

Arthur Shaw,
— Reading in the Phil of Law — 4th ed.

means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German court for an offense which we would describe as illegally depriving a person of his freedom. This was punishable as a crime under the German Criminal Code of 1871, which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective—that of punish-

ing a woman for an outrageously immoral act—but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are.

REVIEW AND DISCUSSION QUESTIONS

1. Describe the facts relating to the woman accused of being a grudge informer.
2. What solution to the problem does Hart recommend? Why does he recommend it?
3. Explain why Hart thinks that retrospective legislation, whatever its disadvantages, is better than the alternative(s).
4. Do you think that "positivism" was a relevant factor in the German experience, as Radbruch did? Explain.

The Problem of the Grudge Informer

Lon Fuller

In the following essay, Lon Fuller discusses an issue that is often confronted as societies undergo rapid political change. The specific question he poses, whether to prosecute grudge informers from a prior regime, raises complex questions about the meaning and importance of the rule of law and about the nature and purpose of law itself. Lon Fuller was professor of law at Harvard Law School.

By a narrow margin you have been elected Minister of Justice of your country, a nation of some twenty million inhabitants. At the outset of your term of office you are confronted by a serious problem that will be described below. But first the background of this problem must be presented.

For many decades your country enjoyed a peaceful, constitutional and democratic government. However, some time ago it came upon bad times. Normal relations were disrupted by a deepening economic depression and by an increasing antagonism among various factional groups, formed along economic, political, and religious lines. The proverbial man on horseback appeared in the form of the Headman of a political party or society that called itself the Purple Shirts.

In a national election attended by much disorder the Headman was elected President of the Republic and his party obtained a majority of the seats in the General Assembly. The success of the party at the polls was partly brought about by a campaign of reckless promises and ingenious falsifications, and partly by the physical intimidation of nightriding Purple Shirts who frightened many people away from the polls who would have voted against the party.

When the Purple Shirts arrived in power they took no steps to repeal the ancient Constitution or any of its provisions. They also left intact the Civil and Criminal Codes and the Code of Procedure. No official action was taken to dismiss any government official or to remove any judge from the bench. Elections continued to be held at intervals and ballots were counted with apparent honesty. Nevertheless, the country lived under a reign of terror.

Judges who rendered decisions contrary to the wishes of the party were beaten and murdered. The accepted meaning of the Criminal Code was perverted to place political opponents in jail. Secret statutes were passed, the contents of which were known only to the upper levels of the party hierarchy. Retroactive statutes were enacted which made acts criminal that were legally innocent when committed. No attention was paid by the government to the restraints of the Constitution, of antecedent laws, or even of its own laws. All opposing political parties were disbanded. Thousands of political opponents were put to death, either methodically in prisons or in sporadic night forays of terror. A gen-

eral amnesty was declared in favor of persons under sentence for acts "committed in defending the fatherland against subversion." Under this amnesty a general liberation of all prisoners who were members of the Purple Shirt party was effected. No one not a member of the party was released under the amnesty.

The Purple Shirts as a matter of deliberate policy preserved an element of flexibility in their operations by acting at times through the party "in the streets," and by acting at other times through the apparatus of the state which they controlled. Choice between the two methods of proceeding was purely a matter of expediency. For example, when the inner circle of the party decided to ruin all the former Socialist-Republicans (whose party put up a last-ditch resistance to the new regime), a dispute arose as to the best way of confiscating their property. One faction, perhaps still influenced by prerevolutionary conceptions, wanted to accomplish this by a statute declaring their goods forfeited for criminal acts. Another wanted to do it by compelling the owners to deed their property over at the point of a bayonet. This group argued against the proposed statute on the ground that it would attract unfavorable comment abroad. The Headman decided in favor of direct action through the party to be followed by a secret statute ratifying the party's action and confirming the titles obtained by threats of physical violence.

The Purple Shirts have now been overthrown and a democratic and constitutional government restored. Some difficult problems have, however, been left behind by the deposed regime. These you and your associates in the new government must find some way of solving. One of these problems is that of the "grudge informer."

During the Purple Shirt regime a great many people worked off grudges by reporting their enemies to the party or to the government authorities. The activities reported were such things as the private expression of views critical of the government, listening to foreign radio broadcasts, associating with known wreckers and hooligans, hoarding more than the permitted amount of dried eggs, failing to report a loss of identification papers within five days, etc. As things then stood with the administration of justice, any of these acts, if proved, could lead to a sentence of death. In some cases this sentence was

authorized by "imposed without duly appointed

After the ov public demand be punished. T ceded that with rized on this n burning issue a longer be postp Minister of Just it. You have ask to the matter at to conference. A speak in turn as

First Deputy can do nothing formers. The according to the ru control of the na on their victims principles of law differed from th consider detestat law of the land. C tween that law a discretion it accc ters. This rule an titled to respect b Shirts introduced two witnesses we immaterial that t or less uncontroll never formally er ceptance. Exactly opposite rule wi judge's discretion ourselves and the an unlawful gover but lies rather in t greater abhorren the fundamental c and theirs is that v in viewpoint, whil monolithic code o government assum pable of expressin aims. The cardina

authorized by "emergency" statutes; in others it was imposed without statutory warrant, though by judges duly appointed to their offices.

After the overthrow of the Purple Shirts, a strong public demand grew up that these grudge informers be punished. The interim government, which preceded that with which you are associated, temporized on this matter. Meanwhile it has become a burning issue and a decision concerning it can no longer be postponed. Accordingly, your first act as Minister of Justice has been to address yourself to it. You have asked your five Deputies to give thought to the matter and to bring their recommendations to conference. At the conference the five Deputies speak in turn as follows:

First Deputy: "It is perfectly clear to me that we can do nothing about these so-called grudge informers. The acts they reported were unlawful according to the rules of the government then in actual control of the nation's affairs. The sentences imposed on their victims were rendered in accordance with principles of law then obtaining. These principles differed from those familiar to us in ways that we consider detestable. Nevertheless they were then the law of the land. One of the principal differences between that law and our own lies in the much wider discretion it accorded to the judge in criminal matters. This rule and its consequences are as much entitled to respect by us as the reform which the Purple Shirts introduced into the law of wills, whereby only two witnesses were required instead of three. It is immaterial that the rule granting the judge a more or less uncontrolled discretion in criminal cases was never formally enacted but was a matter of tacit acceptance. Exactly the same thing can be said of the opposite rule which we accept that restricts the judge's discretion narrowly. The difference between ourselves and the Purple Shirts is not that theirs was an unlawful government—a contradiction in terms—but lies rather in the field of ideology. No one has a greater abhorrence than I for Purple Shirtism. Yet the fundamental difference between our philosophy and theirs is that we permit and tolerate differences in viewpoint, while they attempted to impose their monolithic code on everyone. Our whole system of government assumes that law is a flexible thing, capable of expressing and effectuating many different aims. The cardinal point of our creed is that when

an objective has been duly incorporated into a law or judicial decree it must be provisionally accepted even by those that hate it, who must await their chance at the polls, or in another litigation, to secure a legal recognition for their own aims. The Purple Shirts, on the other hand, simply disregarded laws that incorporated objectives of which they did not approve, not even considering it worth the effort involved to repeal them. If we now seek to unscramble the acts of the Purple Shirt regime, declaring this judgment invalid, that statute void, this sentence excessive, we shall be doing exactly the thing we most condemn in them. I recognize that it will take courage to carry through with the program I recommend and we shall have to resist strong pressures of public opinion. We shall also have to be prepared to prevent the people from taking the law into their own hands. In the long run, however, I believe the course I recommend is the only one that will insure the triumph of the conceptions of law and government in which we believe."

Second Deputy: "Curiously, I arrive at the same conclusion as my colleague, by an exactly opposite route. To me it seems absurd to call the Purple Shirt regime a lawful government. A legal system does not exist simply because policemen continue to patrol the streets and wear uniforms or because a constitution and code are left on the shelf unrepealed. A legal system presupposes laws that are known, or can be known, by those subject to them. It presupposes some uniformity of action and that like cases will be given like treatment. It presupposes the absence of some lawless power, like the Purple Shirt Party, standing above the government and able at any time to interfere with the administration of justice whenever it does not function according to the whims of that power. All of these presuppositions enter into the very conception of an order of law and have nothing to do with political and economic ideologies. In my opinion law in any ordinary sense of the word ceased to exist when the Purple Shirts came to power. During their regime we had, in effect, an interregnum in the rule of law. Instead of a government of laws we had a war of all against all conducted behind barred doors, in dark alleyways, in palace intrigues, and prisonyard conspiracies. The acts of these so-called grudge informers were just one phase of that war. For us to condemn these acts as criminal would involve as much incongruity as if

we were to attempt to apply juristic conceptions to the struggle for existence that goes on in the jungle or beneath the surface of the sea. We must put this whole dark, lawless chapter of our history behind us like a bad dream. If we stir among its hatreds, we shall bring upon ourselves something of its evil spirit and risk infection from its miasmas. I therefore say with my colleague, let bygones be bygones. Let us do nothing about the so-called grudge informers. What they did do was neither lawful nor contrary to law, for they lived, not under a regime of law, but under one of anarchy and terror."

Third Deputy: "I have a profound suspicion of any kind of reasoning that proceeds by an 'either-or' alternative. I do not think we need to assume either, on the one hand, that in some manner the whole of the Purple Shirt regime was outside the realm of law, or, on the other, that all of its doings are entitled to full credence as the act of a lawful government. My two colleagues have unwittingly delivered powerful arguments against these extreme assumptions by demonstrating that both of them lead to the same absurd conclusion, a conclusion that is ethically and politically impossible. If one reflects about the matter without emotion it becomes clear that we did not have during the Purple Shirt regime a 'war of all against all.' Under the surface much of what we call normal human life went on—marriages were contracted, goods were sold, wills were drafted and executed. This life was attended by the usual dislocations—automobile accidents, bankruptcies, unwitnessed wills, defamatory misprints in the newspapers. Much of this normal life and most of these equally normal dislocations of it were unaffected by the Purple Shirt ideology. The legal questions that arose in this area were handled by the courts much as they had been formerly and much as they are being handled today. It would invite an intolerable chaos if we were to declare everything that happened under the Purple Shirts to be without legal basis. On the other hand, we certainly cannot say that the murders committed in the streets by members of the party acting under orders from the Headman were lawful simply because the party had achieved control of the government and its chief had become President of the Republic. If we must condemn the criminal acts of the party and its members, it would seem absurd to uphold every act which happened to be canalized through the apparatus of a

government that had become, in effect, the alter ego of the Purple Shirt Party. We must therefore, in this situation, as in most human affairs, discriminate. Where the Purple Shirt philosophy introduced itself and perverted the administration of justice from its normal aims and uses, there we must interfere. Among these perversions of justice I would count, for example, the case of a man who was in love with another man's wife and brought about the death of the husband by informing against him for a wholly trivial offense, that is, for not reporting a loss of his identification papers within five days. This informer was a murderer under the Criminal Code which was in effect at the time of his act and which the Purple Shirts had not repealed. He encompassed the death of one who stood in the way of his illicit passions and utilized the courts for the realization of his murderous intent. He knew that the courts were themselves the pliant instruments of whatever policy the Purple Shirts might for the moment consider expedient. There are other cases that are equally clear. I admit that there are also some that are less clear. We shall be embarrassed, for example, by the cases of mere busybodies who reported to the authorities everything that looked suspect. Some of these persons acted not from desire to get rid of those they accused, but with a desire to curry favor with the party, to divert suspicions (perhaps ill-founded) raised against themselves, or through sheer officiousness. I don't know how these cases should be handled, and make no recommendation with regard to them. But the fact that these troublesome cases exist should not deter us from acting at once in the cases that are clear, of which there are far too many to permit us to disregard them."

Fourth Deputy: "Like my colleague I too distrust 'either-or' reasoning, but I think we need to reflect more than he has about where we are headed. This proposal to pick and choose among the acts of the deposed regime is thoroughly objectionable. It is, in fact, Purple Shirtism itself, pure and simple. We like this law, so let us enforce it. We like this judgment, let it stand. This law we don't like, therefore it never was a law at all. This governmental act we disapprove, let it be deemed a nullity. If we proceed this way, we take toward the laws and acts of the Purple Shirt government precisely the unprincipled attitude they took toward the laws and acts of the government they supplanted. We shall have chaos, with

every judge and ev
unto himself. Inste
Purple Shirt regime
perpetuate them. T
with this problem t
losophy of law and
with it by duly ena
statute directed to
problem of the grud
facts, and draft a co
We shall not then b
for which they wer
thermore provide p
fense and not treat
simply because the
timately executed.
some difficult prob
other things, we sha
meaning to 'grudge
should not be dete
ever, from adopting
out of a condition c

Fifth Deputy: "I
last proposal. It spe
the abuses of the P
do this by resorting
of the Purple Shirt
statute. My colleagu
result if we attempt
redress 'wrong' acts
uphold and enforce
to realize that his p
cious cure for this
plausible argument
agree it would be n
and white on paper.
provide? One of m
who had failed for
identification paper
judicial sentence in

REVIEW AND DISCUSSION

1. Describe the five
2. Fuller's dialogu
one when what
3. The article also
light of your ov

effect, the alter ego must therefore, in this affair, discriminate. Why introduced itself on of justice from its we must interfere. Justice I would count, who was in love with about the death of first him for a wholly reporting a loss of his days. This informer's Code which was and which the Purple encompassed the death is illicit passions and ation of his murderers were themselves over policy the Purple consider expedient. Equally clear. I admit less clear. We shall y the cases of mere e authorities every- e of these persons d of those they ac- favor with the party. ill-founded) raised sheer officiousness. ould be handled, and regard to them. But cases exist should n the cases that are many to permit us

ague I too distrust we need to reflect e are headed. This ong the acts of the ectionable. It is, in nd simple. We like like this judgment, s, therefore it never ntal act we disap- If we proceed this acts of the Purple rincipled attitude icts of the govern- I have chaos, with

every judge and every prosecuting attorney a law unto himself. Instead of ending the abuses of the Purple Shirt regime, my colleague's proposal would perpetuate them. There is only one way of dealing with this problem that is compatible with our philosophy of law and government and that is to deal with it by duly enacted law. I mean, by a special statute directed toward it. Let us study this whole problem of the grudge informer, get all the relevant facts, and draft a comprehensive law dealing with it. We shall not then be twisting old laws to purposes for which they were never intended. We shall furthermore provide penalties appropriate to the offense and not treat every informer as a murderer simply because the one he informed against was ultimately executed. I admit that we shall encounter some difficult problems of draftsmanship. Among other things, we shall have to assign a definite legal meaning to 'grudge' and that will not be easy. We should not be deterred by these difficulties, however, from adopting the only course that will lead us out of a condition of lawless, personal rule."

Fifth Deputy: "I find a considerable irony in the last proposal. It speaks of putting a definite end to the abuses of the Purple Shirtism, yet it proposes to do this by resorting to one of the most hated devices of the Purple Shirt regime, the *ex post facto* criminal statute. My colleague dreads the confusion that will result if we attempt without a statute to undo and redress 'wrong' acts of the departed order, while we uphold and enforce its 'right' acts. Yet he seems not to realize that his proposed statute is a wholly specious cure for this uncertainty. It is easy to make a plausible argument for an undrafted statute; we all agree it would be nice to have things down in black and white on paper. But just what would this statute provide? One of my colleagues speaks of someone who had failed for five days to report a loss of his identification papers. My colleague implies that the judicial sentence imposed for that offense, namely

death, was so utterly disproportionate as to be clearly wrong. But we must remember that at that time the underground movement against the Purple Shirts was mounting in intensity and that the Purple Shirts were being harassed constantly by people with false identification papers. From their point of view they had a real problem, and the only objection we can make to their solution of it (other than the fact that we didn't want them to solve it) was that they acted with somewhat more rigor than the occasion seemed to demand. How will my colleague deal with this case in his statute, and with all of its cousins and second cousins? Will he deny the existence of any need for law and order under the Purple Shirt regime? I will not go further into the difficulties involved in drafting this proposed statute, since they are evident enough to anyone who reflects. I shall instead turn to my own solution. It has been said on very respectable authority that the main purpose of the criminal law is to give an outlet to the human instinct for revenge. There are times, and I believe this is one of them, when we should allow that instinct to express itself directly without the intervention of forms of law. This matter of the grudge informers is already in process of straightening itself out. One reads almost every day that a former lackey of the Purple Shirt regime has met his just reward in some unguarded spot. The people are quietly handling this thing in their own way and if we leave them alone, and instruct our public prosecutors to do the same, there will soon be no problem left for us to solve. There will be some disorders, of course, and a few innocent heads will be broken. But our government and our legal system will not be involved in the affair and we shall not find ourselves hopelessly bogged down in an attempt to unscramble all the deeds and misdeeds of the Purple Shirts."

As Minister of Justice which of these recommendations would you adopt?

REVIEW AND DISCUSSION QUESTIONS

1. Describe the five alternatives that the various deputies defend.
2. Fuller's dialogue raises two issues. The first is whether or not a state may legitimately punish someone when what he or she did was wrong, though not illegal. How would you answer that question?
3. The article also raises questions about the validity of laws during the reign of the Purple Shirts. In light of your own understanding of what it is that makes a law valid, and the deputy's arguments, is

the law of the Purple Shirts valid? Were laws from the previous constitutional regime still valid? How does that question bear on the choice between the five deputies' positions?

4. How would you answer the question raised at the end of the article? Explain why you reject the advice of each deputy whose position you think is mistaken.
5. Fuller's article shows that this is a dilemma in which each position leads to the next, and the final back to the first. Explain.

The Rule of Law and Its Virtues

Joseph Raz

In this essay, Joseph Raz begins with a discussion of the nature of the ideal of the rule of law itself: What, precisely, does that ideal mean? His answer leads to a discussion of various principles that can be derived from the basic idea of the rule of law. He then describes the values of the rule of law and concludes with a brief critique of the attempt by Lon Fuller to establish a link between law and morality. Joseph Raz is professor of philosophy at Oxford University.

... The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A nondemocratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.

Given the promiscuous use made in recent years of the expression 'the rule of law' it is hardly surprising that my claim will alarm many. We have reached the stage in which no purist can claim that truth is on his side and blame the others for distorting the notion of the rule of law. ...

1. THE BASIC IDEA

"The rule of law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase "government by law and not by men." No sooner does one use these formulas than their obscurity becomes evident. Surely government must be both by law and by men. It is said that the rule of law means that all government action must have foundation in law, must be authorized by law. But is not that a tautology? Actions not authorized by law cannot be the actions of the government as a government. They would be without legal effect and often unlawful. ...

... If government is, by definition, government authorized by law the rule of law seems to amount to an empty tautology, not a political ideal.

The solution to this riddle is in the difference between the professional and the lay sense of "law." For the lawyer anything is the law if it meets the con-

ditions of validity laid out in the constitution, parliamentary regulations, police regulations, licenses, etc. To the layman, however, "law" means general, open, and stable rules of law. In fact, the danger of the rule of law might set to work which no legal system could possess very little virtue. It is law can consist only of undesirable that it should be ruled both by laws and by general and particular law which we need the law.

The doctrine of the rule of law in every legal system should be open, and stable rules of law) and particular law: tool in the hands of the alike. As we shall see, the subject of particular and stable ones. It is one of the doctrine that *the should be guided by open rules.*

This principle shows of law and not of men a political ideal. The principle exhaust the meaning of 'the rule of law.' It helps by itself illuminate the importance. Let us, therefore, of "the rule of law." It helps people should be ruled by the law that the law should be seen to be guided by it. As we see, a second aspect that we are not capable of being obeyed the law to the extent that he obeys the law or conforming is his knowledge of the law is to be obeyed in the behaviour of its subjects they can find out what i