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The Rule of Law: Pasts, Presents, and two possible Futures.

Martin Krygier[1]

The rule of law is today *so totally* on every aid donor's agenda that it has become an unavoidable cliché of international organizations of every kind. More generally, praise for it has infiltrated contemporary political moralizing virtually unopposed. It might not do much to quicken the pulse, but it is prescribed for a vast array of other ailments. This is a relatively recent occurrence (Krygier 2014), which one would not have predicted as recently as the 1980s – I know; I didn't. If I had known the stocks of rule of law would soar as they have, I would have printed money, instead of mere words, to invest in it. But I had no inkling I was talking up a goldmine.

This has changed so dramatically, that in virtually every introduction to the subject, the rule of law logo-cliché has come to be joined by three supplementary 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, along with popularity has gone promiscuity. It has a huge array of suitors around the world, 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: the rule of law now means so many different things to so many different people, it is so 'essentially contested' (see Waldron 2002) and likely to remain so, that it is hard to say just what this rhetorical balloon is full of, or indeed where it might float next. These clichés off their chests, people continue to blow warm air into 'it'.

The rule of law's recent rise from parochial and controversial political and legal ideal to universal international slogan has, then, given it a great boost in brand recognition, but its now mandatory rhetorical presence has rendered increasingly murky what the concept might mean, what the phenomenon might be, and why anyone should care. This fluidity might even be part of its charm to those who deploy it (as suggested by Chesterman 2002, 2; Rajagopal 2008, 1359; Security Council Report 2011, 13), but it has a price. For the concept speaks to important and enduring issues of politics and law, not always apparent in current rule of law effusions.

So this article begins in a deliberately unoriginal way, not with those effusions but with some intimations of old traditions of thought. It identifies two venerable themes, related to

[1] The first draft of this article was delivered at the inaugural INFAR conference: Changing Narratives of the Rule of Law, Erasmus University Rotterdam, 28-29 January 2016; later drafts: to a seminar sponsored by Center for Study of Law & Society, and Kadish Center for Morality, Law & Public Affairs, University of California Berkeley, 2 March 2016; and the Law Schools of the Interdisciplinary Center, Herzliyah, and the Hebrew University, Jerusalem. I am grateful to the conference and seminar participants for their discussions, and to Julian Sempill and Mark Brown for their insights and comments on the written drafts.

each other as vexed problem and putative solution, namely arbitrary exercise of power, and its institutionalized *tempering.* These date from well before the rule of law became an economist's and aid worker's cliché. They might usefully inform present conversations, which instead often proceed in ignorance of them. The article then moves to some past experiences with and without the rule of law understood this way. It then goes normative, to suggest the ideal of the rule of law is a THOROUGHLY GOOD THING, even if not every invocation or even application of it is. The penultimate section raises some normative and sociological criticisms of current discussions, to do with their inadequate treatment of ideals and of contexts. The article concludes with two suggestions about future directions: one a call for a social science that doesn't exist, and the other a timid suggestion that it might be time to go beyond the rule of law, in order to pursue the ideals that led us to it.

1. **'THE PURSUIT OF INTIMATIONS'** (Oakeshott, 1991, 66-69)

The English phrase 'the Rule of Law' was made famous and influential by the constitutionalist, Albert Venn Dicey, at the end of the nineteenth century, to capture 'a trait of national character which is as noticeable as it is hard to portray' (Dicey 1982, 109). There has been some discussion about whether he coined the term for this purpose or inherited it. Either way, focusing on the 'literal sense' (Raz 1979, 213) of the phrase will not take you far. That path, as Jeremy Waldron (2012, 8) and Julian Sempill (2016, 338-40) have noted, is unhelpful and liable to mislead. As Sempill points out, focusing on the specific form of words can confuse, both by excluding cognate conceptions just because they are expressed in different terms, and by suggesting connections between unrelated ideas that happen to have found shelter under the same verbal umbrella.

Whoever thought to put these four words together (with – in English - their, key, prefatory definite article: '***the'*** not just ***'a'*** rule of law) to designate a normative ideal rather than simply a species of legal norm, did not invent the idea, nor the concerns it addresses. So, parsing the specific words and phrase Dicey popularized will not on its own reveal the problematic of concerns, threats, responses, etc., to which discourses about the rule of law have long been addressed, and for which this phrase and others like it have come to be shorthand indicators. Whether *avant la lettre* or not, concerns with these issues are millennia old, at least in Western legal traditions; part of History with a capital 'H'.

Conversely, as Sempill also argues, the presence of the *lettre* does not guarantee identity of ideas. Thus while the phrase has remained the same through its recent renaissance 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 surprisingly.

If following the words won't do it, how about following the money? Thus Deval Desai has registered but rejected the numerous complaints from frustrated toilers in the 'Rule of Law Reform Field,' that it might not exist, given the unclarity and contestation that surround its content and the lack of success of efforts to cultivate it. He rejects any attempt to ground the meaning of the term in any essential features or any disciplinary or conceptual domain. However, he insists that there is a field after all, and we can discern its subject by looking at what those now in the field think it is. And that is to be ascertained by looking at hiring

criteria used by rule of law promoting agencies (as to which, see O'Connor 2015). As he puts it:

> I rely on the self-articulation of actors as rule of law professionals—thereby performatively constituting a rule of law field—and the institutions that give this self-articulation material weight, from donors to journals to job postings. (Desai 2014, 45)

That might suggest that this signpost of a very old range of concerns, which have been treated seriously by serious thinkers for serious reasons for millennia, was just a place-holder waiting for the World Bank and its equivalents to get their act together and stipulate what it means. But why think that? Better to follow Amartya Sen's comments (at the Bank) about another, related and also 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.(Sen 2000)

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 that it was a bad idea. And when such a term appears in new renderings 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 renders invisible. Moreover, criticisms of recent incarnations might well be sound about *them,* 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 'bourgeois ideology'[2] which it often is, but that is not the whole story (at least Aristotle would not have thought so); so it appears to be becoming today when it is cast, or cast out, as just a prop in some 'neo-liberal' project. In both cases there was and is more to be said.

No one, then, can dictate a uniquely correct meaning for the rule of law, or any uncontestable stipulation of the values it serves. It is too late for that, and in any event it would not be enough. Too late because the term has become too protean, the purposes for which it is invoked too many and varied, the freight carried by this short phrase too distant from anything that could be derived from dictionary definitions of its component words. Not enough, because the phrase is part of old and ongoing moral and political arguments about fundamental matters of political organization, concerns and ideals, much affirmed and much contested. These include enduring common themes but also axes of argument and disputation that have pervaded discourse on the rule of law over long periods. So, while it would not be helpful, even if we could, to try to excavate some universally acceptable lowest common denominator, it might help to recall concerns that have motivated the vocabularies we have inherited; what was at stake for those who shared or debated those concerns, what were the ideals that they believed mattered and why, is there anything we

[2] Cf. Collins 198 : 'the principal aim of Marxist jurisprudence is to criticize the centrepiece of liberal political philosophy, the ideal called the Rule of Law'.

can learn from them even though we live in a many ways different world, and do they still or again deserve support?

This is not to consign sensible discussion of the rule of law to historians. Rather, it is a caution against the kind of willed or unwilled ignorance, so common among contemporary activists and social scientists, who often write as though it all starts with them. Historians might recover original intentions and contexts, often likely to be very far, perhaps unbridgeably far, from our own. But past thoughts are not all package deals to be taken or left just as they were in the minds of those who first thought them. There are other ways to draw on them. One such is motivated less by a concern to reconstruct past thoughts in and with their immediately animating contexts, than to pursue intimations of intellectual dispositions, sensibilities, and traditions of thought and practice that have left significant residues in our culture and seem still able to offer valuable clues about things that matter. If that looks at times like cherry picking, well, if they're tasty that's what you do with cherries.

Alasdair MacIntyre has argued that 'a tradition is an argument extended through time' (MacIntyre 1988, 12), and thus 'Traditions, when vital, embody continuities of conflict. … A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations' (MacIntyre, 1985, 222). All this has been true of rule of law traditions, and not for a short time. So while there is no single understanding of the rule of law that captures it all, there are constellations of themes, preoccupations and tendencies, some long-lived. The stakes can be high, and it makes sense to draw on traditions of thinking about how to play well for them. Even if it did not make sense, by the way, we would continue to echo past thoughts and the traditions that bear them, consciously and unconsciously, reflectively and otherwise, intelligently and stupidly, since as Edward Shils has observed, 'every human action and belief has a career behind it' (Shils 1981, 43). Better to try to make some acquaintance with that career, be reminded that some problems recur, avoid pitfalls it has exposed or fallen into, and develop novel thoughts in the light of all the above, rather than be condemned, often by *hubris* (a vice many in these traditions condemned from the beginning (North 1973)), to ignore its moments of insight and achievement or remake its mistakes.

2. INTIMATIONS IN THOUGHT

a. The Problem: Arbitrary Power

The rule of law has typically been advocated as (part of) a solution to a problem or class of problems. Though contemporary rule of law writers and reformers too often start the other way around (Kleinfeld 2006; Krygier 2011), it is important to start with the problem, rather than the purported solution, with the end rather than the means. Many problems have been identified for the rule of law to solve, these days too many. However, one that has generated reflection over centuries has to do with long familiar perversions and pathologies of power. How might its exercise be channeled away from recurrent objectionable forms and tendencies, how might it be rendered at least safe and then, more positively, *helpful,* for those subject to it, rather than loom as a perennial source of threat and fear?

So the focus is on *power* and how it is exercised. That is the place to start. And what makes it problematic is not its mere *existence* but the potential for its abuse. Power is necessary for all sorts of good things. In any event the existence of power and disparities of power cannot be eliminated, and rule of law traditions (unlike anarchist ones) do not seek to do so. They do seek, though, to temper the ways it is liable to be exercised.

Rule of law traditions have particularly focused on *arbitrary* exercise of power, often using precisely that word, as the anti-hero in the rule of law story. A common thought has been that left to their own devices wielders of power cannot be relied on to avoid exercising it arbitrarily, and will constantly face temptations and in many circumstances strong incentives to act in their own, rather than the public interest (however that is defined). Some rulers might confound such pessimistic expectations, but we should not have to rely on that. At least we need to hedge our bets. For even were power-wielders' intentions beneficently public-oriented, the *possibility* of arbitrary exercise of power would still be a perennial concern. All the more because (though not only because), as Lord Acton was not the first to notice, corruption awaits. If we are left merely to the *will* or *pleasure* of the power-holder (to use traditional terms of apprehension), arbitrariness will be a constant possibility, and if so a constant worry. That is because, to put briefly what many writers have argued in many places: even the *potential* of its arbitrary exercise diminishes subjects' freedom (Pettit 1997), causes their lives to be fearful (Shklar 1998), denies them respect, dignity (Fuller 1969, Waldron 2011) and moral equality (Gowder 2016; Sempill 2016), and destroys possibilities of fruitful cooperation among citizens and between citizens and states (Hayek 1960). So it is NOT A GOOD THING! What might be done about it? There are traditions of thought about such matters. Many of them put the rule of law at the centre of their reflections.

Arbitrariness is notoriously under-theorized (see Endicott 2014, Gowder 2016, Sempill 2016), and I will not deliver conceptual purity here. I just mention three sources and sorts; there may be others. Often they are not distinguished. I think they are three different ways in which citizens are made vulnerable to power that can be exercised without the requirement that their legitimate interests, expectations and opinions be taken into account; three species of a distasteful genus. So exercise of power which is arbitrary in any one or more of these senses should be treated with great suspicion; better still, the possibility of such exercise of power should be reliably curtailed, and the paths towards non-arbitrary exercise of power opened and smoothed.

One form is found where power-wielders are not subject to routine, regular control or limit, or accountability to anything other than their own 'will' or 'pleasure.' This sense is nicely captured in the Indian Supreme Court's interpretation of a constitutional provision guaranteeing equality before the law. This provision, the Court held, implied that natural resources could not be handed out 'according to the sweet will and whims of the political entities and/or officers of the State.'[3] This might well have been the original notion of the term: exercise of power is arbitrary to the extent that it 'is subject just to the *arbitrium,* the decision or judgement of the agent; the agent was in a position to choose it or not choose it, at their pleasure' (Pettit 1997, 55).

[3] *Akhil Bharatiya Upbhokta Congress v State of Madhya Pradesh* (2011) 5 SCC 29 [65], quoted in Endicott 2014, 1.

In a second sense, often but not necessarily allied with the first, power is exercised arbitrarily when those it affects cannot know, predict, understand or comply with the ways power comes to be wielded. That is the form typically taken up in the various 'laundry lists' (Waldron 2011b) of formal characteristics of 'legality' or the rule of law - clear, prospective, public, etc., so beloved by contemporary analytic philosophers of law (see Fuller 1969; Raz 1979; de Q. Walker 1988), and it is true that if one cannot know how power is to be exercised, because its grounds are secret, retroactive, too variable to know, vague beyond specification, impossible to perform, exercised in ways unrelated to the rules that purport to govern them and so on, then one has been treated arbitrarily.

The common law tradition from the medieval period to the eighteenth century laid more emphasis on avoiding the first sort of arbitrariness (McIlwain 1947; Palombella 2012); it was less concerned with the law's clarity than its superiority, even to the King (see Reid 1977, 2004). Post-eighteenth century legislative developments in England (Reid 2004), and the contemporaneous development of the concept of the *Rechtsstaat* (Krygier 2015) in Europe, particularly in the second half of the nineteenth century, put more emphasis on the second. Until the twentieth century advent of written constitutions in Europe, the *Rechtsstaat* did not know a higher law (Palombella 2010; 2012), and from the eighteenth century the English rejected it (though they, Dicey among them, called on 'conventions' to do what law was now thought not to do). Power that is unlimited and that is unruly are not the same, but for those at the receiving end both are arbitrary.

These are not the only ways the powerful can treat their subjects/objects arbitrarily. For a third way would be the exercise of power, whether or not limited and/or predictable, where there is no space or means made available for its targets to be heard, to question, to inform, or to affect the exercise of power over them and no requirement that their voices and interests be taken into account in the exercise of power. In recent writings, Waldron has stressed the importance of this dimension and of procedural elements of law, and strong traditions in law, that require attention to such concerns, that do not allow those subject to power to be treated 'like a rabid animal or a dilapidated house' (Waldron 2011b, 19).

Different thinkers have been more or less concerned with one or other of the above forms; often they have been elided. They can be distinguished, however, at least analytically, and what one does about each might need to be different. Each deserves to be opposed. A regime is not home free because it scores well (low) on one, but not another dimension of arbitrariness. It should do well on all three. There are all sorts of benefits that might accrue to a regime that applies stable and understandable rules, for example, but if rulers are free to act purely at their 'sweet will and whim', even if they choose not to, and even more if the rules shut those affected out from consideration, subject/objects of power are vulnerable to its arbitrary exercise.

Commitment to tempering power is not an absolute, all or nothing affair, in at least two senses. First, it is more urgent as arbitrariness is more gross. If power-holders could do *whatever* they liked; if there were *no* way that subjects could know the law; and if *no* account whatever were taken of the existence, voice, or interests of those affected by power this, of course, would be abominable. But arbitrariness comes in degrees. For some way along the scales, less arbitrariness in any of these senses is better. But there are vices that go with constraints so rigid that those in power can exercise no initiative, flexibility,

judgment, wisdom, or attention to substance or particulars; indeed such constraints may generate arbitrariness of their own. These are very old themes and concerns (see Mansfield 1985; Selznick 1992, 437). It is not obvious, however, that an admirable hostility to arbitrariness need slide, as Dicey's did, by sleight of hand not powerful reasoning, into hostility to any exercise of discretion. Thus Dicey, and many opponents of the Welfare State after him (see Hayek 1994), elide a number of possibilities as a common antithesis to the rule of law, when he asserts that 'the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint' (Dicey 1982, 110). We are not compelled to follow him there. Width and discretion might indeed be necessary for flexibility in many circumstances of governance, and for many legitimate ends, including avoiding arbitrariness in my third sense, of ignoring the specific interests and views of persons subject to power. If wide and discretionary powers can be effectively limited, framed and subject to review, must one assume that they will involve arbitrariness, which is the real foe of the rule of law? Eliding them all, however, does make it easier to oppose active government. There may be reasons to do that, but they do not follow automatically from a commitment to the rule of law. They will need to be separately argued. Where the boundaries lie between discretions that can and should be permitted and those that should be curbed, and how it should be marked, are never easy or uncontested matters to decide, but the former should not be assumed necessarily to be the start of an inexorable and slippery slope to the latter.

Secondly, the rule of law is never the only thing we want, and so its purity might well need to be balanced against other goals that we deem valuable (see Raz 1979, 228-29). Moreover, when the exercise of power is in large measure routinely and reliably tempered, different values might be contemplated more safely and helpfully than otherwise (see Selznick 1992, 464). It is a strong consideration always to be borne in mind, that power should be prevented from being arbitrary. It should not be thought of as an automatic conversation stopper in every exercise of power, in every time or circumstance or discussion of social goods and policy choices.

b. The Solution: Tempering Power

If arbitrary power is a problem, many have looked to legal *tempering* of power as a key part of the solution. On such views, law should be involved in the exercise of power, not merely as vehicle or instrument but as channel, limit, constraint, tempering agent. The point has most often been cast in negative terms - as a need for curb, limit, constraint (Sajó 1999) – and that concern is rarely misplaced. However, the point of the rule of law can also be understood to include a more positive dimension as well. The object is to *temper* or *moderate* the exercise of power (Krygier 2016c), in order to avoid its arbitrary use, not necessarily to weaken or shackle it. The rule of law is recommended to prevent the ever-present dangers of arbitrariness, but also, through its 'enabling constraints' (Holmes 1995, xi) to allow positive uses of power, and social responses to power, to flourish, which might depend on its salutary exercise, but would never bloom or would quickly wilt in the face of arbitrariness.

Such concerns are already implicit in Aristotle's distinctions between 'true forms' of government, concerned with 'the common interest' and those that 'regard only the interest of the rulers'. The latter 'are all defective and perverted forms … for they are despotic,

whereas a state is a community of freemen' (Aristotle 1988, § 19 – 22). A central difference between true and perverted forms, lies in the role of law: 'the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law' (Aristotle 1988, §1287a 19 – 22). One reason for such rule of law is that it helps to prevent the overreaching (*pleonexia*) that Aristotle feared, and to engender that virtue exalted in Greek drama and Greek philosophy alike: temperance (sōphrōsynē, glossed by Cicero and Roman writers after him, as *temperantia*) in the exercise of power (North 1973).

Too many commentators (eg Loughlin 2010, 312) think they need to remind us that it is impossible to have the rule of law without the rule of men. It is unlikely Aristotle would have been surprised to hear it, or have demurred (see Frank 2005, ch.4). Rather, these words might be thought of as seminal reflections on the importance of *institutionalizing* the exercise of power, so as to temper what powerful individuals might otherwise do, both to avoid excesses feared to flow from untempered power and to reap the benefits of its temperate exercise. Such institutionalization is meant to help generate, Aristotle and many contemporaries and successors argued, positive political virtues such as 'moderation, the golden mean, mixed government, and temperance' (Craiutu 2012, 20) and is contrasted with unqualified power's predictable perversions, central among them arbitrariness and what over millennia has been condemned as 'tyranny'. These themes recur through the centuries, in Greek reflections on temperance, moderation, lack of excess and their links with thoughtful self-knowledge and wisdom, in Aristotle's expansion of the scope of such virtues from personal/ethical to institutional/political, in later reflections on and embroideries of Aristotle such as Roman discussions of *Imperium legum* (Sellers 2014, 14), in Marsilius of Padua's invocation of 'the Philosopher' to distinguish between 'two generic kinds of princely part or principate, the one well-tempered and the other flawed' (Marsilius 2005, 40), for example, and in many other writings.

In France, to pick one high point, Montesquieu above all puts at the centre of *the Spirit of the Laws* (Montesquieu 1992), the distinction between 'moderate' forms of government, which he applauds, and 'immoderate' forms which he loathes. Thus, while both monarchs and despots rule alone, the former do so 'by fixed and established laws,' while the latter, who governs 'without law and without rule, draws everything along by his will and his caprices' (Montesquieu 1992, 10). Whoever wielded power, Montesquieu's overriding question was whether they did so moderately or not, and one of the keys to moderation was the rule of law.

Moderation of power was not, he insisted, an easy task. Indeed, he notes that, despite the horrors of despotism and the attractions of moderation, the world has seen many more despotic governments than well-ordered moderate ones. He laments that but finds it unsurprising, because a moderate government is a much more complicated achievement, that involves difficult and complex balancing, tempering, regulating (Montesquieu 1992, 63). The language with which he makes the contrast is suggestive, for contrary to what many say about the rule of law, he clearly saw the aim of moderating or tempering power as not to *shackle* government, but to channel its activities to what it needs to do, and in the process make it able to do such things better, and not do things it should not do.

Craiutu notes that 'Montesquieu was favourably disposed toward moderate monarchy *á l'anglaise,* because in this regime laws reign rather than the will of individuals (in the Aristotelian sense) and the authority of the sovereign is effectively limited by intermediary powers and fundamental laws' (Craiutu 2012, 39). Indeed he famously and wrongly attributed a tripartite institutional separation of powers to the English, thus influencing the Americans to institutionalize it. But he did not get everything wrong. Rule of law traditions have been extraordinarily significant in England if not, as Dicey fantasized, there alone.

Of course, such developments can easily be bowdlerised, as anyone will recognise, who recently endured the year of encomia in England and its former colonies on the 800th anniversary of Magna Carta (see Krygier 2016b), which has sanctified this at the time ineffective interest-driven deal between King, Church and barons. And yet, while it might not have been a general thought among the barons who negotiated the particular deal in the Charter, many of its chapters exemplified a general principle that was already part of arguments found in European, among them English, legal traditions (Berman 1983), and continued to be a matter of argument and institutional experimentation. The line was not straight, the arguments were often lost, power and interest trumped and co-opted them often enough, and there were opposing arguments. However, there were victories, many of them coming to be institutionalized in legal practices, and expectations of them.

And then there was the English seventeenth century apotheosis (with copious acknowledgments to Aristotle and Livy) of Magna Carta, the 'ancient constitution' (see Pocock 1987), and 'an empire of laws, and not of men' (Harrington 1771, 110). However much myth-making was involved in the appropriations of former documents and events, there is no doubt that that century drew on real precedents and then spawned its own legacies, central among them powerful statements, actions, and ultimately traditions, professedly hostile to arbitrary power. Thus, central to John Philip Reid's account of the rule of law tradition in England is the antinomy repeated over centuries between rule of law and arbitrary power (Reid 2004). As he writes of seventeenth century demands, 'As "arbitrary" was the opposite of "liberty," and the opposite of "liberty" was also "unlimited power" or "tyranny," it followed that another antonym of "arbitrary" was "law" or "rule of law." Any check on unlimited power moved government away from arbitrariness and closer to constitutional liberty, and English experience had uncovered no other check than the rule of law' (Reid 1977, 463).

Of course, that century saw some of the most powerful defences of absolutism, first among them the timeless texts of Hobbes and also Filmer's *Patriarcha*, influential at the time; not to mention the at last eloquent but unfortunate defences of Charles I. But ultimately they lost, Charles most of all. Among those on the winning side was John Locke, with his condemnation of:

> Absolute Arbitrary Power, or Governing without *settled standing Laws,* [which] 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. (Locke 1960, II, art. 137, 405)

To think that men would (should) do otherwise, would be to judge them 'so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*' (Locke 1960, II, art.93, 372).

The American colonists inherited these traditions, valued them, and mythologized them in turn. They felt betrayed by their British rulers for very British reasons (see Reid 1977, 461). Indeed, the last great defence of that old English conception, Reid argues conscious of the irony, was the American Revolution against the British Crown. In the eighteenth century, the Americans insisted that no government was above the law, but the English had moved beyond them to regard the lawmaker as legally sovereign, outstripping though (and perhaps thus) losing its about-to-be-former colony. The Americans still defended – and in their written constitution made an institutional innovation to resurrect - an older understanding of law and the rule of law (Reid 2004, 75).

These have not been the only themes and streams in western traditions of thought, still less of political practice, and often they were submerged or even anathematized. They have mixed choppily with other streams, their significance is often exaggerated, but by comparison with many political orders, there has been something significant there to exaggerate. And where, as often, practice did or was thought to betray the ideals, there has developed a rich *critical* language in which to condemn arbitrary exercise of power.

Such a language, still less instantiation of the ideal it recommends, has not always or everywhere been available. A tradition in which the rule of law has been an animating value shared, always unevenly but still significantly, among initiates, lay people and institutions is a good one to have. It is not universal. Indeed it is rare (see Popitz in Poggi 2014, 48).For distinctive and strong rule of law traditions are not natural facts, in some times and places not facts at all. In the Russian imperial state tradition, for example, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of central Tsarist power (see Pipes 1977), over which there stood no superior. The notion that power should be framed and restrained by law, that law should have a power-tempering role, both *horizontally* among members of the society and *vertically* between political power-holders and their 'subjects', or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing. Here law was viewed primarily as properly a subordinate – often indeed servile – branch of political, administrative, and at time theocratic power. This has not altogether changed.

Such views are not ancient history. Thus two recent and exemplary works of socio-legal scholarship (Cheesman 2015a; Massoud 2013) have shown, of Myanmar and Sudan respectively, the deliberate and systematic use of law to serve ends contradictory to those of the rule of law. At the time of writing, an interesting experiment to change these realities, often cast explicitly under the rubric of the rule of law (both in English and Burmese,Cheesman 2015b), has begun in Myanmar. It is too soon to predict its fate. In yet other polities, eg contemporary Poland, Hungary, South Africa, rule of law values and practices exist and have been to some extent institutionalized but they appear thinly so, and threatened (on Hungary: Bozóki 2012, South Africa: Issacharoff 2013, Poland: Sadurski 2016). Even where such values and practices are long-embedded, they can come under huge pressures in times of real or purported crisis, such as the 'War on Terror' (see Holmes 2005), or the contemporary treatment of refugees.

3. INTIMATIONS IN PRACTICE

a. At home

Associations between tempering of power, hostility to arbitrariness in its exercise, and the rule of law have, then, been significant themes in enduring and recurring dispositions and traditions, for long periods at least in the western legal traditions with which I am familiar. Moreover, in several of the societies where these traditions exist, measures to restrain arbitrariness have permeated practices of law and more generally the exercise of power, and expectations as to how power will be exercised. They matter and are thought to matter in the everyday workings of a society. That is all good, even if one might often hope it could be better, and even if the rhetorical and other uses to which people might put such a salutary achievement are not always good at all (see Krygier 2006).

A separate point is that even where power-wielders ignore or reject or flout or mock the ideal directly or through hypocrisy, there are concepts, values, ideals available and so too a *language,* in which they might be condemned. This *critical* potential of the concept and the tradition is key, but often forgotten, both by those who celebrate the rule of law as a panacea in the possession of some rather than others, and also often by those critical of boosterisms of this sort. The rule of law is no panacea, though it might well be a source of health. It is a practical ideal of great worth. As such, it should be invoked as much when the values it endorses are flouted as much as or more than when they are served.

Where all that is available, it is only partly traceable to the activities of contemporary actors, or to particular rules and institutions, though these matter too. It is buttressed, made to endure, made part of the legal culture, by less obvious but no less important, indeed indispensable, legal traditions which underpin, institutionalize, and transmit the values and practices (many unwritten) that accompany them.

There is nothing Whiggish in this claim, no historical script, no universal happy development. Just some dispositions, of varying strength and prominence, embedded in and transmitted by traditions of some significance. It would be nice if they did well, but nothing assures it and they have often been radically, even tragically, maligned, rejected, ignored, overwhelmed. Residents of modern Europe, indeed anyone who was alive in the twentieth century, should not need any reminders.

Of course, we know from innumerable radical and Marxist critiques, from classic works in the sociology of law, and from common experience that, even in the birthplaces of rule of law rhetoric, commonly 'the haves come out ahead' (Galanter 2014). It is not clear that on its own the rule of law in the sense sketched here can ensure against all such inequities, since they depend on many things other than the ways power is exercised. They will often be a sign of arbitrary distinctions and uses of power, and so deserving of critique in terms of rule of law values, and arguably on other terms as well. But pursuit of ideals of *social* egalitarianism have other reasons, and will need to supplement the tempering of power in other ways. While that shows that tempering power is not all one should demand of a political order; it does nothing to show such tempering is not precious in its own right nor, as the Greeks insisted, that it might not be a precondition for the safe and *thoughtful* (Waldron 2011a) pursuit of other worthy ends.

Necessary conditions for some good ends are rarely sufficient for all. But if they are real conditions for real goods, that should be recognized, even as one heeds their limitations, and hopes for more. And thus, notwithstanding the storm of controversy he caused when he first made the claim, I side with E.P. Thompson's impassioned insistence, at the end of a profoundly hostile critique of English eighteenth century criminal law as ruling class law, that still:

> … there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law ... [but] the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me an unqualified human good. (Thompson 1975, 266)

As one of the most distinguished Marxist historians of his generation, Thompson did not need to be told that even where the rule of law was strong, law might be of use to ruling classes. Still he insisted that while:

> this study has shown that for many of England's governing élite the rules of law were a nuisance, to be manipulated and bent in what ways they could … I do not conclude from this that the rule of law itself was humbug. On the contrary … the notion of the regulation and reconciliation of conflicts through the rule of law -and the e1aboration of rules and procedures which, on occasion, made some approximate approach towards the ideal - seems to me a cultural achievement of universal significance. (Thompson 1975, 266)

b. Abroad

Of course, rulers from the homes of these rule of law traditions did not always stay home. And thus imperialism, which came in many forms to many places, rested upon dramatic inequities of power and was commonly (though not always) quite untempered in its violence, exploitation, condescension and humiliation of colonized populations. In some empires, prominently the British, the whole combination was imbued with a certainty of mission, often proclaimed as the delivery of civilizational blessings, among them the rule of law, to benighted savages. Law was typically a central part of the colonists' institutional and spiritual baggage (see Benton 2002, McLaren 2015). What does that tell us about the rule of law?

Critics of colonial legalism have often claimed that it shows that the rule of law is merely an instrument of colonial exploitation, or an ideological cover and fig leaf for the same (Mattei and Nader 2008; Guha 1998). However, some conceptual specification might be useful here. If the concept is stretched, as it sometimes is, to any use of law whatsoever, or rhetorical whitewash or ideological justification that invokes the rule of law, then there is a lot to condemn (Krygier 2006). Since law, rhetoric, ideology etc can be found in many places, some not at all attractive, it becomes easy to denounce the rule of law for a lot of things. Easy but empty. For if one attends to the traditions I have recalled, that conceptual looseness drains the rule of law, understood as a practical and therefore also critical normative ideal, of specific content. Just as 'People's Democracy' should not be confused with democracy, so what colonists called the rule of law was often not that at all, whatever they said.

The ideal of the rule of law is always fundamentally compromised in colonial settings, if only because the ideal demands that persons be treated without arbitrary discriminations, and that is one thing colonists don't do. Does that make invocation of the rule of law in such settings necessarily a fraud or ideological cover for nefarious activities? Often simply yes, but not always and not only. Often the picture was more plural and interactive (Benton 2002) than that. And a further question remains: does it discredit the ideal?

That ideal demands that the exercise of power be tempered, so as to lessen the chances of its arbitrary exercise. It is not enough that the ideal is invoked, or that those who do so also impose law. The question has to do with whether the ideal is actually in play and approached in the society in question, not whether the term is used. In terms of this discussion, that question becomes whether there were effective efforts to institutionalize ways of tempering power to avoid arbitrariness in at least the three senses discussed above.

One source of complication is that non-arbitrary power can serve many different and competing interests, including those of rulers and ruled at the same time. Take, for example, the reduction of arbitrariness in sense 2: unruliness. As Max Weber understood so well, regularity and predictability can serve many different constituencies: rulers who want to know and control what is happening in the peripheries; officials, so they can be employed throughout the realm; economic actors, so they can rely on predictable frameworks for 'sober bourgeois capitalist' investment; rights advocates so that power is less able to take them by surprise (Weber 1968, 846-48). Even where colonial rule turns out to be non-arbitrary in this sense, however, the extent of arbitrariness remaining in colonial settings depends in significant part on the two other dimensions of prevention of arbitrariness as well: control over power; and provision for presence, voice, and attention to the interests of those to whom power is applied. On these scores, particularly the second, colonialism typically fares poorly. And though an ex-colony, Singapore, to take a fascinating and complex example, fares well against arbitrariness in sense 2, and in *some* (primarily economic) domains in sense 3, it is weak (because strong) in sense 1, and in other domains (eg political) in sense 3. These bifurcations lead Rajah to speak of 'a Singapore paradox: A regime that has systematically undercut "rule of law" freedoms has managed to be proclaimed as a rule of law state' (Rajah 2012, 2). That is not a simple paradox, still less a tautology, but a signal of the complexity – sometimes morally fraught complexity - of our subject.

Of course and always, in matters of ideals one should never discount hypocrisy, the homage of vice to virtue. When some benefit by taking things from others, this will rarely be far from the surface. Thus, where (colonial and other) rulers prate about the rule of law, as today and oftentimes they have, while exercising arbitrary power, we are dealing with hypocritical *abuse* of the rhetoric of the rule of law (see Krygier 2006), not the thing itself. 'Hurrah terms' such as rule of law, democracy, liberty, equality, lend themselves to such abuse, precisely because they are thought to be good things to have, and so rulers tend to boast that they have them. In such circumstances, the ideal should be invoked *critically* to expose false claims in its name. That is another reason one should seek to clarify and hold onto the ideal, however one construes it, not simply let it be appropriated by impostors. Without it, immanent normative criticism has nowhere to stand.

In many colonial encounters, however, realities were more ambiguous and complex, maybe indeed 'fatally confused' (Washbrook (1968), 407). Thus Mark Massoud has written of the convoluted and often tragic legal history of Sudan from the time of British colonialism (Massoud 2013) through a brief democratic interlude, to dictatorial successors, joined more recently by human rights advocates and aid workers. In the phase of colonial rule, there was great emphasis on creating legal institutions on the British model, integrating local elites into their activities, enlisting locals as jurors, and more generally, 'put[ting] the Sudanese under colonial control by advancing a weak rule of law and seeking to create an independent judiciary' (Massoud 2013, 44). Massoud finds many similarities between the uses of law by the colonists and those of later dictators whose rule, he stresses, was not 'lawless' but heavily dependent on law. On the one hand, he describes this extension of a 'weak rule of law' as part of a British strategy of legitimation, for which law rather than rifles, or law before rifles, or along with them, was well adapted (Massoud 2013, 47). On the other hand, Massoud acknowledges that under the British it was by no means all smoke and mirrors. Thus he writes frequently of the attractions and uses of English law to anti-and immediate-post-colonial activists, and in cadences that evoke the complexities and ambivalences of Thompson, reports: '[l]ike all foreign diplomats, members of the Sudan Political Service were appointed to serve the interests of the metropole. But unlike many of their colleagues stationed in other British colonies, many SPS officials saw themselves as obligated to serve the Sudanese as well. They sought to promote an authority in Sudan greater than their own: the authority of law … the rule of law was not just lipstick on the face of an authoritarian pig. On some level, however limited it was, norms of fairness did guide Britain's representatives in Sudan. But by cultivating an image of fairness and justice, the colonial regime was also able to maintain its essentially unust and authoritarian rule' (Massoud 2013, 82). Similar tension-ridden observations have been made about many parts of the British Empire (see on India, Kolsky 2012, 13) and about other empires as well (see Benton 2002).

There is no logical inconsistency between Massoud's two themes – legitimation of exploitative imposition and salutary anti-arbitrariness. Law can ultimately serve bad purposes even if it does some good; indeed as Massoud stresses, doing good can be one way of doing bad because, for example, it legitimizes illegitimate power, distances it from (its own) distasteful acts, can act as a pressure release valve. But sometimes, even in the midst of bad, doing good just does good; sometimes it is even intended to. Constraining arbitrariness in the exercise of power is one such good. We should leave conceptual space for those ambiguous possibilities, though it is not always easy to do that, and it is often not done.

Finally, one should never confound the mere presence and active utilization *of law*, even when accompanied with rule of law rhetoric, with the rule of law itself. The rulers of the Soviet Union, for example, made extensive use of law and extensive use of legalistic rhetoric, after Stalin ended the period (that he had instituted) of 'legal nihilism' in the 1920s. He was never burdened, however, by concern for the rule of law (see Kurkchiyan 2003; Krygier, Czarnota 2006). The existence and use of law are facts of political organization and practice. They can be deployed for many purposes, some antithetical to the ideal of the rule of law, some supporting of it, some both at once. What role a particular legal order plays in the attainment of the ideal is a question; it should never be an assumption.

4. CONTEMPORARY RULE OF LAW DISCOURSES

This last point is not merely of antiquarian concern. For arbitrary power is as rampant in many parts of the world as it ever was, even though the world is full of law and, as never before, of rule of law missionaries. Often they travel to places where fierce wars are ongoing or just over, where state structures are fragile, where all sorts of religious, ethnic, cultural cleavages make everyday life 'solitary, poor, nasty, brutish, and short,' (Hobbes 1960, 82) and where the 'facts on the ground' have no connection with the legal *bric-á-brac* that is being imported or polished up. These are simply 'hard facts' (di Palma 1989, chapter 1). They mean the job is never easy, and success in limiting possibilities of arbitrary power is likely to be elusive or ephemeral. But apart from the existence of such hard facts, there are ways in which we think about them (or often do not) that do not make them easier. Here are a few. Some have to do with the ideals that spur interest in the rule of law; others with the relations between institutions and contexts.

a. Ideals

i. Ends and Means[4]

It is extremely common for the question 'what is the rule of law?' to be answered with a list of purported institutional elements, as though they were ingredients in a recipe or blueprint for institutional design, wherever in the world that seems called for. That seems to me quite the wrong way to proceed. It is the wrong way to *begin,* because as a normative notion, one needs to start with the *point* of the exercise, before one can identify what achievement of that point might require. And it is the wrong way to *go on,* because the value(s) that animate concern with the rule of law might in principle be pursued and institutionalized in a variety of ways. Specifying the ultimate values that the rule of law is asked to secure is not yet to describe how these values are to be achieved. And perhaps such specification can never be accomplished with any combination of generality and precision.

In different societies, with different histories, traditions, circumstances, and problems, these (and other) values have been secured in different ways. And there are also many ways, and often incentives, to fail. Starting with generally specified commitments - eg. hostility to arbitrary power – one can seek to elaborate more specific conditions and intermediate and more concrete principles – eg don't put all power in the same hands; generate power to balance power, etc. From these in turn one can seek to develop specific practical and institutional recommendations, in particular circumstances, with particular ways and means derived from and adapted to those circumstances. These intermediate principles can help in appraising whatever normative and institutional setups one has, and suggesting modifications or alternatives to them. They are variably fulfilled, and fulfilled in various ways, in different societies and times. And again, there are many ways to fail, some of them quite surprising to missionaries of the rule of law.

On the one hand, ideals of the rule of law have been better served in some nations and by some institutions than others. One need not conclude from institutional variety that new contexts are simply '*sui generis*' (Teitel, 2000, *passim*), (as all contexts are in part but not completely). Institutional possibilities are not infinite, institutions have consequences,

[4] This section is drawn from Krygier 2016d.

different institutions have different consequences, learning can and does occur, and you have to start somewhere. So it would be absurd to ignore what Selznick (1969, 9), following John Dewey, called the 'funded experience' of generations, among them truisms that have proved valuable again and again. One of these might be, as Montesquieu and Reinhold Niebuhr insisted, that 'power must be challenged by power' (Niebuhr 1932, xv). One is, therefore, often warranted in starting with a (preferably weak) presumption in favour of institutional models which have worked elsewhere.

On the other hand, one should be wary of too swiftly converting general presumptions into prescriptions, particularly prescriptions that are highly specific, let alone that hold out particular institutions as universal models to be emulated. Even if it makes sense to think of the rule of law as any sort of technology at all, it has to be understood as a distinctive kind of technology: an *interaction* technology, not a production technology, to borrow a distinction from Stephen Holmes. The success of interaction technology depends crucially on how it engages with thespecific sorts of interactions to which it is applied. Since the patterns and character of social interactions vary hugely with time, place and circumstance, how they might be affected is not something to be understood *a priori.*

Pursuit of the rule of law requires reflection on how some generally valuable goods might be achieved in particular contexts. Problems and predicaments will vary, and so too will the best ways to meet them. Wherever you are, the rule of law should be approached with a combination of its point(s) in mind, more specific principles derivable from those grounding values, and acquaintance with various attempts to secure and institutionalize such ends, *together with* a great deal of reflected-upon local knowledge. It is more common, however, to cut to what is imagined to be the chase, often without much idea of any particular terrain (other than one's own), or of what fresh obstacles (and, for that matter, opportunities) might lie in wait.

ii. Thin and thick

On the view developed here, the ideal of the rule of law is concerned with the exercise of power. Distinctions have to be made, and matters of scale, character and consequence matter, but the bottom line is that wherever power with significant public consequence is in play, it is better that it be tempered than not. I find it hard to understand how anyone can treat the problem lightly. It is perennial, examples of its tragic outcomes are close to infinite, and those examples are not drying up. To worry about the problem is not original (which in this case I take to be a virtue). It is not unanimously endorsed, however, both because some people do not consider it worrisome, and others have other worries. There are certainly other things one might worry about, such as social inequalities, or public health, or education, or the predicament of refugees around the world. None of these is a small problem, but arbitrary power is not trivial either. We do better when there are some regular and reliable ways to diminish it.

In the perspective of contemporary discussions, however, this focus might seem to attribute either too much or too little to the rule of law: too much if you are committed to what is called a 'thin', 'formal', institution-focused conception of the rule of law; too little if one's preference is for a 'thick,' 'substantive', or 'material' conception of it. Thin accounts identify the rule of law with a particular set of institutions, rules, and/or practices, but exclude valued outcomes from the definition. Their concept of what the rule of law *is* is morally

unencumbered, even though most of them appear to think it is by and large a good thing. 'Thick' accounts are morally more ambitious and include 'substantive' outcomes, from a larger vision of a good society and polity, as part of the conception itself.

'Thin' and 'thick', 'formal' and 'substantive', conceptions compete in countless discussions of the rule of law, among legal philosophers (Raz 1979), comparative lawyers (Peerenboom 2004), and rule-of-law promoters (Cavanagh and Jones 2011). Positivist legal philosophers, and legal comparativists, tend to favour 'thin' conceptions, what might be called rule-of-law-lite, for their lack of normative ballast: morally non-committal, easier to identify, and able to travel further, because they carry less baggage. Many governments, too, particularly authoritarian ones, prefer to be assessed against thin formal criteria, easier to satisfy than thick morally demanding ones. Today international businesspeople, unwilling to buy into controversial questions about democracy, human rights and other large values in, say, Singapore and China (with both of which they might want to do business), often prefer a formal, thin, conception too.

There are difficulties at both ends of this spectrum – thin institutions versus chubby values - and indeed with framing the issues along such a spectrum at all. On the one hand, thin accounts carry more weight than they admit. Typically they list features of legal institutions – *official, state,* institutions - that are thought to be the primary vehicles of what we take to be the rule of law, in First World countries thought to have it. What then about the now notorious problems of 'isomorphic mimicry … adopting the camouflage of *organizational* forms that are successful elsewhere to hide their actual dysfunction' (Pritchett, Woolcock, Andrews 2010, 2). Institutions and rules are shipped or copied but the outcomes expected do not eventuate. Does one then have the rule of law because the institutions appear to be in place, or lack it because nothing works as it should?

More generally, and to anticipate a point elaborated below, given the focus of thin accounts on state institutions, what of the exercise of power by non-state forces – social networks, prominent (dominant?) families, clans, religious leaders, Mafia bosses, or assorted fellowships of 'dirty togetherness' (Podgórecki 1994, 51, 115, 131-32)? If, whatever the law says, they are free to act arbitrarily, capriciously, does it make sense to insist that nevertheless the rule of law exists because purported institutional underpinnings of a legal order are present, or standard practices have been mimicked?

One (not small) problem with the activities of rule of law promoters, as an anonymous colleague of Carothers famously and in lapidary terms explained, is that 'we know how to do a lot of things, but deep down we don't really know what we're doing' (Carothers 2006, 15). We simply do not know how institutions, even familiar institutions that we associate with the rule of law at home, will perform in the sorts of settings where we promote the rule of law abroad. For that matter, we do not know much about why such institutions perform as they do at home. So much is in place that cannot be wished away.

Should we say we have achieved the rule of law, when we have built courts, installed computers, trained judges, but no one visits them and, more important, they have little effect on what goes on in the wider society (see Kilcullen 2011)? Or what should we say when the efforts of so-called 'rule of law' or 'human rights' focused law reformers to train judges and build courthouses in Sudan, in order to enlist and reform the law in the service of the poor, turn out not to do much of that but to legitimize the power of a dictatorship that

is 'already accustomed to using any available legal tools and resources for political gain' (Massoud, 2013,206)? Have they installed the rule of law or have they simply issued their best guess about what might serve rule of law values, which turns out not to? Or has what they have done anything to do with the rule of law at all?

Again, Kleinfeld observes (2006, 53) that certain efforts, which may well satisfy thin accounts as rule of law measures, might turn out to harm precisely what they are supposed to help. Thus, she points out:

> Most pernicious, depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant "improvement" of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal environment. An end good of the rule of law---a stable, predictable legal system---has been undermined by the so-called reform process.

So thin accounts are at once too thin, since they bear only a contingent relationship to what we would want and recognize as the rule of law, and too thick, since they are full of parochial assumptions about the workings and value of legal institutions, assumptions we have no reason to imagine will flow as far as the institutions and rules that supposedly carry them (see further Krygier 2016d).

On the other hand, thick accounts too easily fall foul of Raz's caution that to equate the rule of law with whatever we take the good to be, robs the concept of any distinctive significance. Loading wide-ranging substantive ideals into the concept threatens to melt it into everything else we might like. As Raz puts it, 'if the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph' (Raz 1979, 211).

The interpretation of the rule of law recommended here does not choose between thick and thin substantive achievement at large, but looks somewhere else. Though its implications are not small it is modest. It has to do not with social values at large but rather with a specific issue: how power is exercised.

iii. The ends of the rule of law

The rule of law would not have received such applause if no one thought it was good for anything. And in truth, all sorts of goods are today claimed to flow from it - economic development, human rights, democracy etc. Indeed these claims are the lifeblood of the international rule of law promotion industry: if they did not think these results flowed from the rule of law, they would not be interested in it. But partisans of the traditions recalled above still would be. Why?

On the view developed here, the problem with which the rule of law is offered as part solution is that of arbitrary power. It makes sense, though it might not always be true, to think of law as a solution to problems that power disparities raise, because law is specifically and characteristically – at its core – a vehicle for the exercise of power. In certain configurations and circumstances, or so is the rule of law hope, it can also be a potent

means, though never the only means, by which power might be channelled, directed, constrained, tempered.

If arbitrariness is successfully minimized, one might argue, as Max Weber did, that 'sober bourgeois capitalism' is likelier to get off the ground, but on my interpretation of the tradition, and of Weber, that is a sociological argument about what reduction of arbitrariness in the exercise of power might facilitate. It is not itself a quality of the rule of law itself. Nor are democracy, the full panoply of human rights (apart from some of those rights, like the right to a fair trial, which are parts of the rule of law) and other things it is now fashionable to attribute to the rule of law. What difference might this make?

On this account, the value of the rule of law is *immanent* and *generic,* that is, hostility to arbitrary power is intrinsic to the ideal of the rule of law, and it is relevant across the board. Hostility to arbitrary power might be grounded in some account of human persons, their interests and needs; thus hostility to arbitrariness might stem from a commitment to liberty (Pettit 1997) or moral equality (Gowder 2016, Sempill 2016),or dignity (Waldron 2011) appropriate to that understanding of humanity and personhood. It might have other grounds as well or instead, for example, suspicion of human weakness, our fallen nature, or tendency to *hubris.* Whatever the grounds, those who connect the rule of law with hostility to arbitrariness were less likely than contemporary rule of law promoters to have a specific domain of life, or purpose in mind. Non-arbitrary power is intimately tied to the concept of the rule of law in ways that other goods, say, economic development or even democracy are simply not, though they might flow from it. The former is not an external but an immanent value of the rule of law, its *telos*. The latter are external benefits said to flow from it.

However, among its contemporary promoters, the rule of law is supported *to the extent that* it supports democracy, contributes to economic development, reinforces human rights, and so on. Treating the rule of law thus, as an *instrument for attainment of particular ends* narrows the reasons to support it, and renders it more fragile.

The reigning accounts today are particularly well characterized by Sempill as expressions of what he calls 'the bureaucratic standpoint,' which seeks:

> to understand how various features of social life, including those practices which embody the projects of one or more traditions, can be appropriated and adapted by possessors of the bureaucratic standpoint to serve as, or in support of, techniques for the effective control of the social world. From this perspective, which is indifferent to the moral goods animating traditions, traditions may nonetheless bequeath things of value insofar as they effectively provide instruments or tools that enhance the power of those whose ends this standpoint serves. …
>
> In the case of the Rule of Law, the bureaucratic standpoint interprets elements of inherited legal thought and practice according to a manipulative idea of instrumental efficiency which obscures their traditional significance. (Sempill 2016, 348, 349)

The main target of Sempill's article is not rule of law promoters, but formalist philosophical accounts of the rule of law, specifically that of Joseph Raz. His argument is larger, however, and his characterization fits promoters even more closely, much more closely, than it does philosophers.

Economists' new passion for the rule of law is a good example. Previously unnoticed, it is now in every nostrum for economic development. Is that a good thing? It depends. Even were we more confident than we have reason to be that neo-liberal legal and market reforms were guaranteed to produce the economic outcomes intended, the selectiveness of their interests should worry anyone with a traditional commitment to the rule of law. Thus, from a World Bank expert on development, we learn that:

> A broad consensus has emerged on the centrality of the rule of law in the second stage of reform … The prevailing development paradigm rooted in the neo-liberal precepts of the Washington Consensus has elevated the rule of law to the altar of the institutional reforms required to sustain market reforms. (Santiso 2003, 113)

The 'broad consensus' seems remarkably contingent, however, on the current state of economic theorizing. Thus:

> While the swift and decisive decision-making needed to implement first generation market reforms often requires a pliant judiciary, second generation economic reforms aimed at anchoring the institutional foundations of the market economy require precisely the opposite.
>
> Market-oriented economic reforms are not sustainable without restoring and strengthening the credibility of the rule of law. As the reliability of the legal and judicial process increases, so does the credibility of the public policymaking process. More fundamentally, government by executive decree, while an asset in the initial phase of economic reform, progressively becomes a liability in the second phase of reform (Santiso, 2003, 119)

What if the author, or the Bank, or the post-Pinochet government were to change their view, and decide that not merely 'first generation market reforms' requires a 'pliant judiciary,' but second generation reforms do too? Or what if the rule of law had been promoted to generate liberal democracy but, like the present (early 2016) Hungarian and Polish governments, we're over that? The logic of the argument, and some contemporary experience in those countries, appears to be that the rule of law would be out the window.

And even when it has got in the door, it may skip a few rooms in the house, particularly those less opulently appointed. Thus economic reformers are particularly interested in encouraging security of property rights, 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 in Latin America in the 1990s were made in its name:

> 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. (O'Donnell 1999, 319-20).

The values the rule of law serves are not absolute but they are *general*, and they are truly valuable. If they are to be favored merely insofar as they are thought instrumental to the achievement of some other *particular* goal, such as economic development or even democracy, then other ways arbitrary power can damage lives threaten to drop from consideration.

This is a particularly serious issue since our knowledge in these areas is notoriously uncertain. There are intuitively plausible reasons, and some evidence, to support the belief that lessening the possibility of arbitrary power might support those further good things. But the evidence is equivocal (see Bugarič 2014; Haggard, Macintyre, Tiede 2008; Haggard, Tiede 2010), and if it were shown that though in a particular society power was not exercised arbitrarily the economy had tanked, say, this would not be reason to deny that the reduction of arbitrariness in the exercise of power was still a good thing.

After a wide-ranging review of literature on law and economic development that had confessedly 'taken a highly instrumental view of the rule of law, stressing its utility for growth in particular,' Haggard et al caution:

> 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. (Haggard, MacIntyre, Tiede 2008, 22)

This warning has not always been heeded. Yet while tempered power is not necessarily or always more important than other goals, it has a specific focus and a general importance not reducible to other things, but often not separately considered or taken into account. There are many ways to exercise power, and doing so in a way that is not, and routinely can be expected not to be, arbitrary is salutary. That is so even independently of the particular substantive ends for which power is exercised (though arbitrary power arguably lends itself to some of the worst ends more easily than its opposite (see Fuller 1969; Rundle 2009)).

b. States and societies

According to Hadfield and Weingast, 'Despite its centrality to many literatures, the concept of the rule of law is woefully undertheorized … Indeed, the great majority of academic and policy work takes the concept for granted, generally equating it with the institutions and practices in those (relatively few) parts of the world where the rule of law has been largely achieved' (Hadfield, Weingast 2014, 22). There are two points here: undertheorization and

institutionalization. Earlier parts of this article confirm the first, but the second is also valid. Just to render explicit what the passage assumes, typically those are the 'institutions and practices' of the formal, official, state legal order. Lawyers typically start and stop there, so too legal philosophers, economists and political scientists, and most often rule of law promoters as well. This 'equation', I have argued elsewhere is virtually universal in discussions of the rule of law (see Krygier 2011; 2016c, and see Kleinfeld 2006): if you define the rule of law, you enumerate features of central legal institutions, if you want to assess its strength or weakness, you look at features of precisely the same institutions, and if you aim to 'build' it, that means building just those institutions or, since the originals don't travel under their own steam, some imitation or simulation of them.

Two examples, one from the field, the other from the study. First, as Jensen and Heller point out:

> In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform.* Basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector. (Heller and Jensen 2003, 1-2; see also Santiso 2003)

It is not quite the case that people have no other ends than serving the means chosen, but rather, as Kleinfeld observes:

> When the rule of law is implicitly defined by its institutions, rather than its ends, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. (Kleinfeld 2006, 50-51, and see Kleinfeld 2012).

Welcome to 'isomorphic mimicry.' No wonder that Pritchett et al complain that '[t]he conflation of form and function … has been one of the most ubiquitous but pernicious mistakes of development policy over the last sixty years, and is manifest most clearly in widespread implementation failure' (Pritchett, Woolcock, Andrews 2010, 2).

A second example of institution-fixation is not a product of the difficulties of recent practice; it is rather a more long-standing, perhaps discipline-inspired, failure of sociological imagination, common among lawyers and philosophers. One rare, notable, and noble exception to the standard in legal philosophy might prove the rule.[5] Jeremy Waldron is one of very few legal philosophers who have complained (rightly) about the narrow social and institutional focus of contemporary philosophical accounts of the rule of law. He makes the important point that 'getting to the Rule of Law does not just mean paying lip service to it in

[5] This condenses a section from Krygier 2016c.

the ordinary security of a prosperous modern democracy: it means extending it into societies that are not necessarily familiar with the ideal; and in those societies that are familiar with it, it means extending it into these darker corners of governance as well' (Waldron 2011, 3-4). He also observes that:

> [w]hen I pay attention to the calls that are made for the Rule of Law around the world, I am struck by the fact that the features that people call attention to are not necessarily the features that legal philosophers have emphasized in their academic conceptions of this ideal … this formal conception is not what ordinary people have in the forefront of their minds when they clamor for the extension of the Rule of Law into settings or modes of governance where it has not been present before. (Waldron 2011, 4)

Waldron purports to capture such features, what 'ordinary people are urging', by supplementing Fuller-and-Raz-style *formal* features of legal rules with elements of legal *procedure* and the institutions like courts that embody them. He commends a list of ten such features, mainly to do with the fair, impartial, open and appealable conduct of legal hearings before 'a legally trained judicial officer' and with a 'right to representation by counsel.' These are all admirable procedures, and well motivated as well. However, they have in common with the accounts Waldron criticizes that they are all focused solely on the usual official institutional suspects. The big shift in institutional focus between Fuller and Waldron is from official legislatures to official courts, particularly criminal courts of kinds well recognized in the West. This is not, in comparative or sociological perspective, a huge distance to travel. Such procedures move barely an inch from the formalities they supplement.

What of keeping faith with 'what ordinary people are urging'? Again, this is welcome. But it is unclear that Waldron's salutary supplement to traditional understandings goes anywhere near far enough. As he would doubtless agree, the vulnerabilities, aspirations, and values that lead people to 'clamour' for the rule of law are not primarily to be judged by what it does for lawyers, still less legal philosophers. Indeed elsewhere he says as much:

> this ideal is not the property of the analytic philosophers and it is certainly not our job to go round reproaching laymen for not using the term in the way that (for example) Joseph Raz uses it (Waldron 2012, Kindle edition, 16).

If the rule of law is a good, it is a social good, and it is challenged, *inter alia*, by social bads. Not all of these have much to do with what goes on before judicial tribunals with refined adjudicative procedures. If Afghan citizens, for example, or Syrians or …, lament the absence of the rule of law in their societies and lives, is it obvious that they are talking only about receiving unclear legal messages from the parliament (Raz), or having a hard day in court (Waldron)? Perhaps the irrelevance of the law or any other institutional constraints, the capriciousness of normatively untempered power from warlords, terrorists, and others in their lives, might matter to them more immediately, more often, and simply more, than the character of any laws they are likely to encounter, or their (likely rare) appearances before judicial tribunals (where they exist).

In pursuing Waldron's agenda, then, we should be open to expanding the social and institutional range of our 'conceptual geography' (Judt 1990, 25), to use an apt phrase from

another context. We need at least to consider whether the values that animate concern with the rule of law might need and draw support from other than western standard-issue sources, as well as whether there might be other conditions for, and alternatives to, effective state-law contributions to that putatively charmed state of affairs.

Though it rarely seems to be taken up by philosophers, this point is far from new. Indeed Desai and Woolcock claim it is a constitutive lament of the rule of law promotion field and has continued to be heard for forty years (Desai, Woolcock 2015, 157). One question, which they tackle, is why members of the field nevertheless continue to do as they have done for so long (Tamanaha 2011, Desai, Woolcock 2015). The work of 'Justice for the Poor', the group within the World Bank of which they are mainstays, is a salutary antidote to long-term tendencies, but it is not (yet) mainstream.

Another question is why such criticisms seemed only to have occurred to rule of law promoters after repeated disappointments in the field, whereas staples of socio-legal research over a century might have short-cut the learning process. The literature of 'legal pluralism' (Tamanaha, Sage, Woolcock 2012) suggesting that societies abound with normatively significant nodes and networks apart from the state, is, after all, not young. Even if we leave aside Aristotle's observations that 'customary laws have more weight, and relate to more important matters, than written laws' (Aristotle 1988, §1287b 5-6), and more extensively and deeply Montesquieu's enumerations of the extra-legal sources of moderation and immoderation, we have Ehrlich (2002), Petrażycki (1968), Malinowski (1926) and their descendants, such as Sally Falk Moore (1978) and Marc Galanter (1981). All of them stress the range and significance of sources of social normativity outside states and official laws (where there *are* states and official laws).

Moore has recently reflected on a long life of discovering such phenomena, sometimes serendipitously, sometimes with intent, alongside the official activities she had investigated, of various sorts and in various societies. Those activities 'have all been shown to exist only in the presence of officially unacknowledged or parallel societal realities. The significance of such parallel contexts to an understanding of the world in which law functions is now generally recognized in studies of society. I would argue that the social context is a dimension that also belongs in the very study of law itself' (Moore 2015, 13).

Elsewhere I have sought to examine some implications of these sociological truisms for the rule of law (e.g., Krygier 2011; Krygier 2016c). Here I will merely compress three themes:

1. *Social causality:* No account of law which systematically ignores the interactions, and the variable *complexities* of interactions, between official law and 'semi-autonomous social fields' (Moore 1978), or 'indigenous orderings' (Galanter 1981) can come to terms with the fundamental questions of 'social causality' (Moore 1978, 6) that lie at the base of any attempt to use law to affect life, and of any attempt to assess how and how much it does so. To take these truisms seriously requires a reassessment of relations between 'centre and periphery' in the relations between official law and those to whom it relates, indeed a reassessment of what is centre and what periphery. As well as noting that many law-affected interactions involve 'bargaining in the shadow of the law' (Mnookin, Kornhauser 1979), we need to be alert to the many and *varied* ways law operates 'in the shadow of indigenous orderings' (Galanter 1981). Since the ends of the rule of law

depend on the causal efficacy of the means chosen, and that only emerges from these interactions, some understanding of what that involves might be useful.

2. *Sources of threat:* If society is full of networks, nodes, fields, orderings that have power over people in and around them, and if arbitrary exercise of power is to be avoided, the conventional assumption, that threats of arbitrariness with which the rule of law is concerned are a state monopoly, needs an argument. I do not know a persuasive one either from the tradition or contemporary writings. What are the sources, scale and significance of arbitrary power are empirical matters, answers to which will vary in different societies and at different times. But then why has there been such an exclusive concentration on threats coming from *governments,* by writers on the rule of law?

   If there are reasons to be concerned about arbitrary exercise of power, then one would think these reasons should apply wherever it is to be found significant enough to make them worrisome. Of course, if the power is inconsequential, or perhaps to be judged a 'private' matter, or for some reason outweighed by benefits of leaving it unregulated, then perhaps those reasons for concern would be overridden. But surely that depends upon evidence relating to the magnitude of the power involved, the number of people who might be affected by it, the significance of the effects, the amount and kinds of arbitrariness to which they might be liable, and so on. None of this can be assumed to point exclusively in the direction of states. The power to harm individuals if exercised arbitrarily can plausibly be alleged of corporations within and outwith states; non-state organisations, among them terrorist and financial organisations, oligarchs, Mafiosi, warlords, tribal elders; international ratings agencies and financial institutions. Banks can do a lot of damage too, and in recent relatively unregulated years and countries, they have. Nothing in the tradition (except its silence on the issue) explains why we should not have an interest in tempering significant power with public consequences, whoever or whatever is exercising it.

3. *Sources of promise:* Why imagine that the state has a monopoly of effective responses to arbitrary power? Sometimes and places, state law will be of great significance in tempering arbitrary power, other times, other places less so. If not there, then, given the significance of avoiding arbitrary power, we will need to look elsewhere for help. And there are likely to be many places to look, though that too will vary from society to society, time to time, source of arbitrariness, available response. If sources of the illness to which the rule of law is supposed to be a cure, might come from entities other than states, so too might it be with cures themselves. Though even that is not self-evident. Non-state causes might have state cures, and vice versa. Universalizing assumptions about variable social processes are unhelpful here.

5. POSSIBLE FUTURES:

a. 'a social science that doesn't exist'

The concerns that have led to discussions of the rule of law - what problems it needs to cope with, what might be helpful in the attempt, how this might vary – are multiple and so too the sources we need to draw on to appreciate them. They include social and political

theory, jurisprudence, history, and several of the social sciences. If there were ever a subject that could benefit from historical awareness and interdisciplinary mixing, it is the rule of law. But such ecumenism is not common.

For inmates of disparate rule of law 'fields' do not mix much. You are unlikely to stumble over many philosophers or historians of political thought at rule of law promoters' conferences, for example. The compliment is commonly returned. Remind me of the last book on the rule of law, which was philosophically adept, betrayed close familiarity with social scientific discussion, the huge rule of law index industry, and the activities of rule of law promoters. Actually, there is one (Gowder 2016), but it was only published this year, and its author rightly claims it to be distinctive for this very combination. And yet everyone agrees that the rule of law is supposed to be not just something but a good thing, so it is odd that the thoughts of those who have reflected deeply on the nature of the good(s) that might be associated with it are so resolutely ignored by those who want to generate them.[6] Conversely, the rule of law is a practical ideal; its partisans think it can make some difference in the world. But should lawyers and philosophers learn some more about how law works in the world, maybe from socio-legal research? Apparently not; not their field.

Philosophers speak about the rule of law, of course, but as I suggested in the last section, they tend to do so in a socially and often historically unanchored way. On the other hand, a sociology specifically concerned to wrestle with the normative and explanatory grounds of the rule of law and their policy implications, is not a well-populated field. Almost fifty years ago, Philip Selznick argued that, given its centrality among legal values, the rule of law 'must be a chief preoccupation of legal sociology' (Selznick 1968, 52), and he pointed to a good deal of research that spoke to that theme. Though they might have spoken to it, however, in the sense of bearing on it, most sociologists did not speak of the rule of law or analyze it particularly closely. The rule of law has not until recently been a mainstream sociological concern.

In recent years, as we have seen, some mainstream social scientists have become interested in what they understand as the rule of law (see Acemoglu, Robinson 2012; Fukuyama 2011, 2014; Heckman, Nelson, and Cabatingan 2010; North, Wallis, Weingast 2009; Hadfield, Weingast 2014), in part because of internal disciplinary developments, particularly in institutional economics, and also because the rule of law export industry has brought attention to problems, and postulates connections, which are interesting for social scientists to explore, and the issues are large. However, social scientists rarely engage closely with philosophical issues of either a conceptual or normative sort. Their conceptual investigations are often perfunctory or focussed on identifying measurable entities rather than exploring contested ambiguities of meaning, and their normative concerns, where these are allowed, are typically commonsense utilitarian. They are generally uneasy to say much about values, perhaps because it remains largely true, as Selznick long ago lamented, that '[t]o put it bluntly, our keenest minds in the social sciences didn't know what to do with an ideal except handle it gingerly and view it with alarm' (Selznick 1973).

A bit of pooling – past/present; specialism/specialism - might help. So I would advocate, (once again) plagiarizing a phrase coined for another purpose by Karol Sołtan, the cultivation

[6] Though see, for a collection of essays that cover quite some ground, Fleming 2011, and for an author unusually familiar with and illuminating about these issues, Tamanaha 2004, 2011.

of 'a social science that doesn't exist' (Sołtan, 1999, 387; 2002, 357[7]). This would begin with a normative range of questions, among them: what are the reasons for which people have 'clamoured' and we might still clamour for the rule of law? Are they good reasons? This essentially philosophical task would involve examining existing answers, perhaps revising them, perhaps devising new ones. If persuaded that the reasons justify the quest, one might then seek to think about how this clamour might be satisfied.

It would then need to be asked where the dangers to whatever values were settled on were likely to come from, where effective responses might be found, and what those might be. Since many of the key dangers are likely to be socially and politically generated, many of the major goods that flow from tempering arbitrary power (or whatever other value is chosen) will be delivered in the wider society, and many of the major sources of defence against arbitrariness need to be found there too, the normative quest would likely lead us to undertake observations and theorizations about things other than law.

And to understand how law does what it does, and why it does not always do what we might like it to do, among other things effectively temper the exercise of power, we need to understand the workings of law in society and of society in law. Politics as well and in spades, since at base we are dealing with incentives, and even in the tropics temperate incentives don't grow on trees. It takes a lot for them to grow where they seemed crazy, weak, suicidal etc., just a short time before and often still (see Ginsburg 2011). That is true for both victims and victors, wieldees and wielders, of arbitrary power. So accounts of the rule of law, billions of dollars spent on rule of law promotion, anatomical dissection of the 'essential elements' of the rule of law, which focus their energies almost exclusively on central, state, legal institutions are misconceived.

These are exceedingly complicated matters, where lawyers', or philosophers', or anyone's, first intuitions are unlikely to be helpful. So we would necessarily be led beyond intuitions, however intelligent, to facts about the social world, and in particular about causality, variety and contexts in that world. We would need to consider, and maybe even do some, empirical research and social theory, asking how those values have been secured (where and if they have), how they might be where not, and how much of what we have discovered to work somewhere is likely to work elsewhere. There is, or that is an implication of this argument, no single all-encompassing recipe to be found, and it is a waste of time to look for one. But there might be fruitful possibilities, law is likely often to be among them, and intelligent, self-consciously modest, extrapolations from one place to another might be available.

b. Beyond the Rule of Law?

In an unpublished conference paper, John Braithwaite (2011) pointed out that though many people speak of the rule of law as a 'good thing for its own sake,' it was not that. Rather, he contended, it 'is best thought of as part of a separation of powers rather than the reverse.' Why should the order matter? According to Braithwaite, who is a card-carrying classical

[7] I (repeatedly) borrow the phrase from Karol Sołtan. He has used it of Philip Selznick, Lon Fuller, and Charles Anderson, whom he considers pioneers of such a science, that of 'civics' (see So357; or, using Fuller's coinage, 'eunomics' (1999, 387). Since Selznick and Fuller are arguably also pioneers in the sociology of the rule of law, I justify myself with the thought that it is not plagiarism but merely respectful homage to have borrowed the phrase from Sołtan.

republican (*not* in the US sense of that word, no tea parties for him; his concern is avoidance of domination):

> Conceiving the separation of powers as a rule of law question constrains a republican imagination in how to struggle for more variegated separations of powers. It tracks political thought to a barren, static constitutional jurisprudence of a tripartite separation of powers. This when conditions of modernity require us to see private concentrations of power such as ratings agencies and private armies ... as both dangers and contributors to productive balances of power.

Later he comments that:

> Webs of institutions are needed to strengthen governance by making it accountable for effectiveness and integrity. Webs of state and non-state institutions that control domination and enable innovation, enterprise and learning, can be mutually enabling and mutually checking of one anothers' accountability failures ...
>
> For most tasks of modern governance, networks get things done better than hierarchies. But networks must be coordinated and sometimes, but only sometimes, the state is the best candidate to coordinate. For most problems, strengthening state hierarchy to solve problems is not as effective as strengthening checks and balances on hierarchy as we also strengthen private-public partnerships, professions with technocratic expertise on that problem, civil society engagement and vigilance, and other networks of governance, while at the same time strengthening co-ordination of networked governance.

I am not totally persuaded. I do not believe, for example that separation of powers should be regarded as the ultimate end in view, and I hang on to the tempering of arbitrary power as closer to that. Separation is one technique to that end, not to be valued in itself but for what, in certain forms and for certain purposes, it can support. We need power to accomplish and enable many good, some indispensable, purposes, but it must be tempered and channelled. Separations of certain sorts are important sources of such tempering and channelling, but not the only ones and not to be applauded merely because separation is accomplished. If separation disintegrates sources of salutary power (eg for peacekeeping, enforcement of bargains, etc.), or if it leads to new sources of 'autistic corporatism' among newly released and then independent subordinates such as judges in post-despotic conditions (Holmes 2004, 9), or to state failure, we should not applaud. In any event there is Montesquieu's point, that mixing and blending - *distributing* - are more important than separation (see Craiutu 2012, 49). I do not believe that Braithwaite would disagree with any of this, and he certainly shares my hostility to arbitrary power, but I fear that putting separation front and centre might mislead.

However I do believe that we would gain greatly by following his suggestion that the law be viewed, not as the always-necessary centrepiece of power-tempering policy to which other measures are inferior or supplementary addenda, but as one implement among several, of

potentially unique importance in some respects and circumstances, but dependent for its success on many other things, and perhaps not more important for the achievement of its own goal than they.

That in no way diminishes the importance of the ideal that the rule of law traditions I have mined here uphold, nor does it suggest that law is unimportant. But it might enable us to see its importance in (variable) perspective(s), give due weight to other phenomena that might need enlisting to serve such goals, and release us from the hold of a mantra which in its modish ubiquity threatens to obscure the valuable purposes for which it was once pushed into the fray, and instead serve virtually any purpose you might want to name.

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