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Source: *Nomos*, 1978, Vol. 19, ANARCHISM (1978), pp. 167-188

Published by: American Society for Political and Legal Philosophy

Stable URL: <https://www.jstor.org/stable/24219046>

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ALAN WERTHEIMER

When the irony and rhetorical flourish of Professor Mazor's article are stripped away, it appears that he has set himself four tasks: to state the critique that anarchy makes of law; to examine the evidence for that critique; to consider two arguments (in the face of this weighty evidence) in defense of respect for law; and finally, to explore the consequences of accepting the anarchist critique. The anarchists assert that the law cannot establish justice and cannot provide social order. Our knowledge of legal systems suggests that there is no reason to think that it could provide either justice or order. If the law is "what the officials of a given state will do," given what we know about the way in which state officials are recruited, to whom they respond, and the procedures by which they operate, there is no reason to expect anyone to pay even a modicum of respect to the law.¹ No state of nature theory, Rawlsian or Hobbesian, can adequately shore up the law under the anarchist attack. Consequently, disrespect for law is a widespread, growing, and (most important) an appropriate response to the inherent inadequacies and cruelties of law. While others have defended a (*prima facie*) obligation to obey the law by rejecting the alternative

of universalizing the maxim of disobedience, for Mazor the prospect of a universalized disrespect for law is among the most attractive features of the anarchist position. Unlike Wolff, who arrives at the truth of anarchism through an *a priori* argument, Mazor reaches the promised land by traveling through the evidence of social science. And unlike Wolff, who cautiously suggests that “we have survived the death of God, and we may yet survive the death of the state,” for Mazor the death of the state is a precondition of our survival.² While Wolff anguishes over the consequence of discovering that the emperor is wearing no legitimate clothes, Mazor is prepared to lead us to the joy of the nudist colony. Not only is anarchy both possible and desirable, but, like Tolstoy, Mazor is convinced that “no anarchical disorder could be worse than the position to which governments have already led their peoples, and to which they are leading them.”³

Just as psychiatrists generally recoil from the claim that “mental illness is a myth,” there is a natural resistance among political scientists and political philosophers to the anarchist challenge to the institutions and concepts upon which their noble professions inevitably rest. That Mazor’s case for anarchy is not rooted in the cautious, sober, and analytic style to which academics have become accustomed makes it even more tempting to dismiss the argument out of hand. But Mazor has rightly reminded us that the modern state and its legal superstructure have not eradicated human misery, may justly be held accountable for history’s most extensive cases of human cruelty, and may be irrelevant to a crisis which is global. I propose to continue the dialogue, to take a few steps back and examine the assumptions and arguments that Mazor employs in making his case for anarchy, and to offer some speculations as to whether or not anarchy is the course which others should be encouraged to follow.

One is told that “anarchy opposes law” because law “cannot lead to justice, cannot establish order.”⁴ It is important to remember that the rule of law requires a widespread respect for law, a respect which is “uncoerced”⁵ and that the rule of law must therefore be distinguished from the rule of “brute force.”⁶ A society may be characterized by disrespect for law when the social order becomes unglued or when it is held together only by the use of force. That the police carry guns in the United States suffices to show that it is a

nation in which disrespect for law is rampant. Basic to the anarchist critique is that the “law’s inability to command respect” stems from the “ample grounds for loss of its capacity to do so . . .”⁷ Thus having claimed that the law does not, in fact, receive respect, Mazor embarks on the most extensive part of his analysis—to show that the law does not deserve respect. The anarchist believes that “those who exercise state power will use [the law] above all to maintain their own position in society, that of the institutions to which they owe their title, and that of the class whose control of the state they are sworn to uphold.”⁸ Because the law cannot provide justice, it does not deserve respect. Because the law does not deserve respect, it does not receive respect.

The anarchist critique of law makes three distinct claims: (1) the law does not receive respect; (2) the law does not deserve respect; (3) the law does not receive respect *because* the law does not deserve respect. Even if the second claim were true, it is entirely possible that the first claim might be false. A legal system thoroughly underserving of respect might nevertheless receive a considerable degree of respect and provide a high degree of order. Even if the first and second claims were true in a given society, the third claim might be false. The causes of disrespect may be located in varying social, economic, and cultural sources. If the law does not receive respect, this may be true for reasons entirely unconnected to the law’s undeservingness of respect.

In order to examine this critique, it is first necessary to take a closer look at the concept “disrespect for law.” What is entailed by respect for law? Given the opportunity to engage in illegal gambling, my behavior (viewed externally) might conform with the law for at least three different reasons. First, I might simply think it unwise (on either prudential or moral grounds) for me to gamble, and refrain for that reason alone. Secondly, knowing that I might be punished for engaging in an illegal activity, I might decide that the risk of incurring the punishment outweighs my expected benefit (psychic or monetary) from gambling. Thirdly, I might refrain from gambling simply because gambling is illegal and because I believe I am under a (*prima facie*) obligation to obey the laws of the state. Mazor would be compelled to argue that only in the third case is it proper to say that I am demonstrating “respect for law.” Respect for law is not an external matter, turning solely on the behavioral fact

of compliance, but an internal matter, turning on the reasons for compliance. In the first case, that gambling is illegal is irrelevant to my behavior. In the second case, I obey the law because I feel “obliged” to obey, not because I feel “obligated” to obey. As Hart points out, one may feel “obliged” to hand over one’s money to a gunman without feeling “obligated” to do so.⁹ In that case, compliance stems from “brute force” which Mazor wishes to contrast with an “uncoerced” respect for law.

Compliance with the law is not identical with respect for law. It is also true that noncompliance with the law is not identical with disrespect for law. If, as Mazor suggests, an act of civil disobedience may signify a great respect for the rule of law as such, to what does he refer when he claims that there is a widespread and growing disrespect for law?¹⁰ Most persons would point to crime. Thieves, muggers, rapists, murderers, dope peddlers, embezzlers, Watergate burglars—it is they who do not respect the law. Yet if I can feel “obliged” to obey the law without feeling “obligated” to do so, I can also feel “obligated” to obey the law without feeling “obliged” to do so. To disobey a law is not necessarily to assert the illegitimacy of the particular law or the legal system as such. To disobey a law is not even to claim that one thinks it is right to disobey. Most of us will, on occasion, place considerations of our *interest* or *desires* over considerations of our obligations or duties, although people may vary in their tendency to do so. I suspect that a considerable proportion of disobedience stems simply from a calculation that disobedience serves one’s interests or desires more effectively than obedience, that is, the probable gains of disobedience outweigh the probable costs. Thieves do not, by their actions, necessarily signify their belief that the laws which uphold the institution of private property are unjust. They may simply wish to evade the law because they believe they stand to gain by doing so.

If “respect for law” means “to accept the law as legitimate,” just as one can obey the law while not respecting the law, one can disobey the law while continuing to respect the law. It might be argued, however, that respect for law must entail more than mere acceptance of the law as legitimate, and that noncompliance (except in the case of civil disobedience, in which one is not attempting to *evade* the law) does signify disrespect for the law. It could be argued that one who claims to accept the legitimacy of the

law and an obligation to obey it, but disobeys the law for reasons of personal interests is not respecting the law, because to “respect the law” means to “voluntarily abide by the law.”

Let us assume that this latter account of “respect for law” is more plausible. “Respect for law” requires voluntary or “uncoerced” obedience. There is, however, a crucial difficulty with the notion of “voluntary obedience” or “uncoerced respect.” Hart points out that all legal systems exhibit a tension between “those who . . . accept and voluntarily co-operate in maintaining the rules . . . and those . . . reject the rules and attend to them only from the external point of view as a sign of possible punishment.”¹¹ Not only is there a tension between those who obey the law from different perspectives, there is an inherent tension between the perspectives. I wish to argue that it is difficult to sustain a sharp distinction between “voluntary obedience” and “uncoerced respect” on the one hand and obedience secured by the threat of punishment or “brute force” on the other. Respect for *law* can never be purely voluntary—it will always require an amount of “brute force.”

The law requires that I drive no faster than fifty-five miles per hour on interstate highways. While I would prefer to drive faster, I accept the legitimacy of the laws (in general) and I think the purpose of this particular law (to reduce gasoline consumption) is quite sound. I respect the law and I am willing to abide by it. Hart has reminded us that when one obeys the law one is not paying homage to some mystical deity, but rather is “cooperating” with one’s fellow citizens by making some sacrifice (paying taxes, joining the army, driving at fifty-five miles per hour) in order that some good be provided or some harm be avoided. My continued voluntary obedience to the law is sustained by my belief that I am, in fact, “cooperating” with my fellow citizens. Let us say that I begin by driving along at fifty-five miles per hour, but find that most of my fellow drivers are unwilling to do likewise. I am annoyed at those drivers who pass me, because they are unwilling to make the sacrifice I have made, and my annoyance is increased by my realization that the tension supposedly inherent in any legal system appears to be absent: they receive no penalty for their disobedience.

When disobedience to the law becomes sufficiently widespread and the law is unenforced, it becomes literally impossible for me voluntarily to “cooperate” with my fellow citizens by obeying the

law, for “cooperation,” by definition, requires that a sufficient number of them do likewise. Obedience to the law is no longer an act of voluntary cooperation, but an act of philanthropy, in which one makes sacrifices for one’s fellow citizens that they are unwilling and are not forced to make for you. As Schelling puts it, the law involves an “enforceable social contract. I’ll cooperate if you and everybody else will; I’m better off if we all cooperate than if we all go our separate ways.”¹² The person who is willing to cooperate and obey the law, but is not willing to do so if others are not (externally) doing so, is not being inconsistent. “He’s *not* interested in doing minute favors for a multitude of individuals, most of whom he doesn’t know. . . .”¹³ I suggest, then that the ability and willingness of the state to penalize those who violate the laws, to use “brute force,” is a precondition for sustaining an “uncoerced” respect for law. It is respect for *law* that is at stake, and law is, by definition, a system that stipulates that disobedience will normally be met with coercion. The tension between the two perspectives is complex. Some “brute force” may be necessary to ensure that a sufficient number of citizens obey the law. Only when enough citizens (externally) obey the law (for whatever internal reason) is it possible for one to “voluntarily cooperate” by obeying the law.

At the conceptual level, it appears that there are two major difficulties with Mazer’s analysis of disrespect for law. First, noncompliance with the law does not require that one have moral objection to the law. One can, without contradiction, accept the legitimacy of the law and disobey the law. One can even believe that it is “right” that one be punished if caught disobeying, while simultaneously attempting to evade getting caught. There is no necessary connection between disrespect for law viewed externally as disobedience, and disrespect for law viewed internally as disobedience stemming from a rejection of one’s obligation to obey the law. Secondly, it is wrong to draw a sharp distinction between voluntary or “uncoerced” respect for the law, and obedience to the law which stems from the fear of punishment. There is no incompatibility between strict enforcement of the laws (the willingness to use “brute force”) and respect for the law. If respect for law is consistent with enforcement of the law, those charged with that responsibility will have to perform their duties in a manner which is responsive to the characteristics of the society. If, for historical,

ideological, and economic reasons, the ownership of guns is widespread in the United States, it is unreasonable to expect the police not to carry guns.¹⁴ Thus, the fact that the police carry guns in the United States does not entail that the United States is a society characterized by widespread disrespect for law. The police also carry guns in Tokyo, a city in which respect for law is reputed to be quite high.¹⁵

At the empirical level, there are still further difficulties with Mazor's analysis. If, as defenders of anarchy are prone to argue, a sound defense of the need for law cannot be rooted in generalizations about human behavior based on observations of particular societies, as adequate defense of anarchy must avoid ethnocentrism. Yet one of the most striking characteristics of Mazor's argument is its extraordinary emphasis on American phenomena. If we look elsewhere we find that it is just not true that the legal systems of modern nation-states are incapable of providing order. Even if the law's undeservingness of respect is a moral universal, the fact is that there are societies in which compliance with and respect for the law is the norm. In Tokyo, it is said that "cars left unlocked are not rifled. Money left in hotel rooms is there when you get back. Almost no one counts the change received in shops."¹⁶ In 1973, Tokyo experienced 361 reported robberies, compared with 72,750 in New York City.¹⁷ There are even societies (*mirabile dictu*) in which the police do not carry guns. If, when the police carry guns we have disrespect for law, can we conclude that when the police do not carry guns we have respect for law? If "those who exercise state power will use it above all to maintain their own position in society" in all legally organized societies, it may be true that the law "cannot lead to justice" and therefore does not deserve respect in any legally organized society. Unfortunately, for the anarchist, it is not universally true that the law is unable to "command respect." Although God is dead, some people continue to believe that he lives. And while law is dead, some people continue to believe in the illusion that it is alive—and they even behave accordingly.

Not only is it untrue that the law is incapable of providing order, there is reason to believe that the best explanations of the varying levels of disobedience are external to the law, that is, not an inevitable systemic consequence of having laws. In accounting for the varying crime rates among different groups in a society or in

explaining the varying crime rates among various societies, it is a commonplace to stress social, economic, and cultural variables; for example, the degree of social homogeneity, economic inequality, cultural and subcultural norms, and the opportunity to disobey the law. If crime is more prevalent among males, are we to conclude that men tend to appreciate the force of the anarchist critique of law to a greater degree than females? Is the increase in shoplifting more plausibly attributable to a growing rejection of the institution of private property, or to the fact that an increasing percentage of merchandise is “out there” to be taken, rather than behind counters and handled by salespersons?

Disrespect for law, of course, may take many different forms. The United States has experienced, not only a rise in crimes of violence and attacks on property, but the exposure of multiple crimes in the highest political offices of the land. That those charged with enforcing the laws have seen fit to break the law when they believe doing so serves their interests is often put forth as a justification and explanation of the increase in crime among those of less wealth and power. As a *justification*, there is some plausibility to this line of argument. But it would be a wonderfully illustrative case of what Robert Nozick calls “normative sociology” (“the study of what the causes of problems *ought to be*”) to tie the one to the other empirically.¹⁸ As Wolff puts it, “disrespect for law is not a contagious disease which spreads through a society by contact . . . no one would be so foolish as to look for correlations between muggings and conscientious objection.”¹⁹ I suggest, then, that there is little evidence to support the anarchist claim that law does not receive respect *because* the law does not deserve respect. When people demonstrate disrespect for law they often do so for reasons that are not particularly supportive of the anarchist case.

Nothing that I have said about the nature and causes of disrespect for law negates Mazor’s claim that the laws are incapable of providing justice and therefore do not deserve respect. It is the demonstration of the moral basis for disrespect for law that constitutes the bulk of Mazor’s argument and to which I now turn. Mazor does not, however, serve his argument well by defining the law as “what the officials of a given state will do.” First, this definition makes it difficult to sustain the anarchist claim that the law cannot provide order. There are and have been societies in

which the officials of given states have (through whatever means) established a rather high degree of order. If law is defined as what the officials of a given state will do, then it is trivially true that law can provide order, if that order is attributable to the actions of the officials of the state. Secondly, this definition gives up any claim to the idea of “law” as a standard by which to evaluate the behavior of the officials of a given state. When Thrasymachus says that “‘just’ or ‘right’ means nothing but what is to the interest of the stronger party,” he precludes the use of “justice” or “right” as standards by which to criticize and evaluate the actions of the stronger party. Similarly, Mazor cannot say that the officials of a state have acted illegally, because what they do is (by definition) law, nor can they be criticized for failing to live up to the idea of law which they are supposed to uphold.

I am not, however, primarily concerned with what Mazor’s definition of law allows him to *say*, although it does not allow him (without contradiction) to say enough. I am more concerned with what I take to be an underlying fundamental commitment to the idea and rule of law. Ronald Dworkin points out that many of those who oppose the law (understood in a positivist sense) are, in fact, quite committed to the idea of law: “They are committed to the idea that government should be regulated by principle, and that those who have social power should extend to everyone the rights that they have consciously or habitually claimed for themselves. . . .”²⁰ When Mazor examines the realities of the legal system, he finds that system wanting because the realities do not square with “the fundamental principles of social obligation” upon which the system rests, that is, the law does not promote “justice.”²¹ Mazor’s argument for anarchy rests on the claim that the reality of the legal system does not live up to the society’s own understanding of what the idea of law entails. In this sense, Mazor is quite committed to the idea of law as something distinct from “what the officials of a given state will do.”

Regardless of any definitional problems in his argument, Mazor is right in arguing that a defense of law must attend to the functional realities of legal systems. Unfortunately, because he focuses exclusively on the United States, there is no evidence that what he finds there is either also true of all modern nation-states or an inevitable systemic consequence of having a legal system. In any

case, what does he find? The judges are not representative of the society; they are an adult, male, legally trained, wealthy elite, who do not and cannot be expected to set aside their class interests when acting in their professional capacity. Those who make law by administration in the multiple bureaucracies do not and cannot achieve the institutional goals which justify their existence. HEW provides neither health, education, nor welfare. The bureaucracies not only fail, their very existence lulls the citizen into falsely believing that his interests are being protected. While poisonous drugs slip through the careful screening of the FDA, in that agency's absence we would all act on the maxim *caveat emptor*, and the law of supply and demand would prevent those drugs from appearing on the shelves of the local pharmacy.²² The police can neither solve crime nor prevent it. Lawyers are largely corporate or (what amounts to the same thing) corrupt. Legal equality, when not a mere fiction, only reinforces social inequalities. Most important, the law is not merely unjust, it is irrelevant. To assume that "the disposition of a limited number of cases and controversies will influence behavior in enough situations to maintain domestic tranquility"²³ is an archaic notion in a crisis which is "apocalyptic . . . global . . . ecological . . . technological . . . psychological . . . evolutionary . . ." ²⁴ Thus, while legislation cannot provide the needed domestic social changes, Mazor finds that the entire nation-state basis of the legal structure is inappropriate to a world which must escape the "narrowness of territoriality" if it is to avoid disaster.²⁵

Our nation and the world are in bad shape. Material scarcity has not been eliminated and may even be growing. Even where a degree of affluence has been achieved, people encounter a "whole new set of human problems, centering in the realm of the interpersonal" with which to contend and from which they suffer.²⁶ One can quarrel here and there with Mazor's analysis, and it is even occasionally difficult to determine if he is serious. Yet the thrust of the analysis cannot be ignored. The legal system does not live up to its own standards, much less a more rigorous set of norms. Rather than quarrel with the critique, let us accept the claim that the operational reality of the legal system is that it does not provide justice. Still, we must ask, does the acceptance of that claim entail anarchy?

In the face of all this evidence, one might wonder why any reasonable person could continue to think that mankind is better off with law than without it. Thus, before stating his case for anarchy, Mazor pauses to consider two lines of justification for respecting law. The more optimistic line, exemplified by Rawls, suggests that men in an original position, placed under a “veil of ignorance” about their own characteristics and the characteristics of their society, would choose to establish a set of rules and practices that would permit considerable inequalities if these inequalities work out to everyone’s advantage. Suspecting any line of argument which could support the claim that the inequalities exhibited by the modern nation-state could conceivably be just, and rejecting the “peculiar” premises that Rawls’s conception of the original position involves, Mazor quickly dismisses this argument and moves on to consider the Hobbesian defense of law.²⁷

This line of argument claims that the purpose of law is to protect men from their own “dangerous propensities,” to avoid the *summum malum* inherent in the contradiction between the characteristics of the human condition. If stripped of its Hobbesian flavor, this argument may be somewhat stronger than Mazor allows. First, the argument does not require the malevolent assumptions which Mazor attributes to it. The argument need not assume that human behavior is characterized by “evil” or “greed,” as Mazor puts it; or, in Hobbes’s words, a “perpetual and restless desire of power after power, that ceaseth only in death.”²⁸ The argument need only reject the anarchist claim that we would be better off if individuals were always permitted to act according to their own moral judgments and to settle their accounts directly with those with whom they may have differences. The argument need only claim that “some areas of human behavior are too risky to be left to individual moral judgment” and that it is preferable to have a third party resolve some disputes than to permit individuals to settle all their own disputes.²⁹ I am not making this argument here, but do wish to suggest that it cannot be dismissed by attributing to it assumptions which it does not need.

Secondly, according to Mazor, the Hobbesian argument should appeal only to one “who has something to lose, that is, one who stands in a position of dominance over others” and whose interests in maintaining that dominance are protected by the state and its

legal superstructure.³⁰ It is, however, wrong to equate those in a position of “dominance” with those who have “something to lose.” The latter set is much larger than the former. In fact, it is those who are in a position of weakness, not dominance, who stand to lose the most in marginal terms. The less one has, the less one can afford to lose. While blacks have suffered from discrimination and brutality at the hand of the law, they have also suffered from the *laissez-faire* (anarchic?) view the law has taken towards injuries which blacks inflict on blacks. While those with very little may well fear the state and its laws, they may be more concerned about their high level of vulnerability to attack from their fellow citizens. It is not generally blacks who wave the black flag.

Thirdly, let us recall that Hobbes prefers law to anarchy, not only to avoid the “continual fear, and danger of violent death,” but because in the absence of the state “there is no place for industry . . . no culture of the earth . . . no commodious building. . . .”³¹ The Hobbesian argument can be understood as claiming not only that the law is needed to reduce interpersonal injuries, but in order to provide certain goods and services without which life would be less pleasant. A society may require or wish to provide certain “public goods,” that is, those goods which, if they are provided at all, cannot be feasibly withheld from any member of the community. Similarly, a society may need or wish to remove certain public harms, those unwanted effects of too many individuals doing what they do; for example, burning garbage, using phosphate detergent, watering lawns during a water shortage. There are goods which it is necessary, most feasible, or most efficient to provide as public goods if they are provided at all, and there are harms the avoidance or reduction of which will necessarily benefit all if they benefit anyone. The “logic of collective action” claims that because one will receive the good or avoid the harm regardless of one’s contribution or sacrifice, the rational man will attempt to free-ride, he will attempt to enjoy the good without incurring the cost. Olson says, “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”³² Without coercion or some other incentive, rational individuals will not do their part in providing a public good, and thus it will not be

provided. In order to ensure that it be provided, the state employs coercion, thereby forcing us to do what we want to do, but would not do unless we were forced to do it. This version of the Hobbesian argument, then, suggests that the state and its laws are necessary, not only for life, but for the good life.

I believe it is this argument which presents the greatest difficulty for the defender of anarchy. The anarchist can, however, offer three lines of objection in an attempt to avoid its conclusion. First, it is no doubt true that as the level of economic development and complexity of a society increases, the need to provide public goods and respond to public harms also increases. The anarchist can accept the claim that public goods require coercion but state that he is unwilling to pay the cost for these material benefits, that he is willing to sacrifice the productivity of a modern society for the liberation and autonomy that a “less developed” society can offer. Thus, it becomes perfectly understandable that anarchism has traditionally been compatible “only with a less complex and therefore more primitive, economic, political, and social structure of society.”³³ Secondly, the “logic of collective action” states that size is inversely related to the ability to provide public goods without coercion. The anarchist can argue that if the community is sufficiently small it will be possible to provide public goods without coercion. The two objections just considered, of course, assume that a large-scale modern society can and should be replaced by a different form of social organization, a problem which I will consider below.

The two objections just considered focus on the nature of an anarchist *society*, a third line of objection focuses on the *individual*. The “logic of collective action” assumes that in the absence of coercion (or other incentives), men will attempt to promote their self-interest and will (at least, too often) be unwilling freely to contribute to the provision of public goods. This argument can be defeated by simply claiming that it is wrong about men. The anarchist can argue that under the appropriate conditions men will be willing to contribute their share, that they can act morally in the Kantian sense. They can act “on the maxim through which you can at the same time will that it should become a universal law.” This Wolff argues, “When rational men, in full knowledge of the proximate and distant consequences of their actions, determine to

set private interest aside and pursue the general good, it *must* be possible for them to create a form of association which accomplishes that end without depriving some of them of their moral autonomy.”³⁴ This argument assumes that it can be “rational” to “set private interest aside and pursue the general good.” I will return to this problem below.

In the face of the defense of law, the anarchist argues that there is no reason to assume the “inevitability of domination.” As Wolff suggests, under the appropriate conditions it must be “possible” for men to live both socially and freely. And as Mazor puts it, “Against the *possibility* of the sharing of the world’s resources in pursuit of a joyous existence, the dark myth which justifies authority and dominance has little appeal.”³⁵ Even if Mazor and Wolff are correct, even if anarchy is possible, even if the existence of legal systems does not inevitably flow from characteristics of the human personality, the defense of law does not automatically collapse. It does not collapse because what distinguishes (at least some) defenses of law from (at least some) defenses of anarchy is not a disagreement as to what is *possible*, but their respective understandings of how men should go about making choices in an uncertain world.

To grasp this distinction, let us consider the defenses of law which Mazor examines. Although their ultimate conceptions of the legitimate state are quite different, both Hobbes and Rawls rest their arguments on the notions of a “state of nature” and a “social contract.” More important, for present purposes, is that they accept a certain understanding of how rational men should go about making choices. According to Hobbes and Rawls, one should act as if the world is out to get you. Under conditions of uncertainty, rational men make choices by using a maximin strategy, that is, that strategy which minimizes one’s losses or maximizes one’s worst possible position. Rather than assume that “somebody up there loves me,” he acts as if “his enemy were to assign him his place.”³⁶ A maximin strategy can be contrasted with a maximax strategy, that is, that strategy which maximizes one’s gains, although it might leave one worse off than a maximin strategy. Regardless of the probability of rain tomorrow, a maximin strategy would dictate that I take my raincoat, because not having a raincoat when it does rain (and one can never be certain that it will not) is the worst position. It is worse than having a raincoat along if it does not rain,

although that may be a nuisance.³⁷ A maximax strategy would dictate that I leave my raincoat home, since only by not taking my raincoat can I achieve the best possible situation—that it not rain and that I not have my raincoat.

It is clearly wrong to assume that a maximin strategy is always most rational. Depending on the amount of the respective losses and gains and the probability of losing or gaining, there are certainly conditions in which it makes sense to trade the possibility of a lesser position for the possibility of a better position, particularly when the probability of the lesser position is sufficiently low and the probability of the better position is sufficiently high. Even a rather cautious person might well leave his raincoat home if the weather bureau states there is a 10 percent probability of rain, although doing so makes possible the worst case—getting caught in the rain without a raincoat. One simply cannot say, *a priori*, that any strategy is always the most rational. One needs, as Barry says, “some sort of system for playing the percentages.”³⁸ In making choices, political or nonpolitical, one must consider the percentages. No serious argument for anarchy as a political strategy, calling on us to “struggle to create a world in which persons are free to develop their own structure of order” and to begin the “building of a space within which it can be exercised,” can avoid this problem.³⁹ A serious case for anarchy must assume that the “possibility” of the “joyous existence” is sufficiently high and sufficiently proximate (given that gains to be received in the distant future are discounted at a higher rate than gains to be received sooner) to justify forsaking whatever improvement over the “worst possible case” the state and its legal superstructure do or could provide. Given that the “decline in respect for established authority is . . . a threat to those reformers who seek to correct social injustice from the top down,” one must consider whether or not it makes sense to encourage such disrespect.⁴⁰ Does anarchy represent a good bet, or, as with another decaying institution, should we stick with the law for “better or worse”?

Let us agree with Barrington Moore that “anarchist communities as such are within the range of general social possibilities, given the appropriate conditions.”⁴¹ As Mazor suggests, anthropologists have demonstrated that human behavior is quite plastic and that aggressive and acquisitive personalities are not universal phe-

nomena. It is also true, that unlike those in Rawls's original position, we do not operate behind a "veil of ignorance." We know something about our history. We know the horrors that have occurred in and have been perpetrated by legally organized modern societies. No anarchist society could have produced the Holocaust. No anarchist society could produce or accumulate weapons which threaten to destroy the very existence of mankind.⁴² But if we are not in the original position, and if we do not operate behind a "veil of ignorance," we must also lack the luxury of choosing "a starting point for our social existence."⁴³ We must start from where we are. Thus, even if anarchy is possible, the anarchist strategy may be wrong for several reasons: (1) the conditions which make anarchy possible do not exist and cannot be achieved; (2) even if those conditions could be achieved, they might not be desirable; (3) the amount and certainty of human suffering that the realization of those conditions would require outweigh the gains to be realized by an anarchist strategy. A defense of law, then, does not assume the impossibility of anarchy. It assumes that the pursuit of anarchy amounts to playing a maximax strategy under unfavorable conditions.

If we must start from where we are, where are we? Without regard to one's model of the desirable society, and without regard to the role that modern nations may have played in causing certain problems, there are facts about the contemporary world which must be considered. First, the population of the earth is (perhaps) too large, but increasing at a rapid rate with no immediate prospect for a serious reduction. Secondly, in much of the world, basic human needs are not being satisfied. If, as Wieck suggests, "it is the purpose of anarchism to look beyond survival," we must remember that many in the world are not even surviving.⁴⁴ Thirdly, the world's natural and human resources are not evenly distributed across the globe. Fourthly, the present level of subsistence is based on a high level of social and economic interdependence among various regions of the world and also within the regions themselves. How do these facts touch on the argument for anarchy?

The increasing world population touches on the argument for anarchy in several ways. First, it seems reasonable to assume that the more densely populated an area, the more difficult it becomes to do without law—"an increase in numbers multiplies the frequency

of situations in which it becomes necessary to have rules and regulations to govern human activities.”⁴⁵ Secondly, if individuals are to be encouraged or compelled to restrict their offspring, it may be impossible to do so without the intervention of the state. Thirdly, one function of the state has traditionally been its responsibility in protecting its members from external threats. It seems reasonable to assume that anarchy can best survive when the prospects of external threats are minimized, But, as Moore points out, “Given the size of the world’s population there is no serious prospect that human beings can organize themselves into small autonomous groups largely isolated from each other.”⁴⁶

Regardless of the problems for anarchy which stem from the size of the world’s population, that population is not surviving at its present level of productivity. While anarchy may claim to minimize domination by other persons, it may not speak to those who feel most dominated by the needs of their bodies and their inability to control the natural world. A response to this problem will certainly require an increase in agricultural productivity in the “third world,” a goal not likely to be achieved under conditions favorable to anarchy. The food shortage will not be solved by family or community organic gardens. In addition, if people demonstrate a desire for a level of comfort beyond mere survival, a greater level of productivity and industrialization in the Third World and continued productivity in the industrial nations may be required. If anarchy implies a “polyculturalism” in which individuals are free to choose their own values, it is possible that many persons will choose to value the goods which only industrialization makes possible.

The natural and human resources of the world are not evenly distributed. As Mazor argues, we must achieve “a distribution of the world’s goods and life’s necessities equitable enough to forestall a disastrous collision.”⁴⁷ If a distribution is to be *achieved*, as Mazor says, it is absurd to think that it will occur spontaneously. If modern legal systems cannot escape the “narrowness of territoriality,” I see no reason to think that small, decentralized anarchic communities will be less narrow. Moore poses an important question: “What may happen due to the fact that some anarchist communities will be much wealthier than others and have control of resources that others require?”⁴⁸ While modern nations may have reinforced or exacerbated the world’s natural inequalities, it does not follow that

those inequalities can be reduced without political institutions. A redistribution of the world's resources may necessitate a worldwide authority, but it does not require anarchy.

If a high level of interdependence among the regions of the world did not already exist, it would have to be invented. The fact is that it does exist and its very existence makes the anarchist strategy extraordinarily risky. Given the ways in which the people of the earth depend upon each other for the exchange of goods and services, "any substantial failure of the existing technical apparatus, including the failure to staff it adequately, could, if it happened suddenly produce as many deaths as a major war, even a nuclear war if the failure were complete and prolonged."⁴⁹ And within the various regions of the world, the very existence of modern cities depends upon political systems capable of effecting transfers between the city and the countryside. Cities may be inappropriate places for genuine anarchist communities. Perhaps cities are not desirable places for human life, although (once again) a genuine polyculturalism might want to allow citizens to choose the experiences which only urban life makes possible. Nevertheless, cities do exist, and "unless one is willing to exterminate the inhabitants of the city" there may well be a need for states and laws capable of providing for their internal and external needs.⁵⁰

I have argued that the defense of anarchy which rests on a rejection of modern society faces severe difficulties which it must surmount. The defense of anarchy which claims that rational men can put aside their self-interest and act for the common good runs into its own difficulties. Human suffering cannot always be attributed to states and their legal superstructures. Some human suffering is a function of natural events, and some of the world's most severe problems result from the unintended consequences of a large set of individual choices made under relatively anarchic conditions. As Schelling puts it, "some severe problems result not from the evil of people but from their helplessness as individuals."⁵¹ The starving poor of the world are trapped in a massive "prisoner's dilemma" problem. While we preach birth control, the Indian peasant continues to propagate children in order that he have help in working his fields and in order to ensure that someone will survive to take care of him when he is too old and infirm to care for himself. The peasant may even appreciate the force of the Kantian

argument and realize that the public good would be served if he restricted his offspring. But can we or should we expect him voluntarily to sacrifice his very means of existence? Can he be morally blamed for wanting to live?

A similar problem is created by the need to defend one's community against external threats. Defense is a public good. If I remain within my community's borders, and it is (somehow) defended, I cannot be deprived of that benefit even if I have not contributed to its provision, either monetarily or bodily. Wolff suggests that "a society of anarchists . . . would be perfectly capable of choosing freely whether to defend the nation. . . ." ⁵² If the society were not capable of providing for its defense on a voluntary basis, this is reason to believe that the society should not continue to exist: "Why should a nation continue to exist if its populace does not wish to defend it?" ⁵³ Wolff suggests we contrast the "Israeli soldiers, on the one hand, and the American forces in Vietnam on the other" to grasp the point he is making. ⁵⁴ While this contrast is illuminating, it does not support his argument. There is no incompatibility (even for an Israeli) between "not wishing to defend" one's nation and also wishing that it "be defended." If Israel is a nation in which a rather significant segment of the population wishes that it be defended, it is also true that Israel does not rely on a voluntary defense force but employs a universal conscription system. Even for the noblest of purposes, even praiseworthy and public-spirited men cannot always be expected to act according to Kantian maxims.

I have argued that the objections a defender of anarchy may want to make to the defense of law run into their own difficulties when squared with the social and individual realities of the human situation. I have argued that while anarchy may indeed be possible, it does not follow that the anarchist strategy is wise. While the anarchist may be right in arguing that the state and its laws have indeed been responsible for much human suffering, it does not follow that we would, at this point, be better off without the law. Peter Berger has issued a warning which any social theory would do well to heed:

No realistic actor . . . has any reason to suppose that his projects will be realized in the way he originally imagined them. Social reality is hard, obstreperous, resistant to our wishes. Any

situation of policy making should embrace as clear an awareness as possible of the likely limits this reality will set to the intended projects . . . it will be advisable to defend these limits narrowly rather than broadly, thus possibly reducing the probability of failure. In other words, since we know so little it is wiser to act toward goals that are relatively proximate and therefore relatively calculable, than toward goals that are so broad and remote that all calculations break down. It is easier to save a village than to save the world. . . .⁵⁵

NOTES

1. Lester Mazon, *Disrespect for Law*, pp. 147-48.
2. Robert Paul Wolff, "Afterword," in Robert Paul Wolff, ed., *The Rule of Law* (New York: Simon and Schuster, 1971), p. 248.
3. Leo Tolstoy, "Patriotism and Government," in *Kingdom of God and Peace Essays*, trans. Louise and Aylmer Maude (London: Oxford University Press, 1935), reprinted in Robert Hoffman, ed., *Anarchism* (New York: Atherton Press, 1970), p. 83.
4. Mazon, p. 147.
5. Mazon, p. 145.
6. Mazon, p. 143.
7. Mazon, p. 155.
8. Mazon, p. 148.
9. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 80.
10. Mazon, p. 145.
11. Hart, *The Concept of Law*, p. 88.
12. Thomas Schelling, "On the Ecology of Micromotives," Discussion Paper No. 2. *The Public Interest* No. 24 (Fall 1971). Quotation taken from Lee Rainwater, ed., *Inequality and Justice* (Chicago: Aldine, 1974), p. 407.
13. Schelling, p. 407.
14. Robert Sherrill argues that the most plausible explanation of this nation's resistance to gun-control legislation is economic, not ideological. See *The Saturday Night Special* (New York: Charterhouse, 1973).
15. See the article on Crime in Toyko in *New York Times*, April 17, 1974.
16. *New York Times*, April 17, 1974.
17. *New York Times*, April 17, 1974. There is reason to believe that the actual difference in crime is greater than is reflected in these statistics, because there is less underreporting of crime in Tokyo than in New York.

18. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 247.
19. Robert Paul Wolff, "In Defense of Anarchism," in Eugene V. Rostow, ed., *Is Law Dead?* (New York: Simon and Schuster, 1971), p. 116.
20. Ronald Dworkin, "Philosophy and the Critique of Law," in Wolff, ed., *The Rule of Law*, pp. 164-165.
21. Dworkin, "Philosophy and the Critique of Law," p. 168.
22. While the claim that the FDA does let poisonous drugs through its screening process appears on page 150, the claim that *fewer* poisonous drugs would appear without the FDA was made in the discussion following the delivery of the paper at the 1974 Meeting of the American Society of Political and Legal Philosophy. One might argue that having to make decisions on all those items to be consumed is, itself, an infringement of our liberty. As Moore argues, "A very precious part of human freedom is that *not* to make decisions. . ." In Barrington Moore, *Reflections on the Causes of Human Misery* (Boston: Beacon Press, 1970), pp. 68-69.
23. Mazor, p. 152.
24. Lester Mazor, "The Crisis of Liberal Legalism," *Yale Law Journal* 81 [1972], p. 1050.
25. Mazor, p. 154.
26. Mazor, "The Crisis of Liberal Legalism," p. 1033.
27. Mazor, p. 155.
28. Thomas Hobbes, *Leviathan*, Chapter 11.
29. Jeffrey H. Reiman, *In Defense of Political Philosophy* (New York: Harper and Row, 1972), p. 42.
30. Mazor, p. 155.
31. Hobbes, *Leviathan*, Chapter 13.
32. Mancur Olson, Jr., *The Logic of Collective Action* (New York: Schocken Books, 1968), p. 2.
33. Derry Novak, "The Place of Anarchism in the History of Political Thought," *Review of Politics* (July 1968), reprinted in Hoffman, ed., *Anarchism*, p. 32.
34. Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970), p. 78.
35. Mazor, p. 156.
36. John Rawls, "Justice as Fairness," in Richard Flathman, ed., *Concepts in Social and Political Philosophy* (New York: Macmillan, 1973), p. 409. Rawls's article originally appeared in the *Philosophical Review*, 1958.
37. I have borrowed the raincoat example from Brian Barry's "On Social Justice," reprinted in Flathman, ed., *Concepts in Social and Political Philosophy*, pp. 422-33. The article originally appeared in *Oxford Review* (1967), pp. 29-43.

38. Barry, "On Social Justice," p. 429.
39. Mazor, p. 156.
40. Wolff, Afterword, in Wolff, ed., *The Rule of Law*, p. 252.
41. Moore, *Reflections . . .*, p. 73.
42. Mazor quite correctly argued that we are not under a "veil of ignorance" with respect to the past in his response to my comments on his paper at the 1974 Meeting of the American Society for Political and Legal Philosophy. But if we are not under a "veil of ignorance" with respect to the past, we may nevertheless be quite ignorant with regard to the future.
43. Mazor, p. 156.
44. David Wieck, "Essentials of Anarchism" in Hoffman, ed., *Anarchism*, p. 88. This article originally appeared in *Resistance*, XI (1953) pp. 4-7, 18.
45. Moore, *Reflections . . .*, p. 44.
46. Moore, *Reflections . . .*, pp. 19-20.
47. Mazor, p. 154.
48. Moore, *Reflections . . .*, p. 75.
49. Moore, *Reflections . . .*, p. 47.
50. Moore, *Reflections . . .*, p. 75.
51. Schelling, "On the Ecology of Micromotives," p. 416.
52. Wolff, *In Defense of Anarchism*, p. 80.
53. Wolff, *In Defense of Anarchism*, p. 80.
54. Wolff, *In Defense of Anarchism*, p. 80.
55. Peter Berger, *Pyramids of Sacrifice* (New York: Basic Books, 1974), p. 130.