Ethical Positivism and the Liberalism of Fear

MARTIN KRYGIER*

Tom Campbell has observed that "[e]very legal theory requires a political setting and no political philosophy should lack a theory of law".[1] His own recent work seeks to make good these requirements by recommending ethical positivism as a "highly political theory of law" [2], a response—not only but above all—to what he calls "the tragic paradox of politics, according to which states are both highly necessary and extremely dangerous".[3] In this article, I explore this paradox, as setting and source of a political philosophy from which ethical positivism gains plausibility, and discuss some implications that have been drawn from it. I endorse some of these implications and question others.

I do not seek to draw a genealogy of ideas—Tom Campbell's or anyone else's—nor, except where I cite him, am I concerned to attribute to Campbell any explicit commitment to the broader views of the political domain which are outlined below. Briefly, I believe his argument echoes many of those views, but not all of them and not them alone. More generally, though the ideas I discuss have distinguished exemplars and I will refer to writers often enough, what follows is less plausibly their version or fault than mine. This caveat is entered not merely to protect me from the erudite, but also because, among those who betray signs of the disposition I want to flesh out, there are many who have not engaged

* Professor of Law, Faculty of Law, University of New South Wales. This article builds upon an Australian Senate Occasional Lecture that I delivered in November, 1998 ("Fear, Hope, Politics and Law", *Papers on Parliament,* no.33, Department of the Senate, Parliament House, Canberra, 1999). I am grateful to David Anderson, Arthur Glass, Owen Harries, Philip Pettit and Philip Selznick for their comments on that lecture and to the students in my class on "Law between Fear and Hope" for helping me to work through some of the issues raised here. Tom Campbell's comments assisted me in reworking that lecture.

1 Tom Campbell, *The Legal Theory of Ethical Positivism,[LEP]* (Dartmouth Publishing Co., Aldershot, 1996), 13. See also at 41: "[w]hat we take law to be, and how we relate it to other aspects of society, is largely determined by a wider political philosophy".

2 *LEP,* 2.

3 *LEP,* 41.

directly with the writers I mention or the arguments that interest me, and would not admit to being—indeed may not actually be—influenced by them. What they share is as much a certain *disposition of thought* as a particular theory or the influence of a particular theorist.

I wish to characterise that disposition, one of whose manifestations is a normative conception of the role of law very like what Campbell calls ethical positivism. Whether or not Campbell would feel flattered or slandered to be put in the company I mix him with, his theory exemplifies many of the views of that company, shares in their strengths, and is subject to some of their weaknesses.

The Liberalism of Fear

Many things have been asked of public institutions and actors, 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 unrestrained power. People of this disposition might ask for more than such security, but they insist that it is central. Judith Shklar, one of the most recent, uncompromising and eloquent exponents of this way of thinking about politics, has aptly named it the "liberalism of fear" [4] It is only one strand within the larger liberal tradition,[5] often combined with other strands, but it is a profoundly important one. I want to explore some of the implications of taking fear seriously, to explore its logic, some of its tendencies and some of its limitations.

Fear underlies and informs many of our central institutional

---

4 Judith Shklar, "The Liberalism of Fear", in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life* (Harvard University Press, Cambridge 1984), 5.

5 And arguably beyond liberalism, properly so-called. It figures centrally in a tradition that liberalism largely supplanted from the seventeenth century—republicanism. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, Oxford, 1997), and Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, Cambridge, 1998). With one exception (below n.18) in what follows I have not discussed the crucial distinction that Pettit and Skinner see between the republican (or, for Skinner, neo-roman) and liberal understandings of freedom and its relation to law. I do not believe that that distinction affects the arguments presented here, though a historically more scrupulous discussion might have to abandon Shklar's capacious notion of the "liberalism of fear" and distinguish between republican and liberal approaches to fear and when, how and why it needs institutional containment.

arrangements and thoughts about them, though it weighs more heavily on some than others. In thought about public affairs, fear is more associated with a sceptical temper, than with optimistic, sunny expectations or ideals. Those who fear fear are likely to be impressed more by history and memory than by hope,[6] are aware of the "crooked timber" of which we are all made,[7] take the first duty of public arrangements to be "damage control" [8] rather than the pursuit of perfection, dream less about attaining the best than avoiding the worst, indeed prefer talk of the least worst to that of the very best.

Acknowledged and unacknowledged, this concern to tame major sources of fear has had deep resonance among thinkers about public affairs over several hundred years. It is expressed among other places in the writings of Montesquieu which greatly influenced the American Founding Fathers. They, in turn, influenced us all, even if today restraint of fear commonly finds more eloquent partisans among those who have suffered its absence than those who live off the fruits of its presence.

This disposition has a distinctive concern with the character of public *institutions*, rather than, say, of public persons. For political thinkers of a fearful disposition are reluctant to leave too much in public affairs to individuals' propensity for virtue, or other good traits. They believe that in such matters, while we might (or might not) want to *encourage* individual virtue, for example, we would be unwise to *rely* upon it, and certainly to rely solely upon it. And that for two reasons. One is that we might not find enough of it, and we need safeguards against its absence. The other is that we might find too much of it and we need safeguards against its presence. For we have good reasons to fear not only fiends but saints as well. Particularly if they are powerful fiends or saints. We need security against excess of zeal from either source. Indeed excess or abuse of power from *any* source.

For such security to be enduring and reliable, institutions are necessary. And in particular, institutions that restrain the exercise of power, channel it through established pathways, divide it, check it, tame it, and thus help us keep fear, at least of the power so exercised, at bay. Many of our most valuable legal and political institutions are intended to serve as barriers against or antidotes to some of the most dangerous public sources of fear. It is important to keep that in mind, particularly when the institutions work effectively and the fear is hard to recall.

---

6 See Shklar, "The Liberalism of Fear", 8, citing Emerson's distinction between the "party of memory" and the "party of hope".

7 Isaiah Berlin renders Kant's aphorism in these terms: "out of the crooked timber of humanity no straight thing was ever made", See his *The Crooked Timber of Humanity* (Alfred A. Knopf, New York, 1991).

8 Shklar, "The Liberalism of Fear", 5.

A classical first move in the argument is the claim that (at least in modern large societies) life will be literally and necessarily frightful, at the very least disorderly, without institutions which can keep the peace, adjudicate disputes and restrain and disarm potentially combative citizens. In different ways, thinkers such as Hobbes and Locke made this move. As they, and particularly Hobbes, knew, not only does the existence of public institutions make it possible to disarm people who can make each others' lives "solitary, poore, nasty, brutish, and short", but, where they are effective, such institutions can reduce fears that might otherwise impel people to behave in abominable ways. At least on some readings, the ghastliness that has overtaken so much of the former Yugoslavia confirms this insight. In response to clichés about primordial ethnic hatreds, for example, Michael Ignatieff has recently observed that the slide into savagery in that tragic country followed a particular trajectory, which he thinks is generalisable and which he explicates in the following terms:

> Note here the causative order: first the collapse of the overarching state, then Hobbesian fear, and only then nationalist paranoia, followed by warfare. Disintegration of the state comes first, nationalist paranoia comes next. Nationalist sentiment on the ground, among common people, is a secondary consequence of political disintegration, a response to the collapse of state order and the interethnic accommodation that made it possible. Nationalism creates communities of fear, groups held together by the conviction that their security depends on sticking together. People become "nationalistic" when they are afraid; when the only answer to the question "Who will protect me now?" becomes "my own people".[9]

To avert such tragedies and lesser ones too, this reasoning goes, we have need of lawmakers who can issue binding laws of general application and who have sufficient power and resources to be able to enforce the laws they make. Which spawns the next problem, and the one that Locke identified, in opposition to Hobbes. If we have so much reason to fear our neighbours who are just individual humans, how should we avoid terror of that "mortal God", the State, which Hobbes called Leviathan?[10] This is a question Kosovo Albanians might well put to Ignatieff. It underlies the "tragic paradox". which Campbell, among others,[11] has identified.

---

9 Michael Ignatieff, *The Warrior's Honor. Ethnic War and the Modern Conscience* (Metropolitan Books, New York, 1998), 45.

10 Cf John Locke, *Two Treatises of Government,* revised edition, with introduction and notes by Peter Laslett (Cambridge University Press, Cambridge, 1965), 405.

11 Brennan and Hamlin characterise "a central problem of politics—indeed, the

One very old answer—central to liberalism though not its invention—is that rulers must be constrained to operate in accordance with an overarching legal ideal, the framework ideal for law known as the rule of law. At least since Aristotle, western legal and political traditions have known ideals of "the rule of law and not of men", even though no one imagined that law could rule without men. Why should people be so attracted to this ideal, and why should they think it so important? One reason—one very good reason—has to do with fear of arbitrary exercise of power. Quite apart from the particular *aims* of any exercise of power, law is looked to as a means of restraining the *ways* in which power can be exercised. Locke put the point thus:

> Absolute Arbitrary Power, or Governing without *settled standing Laws,* can neither of them consist with the ends of Society and Government, which Men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their Lives, Liberties and Fortunes; and by *stated Rules* of Right and Property to secure their Peace and Quiet. ...And therefore whatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared* and *received Laws,* and not by extemporary Dictates and undetermined Resolutions ...For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and promulgated Laws:* that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds..." [12]

Judith 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. The choice, according to Shklar, is simple and stark. As she explicates 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 basic dichotomy. The ultimate spiritual and political struggle is always between war and law... The Rule of Law is the one way

---

central problem of politics...as a form of principal-agent problem. Society must delegate powers to agents, but the agents cannot be trusted fully to act in the interests of the principals". Geoffrey Brennan and Alan Hamlin, "Constitutional Political Economy: The Political Economy of *Homo Economicus*" (1996) 3,3 *The Journal of Political Economy* 296.

12 John Locke, *op.cit.,* 405-06.

ruling classes have of imposing controls upon each other".[13]

In a similar vein, in the conclusion of his book, *Whigs and Hunters,* the eminent Marxist historian, E.P. Thompson scandalised many other Marxists, who traditionally had little time for law, by insisting that "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 be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error".[14] What Shklar, a lifelong liberal, and Thompson, a somewhat rueful Marxist or ex-Marxist, share is the insistence that the value of the rule of law lies primarily in what it shields us against. When they warn complacent beneficiaries of the rule of law to value what they have—what *we* have—it is by comparison with the perils that they know flow from its lack.

But—as Locke, Shklar and Thompson knew all too well—despots have laws too, so not just any sort of law will do. And important as ideals are, no sceptic will want to trust to them alone. They need support, and if the support is to be robust and lasting, it needs to be built into enduring structures, among which legal structures are crucial. The trick is to arrange an institutional order in such a way that it manages to restrain precisely those with the most power: lawmakers, as well as other significant powerholders. That's quite a trick.

One way of elaborating Locke's theme is to try to spell out the institutional implications of rule of law values, values that—above all—seek to ensure that power cannot catch us unawares. Note that in the passage quoted, Locke is not insisting merely that government be by something that can be called "law". Nor does he say anything in this passage about the *content* of the law. He insists, rather, on the need for laws of a particular—clear, stable and knowable—*character*, on "*settled standing Laws*...*stated Rules* of Right and Property...*declared* and *received Laws,* and not...extemporary Dictates and undetermined Resolutions...". And the reason for this emphasis on the medium rather than the message is plain. The vice he is most concerned to condemn is not the exercise of power itself but "Absolute Arbitrary Power", "Government...Arbitrary and at Pleasure." And, as anyone who has suffered such power will confirm, he is right to condemn it.

Laws that conform to the rule of law are not retrospective, secret,

---

13 Judith N. Shklar, "Political Theory and the Rule of Law", in Shklar, *Political Thought and Political Thinkers,* edited by Stanley Hoffmann, University of Chicago Press, Chicago, 1998, 25.

14 E.P. Thompson, *Whigs and Hunters. The Origins of the Black Act* (Penguin, Harmondsworth), 266.

incomprehensible, contradictory. They do not require things that are impossible to perform. On the basis of them, one can make plans. To the extent that a legal order approximates the rule of law ideal, citizens have or can obtain clear understanding, in advance, of their legal obligations and they can reasonably have faith that the law will constrain other citizens and officials of state in ways that, under the rule of law, they can predict.

This is not just a question of the formal character of the written laws, for citizens must also be able to have reasonable faith that the interpreters and enforcers of the law will construe it with fidelity to its publicly known terms and independently of extra-legal pressures to bend or ignore it. That, in turn, will require institutional safeguards for the independence of those who interpret the laws. It will also benefit from a host of—apparently "soft" but actually crucial—cultural supports, among them socialisation into the values of the rule of law, at least of the professionals who have to administer it and, commonly less self-consciously and explicitly, among large numbers of citizens. For a crucial aspect of the rule of law which only partly depends on the law itself is that, in the society at large, laws can, do and should significantly *count* as part of the normative fabric of everyday life. The extent to which any of these features exists is highly variable among and within societies and so, therefore, is the salience of the rule of law.[15]

To the extent that the ideals and conditions of the rule of law are honoured in practice, citizens have some means of knowing where they stand and where others stand. This contributes to lessening their reasons for fearing what others might do, or at least clarifies what they have to fear. And it puts others in the same position when they seek to anticipate what we will do.

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 restraint on 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 implement rule of law ideals, 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, since the rule of law is not a recipe for detailed institutional design. It represents rather a cluster of values which might inform such design, and which might be—

15 I have sought to explore the nature, complexity and consequences of some of these conditions in "Institutional Optimism, Cultural Pessimism and the Rule of Law" in Martin Krygier and Adam Czarnota, (eds), *The Rule of Law after Communism* (Ashgate, Aldershot, 1999), 77-105.

and have been—pursued in a variety of ways.[16]

Still, among liberal arrangements which have often been adopted are forms of separation and division of powers, and more generally attempts to check power by institutionalising countervailing powers. Since the American Revolution, a written and binding constitution has stood as a symbol and instrument of many endeavours in this direction, and, since shortly thereafter, judicial review of the legality of the exercise of power has become its common accessory. Many motives feed these arrangements, but one important among them is trenchantly—if perhaps uncharacteristically—expressed by Thomas Jefferson: "free government is founded in jealousy, and not in confidence; it is jealousy, not confidence, which prescribes limited constitutions, to bind down those whom we are obliged to trust with power; ...in questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." [17]

None of this can completely *eliminate* fear, of course. Nothing could do that, and particularly not law, since its association with force renders it—for many people in many circumstances—inevitably a source of fear itself. But it helps tame some of the worst things we have reason to fear from public power, and it helps us to know what, and in what circumstances, we have to fear. All it needs to make one take this kind of thinking seriously is the concession that the world can be a dangerous place. And all it needs to make that concession seem sensible is a cursory knowledge of history, or even a glance at a newspaper. The less cursory that knowledge, the longer the glance, the more sensible the concession will appear.

The legal recommendations so far discussed are devoted to providing frameworks for the containment, and channels for the safe transmission, of political energies. But what of the animating sources of these energies, where politics and law meet. Politics is, after all, not a frictionless motion of actors bounded and insulated by faithfully applied and unchanging laws. And laws are not neutral or eternal frameworks. They are *made* by people with purposes and ambitions. How to domesticate those purposes and tame those ambitions? Moreover, laws have effects, so one is not merely concerned with what goes *into* the political machinery, but with what comes out. How to make those who make and enforce laws accountable to those whom they will affect?

At the centre of most modern answers to these questions is democracy. In modern times, the rule of law has been intertwined with

---

16 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.

17 Quoted in Selznick, *The Moral Commonwealth,* 279-80.

political democracy. And so we speak routinely of liberal democracy. These two elements were not always linked historically and on one view[18] they have no special conceptual connection either, since one can imagine a benign and liberal prince who respects legal constraints[19] or an elected demagogue who does not. However, quite apart from the many independent reasons to value democracy, their connection makes a great deal of sense.

One major reason for democracy, certainly not the only reason but one which allies it with the liberalism of fear, is that it puts ultimate control, over those with their hands immediately on the levers of power, in the hands of those who will be affected by the exercise of that power. But what stops the people themselves from being unruly? After all, politics is a domain of passions, contests, ambitions, interests, values. How to contain the results of these often tempestuous forces? Here the liberal democrat folds politics back into the restraining web of institutions and the rule of law. Political power should be exercised by way of laws within a system that conforms to the rule of law, and social power should also be contained within the framework of such laws.

To simplify complex theory and different and unevenly successful practice, the political process has the task of liberating, but then containing, what emerges from the agitation of politics and then *funnelling* it through legislative institutions, which distil it into laws. Some laws come out of this process to affect us directly, others through the activities of officials. If there are disputes about the meaning and bearing of laws, other officials

---

18 This is the classical position of such writers as Benjamin Constant and Isaiah Berlin, for whom "[t]he answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?'" ["Two Concepts of Liberty" reprinted in *Four Essays on Liberty,* (Oxford University Press, Oxford, 1969), 130.] The first question, according to Berlin has to do with "positive", the second with "negative" liberty. And, Berlin believes, the liberal is first of all committed to negative liberty. According to Pettit and Skinner, on the other hand, republican or "neo-roman" thought saw liberty not merely as absence of interference, but *secure* absence; the opposite not merely of coercion by another but of domination by another, whether coercive or not and whether benign or not. That, so the argument goes on, is why slavery is always inconsistent with freedom, even if a slave-owner treats his slaves well. For he *could* do otherwise. Republican freedom requires that no one else have dominion over me, and for this to be possible I must have the right to participate in control over decisions that affect me, however indirect practical constraints make that right. As Skinner expresses the neo-roman argument: "From the perspective of the individual citizen, the alternatives are stark: unless you live under a system of self-government you will live as a slave" [*Liberty Before Liberalism,* 76. See also Pettit, *Republicanism, passim.*].

19 This was implicit in the non-democratic ideal of the *Rechtsstaat* in nineteenth century Prussia.

interpret those laws and adjudicate those disputes.

On this view, it is important to distinguish between the mouth of the funnel, where new matter appropriately enters to become law, and these ancillary points of official intervention, which are to be limited to enforcing and applying the law and not be additional sources of that law. For the ambition is to fix the location of political decision to where the people are or can be, so that from the time it leaves them to be distilled into laws it can emerge to affect them as untainted and unaltered by alien material as can be contrived. On this view the application of the law by unelected officials should not be another inlet, not itself the occasion for fresh political agitation or lawmaking. For that one must return to the funnel mouth, where politics rightly happens and the people can control what is decided.

Now from the point of view of the liberalism of fear, the complex arrangements that I have merely sketched are at once indispensable and fragile. Indispensable because they limit the sway of unaccountable power. Fragile, both because they are subject to external threats and also because the complex interdependencies and balances upon which they rely are so liable to being upset. Each of the elements might become stronger or weaker than it needs to be to cooperate with and to limit the others. Popular passions might overflow or erode the channels intended to restrain them, or they might be led astray. Power might seep or flood from the elected government to its bureaucracy as unelected officials contrive to render oversight by the people or their representatives nugatory. And what of also unelected and virtually irremovable judges, particularly senior judges? These are strategically located in the whole design of control over other institutions and the law, but they themselves escape the circles of control because of their institutionally protected independence, which itself has impeccable liberal foundations. Here the liberal component in liberal democracy tends to strain against its partner; the former often biased in favour of institutions that limit lawmakers, such as courts, the latter favouring those that are accountable to the people, such as legislatures. And I have not even mentioned the arguments of radical critics of liberalism, who suggest that the whole enterprise of constraining social power by legal means is doomed to fail, or at least systematically to serve some elements of society at the expense of others, while masking this systematic bias under the universalist rhetoric of the rule of law. [20]

---

[20] I have discussed one version of this criticism, that of the critical legal studies movement, in "Critical Legal Studies and Social Theory. A Response to Alan Hunt", (1987) 7 (1) *Oxford Journal of Legal Studies* 26-39, and others, from within the Marxist tradition, in "Marxism, Communism, and the Rule of Law," in Martin Krygier, (ed.) *Marxism and Communism. Posthumous Reflections on Politics, Society, and Law*, Poznan Studies in the Philosophy of Sciences and the Humanities, Rodopi, Amsterdam—Atlanta, GA., 1994,

At each of these and other points of suspected vulnerability, the logic, the *grain*, of the liberalism of fear will tend in the direction of strengthening accountability, finding ways of controlling controllers, guarding guardians, cabining, confining and balancing every position and every moment where power can be exercised: legislatures by citizens; governments by legislatures, courts and tribunals; courts by the law. This, of course, makes adjudication a very sensitive and delicate business *in principle*, since though the judges are the exemplary officers of the rule of law, responsible for maintaining it against all comers, they are—at least in constitutional matters—formally controllable by no one. If fear is what motivates you, that is a worry, and I will return to it. But it is only one of many.

Ethical Positivism

The logic of the liberalism of fear leads naturally, then, to concern for systematic restraint on state power. But it is important to recognise that that is one *consequence* among others of that logic, not its originating source. To forget the distinction between source and consequence, as many fearful liberals have, often leads to exaggeration of the importance of that consequence. It also tends to obscure the fact that a feature of the "paradox of politics" is that *restraint* on the state comes into play only after the first—sometimes only dimly-remembered—move of the liberals' own argument. That, after all, was to stress the importance of *having* a state with, in Madison's terms, "regular powers commensurate to its objects".[21] That requires a state that is strong and effective enough to do what states need to do. That in turn, as I have tried to show elsewhere, is quite a lot.[22] It also requires states, and public institutions more generally, to do well what they do. That too is no small matter. For what must be avoided is not state power *per se,* but arbitrary, capricious, despotic, exercise of that power. What must be nurtured is not state weakness, but sufficient strength, and strength of the right sort, to enable the state to act fairly and usefully, spend effectively and deploy its power to good ends.

And states and public institutions must be not only *strong* enough to do what they should but also *competent* to do what they are peculiarly suited to do, even as they must be restrained from doing what they are ill suited to do well, or well suited to do ill. Even those who understand the need for state strength do not always understand the character and imperatives of competence. To ensure it we must understand what it involves. This will be complex and variable, as competence varies from

135-68.

21 *The Federalist Papers,* [no.38], Mentor, NY, 1961, 240.

22 *Between Fear and Hope. Hybrid Thoughts on Public Values,* (ABC Books, Sydney, 1997), chapter 5.

institution to institution. Then there remains the small matter of achieving it. Fearful liberals are not incapable of addressing these issues, but they are not always their central interest, nor always their special strength.

There is. of course, nothing startling about recommending that public institutions should be competent. Who wants anything else? Nevertheless the recommendation is not as banal as it might seem. For there are several contexts in which the natural and laudable implications of the liberalism of fear, untempered by other concerns, tend to pinch and strain against certain kinds and sources of institutional competence. They do so, I would maintain, even when, like Tom Campbell, one recognises a large and important role for public power and is firmly committed to a competent and active state.

One context of crucial importance is that of law. Here there are strong liberal and perhaps even stronger democratic reasons to insist that the law be solely or as much as possible a "law of rules",[23] where rules are understood to act as "exclusionary reasons".[24] Where such reasons for decision are in play, they exclude recourse, by all but authoritative law-makers, to extra-rule considerations which might otherwise be considered relevant, whether these be considerations of politics, morals, consequences or whatever. On a strict interpretation of this view, that might even exclude direct consideration of, say, the purposes which might have or be thought to have led to the rules in the first place,[25] and it would certainly

---

23 Cf., Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 *University of Chicago Law Review* 1175. This is the central theme of Tom Campbell's *The Legal Theory of Ethical Positivism.* Campbell's "ethical positivism" is "an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments" (2).

24 Joseph Raz, *Practical Reasons and Norms,* Hutchinson, London, 1975, 15-84. Though this is Raz's conception of mandatory rules, what follows is not his conception of the role of the judge. It is Tom Campbell's, though (see *LEP,* chapters 1 and 3), since he insists on the "'prescriptive separation thesis' according to which the identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law". *LEP,* 3. And see *LEP* 5: "a system of law ought to be a system of rules. Further, the rules in question must be 'real' rules, that is rules which have, in Raz's term, 'exclusionary force'".

25 Though this is not precisely Campbell's view. LEP does not allow recourse to purposes "ulterior" to those which emerge from the words of legislation or the "intent" such words convey, and certainly not purposes which would conflict with those words. However, Campbell does condone judges, in circumstances of ambiguity or uncertainty, interpreting those words in the light of "overt and publicly stated purposes" (9) which can be drawn from "a

exclude any considerations which lay further afield. That, so this view insists, is what is meant by *applying* the law that you have, rather than speculating about why you have it or making a new law, different from the one in front of you. For a rule to have the signal attribute of "ruleness", then, it must act at the point of application as an unambiguous, mandatory and exclusionary rule, to be preferred to non-rule considerations, not a mere rule of thumb, simply to be taken into account along with them.

There are authoritarian "top-down" versions of such a model of rules, which emphasise the subordination of officials and citizens to rules, but leave prerogatives untrammelled at the centre. Here the law is seen as above all an *instrument* of authoritative command, and "ruleness" is assessed in terms of its efficacy in transmitting central commands. It will go along with weak political and legal accountability of power-wielders and a merely instrumental and contingent commitment on the part of the centre to abide by the rules. And there may well be circumstances where open-ended discretions or extra-rule exercise of power will be preferred by the rulers, instead of or as well as insistence on rules. Citizens will not be empowered to insist that rules bind rulers as well.

When combined with liberal democracy, however, the significance of rules in the model is different. Their point is to segregate the legislative level at which politics, interests and clashes of value have legitimate play, from the executive and adjudicative levels where they do not, on the grounds that the former are controlled democratically, while the latter are not. Only this, and the associated *autonomy* of law-application from the world of politics, interests and clashes of value, gives democratic legitimacy to the former, since the *demos* is there and to the latter, since it isn't. Moreover, unless the law observes such segregation, the rule of law itself might be imperilled, since any alterations at the stage of application would mean that the law could not have been known beforehand. Its effect will be retrospective. So too with any softening of the "ruleness" of law. If law is comprised of open-ended "standards" which are only made concrete at the point of "application", if it can be outweighed by the decision makers' views of morals, politics or consequences, then again the rule of law threatens to degenerate into the rule of men.

It is easy to see the attractiveness of this understanding to the liberalism of fear, and to liberal democrats influenced by it. It would seem

contextual understanding of the rules themselves" (7), "the purpose as stated in the legislation or the politically authenticated statement of the legitimating purpose of the law in question" (143). Nevertheless, "[o]nly when there is a failure of communication between legislator and subject is a direct use of legislative purpose relevant to the regulatory process" (147). See also 87-91, esp. 109-117 on the "technique and...ethic of judging", and chapter 6.

to keep the consideration of politics and values where, in their scheme of restraint, they should lie—at the properly *political* stage of the process, where laws are made by representatives answerable to the people. If the laws so made can be ignored, revised, remade, by unelected officials, whether bureaucrats or judges, or if their terms are so vague that their particular scope and meaning must await an interpreter's decision, the whole ambition to *funnel* values into a set of institutions constrained by law starts to come apart. This seems calculated to puncture holes in the legal funnel, through which legitimate (because under democratic control) purposes and values might seep out, and illegitimate ones (because uncontrolled either by legality or democracy) might be injected. Moreover, the whole notion of clarity, non-retrospectivity, and stability of law would seem up for grabs, at the mercy of the next decision. If so, doesn't that rob citizens of precisely what the rule of law was intended to ensure them?

It is parallel considerations that lead many people to decry the consequences of the welfare state for the rule of law. The modern active state relies greatly on open-ended laws, expanding official discretions, ballooning and hard to ascertain regulations. How to know them in advance? How to interpret them? How to rely on them? How to keep them from favouring some at the expense of others? Many thinkers have warned against the consequences of these developments for the maintenance of the rule of law,[26] and their fears, though often exaggerated, are not empty.

One response to such developments is to favour tight legislative definition of administrative action and limitations on administrative discretion,[27] clear and precise legislative rules rather than vague standards, statutes rather than the common law,[28] "judicial restraint" rather than "judicial activism",[29] precise legislative definition of rights not vague constitutional bills of rights,[30] all the more not constitutionally entrenched

---

26 See F.A. Hayek, Law, Legislation and Liberty, vol.1 (University of Chicago Press, Chicago, 1973), vol.2, (University of Chicago Press, Chicago, 1974), vol.3, (University of Chicago Press, Chicago, 1979); Eugene Kamenka and Alice Erh-Soon Tay, "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; Theodore J. Lowi, "The Welfare State, The New Regulation, and The Rule of Law", in Allan C. Hutchinson and Patrick Monahan, (eds), *The Rule of Law. Ideal or Ideology*, (Carswell, Toronto, 1987), 17-58; Geoffrey de Q. Walker, *The Rule of Law*, (Melbourne University Press, Melbourne), 1988.

27 See *LEP*, 9: "LEP is opposed to the extensive use of judicial or administrative discretion directed only by general standards".

28 See *LEP*, 8-9, "The Politics of Legal Positivism", 85.

29 See *LEP*, 134.

30 "The Point of Legal Positivism", 85-86; *LEP* 4, 29, chapter 7.

bills of rights. These last, it might be observed from this viewpoint, are falsely called difficult to amend, for that only means that citizens have difficulty amending them. Judges are free to do so whenever they come to "interpret" them. This would seem to offend the principles of democracy and liberalism at the same time.

Fear of uncontrollable judges might, then, lead some to spurn bills of rights, even though it might have been fear of only loosely controlled legislatures which led others to embrace them. And this is an instance of a wider difficulty or source of tensions within attempts to realise the liberalism of fear. There are so many potential sources of fear that attempts to institutionalise antidotes to one such source might themselves build up powers in another, of which one has in turn reason to be afraid. This, as we saw earlier, is where democratic and liberal commitments might strain against each other. A strong court might neutralise a strong legislature or executive, but then what about the court? So long as courts keep their heads down and can convince people that they are merely applying laws made elsewhere, this fear might lie dormant. However as soon as they seem to show some initiative, this is a source of disquiet to many, since there is no obvious way to impose extra-judicial control over that initiative without destroying the independence so precious to the role that fearful liberals require courts to play. And this is where the attack on judicial activism has its most potent source. For if the defences of fearful liberalism are to be rigorous they should leave no unguarded guardians. But that is precisely what law-making judges seem to be.

The foregoing account has deliberately been cast broadly, since the considerations advanced in it have persuaded many people who have never heard either of the liberalism of fear or of ethical positivism. But there is no doubt that an ethical positivist of Campbell's sort would find many of them compelling, and it is not surprising that, while they are not the only considerations that move him, Campbell himself stresses many of them. After all, ethical positivism, like the liberalism of fear, is an attempt to deploy law to deal with "the tragic paradox of politics" And like the fearful liberal, the ethical positivist considers that "the paradox is tragic in so far as both the need for and the dangers of government stem from the same features of the human condition: the vulnerability of individuals and small groups in situations where scarcity, or perhaps human nature itself, generates the drive to dominate and control others".[31] And so, ethical positivism "sets out a rule-based framework for mitigating the tragic dilemmas arising out of the paradox of politics".[32] designed above all, to funnel decisions into law and separate the activities and personnel engaged in making the law from those involved in its interpretation and application.

31 *LEP*, 20.
32 *LEP*, 69.

As Campbell explains:

> The point of legal positivism—understood as an ethical theory concerning the legally relevant conduct of citizens, legislators and judges—can be seen as the provision of a model and a justification for the construct of a legal system which approaches as far as is practicable to the realisation of an autonomous system of rules as a necessary part of any acceptable legal system. The autonomy in question relates not to the inputs to legal system which, on the democratic model of legal positivism at least, are the rules emanating from legislatures, but to the court-centred processes whose function is to apply legal rules to particular circumstances and resolve the question of law and fact which are brought to their attention. The point of legal positivism, so understood, is to commend that legal systems be developed in such a way as to maximise the social and political benefits of having a system of readily identifiable mandatory rules of such clarity, precision and scope that they can be routinely understood and applied without recourse to contentious moral and political judgments.[33]

These are weighty considerations. It is certainly no answer to them to favour judicial or administrative activism simply on the grounds that one prefers the results in particular cases. For there will be other cases, and institutions are in for the long haul. Nor can a sceptic be happy to "let justice be done though the heavens fall". People who advocate that are unlikely to have experienced falling heavens. And demands that "justice" should invariably triumph over "blind adherence to rules" ignore at their or our peril just how contentious justice can be and how important the work of rules is. Liberals, democrats and ethical positivists are right to emphasise the importance of rules, and they are equally right to insist that a serious political theory must reckon not merely with what results institutions should generate but equally with what institutions should generate them. They must have a theory of what institutions should have *authority* when values are in dispute, not merely what values they think should win.[34] There *are* strong democratic reasons to favour legislative sources for fundamental value decisions, strong liberal reasons for "ruleness", and strong reasons to worry about unfettered discretions in the hands of unfettered decision-makers. But are they always and everywhere overwhelming, and more particularly should they uniformly override any other considerations?

---

33 "The Point of Legal Positivism", 65-66.

34 For a forceful argument on this and related points, see Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" in (1993) 13, 1 *Oxford Journal of Legal Studies* 18-51.

For there are such considerations.

First of all, one must reckon with the impossibility, now almost universally acknowledged among lawyers, of a gapless regime of totally, mechanically, applicable rules. No legal theorist, and certainly not Tom Campbell, pretends that such a regime can exist in practice, for there are so many unavoidable factors about law and about life that militate against perfect ruleness of rules. Just to mention one: rules, expressed in words, have to be interpreted and they cannot dictate the interpretation they receive. That comes from outside them, from those who interpret them.[35] It does not follow that meaning is necessarily unstable, at least among lawyers, since there is usually considerable consensus within interpretive communities on how they are to be interpreted. But that in turn depends, among other things, on canons of interpretation within such communities, which in turn are controversial, often inconsistent, and change, for the proper grounds, means and ends of interpretation are themselves complex and matters of dispute. And then rules of interpretation, even when agreed upon, have themselves to be interpreted, and so on. None of this is news to any legal theorist, though different theorists draw different conclusions from it, and popular polemics often ignore it. Other chestnuts of legal theory concern questions of what decision-makers should do if their understanding of the meaning of the rule, as applied in a particular case, contradicts what they understand the purpose of the rule to have been. Or what if the rule seems to dictate a conclusion out of line with values deep in the larger body of law? Or manifestly unjust? It is not obvious that such considerations should invariably trump respect for rules, but nor is it obvious that they should always lose.

The real dispute about the role of officials is rarely between those who think the law is or can be always plain and officials should/shouldn't ignore it. Rather it is a dispute of political morality as to what officials should do in those many cases when there is no simple and uncontroversial way of reading off a univocal result from the words of the legal rules. What approach by officials—at that point of decision—best serves democracy, fidelity to law, justice, institutional competence, and whatever other values are nominated, and then—if these values point in different directions—which should have what priority? These questions are particularly insistent at appellate levels, since odds are that the case would not be there if the answer were simple. And to such questions, as to most questions of institutional design, there is no one-size-fits-all answer that will do.

Thinkers who still are primarily concerned to cabin official acts often

35 For an exaggerated, repetitive, self-indulgent, and often dazzling series of essays which make this point, often, see Stanley Fish, *Doing What Comes Naturally* (Duke University Press, Durham, NC, 1989).

modify their original injunction that the law should simply be applied to say that officials should stick as close to the rules as they can when they apply them, and add as little of their own as they can. They should be systematically "restrained", not "activist", deferential to legislatures, cautious in any extensions of the law they might be driven to suggest. And, given the democratic deficit under which judges labour, there is a lot to be said for judicial restraint in many—perhaps most—circumstances, for judges' settling for "incompletely theorised agreement" [36] short of the fully theorised "moral reading" that some[37] demand from them. Modesty is, after all, a virtue, particularly from incumbents of an institution which is deliberately cut off from democratic accountability, systematic training in anything other than law, and systematic access to information other than law. However, modesty is not the only virtue and where it is disingenuous it might not even be virtuous. That aside, the demand for "restraint" rather than simple rule-application already suggests that the legal funnel is leaking. And if the leakage proves unstoppable, one might reconsider whether to try all measures to stem the flow. Instead it might be worth thinking whether it could be directed to good ends.

The 'England Problem'

Among the primary virtues of the rule of law is that it allows us to know what the law is in advance, and therefore place reliance upon it. Potentially, these are remarkable contributions that a stable and coherent legal order bestows on a society. However, *how much* predictability a legal order needs to successfully undergird a civil society, what sorts of law produce it, and what besides law is needed, are less simple questions than they appear. They are sociological rather than philosophical questions and ones on which evidence bears. There is therefore no reason to believe that philosophers are particularly well-equipped to answer them, though they have not been shy to try. And the answers of many fearful liberals—the more predictability the better, and a tight rule-based legal order—are less obviously compelling than they might seem.

An example might help here. Max Weber argued powerfully that modern "sober bourgeois capitalism" could not have developed in the absence of a highly predictable order of politics, administration and law. Where the ruler's prerogative constantly threatened, or the administration was unsystematic and not based on rules, or the law was unclear or

---

36 See Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, Oxford, 1996).

37 See Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986), *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, Mass., 1995).

unascertainable or liable to arbitrary change, various forms of "adventurous and speculative capitalism and all sorts of politically determinedcapitalisms are possible, but no rational enterprise under individual initiative, with fixed capital and certainty of calculations" [38] and with it the enormous dynamism which the Western capitalist order uniquely displayed. Such an economic order needed "a calculable legal system and an administration in terms of formal rules".[39] The key, Weber insisted, was the sovereignty of predictable rules.

This is a sociological thesis and a highly plausible one. Without at least a reliable threshold of predictability of political action and of restraint on the arbitrary exercise of significant power, sober bourgeois capitalism won't develop, though snatch-and-grab capitalism might. That is a lesson that contemporary Russia confirms. However Weber went further. As a trained German lawyer and legal philosopher, Weber identified the continental civil law order, which had as its regulative ideal a gapless, coherent system of formal general rules, as the most predictable and hence the most suitable for capitalism. Weber knew that the ideal was unrealisable in practice, but he seemed to think that the determined attempt to approximate it would generate more predictability than could any alternative. Tom Campbell favours statute law to common law, apparently for similar reasons.

That, however, left Weber with a notorious difficulty, often simply called his "England problem". The common law as developed in England and its offshoots, among them the United States, had altogether messier, inductive, case by case methods; English legal thought, Weber wrote, "is essentially an empirical art... One can also still observe the charismatic character of lawfinding, especially, although not exclusively in the new countries, and quite particularly the United States".[40] Indeed, "[a]ll in all, the Common Law...presents a picture of an administration of justice which in the most fundamental formal features of both substantive law and procedure differs from the structure of Continental law as much as is possible within a secular system of justice".[41] This is an embarrassment for Weber's legal thesis, because it was precisely these common law countries which were the great engines of capitalism; not Germany and France with their far more systematic sets of rules. Worse still, Weber—who was nothing if not honest (and a genius besides)—acknowledged that where the two systems competed, as in Canada, "the Common Law has come out on

38 *The Protestant Ethic and the Spirit of Capitalism*, (Unwin, London, 1971), 25.

39 *Ibid.*

40 Max Weber, *Economy and Society*, vol. 2, (Bedminster Press, New York), 1968, 890.

41 *Ibid*, 891.

top and has overcome the Continental alternative rather quickly".[42] He might also have acknowledged that the English system of political rule was not obviously more arbitrary than the German, for all the latter's formality and rules; nor—to add the liberals' preoccupation—did the English have more reason to fear abuse of political power than the German or French.

Weber made a variety of *ad hoc* attempts to reconcile his thesis about Continental technical superiority with the facts of English and American success. These brief hypotheses were unsuccessful in that aim because they each undercut the special significance of formal rationality, but each was fertile. I will recall one here, and one in a moment. The first was that English law "while not rational [roughly: derived from a coherent system of general rules]...was calculable, and it made extensive contractual autonomy possible".[43] This saves the sociological thesis that capitalism requires predictable law, but not the legal one, that it requires "formally rational" law on the Continental model. It appears that your law can be predictable *enough*—perhaps more than enough—even where predictability matters a lot, though it is—by some standards—quite unruly

This suggests two important points for fearful liberals and ethical positivists committed to a law of rules. First of all, the attempt to realise an unrealisable ideal is not necessarily the best strategy for anchoring one's values in the world. That is perhaps an illustration of the economists' "theory of the second best". As I understand it, this theory holds that if in an ideal theoretical model a combination of factors and circumstances would produce a particular optimal result, but some of these factors are missing in actuality, you won't necessarily do best by simply seeking to maximise those of the stipulated factors that remain, in the circumstances that you have. Or to adapt an illustration made by Avishai Margalit,[44] imagine you are desperate to fly for a holiday in Hawaii, but only have enough fuel to drop you a few hundred miles short, somewhere in the Pacific ocean. Rather than try to fly as close to your goal as you can, you might do better to settle for somewhere closer. Particularly if there are other benefits in doing so. In our context, also one of inevitable shortfall—in this case from formalistic perfection—it might not prove sensible relentlessly to urge approximation to an unattainable ideal, in the context of a world in which complete

---

42 *Ibid,* 892.

43 Max Weber, *The Religion of China* (Free Press, New York, 1964), 102.

44 *The Decent Society,* Harvard University Press, Cambridge, Mass., 1996, 283. Margalit has another illustration of the theory, with which many might find it possible to empathise: "St. Paul believed that the human ideal for men is celibacy. But if someone has strong desires, he had better not remain a bachelor, trying to fornicate as little as possible and thus coming as close to the ideal even if he can never actually reach it. It would be better for him to get married".

ruleness is unavailable, there is evidence that it is not necessary for what you want, and other considerations are also important. All the more since, as I will argue in a moment, legislators are not in control of many of the factors which will ultimately determine the effects of the laws they launch into the world, and they don't know much about them either.

The second point is this. The liberalism of fear can only distinguish itself from paranoia, and ethical positivism can only make plausible claims about the effects of laws in the world, if they 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 on the rule of law and the autonomy from other pressures which a law of rules promises. Comparing relatively autonomous legal orders with repressive and arbitrary ones, they prefer the former. And rightly so. But these are not the only alternatives. For legal orders differ greatly in the extent to which the values and practices of the rule of law are strongly embedded within them. 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, socialised to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders over centuries are rule of law values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them. Not every legal order is so strong. That suggests that not every legal order is equally at risk from limited incursions on its "ruliness": some will be much threatened, others less so.

Philip Selznick insists upon this point, in arguing for a legal order more "responsive" to changing needs, particular circumstances, principles of justice embedded in legal traditions but often not formulated as hard and fast rules, and considerations of justice more broadly. 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. However, he also observes that just as people exhibit what he calls "moral development," so the point can be generalised to institutions, systems, communities.[45] At certain stages in the career of an institution, for example, particularly

[45] See Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law* (New York, 1978), 18-27, "A Developmental Model".

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. Thus:

> For many institutions, a large measure of autonomy is especially important in its *formative* stages. When policies and perspectives must be nurtured—given a chance to become established and secure; in a word, institutionalised—they need the protection autonomy can give. Once the system or policy is secure, that need becomes less compelling. Then more precision is required as to *what kind of* autonomy and *how much* is required or desirable.[46]

One can, then, agree with Campbell's "modest but important claim...that, given the appropriate political and legal culture, specific rule governance can have an important role to play in moving societies towards the attainment of general prosperity, effective humanity and social justice",[47] without agreeing that rule governance should be always the only legal game in town.

But why would one want to compromise the ruleness of law?[48]

---

46 *The Moral Commonwealth,* 335. As he writes elsewhere: "there is or should be a dual focus on *baselines* and *flourishings*. We hold fast to the vital minimum even as we reach for the more subtle, more elaborated, more problematic ideal. Without protection of baseline values and procedures, the rule of law loses focus, obscured in a utopian plea for a world untainted by power or authority. This is the danger in radical criticisms of 'liberal legalism'. The criticisms are useful insofar as they show how the classical rule-of-law model undermines solidarity and delivers a cramped, impoverished justice. Such criticisms are misplaced, however, insofar as they lose purchase on the need for elementary constraints on the abuse of power.

There is nothing strange or exotic about the dual concern I recommend. It follows a familiar logic. In parenting and education, for example, we cannot act responsibly if we fail to address foundational needs for nurture, stimulation, and discipline, as well as elementary expectations with regard to learning and character. But we would fail as parents and educators if we did not encourage and support more complex virtues and higher competencies." "Legal Cultures and the Rule of Law", 34.

47 *LEP,* 9.

48 Campbell mentions some reasons summarily in *LEP,* 62 ff. However of the

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. And so Selznick insists on the importance of attending to both baselines, conditions of survival, on the one hand, and aspirations, conditions of flourishing, on the other.

Fears and Hopes

We ask a lot of things of law as of life, and not all of them are consistent with each other. After all, judges are sworn to do justice according to law, so there is something poignant when the two demands come apart. Sometimes our fondness for ruleness might seem outweighed by our wish to do justice in a particular case, sometimes simply by our wish to act sensibly in particular circumstances, sometimes by our wish to serve the purposes of a statute, even if that involves setting aside the implications of what we understand its words to require, because in a particular case the result of their application would lead to a foolish result. And judges are not the only officials who are bound by rules and bound to apply them. Regulators are sent throughout the society authorised by law to check on the performance of industries, hospitals, schools, and so on. How should they do their important jobs? Our fears lest such sources act poorly will often point in different directions from our hopes that the same sources might act well. Fear is important enough to have considerable priority, maybe enough to raise a presumption in favour of moves to counteract it. But it should not always be our only concern.

This is something Weber hints at in another attempt to explain the embarrassing English advantage. In English law, he writes, "[s]afety valves are...provided against legal formalism. ...the institution of the civil jury imposes on rationality limits which are not merely accepted as inevitable but are actually prized because of the binding force of precedent and the fear that a precedent might thus create 'bad law' in a sphere which one wishes to keep open for a concrete balancing of interests. ...It does in any case represent a softening of rationality in the administration of justice".[49] Such "safety valves", which allow escape from the excessive rigidity often associated with a single-minded devotion to rules, might be useful in other contexts as well. Paradoxically they might even deliver us more reliable legal consequences.

There are at the same time important sociological and moral

reasons that matter to me only a few are noted and even they are swiftly passed by rather than dealt with directly or in any depth (see 62, para. 2).

49 *Economy and Society,* vol.2, 891.

dimensions to all this, and I will take them in turn. A confidence in the real-world consequences of precise rules, tight discretions, crisp definitions, judicial restraint and so on, assumes a lot about the ways that laws in the books and in the courts affect lives in the world. But much of this advocacy, whether by lawyers, legislators, economists, philosophers,—even Max Weber!—betrays a remarkable sociological innocence. First of all, few of us are simply waiting to hear from officials and their law. This law competes with many other signals, pressures and sources of normative guidance and dispute resolution in our life—Petrazycki's "intuitive" and Ehrlich's "living" law— many of them closer and more salient to us and the groups within which we move than the laws on which lawyers and legal philosophers concentrate. Not only will they compete with the law for our attention, and often win, but they will be part of the context in which the law is understood, use is or isn't made of it, it is heeded or ignored.[50] Since people live most of their lives in such "semi-autonomous social fields" [51] of which legislators know little, it is not surprising that the life of the "law in action" is difficult if not impossible for the legislator, or anyone who merely relies on lawyers' folk understandings of human behaviour, to predict. So if we are concerned with how law actually affects people's lives and what is made of it there, any simple extrapolation from the technical character of laws and their official interpretation in particular hard cases, to their systematic effects in the world, is simply uninformed guesswork. One has to look at the play of law in the world.

When one does look, much that one finds would surprise those who imagine that the virtues of a law of strict and strictly applied rules is self-evident. The literature of regulatory theory is full, for example, of accounts of the pathologies generated by attempts to "fix" rules as precisely as possible. In their splendid and splendidly named work, *Going by the*

---

50 For an excellent discussion of how the law filters into the world, see Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", (1981) 19 *Journal of Legal Pluralism,* 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 characterised 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 20).

51 A phrase from the seminal article by Sally Falk Moore, "Law and social change: the semi-autonomous social field as an appropriate subject of study," in *Law as Process. An Anthropoligical Approach* (Routledge and Kegan Paul, London, 1978), 54-81.

Book,[52] Bardach and Kagan point to the "site unreasonableness", unresponsiveness and ineffectiveness which systematically occur when over-inclusive rules are applied inflexibly to complex, variable and changing circumstances. They stress the "perverse effects of legalism", among which are the dumbing-down effects of formal rules which "by their nature...are enforceable only if they specify *minimum conditions* of performance or quality or whatever. They cannot be designed to bring about higher levels of *aspiration* or continuous improvement or concern about quality".[53]

This is a theme echoed by the American sociologist, Carol Heimer, who explores regulation in a variety of contexts where there is reason for concern both to eliminate abuses and encourage excellence. Typically, regimes of legalistic rules are aimed at the former goal, and not only don't serve but undermine support for the latter. As Heimer writes:

> Ideally, two different sets of incentives should address the analytically separate problems of discouraging and punishing dishonesty and wrongdoing and encouraging and rewarding high-quality performances. Ideally these two incentive systems would be quite independent since incentive effects get distorted when the two problems are addressed by a single set of rewards and punishments. One doesn't want rules designed to curb the abuses of the worst 1% to become the guidelines for an entire system.[54]

Or, as she remarks in the same piece, "[w]e would not have great symphony orchestras if conductors focused only on keeping musicians from playing out of tune".[55]

One overriding danger of such officious negatively-inclined regulation, emphasised by Bardach and Kagan, is that "*accountability replaces responsibility,*"[56] a theme which Heimer's studies vividly illustrate. This suggests, and it has suggested to Geoffrey Brennan—no hater of rules—that there might be point in discriminating among the targets of regulatory regimes and varying the mode and character of regulation accordingly.[57] If your major aim is to catch crooks, one sort of regime might

---

52 Eugene Bardach and Robert Kagan, *Going by the Book* (Temple University Press), 1982.

53 *Ibid,* 100.

54 Carol Heimer, "Legislating Responsibility" American Bar Foundation Working Paper No. 9711, 11

55 *Ibid,* 13

56 Bardach and Kagan,321

57 See Geoffrey Brennan, "Institutionalising Accountability: Comments on the Evans, Niland and Braithwaite Papers" (unpublished ms.)

(though even there it might not) be the regime of choice. If, on the other hand, among one's aims are improving the competence, talents, application, care, loyalty of actors in institutions one is regulating, a system of inflexible rules might be dramatically counterproductive.

Indeed, even if it is bad performance which worries you, such a system might still serve you ill. For strict rules lend themselves to what Heimer elsewhere calls "creative compliance, in which people or organisations follow the letter but not the spirit of the law" and "feigned compliance [where people] do not even bother with the letter of the law except to use it as a guide for creating an appearance of compliance" [58] John and Valerie Braithwaite, for example, compared the regulation of nursing homes in the United States and Australia. The former is based on a large number of very precise and detailed rules; the latter on a small number of vague and value-laden standards. The Braithwaites demonstrate that, contrary to their initial intuitions, the Australian system of "wishy washy and blunt" standards turns out to be far more reliable than the American law of detailed rules. There are many reasons for that, the most important of which is that conscientious staff are empowered and involved in the activity of particularising and satisfying the standards, rather than alienated and tempted to avoid or simply formally to conform to the host of detailed rules, while ignoring the goals which the rules were intended to serve. But there is a negative payoff as well: "Detailed laws can provide a set of signposts to navigate around for those with the resources to employ a good legal navigator... Marching under the banner of consistency, business can co-opt lawyers, social scientists, legislators and consumer advocates to the delivery of strategically inconsistent regulation of limited potency." [59] Standards are often harder to evade.

The point here is not that rules serve no purpose, or that standards should always be preferred or that administrators and judges should do what they like. Certainly not that political authority should abandon the mediation of rules and be "simply a matter of ad hoc particularistic decrees or discretions".[60] This "are you still beating your wife?" way of posing the alternatives is unhelpful and is no necessary implication of scepticism in regard to lawyers' and philosophers' speculations about the ways of law in the world. Two things are suggested, however, by even this cursory sketch. The first and more general point is that Campbell's salutary and effective

---

58 "The Routinization of Responsiveness: Regulatory Compliance and the Construction of Organizational Routines", American Bar Foundation Working Paper No. 9801, 6, 7.

59 John Braithwaite and Valerie Braithwaite, "The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation" (1995) 4 *Social and Legal Studies,* 336-37

60 *LEP,* 6.

critique of the division of labour between legal and political philosophy should be extended. The disciplinary apartheid which often divides philosophical from empirical and social theoretical enquiries is also unfortunate, since not everything on which legal philosophy depends, particularly philosophy that is committed to understanding law in its "political setting", is discoverable by philosophy.[61] More specifically, there is not much that is self-evident about the ways laws percolate into social life, about how much and in what circumstances they matter, about what about them matters, about what is made of them, about what effects they have and what in them has effects. Much that seems self-evident, including some of the ethical positivist's confidence in the comparative efficacy of rules, might well be false. And even where not false, it might simply exaggerate the importance of what it advocates and underrate the importance of considerations it overlooks or overrides.

There are many dimensions to this, one of them moral. I will conclude with it. Again and again, the language of the law, and aspirations people have for it, include distinctions which we should not ignore when thinking what might be gained from our institutions: the letter and the spirit of the law, legality and justice, rules and principles, baselines and aspirations, negative and affirmative ambitions, fears to be allayed and hopes to be realised. Ideally we would serve them all, and practically we need security from fear to be able to pursue hopes with confidence. But securing the first is not the same as securing the second, and a single-minded devotion to one might undermine our chances to gain the other.

Since my wrestling with these problems is so deeply indebted to Philip Selznick's wise, uncomfortable and relentless determination to hold onto both horns of important dilemmas, I will quote him at length:

> Positivism is not indifferent to legal values. On the contrary, from positivism we gain a steady focus on *clarity, certainty,* and institutional *autonomy.* These virtues serve the ends of justice. They uphold the expectations of citizens, limit the abuse of official discretion, and determine the reach of binding obligations. By insisting on a definite boundary between the legal and the nonlegal, they sustain the independence of judges and the separation of law from politics. They thereby enhance, in some respects at least, the integrity of legal institutions...
>
> The truth in legal positivism is, however, a limited

[61] I have sought to make this general point at some length in "*The Concept of Law* and Social Theory" (1982) 2.2 *Oxford Journal of Legal Studies*, 155-80.

> truth. The virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way. Precise rules, accurate facts, and uniform administration are elements of *formal* justice, which equalizes parties, restrains partiality, and makes decisions predictable. These surely contribute to the mitigation of arbitrary rule. But legal "correctness" has its own costs. Like any other technology, it is vulnerable to the divorce of ends and means. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system either to take new interests and circumstances into account or to remedy the effects of social inequality. Formal justice tends to serve the status quo. It therefore may be experienced as arbitrary by those whose interests are only dimly perceived or who are really outside the "system".[62]

Australians have a local example, which has engaged the country in a welter of legal, moral and political debate over several years. In *Mabo* v. *Queensland No.2,*[63] the Australian High Court acknowledged what no Australian court had ever acknowledged before: that Aborigines had original title over their lands, which the common law recognised, even though statute might override it. The reaction of most public commentators to this decision, as to the later *Wik*[64] decision, which held that native title was not automatically destroyed by grants of land use to pastoralists, could be read off simply from where they stood on the issue of native title. If they approved of its recognition, they approved the decision; if not, then not. However, there was also an institutional issue, which formed a strong theme in the debate. What was the proper role of the High Court in such a case? Opponents of the decision adopted the "law of rules" approach to judicial decision. There was an established legal understanding (though never enunciated by the High Court) that Australia had been *terra nullius* when whites arrived here, and in consequence there were no rights to recognise. On this view, that is where the Court should have stopped. If the law were to be changed, the legislature should be the body to do it.

That seems to me an inadequate response to the Court's predicament. Certainly the court is not a legislature, but nor did it act as one. It recognised the previous understanding of Australian courts. It carefully considered the available law of property, the history of settlement, and in

---

62 *The Moral Commonwealth*, 436-37.

63 (1992) 175 CLR 1

64 *Wik Peoples v. Queensland* (1996) 187 CLR 1.

particular the empirical falsity of the doctrine of *terra nullius*, on which non-recognition of native title had been legally based. It noted that, on the evidence before it, the claim that this country was uninhabited or inhabited by peoples without laws, was false. It noted too, that the law governing settlement in the United States, Canada, and New Zealand—all members of the common law family of nations to which Australia belongs—had not categorised the countries they occupied, and consequently the legal status of the indigenous occupiers, in this way. The Court was without doubt also clearly moved by the injustice of nonrecognition, its injustice at the time of settlement and the tragic injustices that ensued. Many of the values which led to this recognition—such as equality before the law, and others—are often-repeated principles of our legal tradition itself. Others they took to be values of our contemporary community. These entered, perhaps motivated, the decision, but they were not the whole of it. It was suffused with consideration of law, which was far from merely ceremonial. Indeed, the ultimate modesty of the scope of that decision was derived from the existing law. The Court did not treat the modification of the law as a simple matter of invoking morality—as a legislature might, though ours hadn't—but wrestled with the bearing of the law as it was supposed to be, knowing that even in its own terms it had been based for two hundred years on a mistake of fact and had authorised shocking injustice. Certainly the Court did not simply apply an existing rule, but it did not invent it out of thin air either. It did something noble and appropriate to a court, particularly a High Court. It did justice, not as the crow flies but in the context of existing law and as mediated by the law, legal values—and moral ones too. And, happily, though they shook a little, the heavens didn't fall.

Conclusion

Life and legal philosophy would be easier if one could identify a comprehensive and exceptionless set of mandatory meta-legal rules, such as those of ethical positivism, to allocate and determine the precise scope, limits, and character of decision-making authority, wherever it occurs. The caricatured legal positivist (Keen, J.) and legal realist (Handy, J.) among the judges in Lon Fuller's *Case of the Speluncean Explorers*[65] subscribe to such meta-rules, one that the written law is all that matters in the tragic case before them, and the other that it doesn't matter at all. This makes their decisions easier than those of some of their more tortured fellow judges, but it also makes them less interesting and it doesn't necessarily make them more wise.

More generally, few of the real and difficult questions of institutional decision-making can be disposed of by such simple choices. They demand

[65] (1949) 62 *Harvard Law Review* 616-45.

more complex combinations of textual and other considerations, and, since people disagree on what should be combined and how, these questions are destined to remain controversial. I suspect these controversies are in principle inescapable, since our institutional ambitions are not all of a piece. In any event, whatever the case in principle, one can confidently predict that such controversies will be perennial. We don't yet know much about how law best fulfils what we want of it, and even if we did we want many different things. The demands on our most significant institutions often pull in different directions. For example, even if—and it is a very big "if"—it was clear that the requirements of institutional restraint and accountability were always best served by an order in which all non-elected institutions deferred fully and unexceptionally to unambiguous laws emanating from a centralised legislature, and even if we knew how to engineer such an exceptionless order, the character and conditions of competence of particular institutions faced with particular problems would remain more complex and variable. And in that domain, as Selznick has observed, "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".[66] It is unlikely that this need will diminish soon.

66 *The Moral Commonwealth*, 474.