The Voluntaryist

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The Myth Of The Rule Of Law: Part II

By John Hasnas

[Editor's Note: Part I of this article appeared in the previous issue.]

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. ...

XI.

What is the significance of these observations? Are we condemned to a continual political struggle for control of the legal system? Well, yes; as long as the law remains a state monopoly, we are. But I would ask you to note that this is a conditional statement while you consider the following parable.

A long time ago in a galaxy far away, there existed a parallel Earth that contained a nation called Monosizea. Monosizea was remarkably similar to the present-day United States. It had the same level of technological development, the same social problems, and was governed by the same type of common law legal system. In fact, Monosizea had a federal constitution that was identical to that of the United States in all respects except one. However, that distinction was quite an odd one. For some reason lost to history, the Monosizean founding fathers had included a provision in the constitution that required all shoes manufactured or imported into Monosizea to be the same size. The particular size could be determined by Congress, but whatever size was selected represented the only size shoe permitted in the country.

As you may imagine, in Monosizea, shoe size was a serious political issue. Although there were a few radical fringe groups which argued for either extremely small or extremely large sizes, Monosizea was essentially a two-party system with most of the electorate divided between the Liberal Democratic party and the Conservative Republican party. The Liberal Democratic position on shoe size was that social justice demanded the legal size to be a large size such as a nine or ten. They presented the egalitarian argument that everyone should have equal access to shoes, and that this could only be achieved by legislating a large shoe size. After all, people with small feet could still use shoes that were too large (even if they did have to stuff some newspaper into them), but people with large feet would be completely disenfranchised if the legal size was a small one. Interestingly, the Liberal Democratic party contained a larger than average number of people who were tall. The Conservative Republican position on shoe size was that respect for family values and the traditional role of government required that the legal size be a small size such as a four or five. They presented the moralistic argument that society's obligation to the next generation and government's duty to protect the weak demanded that the legal size be set so that children could have adequate footwear. They contended that children needed reasonably well-fitting shoes while they were in their formative years and their feet were tender. Later, when they were adults and their feet were fully developed, they would be able to cope with the rigors of barefoot life. Interestingly, the Conservative Republican party contained a larger than average number of people who were short.

Every two years as congressional elections approached, and especially when this corresponded with a presidential election, the rhetoric over the shoe size issue heated up. The Liberal Democrats would accuse the Conservative Republicans of being under the control of the fundamentalist Christians and of intolerantly attempting to impose their religious values on society. The Conservative Republicans would accuse the Liberal Democrats of being misguided, bleeding-heart do-gooders who were either the dupes of the socialists or socialists themselves. However, after the elections, the shoe size legislation actually hammered out by the President and Congress always seemed to set the legal shoe size close to a seven, which was the average foot size in Monosizea. Further, this legislation always defined the size in broad terms so that it might encompass a size or two on either side, and authorized the manufacture of shoes made of extremely flexible materials that could stretch or contract as necessary. For this reason, most average-sized Monosizeans, who were predominantly politically moderate, had acceptable footwear. This state of affairs seemed quite natural to everyone in Monosizea except a boy named Socrates. Socrates was a pensive, shy young man who, when not reading a book, was often lost in thought. His contemplative nature caused his parents to think of him as a dreamer, his schoolmates to think of him as a nerd, and everyone else to think of him as a bit odd. One day, after learning about the Monosizean

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The Myth Of The Rule Of Law: Part II

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Constitution in school and listening to his parents discuss the latest public opinion poll on the shoe size issue, Socrates approached his parents and said:

> I have an idea. Why don't we amend the constitution to permit shoemakers to manufacture and sell more than one size shoe. Then everyone could have shoes that fit and we wouldn't have to argue about what the legal shoe size should be anymore.

Socrates' parents found his naive idealism amusing and were proud that their son was so imaginative. For this reason, they tried to show him that his idea was a silly one in a way that would not discourage him from future creative thinking. Thus, Socrates' father said:

> That's a very interesting idea, son, but it's simply not practical. There's always been only one size shoe in Monosizea, so that's just the way things have to be. People are used to living this way, and you can't fight city hall. I'm afraid your idea is just too radical.

Although Socrates eventually dropped the subject with his parents, he was never satisfied with their response. During his teenage years, he became more interested in politics and decided to take his idea to the Liberal Democrats. He thought that because they believed all citizens are entitled to adequate footwear, they would surely see the value of his proposal. However, although they seemed to listen with interest and thanked him for his input, they were not impressed with his idea. As the leader of the local party explained:

> Your idea is fine in theory, but it will never work in practice. If manufacturers could make whatever size shoes they wanted, consumers would be at the mercy of unscrupulous business people. Each manufacturer would set up his or her own scale of sizes and consumers would have no way of determining what their foot size truly was. In such a case, profit-hungry shoe sales people could easily trick the unwary consumer into buying the wrong size. Without the government setting the size, there would be no guarantee that any shoe was really the size it purported to be. We simply cannot abandon the public to the vicissitudes of an unregulated market in shoes.

To Socrates' protests that people didn't seem to be exploited in other clothing markets and that the shoes manufactured under the present system didn't really fit very well anyway, the party leader responded:

> The shoe market is unique. Adequate shoes are absolutely essential to public welfare. Therefore, the ordinary laws of supply and demand cannot be relied upon. And even if we could somehow get around the practical problems, your idea is simply not politically feasible. To make any progress, we must focus on what can actually be accomplished in the current political climate. If we begin advocating radical constitutional changes, we'll be routed in the next election.

Disillusioned by this response, Socrates approached the Conservative Republicans with his idea, explaining that if shoes could be manufactured in any size, all children could be provided with the well- fitting shoes they needed. However, the Conservative Republicans were even less receptive than the liberal Democrats had been. The leader of their local party responded quite contemptuously, saying:

> Look, Monosizea is the greatest, freest country on the face of the planet, and it's respect for our traditional values that has made it that way. Our constitution is based on these values, and it has served us well for the past 200 years. Who are you to question the wisdom of the founding fathers? If you don't like it in this country, why don't you just leave?

Somewhat taken aback, Socrates explained that he respected the Monosizean Constitution as much as they did, but that did not mean it could not be improved. Even the founding fathers included a process by which it could be amended. However, this did nothing to ameliorate the party leader's disdain. He responded:

> It's one thing to propose amending the constitution; it's another to undermine it entirely. Doing away with the shoe size provision would rend the very fabric of our society. If people could make whatever size shoes they wanted whenever they wanted, there would be no way to maintain order in the industry. What you're proposing is not liberty, it's license. Were we to adopt your proposal, we would be abandoning the rule of law itself. Can't you see that what you are advocating is not freedom, but anarchy?

After this experience, Socrates came to realize that there was no place for him in the political realm. As a result, he went off to college where he took up the study of philosophy. Eventually, he got a Ph.D., became a philosophy professor, and was never heard from again.

So, what is the point of this outlandish parable? I stated at the beginning of this section that as long as the law remains a state monopoly, there will always be a political struggle for its control. This sounds like a cynical conclusion because we naturally assume that the law is necessarily the province of the state. Just as the Monosizeans could not conceive of a world in which shoe size was not set by the government, we cannot conceive of one in which law is not provided exclusively by it. But what if we are wrong? What if, just as Monosizea could eliminate the politics of shoe size by allowing individuals to produce and buy whatever size shoes they pleased, we could eliminate the politics of law by allowing individuals to adopt whatever rules of behavior best fit their needs? What if law is not a unique product that must be supplied on a one-size-fits-all basis by the state, but one which could be adequately supplied by the ordinary play of market forces? What if we were to try Socrates' solution and end the monopoly of law?

XII.

The problem with this suggestion is that most people are unable to understand what it could possibly mean. This is chiefly because the language necessary to express the idea clearly does not really exist. Most people have been raised to identify law with the state. They cannot even conceive of the idea of legal services apart from the government. The very notion of a free market in legal services conjures up the image of anarchic gang warfare or rule by organized crime. In our system, an advocate of free market law is treated the same way Socrates was treated in Monosizea, and is confronted with the same types of arguments.

The primary reason for this is that the public has been politically indoctrinated to fail to recognize the distinction between order and law. Order is what people need if they are to live together in peace and security. Law, on the other hand, is a particular method of producing order. As it is presently constituted, law is the production of order by requiring all members of society to live under the same set of state-generated rules; it is order produced by centralized planning. Yet, from childhood, citizens are taught to invariably link the words "law" and "order." Political discourse conditions them to hear and use the terms as though they were synonymous and to express the desire for a safer, more peaceful society as a desire for "law and order."

The state nurtures this confusion because it is the public's inability to distinguish order from law that generates its fundamental support for the state. As long as the public identifies order with law, it will believe that an orderly society is impossible without the law the state provides. And as long as the public believes this, it will continue to support the state almost without regard to how oppressive it may become.

The public's identification of order with law makes it impossible for the public to ask for one without asking for the other. There is clearly a public demand for an orderly society. One of human beings' most fundamental desires is for a peaceful existence secure from violence. But because the public has been conditioned to express its desire for order as one for law, all calls for a more orderly society are interpreted as calls for more law. And since under our current political system, all law is supplied by the state, all such calls are interpreted as calls for a more active and powerful state. The identification of order with law eliminates from public consciousness the very concept of the decentralized provision of order. With regard to legal services, it renders the classical liberal idea of a market-generated, spontaneous order incomprehensible.

I began this Article with a reference to Orwell's concept of doublethink. But I am now describing the most effective contemporary example we have of Orwellian "newspeak," the process by which words are redefined to render certain thoughts unthinkable. Were the distinction between order and law well-understood, the question of whether a state monopoly of law is the best way to ensure an orderly society could be intelligently discussed. But this is precisely the question that the state does not wish to see raised. By collapsing the concept of order into that of law, the state can ensure that it is not, for it will have effectively eliminated the idea of a non-state generated order from the public mind. Under such circumstances, we can hardly be surprised if the advocates of a free market in law are treated like Socrates of Monosizea.

XIII.

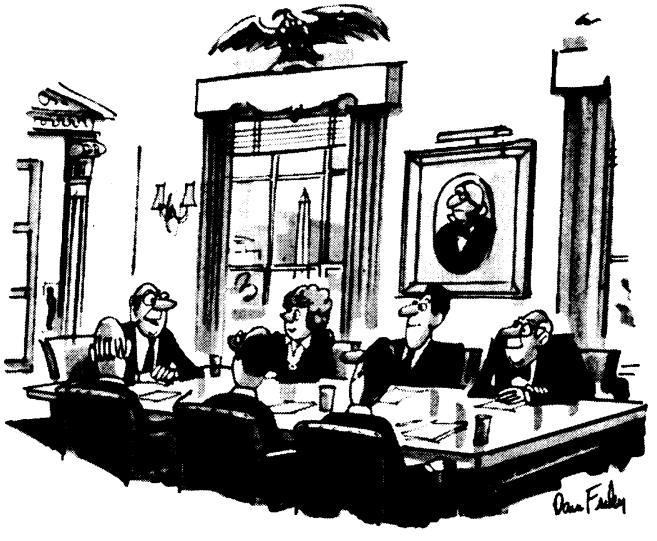
I am aware that this explanation probably appears as initially unconvincing as was my earlier contention that the law is inherently political. Even if you found my Monosizea parable entertaining, it is likely that you regard it as irrelevant. You probably believe that the analogy fails because shoes are qualitatively different from legal services. After all, law is a public good which, unlike shoes, really is crucial to public welfare. It is easy to see how the free market can adequately supply the public with shoes. But how can it possibly provide the order-generating and maintaining processes necessary for the peaceful coexistence of human beings in society? What would a free market in legal services be like?

I am always tempted to give the honest and accurate response to this challenge, which is that to ask

the question is to miss the point. If human beings had the wisdom and knowledge-generating capacity to be able to describe how a free market would work, that would be the strongest possible argument for central planning. One advocates a free market not because of some moral imprimatur written across the heavens, but because it is impossible for human beings to amass the knowledge of local conditions and the predictive capacity necessary to effectively organize economic relationships among millions of individuals. It is possible to describe what a free market in shoes would be like *because we have one.* But such a description is merely an observation of the current state of a functioning market, not a projection of how human beings would organize themselves to supply a currently non-marketed good. To demand that an advocate of free market law (or Socrates of Monosizea, for that matter) describe in advance how markets would supply legal services (or shoes) is to issue an impossible challenge. Further, for an advocate of free market law (or Socrates) to even accept this challenge would be to engage in self-defeating activity since the more successfully he or she could describe how the law (or shoe) market would function, the more he or she would prove that it could be run by state planners. Free markets supply human wants better than state monopolies precisely because they allow an unlimited number of suppliers to attempt to do so. By patronizing those who most effectively meet their particular needs and causing those who do not to fail, consumers determine the optimal method of supply. If it were possible to specify in advance what the outcome of this process of selection would be, there would be no need for the process itself.

Although I am tempted to give this response, I never do. This is because, although true, it never persuades. Instead, it is usually interpreted as an appeal for blind faith in the free market, and the failure to provide a specific explanation as to how such a market would provide legal services is interpreted as proof that it cannot. Therefore, despite the self-defeating nature of the attempt, I usually do try to suggest how a free market in law might work.

So, what would a free market in legal services be like? As Sherlock Holmes would regularly say to the good doctor, "You see, Watson, but you do not observe." Examples of non-state law are all around us. Consider labor-management collective bargaining agreements. In addition to setting wage rates, such agreements typically determine both the work rules the parties must abide by and the grievance procedures they must follow to resolve disputes. In essence, such contracts create the substantive law of the workplace as well as the workplace judiciary. A similar situation exists with regard to homeowner agreements, which create both the rules and dispute settlement procedures within a condominium or housing development, i.e., the law and judicial procedure of the residential community. Perhaps a better example is supplied by universities. These institutions create their own codes of conduct for both students and faculty that cover everything from academic dishonesty to what constitutes acceptable speech and dating behavior. In addition, they not only devise their own elaborate judicial procedures to deal with violations of these codes, but typically supply their own campus police forces as well. A final example may be supplied by the many commercial enterprises that voluntarily opt out of the state judicial system by writing clauses in their contracts that require disputes to be settled through binding arbitration or mediation rather than through a lawsuit. In this vein, the variegated "legal" procedures that have recently been assigned the sobriquet of Alternative Dispute Resolution (ADR) do a good job of suggesting what a free market in legal service might be like.



"Then we agree! We're doing the best job that can be done considering the country's ungovernable."

Of course, it is not merely that we fail to observe what is presently all around us. We also act as though we have no knowledge of our own cultural or legal history. Consider, for example, the situation of African-American communities in the segregated South or the immigrant communities in New York in the first quarter of the twentieth century. Because of prejudice, poverty and the language barrier, these groups were essentially cut off from the state legal system. And yet, rather than disintegrate into chaotic disorder, they were able to privately supply themselves with the rules of behavior and dispute-settlement procedures necessary to maintain peaceful, stable, and highly structured communities. Furthermore, virtually none of the law that orders our interpersonal relationships was produced by the intentional actions of central governments. Our commercial law arose almost entirely from the Law Merchant, a non-governmental set of rules and procedures developed by merchants to quickly and peacefully resolve disputes and facilitate commercial relations.

Property, tort, and criminal law are all the products of common law processes by which rules of behavior evolve out of and are informed by the particular circumstances of actual human controversies. In fact, a careful study of Anglo-American legal history will demonstrate that almost all of the law which facilitates peaceful human interaction arose in this way. On the other hand, the source of the law which produces oppression and social division is almost always the state. Measures that impose religious or racial intolerance, economic exploitation, one group's idea of "fairness," or another's of "community" or "family" values virtually always originate in legislation, the law consciously made by the central government. If the purpose of the law really is to bring order to human existence, then it is fair to say that the law actually made by the state is precisely the law that does not work.

Unfortunately, no matter how suggestive these examples might be, they represent only what can develop within a state-dominated system. Since, for the reasons indicated above, it is impossible to outthink a free market, any attempt to account for what would result from a true free market in law would be pure speculation. However, if I must engage in such speculation, I will try to avoid what might be called "static thinking" in doing so. Static thinking occurs when we imagine changing one feature of a dynamic system without appreciating how doing so will alter the character of all other features of the system. For example, I would be engaging in static thinking were I to ask how, if the state did not provide the law and courts, the free market could provide them *in their present form*. It is this type of thinking that is responsible for the conventional assumption that free market legal services would be "competing governments" which would be the equivalent of organized gang warfare. Once this static thinking is rejected, it becomes apparent that if the state did not provide the law and courts, they simply would not exist in their present form. This, however, only highlights the difficulty of describing free market order-generating services and reinforces the speculative nature of all attempts to do so.

One thing it seems safe to assume is that there would not be any universally binding, society-wide set of "legal" rules. In a free market, the law would not come in one-size-fits-all. Although the rules necessary to the maintenance of a minimal level of order, such as prohibitions against murder, assault, and theft, would be common to most systems, different communities of interest would assuredly adopt those rules and dispute-settlement procedures that would best fit their needs. For example, it seems extremely unlikely that there would be anything resembling a uniform body of contract law. Consider, as just one illustration, the differences between commercial and consumer contracts. Commercial contracts are usually between corporate entities with specialized knowledge of industrial practices and a financial interest in minimizing the interruption of business. On the other hand, consumer contracts are those in which one or both parties lack commercial sophistication and large sums do not rest upon a speedy resolution of any dispute that might arise. In a free market for legal services, the rules that govern these types of contracts would necessarily be radically different.

This example can also illustrate the different types of dispute-settlement procedures that would be likely to arise. In disputes over consumer contracts, the parties might well be satisfied with the current system of litigation in which the parties present their cases to an impartial judge or jury who renders a verdict for one side or the other. However, in commercial disputes, the parties might prefer a mediational process with a negotiated settlement in order to preserve an ongoing commercial relationship or a quick and informal arbitration in order to avoid the losses associated with excessive delay. Further, it is virtually certain that they would want mediators, arbitrators, or judges who are highly knowledgeable about commercial practice, rather than the typical generalist judge or a jury of lay people.

The problem with trying to specify the individuated "legal systems" which would develop is that there is no limit to the number of dimensions along which individuals may choose to order their lives, and hence no limit to the number of overlapping sets of rules and dispute resolution procedures to which they may subscribe. An individual might settle his or her disputes with neighbors according to voluntarily adopted homeowner association rules and procedures, with co-workers according to the rules and procedures described in a collective bargaining agreement, with members of his or her religious congregation according to scriptural law and tribunal, with other drivers according to the processes agreed to in his or her automobile insurance contract, and with total strangers by selecting a dispute resolution company from the yellow pages of the phone book. Given the current thinking about racial and sexual identity, it seems likely that many disputes among members of the same minority group or among women would be brought to "niche" dispute resolution companies composed predominantly of members of the relevant group, who would use their specialized knowledge of group "culture" to devise superior rules and procedures for intra-group dispute resolution.

I suspect that in many ways a free market in law would resemble the situation in Medieval Europe before the rise of strong central governments in which disputants could select among several fora. Depending upon the nature of the dispute, its geographical location, the parties' status, and what was convenient, the parties could bring their case in either village, shire, urban, merchant, manorial, ecclesiastical, or

royal courts. Even with the limited mobility and communications of the time, this restricted market for dispute-settlement services was able to generate the order necessary for both the commercial and civil advancement of society. Consider how much more effectively such a market could function given the current level of travel and telecommunication technology. Under contemporary conditions, there would be an explosion of alternative order-providing organizations. I would expect that, late at night, wedged between commercials for Veg-o-matic and Slim Whitman albums, we would find television ads with messages such as, "Upset with your neighbor for playing rock and roll music all night long? Is his dog digging up your flower beds? Come to Acme Arbitration Company's grand opening two-for-one sale."

I should point out that, despite my earlier disclaimer, even these suggestions embody static thinking since they assume that a free market would produce a choice among confrontational systems of justice similar to the one we are most familiar with. In fact, I strongly believe that this would not be the case. The current state-supplied legal system is adversarial in nature, pitting the plaintiff or prosecution against the defendant in a winner-take-all, loser-get-nothing contest. The reason for this arrangement has absolutely nothing to do with this procedure's effectiveness in settling disputes and everything to do with the medieval English kings' desire to centralize power. For historical reasons well beyond the scope of this Article, the Crown was able to extend its temporal power relative to the feudal lords as well as raise significant revenue by commanding or enticing the parties to local disputes to bring their case before the king or other royal official for decision. Our current system of adversarial presentation to a third-party decisionmaker is an outgrowth of these early "public choice" considerations, not its ability to successfully provide mutually satisfactory resolutions to interpersonal disputes.

In fact, this system is a terrible one for peacefully resolving disputes and would be extremely unlikely to have many adherents in a free market. Its adversarial nature causes each party to view the other as an enemy to be defeated, and its winner-take-all character motivates each to fight as hard as he or she can to the bitter end. Since the loser gets nothing, he or she has every reason to attempt to reopen the dispute, which gives rise to frequent appeals. The incentives of the system make it in each party's interest to do whatever he or she can to wear down the opponent while being uniformly opposed to cooperation, compromise, and reconciliation. That this is not the kind of dispute-settlement procedure people are likely to employ if given a choice is evidenced by the large percentage of litigants who are turning to ADR in an effort to avoid it.

My personal belief is that under free market conditions, most people would adopt compositional, rather than confrontational, dispute settlement procedures, i.e., procedures designed to compose disputes and reconcile the parties rather than render third party judgments. This was, in fact, the essential character of the ancient "legal system" that was replaced by the extension of royal jurisdiction. Before the rise of the European nation-states, what we might anachronistically call judicial procedure was chiefly a set of complex negotiations between the parties mediated by the members of the local community in an effort to reestablish a harmonious relationship. Essentially, public pressure was brought upon the parties to settle their dispute peacefully through negotiation and compromise. The incentives of this ancient system favored cooperation and conciliation rather than defeating one's opponent.

Although I have no crystal ball, I suspect that a free market in law would resemble the ancient system a great deal more than the modern one. Recent experiments with negotiated dispute-settlement have demonstrated that mediation 1) produces a higher level of participant satisfaction with regard to both process and result, 2) resolves cases more quickly and at significantly lower cost, and 3) results in a higher rate of voluntary compliance with the final decree than was the case with traditional litigation. This is perhaps unsurprising, given that mediation's lack of a winner-take-all format encourages the parties to seek common ground rather than attempt to vanquish the opponent and that, since both parties must agree to any solution, there is a reduced likelihood that either will wish to reopen the dispute. Given human beings' manifest desire to retain control over their lives, I suspect that, if given a choice, few would willingly place their fate in the hands of third-party decisionmakers. Thus, I believe that a free market in law would produce a system that is essentially compositional in nature.

XIV.

In this Article, I have suggested that when it comes to the idea of the rule of law, the American public is in a state of deep denial. Despite being surrounded by evidence that the law is inherently political in nature, most people are nevertheless able to convince themselves that it is an embodiment of objective rules of justice which they have a moral obligation to obey. As in all cases of denial, people participate in this fiction because of the psychological comfort that can be gained by refusing to see the truth. As we saw with our friends Arnie and Ann, belief in the existence of an objective, non-ideological law enables average citizens to see those advocating legal positions inconsistent with their values as inappropriately manipulating the law for political purposes, while viewing their own position as neutrally capturing the plain meaning immanent within the law. The citizens' faith in the rule of law

allows them to hide from themselves both that their position is as politically motivated as is their opponents' and that they are attempting to impose their values on their opponents as much as their opponents are attempting to impose their values on them. But, again, as in all cases of denial, the comfort gained comes at a price. For with the acceptance of the myth of the rule of law comes a blindness to the fact that laws are merely the commands of those with political power, and an increased willingness to submit oneself to the yoke of the state. Once one is truly convinced that the law is an impersonal, objective code of justice rather than an expression of the will of the powerful, one is likely to be willing not only to relinquish a large measure of one's own freedom, but to enthusiastically support the state in the suppression of others' freedom as well.

The fact is that there is no such thing as a government of law and not people. The law is an amalgam of contradictory rules and counter-rules expressed in inherently vague language that can yield a legitimate legal argument for any desired conclusion. For this reason, as long as the law remains a state monopoly, it will always reflect the political ideology of those invested with decisionmaking power. Like it or not, we are faced with only two choices. We can continue the ideological power struggle for control of the law in which the group that gains dominance is empowered to impose its will on the rest of society, or we can end the monopoly.

Our long-standing love affair with the myth of the rule of law has made us blind to the latter possibility. Like the Monosizeans, who after centuries of state control cannot imagine a society in which people can buy whatever size shoes they wish, we cannot conceive of a society in which individuals may purchase the legal services they desire. The very idea of a free market in law makes us uncomfortable. But it is time for us to overcome this discomfort and consider adopting Socrates' approach. We must recognize that our love for the rule of law is unrequited, and that, as so often happens in such cases, we have become enslaved to the object of our desire. No clearer example of this exists than the legal process by which our Constitution was transformed from a document creating a government of limited powers and guaranteed rights into one which provides the justification for the activities of the all-encompassing superstate of today. However heart-wrenching it may be, we must break off this one-sided affair. The time has come for those committed to individual liberty to realize that the establishment of a truly free society requires the abandonment of the myth of the rule of law.

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Law, Order and the Failure of the State:

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not eat dinner in his own home. Similarly, every business owner has the right to determine who does and does not eat dinner in his restaurant. The only difference is that the restaurant owner hopes to facilitate more patrons. He would likely have to have an extremely good financial motive for exclusion.

But if we believe in property rights, he should have the right of exclusion on any grounds. From the point of view of the state, it is easier to start the attack on property by taking away the right of exclusion from commercial properties. Then the state can gradually invade the last bastion of undisputed private property, the family household.

AEN: You recently gave a paper on the failure of classical liberalism. What was that failure?

HOPPE: It was the belief in the possibility of a minimal state, and that the state can play a purely protective role. If the state is defined as the institution that has the right to impose taxation and has the compulsory territorial monopoly of jurisdiction, then it is easy to show that this sort of institution is inherently incapable of providing what these classical liberals want the state to provide, that is protection and security.

Once you grant an institution the right to determine unilaterally how much you have to pay to be protected, this institution will have the tendency, by virtue of its self interest, to increase expenditures on protection while reducing the actual production of protection.

The state asks itself the question: how much money is needed in order to protect people from violence? The answer is always that it needs more. And since there is disutility attached to labor, the less protection the state produces, the better off its employees are.

Every state, even if it starts out as a minimal state, then, will end up as a maximal state. To think that the problem of protection can ever come from an institution such as the state is an illusion. It is a myth and a patent error on the grandest scale.

One of the most important services on earth—to be protected from aggression by other people—should not be assigned to an institution that can tax you in order to do it and prevent you from seeking out other protectors. All of the incentives are wrong and it sets up a potential disaster.

[Excerpted from the Ludwig Von Mises Institute's AUSTRIAN ECONOMICS NEWSLETTER, Spring, 1998, pp. 4-5. Permission to reprint granted by Jeffrey Tucker in phone conversation April 28, 1998.]

"There is no right way to do a wrong thing."

Law, Order and the Failure of the State: An Interview with Hans-Hermann Hoppe

AEN: If society was based entirely on private property and exchange, most people would say there would he no such thing as community and order.
HOPPE: The market's speciality is producing things that people want, and that is certainly true of conditions like community and order. A main means of achieving them is the right of exclusion, which, in a market economy, property owners can always exercise. This allows owners to keep up the value of their property and to encourage civilized behavior.

Part of the terrible trend in modern government has been to trample on the right of exclusion. That is essentially what civil rights law does. Employers cannot hire and fire as they see fit. Teachers cannot kick students out of school. Businesses must accommodate customers who are detrimental to the long- term interest of the firm. In light of this, cultural decay and rotten behavior are to be expected. Even the right of parents to be the ultimate judge in their own household is under attack.

The covenant is a crucial market institution that affirms the right to exclude. Groups of people, usually with one founder, lay down all sorts of rules to which all people who are part of the group are required to adhere. The ultimate owner determines the rules based on consent. And there are competitive markets for covenantal property arrangements themselves, offering varying degrees of strictness.
AEN: The restrictions are then attached to the property itself?
HOPPE: Let's say you buy some property within a larger covenantal structure. You also buy the restrictions, which are presumably in your favor, since the rules are a crucial key to the value of your property. The terms of the covenant can be adjusted according to a process established by the bylaws of the community. If the overarching community is purchased from the full owner, in terms dictated by the covenant, the covenant can also be changed to more fully accord with market conditions.

This mechanism, which rests on the right of property owners to exclude and to dictate rules, is a source of community and order within the matrix of voluntary exchange. But the state hates covenantal arrangements because they form competitive systems of law. The democratic state hates them as much as it hates the right of a businessman to refuse service or the right of an employer to fire an employee.
AEN: So you see no real distinction between private life and commercial life?
HOPPE: There should be no difference so far as property ownership and rights are concerned. Every person has the right to determine who does and does

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