

POPULISM AND THE RULE OF LAW

EDWARD A. SHILS*

OUR society lives in a commitment which is, at its best, a balance among three ideals, not necessarily, and never perfectly, in harmony with one another. These are the ideal of liberty, individual and corporate; the ideal of the fundamental equality in moral dignity of all adult members of our society; and the ideal of the supremacy of the law. These ideals, although at odds with one another in their complete fulfilment, are capable of effective collaboration. Their collaboration is a product of good fortune and good judgment, and these are often, in fact, enjoyed. There are, however, times when fortune and judgment falter and our society veers toward danger.

I

The idea of a free society is that of individual and corporate autonomy, limited by voluntary agreement, moral obligation, personal attachment, and, at the outermost limit, the law, with the force of the state behind it. The legal system of a free society is the rule of law—law made within the framework of a constitution, written or unwritten, by elected representatives, executed by a partially autonomous administrative staff and adjudicated by an independent judiciary.

The rule of law is the limitation of government by law. It is the limitation by law of the discretion of the executive in the exercise of power over the citizen; it is also the limitation of the legislative by constitution and custom, by tradition and morals. The limitation of the executive to the law passed by the legislative and adjudged by the judiciary entails, at once, the separation of powers. The rule of law is infringed when any one of the instances involved abdicates its autonomous function within the total system of authority or seeks so to expand it that it encroaches on the autonomy of another function. A bureaucracy which acts without reference to law infringes on the rule of law as much as a legislature which seeks to dominate the decisions of the judiciary. A legislative body which abandons its responsibilities

* Professor of Social Sciences and Executive Secretary, Committee on Social Thought, University of Chicago.

to the populace which has elected it diverges from the rule of law as much as does a legislative which renounces its constitutional powers to the executive.

Dependent on the balance of so many passions, interests, and conditions, the rule of law encounters difficulties from every side. The ambitions of rulers who strive to increase their power and glory, the enthusiasm of well-intentioned reformers who would use the machinery of the state to bring about a redistribution of values, the ineptitude or cowardice of legislators who delegate their powers to administrators, the professional pride or the arrogance of administrators who hope simply to have their own way, the indifference of judges to their special responsibilities to see that laws are neither underobeyed nor over-enforced, the impatient passion of constituents who will not rely on the independent judgment of their elected representative—these are only a few among the dispositions which threaten the rule of law. Even a longer enumeration of dispositions will still not disclose the conditions which generate or intensify them. We may neglect the latter and cut short the former by concentrating our attention on one which seems to us to lie at the very root of the matter. The rule of law rests at bottom on the belief widely and deeply diffused throughout the society that there is an intrinsically *sacred* element in the law as such. The law, if the rule of law is to exist, must be thought to be *legitimate*. The *lawfulness* of law, its *legitimacy*, must be generally accepted, and in legitimacy there is a flavor of the sacred.

This brings us immediately into the face of one of our antinomies. Liberty, intellectual liberty, the freedom to criticize and to change, is affronted by the notion of the sacred which fixes the law and obstructs its change.

Modern individualistic liberalism insists that no law should be so secure that no one can ever discuss it or challenge it or seek to modify it or even actually modify it, but it also acknowledges some laws that ought to be more unmodifiable than others. All laws, to be effective, must have some element of intrinsic legitimacy in them, even if it is only the fact that they have been enacted and have not been superseded and are meant to be observed. This means that, regardless of its content, a law must receive the respect that is due to it *simply* as a law. There are also laws which must be respected because of their content or the consequences of their observance and not solely by virtue of their being laws.

By virtue of being law, it should be thought to have an inherent,

even if only temporary, validity. It must be obeyed, not just by adherents of the prevailing party, but by all citizens, even by those who criticize it, who challenge it in the courts, and who wish it to be repealed. While no single law should be regarded as sacred, it must be viewed as having some sacredness from the mere fact of its being part of a system of laws, enacted by a legitimate government or inherited through a legitimating tradition. The sacred element in the law must derive in part from its sharing in the ultimate principle, but too much is not to be expected from this. Laws are too specific and too differentiated for more than a general affinity between the vague notion of justice of the citizen and the concrete law. Rather, for the legitimacy of a law to be accepted, the citizenry must believe in the legitimacy of the institutions through which the laws are made and the legitimacy of those who make them.

If, even though men were angels, there were still a need for laws, the fact that the lawmakers were angels would make obedience to the law easier. But lawmakers are not angelic. Statute law, except in absolutist regimes (where they are the objects of hidden politics), is always the product of a visible political process. Law is made by legislators who, to become such, must also be politicians. Politics is necessarily sectional; it always involves the quest of the advantage of some group, class, region, coalition of classes or regions, race, generation, one of the sexes, sector of the economy, etc., but, above all, the party itself. Even when most detached from the interest of a group, less comprehensive than the whole society, politics centers about divergent interpretations of the common good.

Politics can never be avoided, least of all in a free society, where it will be more open to the public eye than in any other regime. Liberty and equality bring politics into the center of attention. This means that disagreement is at the center of attention, much more than the agreement which forms its matrix.

In the nature of the case, then, politics involves disagreement; it involves, to some extent, at least the denial of the virtues of the other side, the denial of the virtues of what they have done, and the denial of the truth of their interpretation of the common good; it involves the polemical espousal of the party's own interpretation of what is good.

Yet the majority party or the governing coalition, which clearly by its own "principles" distinguishes itself from its antagonists, must be accepted by the citizenry as representative of the whole. It must be interpreted as ruling, to some extent, for the good of the whole com-

munity. The laws which it promulgates must be put forward by it as being, and should be believed to be directly subsumed under the higher law and the central tradition of the common values of the society. The laws made by one party must be accepted as *legitimate*—as toned by some, at least, of the values which are generally believed to be shared in the society at large—by the authorities as well as citizens. The more dissensual the ruling political elite and counterelite, the more bitter the criticism one side directs against the other, the more injurious is the dissensus to the general belief in the validity of the laws and of the legal and political system, its personnel, and its products.

This is a source of strain in any liberal democratic political system, the very constitution of which comprises some measure of dissensus. Where free discussion and independent criticism of the laws and actions of the authorities are possible, and where laws may be challenged and shown to be wrong, the preservation of both the appearance and the reality of fundamental agreement on certain standards and rules is difficult. (It is not easier to create and maintain belief in the justice of laws in more oligarchical regimes, but we are not discussing this problem here. All that we wish to say on this point is that other regimes have their own peculiar difficulties as regards moral consensus.)

There are enough antinomian tendencies in human beings to make them hostile to rules and authority, just as there are also tendencies toward submissiveness toward the same rules and authorities. Obedience to the sacred is not achieved without cost. Obedience generates hostility, which must be held in check or diverted if it is not to turn against the sacred and its custodians. The conflict and mutual derogation of the custodians tend toward the diminution of the dignity which the law enjoys in the minds of the public. In this way the tendency toward disrespect for law is strengthened and the rule of law weakened.

II

Thus far we have considered forces injurious to the rule of law arising from the nature of the liberal democratic system, from the institutions of criticism, from individual revolt against dogmatic authority, and particularly from the competition of parties on which criticism and revolt are focused. These forces are engendered by the nature of the system in which the three ideals or principles exist in a state of equilibrium. There are also situations endangering the rule of law much more seriously which arise from the accentuation of the equalitarian component in a populistic direction.

Before entering directly into the impact of populism on the rule of law, it is desirable to examine a hypothesis contrary to that which we are asserting.

Central to the tradition of individualistic liberalism has been the belief that the first requirement for holding rulers—legislators and bureaucrats—in check is the distrust of the ruled. Jeremy Bentham said that the eye of the citizen was the virtue of the statesman, and James Mill was certain that "all the difficult questions of government relate to the means of restraining those in whose hands are lodged the powers necessary for the protection of all, from making a bad use of it." With his point of departure in Hobbes, James Mill went further than Hobbes. Only the wolf in the citizen could restrain the wolf in the ruler. "Whatever would be the temptations under which individuals would lie, if there was no government, to take the objects of desire from others weaker than themselves, under the same temptations the members of the Government lie, to take the objects of desire from the members of the community, if they are not prevented from doing so."¹ Mill spent much of the remainder of his argument to show that representative government, with universal suffrage, by enabling the whole electorate to act on the basis of its distrust, would provide the required restraint on the government. Representative government, based on nearly universal male suffrage, would force the government to stay within the boundaries prescribed by the higher law of utility. Thomas Jefferson was at least as explicit when he wrote in his draft of the Kentucky Resolution (1798) that "confidence is everywhere the parent of despotism . . . free government is found in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power; that our constitution has accordingly fixed the limits to which, and no further, our confidence may go. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."²

Up to a point, these arguments are true. Despots are held in check by the fear of civil disorder; ordinary politicians are held in check by the fear of not being re-elected; bureaucrats are held in check by their fear of their superiors, by their fear of congressional inquiries, and by

¹ James Mill, *An Essay on Government*, ed. Ernest Barker (Cambridge: Cambridge University Press, 1937), p. 6.

² *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York, 1904), VIII, 474-75.

their fear of adverse judicial decisions. But beyond a certain point the truth of these propositions is exhausted. Where each section of the triply divided government has sufficient self-esteem to withstand the perpetual threat of disapproval and restriction by the other branches or the populace, distrust performs a useful function. But it is limited distrust and specific distrust—distrust in a context of something other than distrust. **Distrust and the assumption of a general moral superiority** on the part of one branch of government vis-à-vis the others, or on the part of the populace vis-à-vis the government, are not likely to maintain the division of powers or the rule of law. **Unqualified distrust** between citizens and government produces, where the government is capable of independent thought and action, a tyranny of self-defense. Rather than sustain the rule of law, it generates a dictatorship, in which the ruling group, to protect itself from the populace which menaces it by its apathy and disapproval, removes every restraint on itself which the rule of law would impose. Or, if the ruling group is lacking in self-confidence, it becomes the supine instrument of a populace or its spokesmen. The latter, lacking confidence in the capacities of the government, insist that its function is no more than the **immediate and concrete expression of the will of the people**. (Reality is more complicated than this simplified scheme, but the essentials are there. Greater realism, however, requires that we specify that the populace does not speak as a whole; it has its vociferous spokesmen within and outside the government.)

The rule of law is certainly not simply the creation of the distrust of the governed for the government; in so far as distrust plays a positive part, it can play it effectively only if the distrust, on the one side, and the experience of being distrusted, on the other, are both set in a matrix of general moral consensus and of a general mutual confidence. This is, in principle, paradoxical, but it is empirically sound. An attitude toward another person can combine distrust about whether that person will perform his task dutifully within the context of confidence, that his worst transgression will be inefficiency or indolence, and that there is no danger of violence, theft, blackmail, etc., from that person. The same pattern can be found in the attitude toward government. Thus distrust, to be fruitful of the maintenance of the rule of law, must be confined and qualified. Unlimited and unqualified distrust would be disastrous, indeed, to the society so unfortunate as to be afflicted with it. Distrust must be confined by consensus.

Consensus must range over such ideas as "due process of law,"

"reasonableness," "fair play," a rough scale of equivalence between exertion in contribution to the common welfare and reward, etc., and it must be shared in large part by both rulers and ruled. These standards are all very vague, and in actual fact they scarcely permit the delivery, in concrete cases, of judgments which can be rigorously or scientifically defended. They contribute to the rule of law by delimiting conflict among private individuals and groups, thus reducing the pressure on government to extend the scope of its laws and the range of its activities. These *vague general standards* also play a major role in regulating the relations between government and the citizenry. Legislators, despite the rigors of the political game, are often guided, at least in part, by such *standards* as these; so are members of the executive branch of government, and so are the members of the judiciary when they adjudicate conflicts between citizens and between citizens and the government. They provide the context of concrete decisions, and their general acceptance renders acceptable the concrete decisions by those to whose disadvantage they work. If the victims of such decisions did not have confidence that these general standards were being observed according to their lights and abilities by those who make them, there would be much more embittered social conflict and a harder, angrier attitude toward government than ordinarily exists in free countries.

The rule of law works through institutions, and it is itself an institutional system. It is facilitated by particular institutions like written constitutions, the judicial review of legislation, and upper and lower legislative chambers. It is not however dependent on any of these. Professor George Keeton says that the United Kingdom can easily pass into dictatorship, since it does not possess a written constitution or an effectively bicameral legislature.³ What he does not tell us, and what seems at least as important, is how the United Kingdom enjoys the rule of law without these institutional arrangements. To answer this question, Professor Keeton would have to invoke the standards of the sort mentioned above and the fact of their far-reaching acceptance in British society. If Great Britain loses the rule of law, it will be because of a disruption of this balance in mutual esteem, as a result of which the bureaucracy would become so impressed with its own moral importance in comparison with other sectors of society that it would become oppressive and arrogant. This is not inconceivable, but, if it were to

³ *The Passing of Parliament* (London, 1954), p. 201.

happen, it would be the product of the corrosion of consensus by distrust.

These standards are the concomitants of a more general attitude of mutual respect among men in their capacity as citizens, including the government—a vague but nonetheless profoundly important feeling of affinity among all who share the same citizenship. This in turn is associated with respect for the law and for the institutions through which it is made and, finally, with respect for the legislator as the maker of law and for the career and environment in which he moves.

In summary, the rule of law depends at least as much as, if not more, on the mutual trust and confidence of government and public, and of the three functions of government for each other, than it does on distrust among them. The need to acknowledge an element of sacredness in the law, a necessity of man's nature and of order, in a free society as much as in any other, finds support in situations in which lawmakers and law-making institutions enjoy respect. This respect, based on a dense thicket of sentiments, was overlooked by the great liberal political philosophers who were quoted earlier. They lived in countries still dominated by well-intrenched political classes, confident of their calling to rule their countries, and enjoying in general the confidence of the electorate. This situation no longer exists to anywhere near the same extent, although it has persisted longer in Great Britain than it has in the United States. It is to the United States that we should turn to consider the respective roles of consensus and trust, on the one hand, and of distrust, on the other, in the support of the regime of the rule of law.

III

In the United States the rule of law, although generally very strong and supported by a powerful tradition, is shaken from time to time by the gusts of ideological enthusiasm and political passions, in which the distrust of authority is one of the main components.

There are three interrelated features of American life which seem to diminish the consensus necessary for the rule of law and, in so doing, to do damage to it. These are (1) disrespect for law; (2) disrespect for politicians; and (3) populism.

It has often been remarked that Americans are not a particularly law-abiding people, suiting their convenience and advantage to the extent that they can and conforming with the law to the extent that they must. It is probable that the situation is not very greatly different

in other countries, especially France, but even Great Britain, the Netherlands, and the Scandinavian countries, which have very good reputations for law observance, have some trace of these dispositions toward the law. Still, there is an exceptional irreverence and disrespect toward the law in the United States; and it is rather widespread, even if not often intense, in most sections of the population. The general attitude of the population toward nearly all municipal regulations, the not infrequent attempts to bribe officials, the only recently reduced tendency in certain regions to "take the law into one's own hands," the fact that in the 1930's hundreds of thousands of educated persons could without repugnance and without thought of the implications lend their support to a political organization which was committed in principle, even though at the time not in practice, to the unconstitutional revolutionary overthrow of the existing governmental and legal order, the toleration of small-scale civil wars in the midst of some of our great cities during the 1920's and their intermittent revival since then, the whole fiasco of the observance of the Eighteenth Amendment—all of these instances and many others add up to the conclusion that, as far as one important prerequisite of the rule of law is concerned, the situation in the United States is a delicately poised one.

The explanations ordinarily adduced run about as follows: America has only recently been a frontier country, and its mores are still the mores of the frontier; America's population consists in large part of persons who are born of recent immigrants strange to the Anglo-American legal and moral tradition; the rapid economic expansion was associated with the emergence of vigorous, forceful individuals who, in taking advantage of the opportunities offered by our natural resources, our government policies, and our institutions, were frequently tempted to go beyond the boundary of legality; these, in turn, created a tradition of lawlessness. There surely is something to each of these explanations which explain why there has been no tight consensus formed in this country.

A major factor which underlies the American disrespect for law and which is not touched by the foregoing explanations is the disrespect for the lawmakers and more generally for the politician. The suspicion of anyone who lives from the public treasury is dying hard in the United States after a long and vigorous life of about a century. In a country only recently recovered from the spoils system of civil service recruitment, and not by any means entirely recovered even now, this suspicion runs pretty widely and finds a broad range. It is not surpris-

ing that only positions of such majesty and power as those of Supreme Court justices, the President, and, to a lesser extent, state governors escape the suspicion which is leveled on an ascending scale against the lawmakers proper, running from the United States Senate to aldermanic and city councils.

It is significant that there is no word in current usage to describe the legislator which is free from either cant or derogation. The word "politician" in the United States brings a wrinkle—and scarcely a smiling one—to the nose. There is no other word save "statesman" for the job, and it always evokes uneasiness and visions of diplomatic chancelleries and of elegant gentlemen who have a rather hard time at the hands of the politicians. The fact that the United States is simultaneously the freest of great states and at the same time the scene of some very appalling departures from the principles of liberty and of the rule of law is closely connected with the devaluation of the politician in American life.

The low status of politicians and the political career, although changing, in the United States is one of the massive facts of our history. In its distrust of the politician, the United States exceeds perhaps all the great Western democracies with the exception of Weimar Germany and present-day France.

The causes of this derogation have been intimately intertwined with another antipolitical tradition—that of populism, and for that reason they merit some further analysis.

America is a country with an equalitarian ethos. It is obviously not equalitarian in the distribution of income or economic power, but these inequalities repose less heavily on the American spirit than the inequalities of political power. Economic inequality is more congenial to American equalitarianism because it is the arena in which important virtues are exemplified and exercised and rewards generally acknowledged as honorable and valuable are obtained. Politics is something else again. As a liberal regime in which the substantial achievements were the products of private activity, cultural and religious as well as economic, the political sphere was not the object of great expectations. What it did for society was not greatly esteemed—the maintenance of public order has been and is still among the lesser values of American society—and the activities of those employed by the state were not thought to be real work. No brows were thought to be moistened by honest sweat by political activity; and in the time of the spoils system there was little distinction made between the politician and the administrator—both were belittled as "politicians." (If anything, the

administrators were thought to be somewhat worse, since they were the dependents and followers of the politicians.)

Closely related to this was the fact that American political life was not the preserve of an aristocracy. In the early years of the Republic the combined gentry and patriciate which had founded the country also ruled it. It did not remain in exclusive possession of its power sufficiently long to form a tradition so strong and imposing that newcomers would be forced to submit to it. The frailty of the tradition was only too evident when the Jacksonian revolution overwhelmed the old ruling class. Politics passed, over large parts of the country, into the hands of groups of lower social status—at first, into the hands of lower-class native stock. In the next phase immigrants, Irish and German, and, above all, the former, took the lead. The image of the politician as an indolent Irishman, despoiling the public treasury on behalf of himself and his henchmen, dates from this period, about a century ago. Among the “respectable” of all classes, working class as well as middle class, “politician” became a depreciatory term. It connoted indolence, dishonesty, lower-class origin, and membership in an ethnic group and generation which had not yet proved itself by virtuous achievement.

On the local level, too, it became the prerogative of ill-educated lawyers, and, given the local basis of the party system, this meant that these same lawyers became preponderant in national politics. The antinomianism of a frontier people, individualistic and ambitious, found little room in its heart for reverence for the law, and the triangular connection of law, politics, and the lawyers helped each to pull the other down a little further in the hierarchy of social dignity. Edmund Burke's evaluation of the lawyers in the French National Assembly had much in common with the popular American attitude toward the small-bore lawyer and his political activities.

Judge, Sir, of my surprise when I found that a very great proportion of the Assembly (a majority, I believe, of the members who attended) was composed of practitioners in the law. It was composed not of distinguished magistrates, who had given pledges to their country of their science, prudence and integrity—not of leading advocates, the glory of the bar—not of renowned professors in the universities—but for the far greater part, as it must in such a number, of the inferior, unlearned, mechanical, merely instrumental members of the profession. There were distinguished exceptions; but the general composition was of obscure provincial advocates, of stewards of petty local jurisdictions, country attorneys, notaries and the train of the ministers of municipal litigation, the fomenters and conductors of the petty war of village vexation. From the moment I read the list, I saw distinctly, and very nearly as it happened, all that was to follow.⁴

⁴ Edmund Burke, *The Writings and Speeches: Reflections on the Revolutions in France* (Boston, 1901), II, 286.

The vast scandals of American politics from the end of the Civil War until Teapot Dome, on the national level, and the recurrent scandals on local and state governmental levels even more recently, although they give a false picture of American political life as a whole, do indeed confirm an underlying prejudice against the politician. The image is deeply rooted in all classes, but it is especially strong in some parts of the business and professional classes.

The fundamentally antipolitical tone of the liberal outlook—never in itself strong enough to be decisive but carrying some weight nonetheless—and the stronger factor of the lower social status of the politician, arising from the social origins of the politician and his activities as a politician, have fused with a third and independent factor which both denies the dignity of the politician as such and directly denies the validity of the rule of law. That is populism.

American populism survives in our minds as a type of radical rural progressivism. It has left behind memories of great humanitarians like Norris and La Follette and of idealistic reformers who would, in a great society, give power back to the people, as, for example, the initiative, the referendum, and the recall. Populism had other faces as well. It was against the great urban centers, which, it felt, were scenes of iniquity and of departures from a simple, wholesome life. It suspected rings, caucuses, and lobbies everywhere in political life and has left its contemporary heirs and admirers with a conspiratorial sectarian conception of politics which is difficult to extirpate. It was suspicious of foreigners and of sophisticated Old World ways. While it sponsored great state universities, it watched them jealously as its own offspring and interfered in their operation, sometimes injuriously and intolerantly and often generously and beneficially. It enjoyed the direct contact with the great orators, the spellbinders, who denounced the mighty for their might and their sins and who praised the people for their simple virtue and honorable wisdom. Populism identified the will of the people with justice and morality.

Populism proclaimed that the will of the people as such is supreme over every other standard, over the standards of traditional institutions, over the autonomy of institutions, and over the will of other strata.

Populism, by its tendency as an organized political movement and more so by the effluvial tradition which it has injected into an already favorably predisposed equalitarianism, has brought about a peculiar sort of inequalitarianism. Originally a protest against the wealthy and great, in their splendor and state, it inclined easily, by the radicalism

of its emphasis, toward an inverted inequalitarianism. Populism is tinted by the belief that the people are not just the equal of their rulers; they are actually better than their rulers and better than the classes—the urban middle classes—associated with the great powers.

The mere fact of popular preference is therefore regarded as all-determining. Emanation from the people confers validity on a policy or on the value underlying it. Populism does not deny ethical standards of objective validity, but it discovers them in the preference of the people. The belief in the intrinsic and immediate validity of the popular will has direct implications of the rule of law. For one thing, it denies any degree of autonomy to the legislative branch of government, just as it denies autonomy to any institution. Demanding that all institutions be permeated by the popular will or responsive to it—since the validity of the popular will is self-evident—populism inclines toward a conception of the legislative branch which may be designated as “identity” as over against “representation.” Legislators are expected to be “identical” with the popular will rather than “representatives” who will interpret it and relate it to other values. Populism is, as indicated above, impatient of institutional traditions and boundaries; it finds the delimitation of jurisdictions so much “bureaucratic red tape” which strangles the popular will. It is impatient of institutional procedures which impede the direct expression of the popular will and the forceful personalities who assume the responsibility of being vessels of the popular will. Populism is impatient of distinctions, and it abhors the division of powers which would restrain and confine the popular will.

It is clear that populism—not just Populism in the specific historical meaning, although that was an instance of the species—regards parliamentary politicians as very inferior beings with no inherent virtue in themselves or in their institution. Politicians are at best errand boys with little right to judgment on their own behalf if that judgment seems to contradict popular sentiment. The administrative branch is even less exalted—discolored as it is by corruption and indolence at an earlier date and excessive education and looking-down on the ordinary people in latter days. The derogatory attitude toward the politician described above, which originated in quite a different moral climate, articulated perfectly with the populist view. But, even without that reinforcement, populism in all countries—even in countries with memories of aristocratic ruling classes (e.g., Germany)—is hostile to the politician.

Burke, who saw the dangers of populistic politics more sharply than

most, said: "The degree of estimation in which any profession is held becomes the standard of the estimation in which the professors hold themselves."⁵

The precipitate, in the legislator, of populism in the electorate is demagogic oratory and conduct and the flattery of the prejudices, presumed or actual, which are regarded as the will of the people. Deferential and eager to be of use, the populistic politician, in his fullest development, is an aggressive orator who fulminates against the wickedness of those who hide things from the people and who stand in their way, who betray the trust of the people, or who depart from the clear directives of popular wisdom.

The flattery of a populistic constituency is carried out not just by singing its praises but also by attacking its enemies. The more embattled a politician against the enemies of the people, the more he earns its approbation. The feeling of uneasy unworthiness of the populistic politician who knows the poor esteem in which his constituents hold his breed is assuaged by the knowledge that he is pleasing to them as well as doing their bidding.

Pressure-group politics which place the politician directly under the impact of some of his more vigorous constituents is a constant reminder to him of his obligations to the "people's will"; pressure groups always, and not hypocritically, justify their activities by reference to the good of the people.⁶

All politicians, in real democracies and in the pseudo-democracies (i.e., the populistic totalitarian regimes), are in some measure oriented toward the public eye. Populistic politicians are hypersensitive to it. They fear its distrustful gaze and the disapproving judgment which it holds in reserve. To this problem, publicity is the solution.

In a country as large as the United States, where congressmen and senators are so far from their home constituencies and where they are so dependent on their constituents, both in fact and in sentiment, publicity is pleasant to those who feel the need for it and invaluable for

⁵ *Ibid.*

⁶ There are few politicians in this country who would challenge the ethical assumptions of pressure-group politics, although, as populists to the marrow, they are usually very vigorous in denouncing lobbies which subvert the people's will. Indeed, so pervasive is populism among Americans that there are few even among intellectuals who are skeptical in principle of the validity of pressure-group politics.

It might seem paradoxical to assert that populism, with its obsession with conspiracies against the popular will, is closely connected with pressure-group politics. But people at the extremes are often very opposed to the kinds of actions which they are carrying out themselves.

letting constituents know that they are being well served. Since populism is moralistic and not just concerned with economic interests, the well-serving politician not only must look after interests but must also place his ideological submission on record.

The artfulness of American journalists and the temptations of press conferences, radio, and television⁷ have all heightened the populistic sensitivity and propensity of American politicians. By increasing the opportunities and even the obligations of publicity, they have made politicians more responsive to the presumed moods of their constituents. And, acting on the same dispositions in the electorate, they have also heightened the populistic orientation there too. Some parts of the electorate like to have dirty linen washed in public so that they can be sure of what has been going on behind the scenes, and, in the course of washing, their appetite to know what goes on behind the scenes is increased too. The politician feels himself more constantly under the scrutiny of the people and more constrained to do things which will conform with their moods and which will show that he is not second to anyone in rushing to their satisfaction. Lacking confidence in his own capacities to guide the opinion of his followers, feeling distant from his electorate and out of touch with them, he responds excessively to the demands of the most vociferous and clamorous of his constituents. Distrusted and disesteemed by their constituents, they for their own part lack the trust in their constituents which comes from having a feeling of easily borne affinity with them. They are obstructed, by their sense of separateness and inferiority, from the solidary understanding of their constituents or from feeling closely connected with them in sentiment.

Under these conditions they tend to overrespond to the demands of their more vociferous, more populistic constituents who assail them by visits, memorials, telegrams, letters, and telephone calls, who seek not merely personal favors and services but service on behalf of a populistic ideal. Those sections of the electorate who are less passionately populistic, who are less aggrievedly ideological, are more apt to be quiet. Hence, the legislator himself who lives in a populistic tradition has that tendency in himself reinforced.

The populistic politician, to satisfy his conscience, which is in the possession of his imagined constituency, must attack the people's

⁷ To this list of distractions should be added the public opinion poll, which stands somewhere between the pressure group initiated externally and the quest for publicity initiated from within but powerfully aided from without.

enemies. Who are they? They are his own enemies—they are the bureaucrats who by virtue of civil service rules and a strong executive are no longer his own creatures; they are the intellectuals who overlap with bureaucrats in the civil service, who look down their noses at politicians as uncouth and ignorant and whose sophistication is an implicit criticism of earthy populism; they are the businessmen, those old enemies of the populists, with their big-city ways, their vast accumulations of power, and their desire to keep their affairs to themselves; they are revolutionaries who would subvert the good moral order in which the people rule in order to establish a dictatorship under foreign inspiration.

The result of this is the passion for investigation which seizes the American Congress, from time to time, and especially in the last few years. The deflection of the legislative branch from its proper business in response to populistic urgings results in ill-considered legislation, in the subversion of the proper relations between the branches of government, in a terrible preoccupation with divergent opinions, and in an interference with the autonomy of institutions and the separation of the spheres which is a life-necessity of a free society and which is constitutive of the rule of law.

Populistic legislators, like the princes of Central Europe after the Reformation, although for different motives, are excessively concerned with opinion. Populism is moralistic, and it thinks that opinions on moral matters make a really considerable practical difference in the conduct of affairs. Just as they wish to conform with what appears to them to be the dominant body of popular opinion, so they are extremely sensitive to opinions which are critical of them. Hence, their extraordinary readiness to believe that practically all opinions, which diverge from the opinions which they are seeking to flatter, are subversive. Hence, there has emerged recently an atmosphere which they share and which they have, in part, created, in which the most harmless disagreements are thought to be intended toward subversive ends. The freedom of expression from governmentally imposed or engendered restraints—a fundamental property of a free society under law—is certainly endangered by such an outlook.

The principle *Cujus regio, illius religio* (or, in the present case, *opinio*) is the principle of a society in which the people distrust their rulers and in which the rulers respond by fearing and hating the people. It is not a principle of a free society or of the rule of law. It is however only an expression of that fundamental absolutist attitude

which cannot tolerate moral or ideological heterogeneity and which is so suspicious of clearly defined jurisdictions and institutional autonomy. Absolutism in the guise of hyperdemocracy is populism. It is the very attitude which seeks to direct the policies of executive departments by continuous investigation and by the indication of positive and negative preferences for particular persons in particular posts.

It is not merely Senator McCarthy who embodies this procedure. It is merely more extreme in him. It has existed before him, and it is not likely to vanish entirely for a very long time to come.

The rule of law is damaged when many legislators abdicate their responsibilities to certain legislative colleagues, who, to gratify their desire for the approval of an uncertain popular will, batter at the separation of powers, intrude into the sphere of the executive, and even look menacingly at the judiciary. Such conduct is a renunciation of the principle of the supremacy of the law, not this time to an encroaching executive but to an indiscriminate and unrepresentative popular will. This renunciation draws its impetus from the fear of disapproval of an erroneously assessed popular will. The populist politician's fear of the misapprehended will of the people, partial, narrow, and ungoverned by reason, is part of the American tradition. It is a distorted and extreme elaboration of the tradition of moral equality. But deformed though it is—an equalitarianism driven so far as to become an inverted inequalitarianism—it is a forceful part of our tradition. It will not serve the rule of law, which with equality and freedom, individual and corporate, stands in the center of our tradition to deny that it exists, that its roots lie in the distrust of politics as a legitimate activity, and that it must be held in check.