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JUSTICE AND ORDER: A PRELIMINARY EXAMINATION OF THE LIMITS OF LAW

Donald H. J. Hermann III*

A demand for "law and order" is the latest manifestation of recurrent public concern about crime.¹ Today this solution is sought as a cure for organized and violent crime, as the remedy to social dissolution and as the response to social dissent.² But just as in the last decade, when "laws" were demanded to cope with problems of discrimination, poverty and social injustice,³ the proposed solution of "law and order" misconceives the nature of "law" and fails to note its limits. The following discussion will examine the limits of the law: justice will be viewed as the objective of the law as it resolves the tension between the individual case and general principles; order will be examined as that fragile situation where individual freedom and social cohesion are held in equilibrium.

JUSTICE . . .

. . . a lawyer asked him a question to test him. "Teacher which is the great commandment in the law?" And he said to him, "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, you shall love your neighbor as yourself. On these two commandments depend all the laws" (Saint Matthew)⁴

"You shall love your neighbor as yourself." This is the Christian

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1. A survey of the literature of the last fifty years reveals that each decade produces prominent articles about the need for strong measures to meet the contemporary crime problem. See Kamisar, *When the Cops Were Not Handcuffed*, N.Y. TIMES, Nov. 7, 1965, § 6 (magazine), at 34-35.

2. See Rocke and Gerdon, *Can Morality Be Legislated*, N.Y. TIMES, May 22, 1955, § 6 (magazine) at 10, 42, 44, 49.

3. See Packer *Law and Order in the Seventies*, THE NEW REPUBLIC, January 10, 1970, at 12-13.

4. *Matthew* 22:35-40.

prescription for human justice, which is the ultimate limit of the law.⁵ During the last decade, the complaint was often heard that law cannot teach morality,⁶ but the response was quick, that law can create an atmosphere of social justice and prevent flagrant abuses of individual civil liberties. Nonetheless, it can safely be said that the goal of justice is never fully achieved in law. Justice is the Platonic ideal of law, *against justice all laws must be evaluated*.⁷ Justice is an extreme, a perfection. Legal rules, legislation and decisions represent compromises. Legislation is the compromise of competing interests in a pluralistic society. Legal decisions represent resolution of competing interests in courtroom controversies. Yet both legislation and decisions must seek to work justice to the extent that pluralism and adversaries will permit.

In the Nuremberg trials, it was determined that rulers bear the responsibility for promulgating just laws, and the concomitant principle was recognized that laws passed in contravention of "humanitarian" principles could not be relied upon to justify acts done in conformity with such laws.⁸ This follows from the principle established in the writings of Aristotle and Augustine and finally declared by Aquinas when he wrote that "an unjust law is no law at all."⁹

5. Classical philosophy provides a parallel formulation in secular terms:

And now I can define to you clearly, and without ambiguity, what I mean by the just and unjust, according to my notion of them:—When anger and fear, and pleasure and pain, and jealousies and desires, tyrannize over the soul, whether they do any harm or not,—I call this injustice. But when the opinion of the best, in whatever part of human nature states or individuals may suppose them to dwell, has dominion in the soul and orders life of every man, even if it be sometimes mistaken, yet what is done in accordance therewith, and the principle in individuals which obey this rule, and is best for the whole life of man, is to be called just

PLATO, LAWS, BOOK IX, in *THE DIALOGUES OF PLATO* 609 (B. Jowett transl. 1937).

6. The argument that law cannot teach morality was proffered as a rationale for opposition to laws aimed at preventing racial discrimination which had come to be regarded as a social injustice.

7. See PLATO, *THE REPUBLIC* 121 (B. Jowett transl. 1901):

You remember the original principle which we were always laying down at the foundation of the State, that one man should practise one thing only, the thing to which his nature was best adapted; now justice is this principle or part of it.

8. See, Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.*, 593, 618 (1958). Hart cites the case of a German woman who was prosecuted after World War II for having denounced her husband during the Nazi regime for his alleged insulting remarks about the Fuehrer; the postwar court found the woman guilty of a violation of the 1871 German Criminal Code, having denied her any defense under a Nazi statute which made the husband's remarks, as well as any failure to report him, criminal. The court held that the Nazi statute contravened humanitarian principles.

9. 28 T. AQUINAS, *SUMMA THEOLOGIAE*, 61, 129 (Blackfriars transl. 1963).

A human law has the force of law to the extent that it falls in with right reason: as such it derives from the Eternal Law. To the extent that it falls away from right

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Law, it must be remembered, does not simply consist of rules in a statute book or code. Law is the application of rules to concrete situations and the process of creating rules and enforcing them. Thus, there are two points of contact with social phenomena at which the goal of justice must be considered. The first is in the *enactment of the law*. Is the law arbitrary or capricious? Is the rule a reasonable regulation? Is the person, property, or transaction, which is the subject matter of the law, rightly considered the subject matter, and fairly dealt with? Reference to these considerations is evident in the American colonials' cry: "No taxation without representation"—the colonials did not consider themselves as justly subjected to taxing regulations absent concomitant representation in the tax-legislating body. Similarly, the Nazi race laws and American antimiscegenation laws identified individuals and subjected them to proscriptions on the arbitrary basis of the individual's racial origins; these laws, too, were unjust.

The second contact point is the *application of the rule or statute to the individual concrete situation*. Our concern for justice at the stage of application is manifested in malicious prosecution laws and remedies for false imprisonment, whereby an individual who has been unjustly prosecuted or imprisoned may recover against those who have unjustly used the law against him. While these statutory protections do not insure just resolution of disputes, they do prevent blatant use of the law by individuals or the state as a means of achieving an unjust end when there is in fact no justifiable basis in law for recovery or prosecution. The equal protection clause of the fourteenth amendment is a manifestation of the Aristotelian principles of justice which require that like cases be treated in like manner. Indeed, the basic vocation of the American court system is to resolve conflicts between parties in

reason if it is called a wicked law: as such it has the quality of an abuse of law, rather than law. [Question 93, Article 3, Reply 2.]

This argument is about a law which inflicts an unjust grievance on its subjects; here also it exceeds the power of command divinely granted, and in such cases a man is not obliged to obey, if without scandal or greater damage he can resist. [Question 96, Article 4, Reply 3.]

See ARISTOTLE, *RECTORICA*, Book I, Chapters 14 and 15 in XI *THE WORKS OF ARISTOTLE* 1374-77 (W. Ross. transl. 1959). See also AUGUSTINE, II *THE CITY OF GOD*, Book XIX, Chapter 21, 330-333. (Marcus Dodd transl. 1948). Augustine writes: "For that which is done by right is justly done, and what is unjustly done cannot be done by right." *Id.* at 331.

such a way as to effect as great a degree of justice as possible through an adversary process in individual cases.

This concern with the individual case is the crux of the existentialist's interest in the law; the existentialist argues that law originates in the concrete singular case, not in the rules, legal concepts, and precedents found in statutes and court decisions.¹⁰ The existentialist theologian Paul Tillich attempted to reconcile the existentialist position and the traditional view of law as a systematic development and application of general rules, by suggesting that law is the mediator between individual needs of justice and the practical utility of general rules:¹¹

Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation. Every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust. Justice can be reached only if both the demand of the universal law and the demand of the particular situation are accepted and made effective for the concrete situation.

Justice, then, is the limit of the aspirations of law. Law may not embody justice; but through law, man seeks justice as a Platonic ideal, the standard against which laws must be measured. Martin Luther King in his "Letter from Birmingham Jail," argued that law must be evaluated in terms of commonly held principles of justice, and that the failure of law to conform to these principles provides the occasion and necessity for civil disobedience. Reverend King wrote:¹²

How can you advocate breaking some laws and obeying others? The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is not law at all."

This analysis is readily applicable to a law which on its face, is clearly

10. See G. COHN, *EXISTENTIALISM AND LEGAL SCIENCE* 2 (1967).

11. P. TILICH, *LOVE, POWER AND JUSTICE* 15 (1960).

12. M. L. KING, *Letter from Birmingham Jail* in *WHY WE CAN'T WAIT* 82 (Signet ed. 1964) [hereinafter cited as KING].

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violative of commonly shared values, such as the American antimiscegenation laws.¹³ But the appropriate response is not so clear when the injustice accrues, not from the general rule itself, but in a concrete situation where the “abstractly” just rule is applied in an unjust manner. Reverend King offered an example from his own experience to illustrate this situation:¹⁴

Sometimes a law is just on its face and unjust on its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First Amendment privilege of peaceful assembly and protest. I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

The achievement of justice, both in the general rule and in the individual case, remains one of attaining conformity of law with the fundamental values which give it legitimacy. Consideration in identifying these fundamental values, while difficult, becomes all the more compelling when an individual claims justification in acting in violation of a law on the basis of conscience. The development of objective criteria by which the individual can make a judgment as to the validity of law is required if order, as a purpose of law, is to be attained without recourse to tyrannical force.

13. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967), where the court held antimiscegenation laws unconstitutional arguing that: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

14. KING, *supra* note 12, at 83-84.

. . . AND ORDER

1. *Anarchy*

you cant steal nothin from a
 white man, he's already
 stole it he owes
 you anything you want, even his
 life. All the stores will
 open if you
 will say the magic words. The
 magic words are: Up
 against the wall mother
 fucker this is a stick up! (LeRoi Jones)¹⁵

In stark contrast to Martin Luther King's submission of civil disobedience as a recourse to injustice is Le Roi Jones' unqualified appeal to anarchy. To the anarchist social injustice is deemed sufficient cause for blind rage and self-serving violence. "Up against the wall" was the cry of the Newark rioters,¹⁶ and of the student rioters at Columbia University as well;¹⁷ the slogan, taken from a poem by Le Roi Jones, symbolizes the anarchy which prevailed in both situations.

The individual ghetto rioter strikes out with blind rage at a system which, he perceives, enslaves him. Even if not purposely and consciously, he does in fact reject that social system, and thus he becomes an agent of anarchy himself. His perception of the blindfolded goddess of Justice is the same as that of Langston Hughes who wrote:¹⁸

That Justice is a blind goddess
 Is a thing to which we black are wise:
 Her bandage hides two festering sores
 That once perhaps were eyes.

In rejecting "Justice," the ghetto rioter rejects the existing laws of society, in the hope of leveling all social institutions so that he may begin building anew. But it is clear that this rejection of existing legal institutions means anarchy and society without laws, if not permanently, at least until the work of revolution is completed.

15. Jones, *Black People*, EVERGREEN REVIEW, Dec. 1967, at 49. This poem was read to the jury by Judge Kapp at the sentencing of Jones at a New Jersey trial, for his role in the 1967 Newark riots. Schneck, *Le Roi Jones, or, Poetics and Policeman or, Trying Heart, Bleeding Heart*, RAMPARTS, July 13, 1967, at 17 [hereinafter cited as Schneck].

16. Schneck, *supra* note 15, at 19. See also T. HAYDEN, *REBELLION IN NEWARK* (1967).

17. See J. AVORN & A. CRANE, *UP AGAINST THE IVY WALL* 291-297 (1969) [hereinafter cited as AVRON].

18. L. HUGHES, *I WONDER AS I WANDER*, 58 (1956).

The movement for anarchy has been perhaps most apparent in our universities, where its black flag has been increasingly at home.¹⁹ "Up against the wall" is shouted from classroom windows at the police, who are the symbol of law to the citizenry, and the proclaimed enemies of the student revolutionaries. "Up against the wall" has been scrawled on the classroom walls of the universities which have molded the society which is reflected in the present legal system. Here, it may be best to let the student revolutionary state his view that anarchy is meant to level existing laws whereupon a new order will arise. During the 1968 Columbia disturbances, student Mark Rudd wrote to then University President Grayson Kirk:²⁰

If we win, we will take control of your world, your corporation, your university, and attempt to mold a world in which we and other people can live as human beings. Your power is directly threatened since we will have to destroy that power before we take over.

To Mr. Rudd, Dr. Kirk was a symbol of existing society, just as existing law is reflective of existing society. The historical school of jurisprudence declares that law is formed by custom and reflects the history of the state.²¹ The positivistic school perceives a necessary

19. See Goodman, *The Black Flag of Anarchism*, N.Y. TIMES, July 14, 1968 § 6 (magazine), at 10. "In Anarchist Theory, 'revolution' means the moment when the structure of authority is loosed, so that free functioning can occur," (at p. 15). "To have a shambles is not unjustifiable, on the hypothesis that total disruption is the only way to change a totally corrupt society." *Id.* at 13. Applying this analysis to the Columbia protests, Goodman observed: "The protesting students are anarchists because they are in a historical situation in which anarchism is their only possible response. . . . Since they are willing to let the Systems fall apart, they are not moved by appeals to law and order . . . they do not trust the due process of administrators and are quick to resort to direct action and civil disobedience." *Id.* at 13. Then with approval, Goodman concludes that this anarchy constitutes a return to a primitive state in which law was not needed: ". . . the Columbia action was also a model of Anarchism. . . . For a while, until the police came back, the atmosphere on the campus was pastoral." *Id.* at 15. See also, P. SEALE & M. McCONVILLE, *RED FLAG BLACK FLAG: FRENCH REVOLUTION 1968*, (Ballantine ed., 1968).

20. Letter from Mark Rudd to Grayson Kirk, April 22, 1968, in Kirk, *A Message to Alumni, Parents and Other Friends of Columbia*, July 1, 1968, reprinted in AVORN, *supra*, note 17, at 25-27.

21. Savigny argues that:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people like their language, manner and constitution. Nay, these phenomena have no separate existence, but they are but the particular faculties and tendencies of an individual people, inseparably united in nature and only wearing the semblance of distinct attributes to our view.

That which binds them into one whole is the common conviction of the people. Savigny, *Von Beruf unserer Zeit zur Gesetzgebung und zur Rechtsursensschaft* in W. FREIDMANN, *LEGAL THEORY* 210 (1967).

relation between the law and the shared values of a society. Thus, Mr. Justice Holmes suggests that the law is nothing more than "the prophecies of what courts will do in fact;"²² judges do mirror the existing social order and reflect existing power distributions.

Just as judicial decisions are grounded in socially shared values, the lawyer, too, is an agent of the popular consciousness. Thus law is integrally related to the history of the state, and reflects the values of the society at each particular moment in history. Law grows with the history of the nation; to alter that course, the anarchist must first destroy that nation as it exists, and then create a new social order and a new legal order reflective of the new social system. But in the first instance, anarchy necessarily means destruction and no law.

The ghetto and student rioters are agents and advocates of this absence of law. This is the lower limit of law for as we approach anarchy we forsake enforcement, authority and the sovereign—all of which are essential to society with law, and which are negated by anarchy.²³ The language used by these anarchists—"Up against the wall, etc. . . ."—reduces those of position and authority to the lowest rank, and portrays their total rejection by the rioters.

It is important to distinguish the actions of ghetto rioters and student revolutionaries who reject the existing system and work outside the legal order, from those of Dr. King's persuasion who advocate "civil disobedience." Abe Fortas, former Associate Justice of the United States Supreme Court has drawn this distinction:²⁴

Civil disobedience, even in its broadest sense, does not apply to efforts to overthrow the government or to seize control of areas or parts of it by force, or by the use of violence to compel the government to grant a measure of autonomy to part of its population. These are programs of revolution. They are not in the same category of reformers who—like Martin Luther King—seek changes within the established order.

Reflecting on Benjamin Cardozo's observation that "law is restraint

22. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

23. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 11-13, (Noonday ed. 1954).

24. A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 59-60 (Signet ed. 1968) [hereinafter cited as FORTAS].

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and absence of restraint is anarchy,"²⁵ Fortas attempted to define "the rule of law" as restraint of both the ruled and the rulers.²⁶

The state, the courts, and the individual citizen are bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual must accept the court's determination of what those rules are and mean in specific instances.

The citizen is governed by laws which have been passed in conformity with established procedures and which do not violate either the rights guaranteed by the state's constitution or the fundamental humanitarian principles required of all civilized states.²⁷ The failure of the state to be "bound by a set of laws," or a failure of its sovereign edicts to conform to fundamental humanitarian principles constitutes official oppression under the guise of "law and order."

2. *Oppression*

Through all the centuries force and power are the determining factors. . . . Only force rules. Force is the first law. (Adolph Hitler)²⁸

Law in National Socialist Germany served as an agency of oppression. The state was totalitarian in form, which required that legal duties and rights be redefined with a view to the total way of life.²⁹ Law has one purpose in the totalitarian state: to maintain the unity of the state. The Fuhrer, as leader of the unified state was both the source of legal purpose and the means of achieving that purpose; he became both lawgiver and judge without any external restrictions on his will as both the source and enforcer of law. In 1936, Dr. Hans Frank, German Minister of Justice, attempted to apply the ideology

25. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 94 (1928).

26. FORTAS, *supra* note 24, at 59.

27. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 642-648 (1958). See also L. FULLER, *THE MORALITY OF LAW* (1964).

28. Address by Adolf Hitler, Essen, Germany, Nov. 22, 1936, in *HITLER'S WORDS* 4 (G. Prange ed. 1944).

29. See generally H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 305-479, (1966).

of the totalitarian state as a concept determining the development of law in National Socialist Germany:³⁰

It is impossible to believe that the unified will of the people is materialized in the will of the state if at the same time it is assumed that this same power of the state subdivides itself into entirely separate competences. . . . There is one kind of power in Germany today—the power of the Fuhrer. . . . In Nationalist Socialist Third Reich it is no longer possible, as it was in the liberalistic epochs, for the judiciary to indulge in subversive opposition to the unified will of the state and the Fuhrer, under the pretext of upholding the independence of the courts. . . . The judges and lawyers, too, are bound by the authority of the Fuhrer.

Frank's rejection of a state "bound by a set of laws" required a theory of government free from the restraint of law. Here is the second lower limit of the law: oppression by the state. John Lindsay, Mayor of New York, made this point in a speech before the 1968 National Republican Convention when he said that "liberty without law is anarchy, but law without justice is tyranny."³¹

An example of official oppression can be found in the police response to the demonstrations in Chicago during the week of the 1968 Democratic National Convention. There, state tyranny took the form of police brutality upon randomly selected victims, and of arbitrary infringements of rights of free expression and assembly. The report to the National Commission on the Causes and Prevention of Violence describes the specter of this official oppression:³²

The nature of the response was unrestrained and indiscriminate police violence on many occasions, particularly at night.

That violence was made all the more shocking by the fact that it was often inflicted upon persons who had broken no law, disobeyed no order, made no threat. These included peaceful demonstrators, onlookers, and large numbers of residents who were simply passing through, or happened to live in, the areas where confrontations were occurring.

The use of official position to attain "governmental" objectives is

30. H. Frank, *Rede Auf der Schlusskundgebung des Deutschen* in S. SIMPSON & J. STONE, *LAW AND SOCIETY 1680-1681* (1949).

31. Address by John Lindsay, National Republican Convention, August 5, 1968.

32. D. WALKER, *RIGHTS IN CONFLICT CHICAGO STUDY TEAM REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* xix (Signet ed. 1968).

further illustrated by attempted vindictive applications of the Selective Service Law to induct "dissidents" exercising their right of free expression against a war they consider unjust. Such punitive reclassification exemplifies the use of an ostensibly just statutory scheme in a manner which unjustly interferes with the principles of personal freedom, including expression and dissent, which are fundamental in a humanitarian society.³³

Anarchy and oppression are the lower limits of the law; when they exist, law does not. Today's frantic call for "law and order" is a cry for oppression, to avert the threat of anarchy posed by revolutionaries and rampant crime. It would indeed be terrifying if the only choice was the vicious terror of crime and the random terror of anarchy or the official terror of state-oppression. The simplistic solution of "law and order"—a call for greater use of naked force to restore domestic order—must be rejected, because the "order" sought thereby is a tyranny which is necessarily reprehensible to civilized society.

The future of a democratic society can best be assured by development and definition of those freedoms which are fundamental in a humanitarian society. The American constitutional system of protection and procedures is intended to provide a workable matrix for creative evolution of such fundamental freedoms, while resolving the conflicting demands of individual justice and general social order.

If current demands for "law and order" result in fewer restraints on police conduct, destruction of the presumption of innocence, and

33. See *Gutknecht v. United States*, 90 S. Ct. 506, 511-512 (1970) where the Court held that accelerated induction was an abuse of local board discretion. The Court noted the following statement by Selective Service Director Hersey:

The escalation of the United States military involvement in Vietnam increased the draft calls, and there was an upsurge of public demonstrations in protest. Some of these protests took the form of turning "draft" cards in to various public officials . . . [these registrants were not prosecuted] but were processed administratively by the local boards. In many instances, the local boards determined that a deferment of such registrant was no longer in the national interest, and he was reclassified. . . . *Id.* at 511-512 n.7. In reviewing this procedure the Court observed: "Where the liberties of the citizen are involved, we said that 'we will construe narrowly all delegated powers that curtail them.'" *Id.* at 511. In examining the powers delegated to the local board, the Court concluded:

[T]here is no suggestion that as respects other types of discrimination the Selective Service has free-wheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure. *Id.* at 511. See also *Breen v. Selective Service Board*, — U.S. —, 24 L. Ed. 2d 653 (1970) holding punitive reclassification to be an abuse of delegated powers; Note, *Draft Reclassification for Political Demonstrations*, 53 CORNELL L. REV. 916 (1968).

erosion of other procedural protections, and we then find that order has still not been attained, we will hear increasingly frantic calls for repression until all of our fundamental legal rights have been abrogated. The unchecked will of the sovereign then will be supreme, and we will face the situation which Thomas More feared in *A Man For All Seasons*:³⁴

What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide. . . the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and your're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Oppression can be the declared policy of the state; for example, the enacted laws of National Socialist Germany imprisoned on the basis of race, and punished all criticism of the Fuhrer. But this element of repression may be even more sinister when it consists in disparity between official conduct and the declared rule, such as when statutes promise protection to the individual but the official conduct of the state violates his rights, and that violation remains exempt from correction despite the protecting laws. When this occurs, we have a condition quite the opposite of law measured by the standards of justice; we do have a state arrayed with the appearance of legality; but it is not a state bound by law, not a state compelled to accept the court's determination of the meaning and force of laws. This we encountered in Nazi Germany, and it is the danger facing America today.

34. R. BOLT, *A MAN FOR ALL SEASONS*, 38 (Vintage ed. 1962).