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Martin Krygier[**]

ABSTRACT

Over some 30 years, I have struggled to reach some clarity about the rule of law and why, as I believe, it matters so. This talk will give some account of the reasons for the quest, some of the dragons that needed to be slain along the way, the glittering but elusive prize, and why, after so long a trek, there still appear to be long tunnels at the end of the light. I conclude by reflecting on the extent to which where we stand in relation to the rule of law often depends on where we sit.

KEYWORDS: Rule of Law, Power, Goods, Evils

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Four Puzzles about the Rule of Law: Why, what, where? And who cares?

Martin Krygier[1]

SUMMARY: INTRODUCTION. 1. WHY?. 2 . WHAT? 3. WHERE? 4. WHO CARES?

INTRODUCTION

It appears the time of the rule of law has come. In the past 20 or so years, the concept has gone from often-derided but more often ignored margins of public concerns to a somewhat hallowed, if also sometimes hollow centre of many of them. Once a quasi-technical term of interest only to lawyers and legal philosophers, it appears all over the globe these days, at ease in the company of such unassailably Good Things as democracy, equality, and justice.

Rule of law is today an international hurrah term, on the lips of every development agency, offered as a support for economic growth, democracy, human rights, and much else. RoL promotion is booming. Lots of people and organizations are contracted to work on it, lots of money is spent on it, lots of academics study it. To a partisan of the rule of law, and I am one, that should be good news, and in a way it is. But only in a way. For it is hard to boast of much success in actually fostering it, let alone understanding what the 'it' is. Nor, given the proliferation of people wanting a slice of it, is it as clear as it once may have seemed, what it might be good for. Some still doubt whether it is good for much at all.

Over some 30 years, I have struggled to reach some clarity about the rule of law and why, as I believe, it matters so. This talk will give some account of the reasons for the quest, some of the dragons that needed to be slain along the way, the glittering but elusive prize, and why, after so long a trek, there still appear to be long tunnels at the end of the light.

Central among the many unclarities that attend the rule of law are those named in the title of this lecture. In what follows I move through this array of puzzles, in the order in which they appear there. One could rearrange the order, and many do, but I suggest that is unwise. I conclude by reflecting on the extent to which where we stand in relation to the rule of law often depends on where we sit. The concept has today become so protean, partly because people can have so

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[1] Published in Nomos L: Getting to the Rule of Law, James E. Fleming, ed. (New York University Press, 2011) This chapter was delivered as the 2010 Annual Lecture of the Centre for Law & Society, University of Edinburgh. I am grateful to Neil Walker for inviting me to deliver the lecture, and for extremely helpful comments on it. I also learnt from participants in the discussion that followed the lecture. Drafts benefited from several long and long-distance skypings with Gianluigi Palombella.

many reasons for being interested in it. That can lead to confusion, but it also can reflect real differences in perspective. I distinguish between two such perspectives that matter over a broad range. One is that appropriate to efforts to establish the rule of law where it has not been much in evidence. The attempt, always difficult and often fruitless, is to generate it. The other occurs where the rule of law is already in place and more or less well established. People seek to analyze it, and may well want to defend it or criticize or improve it. However they have it[2] and can draw on it, though they might well want more or better of it. Before we say what the rule of law is, what it depends on, and what it's worth, it helps to clarify who is asking, and in what circumstances.

1. WHY?

It is common to start discussions of the rule of law by saying *what* it is, before going on to ask what, if anything it might be good for and worth. The focus is on one or other set of purportedly defining characteristics of the thing itself, made up of elements of legal institutions and legal rules. Such accounts differ in many ways. Some are abstract, some specifically tied to particular concrete incarnations, and some are checklists of legal, particularly judicial, infrastructure, thought packageable for export.

At the most abstract level, for example, legal philosophers typically identify formal aspects of laws. Thus the most influential such account, Lon Fuller's 'internal morality of law,' is made up of eight formal characteristics of legal rules – that they be 1. general; 2. public; 3. non-retroactive; 4. comprehensible; 5. non-contradictory; 6. possible to perform; 7. relatively stable; 8. administered in ways congruent with the rules as announced. A purported legal order that fails totally in any of these dimensions does not, Fuller argues, deserve the name. One that scores well is likely to be doing well, even though other things matter, life is complex, and perfection in any of these dimensions is neither desirable nor possible.[3]

More concretely and parochially,[4] in his enormously influential account of the rule of law,[5] A.V.

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[2] I am using shorthand here. The rule of law is not something you have or don't have. It comes in degrees, more or less, and not only on one scale. That is often important to recognize. When I use this shorthand, I only mean that a society is comparatively well endowed with the rule of law. Other societies are less well endowed, some so poorly served that we say, also usually in shorthand, that they lack the rule of law.

[3] See Lon L. Fuller, *The Morality of Law*, revised edition, New Haven, Yale University Press, 1969.

[4] See Judith Shklar, 'Political Theory and the Rule of Law,' in *Political Theory and Political Thinkers*, (Chicago, University of Chicago Press, 1998) 26, on 'Dicey's unfortunate outburst of Anglo-Saxon parochialism … The Rule of Law was thus both trivialised as the peculiar patrimony of one and only one national order, and formalised, by the insistence that only one set of inherited procedures and court practices could sustain it.',

[5] *Introduction to the Study of the Law of the Constitution*, 10th edition 1959 (first edition 1885), Macmillan, London, 195-96.

Dicey focused on three distinctive elements of the British institutional order – inability of authorities to exercise 'wide, arbitrary, or discretionary powers of constraint;' subjection of all citizens, whatever their 'rank or condition,' to the same, ordinary, law administered by the same ordinary courts; and constitutional principles that flowed up from court judgments in particular cases rather than down from general written constitutional documents. Lawyers often follow Dicey's example, whether influenced by him or not, and identify the rule of law with what they like about their own legal orders.

Thirdly, benighted parts of the world are likely to be visited by numerous international rule of law promoters, for it has become fashionable to believe, on arguable[6] but not insubstantial grounds, that the rule of law is a necessary means to achieve various valuable ends beyond the rule of law itself. As Charles T. Call observes:

> Among a plethora of development and security agencies, a new 'rule of law consensus' has emerged. This consensus consists of two elements: (1) the belief that the rule of law is essential to virtually every Western liberal foreign policy goal – human rights, democracy, economic and political stability, international security from terrorist and other transnational threats, and transnational free trade and investment; and (2) the belief that international interventions, be they through money, people, or ideas, must include a rule-of-law component.[7]

The rule of law in these interventions is identified with aspects of 'the justice sector,' particularly the judiciary and lawyers. As Tom Ginsburg has remarked, '"Rule of law" programming has become shorthand for all interventions targeting legal institutions, a synonym for work on the "the justice sector." As used in contemporary practice, it is really shorthand for the rule of lawyers rather than the rule of law in the classic sense, though of course the two projects can overlap.'[8] This agenda and style of rule of law intervention – which even excludes 'non-lawyerly as-

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[6] See Randall Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?', (2005) 36 *Georgetown Journal of International Law*, 809-945; David Trubek and Alvaro Santos, eds, *The New Law and Economic Development. A Critical Approach*, Cambridge University Press, 2006; Stephen Golub, 'A House without foundations' in Carothers, ed., *Promoting the Rule of Law Abroad*, Carnegie Endowment for International Peace, Washington, DC, 2006, 105-36.

[7] 'Introduction' to Call, ed., *Constructing Justice and Security after War*, United States Institute of Peace Press, Washington, D.C., 2007, 4.

[8] 'In Defense of Imperialism? The Rule of Law and the State-building Project,' forthcoming, *Nomos* (2011) 'Getting to the Rule of Law,' and see Erik Jensen and Thomas C. Heller, eds., *Beyond Common Knowledge. Empirical Approaches to the Rule of Law*, (Stanford, Stanford Law and Politics, 2003), 1-2:

'In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform.* Basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector.

... During the last seven years, we have witnessed an explosion of literature related to legal and judicial reform. Yet

pects [of the state] such as public administration or non-state justice'[9] - has two consequences: on the one hand, rule of law reformers try to develop the rule of law because the external ends it is thought to facilitate are valued; on the other hand, those ends are themselves outside the province of rule of law reformers. *We* do rule of law, that is, build the institutions that comprise the formal justice sector; economists, sociologists, and politologists do the other stuff, dependent though that is thought to be on what we have done.

These three perspectives, and those many influenced by them and engaging with them, differ from each other substantially. However, they all have in common two core assumptions: a) that the ingredients of the rule of law are legal institutions, rules, and official practices and b) that we are in a position to stipulate, in terms that apply generally, what aspects and elements of these institutions, rules and practices add up to the rule of law. Many other accounts of the rule of law – among them 'thick' versions that include substantive content of provisions, for example dealing with human rights, and more spare 'thin' ones that focus on legal forms rather than substantive content - are even more specific than these. They mention particular configurations of institutions, presence or absence of bills of rights, and so on. Again, the focus is on features of the central legal order and what it proclaims.

I believe that there are problems with each of these approaches taken separately, but I also think, and have elsewhere argued, that what they share is as misleading as where they differ. They *start* with the wrong question, so their answers, however insightful, are often beside the point. The proper place to start, I believe, is with the question *why*, what might one want the rule of law *for?* not *what*, what is it made up of? And that matters, because no sensible answer to the second question can be given until one comes to a view on the first. And what counts as a sensible answer in one place might not be too sensible somewhere else. I have thought this for a long time, and have argued it often.[10] The reasons have evolved, and I now have three of them, one conceptual, one empirical and one practical.

The conceptual reason is this: the rule of law is not a natural object, like a pebble or a tree, which can be identified apart from questions of what we want of it. Nor is it even a human artefact you can point to, like the statement of a legal rule, though its realization or approximation might depend on such artefacts. The rule of law occurs insofar as a valued state of affairs exists, one to which we gesture by saying the law rules (not a simple notion and not one to be expound-

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very little attention has been paid to the widening gap between theory and practice, or to the disconnection between stated project goals and objectives and the actual activities supported.'[8]

[9] Richard Sannerholm, Rule of Law after War. Ideologies, Norms and Methods for Legal and Judicial Reform, (2009) 1 Örebro Studies in Law, 131 and *passim.*

[10] Most recently in 'The Rule of Law: Teleology, Legality, Sociology,' in Gianluigi Palomella and Neil Walker, eds., *Relocating the Rule of Law,* Oxford, Hart Publishers, 2009, 45-69.

ed simply by looking up two words in a dictionary, but let it lie for the moment). What we take to be its elements are supposed to add up to something, to be good for generating or securing that state of affairs. It is a teleological notion, in other words, to be understood in terms of its point, not an anatomical one, concerned with the morphology of particular legal structures and practices, whatever they turn out to do. For even if the structures are just as we want them and yet the law doesn't rule, we don't have the rule of law. And conversely, if the institutions are not those we expected, but they do what we want from the rule of law, then arguably we do have it. We seek the rule of law for purposes, enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind.

Should you have Fuller's octet, or Dicey's trio, or the World Bank's RoL recipe book, but they happen to serve no salutary purposes in a particular society, or serve them ill, or do the opposite of what we believe the rule of law should do, or do nothing at all, or are overborne by hostile forces, it would be odd to say, with feeling: *that* society has the rule of law. It would be hard to find a non-academic, at any rate, who would think to do so. The reason is simple and should be obvious: you might have law, but in such cases it doesn't rule.

It is in accord with the achievement that we postulate as the rule of law that we can sensibly say there is a lot of it about, say, in Scotland, less so in Russia; hard to find a living trace in, say, Byelorussia or Burma. And we can do so without too much knowledge of legal technicalities and intricacies. Knowing whether the rule of law is well realized in a society, then, is not in the first instance a question of the morphology of legal institutions, but of the existence, bare or flourishing, of the state of affairs in which the values of the rule of law are approached.

In another context, Gianfranco Poggi spoke of Durkheim's concept of society as a a contingent, 'insofar as reality,' 'real *insofar as* certain things go on'[11]: socially patterned behaviors, shared and internalized norms, and so on. I think of the rule of law that way. It is a relative and variable achievement, not all or nothing. But one can say it exists in good shape or repair insofar as a certain sort of valued state of affairs, to which law contributes in particular ways, exists. At this point I don't want to argue for a specific account of that state of affairs; I will just gesture in the direction. Putting it roughly for the moment, the rule of law is in relatively good order insofar as some possible behaviors, central among them the exercise of political, social, and economic power, are effectively constrained and channeled to a significant extent by and in accordance with law, so that non-arbitrary exercises of such powers are relatively routine, while other sorts,

[11] Gianfranco Poggi coins the phrase to describe Durkheim's conception of society. See his *Durkheim*, Oxford University Press, Oxford, 2000, 85.

such as lawless, capricious, willful exercises of power routinely occur less.

There is, of course, controversy about how that state of affairs should be characterized, how the law might contribute to it, and what it needs to be like to do that effectively. Such controversies are not unique to the rule of law, however. Recall democracy, justice, equality. Concepts that are contested, even 'essentially contested,'[12] are not for that reason alone meaningless or useless. On the contrary, some of them are the most important we have.

My own specification cannot put an end to such controversy. Ends and means are both in play and disagreements are common in both domains. I only want to suggest that the rule of law needs first to be approached by asking after its *telos*. The purposes you postulate don't have to be moral purposes (though in my understanding of the rule of law they have moral value); it depends how you characterize them. But you can't usefully describe or explore the rule of law before clarifying what you think it's good for. Of course, those who make lists of the legal constituents of the rule of law think they add up to something too. But they too easily assume an identity between the purposes and the institutional apparatus of the rule of law. They certainly have much more to say about the apparatus than the purposes.

This shades into my empirical point, directed both to analysts who seek to assess the extent of rule of law in different societies, and to rule of law promoters, who seek to generate it. Social scientists who study the rule of law seek markers of it in various settings. This can be a sophisticated activity, full of indicators, data sets, and so on. But what do indicators indicate? Often this is a seriously under-theorized question. Take one standard rule of law indicator, judicial independence. We know why people think it important that judges not be swayed by overweening overlords, outsiders or off-siders. The judiciary is the institution where the legal buck stops, at least in principle, since judicial interpretations ultimately govern what the law is, or becomes. And so it seems obvious that the more strongly the judiciary is shielded, institutionally, culturally, financially, from outside pressures the better for the rule of law. As a result, judicial independence is a standard rule of law indicator. However, unless independence is assumed *a priori* to be good for the rule of law, the relationship between indicator and indicatee is altogether more problematic than it may seem at first blush.

Judicial independence is at best never more than part of what is required for judicial integrity and competence. More important, there are circumstances in which it works in precisely the opposite direction. It can be an effective shield for incompetence, political affiliations and corruption, particularly in societies where these were rife before independence was institutionalized,

[12] See Jeremy Waldron, ''Is the Rule of Law an Essentially Contested Concept (in Florida?)', (2002), 21 Law and Philosophy 137

and the notion that judges should be fundamentally creatures and speakers of the law had been the very last thing on anyone's mind. Thus several post-communist countries quickly institutionalized internal judicial self-government and independence from outside interference, as though their ideal of having a judiciary committed to the integrity and rule of law would best be reached by imagining it had already been attained. That made irremovable old, incompetent, corrupt, badly-formed hold-overs from earlier times. Indeed, in some legal orders 'in transition,' it seems that rendering judges irremovable was actually *intended,* by the first unrenovated ex-communist leaders, to have that result so that if they lost electorally, they would still have their people on the bench, independent of pressures from their opponents.[13]

Writing on some of the innocences of Technical Legal Assistance [TLA] programs, Stephen Holmes has pointed out that judicial independence is an ambivalent achievement. It is never all we want and in certain aspects not what we should want. Judges, he points out, are rightly dependent on the state to pay them, maintain court buildings, equipment and so on, and faithfully and effectively enforce judicial decisions. None of these is a small undertaking, and we don't want judges to find ways to do them for themselves. Of course, we want the judges to make their decisions independently of all this routine dependency, and there are institutional ways to encourage this. However, unless it is accompanied by real deference to something outside their own interests – law, for example - independence can be a cure as bad as any disease. These are general truths, made all the more dramatic, as Holmes observes, in post-authoritarian regimes, where:

> the judiciary is an 'orphaned institution,' suddenly freed from the tutelage of a now-defunct political authority, which it once approached on bent knees. Such surviving fragments of a dead authoritarian system are typically populated by sclerotic professionals wedded to old fashioned ways of doing business. The ideology of judicial independence, if accepted unthinkingly, can be used to obstruct or postpone their re-education.[14]

In such settings, Holmes goes on to note:

> [a] significant danger during transition, in fact, is *halfway reform.* Halfway reform occurs when the judiciary manages to free itself from authoritarianism without adapting to democracy. It can refuse orders from the executive branch without giving any particular deference to the interests of society expressed in the constitution or ordinary acts of the elected legislature. The post-authoritarian judiciary can instead work exclusively to perpetuate and aug-

[13] See Pedro Magalhães, 'The Politics of Judicial Reform in Eastern Europe', (October 1999) 32, 1 *Comparative Politics,* 43-62, and my 'The Rule of Law. An Abuser's Guide', in András Sajó, ed., *The Dark Side of Fundamental Rights,* Eleven International Publishing, Utrecht, 2006 129-161

[14] 'Judicial Independence as Ambiguous Reality and Insidious Illusion,' in Ronald Dworkin, ed., *From Liberal Values to Democratic Transition. Essays in Honor of János Kis,* CEU Press, Budapest, 2004, 8.

ment its own corporate advantages. The private guild interests of judges can refuse all compromise with the common interest of society and, remarkably enough, can defend this recalcitrance with the language of liberalism … To avoid such autistic corporatism, disguised as liberal orthodoxy and increasingly common in transitional regimes, should be, but is still not, one of the main objectives of TLA [Technical Legal Assistance].[15]

To the extent that these pathologies attend judicial independence, its existence can only be an automatic 'indicator' of the rule of law if it is taken to be so as a matter of definition. The basis for selecting empirical indicators for the rule of law cannot itself be simply empirical. It must be theoretically guided, and central to the theorization must be some conception of the relationship between the indicator and what you are trying to indicate, or in other words, whether it supports the rule of law or does not.

My third, practical, reason for suspicion of accounts of the rule of law that start with institutional means rather than valued ends, follows from this tendency too readily to understand the rule of law in terms of institutional bits and pieces, often of distinguished, but also often of distant and different, provenance. The world of rule of law promotion is prone to a pathology well remarked by organization theorists, namely, goal displacement. This occurs, simply put, when means are substituted for ends, often unconsciously, and people flap about with check lists (and check books), recipes, 'off-the-shelf blueprints',[16] often modelled on alien and distant originals, with scant reflection on the purpose(s) of the rule of law, or the proper purposes of their own enterprise. Are they to stock judicial libraries, increase the numbers of computers on judicial desks, teach judges some method or other of case management, all for their own sake, or are they supposed to promote the rule of law? Of course, we know what anyone would answer if asked. However, the link between what rule of law promoters promote and the rule of law is too often assumed rather than demonstrated or even questioned. Particular institutions and institutional forms are taken to contribute to the rule of law, and focus becomes fixed on those institutions rather than the ends that, sometimes in a dimly remembered or clearly forgotten past, had inspired the development of those very institutions, but which they may well not be serving in any way.

Where the rule of law is in good shape, and especially where it has been so for generations, we may not really understand why, and still benefit from it. Philip Selznick cites Kenneth Winston's observation, that, 'we often don't know what it means to be committed to the value apart from the forms,' to argue that 'we often have more confidence in a particular form or practice,

15 Ibid., 9.

16 W. Jacoby, 'Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe', *East European Constitutional Review* Vol. 8 No. 2 (1999) p. 62.

rooted in experience, than in an abstract statement of why the form exists or what values it upholds.'[17] In such circumstances, there is a lot to be said for Michael Oakeshott's preference for the 'pursuit of the intimations'[18] of traditions, over attempts to vindicate some rationalist plan. However, the project is different when people seek to institutionalize the rule of law where this has not happened before, and where local traditions though still of crucial importance because they are there and will need to be negotiated, are inhospitable to values one seeks to generate. Then pursuit of intimations is not enough. We need to think more deeply about first principles. In a context where the rule of law has been proposed for many societies where it was not strong or long embedded, and where it often faces fierce competition from forces that have no concern with it, and whose major interests allow no accommodation for it, my argument is that responses to such proposals, that begin with what are taken to be the legal-institutional features of success-stories, are a bad way to start. We need to ask what values they do and should, particularly should, serve.

Of course, not everyone agrees on values, and the term 'rule of law,' we will see, is used by so many people to express so many different ambitions that it is important to get straight where they are coming from in this discussion. Given that the word is in common use, it is unhelpful to be too eccentric or solipsistic in one's use of it. However, given that it is in *such* common use, it is hard not to be stipulative to some degree. What follows are some of my non-eccentric, but particular, stipulations.

EXTRINSIC AND IMMANENT ENDS

Now there is one constituency for the rule of law that might appear to have heeded my advice. That is the world of those many international agencies involved in rule of law promotion in 'transitional', 'post-conflict' and 'developing' countries. After all, the rule of law is today so popular among such agencies not for its own sake but because, as we have seen, it is thought to deliver other goods: economic development, human rights, democracy, and so on.

However, though I would be happy with any support, and while the popularity of the rule of law is welcome, I have something different in mind. As I mentioned a moment ago, the sorts of ends just enumerated are *external* to the rule of law itself, benefits supposed to flow from it, what it is thought to do and facilitate, not themselves part of what it means for it to exist. Moreover, those

[17] *The Moral Commonwealth*, 454.

[18] 'In politics, then, every enterprise is a consequential enterprise, the pursuit, not of a dream, or of a general principle, by of an intimation.,' Michael Oakeshott, 'Political Education,' in *Rationalism in Politics and other essays*, new and expanded edition, (Indianapolis, IN., Liberty Press, 1991) 57. And see 66-69, 'The Pursuit of Intimations.'

ends don't affect promoters' understandings of what the rule of law is or where it lies. The rule of law is treated as a kind of technology whose features can be specified independently of the ends that are supposed to flow from them.[19]

Indeed, the literature discussing whether or not the rule of law serves such ends typically jumps from an understanding of the rule of law that identifies it with particular legal institutions to the external ends sought, ignoring that in the gap in between the question remains whether the rule of law's own proper purposes have been achieved, even partially. This becomes particularly evident in moments of disappointment, which in rule of law promotion are very common. Promotional activity is undertaken, money is spent, judges trained, and yet the economy does badly or a despot takes over, or civil war breaks out, again, and human rights are trampled. 'What did the rule of law do for *us?'* disgruntled reformers are likely to complain. Thus, Frank Upham laments:

> The likelihood that Western mischaracterization of the appropriate roles of law will be accepted by developing countries, thus leading to misallocation of domestic effort and attention, and perhaps most important, eventually to deep disillusionment with the potential of law. When the revision of the criminal code does not prevent warlords from creating havoc in Afghanistan and the training of Chinese judges by American law professors does not prevent the detention of political dissidents – or, perversely, enables judges to provide plausible legal reasons for their detention – political leaders on all sides may turn away from law completely and miss the modest role that law can play in political and economic development.[20]

Typically, Upham identifies the rule of law and exaggerated expectations of it, rather than an inadequate understanding of it, as the source of his fears. However, what if the problem is less that the rule of law was installed but failed to do much good, than that what was installed was not yet the rule of law, but only bits of legal apparatus not on their own up to the job? That is my view. When legal institutional tinkering fails to prevent havoc, when people who count ignore the law and those who don't count have merely to suffer it, the rule of law is in very poor shape if it exists at all, whatever the laws and institutional structures look like. For reasons to which we will come, that should not have been a surprise. On their own, the legal institutional features so often identified with the rule of law are not up to the task. On their own, they never are.

Surely one anticipates good consequences from the rule of law, if one does, because what it *does* has further benefits. It is because of something that the rule of law *offers or allows* that we antic-

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19 See my 'Approaching the Rule of Law,' in Whit Mason, ed., *The Rule of Law in Afghanistan. Missing in Inaction,* Cambridge, Cambridge University Press, forthcoming 2010.

20 'The Illusory Promise of the Rule of Law,' in András Sajó, ed. *Human Rights with Modesty. The Problem of Universalism,,* (Leiden/Boston, Martinus Nijhoff, 2004) 281.

ipate salutary results for the economy, for democracy, for human rights, and so on. That might be a plausible hope or not. However, we will only be able to tell once we have the achievement, not merely some institutions hoped to produce it. Think of Max Weber on law and capitalism. He believed that formally rational law was more predictable than other sorts, and that *from that predictability* flowed further benefits to modern capitalists. He might have been wrong about the connections, but that is the logic of the claim. We need to focus in the first instance on the *immanent* ends of the rule of law, its own *telos*, the point of the enterprise, goals internal to it. Further second order effects on democracy, human rights or the economy may or may not flow from the rule of law, and that would need investigation, but they are not intrinsic to it. Put in other words, economic development or even democracy are not in the first instance the goals of the rule of law. If they are favored by it, this is because immanent features of what it does, when it does what it should, favor them.

What ends are immanent in this sense? A first take on ends intrinsic to the rule of law, and one perhaps deepest in the rule of law tradition,[21] is that they involve legal reduction of the possibility of *arbitrary* exercise of power by those in a position to wield significant power. I have yet to provide or find a sufficiently complex and textured analysis of what arbitrariness includes (what degree of caprice? whim? unreasonableness? unreasonedness? discretion? If not all discretion, how much? And so on) and excludes. At a general level, however, I am happy with Philip Pettit's definition:

> An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium,* the decision or judgement , of the agent; the agent was in a position to choose it or not choose it, at their pleasure. When we say that an act of interference is perpetrated on an arbitrary basis … we imply that it is chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgements.[22]

Moreover, however difficult it may be to distinguish in detail, say, between arbitrary and non-arbitrary choices, it is not hard to map the territory roughly and to find examples, particularly of rank arbitrariness if not of some perfect, imagined, antipode of that. If the edges are blurred, the importance of arbitrariness as an (and perhaps *the*)[23] anti-value among those who have written about the rule of law for centuries is not open to doubt.

Once I thought that reduction of the possibility of arbitrariness was enough to locate the *telos* of

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21 See John Philip Reid, *The Rule of Law,* University of Illinois Press, Illinois, 2004.

22 Republicanism, 55

23 Goaded by Gianluigi Palombella, I am not sure that arbitrariness takes us far enough, but it's as far as I have so far worked out how to go, and I'm not sure we need to go any further.

the rule of law, and I still believe that, but it needs to be spelt out a little more. For taken too simply, it might seem inconsistent with an element of legal orders that goes deep, and for good reason. Neil MacCormick and Jeremy Waldron have reminded us that 'law is an argumentative discipline,'[24] and that is not through accident or misadventure. People with legal interests at stake need to be able to speak for those interests, whether they accuse or are accused. This requires a good deal of provision from legal orders. Waldron stresses 'a deep and important sense associated foundationally with the idea of a legal system, that law is a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of the norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality and entity one is dealing with … As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves.*'[25]

This is a moral value, but it is not simply a part of morality at large, and it is not just randomly or fortuitously associated with law. It is pre-eminently a *legal* value, fundamental to the moral integrity of *legal* ordering, of what Fuller characterized as 'the enterprise of subjecting human conduct to the governance of rules.'[26] It is part, to use Fuller's words again, of the 'internal morality' of law. To quote Waldron again:

> Argumentation (about what this or that provision means, or what the effect is of this array of precedents) is *business as usual* in law. We would be uneasy about counting a system that did not exhibit it and make routine provision for it as a legal system. …. Courts, hearings and arguments – those aspects of law are not optional extras; they are integral parts of how law works; and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to slice in half, to truncate, what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence.[27]

Is this, though, *another* legal value, in competition with reduction of arbitrariness, or is it rather an enrichment of our understanding of opposition to arbitrary power?

Often opposition to legal arbitrariness is identified as pursuit of legal certainty. If we understand success in this quest as identical to increase of certainty, and if we thus think the more certainty

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24 *Rhetoric and the Rule of Law*, Oxford, Oxford University Press, 2005, 14.
25 'The Rule of Law and the Importance of Procedure,' 19.
26 *The Morality of Law*, at 96.
27 Op. cit., 29-30

the better, then the argumentative nature of law appears to be a major problem, or at least a different, perhaps inconsistent, value, for law. For legal argument commonly upsets, indeed is often designed to upset, prevailing certainties. The more we can render contentious the possibilities offered by the law, it might seem, the less certain it becomes and so the rule of law suffers.

However, the pursuit of certainty is a vain and misleading pursuit. First of all, law can never deliver it, both because the inherent uncertainties of legal interpretation make it impossible and because so many other sources of uncertainty in the world render it unavailable as well. For several reasons to which I will return, it is better to speak of reduction of uncertainties to an acceptable level rather than the attainment of certainty. Neil MacCormick is wise here, as he so often was. Recalling his time as a Scottish Deputy in the European Parliament, he writes:

> As a philosopher of law among the ranks of lawmakers, I always had a certain inclination to remind colleagues that certainty is unattainable, and that the most one can do is aim to diminish uncertainty to an acceptable degree. What degree is acceptable depends on the fact that other values, including justice in the light of developing but currently unforeseen situations, is at stake.[28]

MacCormick's wisdom, like so many of his virtues, is not universally shared. Law can reduce many uncertainties that stem from arbitrary exercise of power, provide significant *thresholds* of security even in the absence of complete and unattainable certainty,[29] and that is all we should expect.

Moreover, *uncertainty* is only one index of arbitrariness in the exercise of power. Another, as is plain from Pettit's definition, is that those with power are free to ignore those affected, need give no thought to them as interested actors with their own 'perspective on the world,' in Simone Weil's phrase. That perspective is all the more crucial to take into account, when its bearers are those liable to be affected by what the law does. The certainty that you and your views will be ignored, will count for nothing, in the exercise of power over you does not render that exercise non-arbitrary. Again, one can do no better than allow MacCormick to make the point:

> If the Rule of Law is to be actually a protection against arbitrary intervention in people's lives, it seems clear that it is not in practice enough to demand that the operative facts did on some occasion actually happen or obtain. It is necessary that some specific and challengeable accusation or averment of relevant facts be made to the individual threatened with action. This in turn must be supported by evidence in an open proceeding in which the party charged may contest each item of evidence … and may offer relevant counter-evidence as she/he chooses. Moreo-

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28 Rhetoric and the Rule of Law, 11.

29 On the importance of securing thresholds as distinct from pursuit of formalistic certainty, see my 'Ethical Postivism and the Liberalism of Fear,' in Tom Campbell and Jeffrey Goldsworthy, eds., *Judicial Powers, Demoracy and Legal Positivism,* Ashgate, Aldershot, 2000, 59-87, esp. at 73ff.

ver, it must also be possible to challenge the relevancy of the legal accusation or claim. [30]

There is then a strong affinity between opposition to arbitrary exercise of power, which some have taken to suggest unchangeable, unchallengeable provisions and interpretations of law, and the argumentative character of law, which demands the opportunity for challenge, reinterpretation, and legally constrained and disciplined disputation, by those affected by the exercise of power. At the point of contested application of laws to facts, which is *not* by the way where or how most law affects most life, provision needs to be made for the fact that power will be exercised arbitrarily unless those it affects are treated as *humans,* with legitimate differences over the meaning of the law, the existence and interpretation of the facts and the application of that law to those facts. For that reason, for their reasons, I follow MacCormick and Waldron in taking openness to argumentation to complement and complete opposition to arbitrary exercise of power. Both the unpredictability or unreliability of the exercise of power, and the inability to challenge it, are obnoxious for several of the same reasons that having one's own perspective silenced or ignored is. Here are four.

One fundamental reason to wish that the possibility of arbitrary power be strongly limited is that it imperils our liberty. It does so on most accounts of liberty, and perhaps most clearly in its republican conception, as non-domination. This conception is particularly law-related, indeed law dependent. It has been emphasized by Philip Pettit[31] as the central republican contribution to political theory, and by Gianluigi Palombella as the central achievement of the rule of law.[32] So understood, liberty is not infringed by every sort of interference, but only by 'arbitrary (reason-independent) interference,'[33] that is, precisely that sort contrary to the ideal of the rule of law. As Pettit puts it, 'To enjoy non-domination is …to be possessed, not just of non-interference by arbitrary powers, but of a secure or resilient variety of such non-interference.'[34] Such security and resilience is not likely to occur by accident but requires institutional support. It is a task for the rule of law. Indeed, the link between law and liberty in this republican understanding depends on law denying the possibility of arbitrary exercise of power; 'the right sort of law is seen as the source of liberty'.[35] Only in circumstances where, and to the extent that, the 'right sort of law' contributes to preventing arbitrary exercise of power is a republican citizen free, that is not subject to the specific evil of domination.

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30 Rhetoric and the Rule of Law, 25-26.

31 Pettit, *op.cit.,* 86.

32 'The Rule of Law as an Institutional Ideal,' in G. Palombella and L. Morlino, eds., *Rule of Law and Democracy. Internal and External Issues*, Brill, Leiden, 2010, 3-37.

33 'The Rule of Law as an Institutional Ideal,' (2010) 9 *Comparative Sociology* 26.

34 Ibid., 69.

35 Philip Pettit, *op. cit.,* 39

Secondly, and perhaps the most basic and elemental consequence of arbitrary threats to one's liberty, is the simple *fearfulness* of life plagued by the potentially devastating impositions of power unrestrained by the need to give consideration to anything but the will and whim of the power-holder. Threats to liberty are obnoxious whether or not they cause fear, but if they do they are doubly so. Fear is the vice that Judith Shklar stresses most in her 'liberalism of fear,'[36] and is a great vice. Reduction of reasons for it is a great deliverance. And it is not enough, as the republican tradition has stressed, that as a simple matter of happy fact one is not actually subjected to acts of arbitrary power, though at any time one could be. On the contrary, as Priestley observed, 'Having always some unknown evil to fear, though it should never come, he has no perfect enjoyment of it himself, or of any of the blessings of life.'[37] To reduce the fear of it (as also its denial of liberty, dignity and clarity), the limits on that power must be secure, and so understood. A way of seeking to make it so is to institutionalize it.

A closely associated harm that flows from arbitrariness is the *indignity* of finding oneself the mere *object* of power, where one has to guess how one might be treated by those in power and/or there is no way of asserting, defending, and claiming attention to one's own point of view in the face of its exercise. [38] All that flattery, bowing and scraping, those forelocks to tug, caps to tip, favors to curry, to use (with Pettit) just some of the more evocative of the language's phrases for an undignified life. Law that avoids and curbs arbitrariness and allows that citizens have their own points of view that must be attended to, treats them as active, self-directing *subjects*, not mere objects of sovereign will. By such laws governments contribute to subjects' ability *to* further their own projects and to defend and pursue their self-chosen interests, without fear that at any time the rules might change without warning and without redress, or might simply not matter.

A final and familiar reason for reducing possibilities of arbitrary power is that, faced with systematic arbitrariness, citizens lack reliable sources of *co-ordination* of expectations among each other and between themselves and the state. It may only be in a disco that we do well when 'the joint is rocking.' Successful social co-ordination depends upon much besides a clear legal framework that cues in even those who might know nothing much else about each other, but in large, complex and mobile societies at any rate it is hard to see it happening without such a

36 In her *Political Thought and Political Thinkers*, Stanley Hoffman, ed., Chicago, University of Chicago Press, 1998, 3-20.

37 *Political Writings*, ed., P.N. Miller, Cambridge University Press, Cambridge, *1993, 35;* quoted in Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press, 1997.

38 Cf my 'The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law', in Geoffrey Brennan and Francis G. Castles, eds., *Australia Reshaped. 200 Years of Institutional Transformation*, Cambridge, Cambridge University Press, 2002, 220-60.

frame. Among other things, the existence of Fullerian clear, prospective, etc., shared norms might (and is often assumed to) facilitate such co-ordination. This is the virtue of the rule of law that Friedrich von Hayek stresses, and in large, modern, mobile and complex societies, it falls to law to provide a great deal of it.

These four valuable outcomes - reduction of domination, of fear, of indignity, and of confusion - are not small reasons to value the rule of law. One might want more, and one might want other things. But in the world we know, this is not a bad place to begin. One way of coming to recognize that is to think about life that doesn't benefit from the rule of law, because the law is irrelevant to the ways power is exercised, or because it is of a sort that militates against the ends of the rule of law or because, as so often occurs, the rule of law is unevenly distributed within a society, rarely favoring those who might benefit from it most. Among examples where law doesn't rule are tyrannies, illiberal democracies, failed states, states strong enough to act arbitrarily but too weak to tame power, societies with extra-legal monsters out of control by law. And even where law is significant, where rule is, as the expression has it, more *by* law rather than *of* law, law is an instrument for the exercise of power, but does not constrain it.[39] Again, we are talking about variations often of degree, but degrees count and the variations in the role(s) law plays can be great. So too the pathologies associated with them. There are many reasons to want to avoid those pathologies. What might law contribute?

2. WHAT?

Accounts of the rule of law proliferate, and they differ greatly among themselves. Some, we have seen, are institutionally 'thin,' others substantively 'thick.'[40] The first are often too spare to amount to much; the latter too rich to allow one to sustain any useful distinction between the rule of law and whatever else you would like to find in a society.[41] A middle ground is available, however. It needs to have a special connection with *law*, lest the rule of law come to mean the rule of whatever is good, in which case we have no need for the concept;[42] we have already seen that there are values of this specifically law-related kind. And it has to address what might be needed for the law to *rule*, in ways that contribute to the particular *telos* one attributes to the rule of law.

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39 I discuss these in my 'Approaches to the Rule of Law,' in Whit Mason, ed., *The Rule of Law in Afghanistan. Missing in Inaction*, forthcoming, Cambridge University Press, 2010.

40 See Peerenboom

41 See Joseph Raz, 'The Rule of Law and its Virtue,' in *The Authority of Law*, Clarendon Press, Oxford, 1979

42 Palombella is particularly good on the distinction between the rule of law as a *legal*, and not just a political or moral ideal. See his *op.cit.*,

The state of affairs that I have commended, where power can be effectively exercised but the possibility of its arbitrary exercise is securely limited, is unlikely to occur, particularly in large and complex societies, unless constraints on and channels for the exercise of power are institutionalized. Where such institutions are legal, the trick is to make law rule over those with significant degrees of power. That must include (though it should not be limited to) ruling over wielders of political power, even as laws are instruments of precisely that, political, power. And if you think the bosses rule the law, the law must be able to rule them too. The attempt to square these particular sorts of circles is the attempt to institutionalize the rule of law.

Lawyers and legal philosophers have suggested many ways in which law might be configured to aid in this attempt. I will mention three. One is by the law having particular formal characteristics. Another that it includes certain procedural guarantees. Legal philosophers have tended to emphasize the formal aspects; lawyers the procedural. Now that Jeremy Waldron has joined the lawyers, procedure is likely to get more philosophical attention. A third way, suggested by Gianluigi Palombella, is to institutionalize a specific 'duality' within law, which balances law that is the instrument of government with a realm of law that it is not within even the ruler's power to alter, at least to alter routinely or easily or arbitrarily. I will sketch these in turn.

Law exerts its force in one or other or both of two directions. One is centrifugal. Law radiates signals of many kinds out to the wider society or segments of it, whether or not any contact develops between citizens and the world of officials at all. The other is centripetal, magnetic. It draws people into direct contact with agencies of the state, where in one way or another they are dealt with directly. There is of course significant overlap and interplay between these two functions. People's likelihood of direct engagement with officials, and their understanding of what that might entail, are affected by the signals sent out by legal institutions, and how they are received and interpreted by citizens. Conversely, what happens in the legal institutions – in cases, trials, the behavior of police – obviously affects those who encounter them directly: litigants, petitioners, persons accused, defamed, assaulted, who come in voluntarily or are brought in by legal officials, among them police (who themselves are sent out into the community to extend the magnetic sweep of the law). However, it also sends signals to many more who never enter a court or even meet a policeman but nevertheless are affected by the law and their understanding of it.

One way of interpreting Lon Fuller's 'internal morality of law' is to see it as primarily addressing the centrifugal functions of law. If messages are to be sent to indefinite numbers of persons assumed to wish and to be able to order their affairs within the frame and according to the injunctions of the law, they need to be able to know that law and confidently rely on it. Laws that

conform to these eight conditions, and are effective, it would seem, are knowable and can be more safely relied upon than laws or exercises of power that do not. Arbitrary effusions of a sovereign power, or managerial direction that treats Fuller's features as contingent, required only when useful to the wielders of power, fail these tests.

Recently, Jeremy Waldron has sought to supplement Fuller's list of formal characteristics, with another group that he calls 'procedural.' His motivation is congenial to anyone who values the rule of law as more than an academic, or luxury, pastime. It has two aspects, both of which seem to me as important as they are often neglected by academics, and even though I will later question whether Waldron's particular response satisfies them:

> Getting to the Rule of Law does not just mean paying lip service to it in the ordinary security of a prosperous modern democracy: it means extending it into societies that are not necessarily familiar with the ideal; and in those societies that are familiar with it, it means extending it into these darker corners of governance as well.
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> When I pay attention to the calls that are made for the Rule of Law around the world, I am struck by the fact that the features that people call attention to are not necessarily the features that legal philosophers have emphasized in their academic conceptions of this ideal.

Waldron's list of procedural elements go to flesh out the normative ambition I referred to earlier, to ensure that in their encounters with legal institutions, people are listened to, treated as human beings. They have, and we presume them to have, their own inner lives and particular 'perspectives on the world,'[43] that the law must accommodate. Such procedural values are many but they include and revolve around the right to a fair trial by an impartial tribunal acting on the basis of evidence and argument, on the one hand, and a host of rights to presence, voice, and representation during the trial, to examine witnesses, present evidence, hear reasons, appeal, on the other.

A third way of trying to capture this complex ambition of constraining and channeling power, including lawful power, by law that is simultaneously an instrument of power, is old in the English tradition of the rule of law, and was imported with binding constitutions elsewhere more recently. Its rationale has recently been recovered and re-articulated by Gianluigi Palombella. According to this tradition, the point of the rule of law is 'to prevent the law from turning itself into a sheer tool of domination, a manageable servant to political monopoly and instrumentalism.'[44] It requires that, besides the laws that bend to the will of governments, '"another" positive law

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[43] Raimond Gaita stresses the fact of our 'inner lives' as a defining element of our common humanity, Simone Weil, an inspiration to Gaita, stresses a 'perspective on the world.' See Gaita, *Good and Evil. An Absolute Conception,* 2nd edition, Routledge, London, 2004; *A common humanity. Thinking about love and truth and justice,* Routledge, London, 2000.

[44] 'The Rule of Law as an Institutional Ideal,' (2010) 9 *Comparative Sociology* 6.

should be available, which is located somehow outside the purview of the (legitimate) government, be it granted by the long standing tradition of the common law or by the creation of a "constitutional" higher law protection, and so forth.'[45] The common law as a higher law (though still law not morality) that protects the right (*jurisdictio*) from being overwhelmed by rulers pursuing the ends of government (*gubernaculum*) is the most ancient institutionalization of this ideal. Written and binding constitutions are more recent examples. In all these the ruler is constrained by something that is truly law but not his to rule, not able to be bent to his will. Such a conception, such a duality, Palombella stresses, was missing, until this century's spread of constitutions, from the European *Rechtsstaat*, which many, wrongly in his view, assimilate to the rule of law. Without this duality, a state may commit to non-arbitrariness as its *form* of rule, without any overarching constraint that renders anything beyond its power. Its ultimate goals might have nothing to do with reduction of domination, fear, indignity or confusion. They might simply amount to tidy and reliable ways for officials to transact matters of state.

I choose these three accounts of what the rule of law is because each captures a significant way in which law might contribute to the rule of law, and also a significant strand in distinguished traditions of thinking about the rule of law and how it is to be made good. Moreover, each ties the features chosen *in principle*, and not merely contingent *prediction,* to the values that the rule of law should serve. Indeed, each of these accounts eschews institutional particulars in favor of a teleological test that particular legal orders need to pass: you need to be able to know the law when you act; however in particular cases these goals are achieved, the law must treat you as a human with dignity and a perspective of your own; the law should institutionalize a balance between pursuit of the good and securing the right through law. I envisage these three accounts as offering a cumulatively rich portrait of what is at stake in the rule of law, and what are some of the generic features of law that might help us gain it. However, something fundamental about the rule of law still seems to me missing. Though I focus on these three as the most distinguished versions, most other accounts of the rule of law suffer from the same deficiencies.

3. WHERE?

I have recently noticed a tendency, or perhaps noticed a recent tendency, for works on the rule of law to adopt geographical terminology. Palombella and Walker, for example, seeks to 'relocate' the rule of law.[46] The book in which this chapter appears hopes to be 'getting to the rule of

45 *Ibid.*, 32.

46 See their edited book, *Relocating the Rule of Law*, Hart, Oxford, 2009.

law.' It is as though, after all this time, scholars have looked in all the usual places, and not been able to find the rule of law in any of them. Perhaps they should look somewhere else.

That should not be surprising, for a great deal that matters most to whether law can rule is found outside legal institutions. It includes many of the *sources* of the rule of law, many *dangers* to the rule of law, and many of the *goods* the rule of law accomplishes. An account of the rule of law devoted only to features of legal institutions, rules and practices themselves, and one that sees it as an antidote to poisons that emanate only from those who wield the law, is likely to miss a great deal of what makes it possible, what threatens it and what makes it valuable.

This is a particular exemplification of a wise objection Lon Fuller made to the title of the 'Law and Society Movement,' and 'law and society' study generally, on the grounds that it should speak not of 'law and' but 'law in.'[47] The point is not merely semantic.

SOURCES

A fundamental truth about the rule of law is that some of its deepest conditions, and even more its most profound consequences, are not found within legal institutions. I begin with conditions. The rule of law grows, needs nurturing, and has to be in sync with local ecologies. It can't just be screwed in, though it can be screwed up, and it depends as much on what's going on around it, on the particular things in that ecological niche, as on its own characteristics. This is a truth commonly ignored by those who fail to register the distinction nicely captured in the title of an essay by Robert Cooter, 'The rule of state law versus the rule-of-law state.'[48] It is the rule-of-law state that we want; the rule of state law, and at times the non-rule of any law, that we often get.

For the rule of law depends on a lot going right outside official practices and institutions, and a lot of what it depends upon is not what we conventionally take to be legal. As Amartya Sen has noted, in his influential speech to the World Bank:

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[47] Cf. Lon L. Fuller, 'Some Unexplored Social Dimensions of the Law,' in Arthur E. Sutherland, *Path of the Law from 1967*, Harvard University Press, Cambridge Mass., 1968, 57: 'The intensified interest in the sociology of law that has developed in recent years has come to assume the proportions of something like an intellectual movement. In the United States this movement has found a kind of sloganized expression in the title, *Law and Society* ...

It would be captious indeed to pick any serious quarrel with this innocent renaming of the familiar. …

At the same time there are, I believe, some dangers in this new title and in the allocation of intellectual energies it seems to imply. By speaking of law *and* society we may forget that law is itself a part of society, that its basic processes are *social* processes, that it contains within its own internal workings social dimensions worthy of the best attentions of the sociologist.'

[48] In E. Buscaglia, W. Ratliff, R. Cooter, eds., *The Law and Economics of Development*, JAI Press, Greenwich, 1997, 101-48.

Even when we consider development in a particular sphere, such as economic development or legal development, the instruments that are needed to enhance development in that circumscribed sphere may not be confined only to institutions and policies in that sphere. … If this sounds a little complex, I must point out that the complication relates, ultimately, to the interdependences of the world in which we live. I did not create that world, and any blame for it has to be addressed elsewhere.[49]

This is not a truth restricted to countries struggling to see glimmers of the rule of law. It is universal, though not always registered by lawyers or legal philosophers. Thus Jeremy Waldron wants to keep faith with the way 'the term is ordinarily used,' and he says that law 'comes to life in institutions,' central among them judicial institutions. And Tom Tyler's work suggests that, at least when they go to court, the values Waldron stresses are those people value especially highly.[50] However, many ordinary people have little to do with such institutions and would ask for the law to have salutary effects in their everyday dealings both with each other and with officials. While the workings of the law clearly depend in many ways on its institutions, much of its life, even – perhaps especially - in the well-appointed homes of its exporters, is lived outside official institutions as much as or more than within them.[51] When, that is, it has a life.

For many of the major effects of central legal institutions, where they *have* major effects (which is far from everywhere), occur outside those institutions. Those effects, in turn, are to variable extents and in varying ways dependent on the ways state laws interrelate with, and are refracted, amplified and nullified by, existing non-state structures, norms, networks and attitudes. There is nowhere where everyone is straining to hear just what the legislature and the courts have to say on most actual or potential sources of conflict. Even if people saw a reason to pay special attention to these sources, there are many other generators of noise, some of it often louder and closer at hand than that generated by the law of the state. And states themselves make a lot of noise, much of it outside the law or contrary to the rule of law.

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49 'What is the role of legal and judicial reform in the development process?' (Washington DC: World Bank Legal Conference, 5 June 2000), p. 10. See too Brian Tamanaha, 'The Primacy of society and the Failures of law and Develompent: Decades of Refusal to Learn,' keynote Address, Conference on the Rule of Law, Nagoya University, Japan, June 13, 2009, forthcoming *Cornell Journal of International Law* (probably 2010).

50 See Tom Tyler, *Why People Obey the Law,* Princeton University Press, 2006.

51 See my 'The Rule of Law and 'the Three Integrations', (March 2009) 1, 1 *Hague Journal on the Rule of Law,* 21-27. Here and elsewhere I have been much influenced by two classics of legal sociology where this point is splendidly made. See Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', in Moore, *Law as Process,* 1978, pp. 54-81; and Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law', (1981) 19 *Journal of Legal Pluralism,* pp. 1-47. As Galanter observes, '[t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation' (at p. 20).

Whenever law stakes a claim to rule, then, there are many sources of potential normative, structural, cultural and institutional collaboration and competition in every society, and they, and their interplay, differ markedly between (and often within) societies. How people will interpret the state's law and respond to it, how highly it will rate for them in comparison with other influences – these things depend only partly on what it says, how it says it, and what the law is intended by its makers to do. In complex and variable ways, people's responses to state law depend on how, in what form and with what salience and force that law is able to penetrate all these intervening media, how attuned to it putative recipients are, and how dense, competitive, resistant or hostile to its messages they might turn out to be.

This is not to say that state law is unimportant. It is often crucially important, but how important, and even if important, in what ways its effects work out in the world, are heavily dependent on the complex social, economic and political contexts into which it intervenes.

DANGERS

Joseph Raz describes the rule of law as 'a purely negative value … merely designed to minimize the harms to freedom and dignity which the law might cause in its pursuit of its goals however laudable these might be.'[52] This seems to me doubly mistaken. The harms for which the rule of law is a suggested antidote are abuses of *power,* not merely of law. There are many ways in which power can be exercised, used and abused, without the intervention of law, even by the state unless by definition everything the state does is counted as done by law. The rule of law is intended to exclude all those other ways from the start. More is necessary, but that exclusion is no small matter wherever arbitrary power is a concern.

Moreover, there are many sources of abuse of power outside the state and law altogether. Raz is clearly thinking only of state power, and even those who might disagree with him over his negative characterization of the rule of law commonly view the primary threat, to which the rule of law is a response, as coming from the state. This is the common view, after all. But what about other sources of power? Shouldn't the test be what they are liable to do, not where they come from?

As I have said, and as we often see, great threats and realizations of unconstrained arbitrary exercise of power can have nothing to do with the state. Indeed they require effective state interventions, interventions to realize the rule 'of law rather than men,' where these are possible and available, to tame. This is the gist of Robin West's forceful response to Waldron:

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[52] *Op.cit.,* 228.

Law does a lot of things, but one of its core functions is to protect individuals against what would otherwise be undeterred privations against them – not by overreaching state officials, but rather by undeterred private individuals, corporations, or entities. Law does, as Jeremy says, stigmatize, punish, impose liability, and so on. Law also, though, compensates individuals for private wrongs and protects them at least much of the time against private violence. Sometimes it does this well, and sometimes it does it only sporadically or not at all. In my view, a society that claims to regulate conduct under the ideal of the "rule of law" – as opposed to the rule of the stronger, or the rule of the more mendacious, or the rule of the more richly endowed, or the rule of the more vindictive, or the more manipulative, or the more fraudulent, or the more violent and so forth – should, seemingly, require that law do as much. Rule of Law scholarship, then, one would think, should reflect these ideals. …

… We want, from a liberal state that abides by the Rule of Law, not only a legal system that won't impose its will against us without respecting our intelligence and seeking out our participation. We also want, from a liberal state that abides by the Rule of Law, some measure of safety in our homes and neighborhoods against private violence, some measure of fairness in our commercial dealings, and some measure of wellbeing in our private lives, free of the privations of more powerful private actors.

West's point is true of every society, including my own (and yours) where the state is relatively effective. All the more so of many conflictual, post-conflict, transitional, and failed states, where the miseries from which the rule of law would be a deliverance are closer to those imagined by Hobbes than to those understood by Locke.

GOODS

The law never really rules unless it rules in the world around it. If that doesn't occur, no amount of internal elegance of design is worth a bean. Treating litigants well when you see them, and have to judge them, is of course worth a whole string of beans, as Waldron rightly stresses. However, its social significance is dwarfed, certainly quantitively and arguably qualitatively too, by what law does for or against people who never enter a lawyer's office, still less a court. Whether or not the rule of law has claim in a society is a matter found in the extent and quality of its reach and effects there: in interactions between citizens and the state, of course, but of equal if not more importance, between citizens themselves.

This is well known to sociologists of law, sometimes too well known, since they can exaggerate the insignificance of states and their laws. Someone who didn't make this mistake, but still understood the point was the historian E.P. Thompson. Thompson, as a man of the Left and former Marxist, enraged erstwhile comrades with his encomium to the rule of law at the end of his, for this reason controversial, *Whigs and Hunters*.[53] I am all on his side on that issue, but I want to

[53] Whigs and Hunters. The Origin of the Black Act, Harmondsworth, Penguin, 1977.

mention a less remarked aspect of his famous/notorious conclusion to *Whigs and Hunters,* in which he reflects on the:

> difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to me an unqualified human good.[54]

Note where Thompson starts: with the point of the rule of law rather than its anatomy. Perhaps fortunately, Thompson was not a lawyer, and unlike most who write about the rule of law, he did not seek to spell out just what legal elements allegedly produced the salutary result he so praised. Rather, he insisted upon the 'obvious point' that 'there is a difference between arbitrary power and the rule of law,' and the latter was identified by what it was claimed to achieve rather than by any recipe or précis of ingredients. Thompson identified the rule of law by the good it did – 'the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims.' It was only if and to the extent that law and the rule of law made that sort of difference that it mattered.

And where did he look for evidence of that difference? Well not in particular legal forms and institutions, which he thought were constantly being 'created … and bent' by 'a Whig oligarchy … in order to legitimise its own property and status.'[55] Still, that oligarchy could not do as it wished; its hands were often tied by the law it sought to exploit. How did Thompson show this? By describing the character of legal institutions and norms, or the experience of litigants, or internal legal balances? No. Rather, he called in aid facts such as that '[w]hat was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights … law was a definition of actual agrarian *practice,* as it has been pursued "time out of mind" … "law" was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law. And … this law, as definition or as rules (imperfectly enforceable through institutional forms) was endorsed by norms, tenaciously transmitted through the community.'[56] It is *social* facts like these that lead Thompson to declare that 'the notion of the regulation and reconciliation of conflicts through the rule of law – and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal – seems to me a cultural achievement of universal significance.'[57] 'Cultural achievement' is a well-chosen phrase, though more than culture is involved. And Thompson was right to seek his

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54 *Ibid.,* 266.
55 *Ibid*., 260-61.
56 *Ibid*., 261.
57 Ibid., 266.

evidence where he did, rather than in descriptions of often contingent, historically specific, institutional particulars. Still more, to avoid taking these particulars to be the universal essence of the rule of law.

4. WHO CARES?

Up to now, I have contrasted my teleological-sociological approach to the rule of law with what I take to be the more common anatomical-institutional concerns that prevail in the literature. However I have also emphasized that within that literature there are many competing views. Indeed, sitting in seminars and conferences about the rule of law over years, I have often recalled those clichéd scenes in Chicago gangster movies, where cops bang on a door and demand 'is a Mr Capone in there?' to which a shouted reply rings out: 'who wants to know?' I can feel that way about discussions of the rule of law. A judge will point in one direction, a legislator in another, a tax lawyer in a third, a criminal defender in a fourth, a victim of Afghan warlords or Russian oligarchs somewhere else altogether, everyone all the while claiming to talk about the same thing. A lot of this can be explained by differences in local concerns and restricted views of a large reality; like the blind men and the elephant. And there are the conceptual contests we have already encountered.

However I think that there is one systematic distinction between approaches to ideals such as the rule of law, that matters across the board. It suggests different emphases and priorities, plays for different stakes, and requires and allows for different institutional strategies. The distinction I have in mind is between those whose first priority is to avoid as yet untamed evils and those who, fortunate to live where those evils have been largely stemmed or kept at bay, seek to secure and perhaps to refine and extend what goods they have. There are two points here. One is a general distinction between ways of approaching ideals; they might somewhat misleadingly be called 'negative' and 'positive,' or 'defensive' and 'expansive' approaches. The second is between two different kinds of circumstance in which one thinks about, and might seek the ends of, the rule of law. One of these is where your need is to *establish* the rule of law to diminish the reign of arbitrary power, where that has not occurred or is not occurring. The other is where one seeks to improve or extend it, where legal constraints on arbitrariness are relatively well embedded.

AVOIDING EVILS, PURSUING GOODS.

One way to approach ideals is to attempt to capture what it is like for them to be properly and fully instantiated; John Rawls famously does that with justice, and he is not alone. Indeed, as Judith Shklar and Amartya Sen both observe, whereas philosophical writings on justice fill libraries, those on injustice might not fill a shelf. Thus Shklar laments and notes of the countless works of philosophy and art devoted to portraits of justice:

> where is injustice? To be sure, sermons, the drama, and fiction deal with little else, but art and philosophy seem to shun injustice seem to shun injustice. They take it for granted that injustice is simply the absence of justice, and that once we know what is just, we will know all we need to know. That belief may not, however, be true. One misses a great deal by looking only at justice. The sense of injustice, the difficulties of identifying the victims of injustice, and the many ways in which we all learn to live with each other's injustices tend to be ignored …Why should we not think of those experiences that we call unjust directly, as independent phenomena in their own right? ... Indeed, in all likelihood most of us have said, 'this is unfair' or 'this is unjust' more often than 'this is just'. Is there nothing much more to be said about the sense of injustice that we know so well when we feel it? Why then do most philosophers refuse to think about injustice as deeply or subtly as they do about justice? I do not know why a curious division of labour prevails, why philosophy ignores iniquity while history and fiction deal with little else, but it does leave a gap in our thinking. [58]

Another way to start, which Shklar favors, is to approach a value or ideal by exploring less where it might deliver us *to* when perfectly instantiated, than with what it might deliver us *from*, and how that deliverance might be secured. Though he doesn't emphasize the point, Philip Pettit significantly casts the goal of republicanism as *non*-domination; 'the condition of liberty is explicated as the status of someone who, unlike the slave, is not subject to the arbitrary power of another, that is, someone who is not dominated by anyone else.'being '*not* subject to the arbitrary power of another; that is, someone who is not dominated by anyone else.'[59]

Amartya Sen approaches 'the idea of justice' from similar beginnings. Most of us, he says, are moved not by 'the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.'[60] Theory, he insists, should pay more attention to this disposition.

In a similar vein, Avishai Margalit explores the nature of a decent society. His account of decency is a deliberately *negative* one; a decent society is not characterized as one whose institutions treat members with respect; it is one whose institutions don't humiliate anyone dependent on them. Margalit deliberately and systematically avoids giving a positive version of these goals. His is an exercise in negative politics, approaching a value by seeking to avoid its nega-

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58 *Faces of Injustice,*Yale University Press, New Haven, 1990, 15-16.

59 Republicanism, 31.

60 *The Idea of Justice,* Harvard University Press, Cambridge, MA., 2009, vii.

tion. A decent society is one that is not indecent.

Margalit is quite explicit about this. He asks, 'why characterize the decent society negatively, as nonhumiliating, rather than positively, as one that, for example, respects its members?' He gives three reasons: one moral, one logical, and one cognitive. The first seems to me the most important and generalisable to other moral concepts. It is that 'there is a weighty asymmetry between eradicating evil and promoting good. It is much more urgent to remove painful evils than to create enjoyable benefits.'[61]

Apart from this asymmetry of urgency, I would add what might be called a kind of asymmetry of recognition. The importance of freedom from arbitrary intervention and oppression is often best understood in the light of experience or reflection on life without such freedom. Where fundamental evils have been tamed, it is hard to recall them. People living in civil and law-governed societies, not to mention just ones, might rightly have ambitions for more and better, but they frequently find it hard realistically to imagine less and worse. Yet as Henry James, I think, has said, those without the imagination of disaster are doomed to be surprised by the world. Part of what is valuable in the rule of law consists in the possibility that it might mitigate some disasters. To lessen our surprise, and for a general understanding of the *value* of this value, we would do well to think about what might do that.

I think that's a good place to start; not to finish but to start. Hobbes started that way to understand the worth of a sovereign polity; he sought to imagine life without it. We might not agree with where he ended up, and Locke didn't, but like Locke, we might learn from starting where Hobbes started. They were both threat experts, as was Shklar. It is an estimable skill, if not the only skill you need.

One can learn a lot about the rule of law by experiencing or trying to imagine life without it. What does/would one miss? What might the rule of law contribute to improving matters? What would be needed for law to contribute what is needed from it? It is, after all, easy to miss what the rule of law does when it does it; easier to identify what it might be good for when one sees its lack. It is also easier to grasp its worth, in its absence, even if just making up for that absence leaves us thirsting for more. If it does we should seek more. But we shouldn't settle for less.

It may turn out that whether one starts positively or negatively, one will come to value what people who start elsewhere value. And it is a mistake to think that where one starts is where one should finish. A just society is one that avoids manifest injustice but it is also one that does justice, and since that is never a completed task, there is always more one might do.

Ultimately, my own conceptual bias is to follow Philip Selznick who, though deeply concerned

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[61] *The Decent Society,* Harvard University Press, Cambridge MA., 1996,

with identifying the conditions of social and institutional *flourishing*, starts, though he doesn't stop, at the same place as Shklar, Sen and Margalit: we must secure the conditions of survival or existence, baselines, he says, before we move on to flourishing. When such conditions are secure, we should aim higher and we are also in a better position to do so. Risks are less risky. We should not, with melodramatic bad faith settle for little because there could always be less, if we are not seriously threatened with less. Ideally, the social-institutional complex in a society will not merely satisfy the minimum conditions for the rule of law plausibly to be said to exist, but enable it to flourish as well. And where such minimum conditions are satisfied, it is no answer to the goad that we can do better to be told that we can do worse. On the other hand, where those conditions are unsatisfied, avoiding worse is a major, immediate, and imperative goal; the rest might have to wait. First things first.[62]

KNOWING YOUR PLACE

Now, whichever place one prefers to start as a conceptual matter, concerns with the rule of law are often very practical ones. And at the level of practice, it is important to note the differences between the imperatives of seeking to establish, following Selznick's terminology, *baselines, conditions of existence, of survival* and those appropriate to *flourishing.* Aims are different, and differently exigent, threats to them similarly; what needs to be done to secure oneself against such threats will differ; the institutional means of deliverance from the worst evils might be quite different from those appropriate to enhance well-secured benefits. One's understanding of success will also vary. Minimal achievements don't sound much when compared with maximal ones, but they may seem very precious compared to no achievement at all, and they might be necessary for any further achievement. There are self-perpetuating spirals in institutional development: the further development and enhancement of the quality of the rule of law are much easier to attain if some of its elements already exist. Conversely, in their absence it can be difficult to develop, even at times to imagine, anything different. And thus successes of a 'negative' kind can be of enormous moment for those concerned to establish baselines, while, once established, they can allow play for more positive ambitions.

Of course, we should where we can (without making matters worse), strive to do both – secure baselines and facilitate flourishing – and yet often people imagine that the same dangers are faced by both, the same goals are apt for both, and thus the same tools are needed by both. Why

[62] The distinction is pervasive in Selznick's writings. See *The Moral Commonwealth,* University of California Press, Berkeley, 1992.

think that? What we might need to do to avoid the worst, or engage in 'damage limitation,' as Shklar implores, might be very different from what is needed to reach out to something better.
Legal orders differ greatly in the extent to which the values and practices of the rule of law are strongly embedded within them. Not every legal order is strongly embedded in institutions, professions, culture and social structure, and so nor will the ways to make it so be everywhere of the same sort. That suggests two things. First, what Stephen Holmes has observed about Russia can be generalized to other rule of law-poor societies:

> Lawyers are trained to solve routine problems within routine procedures. They are not trained to reflect creatively on the emergence and stabilization of the complex institutions that lawyering silently presupposes. Ordinary legal training, therefore, is not adequate to the extraordinary problems faced by the manager of a legal-development project in Russia. The problem is not Russian uniqueness and exceptionalism, but the opposite. In Russia, as everywhere else, legal reform cannot succeed without attention to social context, local infrastructure, professional skills, logistic capacities, and political support. …. So legal knowledge alone is never enough.[63]

It may therefore be that the importance of attending to things other than law, when thinking about the rule of law, varies inversely with the latter's strength in a society.
However, and this is the second point, to the extent that lawyers' insights are relevant in 'rule of law poor' countries, they might favor emphasis precisely on those unnuanced conceptions of legality that conservatives make so much of, and progressives deride, in less threatened places and times. For as Selznick has argued:

> Institutional autonomy, is, indeed, the chief bulwark of the rule of law. Judging, lawyering, fact-finding, rule-making: all require insulation from pressures that would corrupt them. The twentieth century has brought many reminders that legal autonomy of some sort is a necessary condition for justice. As the dictatorships of our time have shown, repressive law is hardly ancient history. In those regimes a primary victim has been the integrity of the legal process. High on the agenda in the struggle for freedom – in Eastern Europe, for example, or South Africa – is the building or rebuilding, of legal institutions capable of resisting political manipulation. For those who suffer oppression, criticism of the rule of law as 'bourgeois justice' or 'liberal legalism' can only be perceived as naïve or heartless, or both.[64]

On the other hand, in strong legal orders, such as those of the Western liberal democracies, for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialized to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over

63 'Can Foreign Aid Promote the Rule of Law?,' (1999) 8, 4 *East European Constitutional Review*, 71.
64 *The Moral Commonwealth*, 464.

centuries. Prominent among the values deeply entrenched in these legal orders are rule of law values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them.

Members of a strong rule of law order may not need to have as great or immediate a concern with the extra-legal foundations of what they have as those where legality is pervasively weak, simply because they have, as it were, been taken care of, if rarely by many in the generations that benefit from them. They may well, of course, want to improve what they have, and since the underlying conditions of legal effectiveness are to a considerable extent met, they are often right to concentrate on legal institutions. That is not because they live in a different world, but because some universal problems have been dealt with in their part of the world, and what the law is like counts here in ways it may not elsewhere. Other problems or opportunities have priority. It might be why so much talk of the rule of law, which emanates from such places, has so little to say about the extra-legal conditions of legal effectiveness. It's not clear, however, how far their understandings will travel.

In these circumstances of relative luxury, moreover, the options open to partisans of the rule of law are also more open than is sometimes acknowledged. As Selznick again has argued:

> the very stability of the rule of law, where that has been achieved, makes possible a still broader vision and a higher aspiration. Without disparaging (to say nothing of trashing) our legal heritage, we may well ask whether it fully meets the community's needs ... So long as the system is basically secure, it is reasonable to accept some institutional risks in the interests of social justice.[65]

That suggests that not every potential source of threat will be equally salient in different legal orders: some will be much threatened, others less so. It also suggests that different threats might require different defences. Not to mention that we might want to do more than ward off threats. Of course, the rule of law can be seriously threatened even where it appears to be in good shape. If we needed reminding, the war on terror reminds us of that, as it does of the dangers of complacency in such circumstances. Yet there is still a lot to draw on, even there, which is unavailable in a tyranny, a failed state, illiberal democracy, and so on.

Conservatives in rule of law rich countries, suspicious of any falling-off from some idealized version of it, often overreact to, say, injection of any substantive concerns into adjudication or discretionary authority in administration, indeed to any number of Welfare State incursions on an idealized rule of Fuller-full-formal laws.[66] These are paraded as dangers to the existence of

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65 *Ibid.*, 464.

66 See for example, Geoffrey de Q. Walker, *The Rule of Law, Foundation of Constitutional Democracy*, Mel-

the rule of law as we know it, whereas they might be dangers only in circumstances where legality is already weak, and has no other resources with which to defend itself. This shows little reflection on what the rule of law really depends upon, what it would be like to really threaten what they have of it, and what it would really mean to lack it. Radicals in the same societies, on the other hand, who treat some indeterminacy in appellate decision-making as testimony to fraudulence of the rule of law ideal or at least to absence of the rule of law, exhibit a similar frivolousness about what it might really be to have to live without a good measure of it.[67] Perspective is all here.

Fuller spoke of the lawyer as a social architect. He appears to have had in mind both the lawer's design of, say, contracts for clients and also the design of public legal institutions. In relation to the latter, at least, the term is sometimes an exaggeration, for there are at least two enterprises going on here. Rule of law promoters in transitional and post-conflict societies too often think about the rule of law as though establishing it where it has not existed or is being shot to pieces, at times quite literally, is in principle the same sort of job, if harder and more dangerous, as cultivating it where it has long grown and has deep roots, and where its presence is an often unreflected-upon ingredient of everyday life. Yet they are truly engaged in social architecture, often undertaken on hostile, unforgiving terrain.[68] Those fortunate to live where the rule of law is strong may have a lot to do to defend, secure, sustain, improve and extend it, but those enterprises are, by comparison, more in the nature of running repairs. They may be major repairs, but there is something, often a great deal, of structure and helpful material there to work with and on. The ultimate goals of these activities and their common goal – lessening the potential for arbitrary abuse of power - are not unrelated in these different circumstances, but the means appropriate to serve them can differ enormously.

And this points to one more difference between the two contexts I have sketched. In societies where the rule of law has long been secure, the fact that it is misconceived might not matter too much, since to a considerable extent it runs on its own steam. However, in conflictual, post-conflict and transitional societies, where efforts are made to generate, better to *catalyse* the rule

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bourne University Press, 1988; *Law, Legislation and Liberty*, vol.1 (University of Chicago Press, 1973; vol.2 1974; vol.3 1979; 'Beyond Bourgeois Individualism - The Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and R.S. Neale, eds., *Feudalism, Capitalism and Beyond,* ANU Press, Canberra and London, 1975) 127-44. And from a different political perspective, see Brian Tamanaha, *Law as a Means to an End. Threat to the Rule of Law,* Cambridge University Press, 2006. A more complex approach to such developments is Philippe Nonet and Philip Selznick, *Law and Society in Transition*. *Towards Responsive Law,* Transaction Publishers, NJ, 2001.

[67] I have particularly in mind Critical Legal Studies, a now outdated movenent which, nevertheless, has occasional echoes. Cf. my 'Critical Legal Studies and Social Theory – A Reply to Alan Hunt,' (1987) 7 *Oxford Journal of Legal Studies*, 26-39.

[68] I discuss some of the difficulties of the task in 'Hart, Fuller and Law in Transitional Societies,' in Peter Cane, ed., *The Hart-Fuller Debate in the Twenty-First Century,* Hart Publisher, Oxford, 2010, 107-34.

of law, these problems can be catastrophic. For those most urgently seeking the rule of law are in the end concerned not with a package of legal techniques but with an *outcome*: that salutary state of affairs where law counts in a society as a reliable constraint on the possibility of arbitrary exercise of power.

More generally, and this is the conclusion of this article and not just this section: with regard to the rule of law it pays to be a contextual universalist: universalist about the value of it; deeply contextual about how to get there. What is precious about the rule of law, and a reason to start there, is not this or that bit of legal stuff, but an outcome, a state of affairs, in which the law counts in certain ways. What conspires to generate such a state of affairs is complex and often mysterious, and will vary from place to place and time to time. In particular it will vary considerably between circumstances where the rule of law has yet to be *established* and those when the ambition is that it be improved. What doesn't vary is that it will depend on many things *outside* what we commonly regard as legal institutions.