Transformations of the Rule of Law: Legal, liberal, and neo-

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I’ve been writing about the rule of law for over 30 years, I’m afraid. But while the phrase has remained the same through that time and has never been more widespread than it is today, its conceptual referents, the contexts in which, and the purposes for which, it has been invoked have changed frequently and in many ways. So much so that in this time of widespread ‘take-up’ of the rule of law, some good reasons to take it up might have become obscured, and some reasons we do take it up are not so good.

The phrase has come to embody concerns and ideals that have figured in legal and political discourse for a very long time, and some that are quite novel. My interest in this paper is to draw upon a rather old disposition of thought that I share, one that values the tempering of power, and to see how some past and present invocations of the rule of law sit with it. I begin with the character of contemporary discussions of the rule of law, introduce the disposition that informs my own, discuss why people of such a disposition might often have turned to law, and sketch a particular strand of liberal thinking which accords with it. At each point, I try to draw out implications of this disposition that are commonly ignored or denied, even by – often especially by – those who share it. I then turn to neo-liberal invocations of the rule of law, seek to unveil some of their animating dispositions and suggest that they include values and prescriptions not generated by and not always consistent with the disposition I commend. My conclusion, briefly stated, is that if many of the ubiquitous invocations of the rule of law – among them neo-liberal invocations - are disappointing or even distasteful, that might not be the fault of the rule of law but of the opportunistic uses to which the term is now put.

Rule of Law

The ‘rule of law’ is one of a number of overlapping ideas, among them constitutionalism, due process, legality, justice, that make claims for the proper character and role of law in well-ordered states and societies. Among these, rule of law has in recent times come into its own. It is lauded by international agencies, pressed upon conflictual, post-conflict, and ‘transitional’ societies, touted as the key to economic development and relief of poverty, security of human rights, and many other good things. It is examined in political theory and jurisprudence, and also, though less often, has been subjected to sociological investigation.
This all aside from its traditional role of being talked up by politicians and lawyers, particularly judges, on ceremonial occasions.

Indeed, the rule of law is so totally on every aid donor’s agenda that it has become an unavoidable international cliché. That is a recent development which one would not have predicted as recently as the 1970s. Today, however, in virtually every introduction to the subject, rule of law has come to be joined by three other clichés, meta-clichés as it were, ritual observations about cliché no.1. The first is evidenced in the preceding paragraph: everyone who writes about the rule of law begins by noting its unprecedented voguishness. Second is the observation that, combined with popularity has gone promiscuity. It has a huge array of international suitors, and it seems happy to hitch up with them all. That has in turn resulted in a third predictable adornment of every contemporary article on the subject: rule of law now means so many different things to many different people, it is, as they say, so ‘essentially contested’ and likely to remain so, that it is hard to say just what this rhetorical balloon is full of, or indeed where it might still float. That having been said, people go on promoting ‘it’. (Neo-liberalism, by the way, generates the same three clichés, though more often from opponents than from partisans.)

Its recent rise from lawyer’s platitude to donors’ logo has, then, given the rule of law a great boost in brand recognition but it has added less, actually nothing, to its clarity. But then clarity was never the concept’s strong suit. It is of course not unique in that. The meaning, scope, conditions and significance of most of our important moral, political and legal ideals, among them democracy, justice and liberty are also all highly contested. And like those ideals, not only are there enduring common themes but also common axes of argument and disputation that have pervaded discourse on the rule of law over long periods. That of itself does not render such ideals vacuous; it might just be testament to their importance.

It is unwise to leave those themes and arguments behind, but it can be tempting. Thus Deval Desai, a self-confessed inhabitant of the ‘Rule of Law Reform Field,’ has registered but rejected the numerous complaints that there might actually be no such field, given the unclarity and contestation that surrounds its subject and the lack of success of its efforts. He rejects any attempt to ground the meaning of the term in any essential features or any disciplinary or conceptual domain. However, he then insist that there is a field after all, and we can learn what its subject is by looking at what those in the field think it is. And that is to be ascertained by looking at hiring criteria used by rule of law promoting agencies.

That is a more radically imperialist/imperious step than I would advise, however. It makes it seem that this old concept, which has been treated seriously by many people for many good reasons for many centuries was just a place-holder until the World Bank and its equivalents got into the game. But why think that? Better to follow Amartya Sen’s comments about another, also again popular, ‘field’ - development:
It is, of course, true that at one level development is a matter of definition, and some people seem to insist that they are free to define any concept in any way they like … However, it so happens that linguistic usage over a long time has given a certain content to the idea of development, and it is not possible to define development independently of those established associations.¹

Well, actually it is possible to define development independently of its established associations. It goes on all the time; with development as with the rule of law, which is precisely why it was important for Sen to point out it was a bad idea. And when such a term appears in new incarnations that drop off or cut across elements important in the old, one should be on the alert. Something significant might be being given up, which a continuity of terms – even more a continuity-claiming term like ‘neo-’ - renders invisible. Moreover, criticisms of the most recent incarnation might well be sound about it, without that necessarily being, as it is often taken to be, destructive of or even relevant to other conceptions that share the same name. So it was in the last century with Marxist critiques of the rule of law as nothing more than ‘bourgeois ideology’, which it can but needn’t be; so it appears to be becoming today when the rule of law is taken to be part of the neo-liberal project of the World Bank or suchlike. In both cases there was and is more to be said.

I am not a purist about this. At best, my method is only quasi-genealogical. That is to say, I draw on earlier discussions of the concept or that have fed thought about the idea, but I am no historian and my purpose is normative rather than descriptive. If I am wrong about the genealogy, that is unfortunate, perhaps embarrassing, but not fatal. My aim here is not to keep faith with the past, but to draw on my (mis?)understandings to improve the way we think about the rule of law in the present. If it looks like I’m cherry picking, well, if they’re tasty that’s what you do with cherries.

**Tempering Power**

Whatever else might be said of it, the rule of law has to do with the exercise of power, particularly – though I will say more later about what this might mean - public power. And while the concept of law itself, positivistically conceived, might be normatively neutral about that relationship, the rule of law is not. Rule by law might occur whenever and however law serves as a vehicle for the exercise of power; the rule of law, its partisans have

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insisted, is not compatible with every way in which power and law are yoked together, but only with some ways.

Appeal to the rule of law signals the hope that law might contribute to articulating, channeling, disciplining, constraining and informing – rather than merely serving – the exercise of power. The collective noun for such contributions I call *tempering* power, rather than, as is common among both liberals and neo-liberals, *limiting* it. The difference has implications, which I will explain shortly. But either way, tempering or limiting, we are already some distance from those who see law simply as one of the means by which power is exercised, neither better nor worse than any other. For there are lots of ways to exercise power, and lots of ways to enlist law in that exercise; partisans of the rule of law believe it is incompatible with many of those ways, including many of the worst of them.²

Why bother about that? Because, as over centuries countless thinkers have observed, a pervasive problem is that power untempered bids fair at least to be capricious and at worst wild. And as too many people over too many centuries have not only observed but experienced, capricious power is terribly unsettling and wild power is simply terrible. More generally, the potential is alive even when power is not wild but merely, to use the more commonly identified vice, arbitrary. Arbitrary power is not necessarily wild but it is usually and already objectionable. Among the reasons identified by its opponents are at least four, that have been emphasized by different thinkers at different times. Where arbitrariness is linked with significant power, it is liable to: threaten the liberty of anyone subject to it; generate reasonable and enduring fear among them; and deprive citizens of reliable sources of expectations of, and coordination with, each other and with the state. And as Lon Fuller and Jeremy Waldron³ have emphasized, it threatens the dignity of all who find themselves mere objects of power exercisable at the whim or caprice of another. More can be said about all of this,⁴ but not today. One hope for the rule of law is that might contribute to limiting the potential of power to generate such effects.

**Implications**

Even at this throat-clearing stage, there are some implications to be noted. First, to oppose arbitrary or wild power is not to say that power of itself is obnoxious. Contrary to the view of Hayek, which he attributes to ‘the great individualist social philosophers of the

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nineteenth century,’ that ‘power itself has always appeared the archevil,’\(^5\) we could not do
without power in many forms and for many purposes. We should not want to deny the need
or emasculate the capacity for power to keep peace, defend populations, enforce legal
judgments, collect taxes, balance other powers, and so on. Anyway, we’re stuck with
power; it won’t disappear.

If all power were illegitimate, one might think of eliminating it, but to insist that a king, for
example, must submit to the rule of law is not to seek to eliminate his power. On the
contrary, it is common to speak well of power exercised within the rule of law. Another way
of putting it is that properly tempered power can be legitimate and the rule of law is
valuable for its contribution to that.

The problem with wild or arbitrary power, then, is what the adjective does to the noun,
rather than the noun \(per \ se\). Arbitrariness is a specific and obnoxious vice when added to
power. A few masochists aside, few of us want to live in circumstances where significant
public power can be exercised over us in an arbitrary manner. There are many other vices
which depend on the purpose or consequences of the exercise, but arbitrary power is
vicious enough even without them and moreover can be vicious even when intentions are
honourable. It is a free-standing vice, as it were, that has to do with the \(\text{ways power is}
\) exercised.

The concept of arbitrariness is complex and insufficiently theorised. We can point to
examples though. Exercises of power which depend on nothing but the caprice, unreasoned
prejudice, untrammelled whim, of a power-holder are arbitrary. So too those, which,
whatever their source, affect people in ways they have no way to predict. A third example:
where the power-wielder is free to ignore the perspectives of those whom it would affect.
What makes each of these exercises of power arbitrary is the fact that the act of power ‘is
subject just to the \(\text{arbrium, the decision or judgement of the [power-wielding] agent; the}
agent was in a position to choose it or not choose it, at their pleasure.\(^6\) Conversely, those
subject to such power cannot manifest their voice and perspective, or take account of it
ahead of time in choosing how to act; it is like lightning.

\[\text{Law}\]

Law has often been seen as an apt vehicle for institutionalising constraints on arbitrariness,
though that is never all that law does, often it doesn’t do it, not just any legal arrangement
will do, and there are many other social practices and institutions necessary to accomplish

\(^5\) *The Road to Serfdom*, 50\(^{th}\) anniversary edition with a new introduction by Milton Friedman, University
of Chicago Press, Chicago, 1994, 159

it. And that is not even to mention uses and kinds of law that deny the values of the rule of law altogether. There are many such uses and kinds. The rule of law rejects them.

From the specific perspective of the rule of law, law does well to the extent that and only insofar as public power is effectively constrained and channelled, so that it is routinely and reliably exercised in non-arbitrary ways. The role of law in the rule of law is to contribute to this state of affairs.

Of course, it is possible to be hostile to wild or arbitrary power without invoking law to remedy it. One might be suspicious that the law will always be in the sway of the powerful, which many have thought and is often the case. Or one might think law too weak a thing to temper power, and often that is true also. Or, and I am coming to hold such a view, one might emphasise the extent to which any good law does will depend on many things going right outside the law, and think it in principle an open question, with answers that vary with circumstance, how much official state law, as distinct from other social forces, practices and traditions might contribute to the tempering of power.

On the other hand, it does not seem to me surprising that the congeries of law-connected (and often well-connected) actors, that Halliday and partners call 'the legal complex', have been found again and again to be active defenders of a certain limited form of what they call 'political liberalism', which demands 1. ‘a moderate state, where power within the state is divided’; 2. Civil society, and 3. ‘a foundation of basic legal freedoms: negative rights to protect citizens against state tyranny or arbitrary state action; core political rights that permit freedoms of speech, association, and movement; and property rights, which give citizens inalienable claims to property.’ That lawyers might also be otherwise conservative, interested in money and status, not concerned with larger social and moral questions, justice in a large form, human rights broadly conceived, might not say much for their professional character, but it can be at least conjecturally explained in my terms: the ways power is exercised, and the ways it might legitimately be exercised are their special concern. That’s unlikely to be everyone's concern, and there are many other equally and maybe ultimately more important concerns, but theirs is an important concern too. One doesn’t expect to find a surfeit of heroes or revolutionaries among lawyers, but they are intimately acquainted with the exercise of public power, and it might well be an occupationally generated calling to prefer it to be exercised in non-arbitrary ways.

Certainly, some traditions of legal thought have long maintained that law is crucial to tempering of power, and some have sought to build that ambition into the structure of law itself. The English common law tradition is distinctive for the length and strength of such

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7 'The Legal Complex’ ... Annual Review + 3 edited volumes
beliefs and effort. And compared to pretty well any place one could name, the English have not done badly in their efforts, at least at home.

The rule of law is an English phrase (though perhaps a translation of the Latin *Imperium legum*) and even without the phrase there is a distinctive tradition of thought about law that can sensibly be referred to as an English rule of law tradition. That is worth noting since its history and origins are different from that of many terms that are today assimilated to it, such as *Rechtsstaat*, *Etat de droit*, *Stato di diritto*, *Państwo prawa*, etc. That the law should rule even over the most powerful people and institutions is a very old theme in the English legal tradition. It is not present in every legal tradition. From at least the thirteenth century until well into the eighteenth, however, the common law tradition maintained that even the king was subject to a law that he had not made, indeed that made him king. For the king, for anyone, to ignore or override that law was to act arbitrarily. Liberties, and procedures to protect them, such as *habeas corpus* and due process, were enshrined in that law, and encroachment on such liberties was barred, even to the monarch, by the law.

Thus, while the common law courts were long agents of the Crown, some of the mythologically most powerful contests in the English rule of law tradition, particularly the constitutional struggles of the seventeenth century, pitted them against successive wearers of that Crown. The courts were the King’s courts, but the law they adjudicated was not, in the main, considered to be the King’s creation, nor his to play with as he wished. They were not just instruments with which the Crown and the state could direct activities and control public policy. For the King, like his subjects, was subject to ‘the law of the land,’ which had come down by various means over many generations.

This was not merely intended as moral exhortation. Old in English traditions of thought about law are attempts to institutionalise the ambition to frame and channel the exercise of power within a legal order that is simultaneously an instrument of power. It was classically described by Charles McIlwain, and its rationale has recently been recovered and re-articulated by Gianluigi Palombella as central to the rule of law. 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.’ It requires that, besides the laws that bend to the will of governments, “another” positive law 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

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8 Sellars, in ROL and Rechtsstaat, 4
9 See Reid, 2004, Palombella, 2010
Draft. Not to be ... etc.

Thanks for their comments to Bojan Bugaric, Arthur Glass, Gianluigi Palombella, Gianfranco Poggi, Wojciech Sadurski.

‘constitutional’ higher law protection, and so forth.’ The common law writers spoke of a balance between the sovereign’s untrammelled right to pursue the ends of government (gubernaculum), on the one hand, and legal protection of the right (jurisdictio), on the other. The former must not overwhelm the latter, even if it is unlimited in its own sphere.

The solution was found in the common law, viewed not just as a moral limit but a binding legal one. Written and binding constitutions are more recent examples of such an ambition. In all these the ruler is supposed to be bound, or ‘bridled’ in Bracton’s usage, 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 argues, was missing from the Continental European Rechtsstaat at least until the last century’s spread of constitutions, which many, wrongly in his view, assimilate to the rule of law. Without this duality, a state may commit to Lon Fuller’s criteria of 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, reliable and controllable ways for officials to extend state power and transact matters of state. On Palombella’s view, the rule of law goes further than this. It lawfully sets limits on even a sovereign’s lawful powers.

Implications

First, note that the rule of law on this interpretation requires a balance between protection of right and pursuit of the common good. It does not deny the responsibility of governments to look to the latter, so long as they do not infringe the former. If the notion of balance denies that gubernaculum can overwhelm jurisdictio, it also implies the converse: the sphere of gubernaculum is a legitimate sphere of government activity, whatever contemporary neo-liberals might be tempted to say against it. This implication is captured in Palombella’s recovery of the medieval notion, and is well brought out by Neil Walker:

Tellingly, the idea of the Rule of Law ... is often reduced in the canonical literature to one side of law’s duality – to the rights-based protection against arbitrary public power. For Palombella, however, it is better conceived of as an integrative achievement. His Rule of Law is concerned with acknowledging and maintaining an equilibrium that allows each desideratum to prosper, and permits all the virtues of law –both the deep autonomy-respecting virtues of individual Right and the collectively self-realising virtue of the common Good, to be placed in balance.  

Secondly, the common law understanding was not the claim that many have recently taken the rule of law to amount to, and that Lon Fuller encoded and made standard among legal

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12 Palombella, 31 [check cite].
13 ‘Law’s Global (Re-)connection,’ (2014) 111, 1 Rivista di filosofia del diritto, 102
philosophers: that the extent to which the law is expressed in clear, consistent, public, stable etc., rules. On the contrary, John Philip Reid shows that in English tradition until the eighteenth century, law was identified with misty, murky but ages-old custom, traced to a time when ‘the memory of man runneth not to the contrary.’ He writes, ‘the medieval constitutional law out of which today’s rule of law developed would not have met the requirements of clarity or precision. There was always an air of indefiniteness, a smoky vagueness surrounding this all-embracing restraining “law” of English constitutionalism. Even its authority as law was shrouded in immeasurability.’ On the old view, as Reid puts it, ‘what mattered was not its intrinsic qualities but that it was customary practice, not deliberative decision.’ The rule of law tempered unruly exercise of power, not because it came in certain forms and not others, but because even the sovereign was not above it. That that law was often not expressed in clear, prospective, general rules (see Maitland, 1965, first edition 1908, 383), today regarded as the essence of the rule of law, was not to the point. Indeed, given the customary, dynamic, fluxful, and evolutionary character of the common law as theorized by its adepts, it was beside the point (see Postema, 1986, chap. 1). The issue was that it was superior.

This changed quite recently. As law became increasingly ‘positivised’ and ‘imperativised’ from around the eighteenth century, the conception of the rule of law gradually became more preoccupied either with the character of the rules that the sovereign enacted – they should be clear, prospective, consistent, etc. – or the specific institutions that generate, adjudicate and enforce the law. Modern philosophers’ thoughts about the rule of law rarely go beyond lists of the character of rules, and rule of law reformers typically have checklists of institutional bric-à-brac which for them add up to the rule of law. It is worth being reminded, however, that it can make sense to speak of the rule of law, and thereby mark a significant distinction between different sorts of polities, by starting by considering what values one wants secured, rather than by insisting that some particular institutional recipe or other, almost certainly socially and historically contingent, must always be at the centre of things. Not only does it make sense. I would argue it’s the right way to go.

Liberalism

Political thinkers have asked many things of political arrangements, among them, fulfilment, liberation, justice, mercy, prosperity, social equality. The list is long and it can be inspiring. There is, however, a strain of thought which appears to ask for little, and that quite austere, but does so insistently. It asks for security from the evils that flow from arbitrary power.

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15 Ibid., 13.
16 I have been hammering this point for some 15 years, but the nail still protrudes. See most recently ‘Four Puzzles . . .’, and ‘The Rule of Law. Legality, Teleology, Sociology,’ in Gianluigi Palombella and Neil Walker, eds., Relocating the Rule of Law, Hart Publishing, Oxford, 2009, 45-69.
People of this disposition might ask for more than such security, but they insist that it is central. Many traditions, legal and political, have exhibited this disposition. It has, for example, been central to the republican tradition. It has also been central to many thinkers and thoughts we call liberal.

Liberalism, a term only coined in the nineteenth century, has many ancestors and many variants, few canonical texts of the sort that Marxism boasts, and no single orthodoxy that covers the field. But what Judith Shklar, one of the most recent, uncompromising and eloquent exponents of this way of thinking about politics, has aptly named the ‘liberalism of fear’ is a prominent inhabitant of the tradition.

The various strands of thought that Shklar characterises as the liberalism of fear can be understood as moments in an extended meditation on ways to institutionalise the tempering of power, consistent with the rule of law ideal. The products of such meditations are various. Different rule of law regimes have often embodied different judgments about how to achieve this goal, and have different legal and other histories and traditions which have influenced the particular shape of the institutions they have. These differences are not automatically fatal, once one recognises that the rule of law is not a recipe for detailed institutional design, but rather a cluster of values which might inform such design, and which might be - and have been - pursued in a variety of ways.17

This concern to tame major sources of fear has had deep resonance among thinkers about public affairs over several hundred years; it was not confined to the English. Roman Republicans expressed the concern, and their influence has lasted from Polybius in Rome (though he was Greek) to Pettit in Princeton and Canberra (though he’s Irish). It is expressed among other places in the writings of Montesquieu (though he’s French), and these greatly influenced the American Constitutional Founding Fathers, among other things to misunderstand the English constitution (as containing a strict separation of powers) in an inspired and until recently relatively useful way. They, in turn, influenced us all, even if today tempering of sources of fear commonly finds more eloquent partisans among those who have suffered its absence than those who live off the fruits of its presence.

Shklar, similarly, considers escape from arbitrary power the fundamental virtue to be sought from legal and political arrangements, and insists that it cannot be achieved without the rule of law. Indeed, her position is quite simple and stark. As she explicates and approves Montesquieu’s institutional recommendations, designed to ensure what he described and valued as ‘moderation’ in government, ‘[t]his whole scheme is ultimately based on a very

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17 See Philip Selznick, ‘Legal Cultures and the Rule of Law’ in Martin Krygier and Adam Czarnota, eds., The Rule of Law after Communism, 23-40. Bojan Bugric has pointed out the parallel between this and the ‘varieties of capitalism’ literature, which makes a similar point about the overall political structure of different ‘capitalisms’ (Hall and Soskice etc)
basic dichotomy. The ultimate spiritual and political struggle is always between war and law. ... The institutions of judicial citizen protection may create rights, but they exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society. The Rule of Law is the one way ruling classes have of imposing controls upon each other.  

**Implications**

Shklar is not alone in her combination of a high regard for the rule of law with a negative view of it. This is only an apparent, verbal, paradox. For it is common to understand it as good, less for what it enables and creates than for what it might prevent. On this interpretation, its point is to *block and limit* the possibility of unruly power, to curb and restrain power’s exercise. This is not a new view, and it is still popular among liberals, and even more neo-liberals. Thus Hayek: ‘The effective limitation of power is the most important problem of social order’, \(^{19}\) and it is the job of constitutionalism and the rule of law to impose the limits. The characteristics most associated with law changed over the centuries, particularly moving from custom to legislation, and with those changes went different conceptions of what the law needed to be like to do its proper work. However, the identification of the rule of law’s purpose with what it strives to rule out rather than what it rules in; what it seeks to prevent, rather than what it hopes to generate and encourages to flourish, remains prevalent.

I find this negative emphasis powerful, above all because it takes ‘the circumstances of politics’ \(^{20}\) much more seriously than a lot of so-called political theory does. Politics is, after all, not just a matter of the ends we should seek, but of conflict, violence, oppression, domination, their consequences, and its study needs to be concerned with what might be needed to avoid them; \(^{21}\) it is not all, as both Bernard Williams and Jeremy Waldron have emphasised, ‘just applied moral philosophy.’ \(^{22}\)

And yet, the liberalism of fear can also limit and distort one’s understanding of politics, and of law. Avoiding the worst is not the sum of politics, or of the contribution of the rule of law. That is one reason I prefer to speak (as Bracton did) of *tempering* power, not limiting it, or any of the other words – taming, restraining, etc., - usually associated with the rule of law. Tempering suggests both moderating (eg justice with mercy) and strengthening (eg of

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steel), and that combination is what the rule of law promises. Power is not to be lessened but augmented in a balance with something else; and it might be strengthened. For the negative conception is not the only way of viewing the rule of law, and arguably not the best.

Jeremy Waldron has criticised views of constitutionalism according to which ‘[e]verything is seen through the lens of restraint and limitation,’ and has insisted on the empowering role and potential of constitutional provisions. Similar points might be made about the rule of law. Again, Stephen Holmes has long stressed the empowering consequences of law; what, in contrast to the more common negative conception, he calls ‘positive constitutionalism’.

 Appropriately configured laws, on this view, provide ‘enabling constraints.’ For the ‘paradoxical insight’ here, as Holmes describes it, is that:

Limited government is, or can be, more powerful than unlimited government. ... that constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism ... By restricting the arbitrary powers of government officials, a liberal constitution can, under the right conditions, increase the state’s capacity to focus on specific problems and mobilise collective resources for common purposes.

On this view, like a swimmer (or a scholar) who must master, and in a sense come to be mastered by, techniques and disciplines to marshal and channel raw energy (or intelligence) for effective performance, so the ability of a state to concentrate its powers where and how it should be enhanced by legal requirements, procedures and institutions which, among other things, block its ability to splash around where and how it shouldn’t.

And there is another point, well made by Philip Selznick. Selznick also saw reduction of arbitrariness as the central point of the rule of law, and he also viewed protection against the brute vices of unrestrained power as primary. But that was not always and everywhere a problem of the same intensity and urgency. Arbitrariness, just to stay with that, comes in many kinds and degrees, and one needs to attend to many things short of war, cruelty and fanaticism. One might also hope for better from rule of law constraints on the exercise of power than avoidance of such terrible forces. In well-established legal orders with strong traditions, institutions and professions, one can ask more of legal institutions than mere restraint on power, notwithstanding the preciousness of that. Rather,

24 Passions and Constraint, Chicago, 1995
26 Passions and Constraint, xi
In contemporary discussions of the rule of law we find much that goes beyond the negative virtue of restraining official misconduct. . . . This thicker, more positive vision speaks to more than abuse of power. It responds to values that can be realized, not merely protected within a legal process. These include respect for the dignity, integrity, and moral equality of persons and groups. Thus understood, the rule of law enlarges horizons even as it conveys a message of restraint.  

In this understanding, arbitrariness, and its antidote the rule of law, both take on a larger meaning, attached to values to be vindicated, rather than simply to a set of institutions and practices imagined to serve them. Arbitrariness is not found merely when a strict rule is overstepped but equally when law is ‘inflexible, insensitive, or justified only by history or precedent.’ ‘Going by the book’ generates its own forms of arbitrariness, as anyone who has sought to deal with officious bureaucrats might testify. To counteract such forms of arbitrariness, space needs to be made for an expanded understanding of the rule of law, more open-ended and open to the world.

Finally, as with most political values, the rule of law is not the only game in town. If there are tensions between tempering power and other important values, those tensions need to be examined and dealt with, sometimes simply put up with, lived with. We do that with tensions all the time, after all. We have few absolute and universal trumps in these games.

**Neo-liberalism**

In the last 30 years or so, ‘neo-liberalism’ has generated precisely the same sorts of clichés as the rule of law, but in reverse. That is to say, the word is everywhere, everyone begins by reminding you of that, of the fact that it is used in many ways, and that contests about its meaning are unavoidable. And everyone goes on using it. The difference here is that these days the term is used far more by enemies than friends. It was actually coined by its friends, the German ‘Ordo-liberals’ of the 1930s, but it was not they who made the term pervasive and they are not the subject of this paper. I focus on those today called neo-liberals, whose influence is thought by many to be pervasive in the contemporary world.

I should confess that I am suspicious of social explanation which reduces all that is distasteful (since it is some time since ‘neo-liberal’ was a boast) to the machinations of some omnipresent and omnivorous neo-liberal imperative, ambition, ideology, or system. Such homogenising efforts have a flavour which matches in reverse some neo-liberal tendencies to attribute everything bad to ‘collectivism’ (Hayek) or the state (Reagan). They flatten out differences among alleged neo-liberals; whereas these can be significant, particularly

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28  Ibid., 27.
between those whose writings began before the Second World War, such as Hayek, and a later generation, galvanised by Milton Friedman, who were more populist, more activist, and more radical. They also flatten out the explanation of often complex social phenomena, in search of one, often pre-determined, causal agent. Reality is typically more complex, however, than enthusiastic neos and anti-neos concede.

However, there are certain modern dispositions of thought, to use that phrase again, which seem to me incontestably to be found wherever ‘neo-liberals’ seem to cluster, and which have seeped into many domains of life (not least the modern university where it is not immediately obvious that they have a place). Here I will limit my observations to a few of them that involve law.

Neo-liberalism began within and in relation to developed Western countries, where it was revived by economists, perhaps best known among them Friedrich von Hayek and Milton Friedman, in reaction to perceived inadequacies in, and normative objections to, the welfare states and Keynesian economics that had been prominent through much of the twentieth century. It achieved political influence in the late 1970s, propelled and symbolised by the political leadership and rhetoric of Margaret Thatcher and Ronald Reagan. Particularly after the collapse of European communism, it became a key influence on and vehicle for (though it is arguably less so now) the evangelical export industry of rule of law promotion in countries allegedly in need of it. I will start with the West and move to the rest.

Home

There are at least two levels at which the welfare and regulatory activities of modern states offend neo-liberals. One appears wholesale, as it were, and covers the gamut of modern welfare and regulatory state activities. It has to do with the purpose and scope of much such activity, and its alleged social, economic and political consequences. The other focuses on the effects of this activity on the character of the laws that this active modern state comes to rely upon, and in particular on the form of law. I will sketch them in turn.

One of the major developments of the twentieth century was the growth of the welfare and regulatory state, and with it unprecedented expansion of state activity, both in quantity and in kind. Numbers soared – people employed, money spent, activities pursued - and so too did the range and substance of state activities, central among them the provision of welfare, services, and regulatory activity. A tag line for neo-liberal responses, buttressed by somewhat more sophisticated if arguable economic theory, is Reagan’s inaugural pronouncement that ‘Government is not the solution to our problem; government is the

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problem.’ So what is the solution? Again not as simple as this, but in this direction: the activities of individuals and corporations in open and free markets. And what is the proper role of law? To secure the conditions of free and efficient market exchange: particularly property rights, contract, law of bankruptcy, but also criminal law, without which all else would be vulnerable. Otherwise, ‘[t]he fundamental principle [is] that in the ordering of our affairs we should make as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion.’31 Governments are necessary to provide some public goods, services and facilities (eg monetary system, land registration, roads, sewers) not provided by the market,32 that secure ‘a favourable framework for individual decisions.’33 However, coercive meddling with private freedom, say by way of intrusive regulation derived not from ‘general and timeless purposes’ but from ‘particular preferences which guide the government of the moment or from any opinion as to how particular people ought to be situated’34 both is inconsistent with the freedom necessary for efficient market transactions, and takes the form of laws that in their very character – imprecise, variable, discretionary, purpose-oriented – undermine the rule of law itself.

Libertarians and so-called neo-liberals in theory (Friedrich von Hayek, Milton Friedman, Robert Nozick) and in power (Margaret Thatcher, Ronald Reagan) objected on political and/or economic and/or philosophical (epistemological and moral) grounds to what they took to be the hyperactivity of the modern state. Hayek had great influence here. He had both moral and epistemological objections to the modern welfare state’s ‘instrumentalisation’ of law. Morally, intervention that purports to further the ‘will-of-the wisp of “social justice”’,35 is the pursuit of a ‘mirage.’36 Only the conduct of individuals or organisations, could be either just or unjust, not collective states of affairs, results of aggregated social action. In particular, the concept had no place in regard to the ‘spontaneous order that is a society, since “nothing that is not subject to human control can be just (or moral)”37 To try to characterise the justice of a society is nonsense, a category mistake,38 and not an innocent one; ‘[i]t is bound to lead back to socialism and its coercive and essentially arbitrary methods.’39 For Hayek, the notion that law must flexibly ‘respond’

33 The Constitution of Liberty, 223
34 Ibid., 226
35 Law, Legislation and Liberty, volume 1, 143.
36 Ibid., Volume 2: The Mirage of Social Justice, Chicago: University of Chicago Press, 1974, and see at 133: “social justice” is an empty phrase without determinable content. ... Like chasing any mirage it is likely to produce results which one would have done much to avoid if one had foreseen them. Many desirable aims will be sacrificed in the vain hope of making possible what must forever elude our grasp.’
37 Ibid., 32
38 Ibid., 31
39 The Constitution of Society, 260
Draft. Not to be ... etc.

Thanks for their comments to Bojan Bugarić, Arthur Glass, Gianluigi Palombella, Gianfranco Poggi, Wojciech Sadurski.

to social needs—other than basic ones for a clear framework of general rules to assist individuals in guiding their actions and interactions—emanates from a flawed social theory and presages a damaged polity. It also pretends to a knowledge that no individuals but only markets, which aggregate more knowledge than anyone separately has, can possess.

Friedman’s hostility to state interventions and regulations was even more thorough-going than Hayek’s (which was already not slight). Post-Friedmanite neo-liberals have typically taken the rule of law to be associated with a restricted state, the appropriate functions of which were to be strictly limited and few, though those few were important: primarily to keep the peace and frame, facilitate and secure the conditions of free individual coordination and choice. The real action was properly elsewhere and by others: in the market, populated and driven by private individuals and corporations, and free from restrictions that hamper its natural self-correcting propensities. In the context of what neo-liberals saw as bloated welfare states of the ’70s, not to mention post-communist states of the ’90s, this therefore would require inter alia large scale privatisation of the assets and activities, and outsourcing of many services hitherto provided by states. The state was certainly not to row, and only on occasion to steer. Or, to change the metaphor, the state was necessary to establish and enforce the constitutive rules of the game;40 not to be a player. These rules were needed to provide a reliable normative frame for market activities, which generates clear signals of the rules of the game, lends stability to and allows coordination among, the expectations of market actors. And that, roughly, was to be it. Attempts to use law to ‘respond’ to social problems, and attend to matters of ‘fairness’ or ‘social justice’, were seen as counter-productive non-solutions to non- or insoluble problems, which in turn create their own problems, among them for the rule of law.

On this model, the job of state and law, when highly constrained, is crucial but not central. Its rules should be clear, stable, precise, and general, but not too many. Such rules can give security to private interests, particularly those of property-owners and market contractors, without which the market cannot work efficiently. The job of the state is to enforce these basic normative rules of the game, an important job but not a particularly extensive one. If it goes further than that, to mess with matters of distribution and regulation, it will threaten the market order.

Apart from the inappropriateness of modern goals, a second neo-liberal objection was to the effects of modern state activity on the legal means used by the welfare and regulatory state. Again Hayek, who thought more than many economists about law, was influential here. Free markets depend on clear, general, abstract, impersonal and negative legal rules of the game, ‘rules of just conduct’,41 interpreted and enforced by independent arbiters,

41 *Law, Legislation, and Liberty*, vol.1, 143
and essentially made up of private and criminal law. They could not withstand blizzards of open-ended policy directives of public law, increasingly vague and unspecific in their terms, full of appeals to substantive criteria and specific social purposes to be achieved, open to discretionary implementation by goal-directed bureaucrats increasingly free (actually required) to adjust their interpretations to the specificity of particular cases in pursuit of governmentally prescribed specific ends.\(^42\) Bad goals in turn generate bad means, laws that don’t guide, frameworks that keep being adjusted, prescriptions too vague and malleable to be followed, but altogether labile in the hands of their wielders.

Much of this governmental regulatory and distributive activity of the modern state devolved upon administrators (though the derisive epithet of choice was usually bureaucrats), well supplied with open-ended legislative provisions, regulatory discretions, and particularised decisions to make. Many writers, prominently but not only neo-liberals, have been concerned that however well-meaning the motives of such activity, their pursuit exacts a high price in terms of the ability of law to constrain power and contribute to coordination, even if their goals are likely to be achieved, which many such critics also doubt. Again, a significant part of the cost of the pursuit, it has often been alleged, is borne by the rule of law.\(^43\)

**Implications**

How should someone who shares the disposition of thought I began with respond to this twofold critique: the wholesale rejection of non-market responses to questions of ‘social justice’ and the retail critique of the sort of law that generates?

Firstly, there is a serious conceptual difficulty with identifying the state as ‘the problem, not the solution’ and the market as that solution, because the market depends heavily, and in many ways unacknowledged by modern neo-liberals, on the state, and in particular on a state that can tax and spend. As several authors have reminded us, while a commonsense distinction between state and society or state and market can be understood, to erect a dichotomy out of it makes no sense. Karl Polanyi already showed that a market society is no natural phenomenon but depends on particular forms of state law and regulation\(^44\); ‘not the

\(^{42}\) See Friedrich von Hayek, [vol. 1]; 1974 [vol. 2]; 1979 [vol. 3]).


\(^{44}\) (Polanyi, Block and Somers 27[cites])
result of underlying inevitable economic mechanisms, but rather the consequence of a series of political choices and explicit government policies.’

Of course, supporters of ‘minimal’ states agree that some sorts of legal (and therefore state) activity are necessary for the state to support civil societies, but these, particularly those after Friedman, allow only those they say are primarily protective, negative activities; not positive, active. They distinguish the former laudable and modest state activities from the latter intrusive and immodest ones of modern welfare states. But on what ground can this distinction be made?

It is common to distinguish between classical liberal rights - so-called negative rights, rights against interference - and more socialistic, ‘positive’, welfare rights which depend on state provision. However, even the most classical of the liberal rights depend on very substantial state provision. Markets and private property, not to mention contract, copyright, IP, corporations, are products of systematic state interference in society. They exist owing to laws which enforce certain rules and not others, embody certain images of social interaction and not others, penalise certain behaviours and reward others. None of this is small game, and none of it involves simply tracking and backing autonomous social activity. What form this activity takes, what consequences it will have, what is to be tracked and what to be backed, and how, and with what implications, are all state decisions. How effectively any of this happens depends on state solvency, integrity, institutional design, trained personnel, and an ethos of office which can withstand the variety of corruptions that high stakes will, without counteraction, attract.

As Holmes and Sunstein make clear, popular but false dichotomies, like that between negative rights that allegedly require no or merely negative state intervention and positive rights that depend upon lots of it, are spurious. Rights, as they emphasise, all rights, including property and contractual rights, depend on government recognition, enforcement, financial and institutional provision, adjudication, remedy. All these things cost, and so all rights cost, often a great deal. There is no categorical distinction to be made. Rather:

Those who object to welfare rights because they cost money should not assume that property rights can be fully safe-guarded, for the conventional contrast between aspirational welfare rights and limited property rights does not survive scrutiny. Our freedom from government interference is no less budget-dependent than our entitlement to public assistance. Both freedoms must be interpreted. Both are implemented by public officials who, drawing on the public purse, have a good deal of discretion in construing and protecting them.46

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46 *The Cost of Rights*, 119
Think what the state must provide just to allow citizens the potential to sue each other, let alone the state itself. And then to expect, and then to get, a fair trial. And then to have a decision enforced. None of these rights is just a negative protection, freedom from interference by others. They are constituted by state decisions, underwritten by state provision, and made good by state intervention, on legal cause proven by state sanctioned methods in state institutions. They are, as Holmes insists, entitlements to state action; just as welfare rights are. And, like welfare rights, they are hollow without such action. As Holmes has observed, ‘Rights protection and enforcement depend on state capacities. Statelessness, therefore, means rightlessness’. 47

A historical reflection might not go amiss here. Many neo-liberals, most notably Hayek, in that remarkable feat of elision, The Road to Serfdom, predicted a slippery slope from the welfare state to totalitarianism. Indeed, characteristically, Hayek denied that there could be any third way between a market order and dictatorship:

There is no other possibility than either the order governed by the impersonal discipline of the market or that directed by the will of a few individuals; and those who are out to destroy the first are wittingly or unwittingly helping to create the second.48

Hayek had the Nazis primarily in mind, though he considered that they shared common socialist, collectivist origins, objectives and illusions with Italian Fascists and Soviet Communists. When only Communism survived the War, later neo-liberals focused on it as the great ‘other’ in the conceptual geography of the world.

It is therefore worth remembering that no society has ever slid down that slope. Germany was at least modern, though more a ‘predatory warfare society’ than a welfare state.49 Moreover, no communist state ever began as a welfare state in decline, and no welfare state has ever delivered the comprehensive political, moral, economic and ecological degradation that communist states did. On the contrary. All success is relative, but given that caveat, western liberal democracies were the success story of the past century. Yet these polities, at the moments of their greatest success, were liberal social democracies, with government activity and welfare services greater than have ever existed in the history of the world. One can say that they would have done immeasurably better if they had never been welfare states at all; but then one can say anything.

Try excising the ‘problem’ state from the market ‘solution’ and it is not clear what will be left. That being the case, the actual controversy is not between more and less state

48 The Road to Serfdom, 219
 provision but rather about the proper kind of state provision. Notwithstanding the best efforts of neo-liberals, state provision and expense haven’t diminished in recent years, but have changed in goals, beneficiaries and those whom it burdens. Seen in that light the debate takes a very different form from that which many neo-liberals suggest, and it can’t be settled within the terms they offer.

So, there is a lot for states to do. One needs a state strong enough to do what it must, and restrained enough not to do what it must not. Therein lie the point and virtue of long liberal and republican political traditions of institutional design, whose central aim is not to emasculate, but to temper and channel the exercise of governmental power. In these circumstances, and from this perspective, the various liberal nostrums that we know so well - limited government, the rule of law, an independent judiciary, a free press, and so on - have the twofold importance of allowing governments the strength they need, while requiring that as much as can be contrived they act through channels, and in ways, and under the watch of other forces which might temper the exercise of power. Such institutionalisation makes power at the same time safer and more effective.

Moreover, even apart from the inextricable dependencies of markets on states, what sense does it make from the point of view of the rule of law to identify the state as the exclusive source of rule of law problems? Let us recall that, on the interpretation I am endorsing here, the key anti-hero of the rule of law story is arbitrary public power. I have emphasised that the rule of law is not hostile to power itself, nor to public power. It is the addition of arbitrariness that hurts.

So far I have left the notion of ‘public’ unexamined, letting it be assumed – as, it must be admitted, most within the major traditions of political thought have assumed - that it was specifically associated with state power. But why would anyone with the disposition I have advocated think that? If other forms and sources of power – social, economic, religious, ethnic – have significant public impact, why imagine that their arbitrary exercise will be benign, simply because it is not the state that exercises it? Indeed, one should put it more strongly than that. If the reason we’re talking about the rule of law is because wild or arbitrary power is so potentially horrible, then whenever an institution or group, more occasionally individual, is in a position to wield arbitrary public power, that should be the subject of concern for anyone who is persuaded of the dangers of such power.

Of course there are limits. ‘Public’ here serves to distinguish between forms of arbitrariness that have public impacts and should be matters of public concern. Distinctions have to be made, and matters of scale, character and consequence really matter. But state/nonstate can’t be the pivot, I think, for people who fear arbitrary power.
Once, but far from always in human history, one might have been confident that states are uniquely more powerful than all other forces, and that is why they are at the centre of attention. But always it is an empirical and variable matter whether threats to the rule of law are going to come from the state or somewhere else or both. And today things are more complicated. If non-state power is arbitrarily exercised by oligarchs, Mafiosi, warlords, tribal elders, Al Qaeda, business executives, finance speculators, international ratings agencies, financial institutions, or indeed university administrators, it too has the potential to bring with it the vices of arbitrariness mentioned above. Banks can do a lot of damage too, and in recent relatively unregulated years and countries, they have. We have an interest in tempering significant public power, whoever is doing the exercise.

Taking the rule of law seriously requires acknowledgment that many of the most significant sources of, goods generated by, and dangers to the rule of law are to be found in the wider society, including the market, not merely in or even near the obvious institutional centres of official law. Sources of power are many, and they vary. There are numerous societies in which arbitrariness flows as much or more from extra-state exercises of power, sometimes aided by suborned official agencies, sometimes opposed to them. Moreover, possible constraints on it may come, or fail to come, from many domains of social life, and from many agencies other than legal ones. Not only might this happen, but it already does, and in spades. There might be other reasons to be chary of interfering with non-state actors wielding arbitrary power, but a concern to temper arbitrary public power doesn’t of itself suggest them.

I now move to the retail dimension, the allegedly transformative and degrading effect of an active state on the form and character of modern law, and its ability to serve the rule of law. It must be admitted that Hayek is a clear thinker, but that is not always a virtue. He is often too clear. His thought is full of what John Dewey used to castigate as ‘pernicious dualisms’, where one pristine logically coherent ideal type, say of a free market or the private law of just conduct, contradicts another, say the regulatory state, or public law. But these are not real-world contradictions. Neo-liberal anxiety can only distinguish itself from paranoia, and can only make plausible claims about the effects of different forms of law in the world, if neo-liberals are prepared to take circumstances, and variations in institutional strength, support and resilience into account. Many who understand the power of evil and corruption in the world are genuinely and rightly reluctant to compromise the capacity of law to frame and give cues to social conduct, and the autonomy from other pressures which a law of stable general rules seems to promise. Comparing relatively autonomous legal orders with repressive and arbitrary ones, they prefer the former. And rightly so. But these are not the only alternatives; there are many possibilities in between, and that’s where many of us live.

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50 For more on this, see my ‘Four Puzzles …’, n.3 above.
Thus Philip Selznick examined with a combination of affection and anxiety the growth of what he called ‘responsive’ law, roughly the sorts of law Hayek despised, in modern societies. He disturbed many who like Hayek thought that the ‘responsiveness’ of a welfare regulatory state represented an inherent danger to the rule of law, by guardedly welcoming it. Though his argument is complex and freighted with ambivalence, he argued that we might well come to see, and it might be good to see, the development of a legal order more ‘responsive’ to changing needs, particular circumstances, considerations of justice, as also those of competence in dealing with ever-more complex problems. Such responsive law, in Selznick’s theory, is not a horse for all courses, not equally salutary in every time and every place. On the contrary, he points out that it is sinister (or frivolous) to demean the values and institutions committed to restraining power, and that a system of ‘autonomous’ law, which gives a high priority to rules, is a potent complex of such values and institutions. He insists that at certain stages in the career of an institution, for example, particularly formative stages, certain values rightly rank high - because they are not yet established or institutionalised, or because they are at risk, or because they face strong threats. Such values must be secured and it is dangerous to compromise them. When, however, they are secure, the balance of emphasis in our moral ambitions can change, and striving toward aspirations can more safely supplement the establishment of baselines of security. We can even take some risks. This is not because the baselines become less important, just that they are more firmly in place and risks are less risky. Perspective is all; here as elsewhere. As Selznick puts it:

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.  

But why would one want to compromise the ruliness of law?  

Basically because, while we need institutions and the rule of law to protect us we might need to enlist them for other purposes as well, and characteristics apt for one purpose might not be equally apt for others, however legitimate they both are:

In the contemporary situation, separation of spheres is no longer the key to political wisdom. The community needs all the help it can get, from institutions capable of making up for one another’s deficiencies. Without yielding the principle of checks and balances, of power taming power, the system must be open to new ways of

51 The Moral Commonwealth, 464.

52 Campbell mentions some reasons summarily in LEP, 62 ff. However of the reasons that matter to me only some are noted and even they are swiftly passed by rather than dealt with directly or in any depth (see 62, para. 2).
infusing public policy with direction and commitment. For this we need cooperation and complementarity, not distance and division.\textsuperscript{53}

Conservatives and neo-liberals in rule-of-law-rich countries, suspicious of any falling-off from some idealized version of its supposed legal vehicles, 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. These are interpreted as dangers to the existence of 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. Such reactions show 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 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.\textsuperscript{54}

That suggests that not every potential source of threat to the rule of law will be equally salient in different legal orders: some will be much threatened, others less so, by the same things. It also suggests that different threats in different circumstances 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 to recall it, 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.

\textbf{Away}

The international career of the rule of law took off in the 1990s, spurred dramatically and quickly by the collapse of European communism in 1989. Given the dichotomies that dominated the conceptual space of most of the preceding century – liberal democracy in politics and market capitalist in economics versus Party-state dictatorship and command economy - the collapse of one of its protagonists was taken by many observers to mean not merely the signal victory of the other, but that the sources of its superiority would be found in institutions and practices that were the \textit{reverse image} of those that had failed. This was particularly true in relation to the state and public administration.

Dissidents under communism were rarely economists, and the opposite was also true. However they often converged in their identification of the Other. Political opposition

\textsuperscript{53} \textit{The Moral Commonwealth}, 474.

\textsuperscript{54} I have particularly in mind Critical Legal Studies, a now dated movement but which has occasional echoes.
within communist states had been increasingly articulated in zero-sum terms: civil society versus the state, us against them, society against power, anti-politics versus the polity. Economists advocated minimal state intervention in place of the pervasive maximalism of the communist state; in place of no property rights, untouchably secure ones, and so on. This was a great boost to the neo-liberal ‘take’ on Western achievements which already had other sources, for some time squeezing out other interpretations of a more mixed, complex and variable sort, of possible relations between states, laws and civil societies. For some time, and to some people, the notion that there were indispensable ‘virtuous circles’, rather than stark oppositions between states and civil societies, for example, or property-securing rule of law on one hand, and regulatory interventions, on the other, could only seem to be squeamish temporising.

These two projects, the political one connected with democracy and the economic one that Trubek calls calls ‘the project of markets and the discovery of institutions’ quickly dominated the scene. The latter:

- stressed export-led growth, free markets, privatization, and foreign investment as the keys to growth. To pursue these goals, it was necessary to create all the institutions of a market economy in former command economies and remove restrictions on markets in dirigiste economies such as those in many Latin American countries.

With roots in the institutional economics of the 1960s and the Hayekian/Friedmanite transformations of the 1980s, the new economic approach laid great stress on law, property rights and security of contract guaranteed by law, and more general economic predictability, also said to flow from law.

While there were overlaps between the democracy/human rights project and the economic project, they had different goals, priorities and targets. Securing property rights is not the same as a commitment to temper arbitrary power in its many manifestations. Though it might be a part of it, it is certainly not sufficient, nor for many purposes even the main game. You might want both, but typically those interested in one had less to say about the other. Nevertheless, as often happens in matters of rhetorical fashion, they fastened onto the same slogan, and together pushed it along. Trubek is again useful:

Once the economic development agencies realized that the neo-liberal turn involved positive intervention to create the institutional conditions for markets, development agencies were committed to investing in legal reform. They found their concerns

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56 Trubek and Santos [CITE] 2006, 84
KJuris workshop with Martin Krygier: Transformations of the Rule of Law: Legal, liberal, and neo-KJuris at Dickson Poon School of Law, KCL, Wednesday, 1 October 2014

Draft. Not to be ... etc.

Thanks for their comments to Bojan Bugaric, Arthur Glass, Gianluigi Palombella, Gianfranco Poggi, Wojciech Sadurski.

overlapped with those of the proponents of human rights and democracy. For both, the rule of law was a common goal.

While the project of democracy and the project of markets seem very different, they both identified ‘the rule of law’ as an essential step toward their objectives.57

Economic development is a major ambition of donor countries and agencies, and it became conventional wisdom that an institutional package which came to be called the rule of law – focusing particularly on formal institutions of private (and some aspects of criminal) law is necessary for it. So the rule of law was popular because its proponents believed there is this causal connection and they support the rule of law because they value the economic results said to flow from it. More recently, the situation has been complicated since the rise of China and the Great Financial Crisis, and the rhetoric has changed considerably, prompting Trubek and others to suggest there might be a new model, the ‘new developmental state’ coming to replace neo-liberal prescriptions of ‘the Washington Consensus,’ but the situation is in flux, and many of the older nostrums and procedures remain strong.

There is now a huge literature in economics and political science devoted to testing the connections between the rule of law and economic growth. From the point of view of a liberal devotee of the former, there are some problems here. I cannot assess neo-liberal rule of law prescriptions from an economic point of view, but since the centrepiece of many of them is the rule of law it matters, at least to me, how well they think about that. The results are not encouraging.

**Implications**

First, particularly for ideological purists influenced by Hayek, there is a considerable preliminary embarrassment. For he insisted that the growth of markets and of the laws that undergird and adapt to them should be primarily a spontaneous process only likely to be derailed by purposive, ‘constructivist’ government intervention. Indeed, he compares the writings of English socialists, ‘the Totalitarians in our Midst’, with those of the Nazis ‘[w]hich destroyed the belief in Western civilization in Germany and created the state of mind in which naziism could become successful.’ Both shared a similar ‘temper with which the problems are approached than of the specific arguments used – a similar readiness to break all cultural ties with the past and to stake everything on the success of a particular experiment.’58

Rejecting that temper did not mean there was nothing to do, but rather that ‘[t]he attitude of the liberal towards society is like that of the gardener who tends a plant and in order to

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57 Ibid., 85
58 *The Road to Serfdom*, 203. On the pathologies of ‘constructive rationalism, see especially Hayek, *Law, Legislation, and Liberty, volume 1,*
create the conditions most favourable to its growth must know as much as possible about its structure and the way it functions’. \(^{59}\) In the foreign ventures of the economic rule of law, however, not gardeners but social engineers have been in charge. They have commonly ignored, or sought to overcome rather than cultivate, their beneficiaries’ ‘cultural ties to the past’, about which they equally commonly knew little, in a confident bet on ‘the success of a particular experiment’. Indeed, often – and in post-communist societies in spades – ties to the past were treated like noxious weeds more than plants deserving the ministrations, at least the careful attention, of devoted gardeners. Too often there has been little but purposive foreign intervention, and that in often the most challenging of circumstances, plagued by civil strife, poverty, ethnic and religious division, and a host of rarely or barely understood ‘spontaneous’ legacies which are precisely what neo-liberal reformers want to eliminate. Rule of law promotion in its current incarnation seeks to do what Hayek seems to have rejected in principle: build the rule of law in circumstances in which it is weak, or non-existent, on the basis of institutions transplanted from radically different contexts. After all, at least the German and English ideas he attacked were largely home grown; the ‘Washington Consensus’ on development assistance abroad was only at home in Washington.

And Hayek apart, the problems of institutional transplantation are still massive. The modern West is usually taken as the model for neo-liberal export, but those exports have depended on social, political, economic understandings and practices that don’t always make the journey. And when they arrive it is not to an empty field (unless because it has recently been laid waste). Societies are patterned in differing ways. \(^{60}\) Many of these patterns endure over time, and they matter for most things, among them legal institutional function, form, social salience and performance. Societies exhibit internal continuities and differences from each other, regions and sub-societies differ too, in the character and texture of relationships they generate, enforce, and suppress. The extent to which social configurations are apt to support and resist specific institutional arrangements also varies.

If one’s interest is the extent to which the exercise of power is successfully tempered in a society, these contextual differences are key. The salience of features of legal institutions, formal and procedural characteristics usually nominated to constitute the rule of law, depends on how successfully they support the attainment of this value, in the wider society. To the extent they do, they have aided us in identifying what the law needs to be like to serve the end of the rule of law – at least there. To the extent that they do not, however, it is not all clear why we fix on them so, still less try to extend them to places where they might merely have parodic roles. The challenge for anyone seeking the rule of law anywhere

\(^{59}\) The Road to Serfdom, 22.

\(^{60}\) See my ‘Why the Rule of Law is too important to be left to lawyers,’ (2012) 2,2 Prawo i Więź (Law & Social Bonds) 30-52
is not primarily to emulate or parody practices that seem to have worked elsewhere, but to find ways of reducing the possibility of arbitrary exercise of power, whatever that takes, here.

Transplanting institutions with the hope to transform behaviours is an ambitious enterprise of social engineering which depends as much or more on context than on the institutions transplanted, but economic analysis has rarely had much to say about context. All this might sound like banal truisms were it not for the fact that it has so often been ignored in the law-transplantation business by, among others, neo-liberal reformers. Thus Sherman only slightly exaggerates when he notes:

Rule of law assistance became a multi-billion dollar enterprise that involved massive overhauls of legal regimes all over the world. A central characteristic of this rule of law project was the idea that the formalization of Western-style laws in the developing world was sufficient for promoting economic development. The idea was that implementing the market-based legal framework – or getting the rules the right - would create the necessary conditions for growth. 61

The World Bank signalled a significant rhetorical change in its 2011 World Development Report, 62 when it advocated ‘best fit’ rather than ‘best practice’, but if that is to be more than rhetoric, they will need to display more understanding than any of us has on what ‘best fit’ might mean and generate in societies in the midst of fighting, legacies hostile to programmatic innovations, etc. There is a sociological innocence in neo-liberal enthusiasms and prescriptions, as indeed in much rule of law promotion more generally, which is striking given the difficulty of the problems of social transformation that they ambitiously confront.

Given these uncertainties and complexities, neo-liberals and other enthusiasts would do well to heed the invocation of the Hippocratic Oath by Haggard and his colleagues:

This review has taken a highly instrumental view of the rule of law, stressing its utility for growth in particular. But our final and most important point is that the rule of law is of great importance as a value in its own right and as a contributor to other values, such as human freedom. Yet precisely for that reason– because we believe in the rule of law– it is all the more important that those who would offer development assistance make sure, first, to do no harm. 63

This warning has not always been heeded.

63 Haggard, MacIntyre Tiede CITE 221.
Even were we more confident than we have reason to be that neo-liberal reforms were guaranteed to produce the economic outcomes intended, the selectiveness of neo-liberal interests should worry anyone committed to the rule of law. Neo-liberals are particularly interested in encouraging investment and trade. That explains what institutional reforms they advocate. It also explains where they advocate them. That is rarely everywhere. So, note the reflections of one of the most sophisticated and dedicated advocates of the importance of the rule of law, as reforms were made in its name in Latin America in the 1990s:

in the present context of Latin America, the type of justification of the rule of law one prefers is likely to make a significant difference in terms of the policies that might be advocated. In particular, there is the danger derived from the fact that nowadays legal and judicial reforms (and the international and domestic funding allocated to support them) are strongly oriented toward the perceived interests of the dominant sectors (basically domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law). This may be useful for fomenting investment, but it tends to produce a ‘dualistic development of the justice system,’ centred on those aspects ‘that concern the modernizing sectors of the economic elite in matters of an economic business or financial nature … [while] other areas of litigation and access to justice remain untouched, corrupted and persistently lacking in infrastructure and resources.’

For societies that are profoundly unequal, these trends may very well reinforce the exclusion of many from the rule of law, while further exaggerating the advantages that the privileged enjoy by means of laws and courts enhanced in their direct interest.

Haggard et al. make a complementary point when they observe that ‘Much of the property rights literature focuses on the security of property rights, but the corruption literature suggests it is possible to have secure property rights that favour an inefficient allocation of resources because of private capture.’

There is a broader point here. The neo-liberal interest in what they call the rule of law flows from the belief that it is good for the economy. Until economists believed that, they didn’t concern themselves with law or advocate the rule of law. Now that they do, billions are spent on it, but what if they are wrong? In the various ‘post’- countries where the money goes – post-conflict, post-dictatorship, post-communist – the results are not especially encouraging, nor are the theoretical underpinnings. Enthusiasts for rule of law promotion...
might, as enthusiasts so often do, blame inadequate zeal in pursuing the reforms they promote. So the answer is more of the same. However, as the authors of one survey of the field have observed:

we really have no robust evidence that shortcomings with respect to property rights are a result of ‘bad’ institutions or the much more fundamental problem of state failure and anarchy. This is hardly a trivial issue!\(^{67}\)

We still have few economic successes to report from neo-liberal reforms. Even where there does seem to be some correlation between the reforms and economic development, we still have not established causation, in two senses. One unsettled question is whether institutional reform is likelier to cause economic success; is the causal sequence perhaps the other way around (the ‘reverse causality’ problem)? The usual templates for such reforms are legal institutions in economically successful countries, but several writers have questioned what came first: the economic development or the institutions. It makes a difference. If, as Chang and Mungiu-Pippidi\(^{68}\) argue, contemporary legal institutions in economically developed countries followed rather than preceded economic development, then perhaps those interested in the latter should focus on policies rather than institutions to spur it. If Chang et al are right, does that mean we should cease to be interested in the rule of law? Might it suggest that we should worry less about implanting new formal institutions which might merely have a ‘parchment’ existence, and more about adopting policies that might generate economic growth? I am not competent to judge the economists’ debate, and have no confident answers to these questions, but confidence is not always the most reliable mood with which to approach these matters.

Another question is whether both economic and institutional success and failure, where they occur, might depend on other factors in particular settings, that we have yet to account for (the ‘endogeneity’ problem\(^ {69}\)). Thus in a nuanced appraisal, Haggard et al observe of what they call the ‘rule-of-law complex’:

The foundational logic of the new institutional economics strikes us as compelling: Investment, trade, financial development, and growth will suffer without relative security of property and contracting and incentives against private appropriation of corporate assets. Yet property rights and the integrity of contract are not simply the result of ‘getting the law right’ in any narrow sense. Rather, property rights come out

\(^{67}\) Haggard M T210
\(^{69}\) See for example, Stephan Haggard and Lydia Tiede, ‘The Rule of Law and Economic Growth: Where are We?’ World Development, 39, 5, (2010), 673-85
of a complex causal chain that includes a variety of complementary institutions and political bargains—with respect to security, appropriate checks on private capture of the state, institutional checks on state power, and the more discrete features of the judicial and legal system. In simplest form: Property rights and contracting rest upon institutions, but these in turn rest upon deep coalitions of consenting interests. 70

What should we think about the rule of law, were we to conclude that it didn’t produce economic growth? Should we lose interest in it? The older tradition is unequivocal in saying no. As Stephen Holmes has stressed: ‘The ideal-typical liberal … saw economic liberty as only one kind of right, ,of no greater importance than, say, freedom of speech, the right to a fair trial, freedom from bodily fear, freedom of conscience, the right to education, or the right to vote’71. We still have every reason to fear despotism and anarchy, to welcome regulated political and personal liberty, to value human dignity, and also to live in a world made safe from wild power, even if we were to discover it’s not worth a dollar in GNP. And even were it to be worth that dollar, we would still have the same reasons to support it in areas that don’t attract international trade or investment. That is to say, we have every interest to value what the rule of law was supposed to ensure.

To put the point more broadly, the rule of law can be likened to what Rawls called primary social goods, both in the sense in which he originally described such goods in Theory of Justice – ‘things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual’s rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less’72 – and in his later more moralised revision – ‘what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life.’73

But today we typically think of the rule of law instrumentally, as good to the extent that it leads to some other specific good, in other particular domains of life. Claims that all sorts of such goods flow from the rule of law - economic development, human rights, democracy etc. – are the lifeblood of the international rule of law promotion industry, as we have seen. But apart from those external, purported, blessings allegedly bestowed by the rule of law, we should value diminution of the possibility of arbitrary power for its own sake and at large. If that occurs, one might still argue, as Max Weber did, that ‘sober bourgeois capitalism’ is likelier to get off the ground than if it doesn’t, but that is a sociological argument about what reduction of arbitrariness that flows from the achievement of the rule of law might facilitate. It is not itself a quality of the value that led many of those fond of the rule of law to be so. Nor are democracy, human rights and other things it is now fashionable

70 HMT 221
71 ‘The Liberal Idea’ in Passions and Interest, 27.
73 Ibid., xiii
to attribute to the rule of law. There are intuitively plausible reasons, and some evidence, to support the belief that lessening of the possibility of arbitrary power might support those further good things. But if it were shown that, in an order where the rule of law in the sense sketched here was strongly in evidence, the economy had tanked, this would not be in itself a reason to conclude that there was no rule of law. Nor that the diminution in the possibility of arbitrary exercise of power was therefore not a good. Unfortunately we still have a bit to learn about how to secure and extend that value in all those domains that make up the lives of people when they are not trading or investing. It is not clear that neo-liberals have much to teach us in this regard.