

INTRODUCTION

This book has its origin in a sense that is shared by the editors and the authors of this book, all people of the law, that in the past couple of decades our public world has been changing under our feet faster than we can see or understand it, especially with respect to the fundamental character of law and democracy. The changes we speak of show up in judicial opinions, congressional deliberations, executive-branch legal advice, international relations, national politics, the nature of law practice, law teaching, legal scholarship, in fact in virtually every aspect of our professional lives. In each of these fields our expectations are repeatedly thwarted or upset, often in ways that do not seem good.

But prevalent and persistent as they are, these changes are hard to identify, let alone understand. The response we made to this situation was to come together in a conference at the University of Michigan in April 2007. The idea was not that we would give papers of the usual scholarly kind but that each of us would pause and ask ourselves what, of all the things that might be said, most needs to be said at this moment in our history. We encouraged each other to say whatever was actually on our minds, and to say it directly, in whatever form seemed best. Of course different people saw things differently and spoke differently about them. To reflect and express these differences was indeed one point of the conference as it is of this book as well.

The authors of these essays share no set of premises or conclusions, no common program for action. We disagree among ourselves on many issues, both in our underlying moral commitments and about what changes we would like to see in the world of public and political action. What we do share is a belief in the value of living speech, a kind of discussion and debate that works by the candid expression of the speakers' minds and hearts. It would be a shallow optimism that assumed such discussions would lead inexorably to agreement. But we believe that it is only through such discussion, such speech, that a humane and democratic society can have its life.

Our hope is that in this book these distinct voices, talking openly and

authentically about different aspects of the cultural and political transformation in the midst of which we find ourselves, will define a topic of thought and concern of interest to others. At the same time we hope it will demonstrate a way of addressing this topic, through collective conversation—both the conversation reflected in the pages of this book and the conversation we hope to stimulate between this book and its readers, and among its readers as well. We hope, that is, that the reader can read these essays as if he were going to contribute one of his own, and, with such a cast of mind, think about what his own perceptions are of the changes taking place in law and democracy; ask himself how he would speak about them; imagine how he would hope others might respond; and so on.

Each of the essays focuses on a different issue, or set of issues, and each of course expresses the perceptions and judgments of an individual mind and person. As one might expect, many of the essays reflect what is seen as a decline or degeneration in our legal and political culture. But it is also true that each in its own way articulates a way of proceeding on these conditions—a ground of hope, in fact. We hope that the book as a whole does this too.

The phrase in our title, “the empire of force,” comes from Simone Weil’s famous essay on the *Iliad*, where she uses it to mean not only brute force of the kind sometimes employed by policemen and soldiers but, more deeply, the ways of thinking and talking and imagining that make that sort of brute force possible: propaganda, advertising, politics by buzzword and cliché, and so on. In this essay she does not give these words any fixed conceptual meaning but uses them to point to the forces, both internal and external, that move us to deny the full humanity of other people and to trivialize or devalue their experience.

We have used the phrase in a similarly open way, both in our invitation to the conference and in the title to this book, not with the idea that it had an established meaning or with the aim that these essays would collectively achieve such a definition. Rather, we used it first as a way of asking a question of the speakers at the conference, and use it now as a way of asking the same question of the reader of this book: Do you have the sense that our world, especially the part of it associated with law and democracy, has become increasingly subject to the forces of dehumanization? If so, how can you—and we—begin to define and think about what those forces are and how they might be exposed and resisted? To do this is especially difficult

because these forces are likely to operate not in an obvious way that makes us aware and conscious of them but somehow beneath the surface of our experience, masked by their very familiarity. In asking these questions we are thus trying to draw attention to the fact that evil can be normalized to the point that it is no longer seen; and we are asking each other, and now the reader too, whether that is what is happening in our own lives, especially in our own public culture.

Of course the answer to these questions, in writer or reader, may be “no.” This answer can be given either after considerable thought and reflection or as a gesture rejecting the inquiry in the first place. In putting together this book we, and the other authors, are encouraging people not to adopt the course of outright rejection, for we think the questions are serious and important. On the other hand, we acknowledge that many different responses to them can be appropriate and wise, and in speaking for the authors of the book as a whole we do not urge the rightness of any particular perception or judgment. Quite the contrary. We think it a merit of this collection of essays that there are so many differences among them: in definition of issue, in style of thought and expression, in ethical and political orientation, and so forth. They are the matured work of individual minds.

We think that what we most hoped for has come to pass: namely, that the essays have a kind of deep authenticity, expressing what the writers actually think in the language in which they think it. This means that all our key terms—*law*, *democracy*, *empire of force* prominent among them—are defined and redefined in these performances, and this is as it should be.

As we suggested earlier, the idea of the book is to place the reader in a position like that of the contributors, asking him or her, What do you perceive to be changing in our world, especially in connection with law and democracy, and what do you think and feel about it? Our hope is that these essays will provide encouragements to thought on these matters; examples of certain kinds of responses, some of which will naturally be more congenial than others to particular readers; and something of an array of possibilities with respect to which the reader can locate his or her own position as it is worked out.



Jedediah Purdy, who teaches law at Duke University, approaches the character of our present political discourse by the analysis of a form that by its

nature tends to capture assumptions that are widely shared in the polity, namely the presidential inaugural address. In doing this he articulates features in our discourse that are deeply troubling, especially a kind of thinness and insincerity that makes it hard to use this language for anything deep and important. Yet he sees perhaps surprisingly hopeful possibilities as well.

M. Cathleen Kaveny, who teaches law and theology at the University of Notre Dame, addresses a structural feature of our political discourse, namely, that sometimes it takes the form she calls “prophesy,” sometimes “casuistical reasoning.” Each of these genres is appropriate to some occasions and inappropriate to others. It is crucial that they be used properly, in ways that do not silence voices that ought to be heard or stifle conversations that ought to take place.

Robin West, who teaches law at Georgetown University, focuses on the ways in which lawyers and judges tend to imagine the Constitution, namely, as a way of creating occasions for the activity of adjudication, which is for them (or us) the primary way in which that document is given meaning. For her this is to erase from consciousness the political process that the Constitution makes possible, in which it can be given meaning in a more direct and vivid way. Indeed, it is to erase the People themselves.

Martin Böhmer, dean of the law school at the Universidad de San Andres in Buenos Aires, asks why it is that Argentina has had such a difficult time establishing a rule of law. His analysis of Argentine culture, including folk songs and high literature as well as political history, suggests an answer deep in the history and psyche of its people; more than that, it suggests how more recent events may promise a better future.

Howard Lesnick, who teaches law at the University of Pennsylvania, addresses a particular move in the public rhetoric of our day, one that occurs when a person dismisses what his opponent says with a label, such as *relativism*, the real function of which is to claim that the speaker need not respond to what his opponent has said on its merits. This move corrupts the process of debate in a way that promotes mindlessness and erases the claims and experiences of others. Lesnick shows how this move can be both understood and resisted.

Joseph Vining, who teaches law at the University of Michigan, analyzes the ways in which legal thought itself has been distorted or deformed by an insistence that it proceed on the premises of social science. These premises

tend to erase from the discourse the human person present in law, the human voice, and human hope. Yet Vining claims that even under these conditions law retains a vitality that resists these deformations, upon which we can found realistic hopes both for law itself and for democracy.

Barry Sullivan, formerly dean at Washington and Lee University and now practicing law in Chicago, addresses changes in the genre of the judicial opinion, which is essential to our law, especially to constitutional law. By analyzing two opinions with care, he shows what some of these changes are and suggests how they might be resisted.

Jed Rubinfeld, who teaches law at Yale University, analyzes what he regards as a collapse in the law of the Fourth Amendment: namely, the reduction of what it protects, and protects against, to a language of “privacy.” He proposes a different way of thinking about the Fourth Amendment, one that promises to renew its political and legal force as a protector of values essential to democracy.

A. W. Brian Simpson, who teaches law at the University of Michigan, draws upon his experience in the United Kingdom to analyze the new legal form of social control there called Anti-Social Behaviour Orders. These efforts to control loutish behavior in public places erase the protections and limits of traditional common law, introducing into the law a way of thinking that threatens conditions essential to liberty under law and to democracy as well.

John T. Noonan Jr., a judge on the Ninth Circuit Court of Appeals, speaks about the process of adjudication from the inside, as one who himself has to make the crucial decisions. He identifies three common situations in which there is deep tension between the formal role of the judge and his or her conscience. In doing so, he offers a model of public thought that resists the trivialization and dehumanization of the judge, the litigants, and the judicial process itself.

H. Jefferson Powell, who teaches law and theology at Duke University, describes the respect that lawyers and officials in the executive branch were, as a matter of ethics in government, traditionally obliged to show to the constitutional and legal judgments of the other branches. This tradition has recently degenerated into a view that sees the judgments of others, and law itself, simply as a set of obstacles or restraints, not as a source of genuine authority. The question he asks is whether that tradition can be revived, perhaps in a new form.

James Boyd White, professor emeritus of law and English at the University of Michigan, addresses what he sees as three major changes in our world: the acceptance by poor and middle-income people of vast transfers of wealth to the rich; the decline in the quality and character of legal thought, as exhibited both in Supreme Court opinions and in the life of law schools; and the acceptance of torture, faintly disguised as “severe interrogation,” as an activity of our government. These three phenomena are in his view connected, and are to be resisted by a fresh understanding of the nature and value of law.