsibility is met, we will move toward a broader and more reliable coincidence of "the rule of law" with "the rule of just law." But the role of the lawyer as legislator, executive, judge, counsellor or advocate does not exhaust his functions. As a leader of his community, whose education and experience make him a special guardian of those great organizing values that give coherence and dignity to our society, the lawyer can and must make ever clear that official agencies alone cannot assure that those values will survive. And he must stand ready to warn and to admonish when those values are threatened by public or private action.

The faculty of this law school, my colleagues to be, and you, the students in this school, share a noble enterprise—the education of the lawyers of tomorrow. I look forward with pleasure to joining the enterprise here. In this community of mind, of spirit, and of common devotion to the great humane values to which we commit ourselves on Law Day, I know I will find, with all of you, work worthy of a man's dignity and of the respect of his society.