

Fear, Hope, Politics and Law*

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My title¹ is sufficiently cumbersome to need an explanation, if not an apology. So I begin with some words that hover between the two. In 1997 I delivered the Boyer lectures, under the title *Between Fear and Hope: Hybrid Thoughts on Public Values*.² While writing those lectures, I was uneasily conscious that an employee of a law school might reasonably be expected to devote one lecture, at least, to law. And not only to placate my Dean. For law, after all, intersects with many of our deepest fears and hopes, whether we are doing something as mundane as preparing a will or buying a house, or something spectacular like, say, planning a murder or a robbery.

But it didn't turn out that way. There were other things I wanted to say, and by the time I had said them there was no room for a lecture specifically on law. It was plain I thought law was important. Among other things, and crucially, it can help us close doors against certain fears and open them to some hopes. But how one might think in any detail about the connections between fears, hopes and laws was left unexplored. In the context of that set of lectures, and the book that

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¹ I am grateful to David Anderson, Arthur Glass, Owen Harries, Philip Pettit and Philip Selznick for their comments on an earlier draft and to the students in my class on 'Law between Fear and Hope' for helping me to work through some of the issues raised here.

² *Between Fear and Hope: Hybrid Thoughts on Public Values*, Sydney, ABC Books, 1997.

expanded upon them, I don't regret the choices I made, but they left some unfinished business. In this lecture, I want to turn to some of that business.

Only some of it though. The subtitle of the lectures stressed that they dealt with *public* values, and I will adopt that as a restriction on what I deal with today as well. For law connects with so many of our fears and hopes—public, private, intimate, secret—that I would need to range far more widely than I have time or inclination for, to deal with them all. And anyway, I have a particular interest in politics, as, I imagine, most of the people who come to work in this building do too. So I will stick to fears and hopes within the public domain, and thus: fear, hope, politics and law.

This title is, I know, rather unwieldy but it could have been worse. For if I'd been braver last year, I'd have used a title that spoke to an even deeper theme of the book than its concerns with fear and hope. That title, drawn from the—perhaps apocryphal and perhaps inaccurate—observation of a great American senator and President that his opponent couldn't do both at once, would be *Pissing and Chewing Gum*. Whatever the truth of the attribution or the allegation, it is apt of our public debate on almost any topic: we're constantly being pressed to choose from a restricted range of oversimplified and allegedly incompatible alternatives, where a choice is often neither necessary nor appropriate. I gave some examples at the beginning of the fifth lecture: realism and idealism, survival and flourishing, individual and community, ethnics and Australians, symbols and practice, pride and shame, civil society and the state. The subtitle of a book with this title would have been: *Try Both*.

And that applies in spades to fear and hope. It is perhaps a characterological divide, maybe even congenital, that some people are drawn to optimism and others to pessimism, but in principle it should be possible to learn from both. The pessimist is concerned—at times obsessed—with the bad that might happen. While that is a sad obsession, it is a healthy concern. For as has been well said by someone—Henry James has been suggested—those who lack the imagination of disaster are doomed to be surprised by the world.³ But then, sometimes, so are those without the capacity to imagine success. The former might fail to protect themselves against the loss of things precious to them; the latter might deny themselves the experience of anything precious to lose. Love, after all, is a very risky venture which no consistent pessimist should contemplate, since it renders one almost infinitely vulnerable. One should of course reckon with that vulnerability. And yet it would be a pity to avoid it altogether.

And so I have advocated what I call 'Hobbesian idealism', an approach that takes fears very seriously and considers it a matter of priority to seek to allay them, but which also tries to make room for the realisation of hopes. More specifically I recommend thinking 'simultaneously about avoiding evil and about pursuing good, about threat, about promise, and about their interplay.'⁴ Where does such Janus-faced thinking lead? And what does it have to do with politics and law?

³ See Owen Harries, 'America and the Euro Gamble', *The National Interest*, Fall 1998, p. 128.

⁴ *Between Fear and Hope*, op. cit., p. 23.

Fear and institutions

Many things have been asked of public institutions and actors, among them, fulfilment, liberation, justice, mercy, prosperity, social equality. The list is long and it can be inspiring. There is, however, a strain of thought which appears to ask for little, and that quite austere, but does so insistently. It asks for security from the worst evils that we can do each other and, in particular, that the powerful can do to others. People of this disposition might ask for more than such security, but they insist that it is central. Judith Shklar, one of the most recent, uncompromising and eloquent exponents of this way of thinking about politics, has aptly named it the ‘liberalism of fear’.⁵ It is only one strand within the larger liberal tradition,⁶ often combined with other strands, but it is a profoundly important one.

I want to explore some of the implications of taking fear seriously, to explore its logic, some of its tendencies and some of its limitations. Though the liberalism of fear has distinguished exemplars and I will refer to writers often enough, what follows is not their version or fault but mine. This caveat is entered not merely to protect me from the erudite, but also because I think that many people betray signs of the disposition I want to flesh out, who have never heard of the liberalism of fear or any of its great exponents and would not admit to be—indeed may not actually be—influenced by it or them. I suspect there will be people hearing or reading this lecture who recognise some elements of this disposition in themselves or someone they know, and it is this disposition that concerns me, more than any particular theorist or theory.

Fear underlies and informs many of our central institutional arrangements and our thoughts about them, though it weighs more heavily on some than others. In thought about public affairs, fear is more associated with a sceptical temper, than with optimistic, sunny expectations or ideals. Those who fear fear are likely to be impressed more by history and memory than by hope⁷, are aware of the ‘crooked timber’ of which we are all made⁸, take the first duty of public arrangements to be ‘damage control’⁹ rather than the pursuit of perfection, dream less about

⁵ Judith Shklar, ‘The Liberalism of Fear’, in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life*, Cambridge, Mass., Harvard University Press, 1984, p. 5.

⁶ And arguably beyond liberalism, properly so-called. It figures centrally in a tradition that liberalism largely supplanted from the seventeenth century—republicanism. See Philip Pettit, *Republicanism: a Theory of Freedom and Government*, Oxford, Oxford University Press, 1997, and Quentin Skinner, *Liberty Before Liberalism*, Cambridge, Cambridge University Press, 1998. With one exception (below note 18) in what follows I have not discussed the crucial distinction that Pettit and Skinner see between the republican (or, for Skinner, neo-roman) and liberal understandings of freedom and its relation to law. I don’t believe that that distinction affects the arguments presented here, though a historically more scrupulous discussion might have to abandon Shklar’s capacious notion of the ‘liberalism of fear’ and distinguish between republican and liberal approaches to fear and when, how and why it needs institutional containment.

⁷ See Judith Shklar, ‘The Liberalism of Fear’, op. cit., p. 8, citing Emerson’s distinction between the ‘party of memory’ and the ‘party of hope’.

⁸ Isaiah Berlin renders Kant’s aphorism in these terms: ‘out of the crooked timber of humanity no straight thing was ever made’. See his *The Crooked Timber of Humanity*, New York, Alfred A. Knopf, 1991.

⁹ Judith Shklar, ‘The Liberalism of Fear’, op. cit., p. 5.

attaining the best than avoiding the worst, indeed prefer talk of the least worst to that of the very best.

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

This disposition has a distinctive concern with the character of public *institutions*, rather than, say, of public persons. If I were trying to think about personal morality—say, seeking to influence my children’s moral development or my own—I might start by examining traits of individual character apt to steel us against folly and temptations and open us to worthy pursuits. I might begin with notions such as prudence, wisdom, or judgment and follow that up with more morally ambitious ideals such as virtue. And if I did I would be in very good company, for much that is wise and good has been written about these aspects of character and personality. Particularly about virtue.

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

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

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

Note here the causative order: first the collapse of the overarching state, then Hobbesian fear, and only then nationalist paranoia, followed by warfare. Disintegration of the state comes first, nationalist paranoia comes next. Nationalist sentiment on the ground, among common people, is a secondary consequence of political disintegration, a response to the collapse of state order and the interethnic accommodation that made it possible. Nationalism creates communities of fear, groups held together by the conviction that their security depends on sticking together. People become ‘nationalistic’ when they are afraid; when the only answer to the question ‘Who will protect me now?’ becomes ‘my own people’.¹⁰

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

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

Absolute Arbitrary Power, or Governing without *settled standing Laws*, can neither of them consist with the ends of Society and Government, which Men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their Lives, Liberties and Fortunes; and by *stated Rules* of Right and Property to secure their Peace and Quiet. ... And therefore whatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared and received Laws*, and not by extemporary Dictates and undetermined Resolutions ... For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and*

¹⁰ Michael Ignatieff, *The Warrior's Honor. Ethnic War and the Modern Conscience*, New York, Metropolitan Books, 1998, p. 45.

¹¹ Cf., John Locke, *Two Treatises of Government*, revised edition, with introduction and notes by Peter Laslett, Cambridge, Cambridge University Press, 1965, p. 405. In a more recent formulation, Brennan and Hamlin characterise ‘a central problem of politics—indeed, the central problem of politics ... as a form of principal-agent problem. Society must delegate powers to agents, but the agents cannot be trusted fully to act in the interests of the principals.’ Geoffrey Brennan and Alan Hamlin, ‘Constitutional political economy: the political economy of *homo economicus*’, *The Journal of Political Economy* vol. 3, no. 3, 1996, p. 296.

*promulgated Laws: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds ...*¹²

Judith Shklar, similarly, considers escape from arbitrary power the fundamental virtue to be sought from legal and political arrangements, and insists that it cannot be achieved without the rule of law. The choice, according to Shklar, is simple and stark. As she explicates Montesquieu's institutional recommendations, designed to ensure what he described and valued as 'moderation' in government, '[t]his whole scheme is ultimately based on a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law. ... The Rule of Law is the one way ruling classes have of imposing controls upon each other.'¹³

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

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

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

¹² John Locke, op.cit., pp. 405-06.

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

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

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

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

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

The various strands of thought that Shklar characterises as the ‘liberalism of fear’ can be understood as moments in an extended meditation on ways to institutionalise restraint on power, consistent with the rule of law ideal. The products of such meditations are various. Different rule of law regimes have often embodied different judgments about how to implement rule of law ideals, and have different legal and other histories and traditions which have influenced the particular shape of the institutions they have. These differences are not automatically fatal, since the rule of law is not a recipe for detailed institutional design. It represents rather a cluster of values which might inform such design, and which might be—and have been—pursued in a variety of ways.¹⁶

Still, among liberal arrangements which have often been adopted are forms of separation and division of powers, and more generally attempts to check power by institutionalising countervailing powers. Since the American revolution, a written and binding constitution has stood as a symbol and instrument of many endeavours in this direction, and, since shortly

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

¹⁶ See Philip Selznick, ‘Legal Cultures and the Rule of Law’ in Martin Krygier and Adam Czarnota, eds, *The Rule of Law after Communism*, op. cit., pp. 23-40.

thereafter, judicial review of the legality of the exercise of power has become its common accessory. Many motives feed these arrangements, but one important among them is trenchantly—if perhaps uncharacteristically—expressed by Thomas Jefferson: ‘free government is founded in jealousy, and not in confidence; it is jealousy, not confidence, which prescribes limited constitutions, to bind down those whom we are obliged to trust with power; ... in questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.’¹⁷

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

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

At the centre of most modern answers to these questions is democracy. In modern times, the rule of law has been intertwined with political democracy. And so we speak routinely of liberal democracy. These two elements were not always linked historically and on one view¹⁸ they have

¹⁷ Quoted in Philip Selznick, *The Moral Commonwealth*, Berkeley, University of California Press, 1992, pp. 279-80.

¹⁸ This is the classical position of such writers as Benjamin Constant and Isaiah Berlin, for whom ‘[t]he answer to the question ‘Who governs me?’ is logically distinct from the question ‘How far does government interfere with me?’’ [‘Two Concepts of Liberty’ reprinted in *Four Essays on Liberty*, Oxford, Oxford University Press, 1969, p. 130.]

The first question, according to Berlin has to do with ‘positive’, the second with ‘negative’ liberty. And, Berlin believes, the liberal is first of all committed to negative liberty. According to Pettit and Skinner, on the other hand, republican or ‘neo-roman’ thought saw liberty not merely as absence of interference, but *secure* absence; the opposite not merely of coercion by another but of domination by another, whether coercive or not and whether benign or not. That, so the argument goes on, is why slavery is always inconsistent with freedom, even if a slave-owner treats his slaves well. For he *could* do otherwise. Republican freedom requires that no one else have dominion over me, and for this to be possible I must have the right to control over decisions that affect me, however indirect practical constraints make that right. As Skinner expresses the neo-roman argument: ‘From the perspective of the individual citizen, the alternatives are stark: unless you live under a system of self-government you will live as a slave.’ [*Liberty Before Liberalism*, op. cit., p. 76. See also Pettit, *Republicanism*, op. cit., *passim*.]

no special conceptual connection either, since one can imagine a benign and liberal prince who respects legal constraints¹⁹ or an elected demagogue who does not. However, quite apart from the many independent reasons to value democracy, their connection makes a great deal of sense.

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

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

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

Now from the point of view of the liberalism of fear, the complex institutional arrangements that I have merely sketched are at once indispensable and fragile. Indispensable because they limit the sway of unaccountable power. Fragile, both because they are subject to external threats and also because the complex interdependencies and balances upon which they rely are so liable to being upset. Each of the elements might become stronger or weaker than it needs to be to cooperate with and to limit the others. Popular passions might overflow or erode the channels intended to restrain them, or they might be led astray. Power might seep or flood from the elected government to its bureaucracy, as unelected officials contrive to render oversight by the people or their representatives nugatory. And what of also unelected and virtually irremovable judges, particularly senior judges? These are strategically located in the whole design of control over other institutions and the law, but they themselves escape the circles of control because of their institutionally protected independence, which itself has impeccable liberal foundations. Here the

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

liberal component in liberal democracy tends to strain against its partner; the former often biased in favour of institutions that limit lawmakers, such as courts, the latter favouring those that are accountable to the people, such as legislatures. And I have not even mentioned the arguments of radical critics of liberalism, who suggest that the whole enterprise of constraining social power by legal means is doomed to fail, or at least systematically to serve some elements of society at the expense of others, while masking this systematic bias under the universalist rhetoric of the rule of law.²⁰

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

Fear, strength and competence

The logic of the liberalism of fear leads naturally, then, to concern for systematic restraint on state power. But it is important to recognise that that is one *consequence* among others of that logic, not its originating source. To forget the distinction between source and consequence, as many fearful liberals have, often leads to exaggeration of the importance of that consequence. It also tends to obscure the fact that *restraint* on the state comes into play only after the first—sometimes only dimly-remembered—move of the liberals' own argument. That, after all, was to stress the importance of *having* a state with, in Madison's terms, 'regular powers commensurate to its objects',²¹ one that is strong and effective enough to do what states need to do. And that, as I have tried to show elsewhere, is quite a lot.²² It also requires states, and public institutions more generally, to do well what they do. That too is no small matter.

Even 'simply' keeping the peace—which mattered so to Hobbes—is no small matter, as is evidenced by the difficulty of restoring peace in societies whose states have ceased to be able to keep it. Moreover, if we explore what else of value in well-functioning modern societies depends on a state that is effective and strong, the list becomes long and complex. It certainly includes markets, private property, and civil societies, which are so often wrongly seen as alternatives to

²⁰ I have discussed one version of this criticism, that of the critical legal studies movement, in 'Critical legal studies and social theory. A response to Alan Hunt', *Oxford Journal of Legal Studies* vol. 7, no. 1, 1987, pp. 26-39, and others from within the Marxist tradition, in 'Marxism, Communism, and the Rule of Law,' in Martin Krygier, ed., *Marxism and Communism. Posthumous Reflections on Politics, Society, and Law*, Poznan Studies in the Philosophy of Sciences and the Humanities, Amsterdam-Atlanta, GA., Rodopi, 1994, pp. 135-68.

²¹ *The Federalist Papers*, [no.38], New York, Mentor, 1961, p. 240.

²² *Between Fear and Hope*, op. cit., chapter 5.

strong and effective states, though in fact they depend upon them. Moreover, as the World Bank has recently reminded us, and perhaps itself, and as is clear from the evidence in the Bank's Development Report of last year,²³ if economic and other social development is to be successful, there is a lot that governments need to do, not merely to make and enforce laws, but also to invest in basic social services and infrastructure, to protect the vulnerable and to protect the environment. They shouldn't do everything themselves, indeed there are excellent reasons why they shouldn't even dream of it, but they have a responsibility to make it possible that such things be done and, often, to see that they are done.

Indeed, even the most classical, and allegedly 'negative' of the liberal rights depend on very substantial state provision. They are, as I stressed in the Boyer lectures:

... products of systematic state interference in society. They exist owing to laws which enforce certain rules and not others, embody certain images of social interaction and not others, penalise certain behaviours and reward others. None of this is small game, and none of it involves simply tracking and backing autonomous social activity. What form this activity takes, what consequences it will have, what is to be tracked and what to be backed, and how, and with what implications, are all state decisions. How effectively any of this happens depends on state solvency, integrity, institutional design, trained personnel, and an ethos of office which can withstand the variety of corruptions that high stakes will, without counteraction, attract.²⁴

So one should avoid the mistake, often made, of seeing the state as the inevitable enemy of liberalism, or at best a necessary evil. It is a necessary good, and if it is in good shape that is very good. At least it is if it is the right sort of state, since states differ. My point is not to praise them all, since many are evil and even adequate states commonly do much that they shouldn't or worse than they should. It is merely to insist that states need to be effective and strong to provide the goods that it is indispensable that they do provide. One consequence of that insistence, worth repeating in the present political climate, is that the liberalism of fear should not be thought to require the emasculation of the state. Rather it should seek to ensure that the state can do and does what it should, and doesn't and can't do what it shouldn't.

The significant questions, to which we only have tentative and controversial answers, have to do with the conditions, character and consequences of good states. We would do better if our public debates were less determined to identify such *qualitative* questions with quantitative ones, with questions of size and cost. Those matters might well be important, but only as they bear on the qualitative issues I have mentioned and only if their bearing is demonstrated. It is not enough to assume their significance without more. For between the extremes of statism and anarchy, the difficult problems concern what states are good for, what that presupposes and requires, and whether our state is capable of doing and apt to do the right things in the right ways. These questions will be no less controversial than quantitative ones, which today assume that more

²³ World Development Report, 1997. *The State in a Changing World*, Oxford, Oxford University Press, 1997.

²⁴ *Between Fear and Hope*, op. cit., pp. 128-29.

means worse and yesterday assumed that more meant better, but they are likely to be more fruitful.

Fortunately, the liberalism of fear is capable of addressing these qualitative issues in a fruitful way, even though it is today most often interpreted otherwise. For its concern with restraint on state power, properly construed, is quite compatible with—indeed an ingredient in—an equally significant concern for the effectiveness of state power. That is a point too often missed. It has been forcefully made by Stephen Holmes, who advocates an interpretation of the values which he describes as ‘positive constitutionalism’ in preference to the negative form that is so often the only one of which we hear. The tradition of what Holmes calls ‘negative constitutionalism’ is the most common way in which we articulate the point of liberal institutional considerations, but not the most illuminating way. It speaks, of course, a fundamental truth of the liberalism of fear: unrestrained power, despotism, tyranny, are terrible. They are to be avoided at all costs and constitutional restraints are key ways in which we seek to avoid them.

Positive constitutionalism does not underrate these virtues of restraint. Rather, it understands them in a different light, for it is concerned to stress at the same time the enabling and facilitating role of constitutional and legal institutions. The insight of this tradition, as Holmes describes it, is that:

Limited government is, or can be, more powerful than unlimited government. The paradoxical insight that constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism By restricting the arbitrary powers of government officials, a liberal constitution can, under the right conditions, *increase* the state’s capacity to focus on specific problems and mobilise collective resources for common purposes.²⁵

Just as many people distrust states in general, however, so people involved in institutional design often seek to implement that distrust through legal and constitutional means. The danger of this approach is that it will thwart whatever good the state can do, and that without an effective state cannot be done. For to the extent that state power can be harnessed to valuable ends, we will want not only to limit the ability of the state to do harm but maximise its ability to do good. Even to reduce our fears, states need to be effective. Even more so, to the extent we think they might contribute to advancing our hopes.

What must be avoided, then, is not state power *per se*, but arbitrary, capricious, despotic exercise of that power. What must be nurtured is not state weakness, but sufficient strength, and strength of the right sort, to enable the state to tax fairly and adequately, spend effectively and deploy its power to good ends. For states must be *competent* to do what they are peculiarly suited to do, even as they must be restrained from doing what they are ill suited to do well, or well suited to do ill. And not just states at large but a variety of particular public institutions. To ensure such institutional competence requires that we understand what it involves. This will be complex and

²⁵ Stephen Holmes, *Passions and Constraint*, Chicago, University of Chicago Press, 1995, p. xi.

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

A law of rules?

There is, of course, nothing startling about recommending that public institutions should be competent. Who wants anything else? Nevertheless the recommendation is not as banal as it might seem. For not only are some people so impressed by the pathologies of state power, that it is unclear what good the state might be able to do if the more strident calls for ‘rolling back the state’ were to be heeded. There are also several contexts in which the natural and laudable implications of the liberalism of fear, untempered by other concerns, tend to pinch and strain against certain kinds and sources of institutional competence.

One context of crucial importance is that of law. Here there are strong liberal and perhaps even stronger democratic reasons to insist that law be solely or as much as possible a ‘law of rules’,²⁶ where rules are understood to act as ‘exclusionary reasons’.²⁷ Where such reasons for decision are in play, they exclude recourse to extra-rule considerations which might otherwise be considered relevant, whether these be considerations of politics, morals, consequences or whatever. On a strict interpretation of this view, that might even exclude direct consideration of, say, the purposes which might have or be thought to have led to the rules in the first place, and it would certainly exclude any considerations which lay further afield. That, so this view insists, is what is meant by *applying* the law that you have, rather than speculating about why you have it or making a new law, different from the one in front of you. For a rule to have the signal attribute of ‘ruleness’, then, it must act at the point of application as an unambiguous, mandatory and exclusionary rule, to be preferred to non-rule considerations, not a mere rule of thumb, simply to be taken into account along with them.

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

²⁶ cf. Antonin Scalia, ‘The rule of law as a law of rules’ *University of Chicago Law Review*, 56, 1989, p. 1175. For a forceful argument along these lines, see Tom Campbell, *The Legal Theory of Ethical Positivism*, Aldershot, Eng., Dartmouth, 1996.

²⁷ Joseph Raz, *Practical Reasons and Norms*, London, Hutchinson, 1975, pp. 15-84. Though this is Raz’s conception of mandatory rules, what follows is not his conception of the role of the judge.

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

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

It is parallel considerations that lead many people to decry the consequences of the welfare state for the rule of law. The modern active state relies greatly on open-ended laws, expanding official discretions, ballooning and hard to ascertain regulations. How to know them in advance? How to interpret them? How to rely on them? How to keep them from favouring some at the expense of others? Many thinkers have warned against the consequences of these developments for the maintenance of the rule of law²⁸, and their fears are not empty.

One response to such developments, by fearful liberals among others²⁹, is to advocate tight legislative definition of administrative action and limitations on administrative discretion, clear

²⁸ See F.A. Hayek, *Law, Legislation and Liberty*, Chicago, University of Chicago Press, vol. 1, 1973, vol. 2, 1974, vol. 3, 1979; Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond Bourgeois Individualism—The Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and R.S. Neale, eds, *Feudalism, Capitalism and Beyond*, Canberra, ANU Press, 1975, pp. 127-44; Theodore J. Lowi, 'The Welfare State, The New Regulation, and The Rule of Law', in Allan C. Hutchinson and Patrick Monahan, eds, *The Rule of Law. Ideal or Ideology*, Toronto, Carswell, 1987, pp. 17-58; Geoffrey de Q. Walker, *The Rule of Law*, Melbourne, Melbourne University Press, 1988.

²⁹ Tom Campbell advocates what he calls 'ethical positivism', which he describes as 'an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the

and precise legislative rules rather than vague standards, 'judicial restraint' rather than 'judicial activism', precise legislative definition of rights not vague constitutional bills of rights, all the more not constitutionally entrenched bills of rights. These last, it might be observed from this viewpoint, are falsely called difficult to amend, for that only means that citizens have difficulty amending them. Judges are free to do so whenever they come to 'interpret' them. This would seem to offend the principles of democracy and liberalism at the same time.

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

These are weighty considerations. It is certainly no answer to them to favour judicial or administrative activism on the grounds that one prefers the results in particular cases. For there will be other cases, and institutions are in for the long haul. Nor can a sceptic be happy to 'let justice be done though the heavens fall.' People who advocate that are unlikely to have experienced falling heavens. And demands that 'justice' should invariably triumph over 'blind adherence to rules' ignore at their or our peril just how contentious justice can be and how important the work of rules is. Liberals and democrats are right to emphasise the importance of rules, and they are equally right to insist that a serious political theory must reckon not merely with what results institutions should generate but equally with what institutions should generate them. They must have a theory of what institutions should have *authority* when values are in dispute, not merely what values they think should win.³⁰ There *are* strong democratic reasons to favour legislative sources for fundamental value decisions, strong liberal reasons for 'ruleness', and strong reasons to worry about unfettered discretions in the hands of unfettered decision-makers. But are they always and everywhere overwhelming, and more particularly should they uniformly override any other considerations? For there are such considerations, perhaps even strong enough to encourage us to chew some gum.

medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments.', op.cit., 2.

³⁰ For a forceful argument on this and related points, see Jeremy Waldron, 'A rights-based critique of constitutional rights' in *Oxford Journal of Legal Studies* vol. 13, no. 1, 1993, pp. 18-51.

First of all, one must reckon with the impossibility, now almost universally acknowledged among lawyers, of a gapless regime of totally, mechanically, applicable rules. No legal theorist pretends that such a regime can exist in practice, for there are so many unavoidable factors about law and about life that militate against perfect ruleness of rules. Just to mention one: rules, expressed in words, have to be interpreted and they cannot dictate the interpretation they receive. That comes from outside them, from those who interpret them.³¹ It does not follow that meaning is necessarily unstable, at least among lawyers, since there is usually considerable consensus within interpretive communities on how they are to be interpreted. But that in turn depends, among other things, on canons of interpretation within such communities, which in turn are controversial, often inconsistent, and change, for the proper grounds, means and ends of interpretation are themselves complex and matters of dispute. And then rules of interpretation, even when agreed upon, have themselves to be interpreted, and so on. None of this is news to any legal theorist, though different theorists draw different conclusions from it, and popular polemics often ignore it. Other chestnuts of legal theory concern questions of what decision-makers should do if their understanding of the meaning of the rule, as applied in a particular case, contradicts what they understand the purpose of the rule to have been. Or what if the rule seems to dictate a conclusion out of line with values deep in the larger body of law? Or manifestly unjust? It is not obvious that such considerations should invariably trump respect for rules, but nor is it obvious that they should always lose.

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

Thinkers who still are primarily concerned to cabin official acts might modify their original injunction that the law should simply be applied to say that officials should stick as close to the rules as they can when they apply them, and add as little of their own as they can. They should be systematically 'restrained', not 'activist', deferential to legislatures, cautious in any extensions of the law they might be driven to suggest. And, given the democratic deficit under which judges labour, there is a lot to be said for judicial restraint in many—perhaps most—circumstances, for judges' settling for 'incompletely theorised agreement'³² short of the fully theorised 'moral reading' that some³³ demand from them. Modesty is, after all, a virtue, particularly from

³¹ For an exaggerated, repetitive, self-indulgent, and often dazzling series of essays which make this point, often, see Stanley Fish, *Doing What Comes Naturally*, Durham, NC, Duke University Press, 1989.

³² See Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford, Oxford University Press, 1996.

³³ See Ronald Dworkin, *Law's Empire*, Cambridge, Mass., Harvard University Press, 1986, and *Freedom's Law: the Moral Reading of the American Constitution*, Cambridge, Mass., Harvard University Press, 1995.

incumbents of an institution which is deliberately cut off from democratic accountability and systematic access to information other than law. However, it is not the only virtue and where it is disingenuous it might not even be virtuous. That aside, the demand for ‘restraint’ rather than simple rule-application already suggests that the legal funnel is leaking. And if the leakage proves unstoppable, one might reconsider whether to try all measures to stem the flow. Instead it might be worth thinking whether it could be directed to good ends.

The realistic pursuit of ideals

Among the primary virtues of the rule of law is that we can know what the law is in advance, and place significant reliance upon it. These are remarkable contributions that a stable and coherent legal order bestows on a society. However, *how much* predictability a legal order needs to successfully undergird a civil society, and what sorts of law produce it, are less simple questions than they appear. And the answers of many fearful liberals—the more the better, and a tight rule-based legal order—are less obviously compelling than they might seem.

An example might help here. The magisterial social theorist, Max Weber, argued powerfully that modern ‘sober bourgeois capitalism’ could not have developed in the absence of a highly predictable order of politics, administration and law. Where the ruler’s prerogative constantly threatened, or the administration was unsystematic and not based on rules, or the law was unclear or unascertainable or liable to arbitrary change, various forms of ‘adventurous and speculative capitalism and all sorts of politically determined capitalisms are possible, but no rational enterprise under individual initiative, with fixed capital and certainty of calculations’³⁴ and with it the enormous dynamism which the Western capitalist order uniquely displayed. Such an economic order needed ‘a calculable legal system and an administration in terms of formal rules’.³⁵ The key was the sovereignty of predictable rules.

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

That, however, left him with a notorious problem. England and the United States had altogether messier, inductive, case by case methods; English legal thought, Weber wrote, ‘is essentially an empirical art ... One can also still observe the charismatic character of lawfinding, especially,

³⁴ *The Protestant Ethic and the Spirit of Capitalism*, London, Unwin, 1971, p. 25.

³⁵ *ibid.*

although not exclusively in the new countries, and quite particularly the United States.’³⁶ Indeed, ‘[a]ll in all, the Common Law... presents a picture of an administration of justice which in the most fundamental formal features of both substantive law and procedure differs from the structure of Continental law as much as is possible within a secular system of justice.’³⁷ This is an embarrassment for Weber’s legal thesis, because it was precisely these countries which were the great engines of capitalism; not Germany and France with their far more systematic sets of rules. Worse still, Weber—who was nothing if not honest (and a genius besides)—acknowledged that where the two systems competed, as in Canada, ‘the Common Law has come out on top and has overcome the Continental alternative rather quickly.’³⁸ He might also have acknowledged that the English system of political rule was not obviously more arbitrary than the German, for all the latter’s formality and rules; nor—to add the liberals’ preoccupation—did the English have more reason to fear abuse of political power than the German or French.

Weber made a variety of *ad hoc* attempts to reconcile his thesis about Continental technical superiority with the facts of English and American success. These brief hypotheses were unsuccessful in that aim because they each undercut the special significance of formal rationality, but each was fertile. I will recall one here, and one in a moment. The first was that English law ‘while not rational [roughly: derived from a coherent system of general rules] ... was calculable, and it made extensive contractual autonomy possible.’³⁹ This saves the sociological thesis that capitalism requires predictable law, but not the legal one, that it requires ‘formally rational’ law on the Continental model. It appears that your law can be predictable *enough*—perhaps more than enough—even where predictability matters a lot, though it is—by some standards—quite unruly.

This suggests two important points for fearful liberals, committed to a law of rules. First of all, the attempt to realise an unrealisable ideal is not necessarily the best strategy for anchoring one’s values in the world. That is perhaps an illustration of the economists’ ‘theory of the second best’. As I understand it, this theory holds that if in an ideal theoretical model a combination of factors and circumstances would produce a particular optimal result, but some of these factors are missing in actuality, you won’t necessarily do best by simply seeking to maximise those of the stipulated factors that remain, in the circumstances that you have. Or to adapt an illustration made by the philosopher Avishai Margalit,⁴⁰ imagine you are desperate to fly for a holiday in Hawaii,

³⁶ Max Weber, *Economy and Society*, vol. 2, New York, Bedminster Press, 1968, p. 890.

³⁷ *ibid.*, p. 891.

³⁸ *ibid.*, p. 892.

³⁹ Max Weber, *The Religion of China*, New York, Free Press, 1951, p. 102.

⁴⁰ *The Decent Society*, Cambridge, Mass., Harvard University Press, 1996, p. 283. Margalit has another illustration of the theory, with which many might find it possible to empathize: ‘St. Paul believed that the human ideal for men is celibacy. But if someone has strong desires, he had better not remain a bachelor, trying to fornicate as little as possible and thus coming as close to the ideal even if he can never actually reach it. It would be better for him to get married.’

but only have enough fuel to drop you a few hundred miles short, somewhere in the Pacific ocean. Rather than try to fly as close to your goal as you can, you might do better to settle for Heron Island. Particularly if there are other benefits in doing so. In our context, also one of inevitable shortfall—in this case from formalistic perfection—it might not prove sensible relentlessly to urge approximation to an unattainable ideal, in the context of a world in which complete ruleness is unavailable, there is evidence that it is not necessary for what you want, and other considerations are also important. All the more since, as I will argue in a moment, legislators are not in control of many of the factors which will ultimately determine the effects of the laws they launch into the world, and they don't know much about them either.

The second point is this. The liberalism of fear can only distinguish itself from paranoia if it is prepared to take circumstances, and variations in institutional strength, support and resilience into account. Many who understand the power of evil and corruption in the world are genuinely and rightly reluctant to compromise on the rule of law and the autonomy from other pressures which a law of rules promises. Comparing relatively autonomous legal orders with repressive and arbitrary ones, they prefer the former. And rightly so. But these are not the only alternatives. For legal orders differ greatly in the extent to which the values and practices of the rule of law are strongly embedded within them. In strong legal orders, such as our own for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialised to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders over centuries are rule of law values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them. Not every legal order is so strong. That suggests that not every legal order is equally at risk from limited incursions on its 'ruleness': some will be much threatened, others less so.

Philip Selznick insists upon this point, in arguing for a legal order more 'responsive' to changing needs, particular circumstances, principles of justice embedded in legal traditions but often not formulated as hard and fast rules, and considerations of justice more broadly. Responsive law, in Selznick's theory, is not a horse for all courses, not equally salutary in every time and every place. On the contrary, he points out that it is sinister (or frivolous) to demean the values and institutions committed to restraining power, and that a system of 'autonomous' law, which gives a high priority to rules, is a potent complex of such values and institutions. However, he also observes that just as people exhibit what he calls 'moral development,' so the point can be generalised to institutions, systems, communities.⁴¹ At certain stages in the career of an institution, for example, particularly formative stages, certain values rightly rank high—because they are not yet established or institutionalised, or because they are at risk, or because they face strong threats. Such values must be secured and it is dangerous to compromise them. When, however, they *are* secure, the balance of emphasis in our moral ambitions can change, and striving toward aspirations can more safely supplement the establishment of baselines of security.

⁴¹ See Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law*, New York, Harper/Colophon, 1978, pp. 18-27, 'A Developmental Model.'

We can even take some risks. This is not because the baselines become less important, just that they are more firmly in place and risks are less risky. Thus:

For many institutions, a large measure of autonomy is especially important in its *formative* stages. When policies and perspectives must be nurtured—given a chance to become established and secure; in a word, institutionalized—they need the protection autonomy can give. Once the system or policy is secure, that need becomes less compelling. Then more precision is required as to *what kind of* autonomy and *how much* is required or desirable.⁴²

But why would one want to compromise the ruleness of law? Basically because, while we need institutions and the rule of law to protect us we might want to enlist them for other purposes as well, and characteristics apt for one purpose might not be equally apt for others, however legitimate they both are. And so Selznick insists on the importance of attending to both baselines, conditions of survival, on the one hand, and aspirations, conditions of flourishing, on the other.

Hopes

We ask a lot of things of law as of life, and not all of them are consistent with each other. After all, judges are sworn to do justice according to law, so there is something poignant when the two demands come apart. Sometimes our fondness for ruleness might seem outweighed by our wish to do justice in a particular case, sometimes simply by our wish to act sensibly in particular circumstances, sometimes by our wish to serve the purposes of a statute, even if that involves setting aside the implications of what we understand its words to require, because in a particular case the result of their application would lead to a foolish result. And judges are not the only officials who are bound by rules and bound to apply them. Regulators are sent throughout the society authorised by law to check on the performance of industries, hospitals, schools, and so on. How should they do their important jobs? Fear and hope will often point in different directions here. Fear is important enough to have considerable priority, maybe enough to raise a presumption in favour of moves to counteract it. But keeping fear at bay is not, nor need it be, the only game in town.

⁴² *The Moral Commonwealth*, op. cit., p. 335. As he writes elsewhere:

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

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

This is something Weber hints at in another attempt to explain the embarrassing English advantage. In English law, he writes:

[s]afety valves are ... provided against legal formalism. ... the institution of the civil jury imposes on rationality limits which are not merely accepted as inevitable but are actually prized because of the binding force of precedent and the fear that a precedent might thus create 'bad law' in a sphere which one wishes to keep open for a concrete balancing of interests. ... It does in any case represent a softening of rationality in the administration of justice.⁴³

Such 'safety valves', which allow escape from the excessive rigidity often associated with a single-minded devotion to rules, might be useful in other contexts as well. Paradoxically they might even deliver us more reliable legal consequences.

There are at the same time important sociological and moral dimensions to all this, and I will take them in turn. A confidence in the real-world consequences of precise rules, tight discretions, crisp definitions, judicial restraint and so on, assumes a lot about the ways that laws in the books and in the courts affect lives in the world. But much of this advocacy, whether by lawyers, legislators, economists, philosophers—even Max Weber!—betrays a remarkable sociological innocence. First of all, few of us are simply waiting to hear from the law. Law competes with many other signals, pressures and sources of normative guidance and dispute resolution in our life, many of them closer and more salient to us and the groups within which we move. Not only will they compete with the law for our attention, and often win, but they will be part of the context in which the law is understood, use is or isn't made of it, it is heeded or ignored.⁴⁴ Since people live most of their lives in such 'semi-autonomous social fields'⁴⁵ of which legislators know little, it is not surprising that the life of the 'law in action' is difficult if not impossible for the legislator, or anyone who merely relies on lawyers' folk understandings of human behaviour, to predict. So if we are concerned with how law actually affects people's lives and what is made of it there, any simple extrapolation from the technical character of laws and their official

⁴³ *Economy and Society*, op. cit., vol. 2, p. 891.

⁴⁴ For an excellent discussion of how the law filters into the world, see Marc Galanter, 'Justice in many rooms: courts, private ordering, and indigenous law', *Journal of Legal Pluralism*, 19, 1981, pp. 1-47. As Galanter observes, '[t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation' (at p. 20).

⁴⁵ A phrase from the seminal article by Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study,' in *Law as Process. An Anthropological Approach*, London, Routledge and Kegan Paul, 1978, pp. 54-81.

interpretation in particular hard cases, to their systematic effects in the world, is simply uninformed guesswork. One has to look at the play of law in the world.

When one does look, much that one finds would surprise those whose fear has led them to a law of rules. The literature of regulatory theory is full, for example, of accounts of the pathologies generated by attempts to ‘fix’ rules as precisely as possible. In their splendid and splendidly named work, *Going by the Book*,⁴⁶ Bardach and Kagan point to the ‘site unreasonableness’, unresponsiveness and ineffectiveness which systematically occur when over-inclusive rules are applied inflexibly to complex, variable and changing circumstances. They stress the ‘perverse effects of legalism’, among which are the dumbing-down effects of formal rules which ‘by their nature ... are enforceable only if they specify *minimum conditions* of performance or quality or whatever. They cannot be designed to bring about higher levels of *aspiration* or continuous improvement or concern about quality.’⁴⁷

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

Ideally, two different sets of incentives should address the analytically separate problems of discouraging and punishing dishonesty and wrongdoing and encouraging and rewarding high-quality performances. Ideally these two incentive systems would be quite independent since incentive effects get distorted when the two problems are addressed by a single set of rewards and punishments. One doesn’t want rules designed to curb the abuses of the worst 1% to become the guidelines for an entire system.⁴⁸

Or, as she remarks in the same piece, ‘[w]e would not have great symphony orchestras if conductors focused only on keeping musicians from playing out of tune.’⁴⁹

One overriding danger of such officious negatively-inclined regulation, emphasised by Bardach and Kagan, is that ‘*accountability replaces responsibility*,’⁵⁰ a theme which Heimer’s studies vividly illustrate. This suggests, and it has suggested to Geoffrey Brennan—no hater of rules—that there might be point in discriminating among the targets of regulatory regimes and varying the mode and character of regulation accordingly⁵¹. If your major aim is to catch crooks, one sort

⁴⁶ Eugene Bardach and Robert Kagan, *Going by the Book*, Philadelphia, Temple University Press, 1982.

⁴⁷ *ibid.*, p. 100.

⁴⁸ Carol Heimer, ‘Legislating Responsibility’, American Bar Foundation Working Paper No. 9711, p. 11

⁴⁹ *ibid.*, p. 13.

⁵⁰ Bardach and Kagan, *op. cit.*, p. 321

⁵¹ See Geoffrey Brennan, ‘Institutionalizing Accountability: Comments on the Evans, Niland and Braithwaite Papers’ (unpublished ms, cited with the author’s permission).

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

Indeed, even if it is bad performance which worries you, such a system might still serve you ill. For strict rules lend themselves to what Heimer elsewhere calls 'creative compliance, in which people or organizations follow the letter but not the spirit of the law' and 'feigned compliance [where people] do not even bother with the letter of the law except to use it as a guide for creating an appearance of compliance.'⁵² John and Valerie Braithwaite, for example, compared the regulation of nursing homes in the United States and Australia. The former is based on a large number of very precise and detailed rules; the latter on a small number of vague and value-laden standards. The Braithwaites demonstrate that, contrary to their initial intuitions, the Australian system of 'wishy washy and blunt' standards turns out to be far more reliable than the American law of detailed rules. There are many reasons for that, the most important of which is that conscientious staff are empowered and involved in the activity of particularising and satisfying the standards, rather than alienated and tempted to avoid or simply formally to conform to the host of detailed rules, while ignoring the goals which the rules were intended to serve. But there is a negative payoff as well: 'Detailed laws can provide a set of signposts to navigate around for those with the resources to employ a good legal navigator Marching under the banner of consistency, business can co-opt lawyers, social scientists, legislators and consumer advocates to the delivery of strategically inconsistent regulation of limited potency.'⁵³ Standards are often harder to evade.

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

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

The virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way. Precise

⁵² 'The Routinization of Responsiveness: Regulatory Compliance and the Construction of Organizational Routines', American Bar Foundation Working Paper No. 9801, 6, 7.

⁵³ John Braithwaite and Valerie Braithwaite, 'The politics of legalism: rules versus standards in nursing-home regulation' *Social and Legal Studies*, 4, 1995, pp. 336-37.

rules, accurate facts, and uniform administration are elements of *formal* justice, which equalizes parties, restrains partiality, and makes decisions predictable. These surely contribute to the mitigation of arbitrary rule. But legal ‘correctness’ has its own costs. Like any other technology, it is vulnerable to the divorce of ends and means. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system either to take new interests and circumstances into account or to remedy the effects of social inequality. Formal justice tends to serve the status quo. It therefore may be experienced as arbitrary by those whose interests are only dimly perceived or who are really outside the ‘system’.⁵⁴

We have a local example. In the *Mabo* case,⁵⁵ the Australian High Court acknowledged what no Australian court had ever acknowledged before: that Aborigines had original title over their lands, which the common law recognised, even though statute might override it. The reaction of most public commentators to this decision, as to the later *Wik*⁵⁶ decision, which held that native title was not automatically destroyed by grants of land use to pastoralists, could be read off simply from where they stood on the issue of native title. If they approved of its recognition, they approved the decision; if not, then not. However, there was also an institutional issue, which formed a strong theme in the debate. What was the proper role of the High Court in such a case? Opponents of the decision adopted the ‘law of rules’ approach to judicial decision. There was an established legal understanding (though never enunciated by the High Court) that Australia had been *terra nullius* when whites arrived here, and in consequence there were no rights to recognise. On this view, that is where the Court should have stopped. If the law were to be changed, the legislature should be the body to do it.

That seems to me an inadequate response to the Court’s predicament. Certainly the Court is not a legislature, but nor did it act as one. It recognised the previous understanding of Australian courts. It carefully considered the available law of property, the history of settlement, and in particular the empirical falsity of the doctrine of *terra nullius*, on which non-recognition of native title had been legally based. It noted that, on the evidence before it, the claim that this country was uninhabited or inhabited by peoples without laws, was false. It noted too, that the law governing settlement in the United States, Canada, and New Zealand—all members of the common law family of nations to which we belong—had not categorised the countries they occupied, and consequently the legal status of the indigenous occupiers, in this way. The Court was without doubt also clearly moved by the injustice of nonrecognition, its injustice at the time of settlement and the tragic injustices that ensued. Many of the values which led to this recognition—such as equality before the law, and others—are often-repeated principles of our legal tradition itself. Others they took to be values of our contemporary community. These entered, perhaps motivated, the decision, but they were not the whole of it. It was suffused with consideration of law, which was far from merely ceremonial. Indeed, the ultimate modesty of the

⁵⁴ *The Moral Commonwealth*, op. cit., p. 437.

⁵⁵ *Mabo v Queensland No.2* (1992) 175 CLR, 1992, p. 1.

⁵⁶ *Wik Peoples v Queensland* (1996) 187 CLR, 1996, p. 1.

scope of that decision was derived from the existing law. The Court did not treat the modification of the law as a simple matter of invoking morality—as a legislature might, though ours hadn't—but wrestled with the bearing of the law as it was supposed to be, knowing that even in its own terms it had been based for two hundred years on a mistake of fact and had authorised shocking injustice. Certainly the Court did not simply apply an existing rule, but it did not invent it out of thin air either. It did something noble and appropriate to a court, particularly a High Court. It did justice, not as the crow flies but in the context of existing law and as mediated by the law, legal values—and moral ones too. And, happily, though they shook a little, the heavens didn't fall.



Question — I came here this afternoon not only to hear a good speaker, but hoping that you would allay my fears of interpretation. Am I to be saddled with interpretation of laws for the rest of my life as it is today?

Professor Krygier — Absolutely. There is no alternative to it, though there are many ways of interpretation. It is often thought that, in judging, the choice is between applying the law and doing something beyond it. For a range of reasons, simply applying the law, particularly at the appellate level, is unavailable. If it was that easy, it wouldn't have got up there, particularly since the High Court gives leave to appeal. Nothing that gets up there simply has an answer that every lawyer looking at it says, 'we know which way it's going to go'. That's the dilemma. It's a dilemma not made by activist judges, but one that all judges have to confront, and particularly at the appellate level. So the question then is really one of what I call in the paper political morality. How should they do that job which they can't avoid doing? And there, what I suspect your position would be, is, they should somehow be modest. And I think modesty *is* a virtue, as I say in the paper. But disingenuous modesty may not be so virtuous. That is, if people pretend to be modest, not to be doing what they actually are doing, and have to do, as a licence for doing something which is also interpretive, but silently so, then I think that is not necessarily so virtuous.

I think that on the issue of political morality, my distance from you is not that great. I think for all the reasons I gave in the first and longer part of the paper, that judges should be humble about what they do. They shouldn't go for overblown moral readings of constitutions or of legal development. They are confronted from time to time with real predicaments, however predicaments of a variety of kinds. It seems to me *Mabo* was one such predicament, and it seems to me the High Court responded to that admirably. I don't think that they should read every tax case before them in the same expansive and demanding way, however.

Question — You speak of law as being primarily about keeping fears at bay. I sense a lot of fear at the moment arises out of fear of litigation, for example. Could you just talk about that balance between laws being there to keep fear at bay and yet, on the other hand, people have become fearful because of perfectly fine laws, which are meant to achieve certain ends, but introduce an area of fear where perhaps there wasn't before.

Professor Krygier — An American sociologist has written about criminal law, in a book called *The Process is the Punishment*, and anybody who has been involved in litigation discovers that. It seems to me that that's a terrible worry. But it's a worry that is not easily rectified. It's a worry too because, as the title of one very famous, classic article in legal sociology tells us—and asks us why, more often than not in litigation—the 'haves' come out ahead. His is not a grand Marxist theory, it simply looks at the resources available to people who are 'repeat players', to use the term that he uses, in a legal system. They have so many resources and so much familiarity and so much less fear of litigation, than people who suddenly find maybe once or twice in their lives that litigation comes out of the sky to hit them. The process and the result can be terrifying. I don't have any magic solutions to that. I don't have any *unmagic* solutions either. I think there are obviously things one can take seriously, like legal aid, and all sorts of micro-developments, but many of them have been tried and the fear has not disappeared. The liberal of fear is a sceptic, and the reaction that he would have is, perhaps, that while improvement must properly be sought, perfection must not. The court is the wrong place to go to enjoy yourself, particularly if you are threatened by something, but it may still be a very valuable place to go to protect yourself or vindicate your rights. Maybe.

Question — I think there are a lot of optimistic liberals, but a lot of people have given up on the law because of the fear you have mentioned. They want to settle their disputes privately. They recognise this is not Bosnia; they think our society is strong enough to do so. Any comments?

Professor Krygier — Again, it is always the case that I spend longer on the first part of my paper than the last part, and as I was galloping through the last part, I didn't mention the context in which I was saying that legal orders differ in strength. The context was an argument in Selznick's, in favour of what he called 'responsive law'. An argument which encompassed a liberalism of fear, though he doesn't use those terms. There is a real issue about protecting people against other people and against state functionaries. It has to be implanted in all sorts of ways and one should never trivialise it. But he argues that institutional orders go through what he calls 'moral development', like children. You might simplify morality, work on the basis of clear, exceptionless rules, when you talk to a very young child—but when the child is older, more complex, more sophisticated, you may allow more exceptions, qualifications, complexity in your injunctions. He says institutions are the same. When they are stronger, more robust, well-implanted in legal and political order, not everything that might be dangerous in more precarious circumstances will necessarily be so now. Given that situation, the sorts of arguments that people often have against alternative dispute resolution (saying, for example, 'there is no precedent' and 'how can you adjust people's activities by it'), are, for me, less compelling than they would be in a more fraught situation where, for example, you don't have a strong legal order. Revolutionary regimes very often immediately put in place 'people's justice', which is a terrifying thing. So one must guard against such terrifying possibilities, but they are not always equally threatening.

There are other arguments about alternative dispute resolution which are more complicated, and which have to do, for example, with the equalising capacities of formal legal orders. This comes back to the earlier question. Courts don't do it particularly well, but they have all sorts of techniques to equalise litigants once they are in the court. OK, if you're rich you can get a better lawyer, if you're poor you get a worse lawyer. But in the court you can at least *have* a lawyer, and 'haves' don't always come out ahead. There are a lot of institutional attempts to equalise, and

some writers about alternative dispute resolution say: ‘these restraints on the power of the powerful are absent from mediation’, etc. The winners outside can readily and directly become the winners inside. How that works out in practice, however, really is an empirical matter, and I don’t have any firm answer there.

Question — Professor, during your address you made some references to the former Yugoslavia and the former Soviet Union, and you also mentioned differences between legal interpretations on the Continent and the English-speaking people. But with those references to one side, you drew very few examples and made very few interpretations as to how societies have performed under the various mix of factors that you have presented to us, except towards the end, when you referred to Australia and spoke about the *Wik* legislation. Drawing on your reference to Australia, I’d like to ask you to comment a little further if you would, by taking you back to the year 1924. That was the year that Stalin came to power in Moscow, a couple of years after Mussolini had taken power in Rome, and the year after Hitler, or the Nazis, had attempted a putsch in Germany. It was also the year that the people who work in this place imposed compulsory voting on Australians, interestingly. People at that time might well have looked on electoral compulsion, and indeed I know they did, as a wave of the future, like other authoritarian and even totalitarian forms of governance. In the event however, it hasn’t worked out that way. Almost nobody else ever adopted it subsequently after the Australians did, and nearly every country that did embrace it subsequently has gotten rid of it—excepting Australia. I wonder what that tells you about this country in relation to questions of fear and of hope and of a state that needs to do what it has to do, but no more than what it has to do, and a number of the other factors you mentioned which make up good governance of a country.

Professor Krygier — I’m quite fond of compulsory voting, for no good reason of principle that I can justify to myself, except one, maybe. That is (and this again would have to bear empirical research) it seems to me plausible that in societies where voting isn’t compulsory—that is, most democratic societies—a lot of effort is taken simply to get out the vote, rather than to make people choose which way to vote. And, it appears, it is easier to get the ‘haves’ I mentioned earlier to vote than the ‘have nots’, for reasons which can be sociologically explained. If such a bias exists where voting is voluntary, I don’t see compulsory voting as a terrible way of seeking to counter it. I don’t think, in any event, that compulsory voting is a large price to be forced to pay to participate in the governance of your country. Since I’m not a philosopher who likes to take principles to their limit, I can live with compulsory seatbelt laws, I don’t find that an intolerable violation of my freedom, but even more can I live with compulsory voting. I think it’s a civic obligation and I don’t know that there is anything that I find wrong with it and I think the results have been salutary.

If I can, I’ll use your question as an excuse to answer a question I was hoping you’d ask but didn’t, for which I have an answer. In terms of the questions you asked, one of the things that strikes me, and has struck me as a result of a very fine book written a few years ago by a friend (David Neal, *The Rule of Law in a Penal Colony*), is the question of how a penal colony became, in a very short time, what he is prepared and happy to call a ‘free society’? And the argument is that this is not simply a question of public politics. This is a question of the cultural baggage which convicts brought with them to Australia; the notion that they had rights, that the law was there to vindicate them, that they could sue. He begins the book with the epic tale of Henry

Kable—and maybe there is a descendant of his here, because there seem to be descendants of his everywhere; he seemed to be good at propagating as well as doing many other things in a remarkable life. He was gaoled in Britain, as was the woman he met there in the gaol, and they gave birth to child. When they were put onto a boat, the child wasn't allowed, so a sympathetic warder galloped to London to see Lord Sydney, had difficulty seeing him, but got permission. So the three of them get on the boat, Henry Kable gives a package worth fifteen pounds to the captain of the ship and when it arrives he asks for it back, but doesn't get it back. So the first civil case in Australia is a case by a convict against an important person for the return of his property, and he wins.

Now I study Eastern Europe and a bit the Soviet Union. I think that if first settlement of Australia had come from those countries, we wouldn't be telling that story, and I think it's a remarkable story.

Question — I won't give all the arguments for and against, just one argument for, and that is, to enable people to do their job properly, there should be an absolute maximum tenure for all politicians and all holders of high bureaucratic office.

Professor Krygier — There are many things on which I don't have views, and this is one of them.