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False Dichotomies, True Perplexities, and the Rule of Law

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‘In many of his writings,’ Philip Selznick tells us, John Dewey ‘hammered away at what he took to be pernicious dualisms ... [that] transform analytical or functional distinctions into ontological divisions ... the effect of the transformation is to frustrate inquiry and limit achievement.’¹ However pernicious they may be, and notwithstanding Dewey’s best efforts, such dualisms remain remarkably popular. Dichotomies that allegedly necessitate choice, perhaps tragic, proliferate: individual (or civil society) versus the state, liberty versus equality, liberalism versus communitarianism, universal versus local, are just a few examples. It is left to a few old fogies to mumble that they might just be aspects of complex phenomena which can manage to include them both. Few find such reminders convincing, still less interesting. Nevertheless, I’m with the fogies. One aim of this article is to suggest the inadequacy of a forced choice between universal or local in relation to the rule of law. Another is to suggest the universal complexity and local variability of the achievement it represents.

There are many ways in which the taste for dichotomies might ‘frustrate inquiry.’ I will mention two. One is by implying that the choice on offer is exhaustive, that one is faced with *nothing but* the alternatives presented. This rules out, *a priori*, such wisdom as Adam Michnik displayed, when asked in 1988 whether he would prefer General Jaruzelski or General Pinochet. Michnik replied that offered such alternatives, he would choose Marlene Dietrich.² Many would applaud his choice.

Again, familiar dichotomies often present as incompatible, unable to share the same space, alternatives what might be amenable to combination. Out of differences that might be complementary, or tensions that might be resolved, or lived with, they postulate contradictions, between which one *must* choose. That does not merely present what might be a false choice, but by the way it frames a problem it makes *choice*, between exclusive and binary alternatives, the first task of thought and action. By implication that excludes other, and perhaps more appropriate, ways of thinking and doing. Like refusing to choose.

¹ *The Moral Commonwealth*, Berkeley, University of California Press, 1992, 21.

² *Times Literary Supplement*, February 19-25, 1988. Things have changed since. I don’t know whether Michnik would prefer Jaruzelski to Dietrich even today, but he does appear to prefer him to Pinochet.

Faced with such stark options, one does well at least to begin with a Deweyite presumption and try to finesse them. The presumption might be quickly rebutted and finessing may not be possible, for sometimes stark choices are inescapable, but we should not strive to multiply such situations. Rather, since the questions we ask delimit the answers we give, we often do better to ask how the two sides of a dichotomy, in our case universal and local, might and do combine and connect, and how best they might be made to combine and connect. That way we might relieve, on the one hand, the abstraction and arrogance that can go with single-minded insistence on purported universals (which have all at least *originated* somewhere in particular) and, on the other, the parochialism and relativism that can flow from excessive devotion to the local.

One way of combining apparent incompatibles is to distinguish levels or moments in the phenomena under discussion, some of which might have claims to be universal, others which are intrinsically, perhaps necessarily, local. Since the subjects of this book – human rights, the rule of law – are complex phenomena with many aspects, it might make sense to think of them as both universal and local, in parts and at once.

In discussion of the universality of human rights, for example, several authors have suggested that there are a number of questions at issue, which are often not distinguished, but which fall to be answered at different levels of generality.³ The rule of law, too, is a layered phenomenon. In the past few years, I have sought to distinguish three questions that need to be asked in relation to it, some of which are appropriately answered only locally, others which have larger scope. This essay continues that program.⁴ My terminology has changed a bit, since I have been learning on the job, but for the present I distinguish ends, conditions and means. My claim is that it is important to separate questions about the point of the rule of law, about what in general it depends upon, and about what forms it should take. It is also important to treat these matters in that order: why? what? and only then how? Questions about universal and local will have different resonance depending on the specific aspect of this complex of values, conditions and institutions one is concerned with. It is a mistake to homogenize the considerations involved and force a melodramatic once-for-all choice, in relation to the range of considerations which must go into any serious consideration of bringing human rights to earth.

Distinguishing levels will not solve all disputes, however, and particularly not some of the most contentious ones in this area. Some purported values are contested at every level. There are also, as I will mention, real problems about the character, conditions and value of the rule of law, which even the sort of wimpish ecumenism I recommend does not solve or dissolve. These problems are important and in some, not

³ See Jack Donnelly, 'Human Rights and Asian Values: A Defense of "Western" Universalism,' in Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights*, Cambridge, Cambridge University Press, 60-87; Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights,' *ibid.*, 124-46.

⁴ Begun in 'The Rule of Law' *International Encyclopedia of the Social and Behavioral Sciences*, editors-in-chief Neil J. Smelser and Paul B. Bates, Elsevier Science, Oxford, 2001, vol.20, 13403-408; and 'Transitional Questions about the Rule of Law: Why, What, and How?' (2001) 28, part 1, *East Central Europe/L'Europe du Centre-Est*, 1-34.

rare, circumstances morally fundamental. The fifth and last part of my article will address some of them.

1. An Unqualified Human Good?

Almost thirty years ago, E. P. Thompson disconcerted many fellow-radicals who had long admired him and considered him their ally, even mentor. He did so by asserting that ‘the notion of the regulation and reconciliation of conflicts through the rule of law – and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal – seems to me a cultural achievement of universal significance.’⁵ To cap this injury with what Marxists had to recognize as insult, he went on to explain:

I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to me an unqualified human good.⁶

Orthodox Marxists, by contrast, knew that the rule of law was neither universal nor good. Not universal, since after the revolution there *would* be no place for it and, on some views (such as those of E.B. Pashukanis), before capitalism there *had* been no place for it. Not good either, since it was an ideological crutch of the bourgeois order. In any event, the ideology of the rule of law (and the French Revolutionary ‘natural’ precursors of ‘human’ rights, which some supposed it to protect) presupposed a malign and atomistic universal anthropology, for which the social plasticity of our natures, and the promise of communist species-sociability, gave no warrant.⁷ And so, as Hugh Collins unabashedly explained rather late in the day, ‘[t]he principal aim of Marxist jurisprudence [*sic*] is to criticize the centre piece of liberal political philosophy, the ideal called the Rule of Law’.⁸ Late twentieth century Marxists, somewhat bruised after sixty years of ‘really existing socialism’, might reluctantly come to a tepid and guarded truce with capitalism-with-the-rule-of-law rather than without it, but ‘universal’, ‘unqualified’? It might need to be tolerated, perhaps even valued a little, but hardly welcomed, still less applauded. And so Thompson was rebuffed, rebutted and rebuked, by people half his size.⁹

⁵ *Whigs and Hunters. The Origin of the Black Act*, Penguin, Harmondsworth, 1977, 265.

⁶ *Ibid.*, 266.

⁷ I discuss these claims at length in ‘Marxism and the Rule of Law. Reflections after the Collapse of Communism’, (1990) *Law and Social Inquiry*, 633-64. That discussion in turn caused some controversy. See the debate in the same issue at 665- 730.

⁸ *Marxism and Law*, Oxford University Press, Oxford, 1982, 1.

⁹ See Collins, *op. cit.*; B. Fine, *Democracy and the Rule of Law. Liberal Ideas and Marxist Critiques*; M. J. Horwitz, ‘The Rule of Law: An Unqualified Human Good?’ (1977) 86 *Yale Law Journal* 561; Adrian Merritt, ‘the Nature of Law: A Criticism of E.P.Thompson’s *Whigs and Hunters*’, (1980) 7 *British Journal of Law and Society* 194. There is a later and more sympathetic discussion of Thompson’s claims, and of the controversy they caused among the believers, in

At least in the West. In the East, on the other hand, it would have been hard even then, let alone by the time European communism collapsed, to see what the fuss was about. One can even imagine ill-mannered questions, like why it had taken Thompson so long to get to where Locke and Madison, not to mention Aristotle, had got somewhat earlier. Marxism was out the window, and the call was for the rule of law to be brought in - without adjectives, unmodified, as Catharine MacKinnon might say.¹⁰ Timothy Garton Ash faithfully captures the spirit of that time, at least as expressed by many prominent activists:

In politics they are all saying: There is no "socialist democracy," there is only democracy. And by democracy they mean multi-party, parliamentary democracy as practised in contemporary Western, Northern, and Southern Europe. They are all saying: There is no "socialist legality," there is only legality. And by that they mean the rule of law, guaranteed by the constitutionally anchored independence of the judiciary.¹¹

I have to confess to a deep and long-held sympathy for Thompson's claim and those characterized by Garton Ash. Faced with the choice between arbitrary power and the rule of law, the latter gets my vote every time. This is one dichotomy which seems to me worth insisting on, and one of its alternatives is immeasurably preferable to the other. And the reasons for that are pretty simple, about as simple as Thompson suggests. Some truths really are as simple as they sound, and the comparative virtues of the rule of law have seemed to me among them.

However, not everything about the rule of law is simple, and some important things about it are neither universal nor unqualified. In recent years I have been led to think about those things in two rather different and distant contexts: on the one hand, that of the post-communist European 'transitions' of the last dozen years or so and, on the other, that of an earlier and no less dramatic transition in my own country, Australia, since the arrival of Europeans two centuries ago. Thinking about each has spurred me to think about the other and to recognize that not everything that can be said in either context has the same resonance elsewhere. This essay is a preliminary attempt to come to terms with this uneasy combination: some fundamental rule of law values that make sense pretty well anywhere, any time, together with ways in which they have and might be realized, that vary greatly and whose sense is at times questionable.

2. Ends

Perhaps fortunately, Thompson was not a lawyer, and unlike the doyen of English rule-of-lawyers, A.V. Dicey,¹² and most other lawyers who write about the rule of law, he did not seek to spell out just what legal elements allegedly produced it. In an 'I know it

Daniel H. Cole, "'An Unqualified Human Good': E.P. Thompson and the Rule of Law", in (June 2001) 28, 2 *Journal of Law and Society* 177-203.

¹⁰ *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, Cambridge, Mass., 1987.

¹¹ 'Eastern Europe: The Year of Truth,' *New York Review of Books*, February 15, 1990, 21.

¹² *Introduction to the Study of the Law of the Constitution*, London, MacMillan, 10th edition 1959 (first edition 1885).

when I see it' way, he insisted upon the 'obvious point' that 'there is a difference between arbitrary power and the rule of law,' and the latter too was identified by what it was claimed to achieve rather than by any recipe or precis of ingredients. Thompson identified the rule of law by the good it did – 'the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims.' For Thompson, it was only if and to the extent that law and the rule of law made that sort of difference that it mattered.

Of course, analysis of the rule of law must go further than this, if only to check that the cause of the good attributed to it has been well identified. But I think Thompson was right at least to start where he did. For I believe it is always preferable to start with the *values* that inspire concern for the rule of law, with why it might matter, what its point might be, than with contingent descriptions of institutional particulars said to further these ends.¹³ Still more, to avoid taking these contingent particular elements, as Dicey took them, to be their universal essence.

There are several reasons for that preference for starting with the end, as it were, but I mention only one here, well known in the study of organizations: the dangers of 'goal displacement.' A well known organizational pathology occurs when institutions initially introduced, or even not deliberately introduced but taken to serve as a way of achieving goals, come to be reified as the best, and often soon after as the only, way to fulfil those goals. That assumed, it is easy to forget the goals altogether and remember only the means, or just identify the two and then only talk about the means. When means thus effectively displace ends, people keep doing things, or trying to copy what others are doing, often with great conviction, but with little idea why. These means are often the stuff of institutional fashion, and when one forgets what was supposed to justify them, institutions are often stuck with them until the fashion changes. And if they're government institutions, we're all stuck with them. It should never be forgotten that means are just instruments which are not self-justifying. Unfortunately, they're often self-perpetuating.

Such self-perpetuation can be contagious, as, for example, when models taken to work somewhere are offered for export under misleading labels. The early history of the 'transitional rule of law' was full of such offers, confidently given, enthusiastically received, and frequently disappointing. That can lead to two different but similarly derived errors. On the one hand, the possibility that there might be other ways of attaining valued results is not explored. On the other hand, institutional emulation is taken to have done the job when models from prestigious places are copied in less prestigious ones, whether or not they work in anything like similar ways after transplantation as before, whether or not they work in any salutary ways at all. My preference, then, is to start with the end, as it were, and only when that is clear move to means.

The end that matters to Thompson - restraint on arbitrary power – is not eccentric. The rule of law is commonly understood and valued by contrast with circumstances which lack it, and arbitrary exercise of power, above all, is the evil that it is supposed to

¹³ 'Transitional Questions...'

curb. The concept and the contrast, though not always the specific verbal formulations, embody ideals that have been central to political and constitutional discourse at least since Aristotle. Means thought to achieve those ideals, needless to say, have varied over that time.

There are three common ways to reply to this encomium to the rule of law, by contrast to arbitrary power. One is to opt for the other alternative, which despots (and, as Weber observed, populist demagogues) often do, but their subjects not always. Another possibility might be to adopt the Michnik strategy, and insist on what today might be called a third way. Some of Thompson's critics seem attracted to this move. But, of course, one then has to consider whether such a way is open even in principle – to anyone, anywhere, any time - and if so, whether it is open to us, here, now. I will return to this point. Thirdly, one might deny that the rule of law is indeed an antidote to be preferred to arbitrariness, either because it is no antidote or because its own consequences are worse than the disease it is supposed to cure. Those claims need an answer.

I will take these proposals in turn. Though real and aspirant power-holders are often keen on unrestrained power, there is little to be said for it, and a lot to be said in favour of trying to curb it. Today that is fairly well accepted so I will be brief. The *reasons* one might want arbitrary power to be restrained are various, There are two that seem to me most general. One aspect might be called *protective*, the second *facilitative*. A third has to do with substantive values of legality in the exercise of public power, but I think that is less general than the first two, though as an aspiration of strong rule of law orders no less important. Since at the moment my focus is on the most universalizable of rule of law values, I will leave this third aspect aside.¹⁴

The protective aspect has to do with fear, fear of surprise, of assault, of interference, of dispossession, of whatever dangers might flow from unbounded power, whether public or private. The sources of well-grounded fear vary – between societies, within them, and over time. Under communism, public power was overwhelming, and could at times inspire overwhelming fear. Today an excess of state power is often the least of a post-communist citizen's problems, and impunity of powerful private actors is what most needs to be addressed. Either way, legal attempts to constrain arbitrariness are at the core of what Judith Shklar has aptly called the 'liberalism of fear,' and that is a good cause. Fear of arbitrary power is a terrible thing, power which can be exercised without check is a good reason for such fear, ways of lessening both are to be commended.¹⁵

In a world which routinely includes strangers, fruitful and co-operative, rather than fearful, distrustful and solipsistic, relations among citizens, and between citizens and officials depend on it being reasonable to assume that relations among non-intimates will

¹⁴ See 'The Rule of Law', 13406-408; and 'Transitional Questions...', 6-8.

¹⁵ Cf Judith Shklar, 'The Liberalism of Fear, in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life*, Harvard University Press, Cambridge Mass., 1984 and 'Political Theory and the Rule of Law', in Shklar, *Political Thought and Political Thinkers*, edited by Stanley Hoffmann, University of Chicago Press, Chicago, 1998,. I have tried to explore some implications of the liberalism of fear in 'Ethical Positivism and the Liberalism of Fear,' in Tom D. Campbell and Jeffrey Goldsworthy, eds., *Judicial Power, Democracy and Legal Positivism*, Dartmouth, Aldershot, 1999, 59-86.

not, as a rule, be inclined, or if inclined will not be free, to be predatory, that opponents will not be able to mobilize the state against you, that in relation to it you will not be defenceless, and so on. These are not natural or inevitable assumptions, and it takes a lot to make them plausible. The hope is that an effective rule-of-law regime can contribute to citizens' confidence that such assumptions are neither foolish nor heroic.

Fear is not, however, the only reason for the rule of law, nor is government its only subject. We all are. Madison wrote that if we were angels we would not need any laws. Unfortunately, so the familiar argument goes, we are not so we do. However, even angels and indeed all but the omniscient, particularly if there are a lot of them about, might benefit from the rule of law. We can all become confused and lose our way, not necessarily due to our or others' evil but merely to the superfluity of possibilities in an unordered world. All the more when that world is, as ours is, full of large and mobile societies of strangers, where ties of kinship, locality and familiarity can only partially bind, reassure or inform.

The predicament of a member of such a 'civilized' society, as Adam Smith already identified it in the eighteenth century, is that he 'stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons.'¹⁶ What is needed is 'a basis for legitimate expectations',¹⁷ without which the 'co-operation and assistance of great multitudes' will necessarily be a more chancy affair. Where such a basis exists, fellow citizens can know a good deal about each other, though many of them are strangers; co-ordinate their actions with others; and feel some security and predictability in their dealings with them. Such a basis can, of course, never make everything predictable. The hope is that it can tie down enough that matters that would otherwise be up for grabs, establish fixed and knowable points in the landscape, on the basis of which the strangers who routinely interact in modern societies can do so with some security, autonomy, and ability to co-operate, to plan, and to choose.

Key to co-operative encounters with others is commonly shared knowledge that there exist limitations on options which, in principle, might be unlimited, or at least too many to deal with, together with common knowledge of what the available options are. Road rules are a good example, literally and metaphorically, of such facilitative option-specifying rules. Rules which can limit and signal options and which can be assumed to have done so, even to strangers, are important simply for us to be able to communicate with others and to engage with them, all the more so whenever it is important to co-ordinate activities with them. Commonly known and acknowledged rules of the game contribute to interpersonal knowability and predictability, from which might come mutual confidence, co-ordination and co-operation and without which such things will not easily develop.

Limits on sources of fear, and commonly understood and reliable rules of the game are good things to have, and it is hard to see where they would not be. They are also necessary conditions for most plausible candidates for human rights, unless it is

¹⁶ *An Inquiry into the Nature and Causes of the Wealth of Nations*, Liberty fund, Indianapolis, vol. I, Indianapolis, 1981, 26.

¹⁷ John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Mass., 1971, 238.

thought there should be human rights to terror and confusion. Where would it be better to be unprotected against potential dangers from, among other things, our political rulers and our fellows? Where would confused and lonely solipsism be better than the possibility of productive co-operation? The difficult questions, and the contingent limitations to the answers, have to do with how we can serve these goals.

Which leads to the second counter-proposal to the choice between arbitrariness and the rule of law: a third way. It would be foolish to reject this in principle for all places and times. Variations in the nature, size, complexity, degree of differentiation, institutionalization and – connected with these - modernity, of societies are of great significance in affecting institutional possibilities, and arguments about universality can scarcely ignore such variations. There are other variations, too, but I will start with these.

There is plenty of evidence that small or nomadic or what used to be called ‘stateless’,¹⁸ pre-modern societies, without our sorts of institutional apparatus – legislatures, executives, judiciaries - can nevertheless contrive to protect their members from familiar dangers (unfamiliar dangers, particularly unprecedented and overwhelming ones such as alien invasions, are a different matter), and encourage certain sorts of necessary co-operation, without a war of all against all. We might not recognize the means by which these ends are accomplished as legal, but that is of little moment. It is an empirical matter how these ends are achieved and a normative one how well.

But there are ecological limits to this, and they are of two familiar sorts. One has to do with size, the other with modernity (which also affects size). Beyond a very small size, as Weber among others has observed, societies will develop institutionalized apparatuses of rule. This is inevitable, and in modern societies it is also in principle good. We *need* states with adequate powers to do what only they can do.¹⁹ This Hobbesian insight has not yet been washed away by the tides of globalization or the tremors of September 11. On the contrary. However, those in control of such states are able to amass great power, which it is difficult to restrain routinely without some institutionalized countervailing measures in response. Unrestrained, it is reasonable to fear them. Moreover, large societies generate co-ordination problems no longer amenable to purely informal resolution on the basis of common understandings. Common knowledge fades with complexity and distance. To be sure, rules of law are never self-sufficient, unmoved movers, and they are never sufficient for whatever good we want either, but in large societies they can contribute to lessening fear and confusion, both of which would be natural enough without them. They don’t do this *necessarily*, for rules of certain sorts can do as much harm as rules of other sorts do good, and you need a lot besides rules, but to do it they are arguably necessary.

Moreover, modernity militates against the endurance of small societies on the basis of their internal social control mechanisms alone. It destroys many and renders

¹⁸ See Meyer Fortes and E.E.Evans Pritchard, eds., *African Political Systems*, Oxford, Oxford University Press, 1948. Cf, Martin Krygier, ‘Anthropological Approaches’, in Eugene Kamenka and Alice Erh-Soon Tay, eds., *Law and Social Control*, Edward Arnold, London, 1980, 27-59.

¹⁹ On this, see esp. Stephen Holmes, *Passions and Constraint*, University of Chicago Press, Chicago, 1995; Cass Sunstein and Stephen Holmes, *The Cost of Rights*, Norton, New York, 1999; and Linda Weiss and John Hobson, *States and Economic Development*, Cambridge, Polity Press, 1995.

others ineffective. Among other things that wreak such destruction, modern states and law do. There is abundant evidence of that, and such destruction and erosion have occurred in many parts of the world. Size is an important part of this, but only a part. Other parts include the thinning of cultural density, competition from other options, freedom of movement, infections and corruptions of every literal and metaphorical sort. So, for better or worse, there are many places where concerns to institutionalize ways to protect and facilitate, which motivate rule of law thought, are or have become indispensable, if only to restrain the power of the institutions they presuppose. In societies with large and concentrated centres of power (traditionally political power, but the point can be generalized), and large, physically and culturally dispersed and mobile populations, we do better if we can rely on institutions that are able to lessen the chances of power being exercised arbitrarily, capriciously, without authority or redress. We do better, too, in large societies, where we are constantly interacting with non-intimates, if we can know important things about people we may not know well in other respects. Such things include their and our rights, responsibilities, risks and constraints. In small and pre-modern societies, as in families, we can know many of these things from personal everyday experience. In larger, more various, agglomerations such knowledge and the shared normative understandings that make it possible, are often not available. Where the rule of law *matters* in a society, however, we can know many of these things even about strangers. That makes their and our activities more predictable to each other and might make us less fearful of and more co-operative with them, and, of course, them of and with us. This can lead to a productive spiral of virtuous circles,²⁰ where each gains by reasonable trust in others. So while, as we will see, the rule of law can be sought along a variety of routes and through a variety of means, I don't see any acceptable alternative to it.

But, and this is the third complaint, perhaps the rule of law does not do what is needed, or what its partisans promise, or does these things at too great an expense. Here three elementary points are worth recalling. First, no one suggests that perfect achievement of the rule of law, whatever that would be, is possible. The rule of law is not something you either have or lack, like a rare painting. Rather, like wealth, one has more or less of it. Whether one has enough of it is a judgment to be made along continua – multiple continua – not a choice between binary alternatives. One seeks to *reduce* arbitrariness, *increase* the sway of the rule of law, not to eliminate the former by installing a new, and fortunately unrealizable, distopia - nothing but the latter. Secondly, the rule of law is obviously not *sufficient* for a good society. At most it is necessary. But that is true too of oxygen, so it does not make the rule of law unimportant. Third, it is not the only game in town. Where other values conflict with it, they need to be taken into account, and compromises in pursuit of one or another might be necessary. That is not a new problem in human affairs. Perhaps, unlike oxygen, single-minded devotion to the rule of law is harmful to other good things we would want to do, like extend certain

²⁰ See Martin Krygier, 'Virtuous Circles. Antipodean Thoughts on Power, Institutions, and Civil Society', (1997) 11, 1 *East European Politics and Societies*, 36-88.

benevolent government activities. There are arguments to this effect²¹ and it might be so, though I believe that both partisans of the welfare state and its critics exaggerate the inconsistencies. And to the extent that they don't, this just makes the rule of law another of those things we value that live in tension with other things we value. Since little comes pure in social life – not even oxygen – it remains to be shown that active government (which I support) and the rule of law (which I also support) cannot be achieved together. I don't believe it has been shown. At least the tensions are likely to be highly variable. As Philip Selznick has insisted, what in weak legal orders might be mere and dangerous opportunism that threatens a fragile order of constraint might in stronger ones be a 'responsive' leavening of the rigidities of legal orders well able to take care of themselves.²²

In any event, there are good reasons to believe, both in principle and in historical experience, that constitutionally restrained government is, in important and valuable ways, more usefully strong than governments whose power is unrestrained, and that to be effective such a government will have a lot to do.²³ And not only are restrained governments stronger than arbitrary ones, so are the societies which depend upon them.

So, I conclude, some of the central values informing pursuit of the rule of law are generally good, if I were less modest I might say universally so, and so too is the pursuit of them. But what of the means? Here it is worth distinguishing between broad conditions such means need to satisfy, qualities they must possess, on the one hand, and the particular sorts of institutions that might be thought to possess them, on the other. The former can be stated with some degree of generality, but not fully; the latter even less so.

3. Conditions

This is not to deride the ideal of the rule of law, for that ideal is not a recipe for detailed institutional design. It is rather a value, or interconnected cluster of values, that might inform the determination of such design, and which might be – and have been – pursued and institutionalized in a variety of ways. So specifying values the rule of law is to secure is not yet to describe how these values are to be achieved. And perhaps such specification can never be achieved with any combination of generality and precision. In different societies, with different histories, traditions, circumstances, and problems, law has contributed to securing these (and other) values in different ways, and arguably could not have secured them all in the same ways. And there are many ways to fail, too. Nevertheless, there are some general conditions which need substantially to be fulfilled by whatever normative and institutional setups one has. They are variably fulfilled in different societies and times, and thus the ends of the rule of law are variably attained. In

²¹ See, for example, F. A. von Hayek, *Law Legislation and Liberty*, 3 vols, 1973, 1976, 1979, University of Chicago Press, and Geoffrey de Q. Qalker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988.

²² See, eg, Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law*, 2nd edition, Transaction Books, New York, 116, and Selznick, *The Moral Commonwealth*, Berkeley, 1992, 336.

²³ See Krygier, 'Virtuous Circles', and 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law,' forthcoming in András Sajó, ed., *From and To Authoritarianism*, Kluwer, Amsterdam, 2002

principle they are highly general goods, for they are jointly necessary for the achievement of the values specified above. In practice, however, they have only rarely existed in abundance. Elsewhere I have explored four such conditions,²⁴ which I will briefly summarize here.

First, *scope* of restraint on, and channelling of power is crucial. To the extent that powerful players are above or beyond the reach of the law, the rule of law will not apply to them.

Secondly, people will not be able to use the law to guide their own acts or their expectations of others unless they can know and understand it or it can readily be made known and understood to them. So the law must be of a *character* such that it can be known. It will rarely be universally known anywhere, but where it is unknowable, so is the rule of law.

A third condition of the rule of law takes us beyond the rules to the ways they are administered. The law must be administered in ways that take its terms seriously and thus allow citizens to do so, interpreted in non-arbitrary ways that can be known and understood publicly, and enforced in accordance with such interpretations.

Finally, to be of social and political, rather than merely legal, consequence the law must actually, and be widely expected and assumed to, *matter, count*, as a constituent and as a frame in the exercise of social power, both by those who exercise it (which, where citizens make *use* of the law, should be far more than just officials) and by those who are affected by its exercise. What is involved when the law counts is a complex sociological question on which the law bears. But it is not in itself an internal legal question, or even a question solely about legal institutions, for it depends as much on characteristics of the society as of the law, and on their interactions. And, although the literature of the rule of law has almost nothing useful to say about it, the rule of law depends upon it.

Recall Thompson. What was key for him, as it has been for dissidents under countless despotisms, was ‘the imposing of *effective* inhibitions upon power and the defence of the citizen from power’s all-intrusive clams’. This is a social result, to which law is supposed to be able to contribute and, needless to say, it depends on many things beside the qualities of the formal law. Yet far too often lawyers and philosophers discussing the rule of law move from some legalistic conception of the first three of the conditions distinguished above to the assumption that where they exist so does the rule of law. Which it might, if the law were the single unmoved mover of the social world. Since no one believes that, this move is as odd as it is common.

Take, for example, knowledge of the law. Lawyers have developed lists of the particular characteristics necessary for law to be known. Often indeed these are taken together to add up to what the rule of law means. The law, they say, must at least exist, of course, but it must also be public, comprehensible, relatively clear, precise, stable, non-contradictory, unambiguous, prospective, and so on.²⁵ These lists are well known, and

²⁴ ‘Transitional Questions ...,’ 9-17.

²⁵ Eg Lon Fuller, *the Morality of Law*, Second edition, Yale U.P., New Haven, 1969, chapter 2; Joseph Raz, ‘The Rule of Law and its Virtue’, in *The Authority of Law*, Clarendon Press, Oxford,

however long they are their rationale is the same: the law must be of a character that people can guide their actions and expectations by it. Since that is the end, it is easy for lawyers to stipulate what, from the legal *sender's* viewpoint, contributes to legal knowability.

But whether the law is known or knowable cannot just be read off merely from legal forms. For success in communication of law surely depends on how the law is *received*, not on how it is expressed or even delivered. And that depends on many – and various – factors that intervene between law and life. But what in a particular society are the sources and impediments to orienting one's actions by law are essentially empirical, socio-legal questions to which we have few certain answers. And since we don't it is odd that lawyers and philosophers are so confident we do.

One *a priori* hypothesis, for example, extremely common among lawyers, is that whatever contributes to making legal rules less vague, ambiguous, open-ended and renders them more precise, tightly-specified and univocal contributes to making law more certain, and therefore reliable. It seems to stand to reason, after all, that if a rule is sharper, more precise, less open to interpretation, it is easier to understand and follow. This assumption underlay both Max Weber's and Evgenii Pashukanis's sociology of law and capitalism, and it remains common, particularly among legal positivists. Thus Joseph Raz gives as one 'fairly obvious' reason for preferring rules to principles in the direct regulation of behaviour that '[p]rinciples, because they prescribe highly unspecific acts, tend to be more vague and less certain than rules' and 'Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application.'²⁶ On that assumption, numerous advocates of the rule of law insist that it should be a 'law of rules,'²⁷ where rules are understood to act as 'exclusionary reasons,'²⁸ rather than more open-ended principles, since the former are more certain and predictable than the latter.²⁹ Even those, like Ronald Dworkin, who are fond of principles are so not on the grounds that they are as predictable as rules, indeed they concede that they are not. Dworkin commends them for offering other virtues of justice which a strict regime of rules might thwart.

Yet it is a major and unresolved issue of socio-legal investigation whether

²⁶ 'Legal Principles and the Limits of Law', (1972) 81 *Yale Law Journal* 823 at 841.

²⁷ Cf., Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 *University of Chicago Law Review* 1175. This is the central theme of Tom Campbell's *The Legal Theory of Ethical Positivism*, Dartmouth, Aldershot, 1996. Campbell's 'ethical positivism' is 'an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments.' (2)

²⁸ Joseph Raz, *Practical Reasons and Norms*, Hutchinson, London, 1975, 15-84. See Campbell, *op. cit.*, 5: 'a system of law ought to be a system of rules. Further, the rules in question must be 'real' rules, that is rules which have, in Raz's term, "exclusionary force"'.

²⁹ See Campbell, Scalia, Geoffrey de Q. Walker, *The Rule of Law: foundation of constitutional Democracy*, Melbourne University Press, Melbourne, 1988, P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, Inaugural Lecture, delivered at Oxford University, February 17, 1978, and published by the Clarendon Press.

precision of rules yields certainty of law. Not only is it unresolved, it is very difficult to resolve, since it is an empirical question for which it is hard to gather evidence. Such evidence as we have suggests, at least to John Braithwaite, that while rules might be more certain than principles in relation to ‘simple, stable patterns of action that do not involve high economic stakes’ - like driving a car - ‘with complex actions in changing environments where large economic interests are at stake’ principles are more likely to enable legal certainty than rules. Indeed, Braithwaite argues, ‘[w]hen flux is great it can be obvious that radically abandoning the precision of rules can increase certainty.’³⁰ The argument is complex and the evidence, as Braithwaite readily concedes, incomplete and hard to obtain, but his arguments are powerful and the evidence on which he draws, though limited, is strong. A complex order of fixed and rigid rules, for example, is typically more open to ‘creative compliance,’ ‘legal entrepreneurship’ and ‘contrived complexity’ particularly at ‘the big end of town.’ This is both because certain sorts of precise rules, and regimes where such rules predominate, lend themselves to such exploitation more readily than certain sorts of principles and too because ‘there is uncertainty that is structurally predictable by features of power in society rather than by features of the law.’³¹ One might speculate that some of the tendencies Braithwaite identifies might even be stronger in less ruly countries than the western, comparatively law-abiding polities (Australia, UK, US) on which this and allied research primarily draws.

Whether or not Braithwaite’s particular hypotheses are confirmed by further work, the point remains that we won’t be able to confirm or deny them without such work. Yet the literature of the rule of law is largely innocent of these sorts of inquiry. Lawyers often stop at the place where social investigation should start, the legal vehicle of transmission, or at a somewhat skewed sample of law-affected behaviour later, where legally relevant bruises and projects are brought to them. They do not regularly investigate those places where legal transmissions are most typically and crucially received and acted upon – in the myriad law-affected everyday interactions of individuals and groups, which go nowhere near lawyers or officials but where law in a rule-of-law society does its most important work. Moreover, sources of and impediments to legal knowledge differ between societies. So even were lawyers interested and equipped to look more widely, they would still typically only have local knowledge. And since philosophers of law rarely go beyond the writings of lawyers for their data, they have even less to work with: vicarious local knowledge. This would need to be supplemented by comparison and reflection, and of sorts which need to go beyond where lawyers usually feel comfortable looking or philosophers thinking. One does not expect lawyers or philosophers to do something alien to their natures, viz. empirical social research, but it would be gratifying if, once in a while, they acknowledged the significance of such investigations for so much that they say in ignorance of them.

This is just one example of a more general point, that the successful attainment of the rule of law is a *social* outcome, not a merely legal one. What matters, here as everywhere with the rule of law, is how the law affects subjects. But since the distance

³⁰ ‘Rules and Principles: A Theory of Legal Certainty’, (2002) 27 *Australian Journal of Legal Philosophy*, 54.

³¹ *Ibid.*, 58-59.

between law in books and action is often long, the space full of many other things, and in different places full of different things, it is a matter of comparative social investigation and theorization what might best, in particular circumstances, in particular societies, further that goal. A docket of the *rechtstaatlich* features of legal instruments, even buttressed by citations to Fuller, Hayek, or Raz, will not do the trick.

The only time the *rule* of law can occur, when then law might be said to rule, is when the law counts significantly, distinct and even in competition with other sources of influence, in the thoughts and behaviour, the normative economy, of significant sectors of a society. But we don't know what makes law count.³² Knowability of legal provisions is obviously only a part of the story. Jurists say little about this large issue, beyond bromides about 'legal effectiveness' or, more occasionally, the importance of legal culture or a culture of lawfulness. However, as seekers of the rule of law in societies without it are discovering in many parts of the world, what these generalities depend upon, and even more how to produce them, are mysteries. And, since what works somewhere does not necessarily work in the same way or at all elsewhere, many mysteries.

What does it mean for law to count in a society, in such a way that we feel confident saying that the rule of law exists there? All the questions asked here have a sociological dimension, this one above all. It asks about the social *reach* and *weight* of law, and the answers, whatever they are, will have to attend to questions of sociology and politics, as much as of law. These answers must vary between societies, whether or not the formal rules do. This is not because the law has no significance, but because what in law does have significance, how it does, and so many other things do as well, that little about the nature and extent of the significance of law can be read off from the law itself.

The notion of legal effectiveness merely hints at the complexity of the conditions of the rule of law, far greater complexity than is needed merely (!) to ensure the effectiveness of a legal order. That is no simple matter either, of course, but one can imagine that, for a while at least, effectiveness might come 'out of the barrel of a gun'. But not the rule of law.

Both effectiveness and the rule of law begin with obedience in any legal order. For the rule of law to exist, that must be manifest to a considerable degree both by ordinary citizens and the powerful. But for the rule of law to thrive, beyond mere obedience, *use and manner of use* matter as well.

If the laws are there but governments by-pass them, it is not the law that rules. So exercises of governmental power must be predominantly channelled through laws that people can know. But governments, as we have seen, are not the only addressees of the rule of law. And for the rule of law to count in the life of its subjects, as important as

³² For some intelligent, still controversial and unsettled, speculations in a particular context, see Kathryn Hendley, Stephen Holmes, Anders Åslund, András Sajó, 'Debate: Demand for Law,' (1999) 8, 4 *East European Constitutional Review* 88-108. Cf. also 'Citizen and Law after Communism, (Winter 1998) 7, 1 *East European Constitutional Review*, 70 88 and Ilian G. Cashu and Mitchell A. Orenstein, 'The Pensioners' Court Campaign: Making Law Matter in Russia' with reply by Kathryn Hendley, "'Demand" for Law – A Mixed Picture,' (Fall 2001) 10, 4 *East European Constitutional Review*.

mere *submission* to law, or even adequate *access* to and *supply* of laws and legal institutions, though far less remarked upon than either, is constraint by *demand* for, and (often unreflective) use of legal services and resources.³³ Such demand and use extend beyond, and frequently will not involve, direct enlistment of legal officials or institutions. They are manifest in the extent to which legal institutions, concepts, options, resources, frame, inform and support the choices of citizens.

More socially significant than citizens' (generally rare) direct invocations of official channels, is the extent to which they are able and willing to use and to rely upon legal resources as cues, standards, models, 'bargaining chips', 'regulatory endowments', authorizations, immunities, in relations with each other and with the state, as realistic (even if necessarily imperfect) indicators of what they and others can and are likely to do. For it is a socio-legal truism, which still escapes many lawyers, that the importance of legal institutions is poorly indicated by the numbers who make direct use of them. The primary impact of such institutions, as Marc Galanter has emphasized,³⁴ is not as magnets for social disputes, a very small proportion of which ever come to them, but as beacons, sending signals about law, rights, costs, delays, advantages, disadvantages, and other possibilities, into the community. Of course it helps if the beacons are bright rather than dim, but that is not all that is needed. It is the job of legal officials to try to make the signals they send clear and encouraging (or, in the case of criminal law discouraging), and of enforcement agencies to try to make them salient. But even when these signals are bright and visible, they are not the only ones that are sent out or received in a society.³⁵ They can be blotted out by more immediate, urgent, extra-legal, often anti-legal messages, sent from many quarters. Or by discouraging messages, such as that whatever the courts say, it won't be implemented (often alleged in Russia), or that the courts are less powerful than local patrons (ditto and elsewhere), or that whatever one gets from the courts won't compensate for the costs, difficulties, delays and even dangers of getting it. And other systems, not always co-operative with the law, come into play. Finally, even after the legal messages have been sent, and not diverted, occluded or misdirected, there are still the receivers, who are nowhere a single entity or homogeneous group but plural, different, self-and-other-directed, within numerous, often distinct, sometimes and in some respects overlapping, 'semi-autonomous' groups which affect them, often deeply. Law 'means' different things to different 'communities of interpreters', especially since for most of them interpretation of law is not their major interest.

The extent to which citizens are able and willing to use and to rely upon legal

³³ See Hendley et al, 'Debate: Demand for Law.'

³⁴ See his 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,' (1981) 19 *Journal of Legal Pluralism*, 1-47. As Galanter observes, "[t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been 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 20).

³⁵ For a classic statement of these points, see Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', in *Law as Process*, Routledge and Kegan Paul, London, 1978, 54-81.

institutions to protect and advance their interests varies, again within and between societies and over time. In many times and places, citizens are willing to use the law but excluded from access to it. In others, including contemporary Russia, it appears that they are unwilling to make much use even of laws they could use. In yet others, such as the United States, many citizens, perhaps too many, are both willing and able. We know a bit about how to affect the supply of law, but we know a good deal less than we might about how to affect demand for it.

Law never means everything in people's lives, and it rarely means nothing either. But to speak sensibly of the rule of law as a significant element in the life of a society, the law's norms must be socially *normative*. If people know nothing of the law, or knowing something think nothing of it, or think of it but don't take it seriously, or even, taking it seriously don't know what to do about it, then their lives will not be enriched by the rule of law (though if it applies to governments they might still be partly protected by it). As to how such normativity might be generated, we have few universal prescriptions worth offering.

4. Means

We have, then, few recipes for producing the legal normativity in a society on which the rule of law depends. Its ingredients vary, some don't travel well, some turn out on arrival to depend upon others which were not noticed at home let alone packed, resources and equipment in some places are more welcoming than in others. And that is not even to mention *tastes*, which everyone knows are beyond discussion. And if this is all true of the conditions that legal orders need to satisfy to be rule of law legal orders, it is much more so of the particular institutions and practices that might satisfy such conditions. Here the variety is enormous. This is true both in a positive sense: there are many ways in which comparable achievements can be arranged;³⁶ and negatively: the same institutional arrangements work differently,³⁷ and some don't work at all, in different places.

This has been vivid in the experience of countries that have embarked upon hoped-for 'transitions' to the rule of law. Like Thompson, dissidents knew what they wanted from the rule of law – above all a curb on arbitrary power. They knew less how to get it, though they fancied that it existed in 'normal countries' of the West. That led to initial optimism that it could be directly imported by constructing institutions modelled on those of the West. That optimism has proved excessive, though it is not altogether and everywhere misplaced.

³⁶ See Philip Selznick, 'Legal Cultures and the Rule of Law', in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism*, Ashgate, Aldershot, 21-38.

³⁷ See for example, András Sajó's observation, based on experience in post-communist Europe, particularly Hungary: 'Where the cabinet is endowed with its own anti-corruption police, that police will investigate those whom the majority in the cabinet dislike. The rule of law will be stabbed in the back by a partisan and arbitrary knife, although the use of that knife was originally authorized to protect the rule of law.' 'Corruption, Clientelism, and the Future of the Constitutional State in Eastern Europe', , Spring 1998) 7, 2 *East European Constitutional Review* 46.

On the one hand, ideals of the rule of law have been better served in some nations and by some institutions than others. Institutional possibilities are not infinite, institutions have consequences, different institutions have different consequences, learning can and does occur, and you have to start somewhere. So it would be absurd to ignore what Dewey called the ‘funded experience’ of generations, among them truisms that have proved valuable again and again. One of these is that only power can tame power.

Some arrangements have been learnt to work well in many contexts; others less so or only in some contexts. One is often warranted in starting with presumptions in favour of institutional models which have worked elsewhere. On the other hand, one should be wary of too swiftly converting presumptions into prescriptions, particularly prescriptions that are highly specific, let alone that hold out particular institutions as universal models to be emulated. When that occurs without answers to deeper questions about conditions and possibilities of institutional transplantation, about how to mesh with (and yet transform) local institutions, expectations, social interests, and history, frustration will threaten even – perhaps especially – the best-laid plans, and transitional societies will be the unhappy beneficiaries of uncontextualised, and commonly unsuccessful, offerings and borrowings.

Here it is important to keep the point(s) of the rule of law in mind. Rather than conclude from institutional variety that new contexts are ‘*sui generis*’³⁸ (as all contexts are in part but not completely), pursuit of the rule of law requires reflection in particular contexts on how some generally valuable goods might be achieved. That is an urgent problem in some contexts, and one which might seem to be unprecedented in many. However, while in particular details it might be, the *sort* of problem it is is not too often likely to be unique. Rather, as Lon Fuller has observed, law is ‘purposive activity attended by certain difficulties that it must surmount if it is to succeed in attaining its ends.’³⁹ The difficulties will vary, and so too will the best ways to meet them. Wherever you are, the rule of law should be approached with a combination of its *point(s)* in mind, acquaintance with various attempts to ground and institutionalize such ends, *together with* a great deal of reflected-upon local knowledge. What needs to be avoided is the Scylla of abstract universalism which has no understanding of the significance, and variable significances, of particular contexts and the Charybdis of a ‘po-mo’ relativism, for which context is all. The former often generates ‘off-the-shelf blueprint’⁴⁰ approaches to the rule of law; the latter, sometimes in justified but unfortunately symmetrical reaction against excessive faith in blueprints, threatens to sever the moorings of the rule of law in the human condition and more general human purposes. That is why I have been recommending that ‘in this, as in many other contexts, we should resist pressure to *choose* between universal and particular. Rather we should ask how best they might be combined, to relieve both the abstraction that commonly goes with the former and the solipsistic idiosyncrasy that can flow from excessive devotion to the latter.’⁴¹ In principle, I still believe that should be attempted.

³⁸ Cf. Ruti Teitel, *Transitional Justice*, New York, Oxford University Press, *passim*.

³⁹ *The Morality of Law*, 117.

⁴⁰ Wade Jacoby, ‘Priest and Penitent: The European Union as a force in the Domestic Politics of Eastern Europe,’ (Winter/Spring 1999) 8,2 *East European Constitutional Review* 62.

⁴¹ ‘Transitional Questions about the Rule of Law’, 3.

5. Antipodean Antinomies

And yet even this compromise is too neat. Doubts and perplexities remain. I have been moved to them by the Australian experience, so let me close with it.⁴² In relation to the rule of law it is at the same time exemplary and fraught, and thus another example, though this time not a uniformly happy one, of dichotomies that resist easy choice.

In January 1788, Governor Arthur Philip landed in Sydney with 9 officials, 212 marines, 759 convicts and all the laws of England that were ‘applicable to their own situation and condition of any infant colony’.⁴³ The aim was to establish a penal colony for convicts who could no longer be transported to America. Thus began what by most criteria and for most inhabitants has been a remarkably successful and long-lived transition to democracy and the rule of law.

The experiment was paradoxical, or two-faced, from the start, however, and it is worth emphasizing both faces, since one or other is often ignored and they are rarely confronted with each other. The first is that, along with the convicts and in relation to them, the settlers brought not just law but the rule of law. Indeed, it sometimes appears that they brought more of the rule of law than of the law itself. For there were all sorts of legal peculiarities in the colony. After all, the first white settlers did not go there for a holiday, nor did they get one when they arrived. Early New South Wales was all very strange, and it was not a pleasant or easy place to be. Apart from the harshness of everyday life there was ‘one fact that everyone in the colony knew, both convict and free: convicts were sent there as a punishment.’⁴⁴ In accordance with that fundamental fact and purpose, the nascent penal colony had no representative political institutions, no jury trials, almost no lawyers (except for some convicts), a dominant military presence, and governors whose formal powers were great and whose practical autonomy, in this wilderness at the end of the world, was even greater. It almost did not have courts. That was not intended until as late as November 1786, when Lord Sydney, the British Home Secretary ‘seems to have decided that too much was being left to chance’.⁴⁵ Fifty years later, however, while the majority of its population was still convict or ex-convict, it was a free society, with considerable legal protection against arbitrary power, and a representative legislature. There is no evidence that the British government planned it that way. Nor was the result inevitable. Nevertheless the transformation occurred, and most Australians are its beneficiaries. Why that happened is a matter of more than local or antiquarian interest.

⁴² Here I draw on my ‘The Grammar of Colonial Legality: Subjects, Objects and the Rule of Law,’ in Geoffrey Brennan and Francis G. Castles, eds., *Australia Reshaped. Essays on 200 Years of Institutional Transformation*, Cambridge, Cambridge University Press, 2002, 220-60.

⁴³ Blackstone, *Commentaries on the Laws of England*, 18th edition, Book 1, 111.

⁴⁴ David Neal, *The Rule of Law in a Penal Colony*, Cambridge, Cambridge University Press, 1991, 45-46. Neal’s book is the major source of my argument here. See also Alan Atkinson, *The Europeans in Australia. A History*, volume one: *the Beginning*, Oxford University Press, Melbourne, 1997; John Braithwaite, ‘Crime in a Convict Republic’, (January 2001) 64 *The Modern Law Review*, 11-50; John Hirst, *Convict Society and its Enemies*, Allen and Unwin, Sydney, 1983. John Hirst, ‘The Australian Experience. The Convict Colony,’ in Norval Morris and David J. Rothman, eds., *The Oxford History of the Prison*, New York, Oxford University Press, 1995.

⁴⁵ Atkinson, *The Europeans in Australia*, 89.

There are, needless to say, many reasons for these changes. But one of the central reasons that New South Wales became a free society, as David Neal has argued, has to do with law, in a very special sense. His argument is that it was not just convicts who were transported, but particular ideas and ideals about law. What transformed Australia from penal colony to free society was what the convicts carried from Britain in their heads, ‘as part of their cultural baggage.’ Central to that cultural baggage was belief in the rule of law, belief that the law should and could matter, that it should be respected by their rulers and that it should and could form the basis of challenge to these rulers. ‘A cluster of ideas known as the rule of law provided the major institutions, arguments, vocabulary and symbols with which the convicts forged the transformation.’⁴⁶ Convicts fought battles for status and recognition in terms of their entitlements under the law, believed in the rule of law, insisted that the authorities should respect it, demanded rights that they believed flowed from it. A great deal flowed from these beliefs. In the term used in this essay, the *scope* of the law reached both high and low, to the Governor and to the convicts; convicts knew and insisted upon that; they were rather liberally granted legal rights; and they made use of them, often to good effect. When they won, it was because their opponents’ hands were tied. They too, after all, had the same baggage in their heads. And even where they didn’t, the courts did, insisting on their independence under British law, and the subordination of the apparently autocratic governors to that same law.

A striking feature underpinning this story, for all its brutality, corruption, and harshness, is that convicts were conceived not only as ‘British subjects’, as they were in law, but ‘subjects’ in a much more robust sense of the word. There were things that could not be done to them, facilities that must be afforded to them, demands that they could make, and which were listened to. They could *use* the law, not merely suffer it. They would undoubtedly have preferred not to be convicts, and they were often treated extremely harshly, but they could not complain that they were systematically treated in ways that denied their humanity or personhood.

All the more striking, then, is what happened at the hands of the same people, thinking the same thoughts, wielding the same law, to the indigenous inhabitants of Australia. For white settlers were never on their own here. Though their jurisprudence denied it, and treated Australia as *terra nullius*, in fact there were scores (maybe hundreds) of thousands of people and several hundred Aboriginal societies here when whites arrived. Yet the same processes that installed English law and the rule of law in a penal colony led to the wholesale dispossession of those people and decimation of their societies.

The plight of Australia’s indigenes was so overdetermined that it is difficult to estimate the role of law in it, but it has surely been considerable. That of itself does not necessarily implicate the rule of law. We know that many legal systems are not rule-of-law systems, and that law itself is compatible with great iniquity. We know too of what Ernst Fraenkel called a ‘Dual State’, dual for it includes both a ‘normative’ and a ‘prerogative’ component.⁴⁷ Nazi Germany was his example, apartheid South Africa

⁴⁶ Neal, *Rule of Law in a Penal Colony*, 62.

⁴⁷ *The Dual State*, trans. E.A. Shils, *et al*, Oxford University Press, New York, 1941, xiii .

might be another, arguably some moments in Australian colonial (and other colonial) history also had a dual character. And so an easy way to exculpate the rule of law from this terrible story is to deny that it was tried: the Aborigines were simply denied it. And for at least the first half of the nineteenth century that was true. For much of that time, whatever the motives of governors, their means were inadequate to prevent what was going on at the frontiers, and what was going on was at times terrible. As Hobbes understood, protection from arbitrariness requires a government with a monopoly over the imposition of force, and in the early years of settlement in New South Wales there was no such government much beyond the limits of Sydney. Thus on the relentlessly expanding frontier, restrictions on the use of force by settlers (and natives) were not enforced, and given the nature of white settlement could not have been. Settlers were often isolated, frightened⁴⁸ and, in the nature of things, on the make. And what they were intent on making, pastoral success, involved them in taking Aborigines' land, water holes, killing their game as pests, killing them, too, for a variety of reasons. This is precisely the sort of situation Hobbes envisaged, and that stems from a truth often enough manifested and noted: *homo homini lupus*. Often nothing more high falutin' is necessary to explain it. In the nineteenth century, not always but often, it was as basic and shabby as that. Sometimes it was better, and not infrequently it was worse, helped along as it was by the weakness of restraints on the frontier, the superior power of the settlers, the fact that real interests were at stake, and beliefs that Aborigines were barbarian, not quite human, anyway nothing like us, and, by the late nineteenth century, doomed to die out.

By the middle of the century, however, the newly emerged colonies of Australia had won self-government and a measure of control. Sometimes, and particularly in Queensland, that was used for murderous purposes against Aborigines. More commonly, Aborigines came to be defined (on the basis of variable and often inconsistent classifications based on race) and dealt with under comprehensive special-purpose legislation that appointed 'Protectors' with discretionary and unappealable powers over the minutest details of the lives of 'aboriginal natives'. Legally the latter had virtually nothing to protect them against the comprehensive powers of such men. That was true whether one interprets the purposes of such legislation as being for the sake of whites or of the Aborigines themselves. It was a thoroughgoing denial of the rule of law, sometimes imposed with the very best will in the world.

While this sad history suggests the rule of law was not applied to Aborigines, none of it necessarily makes the normative appeal or reach of the rule of law any less general. One could always say: if only the rule of law *had* been applied. And in many respects it would have been better if the government had been willing and when willing able to insist on the rule of law in encounters between whites and Aborigines, as plaintive Imperial directives kept demanding. At least there would have been restraint on power, some protection from fear, if the most powerful actors had been required to stay within legal bounds. However, what of facilitation of co-operative encounters? By the 1830s, the official interpretation was settled and clear: Aborigines were British subjects, in principle protected by and able to make use of British law. However, if it is hard to see how

⁴⁸ The significance of fear in the frontier setting is emphasised by Henry Reynolds in *Frontier*, Allen and Unwin, Sydney, 1996, 9-31, 44-50.

Aborigines were or could have been protected by law in the circumstances I have sketched, it is even less clear how they could make use of it.

In the first stages of contact, this was not primarily or even significantly a result of the character of the formal law. With a few exceptions, law had yet to be devised specifically for Aborigines. The 'law in the books' was generally that which applied to convicts. But contact brought out, in the most dramatic and extreme forms, the depth of those truisms of sociology of law that stress the distance between 'law in books' and 'law in action', or between official law and what Ehrlich and Petrażycki, respectively, call 'living' or 'intuitive' law. Those distances exist in every society, however familiar and obedient to positive law. But some societies are not at all familiar with it, and among those who are, not all are obedient. In this connection, I would repeat the following observation, born of reflection on eastern Europe, which is even more dramatically applicable of the Aboriginal experience:

for the rule of law to *count*, rather than simply to be announced or decreed, people must *care* about what the law says - the rules themselves must be taken seriously, and the institutions must come to matter. They must enter into the psychological economy of everyday life - to bear both on calculations of likely official responses *and* on those many circumstances in which one's actions are very unlikely to come to any officials' attention at all. They must mesh with, rather than contradict or be irrelevant to the 'intuitive law' of which Leon Petrażycki wrote, in terms of which people think about and organize their everyday lives. None of this can be simply decreed.⁴⁹

Whatever the formal law was like, Aborigines did not and for a long time could not know it, or understand it. If Poles under Russian or Prussian or Austro-Hungarian rule throughout the nineteenth century, or under communism in the twentieth, took the law to be alien and imposed, were reluctant to enlist the legal system and not much used to doing so, then early nineteenth century Aborigines, assailed with the finest fruits of the common law tradition, were astronomically less well placed. And how could it have been otherwise? As Paul Hasluck, onetime historian and later Minister for Aboriginal Affairs, comments:

These new British subjects did not know British law and they did not believe it was a good law, and even if they had known and believed, their situation and condition meant that the law was not accessible to them and that they were not amenable to it. They knew nothing of the process of sworn complaint, warrant, arrest, committal for trial, challenging the jury, pleading, legal defence, recovery of costs, suit for damages, summons for assault, evidence on oath, and so on. Those living in the bush did not know that it was wrong to resist arrest or hinder a policeman in the execution of his duty and they also frequently refused to stop when called upon to do so.⁵⁰

⁴⁹ 'Institutional Optimism, Cultural Pessimism, and the Rule of Law, in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism*, Dartmouth/Ashgate, 1999, 89-90.

⁵⁰ Paul Hasluck, *Black Australians*, Melbourne, Melbourne University Press, 1970 (first published 1942), 123.

The notion in such circumstances of Aborigines *using* the law makes little sense. That is dramatically true of criminal law, where the process was in the hands of whites, and it was even more true of civil law. For, as Hasluck reminds us, ‘in any civil relation ... the move for redressing injury or maintaining a right rests with the wronged person’.⁵¹ It takes a great deal to imagine crowds of avid Aboriginal litigants in the early years of settlement. Still less the far more important service that the rule of law is supposed to provide in informing and supporting the relations of citizens who never go to court but act on understandings of the law in countless routine individual acts, accidents and forms of co-operation in daily life. None of this ‘tacit knowledge’ was or could quickly be available to the Aborigines upon which the penal colony had been inflicted. In the long meantime, at so many levels in so many ways, British law contradicted exactly that ‘living’, ‘intuitive’ law that legal sociology has shown to be fundamental to people’s ordinary lives, and to the structures, roles, culture, and expectations that underpin them.

The rule of law, then, presupposes a lot to be effective and a lot to be good. In early contact with Aboriginal society its presuppositions did not exist even where the will to adhere to it did. And as we have seen that often did not exist either. Most unsettling for my argument is that it is hard to see how a will more concerned to bring the rule of law could have done much to alter the tragedy that became the Aboriginal story in my country, and it is not clear that the entry of European law into Aboriginal societies could be said by anyone to be an ‘unqualified human good.’ Indeed, in the context I have described, and even more in the light of the relative impotence of the imposed law for much of the century, the rule of law more likely served as what some of Thompson’s critics have taken it more generally to be. It justified, mythologised, and may well have blinded the perpetrators to the horror of relationships of domination and exploitation out of which, systematically and unavoidably, there could be only one set of winners.

Today several of the milestones in the struggle of Aborigines for recognition and improvement of their condition have issued from the law and the depth of the rule of law in Australia. That is no small matter, but fearful damage has already been done, much of it according to law, and most of it, of course, law cannot undo. Perhaps all that can be said is that if invaders have to come, it is better when they bring the rule of law with them. But it is not always obviously that much better.

So my reflections on the rule of law end on a sombre note. It still seems to me a ‘cultural achievement of universal significance,’ if only because the sources of threat and confusion throughout the world are so pervasive that a life without the rule of law, virtually anywhere today, is likely to be worse than a life with it. And in most cases, very much worse. But what ‘it’ will turn out to be in any particular case is best known, perhaps only known, after the event, and, as the Aboriginal experience with one of the great purveyors of that achievement suggests, as human goods go it is at times somewhat qualified.

⁵¹ *Ibid.*, 147-48.

