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What's the Point of the Rule of Law?

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'Domination is resilient because it is always captured by the most powerful forces in a society, be they forces of state or private power or the military-industrial complex.

Power therefore must be tempered every which way'.

—John Braithwaite, 'Hybrid politics for justice,' 25.

'Tempering power' is not a new or unusual phrase but it attracts little investment, carries little freight, and at least under that name is not (yet!) an academic subject. By contrast, "the rule of law" draws multi-billion dollar investments,¹ is overladen with ideological and theoretical baggage, and is now a subject in many fields, among them: law, philosophy, political science, and economics. Its surge to

† This paper had its origins in my unpublished 2017 Dennis Leslie Mahoney Prize Lecture, 'Re-Imagining the Rule of Law' delivered to the Julius Stone Institute of Jurisprudence, University of Sydney Law School, September 7, 2017. It came to take its present form at the Baldy Center's 40th Annual Conference, 'Tempering Power,' on November 9–10, 2018, and was tweaked in presentations at the Law Schools of the universities of Wrocław and Kraków, the Archiwum Osiatynskiego, Warsaw, and the Albert Hirschman Center on Democracy, The Graduate Institute, Geneva. I am grateful to participants in all those events, and particularly to my commentator at the Baldy Center, Guyora Binder, and to John Braithwaite, with whom I had numerous conversations on common themes over the years, and particularly in the months after the Baldy conference.

1. A 2010 estimate was 2.7 billion USD per year. See Ronald Janse, *A Turn to Legal Pluralism in Rule of Law Promotion*, 2013 ERASMUS L. REV. 181, 182.

prominence is recent but unmistakable, indeed unavoidable.

Over the last thirty years, as virtually every article on the rule of law begins by noting, it has come to be invoked pretty well everywhere.² Once a phrase that only lawyers used with confidence, whether misplaced or not, now everyone is on to it. So much so that, whereas “tempering power” has a vocal constituency of two (Braithwaite, Krygier), the rule of law has come to join those elevated – “iconic” I guess we’d say today - terms whose contrary has virtually no voice at all. Like democracy, equality, liberty, and justice, it is much abused in practice, but rarely by name.

It wasn’t always so, but nowadays the most unlikely regimes have come to claim to be honoring the rule of law, however implausible their boasts might be. Sinister talk of “the rule of law with Chinese characteristics” or in Vietnam with “socialist characteristics” shows the lingering power of the phrase. And hear Robert Mugabe explain that “[o]nly a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law.”³

Governments apart, the rule of law has become a cliché of choice among international organisations of every kind. At a global development conference ten years ago, I heard a senior development economist announce that “it’s the law stupid,”⁴ perhaps to the consternation of some of his peers who thought it was still the economy. There seems no end in sight to the money spent on rule of law promotion, notwithstanding a less than glorious record of success. Once,

2. Indeed, that is true of every article I have written on the subject as well. See Martin Krygier, *The Rule of Law after the Short Twentieth Century: Launching a Global Career*, in *LAW, SOCIETY AND COMMUNITY: ESSAYS IN HONOUR OF ROGER COTTERRELL* 327 *passim* (Richard Nobles & David Schiff eds., 2014).

3. B. Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 2 (2004).

4. Ninth Annual Global Development Network Conference (Jan. 27– Feb. 2, 2008).

the rule of law was not something that anyone but lawyers spoke of, still less wasted money on; now all sorts of folks are eager to do both. Economists recommend it as necessary for economic development; democrats as integral to their projects; constitutionalists as another name for the business they are in; those who essay to repair “failed,” “post-conflict,” “post-dictatorial,” and “transitional” states carry rule of law promotional toolkits into the field. A bunch of outfits – the World Justice Project, the Heritage Foundation, Freedom House, the World Bank, the United Nations and others, have developed “rule of law indicators,” which claim to assess the state of the rule of law around the globe. The indicators differ from outfit to outfit and what they actually tell us about the rule of law rather than about the agendas of those who purport to measure it is unclear,⁵ but they’re everywhere.

Today, however, while what I have just said remains true, we might be entering a new phase. The rule of law is being assaulted in fact if not by name, by new foes in new ways, many of them apparently lawful: the rule of law is subverted, ostensibly according to the rules. Recent developments in Poland, Hungary, and elsewhere have raised disturbing questions about the conditions and nature of the rule of law and of threats to it. Partisans of the ideals of the rule of law are called on not merely to praise those ideals, or promote them, but defend them against determined attack. And as the magnetic post-communist appeal of liberal-democracy (“the end of history”) appears to be eroding in many parts of the globe, there may well come to be a backlash against rule of law promotion wherever that chafes or falters; and it chafes and falters often and in many places.

I come to praise the rule of law, not to bury it. Yet that is not an unproblematic task. While the idea is too important to reject or ignore, as thrown around in contemporary

5. See Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. & SOC. INQUIRY 100–137 (2017).

discussions, it is too confused and confusing to guide. If it is to be revived, it needs to be re-imagined. What follows is an attempt at such re-imagining. The first two sections identify and criticise some common underlying features of conventional accounts of the rule of law: Part I characterises elements that those features share, and Part II outlines six reasons not to start, still less to end, with them. The rest of the paper develops an alternative account. Part III suggests that we do better to start with consideration of the point, the *telos* of the rule of law, rather than with enumeration of purported elements, the anatomy of it. Since the rule of law is typically seen as a response to a problem, often described as arbitrary power, Part IV attempts to say what sort of a problem that is and why it has so often been regarded as problematic. Part V considers existing accounts of the character of a *solution* to that problem, and Part VI seeks to explain why the metaphor of tempering power well captures some of the character of such a solution. That I take to be the appropriate animating ideal for the rule of law. Part VII sketches some expansive implications of that ideal. It suggests that it should be understood as an inherently social and political ideal, not merely an ideal for law.

I. WHAT ARE WE TALKING ABOUT?

It is old wisdom (Miles's law) that where people stand depends on where they sit. With the rule of law, what they "under-stand" it to be seems to follow a similar rule. Lawyers sit in law offices, legal academics in law schools, judges in courts, and legal philosophers spend their sitting time reading lawyers, legal academics, judges, and other legal philosophers. That is as it should be, but its effects on how the rule of law has come to be understood by its new and wider audience are not always salutary.

For lawyers, sitting where they do, the rule of law is a virtue of the law. The rule of law—to the extent it is manifest—inheres in a state's legal order, with its official agencies, rules, procedures, practices and outputs. Typically

that's where lawyers start and almost as often it's where they stay.

So, in the case of the rule of law, even though lawyers, legal philosophers, rule of law promoters, and others differ greatly over specifics, underlying their differences is an assumption so shared, so assumed that it is never explicitly discussed, namely that the phrase speaks of virtues *internal* to the state's legal apparatus and ways of doing things. It has to do above all with the character of official legal institutions, rules and practices, features taken to be necessary for a legal order to be in good shape, to accord with the rule of law. There are many such accounts, but they all have in common this centering of the state of legislatures and courts, the character of the rules they make and apply, the behaviour of the legally authorised agencies that enforce them. Differences among lawyers' accounts are about what sub-categorisations of that official legal complex are key.

Thus, the most influential Anglo lawyers' account, that of A.V. Dicey, focuses on the distinctive role of the courts (and also administrators) in common law countries, the only ones he concedes to be blessed with this asset. Different in detail but the same in domain, one of the most influential contemporary philosophical accounts, that advanced by Lon Fuller of Harvard and developed by Joseph Raz of Oxford (and before them both, by Jeremy Bentham),⁶ focuses primarily on the formal character of legal rules, on aspects of legal craftsmanship—publicity, clarity, non-contradiction, prospectivity, coherence, etc.—that might make law predictable and allow the law to guide citizens and to treat them with respect (a point taken further by Jeremy Waldron, who focuses on procedures courts should offer anyone brought before them).⁷ Morally ambitious, “thick” theories,

6. Timothy Endicott, *Arbitrariness* 5 (U. Oxford Legal Res. Paper Series, Working Paper No. 2/2014, 2014) (discussing works by Jeremy Bentham).

7. Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 3-31 (N.Y.U. Pub. L. & Legal Theory Res. Paper Series, Paper No. 10-73, 2010).

such as Ronald Dworkin's or Lord Bingham's, do differ from "thin" accounts that speak just of institutions and rules in their concern with the moral *content* of legal rules and judgments, but not in *where* they expect the rule of law to be found, where its sources lie.

There are plenty of sub-variants of these accounts, and alternatives as well to choose from, but they all start from the shared assumptions discussed above. Indeed, as Jeremy Waldron wryly observes, "There is a tradition of trying to capture the essence of the Rule of Law in a laundry list of principles: Dicey had three, John Rawls four, Cass Sunstein came up with seven, Lon Fuller had eight, Joseph Raz eight, John Finnis eight, Lord Bingham eight in his excellent book on *The Rule of Law*. (I don't know why eight is the magic number: but it's a slightly different eight in each case); Robert Summers holds the record, I think, with eighteen Rule of Law principles."⁸ (Bentham had seven, very similar to the eight of Fuller and Raz). Undaunted, Waldron adds yet another list (ten principles) which while differing in important detail and moral rationale, shares, as I have argued elsewhere, exactly the same underlying assumption.⁹

Not only lawyers think this way. For obvious reasons, their views and accounts have disproportionate influence. After all it's the rule of *law* we're talking about, so many people take it to be obvious that law must take the lead, that the rule of law has to do with the characteristics of official legal institutions etc., and that lawyers, as the experts in that domain, are the ones from whom lay people should take their cues. Moreover, once the rule of law became something to be "built" by the deliberate concentrated efforts of an industry of RoL (Rule of Law) promoters in countries that never had it or have been denied it or where it is judged to

8. Jeremy Waldron, *Thoughtfulness and the Rule of Law* 3 (N.Y.U. Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 11-13, 2011).

9. Martin Krygier, *Legal Pluralism and the Rule of Law*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 294 *passim* (Nicole Roughan & Andrew Halpin eds., 2017); Waldron, *supra* note 7 at 3-31.

be in poor shape, the obvious source of enlightenment has seemed to be the experts. And they beget the new industry of promoter-experts.

I don't propose to add to these lists. There are so many available—"the rule of law is a, b, c; or x, y, z"—they can't all be right. More important, if you want to know which if any account ultimately to prefer then, quite apart from the details of any particular one, it seems to me a deep mistake to start as they all do, by specifying purported legal institutional components or even their required moral content. My reasons for this belief are both practical and conceptual. I start with practice and in Parts III to VI move to concepts.

II. AGAINST RECIPES

Examined more closely, the assumption shared by the various accounts I have mentioned, and those many influenced by them and engaging with them, has two core elements. One is that we are in a position to stipulate in terms that apply generally and often in detail, what institutions, rules, and procedures add up to or will deliver the rule of law. The other is that these ingredients are to be found in the activities and products of the formal legal institutions of states. "Ingredients" is a good word here, for these accounts so often read like institutional recipes for a somewhat elusive feast. I don't think we should rely on, still less start from, such recipes for at least six reasons.

First, legal and institutional forms often vary more and change more rapidly than certain perennial social and political problems which the rule of law has been invoked to deal with. Second, and conversely, many new problems arise for which old prescriptions have little helpful to offer. Third, much effort to cook up the rule of law by following established legalistic recipes is spectacularly and predictably ineffective. Fourth, and one reason for ineffectiveness, conventional accounts pay very little attention to the complex nature of social causality in conventional accounts.

Often the usual lawyers' suspects aren't where many of the problems the rule of law is hoped to alleviate occur, nor are conventional legal ingredients always likely solutions, and even when they are, they depend on social realities and forces that central legal agencies only ever partially control. Fifth, the very legal forms chosen and crafted to generate the rule of law can be complicit, indeed helpful, in its abuse. And sixth, if you want to explain to non-lawyers why any of this matters, they are unlikely to follow your explications of institutional detail, controversies about legality and constitutionality and so on, or at least they are unlikely to follow you very far without asking: *but what's the point?* That seems to me a very good question to ask. Taking these challenges to legal laundry lists (or recipe books; take your pick: are they adequate to keep you clean, or well fed?) in turn:

First, institutional variety. Institutions change and differ. They do so over time and from place to place. The institutions that occurred to Aristotle to distinguish "the rule of law" from "that of any individual" were not those specified in Magna Carta; those had little in common with the ones that drew Montesquieu; what he lit upon was different from Dicey's homegrown selection; these from Hayek's; those from Oakeshott's; his from Fuller's; his (though not so much) from Raz's; any of theirs from Waldron's; his from those chosen by rule of law indexers; theirs from each other.

Not only do such institutions and practices differ; they are bound to since the circumstances in which they operate, the problems they are called upon to deal with, their capacities, the institutional practices, conventions, traditions and options from which they draw, differ hugely over time and place.¹⁰ They are affected, too, by vast differences and changes—cultural, religious, demographic,

10. See Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1072–78 (2008).

economic, and technological—between societies, within them, and over time. The modern state thinks differently from other states, for example, and does different things in different ways. Different things are thinkable and much is doable and done by states, for better and worse, that has never been done or doable before. So even if your concern is with one very old problem, for example, arbitrary power, specific ways of dealing it are unlikely to be those recommended by Aristotle.

Second, new problems. Among the things that have varied and changed dramatically over time and place are specific kinds and sources of challenge to the rule of law, and what might be effective responses to them. This was always true, and it is arguably never more true than today when so much that impinges on huge populations changes so fast, and in so many unpredictable ways, that much of it is likely to elude traditional institutional devices and practices. I mention only two examples I barely understand: bitcoin and Facebook. There will be many more. So a search for an identikit package of institutions and practices to deal with emerging problems will often not take us far, or far back.

Third, ineffectual promotion. These first two facts are often overlooked by rule of law promotion programs, replete as they are with costly, prolonged, and labour-intensive endeavours to transplant particular features of legal, state, institutions, forms, conventions, practices—that are supposed to secure what we take to be the rule of law in First World countries thought to have it, and that are then ‘installed’ in, usually other world, countries thought to need it. These endeavors have been rightly accused of, sorry for the fancy language, “isomorphic mimicry . . . adopting the camouflage of organisational forms that are successful elsewhere to hide their actual dysfunction.” As these authors point out of much development assistance more generally, rule of law promotion “conflates[] . . . form and function . . . one of the most ubiquitous but pernicious mistakes of development policy over the last sixty years, and is manifest

most clearly in widespread implementation failure.”¹¹ Institutions and rules are shipped or copied, but the outcomes expected do not eventuate. Does one then have the rule of law because the institutions appear to be in place, or lack it because nothing works as it should?

Should we say we have achieved the rule of law when we have built courts, installed computers, and trained judges, but no one visits them and, more important, they have little effect on what goes on in the wider society?¹² Or what should we conclude when the efforts of so-called rule of law or human rights-focused law reformers to train judges and build courthouses in Sudan, to enlist and reform the law in the service of the poor, turn out not to do much of that but rather legitimise the power of a dictatorship that is “already accustomed to using any available legal tools and resources for political gain?”¹³ Have they installed the rule of law, or have they simply issued their best guess about what might serve rule of law values, which turns out not to? Or has what they have done got anything to do with the rule of law at all? These examples can readily be multiplied.

When legal institutional tinkering fails to prevent havoc, when people who count ignore the law and those who don't merely suffer it, the rule of law is in very poor shape if it exists at all, whatever the laws look like, and commonly that should not have been a surprise. On their own, the legal institutional features so often identified with the rule of law are not up to the task. Indeed, on their own they never are, but always need supporting circumstances, social and political structures and cultural supports, which are not always available and are difficult to engineer.

11. Lant Pritchett et al., *Capability Traps? The Mechanisms of Persistent Implementation Failure* 2 (Ctr. for Glob. Dev., Working Paper No. 234, 2010).

12. *See generally* THE RULE OF LAW IN AFGHANISTAN (Whit Mason ed., 2011).

13. MARK FATHI MASSOUD, LAW'S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN 206 (2013).

Fourth, causality: social, crucial, and complicated.

We should not be surprised that rule of law promotion is often disappointing. It is intrinsically hard, and it doesn't help that we are often looking in the wrong way at the wrong things.

I have already mentioned the banal truth that lawyers take the rule of law to be all about law. In numerous writings,¹⁴ I have also sought to recall what should also be treated as banal, but is not often a matter of reflection in writings about the rule of law, what might be called the social face or dimension of the rule of law. Many of the major threats to rule of law values come from beyond the state—think Facebook and Al Q'aida; many responses to such threats will also need to be found outside the state and its laws—think media and civil society; and even where the state and law are important or relevant, their significance depends on complex chains of social causality, including the presence, absence, power, character, of social agencies and currents that the law can never completely control. In some circumstances, such agents and media of social causality support the efforts of state law; in others they undermine it; in many places both support and undermining take place. The tunnel vision of rule of law legalism is not terribly illuminating here.

Fifth, institutional complicity. In recent years new concepts have entered the lexicon of observers of constitutional politics, among them “abusive constitutionalism,” “stealth constitutionalism,” and “constitutional coups.”¹⁵ The lexicon develops to try to

14. Most recently, Krygier, *supra passim* note 9; Martin Krygier, *The Rule of Law and State Legitimacy*, in LEGITIMACY: THE STATE AND BEYOND 106 *passim* (Wojciech Sadurski et al. eds., 2019).

15. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 *passim* (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 *passim* (2018); Kim Lane Scheppele, *Constitutional Coups in EU Law*, in CONSTITUTIONALISM AND THE RULE OF LAW 446 *passim* (Maurice Adams et al. eds., 2017); Grażyna Skapska, *Znieważający Konstytucjonalizm i Konstytucjonalizm Znieważony: Refleksja Socjologiczna na Temat Kryzysu Liberalno-*

capture some distinctive ways many modern authoritarian regimes use law to undermine rule of law values. Thus, the American scholar, David Landau, presciently analysed what he termed “abusive constitutionalism.” Old-style authoritarians often staged coups, but that has become considerably less fashionable, and instead has often been replaced by a:

rash of recent incidents in a diverse group of countries such as Hungary, Egypt, and Venezuela [that have] shown that the tools of constitutional amendment and replacement can be used by would-be autocrats to undermine democracy with relative ease. Since military coups and other blatant ruptures in the constitutional order have fallen out of favor, actors instead rework the constitutional order with subtle changes in order to make themselves difficult to dislodge and to disable or pack courts and other accountability institutions. The resulting regimes continue to have elections and are not fully authoritarian, but they are significantly less democratic than they were previously.¹⁶

Landau’s article appeared in 2013, and the rash has not stopped spreading. Add Turkey and Poland to the list; the USA is being tested as we speak. Legal institutions and others are taken over and/or rendered supine by an authoritarian government, in deliberate and comprehensive violation of the rule of law, though often with the aid of the existing law. This is not the first time that people need to be reminded of the distinction, and often distance, between the existence of any particular legal institutions, on the one hand, and closeness to the ideal of the rule of law, on the other.

The problem of bending often well-intentioned institutions to ill-intentioned interests extends beyond populist politicians. As John Braithwaite has shown, powerful interests, whether political, economic, military, or social, often have the resources and can hire the skills to

Demokratycznego Konstytucjonalizmu w Europie Północno-Wschodniej, 7 FILOZOFIA PUBLICZNA I EDUKACJA DEMOKRATYCZNA 276 *passim* (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 *passim* (2015).

16. Landau, *supra passim* note 15.

“game” systems of rule, particularly in complex circumstances where instability is common and the stakes are high, if the legal order insists on legalistic punctiliousness and does not allow exploration of the purposes and principles that underlie the rules.¹⁷ Indeed, an implication of his argument is that it is possible that in circumstances of complexity, stability, and high stakes, legal rules closest to fashionable formal laundry lists are particularly open to being gamed.

Sixth, pointlessness. It is easy for professionals in any sphere to be so caught up in internal complexities that they forget, or fail to communicate to outsiders, what is at stake in their technical discussions. Not to mention that they often won't *know* what's at stake. That is true at the level of *analysis*—one should always be in a position to know *why* something you are doing, presumably for some reason, matters. It is also true at a very *practical* level, so one can avoid that disease of which bureaucrats are commonly accused: goal displacement. They can tell you what the rules require, but not why. Eventually, often, they themselves forget why; though they don't forget the rules! So my advice is to start elsewhere: by asking not what the rules of the rule of law are but what its point is.

This is not merely an issue of academics finding it hard to express their profound and arcane mysteries in language simple enough for laypeople to understand. It goes deeper. Many people who stand most in need of the ideal of the rule of law have good reason to think we are starting and stopping in the wrong place if we confine our attention to the usual suspects of rule of law enthusiasts, the internal workings of legal institutions, the formal attributes of rules, the procedural configurations of high criminal courts. For most people in most places, these are not where they are ever

17. See John Braithwaite, *Hybrid Politics for Justice: The Silk Road for Restorative Justice II*, 5 RESTORATIVE JUST. 7 *passim* (2017); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEG. PHIL. 47 *passim* (2002).

likely to feel either the strengths or the weaknesses of the rule of law. But there are many other places where they might value the former and lament the latter.

Many of the world's populations endure political orders (and disorders) where the central institutions of law are far from central in the society. Other forces matter more. At the other end of the scale—there are many points in between and often over time ends come to meet—the state really does matter, so much so that nothing—least of all law, however handsomely configured and appointed—gets in its way. Billions live close to one of these ends or the other; often a single human life will have to endure both. Where so, if citizens demand the rule of law,¹⁸ I surmise, their pleas are likely to have less to do with the formal character of legal rules, or internal workings of institutions and practices (though these are often not irrelevant to the relatively few who reach them) than lawyers in rule-of-law rich countries are likely to find familiar. Pressed for their thoughts on the rule of law, I surmise again, those citizens' concerns will only occasionally overlap with what concerned Lord Bingham in his well-selling volume of that title,¹⁹ an admirable if entirely conventional internal lawyer's characterisation of what the rule of law amounts to (in the United Kingdom and other similarly privileged countries), recommended for the world. For the fundamental concerns in societies where the rule of law is notable by its absence²⁰ and/or by the presence of ambitions for power antithetical to any that animate it,²¹ here a third surmise, are likely to be whether and in what ways those who wield power that can hurt are free to do what they like, in ways we have good reasons not to like. To the extent citizen/subjects think of law in such societies they

18. See, e.g., NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER* *passim* (2012).

19. Tom Bingham, *The Rule of Law*, 66 *CAMBRIDGE L.J.* 67 *passim* (2007).

20. See *The Rule of Law in Afghanistan*, *supra passim* note 12.

21. See CHEESMAN, *supra passim* note 18.

might be pleased, but are likely to be surprised, if power-wielders have to *reckon* with law at all, for that's not their experience or expectation. If law is taken to matter at all, it is often more naturally to be thought of as part of an arsenal that rulers either wield or regard as irrelevant to what they are able to do, sometimes one, sometimes the other. In such places, that is, much of the world, it is not a local assumption that the powerful need to reckon with the law, even if the unpowerful might have to. And what might be needed to satisfy the latter's yearnings that things might be otherwise in their societies at this time are unlikely to be found in Bingham's book, or indeed most of the literature by first world lawyers that purports to characterise the fundamental nature and ingredients of the rule of law.

The vulnerabilities, aspirations, and values that lead people to clamor for the rule of law are not primarily to be judged by what it does for lawyers, still less legal philosophers. If the rule of law is a good, it is a social good, and it is challenged, *inter alia*, by social bads. If Afghan citizens, for example, or Syrians or . . . , lament the absence of the rule of law in their societies, is it obvious that they are talking only about receiving unclear legal messages from the government (Fuller), or having a hard day in court (Waldron)? Perhaps the irrelevance of the law or any other institutional constraints, to the ways power is experienced in their everyday lives, might matter to them more immediately, and even more, than their (likely rare) appearances before judicial tribunals (where they exist).

I conclude from these multiple misadventures of legalistic, institutional, fixations, that you can only work out what the rule of law needs to be made up of, after you think about what it might be for. We need at least to consider whether the values that animate concern with the rule of law might need and draw support from other than the usual institutional suspects, as well as whether there might be other conditions for, and alternatives to, effective state-law contributions to that putatively charmed state of affairs. In

seeing these contributions and conditions and challenges more clearly, we might have to reconsider the role and contributions of state law to the rule of law, more has been common. But to do that we should start by considering what we want them to do.

III. LET'S START AGAIN

Considerations such as these have led me to argue for some time that, apart from difficulties with identifying the rule of law in the world, and perhaps contributing to them, we are often hindered by the way we, and particularly the lawyer defenders of the realm, commonly approach the rule of law. For it is not a thing like a stone we might stumble on or over, but a complex practical ideal. It is complex, because a lot is needed even to approximate it and that lot changes; it is practical because it is neither a natural fact nor a Utopian fantasy but a goal intended to be made good (even if only partially) in the real world, and it is an ideal rather than a simple description. The concept is normative, the condition supposed to be valuable. We need things in the world to achieve it, but surely what we need will depend on what we want to achieve, as well as on the conditions and circumstances in which we seek to achieve it. Three ways of thinking about our subject are commonly muted, where they are not missing altogether from legal/operational/technocratic ways of thought: one is as a matter for political morality, a second as a question needing sociological imagination, and the third as a fundamentally political achievement. I will take them in turn: the first in this and the next three sections; the second in Part VI and the third in the final Part, VII.

First, political morality. The rule of law incorporates an ideal, and one of a particular kind, nicely captured by Jeremy Waldron's notion of a "solution-concept." Waldron comments,

Perhaps there is no exemplar of the Rule of Law, but just a problem that has preoccupied us for 2,500 years: *how can we make law rule?* On this account, the Rule of Law is a solution-concept, rather than

an achievement concept, the concept of a solution to a problem we're not sure how to solve; and rival conceptions are rival proposals for solving it or rival proposals for doing the best we can in this regard given that the problem is insoluble.²²

I will question Waldron's rendition of the nature of the problem in a moment, but I think the notion of rule of law as a solution-concept is spot-on. And if it is, the first question we need to ask, before we purport to identify the solution, is what's the problem?

Even if you reject my *particular* answer to that question, I would still want to insist that that question must be the one to start with. Starting with legal institutional checklists constrains thought and blocks imagination. Familiar features of legal rules or institutions, so often those that just happen to be taken to embody the rule of law in our own time and place, come to be thought of as default settings for its achievement, even as necessary settings. That can tie us simply to what we happen to know, rather than allow us to explore whether there are other ways of getting where we want to go. It makes it hard to think either that the rule of law might be served in the absence of familiar legal hardware, or indeed of it being disserved even where the hardware is present. And it often leads, as I mentioned above, to goal displacement. A predicament looms, that has been so aptly noted of the whole rule of law promotion industry—"we know how to do a lot of things, but deep down we don't really know what we're doing."²³ So I recommend that we start by considering the point or *end* of the enterprise, not the means, the *why* before the *what*.

IV. WHAT'S THE PROBLEM?

Well, why? What is the rule of law problem? As we saw, Waldron suggests that "the problem that has preoccupied us

22. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & Phil. 137, 158 (2002).

23. THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD 15 (2006).

over the last 2,500 years [is] *how can we make law rule?*”, but surely that doesn’t push the question back far enough. We would only ask that question if we thought making law rule was good for something. Otherwise, why bother? Why should we want the law to rule? Just for its own sake? For the sake of *what*, as answer to what problem have we reached for a solution-concept, which indeed *has* preoccupied us, or at least some of us, over the last 2,500 years?

It is impossible to legislate in these matters, given the currency of the term and the contending confusion, or confusing contention, about what it means. One can only propose and commend. My proposal is this: at the core of the rule of law, understood as a distinctive concept, is and has long and often been a particular concern—namely, the ways power is exercised; and it responds to a specific antipathy—namely, the arbitrary exercise of power. Probably the antipathy is even broader—to the *abuse* of power—but that is so capacious a category, so empty of particular content and difficult to define, that arbitrariness is a large enough species of the genre (also not at all easy to define)²⁴ to start with. The proposal is not original (which in this case I take to be a virtue). I know of no one who thinks arbitrariness has nothing to do with the rule of law, however not everyone believes that opposition to it takes us far enough. I’m not especially ambitious here: I believe in the signal importance of reducing arbitrariness in the exercise of power, but I too want more out of life than that. I’m just not sure that it helps to extend the connotations of the rule of law much further, lest we bleed the concept dry of any distinctive conceptual features. In any event, it is enough for me to identify a core concern. If others offer reasons to supplement it, I will listen carefully; if they seek to discard it, I will listen, if at all,

24. See, e.g., Samuel Arnold & John R. Harris, *What Is Arbitrary Power?*, 10 J. POL. POWER 55 *passim* (2017); Endicott, *supra passim* note 6; Frank Lovett, *What Counts as Arbitrary Power?*, 5 J. POL. POWER 137 *passim* (2012); Assaf Sharon, *Domination and the Rule of Law*, in 2 OXFORD STUDIES IN POLITICAL PHILOSOPHY 128, 131 (David Sobel et. al. eds., 2016).

skeptically.

Once upon a time, before the World Justice Project got to spend millions “measuring” the rule of law and before anyone had even dreamt of linking it with human rights or economic development, people in many times and many places knew that there was a phenomenon common in the world, that could lead to great unpleasantness: arbitrary power, often—and for centuries in the English common law—called precisely by that name.²⁵ Not everyone shares the common law’s stated hostility to arbitrary power—those who wield it often like it until they lose it—but the occasional masochist aside, most anyone who has felt it on their skins has thought it oppressive, and it would be nice if something could be done about it. Though rarely contested, that has been a central theme—and arbitrary power the central anti-hero—of countless writings in rule of law traditions over millennia. It’s a precious theme.

My claim, then, is that a *distinctive* domain that has long been closely associated with the ideal of rule of law is the exercise of power, and that that is a domain worth recognising in itself. It is not more important than others, but it has a specific importance not reducible to other things, and often not separately considered. There are many ways to exercise power, and arbitrary ways should be shunned.

Law is specifically and characteristically—at its core—a vehicle for the exercise of power; that is what it does. In certain configurations and circumstances, or so is the rule of law hope, it is also a potent means by which power—state *and* non-state—might be channeled, directed, constrained, tempered. One question, perhaps the central one for the rule of law, is what difference law can make to the ways power is exercised. Ways of exercising power, including non-arbitrary and non-dominating ways are, in other words, tied to the concept of the rule of law, are *immanent* to the concept. Other

25. See JOHN PHILIP REID, *THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 41 (2004).

goods, say, economic development or even democracy, that might be thought to flow from it (and are the only reasons many people today are interested in it²⁶) are simply not immanent in this way. The former are not external but immanent values of the rule of law, their *telos*. The latter are external and, in principle, contingent benefits said to flow from it.

But when is power arbitrary? The word is common enough, both in ordinary and specialist legal talk, but you can trawl through the scholarly literature and find little consensus on what it means.²⁷ A common way with it is to clear one's throat by confessing it is "undertheorised" in the hope that acknowledgement might palliate, at least keep at bay, conceptual pedants. You can then draw breath and keep using it in an "I know it when I see it" sort of way. For some time that is exactly what I did. More recently, I have sought to extract three kinds of exercise of power that significant rule of law traditions have treated as both arbitrary, and for that reason, objectionable.²⁸ These three do not exhaust the field, but they're a start and they cover a lot of ground. Here, I just summarise them. Power is exercised arbitrarily when:

power-wielders are not subject to regular control or limit, or accountability to anything other than their own will or pleasure. The common law tradition from the medieval period to the eighteenth century recurrently warned against arbitrary power in this sense: no one, not even the King should have uncontrolled power.

power is exercised in unpredictable—or perhaps more precisely unreckonable—ways, when those it affects cannot

26. See Martin Krygier, *Transformations of the Rule of Law: Legal, Liberal, Neo-*, in *THE POLITICS OF LEGALITY IN A NEOLIBERAL AGE* 19 *passim* (Ben Golder & Daniel McLoughlin eds., 2017).

27. Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, 50 *NOMOS* 64, 75–76 (2011).

28. Krygier, *supra passim* note 9; Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 *ANN. REV. L. & SOC. SCI.* 199, 203–04 (2016).

know, foresee, understand, or comply with the ways power comes to be wielded. It can strike like lightning. This is the kind of abuse of power typically taken up in the various lists of formal characteristics of legality or the rule of law—clear, prospective, public, etc.—compiled by contemporary analytic philosophers of law, such as Fuller and Raz, mentioned above.

when, whether or not limited and/or reckonable, it is exercised in circumstances which deny or do not afford space or means for its targets to make themselves heard, to question, to inform, or to affect the exercise of power over them, and no requirement that their voices and interests be taken into account in the exercise of power. They are treated as if they were, in Jeremy Waldron's apt phrase, "a rabid animal or a dilapidated house."²⁹ The moral basis for objection to power exercised in such ways, stressed by Waldron among others, is that persons should always be treated as *persons* with interests and a voice that needs to be heard. It is a large concern, not necessarily limited to law. Thus, Simone Weil similarly condemned circumstances in which those with power acted in ways oblivious to the fact that persons affected by them might be interested actors with their own perspective on the world.

These three examples of arbitrary power each connect well-supported candidates for the for the rule of law with plausible, I think compelling, teleological foundations. Antidotes to them have been commended in turn by the common law tradition, formal "laundry listers," and Jeremy Waldron's procedural understanding, as elements of the rule of law. I am also encouraged to discover from Julian Sempill that they closely resemble three different conceptions he finds in John Locke's uses of the term.³⁰ For reasons I have

29. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 16 (2011).

30. Julian A. Sempill, *Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power*, 31 J.L. & POL., 333, 366 n.89 (2016) ("i. Locke employs 'arbitrary' to describe a certain type of discretionary power, namely one that is

given, I am less attracted to the specific legalistic lists taken to achieve these ends but I think in each case the point driving them is sound.

I am not a conceptual analyst, and I am not confident I can nail with precision the conceptual content that holds these examples together, but I am much attracted to Sempill's account, drawn from what he calls the "limited government tradition" of rule of law thinking. According to Sempill:

the tradition maintains that power is legitimate (and, therefore, properly regarded as authoritative) only if it is wielded in a manner that gives due weight to, though does not necessarily protect, the genuinely respect-worthy interests, expectations, and rights of all relevant persons. Sometimes giving due weight to an interest, expectation, or right requires it to be treated as inviolable. For example, a power-holder would only give due weight to the right not to be tortured by treating the right as inviolable.

If a power-holder failed to give due weight—i.e., respect—to a genuinely respect-worthy thing, the legitimate scope, if any, of his or her power would thereby have been exceeded. In the idiom of the tradition, the power-holder would have acted "arbitrarily" or "abused" his or her power.³¹

This formulation appeals to me because it focuses on the moral qualities of the *way* power is exercised rather than the frequently contentious and contended results of that exercise. And it can be tied in with the civic republican insistence (see below) that even if power holders choose not to exercise the power they have in objectionable ways, the situation is one of arbitrary domination so long as they are

unguided or unconstrained by enforceable impersonal rules, standards, or criteria . . . ii. Locke also uses 'arbitrary' in another sense, to refer to inconstancy of will: where a ruler possesses a poorly constituted discretionary power—an 'arbitrary power' in the first sense—the ruled thereby risk being rendered 'subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.' . . . iii. . . . Locke employs the distinctive limited government conception of arbitrariness that is the focus of the discussion in the main text: i.e., the exercise of power without respect for moral equality." I draw on Sempill in what follows.

31. *Id.* at 367–68. For reasons advanced in Parts V and VI below, I prefer to think of tempering power rather than limiting government, but in most other respects my views accord closely with Sempill's.

in a position to do so. The objection then to unchecked power and to secret or otherwise unpredictable power (versions 1 and 2 above) is that they allow power-wielders to act arbitrarily, even if they choose not to. On this version, one seeks to limit the possibilities that in their exercise of power, power-wielders can choose not to “give[] due weight to . . . the genuinely respect-worthy interests, expectations, and rights of all relevant persons,”³² and also (in the positive version that I commend below) exercises of power are channelled through institutions and in ways that encourage, perhaps require them, to give due weight.

Powerful entities are not home free because they score well (low) on one but not another dimension of arbitrariness (as, say, Singapore might on 2 but not on 1 and, at least in regard to political opponents, not on 3). They should do well on all three because denial of any is a denial to give “due weight.” There are all sorts of benefits that might accrue to a political regime, for example, that applies stable and understandable rules, but if it is free to act purely by exercising sovereign will, even if it chooses not to, and even more if the rules shut those affected out from consideration, then subjects—more accurately objects³³—of power are vulnerable to its arbitrary exercise. Rule of law comes in dimensions and degrees, so it’s not one strike and you’re out. But for any appraisal of the state of the rule of law, how the exercise of power rates on such dimensions is crucial. Moreover, the list is not closed and it is unlikely to be short. Where power discriminates without relevant and justifiable reason between persons it is acting arbitrarily, and in my interpretation violates the value of the rule of law. So selecting candidates on merit for university places is fine; on race, no.

32. *Id.*

33. Martin Krygier, *The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law*, in *AUSTRALIA RESHAPED* 220 *passim* (Geoffrey Brennan & Francis G. Castles eds., 2002).

An arrangement of forces and resources, so that power is routinely not available for arbitrary exercise, particularly when the power of some over others is considerable, is not a simple or natural state of affairs. Unless something is done to prevent it, arbitrariness is likely where power is concentrated, as it so often is, in the big grasping hands of small numbers. Where arbitrariness is available, many classical authors feared, despotism is not likely to be far away; indeed a standard contrast classically made and repeated has been between arbitrary despotism, or *tyranny*, on the one hand, and government according to the rule of law, on the other. These are political terms, and traditionally the rule of law has been discussed primarily in relation to political power. But it is a question, to which below and elsewhere I answer no,³⁴ whether there is any reason *in principle* to limit the discussion in that way.

But why is arbitrariness, despotism even, objectionable? An enlightened despot might ask that; many unenlightened despots too, too many to mention. Contemporary would-be-despots-on-the-make, such as Viktor Orbán in Hungary or Jarosław Kaczyński in Poland, are in effect asking precisely that. Today the conceit is “illiberal democracy,” but aside from elections, no small thing but not enough, the ambition is to destroy all tempering constraints on power, such as the rule of law, and so too to dominate elections themselves. Kaczyński complains of the “impossibilism” of the state he now runs and pledges to transform: a “programmed state incapacity to take many steps necessary for the defence of its own interests and the good of citizens.”³⁵ The state simply can’t push through its will. He aims to change that by, among other things, clearing all intermediate institutions laws, and practices that might stand in the way. There are several

34. See Krygier, ‘Legal Pluralism and the Rule of Law’; see also Julian A. Sempill, *What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power*, 10 HAGUE J. RULE L. 219 *passim* (2018).

35. PiS, *Nowoczesna, Solidarna, Bezpieczna Polska: Program Prawa i Sprawiedliwości* 17 (2011).

reasons, or so say many long traditions of thought about the rule of law, why this is not a great idea.

Perhaps the fundamental one, explored by Sempill and Waldron, is general and deontological in nature—arbitrary exercise of power is an immoral way to treat persons. Others are more particular and empirical/consequential. The simplest one is that despots, or manipulators of illiberal democracy cannot be relied upon to be, or even if they start that way, to stay, enlightened. That's not a necessary truth, but it's a very commonly confirmed empirical one. A more subtle answer, mentioned above, is given by the civic republican tradition: whenever someone has power to treat you arbitrarily, even if they choose not to, you are in their power, subject to domination by them, whatever they arbitrarily choose to do. And that, as slaves of even the most benign masters have learnt, is a deeply demeaning condition for a person to be in.³⁶ Add to that, liberal warnings about arbitrary power being a constant source of fear, a constant threat to freedom and dignity, and a threat to the sorts of coordination among multitudes that a complex society depends upon, and you have powerful arguments against it.³⁷

Moreover, a frequently overlooked but no less important answer than these three, speaks directly to the Polish ruler, Jarosław Kaczyński's determination to overcome the state "impossibilism" that frustrates him so much. It is as much pragmatic as moral. As his government is beginning to illustrate, arbitrary power can be a powerful source of *stupidity*, even craziness, in the exercise of power. He's still far from the apogee of this trajectory yet, but just visit Nay Pyi Taw, the bizarre, secretly-built, largely empty, Disneyland capital of Myanmar. Or walk the huge main boulevard of Bucharest to the grotesque but enormous Presidential palace built for and once occupied by the tight-

36. See PHILIP PETTIT, *REPUBLICANISM* 52–57 (David Miller & Alan Ryan eds., 1997).

37. For further discussion see Krygier, *supra* note 27, at 79–81.

knit rulers of “socialism in one family,” built by “the genius of Bucharest,” the “source of our light,” “the treasure of wisdom and charisma.” Streets, roads, and houses were razed and some 40,000 residents were ejected from their homes with 24 hours notice and minimal compensation, for this absurdity.³⁸ Alas, it is not at all hard to find evidence of what arbitrary power, which never has to answer a question or conform to an institutional requirement, can conjure up. And I have not even mentioned Mao Tse Tung or even one Kim, the earlier of whom indeed were models for the genius of Bucharest.

As Confucius might have said, governments that act in the dark too often lose their way. They do the wrong things, catch and harass the wrong people, miss the right ones. Often they blunder, and if ill motivated they do worse than blunder, all the more because they can do their worst in the dark.

V. WHAT'S THE SOLUTION?³⁹

Arbitrariness, then, is a specific and obnoxious vice when added to power. There are many other vices which depend on the particular substantive purposes and results of the exercise, but arbitrary power is vicious enough even if exercised with the best of intentions, and even if some of its results prove to be salutary. It is a free-standing and toxic vice, that has to do with the *ways* power is exercised. Appeal to the rule of law signals the hope that there may be ways, and that law might contribute, to diminish the kinds and levels of arbitrariness available to those who exercise power. What might we expect the character of such measures to be?

The commonest way to frame the hoped-for contribution

38. Darrick Danta, *Ceausescu's Bucharest*, 83 AM. GEOGRAPHICAL SOC'Y N.Y. 170, 175 (1993).

39. Parts of this and the next section are drawn and adapted from my previous work. See Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND THE RULE OF LAW 34 *passim* (Maurice Adams et al. eds., 2017).

of the rule of law to reducing arbitrariness is to understand it in a negative, defensive manner, to characterise it as good less for what it enables and creates, than for what it might prevent; to identify its purpose with what it rules out rather than what it rules in; what it manages to prevent, curb, restrain, rather than what it might generate and encourage to flourish.

The reasoning is familiar. The world's a tough place where "the strong do what they can while the weak do what they must."⁴⁰ The signal contribution of constraints on power is to try to help the weak by putting limits on what the strong can do. On this interpretation, the point is to *block* and *limit* the possibility of unruly power, to curb and restrain power's exercise. This is not a new view, and it remains popular among liberals, even more among neo-liberals. Thus Friedrich Hayek asserts that "power itself has always appeared the archevil,"⁴¹ and insists elsewhere: "The effective limitation of power is the most important problem of social order."⁴² It is the job of constitutionalism and the rule of law to impose the limits: "Constitutionalism means limited government. . . . indeed, what function is served by a constitution which makes omnipotent government possible? Is its function to be merely that governments work smoothly and efficient, whatever their aims?"⁴³

And it's not just 'neos' who think this way. Thus Judith Shklar, a profound analyst and exponent of liberalism, reads Montesquieu to argue that the rule of law:

really has only one aim, to protect the ruled against the aggression of those who rule. While it embraces all people, it fulfills only one fundamental aim, freedom from fear, which, to be sure, was for Montesquieu supremely important. . . . This whole scheme is ultimately based on a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law. . . . The

40. THUCYDIDES, *THE PELOPONNESIAN WAR*, bk. 5, para. 89.

41. F. A. HAYEK, *THE ROAD TO SERFDOM*, 159 (50th anniversary ed. 1994).

42. 3 F. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 128 (1979).

43. 1 F. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 1 (1973).

institutions of judicial citizen protection may create rights, but they exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society.⁴⁴

Shklar's own choice between these two accounts is clear:

If one then begins with the fear of violence, the insecurity of arbitrary government, and the discriminations of injustice, one may work one's way up to finding a significant place for the Rule of Law, and for the boundaries it has historically set upon these the most enduring of our political troubles.⁴⁵

On this view the prevention of evil, rather than a quest for the good, is the signal virtue of the rule of law; its goal, supremely important but negative, is "damage control."⁴⁶

For such thinkers, and there are plenty of them (me among them), this negative, constraining, controlling aspect of the rule of law is fundamental. And indeed it responds to "the circumstances of politics"⁴⁷ as they often have been found to be. The exercise of power carries terrible risks. It is wise to be aware and wary of them and to think about what may be done to minimise them, both because they are directly threatening in themselves and because where such threats are realised, nothing much else good will occur. Partisans of the rule of law are clearly deeply informed by such thought, which is a form of "moral realism" in the sense identified by Philip Selznick, according to which it is:

[not] enough to think of specific evils as problems to be solved or as obstacles to be overcome. Rather, the perspective of moral realism treats some transgressions as dynamic and inescapable. They can be depended on to arise, in one form or another, despite our best efforts to put them down.⁴⁸

44. JUDITH N. SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS* 24–25 (Stanley Hoffman ed., 1998).

45. *Id.* at 36.

46. *Id.* at 9.

47. See JEREMY WALDRON, *LAW AND DISAGREEMENT passim* (1999).

48. PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 175 (1992).

And not just “moral realism” but specifically *political* realism is necessary in the case of constitutionalism and the rule of law, for thinking about such things is not, as both Bernard Williams and Jeremy Waldron have emphasised against much conventional academic unwisdom, “just applied moral philosophy.”⁴⁹ Politics and the wielding of power more generally are, after all, not just a matter of the ideal ends we should seek, but of conflict, violence, oppression, domination, their consequences, and what might be needed and feasible to avoid them.⁵⁰ The liberalism of fear articulated by Shklar and others is a sober, somber, response to such realities.

For a long time my view of the rationale and justification of the rule of law stopped about here. Central to the greatest man-made tragedies of the twentieth century seemed to me overweening, ideology-driven and otherwise unconstrained despotisms. From that I took a central lesson to be that power needed above all to be reliably and securely limited, curbed. And when I came to the rule of law, I took its promise to be, above all, that it might provide such limitation.

I still think there is much to be said for the virtues of institutionalised constraint that the rule of law promises. However, a purely negative, defensive, interpretation of the liberalism of fear can also reduce and distort one’s understanding of politics, of power, and of the rule of law. Violence and oppression are not the sum of what politics and power well exercised can and often do deliver, and limitation of power is not the sum of what the rule of law can contribute to a well-ordered public order.

I was shaken into this new (to me) understanding by an article of my friend Stephen Holmes, by whom I have often been surprised. He has frequently argued that modern

49. Jeremy Waldron, *Political Theory: An Inaugural Lecture*, 21 J. POL. PHIL. 1, 6 (2013).

50. See BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 52–61 (Geoffrey Hawthorn ed., 2005).

liberals, unlike some of their classical forebears, have simply not understood how liberal values depend on state strength and are endangered by state weakness. Holmes has pursued these themes in many contexts, from the history of liberal thought to the arguments of many governments post-9/11 that in such situations of emergency they needed to be able to “throw off the shackles” of the rule of law. One context was particularly close to my heart and turned my head. It was drawn from the pervasive and pathological weaknesses of the Yeltsin post-Soviet Russian state. It had been so obvious to rule of law liberals like me that the Soviet state’s elephantine power was a major source of misery for its citizens that when I read Holmes’s article, *What Russia Teaches Us Now*,⁵¹ I was caught unprepared by his argument that post-communist Russian experience taught that whereas:

During the Cold War, when all political evils seemed to swarm from “too much government,” the threat posed by too weak a government played little role in liberal self-understanding. . . . Today’s Russia makes excruciatingly plain that liberal values are threatened just as thoroughly by state incapacity as by despotic power.⁵²

In that piece and many others, Holmes makes plain how much modern societies depend upon well-functioning states, able to do many things that require marshalled strength and resources that can be routinely collected in non-coercive but not routinely evaded ways. Once the point is made, and examples of the pathologies of the insufficiently strong public institutions paraded, I don’t know any way round it. So I have adopted it, and believe that any adequate understanding of the rule of law must accommodate it.

For power has an undeservedly bad name, which is a pity, since it’s not going anywhere and if it were to, we would miss it. We need power, and not just as a necessary evil but

51. Stephen Holmes, *What Russia Teaches Us Now*, AM. PROSPECT (July-Aug. 1997), <https://prospect.org/article/what-russia-teaches-us-now>.

52. *Id.*

a positive good. We could not do, and certainly we could not do well, without it in many forms and for many purposes. We should not want to deny the need or emasculate the capacity for power to keep peace, defend populations, enforce legal judgments, collect taxes, balance other powers, and so on. And we don't want ordinary citizens to be impotent either. People who have ever seen, still worse lived in, what are called "failed states," have witnessed or suffered a terrible experience, *not* because the state is too strong but because it is too weak to do what we need states to do. Other states, conversely, might be too strong or strong in the wrong ways, and these are also problems to which the rule of law is relevant. In any event, we're stuck with power; it won't disappear. As my colleague, Theunis Roux has remarked, one of the reasons we need effective *public* power, democratically sourced, is to protect us against private power. Conversely, as the history of communism so dramatically demonstrated, a central reason for the devastation that communist regimes wrought on their citizenry was that they had begun with the elimination of independent sources of resource and power that might stand in their way.

Holmes had long stressed the empowering consequences of constitutionalism and the rule of law; what, in contrast to the more common negative conception, he calls "positive constitutionalism."⁵³ Appropriately configured laws, on this view, provide "enabling constraints."⁵⁴ For the "paradoxical insight" here, as Holmes describes it, is that:

Limited government is, or can be, more powerful than unlimited government. . . . [T]hat constraints can be enabling, which is far

53. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 178 (1995).

54. See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* *passim* (2000); MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* *passim* (2003); DAVID STARK & LASZLO BRUSZT, *POSTSOCIALIST PATHWAYS: TRANSFORMING POLITICS AND PROPERTY IN EAST CENTRAL EUROPE* 166–87 (1998).

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.⁵⁵

Jeremy Waldron has similarly criticised the tendency among constitutionalists to

think simplistically [of constitutional devices] . . . just as *brakes* upon the law-making process, ways of slowing things down, points of possible resistance against oppressive legislation. Equally there is a tendency to think of the formal separation of powers between (say) legislature, executive, and judiciary simply as a way of diluting power and making it harder for it to be exercised.⁵⁶

He has insisted on the positive role and potential of constitutional provisions. Constitutions, after all, *constitute* the elements of a polity and *empower* particular institutions. They *distribute* power to some institutions and actors and not others, they establish fora for discussion and decision, "so that public deliberation becomes a structured enterprise."⁵⁷ All this crucial work is given short shrift by a perspective in which "[e]verything is seen through the lens of restraint and limitation."⁵⁸

There is no contradiction here, I now understand. Overweening, despotic power is horrible, but so is the lack of power of the sort that is needed, where it is needed. Power is necessary, but not just any form or way of exercising power will do. If Yeltsin illustrated the first point, Putin illustrates the second. Power must be of the right sort in the right places to be able to do what cannot be done without it. If it is of the wrong sort, but also if it is not powerful enough, we are in trouble. The issue, then is not to get rid of power but to

55. HOLMES, *supra* note 53, at xi.

56. Jeremy Waldron, *Constitutionalism: A Skeptical View* 22 (N.Y. Univ. Pub. Law Theory Research Paper Series, Working Paper No. 10-87, 2012).

57. *Id.* at 23.

58. *Id.* at 22.

reduce possibilities of its malignant exercise.

These are not new discoveries. Thus Holmes traces the awareness of enabling constraints to Bodin in the sixteenth century. Montesquieu was well aware of them too. The whole of *The Spirit of the Laws* was bent to investigating the sources of *moderation* of government and recommending institutional ways to ensure it. He notes that, despite the horrors of despotism and the attractions of moderation, the world has seen many more despotic governments than well-ordered moderate ones. He laments that but finds it unsurprising, because a moderate government is a much more complicated achievement.

Despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government [despotism]. This is easy to understand. In order to form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. By contrast, a despotic government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that.⁵⁹

The language with which he makes the contrast is suggestive, for it is not a language of brute impediments⁶⁰ but of difficult and complex balancing, tempering, regulating; not shackling, and certainly not weakening.

But what sort of strength will do? Here a distinction from the historical sociologist, Michael Mann, is helpful. Mann

59. C. L. DE SECONDAT DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 63 (Anne M. Cohler et al. eds. & trans., Cambridge University Press 1992) (1748); cf. AURELIAN CRAIUTU, *A VIRTUE FOR COURAGEOUS MINDS: MODERATION IN FRENCH POLITICAL THOUGHT, 1748–1830* 31–32 (2012) (“[T]he strong connection between moderation and institutional complexity [is] an idea that would resonate . . . with Montesquieu, Mounier, Necker, Mme de Staël, and Constant. . . [C]lassical authors praised the institutional framework of mixed government, not only because the latter blended various social interests and elements, allowing them to coexist harmoniously, but also because it made it extremely difficult for any group to impose its will over others and exercise arbitrary power.”).

60. See MONTESQUIEU, *supra* note 59, at 63.

distinguishes between what he calls *despotic* power—"the range of actions which the elite is empowered to undertake without routine, institutionalised negotiations with civil society"—and *infrastructural* power—"the capacity of the state to actually penetrate society, and to implement logistically political decisions throughout the realm."⁶¹ For the release and development of social and economic energies, as well as for political decency, it is infrastructural power that is crucial. Despotic states combine arbitrariness and lack of political or legal limits with chronic incapacity to mobilise social energies and make use of social potential. As a former colleague of Mann's, John Hall, puts it,⁶² they sit like capstones atop the societies they dominate; they do not penetrate organically and effectively into the social structure. They dominate from above, but do little to contribute from within.

The connection between despotic strength and social weakness is not accidental. Though despots can repress effectively for a time, and mobilise for limited specialised purposes such as war, they have proved very weak in the capacity to penetrate, mobilise, and facilitate energetic and resilient social forces. On the contrary, they typically seek to block them, and they stunt their development. In other terms, despotically strong states go along with weak societies. And this is centrally because of the arbitrariness and unpredictability with which they exercise power. These states are predatory and their societies are prey. They are not productive, and neither are their societies. That is yet another reason why the attempts by populist leaders such as Kaczyński and Orbán to destroy institutional constraints on their power are so dangerous: they feed exactly the sort of

61. MICHAEL MANN, STATES, WAR, AND CAPITALISM 5 (Basil Blackwell ed. 1988); *see also* 1 MICHAEL MANN, THE SOURCES OF SOCIAL POWER 477 (1986) (contrasting "power over civil society, that is, *despotism*" and "the power to coordinate civil society, that is, *infrastructural strength*").

62. JOHN A. HALL, POWERS AND LIBERTIES: THE CAUSES AND CONSEQUENCES OF THE RISE OF THE WEST 34–35 (Basil Blackwell ed., 1985).

state power that threatens a strong society, by starving it of the sort of moderated infrastructural power it needs.

Some evidence of the usefulness of this distinction was provided by the house-of-cards collapse of the Soviet Union and its dominions. This was one of the most despotic empires the world has known, but it was not the first occasion when apparently overwhelmingly powerful despotisms have wilted before forces which hardly seemed up to the task. Like the collapse of communism, the French and Russian Revolutions, the end of the Marcos regime, the fall of the Shah, all seemed overdetermined *after* the event. But they revealed that extraordinary fragility of despotisms which keeps taking us by surprise. It shouldn't.⁶³ Despotically powerful states can be remarkable brittle.

By contrast, though the contemporary difficulties of liberal democracy might lead to a change in the durability of this assessment (but they might not; the jury is still out), there is a lot to be said for the strength of the tempered powers of liberal democracies. At least during the course of the twentieth century, muddling moderate liberal regimes—derided and disdained for much of the time—displayed, in their prosaic apparently shambolic and ineffectual way, a staying power that many—often in that century and on very plausible evidence—had doubted. This may be partly due to the fact that constitutionalism and the rule of law not only get in the way of despotic power, but they also channel, direct, facilitate, and inform infrastructural strength. Perhaps the day of specific institutions that have done such work is passing, and new kinds will need to arise, but I cannot conceive of an end of the need for that sort of work to be done somehow.

Moreover, the state is not the only game in town, neither as a source of problems nor as a source of responses to them.

63. The last few paragraphs are drawn from my Australian Broadcasting Commission radio lectures (the Boyer lectures), Martin Krygier, BETWEEN FEAR AND HOPE: HYBRID THOUGHTS ON PUBLIC VALUES 112–13 (1997).

The ideal of the rule of law will involve much more than the law itself to be able to respond strongly and effectively to arbitrary exercises of power, wherever they come from. One of the deepest pathologies of despotic power, found at the extreme in totalitarian states, is the determined subversion of non-state as well as state-infrastructural strength. Another, found in many post-communist despotisms, occurs when it aids and abets the power of non-state “oligarchs,” “tycoons,” and similar.

VI. TEMPERING POWER

How might one capture this seeming paradox of constraints that enable, limits that empower, mixes and balances that do not emasculate but render more potent. A moment’s thought about ordinary life experience will show that there is no real paradox here. Anyone who has learnt to swim will have quickly discovered that effective performance requires mastery of, and in a sense coming to be mastered by, constraints, techniques and disciplines to marshal and channel raw energy to good and effective purpose. No one imagines that the power of a swimmer (or boxer) is lessened by the disciplined constraints within which they ply their craft. So too the ability of institutions to concentrate their powers where and how they should is enhanced by traditions, practices, requirements, procedures and institutions of the rule of law which, among other things, redirect their movements so they don’t splash or smash around where and how they shouldn’t.

Seeking language to express this, as it turns out unparadoxical, paradox of moderation that strengthens, the term “tempering power” came to mind. I was excited and for a moment hubristically self-satisfied to come up with this “coinage” for this purpose, though somewhat less so when I discovered the ancient Greek, Roman, and early common law forebears and origins, of the term and the idea. Were I a

philologist like Nietzsche⁶⁴ or a scholar of ancient Greece and Rome like Helen North,⁶⁵ I could enrich my use of this metaphor in many ways unavailable to me, *homme moyen sensuel* that I am. But the English term is suggestive enough on its own, and with even a little unscholarly ransacking it captures a great deal that we want in relation to the exercise of power. So I have stuck with tempering power, and I keep finding reasons to applaud my ignorant plagiarism.

There are at least three registers in which we speak in English of “tempering” or “temperance.” The first is as a dimension of personal virtue, the second of institutional behaviour, and the third as a chemical process. Together, all of them are grist to the rule of law’s mill. For the Greeks, the term *sophrosyne*, which Cicero translated into Latin and introduced into European tradition as *temperantia*,⁶⁶ was one of the four cardinal virtues. It included restraint, particularly self-restraint, and was the opposite of *hubris*, but it also suggested and went along with moderation and self-knowledge. The example of self-knowledge is important. As Helen North comments on Greek literary traditions:

From Aeschylus and Sophocles, Herodotus and the grave-epigrams, we learn that to the Athenian of the late to mid-fifth century *sôphrosynê* implied good sense moderation, self-knowledge and that accurate observance of divine and human boundaries which

64. 3 PAUL VAN TONGEREN, NIETZSCHE’S REVALUATION OF THE CARDINAL VIRTUES: THE CASE OF *SOPHROSYNE* 128 (Nijmegen Univ. 2001).

65. See HELEN NORTH, *SOPHROSYNE: SELF-KNOWLEDGE AND SELF-RESTRAINT IN GREEK LITERATURE* vii (1966).

66. Actually,

Cicero suggests [four] different translations of *sophrosyne*, that all have their own connotations: *moderatio* which means moderation in the sense of control and restrain; *constantia*, which means being (remaining) unperturbable or undisturbed; *frugalitas*, which means frugality and thrift; and the fourth one, which became the most influential: *temperantia*, which means of course temperance. But temperance has in Latin, certainly in Cicero’s Latin the connotation of: “the right mixture”, the right balance; temperare means to mix different liquids in the right proportion.

VAN TONGEREN, *supra* note 64 at 133.

protects man from dangerous extremes of every kind. In private life it is opposed to *hybris*, and in the life of the State to both anarchy and tyranny.⁶⁷

Many aspects of the rule of law are intended to encourage such virtues of moderation and thoughtful self-knowledge.⁶⁸

Institutionally, tempering suggests a moderating blending of powers and of elements (e.g. power with law; justice with mercy; strength with moderation), a *balancing*, designed to lessen the severity, the harshness of unblended motive or power. Thus Henry Bracton, the first compiler of the English common law in the thirteenth century, was not out to weaken the king, who “has no equal within his realm,” when he urged that he should “temper his power by law, which is the bridle of power.”⁶⁹ Again:

The king has a superior, namely, God. Also the law by which he is made king. Also his curia, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him. [That is why the earls are called the partners, so to speak, of the king; he who has a partner has a master.] When even they, like the king, are without bridle, then will the subjects cry out and say “Lord Jesus, bind fast their jaws in rein and bridle.”⁷⁰

In early medieval representations, *Temperantia* held a mixing bowl, “in keeping with the translation of ‘temperamentum’ as measure/proper mixture/moderation.”⁷¹ But in Lorenzetti’s marvellous *Allegory of Good Government*, in Siena’s town hall, *Temperantia* holds an hourglass rather than a mixing bowl, I imagine to make an allied point.

67. Helen North, *A Period of Opposition to Sôphrosynê in Greek Thought*, in 78 TRANSACTIONS AND PROCEEDINGS OF THE AMERICAN PHILOLOGICAL ASSOCIATION 3 (1947).

68. See generally Waldron, *supra* note 56; Waldron, *supra* note 8.

69. Henry Bracton, *Bracton on Kingship*, in THE AGE OF PROPERTY: THE AFTERMATH OF HENRY II (S. Thorne, trans. 1968), <http://www.law.harvard.edu/faculty/cdonahue/courses/lhsemelh/materials/Mats5F.pdf>.

70. *Id.*

71. GERHARD DOHRN-VAN ROSSUM, HISTORY OF THE HOUR: CLOCKS AND MODERN TEMPORAL ORDERS 5–6 (Thomas Dunlap trans. 1996).

Among the fresco's seven "virtues of good government," she is immediately flanked by Justitia on one side holding the severed head of some (presumably justly convicted) felon and Magnanimita freely disbursing coins from a large dish, on the other. The juxtaposition is unlikely to be accidental. Justice and magnanimity are good, but temperance mediates between them with measured patience, which allows for thoughtfulness. A good society needs all three virtues, plus another four. This complexity is missed in much of the conventional language of constitutionalism and the rule of law.

Indeed, though negative constraining conceptions of constitutionalism often speak of separation of powers, as everyone knows that is not enough: mixing is key. As Craiutu observes: "Montesquieu in fact favoured a blending rather than a strict separation of powers and referred in his book to *pouvoirs distribués* and not *pouvoirs séparés*."⁷² Such distribution of powers does not lessen the capacity for effective exercise of power. On the contrary, it is arguably a prerequisite for it. This is the burden of Holmes's wise reflections on the temptations governments have felt to "remove the shackles" in times of emergency:

The rule of law enforces an uncomfortable degree of transparency on the executive. It requires that the factual premises for the government's resort to coercion and force must be tested in some sort of adversarial process, giving interested and knowledgeable parties a fair opportunity to question the accuracy and reliability of evidence. That is how due process serves the public interest and helps reduce the risk of error. To reject the rule of law is reckless because it frees the government from the need to give reasons for its actions before a tribunal that does not depend on spoon-fed disinformation and is capable of pushing back. A government that is not compelled to give reasons for its actions may soon have no plausible reasons for its actions.⁷³

Analogous points can be made about the third sense in

72. CRAIUTU, *supra* note 59, at 49.

73. STEPHEN HOLMES, *THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR 6* (2007).

which we use the term, for the chemical process of tempering steel (and other compounds) to make it/them more fit for purpose. Certainly, tempering does not suggest weakening but on the contrary, toughening; the resulting compound is less brittle than its primary component alone. Tempered steel, after all is stronger than iron or untempered steel; as Wikipedia informs us, it is intended “to achieve greater toughness by decreasing the hardness of the alloy.”⁷⁴ And it does so by judicious blending. As that distinguished metallurgist,⁷⁵ John Braithwaite, has instructed us: “Tempered steel is more flexible, yet stronger for realising its purposes: it is resilient and responsive. Tempered steel is distinguished from iron by a combination of alloying it with carbon and other checks and balances and testing it with extreme heat that makes it resilient.”⁷⁶

And so, the umbrella term that I have come to prefer for the contributions of the rule of law is *tempering* power, rather than limiting, or any of the other words—taming, restraining, controlling, etc.—commonly invoked.⁷⁷ Not that they are simply wrong, but they are insufficient to grasp some core features of the rule of law. For the rule of law is not merely about constraint, it also depends upon, and in turn is intended to produce, salutary positive results, in many circumstances difficult to achieve otherwise. Many aspects of the rule of law are intended to generate virtues of moderation and thoughtful self-knowledge, that are *encouraged* by constitutional and rule of law practices and institutions, not contained or constrained by them. Such practices and institutions provide “enabling constraints” that enable more focused and effective use of power for good

74. *Tempering (metallurgy)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tempering_\(metallurgy\)](https://en.wikipedia.org/wiki/Tempering_(metallurgy)) (last visited May 6, 2019).

75. It's possible. He knows about everything else. See also his elaboration of these qualities in his contribution to this volume, John Braithwaite, *Tempered Power, Variegated Capitalism, Law and Society*, 67 BUFF. L. REV. 527 (2019).

76. John Braithwaite, *Hybrid Politics for Justice*, *supra* note 17, at 25.

77. Krygier, *supra* note 39, at 35.

ends (while making more difficult some uses of power for bad ends).

Applied to the ideal of the rule of law, then, tempering can suggest some judicious combination of mix, balance, moderation, self-knowledge, all contributing to particular and salutary sorts of strength. These suggestions need to be kept in mind, for the negative conception, the flint-edged realism of Shklar or other sceptics, though the one that more immediately springs to mind, is not the only way of viewing constitutionalism and the rule of law, and not on its own the best.

VII. *TEMPERING POWER AS A SOCIAL IDEAL*

Not many people will deny that ideals of the rule of law are hostile to arbitrary power. Nor is it likely that many, at least of those attracted to the rule of law, would object to the notion of “tempering power,” even if that is not a term that today springs immediately to mind. So what is gained by bashing out these old tunes with all this heavy metal? What difference does it make to disinter these terms and to insist that they should come first, should frame our thinking about the rule of law rather than, as is more usual, the other way around? I have sought to suggest one reason in the preceding section, but taking that seriously suggests another. Here it is important to follow not just the meaning but some broad implications of this way of speaking.

As so often, a clue comes from John Braithwaite. Some years ago, I received an (unintended but powerful) provocation from him. Having spent all those years grinding away at the rule of law, I was startled, at a conference I had organised in 2011 on media, democracy, and the rule of law, by the argument of a paper John delivered, with the apparently innocent title *Is Separating Powers a Rule of Law Issue? The Media Case*. John pointed out that though many people speak of the rule of law as a “good thing for its own sake,” it was not that. Rather, he contended, it “is best thought of as part of a separation of powers rather than the

reverse.” Why should the order matter? According to Braithwaite:

Conceiving the separation of powers as a rule of law question constrains a republican imagination in how to struggle for more variegated separations of powers. It tracks political thought to a barren, static constitutional jurisprudence of a tripartite separation of powers. This when conditions of modernity require us to see private concentrations of power such as ratings agencies and private armies . . . as both dangers and contributors to productive balances of power.⁷⁸

I am sympathetic to John’s “republican imagination,” but even if I were not I would find the point he makes here arresting, though I would quibble with the statement of the goal as “separation of powers,” for reasons already elaborated, and which I believe John would accept. Following Montesquieu, I prefer “distribution” to “separation,” and in turn “tempering” as the underlying reason for both. Distribution of powers is a strong way to temper power, not to be valued in itself but for what, in certain forms and for certain purposes, it can prevent and support. That is true also of separation, but separation is not enough. Distribution involves separation, but it also must involve connection, cooperation and mutual oversight, judicious mixing and balancing, lest sources of salutary power (e.g. for peacekeeping, enforcement of bargains, etc.) be disjointed and weakened, or lest it lead to sources of dysfunctional self-serving autarky by corporate groups, say among formerly subordinate and newly rendered independent judges in post-despotic states that, liberated from despotic control, become free to serve no other interests than their own.⁷⁹ I don’t believe that Braithwaite would disagree with any of this, indeed it is not hard to find passages in which he makes the

78. John Braithwaite, Australian National University, *Is Separating Powers a Rule of Law Issue? The Media Case 2–3* (2011) (transcript on file with author).

79. See Stephen Holmes, *Judicial Independence as Ambiguous Reality and Insidious Illusion*, in *FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION: ESSAYS IN HONOR OF JÁNOS KIS* 3, 9 (Ronald Dworkin ed., 2004).

same points, but I fear that putting “separation” front and centre might mislead.

The deeper point remains. It has effectively been the argument of this paper that we would gain greatly by following John’s suggestion that the law be viewed, not as the always-necessary centre-piece of power-tempering policy, to which other measures are at best secondary or supplementary addenda but as one implement among several, of potentially unique importance in some respects and circumstances, but dependent for its success on many other things, and perhaps not more important for the achievement of its own goal than they. As John has recently made the point:

For the complex conditions of contemporary capitalism, the simple liberal prescription of writing laws and enforcing them equally and consistently is an empty vessel. . . . Domination reduction requires a plurality of institutions that temper abuse of power: anti-corruption commissions; independent election commissions; human-rights commissions; ombudsmen; public auditors-general interacting productively with private-sector auditors; private and public ratings agencies; private regulation by stock exchanges; public regulation of stock exchanges and securities; anti-fraud policing; competition authorities that hold monopolisation to account; prudential regulators; and more. More importantly than all of these elements, it requires a vigilant civil society⁸⁰

To conclude, there are two fundamental differences between the account presented here and most conventional accounts. First, the ideal is not best thought of in terms of limitation but of tempering. That ideal is important because untempered power is so often so obnoxious. And if it is, if arbitrary power presents such dangers, we should be wary of it *wherever* it is likely to be significant.

And that leads to a second overarching observation: tempering power, the ideal of the rule of law, is not best thought of as a self-contained ideal *for law or for government*. It is also, and in my view primarily and more significantly an

80. John Braithwaite, *Hybrid Politics for Justice*, *supra* note 17, at 22.

ideal *for polity and society*, to be understood in relation to, and as an element in solution of, perennial problems that arise from pathologies of the exercise of power, wherever and in whatever hands it is powerful enough to harm.

For if arbitrary power is as obnoxious and tempering power as important as I have suggested, it is not obvious why we should focus so single-mindedly on *state* arbitrariness or *legal* tempering. On the one hand, both in the pre-Westphalian world and the globalised, corporatised world of today, there have been many, and are likely to be more, centres of great power liable to arbitrary and consequential abuse, apart from the state. Perhaps Michael Walzer exaggerates a little in saying that “plutocrats and meritocrats . . . are tyrants as much as autocrats are”⁸¹ but why assume that their tyrannous potential is of no account?

What of al Qaida, the Mafia, banks, huge corporations, omnivorous data miners such as Facebook or Google? The list of power-amassers and wielders with a potential for arbitrary exercise of power at great social cost is unlikely to be short or stay still. All over the world, capital has huge power and consequences, and often they are not tempered; indeed they typically resist tempering, and with powerful resources. The struggle to temper power must extend to these sorts of power as well, and often traditional legal measures are weak, sometimes spectacularly weak in dealing with them. We should not forget every other source of challenge just because one has traditionally loomed so large.

Again, when communism became post, rule of law promotion became a central game. But not every post-communist problem is a problem of states, which indeed are often overly weak, at least in crucial domains, particularly infrastructural domains, rather than dangerously strong. With the collapse of the Party’s monopoly of power, rule of

81. MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 37 (1994).

law and the tempering of power have not been automatic results. For there are other potential external sources of threat. This is a point that populists in post-communist states exploit mercilessly, but they do so partly because there are pathologies there to exploit. Thus, powerful economic actors or networks of political and politico-economic actors and relationships: “oligarchs” (Russia), “tycoons” (Croatia), “wrestlers” (Bulgaria), “biznesmeni” and “banksterzy” (Poland), Mafias (everywhere), have in various ways and with varying degrees of success, sought to “capture,” to lean on, or to bypass the state. Personal clientelistic networks which are commonly embedded in social power arrangements, are often politically significant, and sometimes legally so. When applied to the legal system, they exert pressure to override formal constraints with informal and *anti*-formal considerations: to make exemptions, to stall or discontinue cases, to minimise penalties, to make favorable decisions. And a lot of what they do—employ, deny employment, speculate, corrupt, subvert—does not involve the state at all, but does involve the arbitrary exercise of power. This is the land of networks. There are many, and their (net-)workings are often secret. These are points that are hugely and irresponsibly exaggerated by modern populists like those of PiS in Poland or Fidesz in Hungary (who in turn do little to destroy such forces; they just replace them with their own networks), but there is a reason they have resonance. Simply to ignore them is to play into the hands of those who would wish to exaggerate their significance.

Surely wherever power is significant enough to bring with it the sorts of harms I have mentioned, it should raise the sorts of worries rule of law partisans have had. If arbitrary power is as obnoxious as many have thought it to be, it is likely to be so wherever someone or group or institution has enough of it to throw around with damaging effect. Philip Selznick wrote a marvelous book, *Law, Society,*

and *Industrial Justice*,⁸² on how one might think of bringing the values of the rule of law to the relationships between large organisations and their members. It was a great book, but a lonely one.

The test should be the kind and amount of power an entity has and the likely consequences of its arbitrary exercise of that power, not its location. And so, people who rightly identify arbitrary power as a problem in need of a solution need to cast their nets more widely. Sometimes states will be key targets, sometimes they will not, and whether they will or will not is a contingent matter. It depends.

Conversely, whatever the *sources* of arbitrary power, why assume that central legal institutions, rules and procedures are uniformly likely to be at the centre of solving whatever problem one has postulated for ideal of the rule of law (unless you have already settled that issue by definition)? And why imagine that the means to achievement are always and everywhere likely to be any particular selection or other, of legal institutions, practices or rules? These means are elusive, are likely to vary, and have to be found.

When we look to find them, conventional lawyers' and jurists' talk and imaginations will often not lead us in the right direction or take us far enough. Many of the threats to rule of law values come from beyond the state, many remedies to such threats will also need to be found outside the state and its laws, and even where the state and law are relevant, their significance depends on social agencies and currents that they do not control.

Untempered power might flourish outside the state in ways the law has difficulty, or sometimes no interest in, reaching. So conventional lawyers' and jurists' talk, sensibilities, and imaginations will often not lead us in the

82. See generally PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969).

right direction or take us far enough. Taking the ideal of the rule of law seriously requires recognition that many of its most significant potential sources of support are often likely to be found, indeed will need to be found, in institutions, practices and traditions in the wider society, not merely in or even near the obvious institutional centers of official law. So, the salience of features of legal institutions, formal and procedural characteristics or whatever, nominated to constitute the rule of law and recommended to countries in need of it, depends on how successfully they can support the attainment of this value. That has to be the test.

The challenge for anyone seeking to temper power anywhere is not primarily to emulate or parody practices that might have worked somewhere else, but to find ways of reducing the possibility of arbitrary exercise of power, whatever that takes, what-or-whoever has it, wherever one happens to be. What roles law might play in helping achieve that solution, and how best those roles might be played, are questions with contingent and variable answers, likely to be given differently in different circumstances. Put together, this ideal expresses an aspiration for a complex social, political and legal achievement—the tempering of the exercise of power so that possibilities of arbitrariness are reduced. Acts of state and the forms of law are likely to contribute, in varying degrees, but never on their own.

I am taken with a phrase coined for another purpose by Gianfranco Poggi. He characterises Durkheim's concept of society—what distinguishes it from a mere mass of people—as a contingent, “insofar as reality,” “real *insofar as* certain things go on”⁸³: in that case, socially patterned behaviours, shared and internalised norms, and so on. I think of the ideal and point of the rule of law that way. It is a relative and variable achievement, not all or nothing. But one can say it exists in good shape or repair insofar as a certain sort of valued state of affairs, to which law contributes in particular

83. GIANFRANCO POGGI, DURKHEIM 85 (2000).

and variable ways, exists. On the conception advanced here, the ideal of the rule of law is well served insofar as the exercise of political, social, and economic power in a society is effectively tempered, constrained, and channelled to a significant extent, so that non-arbitrary exercises of such powers are relatively routine, while other sorts, such as lawless, capricious, and wilful exercises of power, routinely occur less.

Of course, states are distinctive in many ways, among them that they have huge potential sources of power that can help and hurt across the board. In the east European contexts that brought me into these concerns, that is again being made plain by new populists who in many ways are taking up what 30 years ago had seemed to have been decisively laid down: ideologies and practices designed to laud and serve the arbitrary exercise of power. Nothing that is happening there suggests that the state is dead, and I have sought elsewhere to examine why it has been so easy to make it yet again maliciously alive.⁸⁴

So nothing I have said is intended to suggest that states and law are unimportant, either as sources of problems or of solutions to them. However, some of it might perhaps help us to see their (variable) importance in perspective, and give due weight both to other sources of power that might need tempering, and to other entities, institutions, and social groups that might need to be enlisted in that cause.

Rather than presume to find complex, sometimes unprecedented sources of challenge likely to arise in coming years, in axiomatically predetermined locations, and respond with items from pre-packaged laundry lists, we might better start by asking: what's at stake? What's the point? If the stakes seem high, the point important, responses will need to be sought. Here lawyers and philosophers have a role but

84. Martin Krygier, *The Challenge of Institutionalisation: Post-Communist "Transitions", Populism and the Rule of Law*, *EUR. CONST. L. REV.* (forthcoming 2019) (manuscript on file with author).

not always a primary one. Key insights will need to be sought from social theorists and investigators, prominent among them theorists and investigators such as John Braithwaite and others assembled in this issue and by and in the Baldy Center. A lawyer or ivory tower legal theorist, perhaps *this* lawyer and theorist, might say to such folk, “arbitrary power seems a bit of a problem. Could you check out what might be a solution?” If the answer comes back—“it all depends”—we should recognise that as a counsel of wisdom not an admission of defeat.