The Voluntaryist

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The Myth Of The Rule Of Law: Part I

By John Hasnas

[Editor's Note: Due to its length, this article will be concluded in the next issue.]

I.

Stop! Before reading this Article, please take the following quiz. The First Amendment to the Constitution of the United States provides, in part: "Congress shall make no law... abridging the freedom of speech, or of the press; ..." On the basis of *your personal understanding* of this sentence's meaning (not your knowledge of constitutional law), please indicate whether you believe the following sentences to be true or false.

___ 1) In time of war, a federal statute may be passed prohibiting citizens from revealing military secrets to the enemy.

___ 2) The President may issue an executive order prohibiting public criticism of his administration.

___ 3) Congress may pass a law prohibiting museums from exhibiting photographs and paintings depicting homosexual activity.

___ 4) A federal statute may be passed prohibiting a citizen from falsely shouting "fire" in a crowded theater.

___ 5) Congress may pass a law prohibiting dancing to rock and roll music.

___ 6) The Internal Revenue Service may issue a regulation prohibiting the publication of a book explaining how to cheat on your taxes and get away with it.

___ 7) Congress may pass a statute prohibiting flag burning.

Thank you. You may now read on.

In his novel *1984*, George Orwell created a nightmare vision of the future in which an all-powerful Party exerts totalitarian control over society by forcing the citizens to master the technique of "doublethink," which requires them "to hold simultaneously two opinions which cancel out, knowing them to be contradictory and believing in both of them." Orwell's doublethink is usually regarded as a wonderful literary device, but, of course, one with no referent in reality since it is obviously impossible to believe both halves of a contradiction. In my opinion, this assessment is quite mistaken. Not only is it possible for people to believe both halves of a contradiction, it is something they do every day with no apparent difficulty.

Consider, for example, people's beliefs about the legal system. They are obviously aware that the law is inherently political. The common complaint that members of Congress are corrupt, or are legislating for their own political benefit or for that of special interest groups demonstrates that citizens understand that the laws under which they live are a product of political forces rather than the embodiment of the ideal of justice. Further, as evidenced by the political battles fought over the recent nominations of Robert Bork and Clarence Thomas to the Supreme Court, the public obviously believes that the ideology of the people who serve as judges influences the way the law is interpreted.

This, however, in no way prevents people from simultaneously regarding the law as a body of definite, politically neutral rules amenable to an impartial application which all citizens have a moral obligation to obey. Thus, they seem both surprised and dismayed to learn that the Clean Air Act might have been written, not to produce the cleanest air possible, but to favor the economic interests of the miners of dirty burning West Virginia coal (West Virginia coincidentally being the home of Robert Byrd, who was then chairman of the Senate Appropriations Committee) over those of the miners of cleaner-burning western coal. And, when the Supreme Court hands down a controversial ruling on a subject such as abortion, civil rights, or capital punishment, then, like Louis in *Casablanca*, the public is shocked, *shocked* to find that the Court may have let political considerations influence its decision. The frequent condemnation of the judiciary for "undemocratic judicial activism" or "unprincipled social engineering" is merely a reflection of the public's belief that the law consists of a set of definite and consistent "neutral principles" which the judge is obligated to apply in an objective manner, free from the influence of his or her personal political and moral beliefs.

I believe that, much as Orwell suggested, it is the public's ability to engage in this type of doublethink, to be aware that the law is inherently political in character and yet believe it to be an objective embodiment of justice, that accounts for the amazing degree to which the federal government is able to exert its control over a supposedly free people. I would argue that this ability to maintain the belief that the law

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The Myth Of The Rule Of Law: Part I

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is a body of consistent, politically neutral rules that can be objectively applied by judges in the face of overwhelming evidence to the contrary, goes a long way toward explaining citizens' acquiescence in the steady erosion of their fundamental freedoms. To show that this is, in fact, the case, I would like to direct your attention to the fiction which resides at the heart of this incongruity and allows the public to engage in the requisite doublethink without cognitive discomfort: the myth of the rule of law.

I refer to the *myth* of the rule of law because, to the extent this phrase suggests a society in which all are governed by neutral rules that are objectively applied by judges, there is no such thing. As a myth, however, the concept of the rule of law is both powerful and dangerous. Its power derives from its great emotive appeal. The rule of law suggests an absence of arbitrariness, an absence of the worst abuses of tyranny. The image presented by the slogan "America is a government of laws and not people" is one of fair and impartial rule rather than subjugation to human whim. This is an image that can command both the allegiance and affection of the citizenry. After all, who wouldn't be in favor of the rule of law if the only alternative were arbitrary rule? But this image is also the source of the myth's danger. For if citizens really believe that they are being governed by fair and impartial rules and that the only alternative is subjection to personal rule, they will be much more likely to support the state as it progressively curtails their freedom.

In this Article, I will argue that this is a false dichotomy. Specifically, I intend to establish three points: 1) there is no such thing as a government of law and not people, 2) the belief that there is serves to maintain public support for society's power structure, and 3) the establishment of a truly free society requires the abandonment of the myth of the rule of law.

II.

Imagine the following scene. A first-year contracts course is being taught at the prestigious Harvard Law School. The professor is a distinguished scholar with a national reputation as one of the leading experts on Anglo-American contract law. Let's call him Professor Kingsfield. He instructs his class to research the following hypothetical for the next day.

> A woman living in a rural setting becomes ill and calls her family physician, who is also the only local doctor, for help. However, it is Wednesday, the doctor's day off and because she has a golf date, she does not respond. The woman's condition worsens and because no other physician can be procured in time, she dies. Her estate then sues the doctor for not coming to her aid. Is the doctor liable?

Two of the students, Arnie Becker and Ann Kelsey, resolve to make a good impression on Kingsfield should they be called on to discuss the case. Arnie is a somewhat conservative, considerably egocentric individual. He believes that doctors are human beings, who like anyone else, are entitled to a day off, and that it would be unfair to require them to be at the beck and call of their patients. For this reason, his initial impression of the solution to the hypothetical is that the doctor should not be liable. Through his research, he discovers the case of *Hurley v. Eddingfield*, which establishes the rule that in the absence of an explicit contract, i.e., when there has been no actual meeting of the minds, there can be no liability. In the hypothetical, there was clearly no meeting of the minds. Therefore, Arnie concludes that his initial impression was correct and that the doctor is not legally liable. Since he has found a valid rule of law which clearly applies to the facts of the case, he is confident that he is prepared for tomorrow's class.

Ann Kelsey is politically liberal and considers herself to be a caring individual. She believes that when doctors take the Hippocratic oath, they accept a special obligation to care for the sick, and that it would be wrong and set a terrible example for doctors to ignore the needs of regular patients who depend on them. For this reason, her initial impression of the solution to the hypothetical is that the doctor should be liable. Through her research, she discovers the case of *Cotnam v. Wisdom*, which establishes the rule that in the absence of an explicit contract, the law will imply a contractual relationship where such is necessary to avoid injustice. She believes that under the facts of the hypothetical, the failure to imply a contractual relationship would be obviously unjust. Therefore, she concludes that her initial impression was correct and that the doctor is legally liable. Since she has found a valid rule of law which clearly applies to the facts of the case, she is confident that she is prepared for tomorrow's class.

The following day, Arnie is called upon and pre-

sents his analysis. Ann, who knows she has found a sound legal argument for exactly the opposite outcome, concludes that Arnie is a typical privileged white male conservative with no sense of compassion, who has obviously missed the point of the hypothetical. She volunteers, and when called upon by Kingsfield criticizes Arnie's analysis of the case and presents her own. Arnie, who knows he has found a sound legal argument for his position, concludes that Ann is a typical female bleeding-heart liberal, whose emotionalism has caused her to miss the point of the hypothetical. Each expects Kingsfield to confirm his or her analysis and dismiss the other's as the misguided bit of illogic it so obviously is. Much to their chagrin, however, when a third student asks, "But who is right, Professor?," Kingsfield gruffly responds, "When you turn that mush between your ears into something useful and begin to think like a lawyer, you will be able to answer that question for yourself" and moves on to another subject.

What Professor Kingsfield knows but will never reveal to the students is that both Arnie's and Ann's analyses are correct. How can this be?

III.

What Professor Kingsfield knows is that the legal world is not like the real world and the type of reasoning appropriate to it is distinct from that which human beings ordinarily employ. In the real world, people usually attempt to solve problems by forming hypotheses and then testing them against the facts as they know them. When the facts confirm the hypotheses, they are accepted as true, although subject to reevaluation as new evidence is discovered. This is a successful method of reasoning about scientific and other empirical matters because the physical world has a definite, unique structure. It works because the laws of nature are consistent. In the real world, it is entirely appropriate to assume that once you have confirmed your hypothesis, all other hypotheses inconsistent with it are incorrect.

In the legal world, however, this assumption does not hold. This is because unlike the laws of nature, political laws are not consistent. The law human beings create to regulate their conduct is made up of incompatible, contradictory rules and principles; and, as anyone who has studied a little logic can demonstrate, *any* conclusion can be validly derived from a set of contradictory premises. This means that a logically sound argument can be found for any legal conclusion.

When human beings engage in legal reasoning, they usually proceed in the same manner as they do when engaged in empirical reasoning. They begin with a hypothesis as to how a case should be decided and test it by searching for a sound supporting argument. After all, no one can "reason" directly to an unimagined conclusion. Without some end in view, there is no way of knowing what premises to employ or what direction the argument should take. When a sound argument is found, then, as in the case of empirical reasoning, one naturally concludes that one's legal hypothesis has been shown to be correct, and further, *that all competing hypotheses are therefore incorrect.*

This is the fallacy of legal reasoning. Because the legal world is comprised of contradictory rules, there will be sound legal arguments available not only for the hypothesis one is investigating, but for other, competing hypotheses as well. The assumption that there is a unique, correct resolution, which serves so well in empirical investigations, leads one astray when dealing with legal matters. Kingsfield, who is well aware of this, knows that Arnie and Ann have both produced legitimate legal arguments for their competing conclusions. He does not reveal this knowledge to the class, however, because the fact that this is possible is precisely what his students must discover for themselves if they are ever to learn to "think like a lawyer." ...

VI.

I have been arguing that the law is not a body of determinate rules that can be objectively and impersonally applied by judges; that what the law prescribes is necessarily determined by the normative predispositions of the one who is interpreting it. In short, I have been arguing that law is *inherently* political. If you, my reader, are like most people, you are far from convinced of this. In fact, I dare say I can read your thoughts. You are thinking that even if I have shown that the present legal system is somewhat indeterminate, I certainly have not shown that the law is inherently political. Although you may agree that the law as presently constituted is too vague or contains too many contradictions, you probably believe that this state of affairs is due to the actions of the liberal judicial activists, or the Reaganite adherents of the doctrine of original intent, or the self-saving politicians, or the _____ *(feel free to fill in your favorite candidate for the group that is responsible for the legal system's ills).* However, you do not believe that the law *must* be this way, that it can never be definite and politically neutral. You believe that the law can be reformed; that to bring about an end to political strife and institute a true rule of law, we merely need to create a legal system comprised of consistent rules that are expressed in clear, definite language.

It is my sad duty to inform you that this cannot be done. Even with all the good will in the world, we could not produce such a legal code because there is simply no such thing as uninterpretable language. Now I could attempt to convince you of this by the conventional method of regaling you with myriad examples of the manipulation of legal language (e.g., an account of how the relatively straightforward language of the Commerce Clause giving Congress

the power to "regulate Commerce... among the several States has been interpreted to permit the regulation of both farmers growing wheat for use on their own farms and the nature of male-female relationships in all private businesses that employ more than fifteen persons). However, I prefer to try a more direct approach. Accordingly, let me direct your attention to the quiz you completed at the beginning of this Article. Please consider your responses.

If your response to question one was "True," you chose to interpret the word "no" as used in the First Amendment to mean "some."

If your response to question two was "False," you chose to interpret the word "Congress" to refer to the President of the United States and the word "law" to refer to an executive order.

If your response to question three was "False," you chose to interpret the words "speech" and "press" to refer to the exhibition of photographs and paintings.

If your response to question four was "True," you have underscored your belief that the word "no" really means "some."

If your response to question five was "False," you chose to interpret the words "speech" and "press" to refer to dancing to rock and roll music.

If your response to question six was "False," you chose to interpret the word "Congress" to refer to the Internal Revenue Service and the word "law" to refer to an IRS regulation.

If your response to question seven was "False," you chose to interpret the words "speech" and "press" to refer to the act of burning a flag.

Unless your responses were: 1) False, 2) True, 3) True, 4) False, 5) True, 6) True, and 7) True, you chose to interpret at least one of the words "Congress," "no," "law," "speech," and "press" in what can only be described as something other than its ordinary sense. Why did you do this? Are your responses based on the "plain meaning" of the words or on certain normative beliefs you hold about the extent to which the federal government should be allowed to interfere with citizens' expressive activities? Are your responses objective and neutral or are they influenced by your "politics"?

I chose this portion of the First Amendment for my example because it contains the clearest, most definite legal language of which I am aware. If a provision as clearly drafted as this may be subjected to political interpretation, what legal provision may not be? But this explains why the legal system cannot be reformed to consist of a body of definite rules yielding unique, objectively verifiable resolutions of cases. What a legal rule means is always determined by the political assumptions of the person applying it.

VII.

Let us assume that I have failed to convince you of the impossibility of reforming the law into a body of definite, consistent rules that produces determinate results. Even if the law could be reformed in this way, *it clearly should not be.* There is nothing perverse in the fact that the law is indeterminate. Society is not the victim of some nefarious conspiracy to undermine legal certainty to further ulterior motives. As long as law remains a state monopoly, as long as it is created and enforced exclusively through governmental bodies, it must remain indeterminate if it is to serve its purpose. Its indeterminacy gives the law its flexibility. And since, as a monopoly product, the law must apply to all members of society in a one-size fits-all manner, flexibility is its most essential feature.

It is certainly true that one of the purposes of law is to ensure a stable social environment, to provide order. But not just *any* order will suffice. Another purpose of the law must be to do justice. The goal of the law is to provide a social environment which is both orderly and just. Unfortunately, these two purposes are always in tension. For the more definite and rigidly-determined the rules of law become, the less the legal system is able to do justice to the individual. Thus, if the law were fully determinate, it would have no ability to consider the equities of the particular case. This is why even if we could reform the law to make it wholly definite and consistent, we should not.

Consider one of the favorite proposals of those who disagree. Those who believe that the law can and should be rendered fully determinate usually propose that contracts be rigorously enforced. Thus, they advocate a rule of law stating that in the absence of physical compulsion or explicit fraud, parties should be absolutely bound to keep their agreements. They believe that as long as no rules inconsistent with this definite, clearly-drawn provision are allowed to enter the law, politics may be eliminated from contract law and commercial transactions greatly facilitated.

Let us assume, contrary to fact, that the terms "fraud" and "physical compulsion" have a plain meaning not subject to interpretation. The question then becomes what should be done about Agnes Syester. Agnes was "a lonely and elderly widow who fell for the blandishments and flattery of those who" ran an Arthur Murray Dance Studio in Des Moines, Iowa. This studio used some highly innovative sales techniques to sell this 68-year-old woman 4,057 hours of dance instruction, including three life memberships and a course in Gold Star dancing, which was "the type of dancing done by Ginger Rogers and Fred Astaire only about twice as difficult," for a total cost of $33,497 in 1960 dollars. Of course, Agnes did voluntarily agree to purchase that number of hours. Now, in a case such as this, one might be tempted to "interpret" the overreaching and unfair sales practices of the studio as fraudulent and allow Agnes to recover her money. However, this is precisely the sort of solution that our reformed, determinate contract law is designed to outlaw. Therefore, it would seem

that since Agnes has voluntarily contracted for the dance lessons, she is liable to pay the full amount for them. This might seem to be a harsh result for Agnes, but from now on, vulnerable little old ladies will be on notice to be more careful in their dealings.

Or consider a proposal that is often advanced by those who wish to render probate law more determinate. They advocate a rule of law declaring a handwritten will that is signed before two witnesses to be absolutely binding. They believe that by depriving the court of the ability to "interpret" the state of mind of the testator, the judges' personal moral opinions may be eliminated from the law and most probate matters brought to a timely conclusion. Of course, the problem then becomes what to do with Elmer Palmer, a young man who murdered his grandfather to gain the inheritance due him under the old man's will a bit earlier than might otherwise have been the case. In a case such as this, one might be tempted to deny Elmer the fruits of his nefarious labor despite the fact that the will was validly drawn, by appealing to the legal principle that no one should profit from his or her own wrong. However, this is precisely the sort of vaguely-expressed counter-rule that our reformers seek to purge from the legal system in order to ensure that the law remains consistent. Therefore, it would seem that although Elmer may spend a considerable amount of time behind bars, he will do so as a wealthy man. This may send a bad message to other young men of Elmer's temperament, but from now on the probate process will be considerably streamlined.

The proposed reforms certainly render the law more determinate. However, they do so by eliminating the law's ability to consider the equities of the individual case. This observation raises the following interesting question: If this is what a determinate legal system is like, who would want to live under one? The fact is that the greater the degree of certainty we build into the law, the less able the law becomes to do justice. For this reason, a monopolistic legal system composed entirely of clear, consistent rules could not function in a manner acceptable to the general public. It could not serve as a system of justice.

VIII.

I have been arguing that the law is inherently indeterminate, and further, that this may not be such a bad thing. I realize, however, that you may still not be convinced. Even if you are now willing to admit that the law is somewhat indeterminate, you probably believe that I have vastly exaggerated the degree to which this is true. After all, it is obvious that the law cannot be radically indeterminate. If this were the case, the law would be completely unpredictable. Judges hearing similar cases would render wildly divergent decisions. There would be no stability or uniformity in the law. But, as imperfect as the current legal system may be, this is clearly not the case.

The observation that the legal system is highly stable is, of course, correct, but it is a mistake to believe that this is because the law is determinate. The stability of the law derives not from any feature of the law itself, but from the overwhelming uniformity of ideological background among those empowered to make legal decisions. Consider who the judges are in this country. Typically, they are people from a solid middle- to upper-class background who performed well at an appropriately prestigious undergraduate institution; demonstrated the ability to engage in the type of analytical reasoning that is measured by the standardized Law School Admissions Test; passed through the crucible of law school, complete with its methodological and political indoctrination; and went on to high-profile careers as attorneys, probably with a prestigious Wall Street-style law firm. To have been appointed to the bench, it is virtually certain that they were both politically moderate and well-connected, and, until recently, white males of the correct ethnic and religious pedigree. It should be clear that, culturally speaking, such a group will tend to be quite homogeneous, sharing a great many moral, spiritual, and political beliefs and values. Given this, it can hardly be surprising that there will be a high degree of agreement among judges as to how cases ought to be decided. But this agreement is due to the common set of normative presuppositions the judges share, not some immanent, objective meaning that exists within the rules of law.

In fact, however, the law is not truly stable, since it is continually, if slowly, evolving in response to changing social mores and conditions. This evolution occurs because each new generation of judges brings with it its own set of "progressive" normative assumptions. As the older generation passes from the scene, these assumptions come to be shared by an ever-increasing percentage of the judiciary. Eventually, they become the consensus of opinion among judicial decisionmakers, and the law changes to reflect them. Thus, a generation of judges that regarded "separate but equal" as a perfectly legitimate interpretation of the Equal Protection Clause of the Fourteenth Amendment gave way to one which interpreted that clause as prohibiting virtually all governmental actions that classify individuals by race, which, in turn, gave way to one which interpreted the same language to permit "benign" racial classifications designed to advance the social status of minority groups. In this way, as the moral and political values conventionally accepted by society change over time, so too do those embedded in the law.

The law *appears* to be stable because of the slowness with which it evolves. But the slow pace of legal development is not due to any inherent characteristic of the law itself. Logically speaking, any conclusion, however radical, is derivable from the rules

of law. It is simply that, even between generations, the range of ideological opinion represented on the bench is so narrow that anything more than incremental departures from conventional wisdom and morality will not be respected within the profession. Such decisions are virtually certain to be overturned on appeal, and thus, are rarely even rendered in the first instance.

Confirming evidence for this thesis can be found in our contemporary judicial history. Over the past quarter-century, the "diversity" movement has produced a bar, and concomitantly a bench, somewhat more open to people of different racial, sexual, ethnic, and socio-economic backgrounds. To some extent, this movement has produced a judiciary that represents a broader range of ideological viewpoints than has been the case in the past. Over the same time period, we have seen an accelerated rate of legal change. Today, long-standing precedents are more freely overruled, novel theories of liability are more frequently accepted by the courts, and different courts hand down different, and seemingly irreconcilable, decisions more often. In addition, it is worth noting that recently, the chief complaint about the legal system seems to concern the degree to which it has become "politicized." This suggests that as the ideological solidarity of the judiciary breaks down, so too does the predictability of legal decisionmaking, and hence, the stability of the law. Regardless of this trend, I hope it is now apparent that to assume that the law is stable because it is determinate is to reverse cause and effect. Rather, it is because the law is basically stable that it appears to be determinate. It is not rule of law that gives us a stable legal system; it is the stability of the culturally shared values of the judiciary that gives rise to and supports the myth of the rule of law.

IX.

It is worth noting that there is nothing new or startling about the claim that the law is indeterminate. This has been the hallmark of the Critical Legal Studies movement since the mid-1970s. The "Crits," however, were merely reviving the earlier contention of the legal realists who made the same point in the 1920s and 30s. And the realists were themselves merely repeating the claim of earlier jurisprudential thinkers. For example, as early as 1897, Oliver Wendell Holmes had pointed out:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

This raises an interesting question. If it has been known for 100 years that the law does not consist of a body of determinate rules, why is the belief that it does still so widespread? If four generations of jurisprudential scholars have shown that the rule of law is a myth, why does the concept still command such fervent commitment? The answer is implicit in the question itself, for the question recognizes that the rule of law is a myth and like all myths, it is designed to serve an emotive, rather than cognitive, function. The purpose of a myth is not to persuade one's reason, but to enlist one's emotions in support of an idea. And this is precisely the case for the myth of the rule of law; its purpose is to enlist the emotions of the public in support of society's political power structure.

People are more willing to support the exercise of authority over themselves when they believe it to be an objective, neutral feature of the natural world. This was the idea behind the concept of the divine right of kings. By making the king appear to be an integral part of God's plan for the world rather than an ordinary human being dominating his fellows by brute force, the public could be more easily persuaded to bow to his authority. However, when the doctrine of divine right became discredited, a replacement was needed to ensure that the public did not view political authority as merely the exercise of naked power. That replacement is the concept of the rule of law.

People who believe they live under "a government of laws and not people" tend to view their nation's legal system as objective and impartial. They tend to see the rules under which they must live not as expressions of human will, but as embodiments of neutral principles of justice, i.e., as natural features of the social world. Once they believe that they are being commanded by an impersonal law rather than other human beings, they view their obedience to political authority as a public-spirited acceptance of the requirements of social life rather than mere acquiescence to superior power. In this way, the concept of the rule of law functions much like the use of the passive voice by the politician who describes a delict on his or her part with the assertion "mistakes were made." It allows people to hide the agency of power behind a facade of words; to believe that it is the law which compels their compliance, not self-aggrandizing politicians, or highly capitalized special interests, or wealthy white Anglo-Saxon Protestant males, or _____ *(fill in your favorite culprit).*

But the myth of the rule of law does more than render the people submissive to state authority; it also turns them into the state's accomplices in the exercise of its power. For people who would ordinarily consider it a great evil to deprive individuals of their rights or oppress politically powerless minority groups will respond with patriotic fervor when these

same actions are described as upholding the rule of law.

Consider the situation in India toward the end of British colonial rule. At that time, the followers of Mohandas Gandhi engaged in nonviolent civil disobedience by manufacturing salt for their own use in contravention of the British monopoly on such manufacture. The British administration and army responded with mass imprisonments and shocking brutality. It is difficult to understand this behavior on the part of the highly moralistic, ever-so-civilized British unless one keeps in mind that they were able to view their activities not as violently repressing the indigenous population, but as upholding the rule of law.

The same is true of the violence directed against the nonviolent civil rights protectors in the American South during the civil rights movement. Although much of the white population of the southern states held racist belief, one cannot account for the overwhelming support given to the violent repression of these protests on the assumption that the vast majority of the white Southerners were sadistic racists devoid of moral sensibilities. The true explanation is that most of these people are able to view themselves not as perpetuating racial oppression and injustice, but as upholding the rule of law against criminals and outside agitators. Similarly, since despite the '60s rhetoric, all police officers are not "fascist pigs," some other explanation is needed for their willingness to participate in the "police riot" at the 1968 Democratic convention, or the campaign of illegal arrests and civil rights violations against those demonstrating in Washington against President Nixon's policies in Vietnam, or the effort to infiltrate and destroy the sanctuary movement that sheltered refugees from Salvadorian death squads during the Reagan era or, for that matter, the attack on and destruction of the Branch Davidian compound in Waco. It is only when these officers have fully bought into the myth that "we are a government of laws and not people," when they truly believe that their actions are commanded by some impersonal body of just rules, that they can fail to see that they are the agency used by those in power to oppress others.

The reason why the myth of the rule of law has survived for 100 years despite the knowledge of its falsity is that it is too valuable a tool to relinquish. The myth of impersonal government is simply the most effective means of social control available to the state. ...

(To be concluded in the next issue)

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What Holds The System Together?

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tions and two-party system could never survive if they depended upon the army and the police to enforce them. They survive because participants have a belief in the system and a feeling of obligation to play according to the rules. Hocart has said that government depends on "spontaneous and incessant goodwill. Without it governments would collapse."

De la Boetie, Machiavelli and Spooner among others would add however, that in any system of government submission is induced by fear and fraud. In THE POLITICS OF OBEDIENCE: THE DISCOURSE OF VOLUNTARY SERVITUDE Etienne de la Boetie devotes himself entirely to the question of why people submit to rulers. He makes the following points:

1 People submit because they are born serfs and are reared as such.
2 People are tricked into servitude by the provision of feasts and circuses by their masters and because they are mystified by ritual practices and religious dogmas which aim to hide the vileness of rulers, imbue reverence and adoration as well as servility.
3 The 'mainspring' of domination is not physical force so much as it is chain effect: the ruler has five or six who are his confidants and under his control; they in turn control 600 and these in their turn control 6,000. "The consequence of all this is fatal indeed. And whoever is pleased to unwind the skein will observe that not the six thousand but a hundred thousand, and even millions, cling to the tyrant by this cord to which they are tied. According to Homer, Jupiter boasts of being able to draw to himself all the gods when he pulls a chain."

Also suggestive of why people obey is Lysander Spooner's classification of "ostensible supporters of a constitution": knaves, dupes and those who see the evil of government but do not know how to get rid of it or do not wish to gamble their personal interests in attempting to do so.

In anarchy there is no such delusion for there is a priority placed upon individual freedom which is absent in democracy. Democracy—granted its concern for liberty and individualism—nevertheless like any other system of rule, puts its ultimate priority in the preservation of the state. When in a democracy one group threatens to withdraw—to secede—there is always the final recourse to a 'war measures' act to compel compliance and suppress 'rebellion'. To summarize, order in the anarchic polity, is founded in diffuse sanctions. It is maintained through self-help, self-regulation and self-restraint and these devices are channeled by fear as well as by the motivation to make the system work and to play the game with a minimum of friction.

—Harold Barclay, PEOPLE WITHOUT GOVERNMENT (1982, pp. 116-117).

What Holds The System Together?

Those who are used to living in society governed by policemen and legal sanctions often fail to appreciate the significance of the sense of obligation to play the game as motivating force for social order even within their own society. We must not forget that in all human societies most members chose to follow rules because they want to and because they believe in them. The would resist any attempt to lead them into nonconformity. In any society, sanctions of whatever kind are for the tiny minority. Were all law enforcement to be removed tomorrow there would probably be an initial burst of crime, but after the novelty wore off it would dissipate. At same time, the vast majority would not be involved, but would go about its business as usual. To hold, as some apparently do, that were the law to be removed there would occur some momentous explosion of brutish and murderous behavior among all the populace is, in the first place grossly to overestimate the present power of the police. More importantly, it is grossly to underestimate the years of conditioning about right and wrong to which all have been exposed and the power of the internalized censor or conscience.

In those cases where traditional techniques for social control have been removed suddenly, or greatly relaxed, two consequences are noteworthy. One is the extent to which voluntary mutual aid spontaneously appears and spreads—people begin helping each other. The other consequence is the opposite response—the one the 'law and order' supporters would predict. That is, there is rioting, looting and mayhem. But the reason for this reaction is not because there is no police to keep order. The reason is suggested by the kinds of people who engage in such behavior. The people are definitely not the members of society who have prospered from it, nor are they the ones in positions of prestige, power and influence. On, the contrary, they are always from the ranks of the disadvantaged and frustrated. And the revolt—which is what it is—is an tempt at catharsis, to relieve pent up aggression and hostility generated by a system perceived to be oppressive (whether it is 'in fact' oppressive is beside the point; it is seen to be such and that is what counts).

It is an error to think of humans as 'naturally' good; it is equally erroneous to condemn them as monsters. And radicals, of all people, should appreciate the extent to which people are conformists.

Some criticize anarchy because its only cement is something of the order of moral obligation or voluntary cooperation. But democracy, too, ultimately works in part because of the same cement. And it works best where the cement is the strongest. That is, democracy ultimately does not operate only because of the presence of a police force. The free elec-

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