Thoughtfulness and the Rule of Law

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1. Law’s obtuseness

We want to be ruled thoughtfully. Or, to put it in a democratic idiom, we want our engagement in governance to be thoughtful and reasoned, rather than rigid or mechanical. Thoughtfulness – the capacity to reflect and deliberate, to ponder complexity and to confront new and unexpected circumstances with an open mind, and to do so articulately (and even sometimes argumentatively) in the company of others with whom we share a society – these are some of the dignifying attributes of humanity, man at his best (men and women at their best) in the governance of their society.

But does the quest for thoughtfulness in government mean endorsing the rule of men rather than the rule of law? To be ruled by laws rather than by men has been an aspiration – indeed an imperative – of the Western political tradition since the time of the ancient Greeks. But it was the Greeks who noticed – or some of them – that rule by law might be something opposed to thoughtfulness in government. Law, said Plato’s visitor in The Statesman, ‘is like a stubborn, stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.’¹ Thoughtfulness – when we get it – is an attribute of human rulers, of people (the few or the many) participating in government. And maybe it is one of the things we turn our back on when we say we want to be ruled by laws – categorical, inflexible laws (laid down, in many cases, centuries ago) – rather than ruled by men. For the sake of the benefits that the Rule of Law provides, we swallow the costs of a certain diminution of intelligence in government.

Of course, in many ways this distinction between rule by men and rule by laws is a false contrast. Laws are human artifacts. They are made by men (made by people), interpreted by people, and applied by people. Rule by law seems to be rule by people all the way down. And in some of those capacities human thoughtfulness is paramount. Law-making, when it is done explicitly, is a thoughtful business and often it represents a paradigmatic exercise of reason in policy conception, in drafting, and even (sometimes) in legislative deliberation. Though every legislator no doubt hopes his works will endure, the legislative mentality at its best represents the agile and flexible application of human intellect, on a collective scale, to the shifting problems and challenges faced by a society. That’s what I have argued in The Dignity of Legislation and elsewhere.²

Historically, though, proponents of the Rule of Law have tended to be suspicious of legislation for that very reason. It’s too clever by half, particularly in democratic politics; it changes too quickly; in an assembly of representatives, said Hobbes, it changes haphazardly with every variation in the political composition of the legislature – different men, different laws.³ If the idea of the Rule of Law is to be credible, law needs to be relatively constant in the face of changes of personnel among those who are thinking about how the society is governed.

The same point was made 20 years ago by the Supreme Court of the United States in 1992 in the great case of Planned Parenthood v. Casey.⁴ What would happen, said Justice O’Connor in the plurality opinion, if precedents changed as often as changes in personnel on the court? Wouldn’t people infer that this was rule by those who happened to be judges rather than rule by law? We can’t go round overturning our past decisions too often, said the Court, certainly not our important decisions. (They were talking about Roe v. Wade⁵ – which some of them had previously disclosed a thoughtful inclination to revisit.)

³ In many cases, says Hobbes, where legislative disagreement is resolved by voting, ‘the Votes are not so unequall, but that the [defeated] part have hopes by the accession of some few of their own opinion at another sitting to make the stronger Party .... [They try therefore to see] that the same businesse may again be brought to agitation, that so what was confirmed by the number of their then present adversaries, the same

may now in some measure become of no effect ... It followes hence, that when the legislative power resides in such convents as these, the Laws must needs be inconstant, and change, not according to the alteration of the state of affaires, nor according to the changeableness of mens min-

des, but as the major part, now of this, then of that faction, do convene; insomuch as the Laws do flote here, and there, as it were upon the waters.’ – Thomas Hobbes, De Cive, ed. Howard Warrender (Oxford University Press, 1983), pp. 137-38.
There is ... a point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith. ... There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.6

With that sort of changeability, it would be less convincing for a thoughtful court to present itself as guardian of ‘the character of a ... people who aspire to live according to the rule of law.’7

In any case, whether or not laws are made and changed thoughtfully, there is still the issue of thoughtlessness in the way they are applied. Intellectual agility in the making of law is one thing; intelligence in its application is another. I said a moment ago that laws don’t interpret and apply themselves; it is people who interpret them and people who apply them, and if we are looking for thoughtfulness in that process, it might well seem that we are looking for something other than the Rule of Law. Many would say that the discipline of the Rule of Law aims to ensure that law is applied with as little independent input from the judge as possible. Whether she is thoughtful or not, she is not supposed to bring her subjective views into play; she is supposed to be bound rigidly and mechanically by the literal text in front of her.

Indeed, our law schools are full of people who say that the only way to respect the thoughtfulness of our lawmakers is to be literal-minded in the way we apply their work product to changing circumstances. In the United States, this reaches its apogee in constitutional originalism. We celebrate the thoughtfulness of the Founding Fathers – James Madison, Alexander Hamilton, and so on: all very thoughtful men – but we do so, 240 years later, either by substituting what we know of their eighteenth century thoughtfulness for our twenty-first century kind, or by sticking rigidly to the text that they produced, even though we know that its calligraphy was framed for utterly different circumstances (a few colonies clanging to the edge of a largely unexplored continent with a population less than that of modern New Zealand).

Even if it is modern legislation that is being interpreted, the textualists among us insist that judges cannot be trusted with adding independent input. And a connection is made not just between thoughtfulness and change, but thoughtfulness and variability, maybe even thoughtfulness and subjectivity. Different people think in different ways. And we say ‘subjective’ because we want to

emphasise the point that one thoughtful judge may come up with conclusions that are quite different from those that another thoughtful judge comes up with. One man’s thoughtful judge is for another man the political partisan of a rival set of ideals. The Rule of Law is supposed to mean that a party coming to law can expect to have his fate determined by the law itself – the law the legislature has enacted – not by the vagaries (even the thoughtful vagaries) of whoever is wearing a wig in the courtroom he happens to be assigned to.8

2. Clarity and certainty in the Rule of Law

Law can be obtuse, rigid, stubborn and in its application mechanical – but, people will say, ‘At least it is predictable; at least we know where we stand with a law that does not often change and which is applied, constantly and faithfully whether the subjective opinions of the judiciary.’ And this, it is said, is not just an effect of the Rule of Law. Many will say that it is as close as we can get to the essence of the Rule of Law. ‘The rule of law,’ said Thomas Carothers, ‘can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.’9 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, Dick Fallon five, Cass Sunstein came up with seven, Lon Fuller has eight, Joseph Raz eight, John Finnis eight, Lord Bingham eight in his excellent book on The Rule of Law;10 (I don’t know why eight is the magic number: but it’s a slightly different eight in each of these four cases); Robert Summers holds the record, I think, with eighteen Rule of Law principles.11

So: at the top of Lord Bingham’s list we find a principle that seems incontestable in what it requires: ‘The law must be accessible and so far as possible intelligible, clear and predictable.’ Who could disagree with that: accessible, clear, predictable? The rule of law has consistently been associated with the value of predictability in human affairs. The most important thing, we are told, that people need from the law that governs them is predictability in the conduct of their lives and businesses. Tom Bingham quoted Lord Mansfield:

In all mercantile transactions the great object should be certainty: and therefore it is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.12

and went on to observe in his own voice that ‘[n]o one would choose to business, perhaps involving large sums of money, in a country where parties rights and obligations were undecided.’13

7 Ibid., p. 868.
12 Vallejo v. Wheeler (1774) 1 Cowp. 143, 153; cited by Bingham, The Rule of Law, at p. 38.
13 Bingham, The Rule of Law, p. 38.
Lord Bingham does not speak of Hayek in his book, but in many ways Hayek’s work – especially his early work on the Rule of Law – has been decisive in pushing this element of predictability to the fore. ‘Striped of all technicalities,’ said Hayek in Chapter 6 of *The Road to Serfdom*, the Rule of Law requires that ‘government in all its actions [must be] bound by rules fixed and announced beforehand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.’ It is a passage that has been quoted in many of these studies since, notably at the beginning of Joseph Raz’s discussion. This element of predictability, this ideal of ‘formal rules [which] tell people in advance what action the state will take in certain types of situation, defined in general terms, ... provided as a means for people to use in making their own plans’ – it is this aspect of the Rule of Law that has been most prominent in law and development studies, with the World Bank and other global institutions treating it as indispensable for the creation of a secure environment for investment in developing countries.

Philosophically, the idea here – again, elaborated most thoroughly by F.A. Hayek – is that there may be no getting away from legal constraint in the circumstances of modern life, but freedom is possible nevertheless if people know in advance how the law will operate and how they have to act if they are to avoid its application. Knowing in advance how the law will operate enables one to make plans and work around its requirements. It creates a stable and calculable environment for business and investment. Not only that, but predictability is the basis of security: whether we think of personal rights or property rights, determinate legal rules applied according to their terms are supposed to give each citizen certainty as to what he can rely on in his dealings with other people and the state. Accordingly, the Rule of Law is supposed to highlight the role of rules rather than standards (I am thinking of Justice Scalia’s famous article, ‘The Rule of Law as a Law of Rules’), operationalised determinacy rather than open-ended language, literal meanings rather than systemic inferences, direct applications rather than arguments, closure rather than continued deliberation, and *ex ante* clarity rather than laboured interpretations.

The Rule of Law is violated, on this account, when the norms that are made public to the citizens do not tell them in advance precisely what to expect in their dealings with officialdom. It is violated when outcomes are determined thoughtfully by official discretion rather than by the literal application of rules with which we are already familiar. And it is violated when the sources of law leave us uncertain about what the rules are supposed to be: Lord Bingham’s book has a useful discussion of the problem posed by multiple judgements in the House of Lords in a single case (and presumably this continues to be an issue in the UK Supreme Court also): dissents and concurrences that can leave people unsure about what principle of law has actually emerged from a given case. If discretion, vagueness and uncertainty become endemic in our system of government, then not only are people’s expectations disappointed, but increasingly they will find themselves unable to *form* expectations on which to rely, and the horizons of their planning and their economic activity will shrink accordingly.

So there you have it. A dominant conception of the Rule of Law that seems to cherish values and features of law and legal administration like certainty and predictability, and a conception of thoughtfulness, which seems likely to disrupt that. The contrast is clearest of course in the continuing debate about the relation between law and discretion; and since Dicey, the Rule of Law has been viewed as an anti-discretion ideal, attacking and discrediting the proliferation of discretionary authority in the agencies of the modern administrative state. There is a lot to be said in defence of discretion, and a lot of it has been said over the years in the response to Dicey’s work, not least in the excellent critique of Dicey’s argument in Kenneth Culp Davis’ book, *Discretionary Justice*, first published in 1969. But that is not where my argument today is located. Instead of defining the need for discretion against the claims of the Rule of Law, I want to indicate ways in which the predictability conceptions sell short the idea of the Rule of Law itself. There is more to law and more to what we value in legality under the heading of the Rule of Law than regularity, rules, determinacy, closure, and certainty. That’s what I want to argue.

Now normally, when people say that, what they are promising to do is to develop a more substantive conception of the Rule of Law, imbued perhaps with convictions about substantive justice held by them and their friends. Predictability is associated with a formalist conception of the Rule of Law; so thoughtfulness must be associated with a substantive conception of the Rule of Law entangled with substantive justice. I can’t emphasise enough that that is not my approach. No doubt there is a debate to be had about whether the Rule of Law should include a substantive dimension: Lord Bingham is unashamed about including fundamental human rights under the auspices of the Rule of Law in Chapter 7 of his book. But before we even get to that, there are important

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16 Hayek, *Road to Serfdom*, p. 78.
formal features and particularly procedural features of the Rule of Law that are much more amenable to legal thoughtfulness than the predictability conceptions would indicate. And it is these formal and procedural aspects of legal thoughtfulness that are my subject today.

3. Lay, academic, and professional views

I am acutely conscious that in talking about these features of the Rule of Law ideal, I am referring primarily to a body of academic literature written by scholars, who are on the one hand detached from the actual practice of law but detached also, to a certain extent, from the way in which the Rule of Law circulates outside legal philosophy, in the populace at large.

This does not mean, by the way, that the academic studies have no influence. Let me give one example. In recent years, scholars have turned their attention to the possible application of the Rule of Law to international governance, meaning not just the presence and importance of international law, but the suggestion that international law and international law-making should be subject to Rule-of-Law requirements. The whole area remains under-theorised, but I am afraid that a great deal of the work that has been done on it simply adopts uncritically the perspective of those who say, at the national level, that the Rule of Law requires clarity, predictability, and determinate rules. And people working in the international area might be impressionable enough to be brow-beaten into accepting this, even though as lawyers they know very well that there is a lot more to legal and practical than this. I believe there is much more to be said on this. They might be overly impressed by a report that my NYU colleague Simon Chesterman produced, entitled The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System, which in my view, in its exclusive emphasis on rules, is way too narrow a conception to develop in this area.

I have written elsewhere about the dissonance between academic and lay understandings of the Rule of Law. The pages of the law journals devoted to this often read like a set of footnotes to the scholarly work of Lon Fuller, and they emphasise the formal features that Fuller drew set of footnotes to the scholarly work of Lon Fuller, and many pages of the law journals devoted to this often read like a report that my NYU colleague Simon Chesterman produced, entitled The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System, which in my view, in its exclusive emphasis on rules, is way too narrow a conception to develop in this area.

So: what are the more thoughtful aspects of the Rule of Law? There are many things we could consider. There is time today to focus on only three aspects of modern legal practice that are, I think, wrongly neglected or denigrated in philosophical discussions of this ideal. The first is the use of standards, as opposed to rules, to occasion and channel thoughtfulness in the application of law. The second is the way in which the rules of legal procedure – the rules of adjudicative procedure in particular – sponsor and orchestrate forms of argumentative thoughtfulness. And the third is the way in which stare decisis provide something like shared premises, or a way of arriving at shared premises, for the sort of thinking-in-the-name-of-us-all that distinguishes legal thinking from say the tendentious and partisan thinking of an individual participating in politics. So: standards, procedures, and precedents. These are my headings.

4. Rules versus standards

Cass Sunstein once remarked that ‘[l]aw has a toolbox, containing many devices, and it is probably a mistake to
identify the Rule of Law with the use of just one kind of tool. Rules with their strict logic and their descriptive and numerical predicates, specifying *ex ante* the outcome for cases that fall under them, are one kind of tool; but standards, which use value terms like ‘reasonableness’ or in some other way call for judgement in the course of their application, are another. There is no particular reason to associate law or the Rule of Law with the former category only, as though for example, in the US Constitution, the Eighth Amendment were less truly law than (say) the Article II rule that says the President must be 35 years old.

When we distinguish rules from standards, we sometimes say that the difference is that a standard is a norm that requires some evaluative judgment of the person who applies it, whereas a rule is a norm presented as the end-product of evaluative judgments already made by the law-maker. A posted speed limit of 70 mph represents a value-judgment already made by the legislature that that speed is appropriate for driving in the designated area. A legal requirement to drive at a ‘reasonable’ speed, by contrast, looks for a value-judgment to be made downstream from the legislature; it indicates that the legislature has decided not to make all the requisite value-judgments itself, but has left some to be addressed to was prepare yourself for the arbitrary outcomes for.

In New Zealand, where I learned to drive, there used to be things called ‘Limited Speed Zones’ (LSZ) – where there was no fixed speed limit lower than the general speed limit but where the LSZ sign alerted drivers to the variability of local circumstances and instructed them to proceed at a speed appropriate to the circumstances. Some jurisdictions eschew speed limits altogether, and just tell their drivers to proceed at a reasonable speed. A conviction entered in Montana against a driver who went 80 mph on hilly country road was struck down in 1998 on the grounds that the relevant statute was void for vagueness, since the array of traffic statutes offered no guidance at all as to properGraceful" speed.28 But other courts in the US have upheld the use of standards rather than rules in other circumstances, where there are background speed limits but where conditions in a particular area defy easy classification, so that at some times of day a patch of road is like an urban street and at other times it is like a rural highway.29 On motorways, perhaps, we can vary the speed limit with digital signs, but not on every country lane. Anyway the traffic example is just an easy paradigm; much more important cases concern the imposition of duties of care in tort law, where a requirement of reasonable care is imposed on potential tortfeasors or human rights provisions that deploy complex value terms like ‘dignity’ or ‘inhuman and degrading treatment’ rather than telling us directly what we are or are not allowed to do.

What people sometimes say in the Rule of Law tradition is that norms that use terms like ‘reasonable’ or value terms like ‘cruel’ or ‘inhuman’ suffer from a deficit of clarity – ‘[t]he desideratum of clarity,’ said Lon Fuller, ‘represents one of the most essential ingredients of legality’30 and therefore they detract from or undermine the Rule of Law, because they don’t let people know in advance exactly where they stand, they don’t offer determinate guidance, and they empower those entrusted with the application of the law to impose their own judgments in a way that is not legally controlled, or at least not tightly controlled by law. People then seem to be at the mercy of the value judgments (the discretion) of officials and courts, second-guessing their own futile attempts to figure out how these norms will be authoritatively applied. It is Hayek’s opinion, expressed in *The Road to Serfdom* that ‘[o]ne could write a history of the decline of the Rule of Law ... in terms of the progressive introduction of these vague formulas [like ‘fairness’ and ‘reasonableness’] into legislation and of the increasing arbitrariness and uncertainty that results.’31

But if we are supposed to infer from this that when standards are in play we might as well not have law at all, or if the implication is that the thoughtfulness which is sponsored in the use of standards represents the opposite of the Rule of Law, then I beg to differ. It is a mistake to regard these norms as simply blank cheques for discretion, as though the most they told the person that they were addressed to was prepare yourself for the arbitrary imposition of a value judgment by those in power. In fact the use of standards clearly represents an exercise in legal guidance. Think back to our sign saying ‘Limited Speed Zone’. Is it really the case that it gives the driver no guidance? Only on the crudest behavioural conception of what it is to guide someone’s action. Having one’s action guided by a norm is not just a matter of finding out about the norm and conforming one’s behaviour to its specifications. It can involve a more complex engagement of practical reason than that. The use of a standard credits a human agent not just with the ability to comply with instructions but with the capacity to engage in practical deliberation. The sign that says ‘Drive at a reasonable speed in the circumstances’ tells the driver ‘Now is the time to check the weather and the road conditions and relate that information to your speed to your speed and moderate your behaviour accordingly. Now is the time to focus on this and do the thinking that the application of the standard requires.’ It mobilises the resources of practical intelligence possessed by the norm subject – a

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30 Fuller, *Morality of Law*, p. 68.

31 Hayek, *Road to Serfdom*, p. 81.
mobilisation that might not take place if the law-maker had not promulgated the standard. It guides his agency in that way, even if it leaves it up to him to determine the appropriate behaviour. It is law that requires and triggers thoughtfulness, rather than law that supersedes thoughtfulness.

And sometimes standards channel our thoughtfulness as well as triggering it. A standard that prohibits ‘inhuman’ and ‘degrading’ treatment requires, it is true, an exercise of judgement, value-judgement, on the part of those who apply it: the legislators and officials to whom it is directed in the first instance, and the judges who are called upon to review their compliance. But it does not require an all-purpose evaluation. ‘Inhuman’ and ‘degrading’ have specific meanings. They require assessment of a practice or a penalty in some dimensions and not others. And so depending on the particular thick predicate that is used, the standard directs our practical reasoning to a particular domain of assessment. So these norms too guide the practical reasoning (and action based on that reasoning) of those to whom they are addressed: they provide structure and channelling for the thoughtfulness they are designed to elicit.

Let me pursue this one step further. There is a temptation among scholars to think that when faced with something like, for example, the Article 3 prohibition in the ECHR on ‘inhuman degrading treatment’, the task of the courts is in effect to replace the standard with rules developed through a succession of cases. In other words, we treat the standard as an inchoate rule, formulated in half-baked fashion by the lawmaker, awaiting elaboration and reconstruction as a set of determinate rules by the courts. If the courts decide that solitary confinement is inhuman, then we can treat the standard prohibiting inhuman treatment as including a rule prohibiting solitary confinement. If they decide that shackling prisoners is degrading, then we take the provision prohibiting degrading treatment as comprising a rule that prohibits shackling. As the precedents build up, we replace vague evaluative terms with lists of practices that are prohibited, practices that can then be identified descriptively rather than by evaluative reasoning. In time, the list usurps the standard; the list of rules becomes the effective norm in our application of the provision; the list is what is referred to when an agency is trying to ensure that it is in compliance.

All this might make law more manageable but I fear that it can detract from the sort of thoughtfulness that the standard initially seemed to invite. Article 3 invited us to reflect upon and argue about the idea of degradation and inhumanity, which are moral ideas. But now we are tempted to simply consult the precedents and the set of rules that they generate, abandoning any of the guidance in our evaluative thought that these particular moral predicates might provide.

(By the way, none of this is new. I am really just elaborating some points made by Ronald Dworkin in a body of insight ranging from his discussion of what he called ‘weak discretion’ in a famous article from 1967 to his more recent advocacy of what he calls ‘the moral reading’ of terms like these in the constitution of the United States. Actually, I hope it is clear that a lot of what I am doing in this lecture is inspired by insights and arguments that have been prominent in Dworkin’s jurisprudence.)

5. Formal procedures

A second regard in which law as such might be associated with thoughtfulness has to do with procedural due process – the highly formalised procedures that structure the judicial hearings in which official legal determinations are arrived at. I worry sometimes that our philosophical conceptions of law and the Rule of Law do not pay nearly enough attention to procedural as opposed to formal aspects of the Rule of Law. For the Rule of Law is not just about the formal characteristics of the norms that we apply, it is about the processes by which they are applied, and those processes involve not just an official with a power of decision, but a whole elaborate structure in which evidence is presented and tested and legal arguments are made.

I spoke of the difference between lay, professional and philosophical images of law. For most lay people, law and the workings of law are represented by the courtroom – the dramatic and almost ritualistic way in which opposing bodies of evidence and opinion confront each other in court. Think of the influence even in the United Kingdom now of the ubiquitous American television show, Law and Order. No doubt, it is a mistake to think of this as the whole of legal practice: most lawyers are not litigators, and a lot of them never see the inside of a working courtroom from one year’s end to the next. But the public are right to assign it an important role nonetheless because an awful lot of legal business is conducted in the shadow of the due process, and with a view to (or a dread of) legal proceedings, even if it does not actually take place in the courtroom itself.

So: let us think about the way we structure judicial or quasi-judicial hearings. By hearings, I mean formal events like trials, tightly structured in order to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides. Those who are immediately concerned have an opportunity to make submissions and present evidence, and confront, examine and respond to evidence and submissions presented from the other side. Not only that, but both sides are listened to by a tribunal which is bound to respond to the arguments put forward in the reasons that it eventually gives for its decision. We tend to think of

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34 See Waldron, ‘The Rule of Law and the Importance of Procedure’.
due process primarily in terms of fairness, but we can think of it also as a way of maximising the role of reason and thoughtfulness in the settlement of disputes.

Here I want to draw on the immensely important work of Lon Fuller in a long essay published posthumously in 1978 in the *Harvard Law Review* called ‘Forms and Limits of Adjudication’. It is an irony, which Professor Lacey has written about, that in the work of his that is most cited in the Rule of Law tradition (and in his famous 1958 dispute with H.L.A. Hart), Fuller focused on formal elements to the exclusion of procedural elements, whereas he was in fact one of our deepest thinkers on matters procedural. His work on this essay is light years in quality beyond anything you find in Hart’s writings on procedure. Anyway, Fuller said this about adjudication:

the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.\(^\text{35}\)

It is, he said, ‘a device which gives formal and institutional expression to the influence of reasoned argument in human affairs’. Fuller did not think that the distinguishing characteristic of courtroom process was the impartial office of judge, because there are all sorts of judging functions, where impartiality is at a premium, that don’t involve the presentation of reason and argument at all: Fuller mentions umpiring in baseball or judging in an agricultural fair.

What distinguishes these functionalities … from courts, administrative tribunals, and boards of arbitration is that their decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments.\(^\text{36}\)

Again, it may be objected to Fuller’s characterisation that there are opportunities to present reasoned arguments in all sorts of contexts, in election campaigns for example. But, says Fuller,

[...this objection fails to take account of a conception that underlies the whole analysis being presented here, the conception, namely, of a form of participating in a decision that is institutionally defined and assured.\(^\text{37}\) And how is it assured? Among other ways by the requirement that judge or arbitrator give reasons for his decision. This is not just because we want the judge to be thoughtful. It is rather, Fuller says, because without such reasoned opinions, the parties would have to just ‘take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments’.\(^\text{38}\)

I know that courtroom process can seem cumbersome. And to someone in the grip of an image of thoughtfulness that privileges the relatively unstructured working of the human intellect – autonomy, spontaneity and flashes of insight – the laborious and ritualised proceedings of the courtroom may seem the antithesis of the sort of thoughtfulness we are looking for in government.

And in some areas that may be right: I am reminded of Lon Fuller’s caution against over-insisting on the use of judicial procedures:

As lawyers we have a natural inclination to ‘judicialize’ every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.\(^\text{39}\)

We need not deny this point in order to recognise that, nevertheless, where it is used, law in its intricate and formal proceduralism does do the work of structuring and channelling argumentation, so that even if it is not the form of thoughtfulness we always want from the agencies of the modern administrative state, still it needs to be credited for what it is: a mode of thoughtfulness that allows rival and competing claims to confront and engage with one another in an orderly process, where the stakes are high indeed, often deadly, without degenerating into an incoherent shouting match. Like parliamentary procedure, it is one of the ways in which we get thoughtful together, even when my thoughtfulness is the adversary of yours.

There is much more to be said on this, and I can’t say it today. If I could I would want to refer to the dignity aspects of due process as well, in the work that people like David Luban and Frank Michelman have done (and some work that I did in my Tanner Lectures in 2009) on the dignity of the opportunity to present oneself before an official who has the power to impose binding decisions, to present oneself directly or through a legal representative as someone with a view of one’s own on the matter that the public is addressing and a conception of one’s own of the elements of the public good that are at stake – a view and a conception that the decision-maker is required to listen to and take into account.\(^\text{40}\)

Let me take the analysis in a slightly different direction. The institutional and procedurised character of legal process makes law a matter of *argument*. Law presents itself as something one can make sense of. The norms administered in our legal system may seem like just one damned command after another, but lawyers and judges try to see the law as a whole; to discern some sort of


\(^\text{36}\) Ibid., p. 365.

\(^\text{37}\) Ibid., p. 366.

\(^\text{38}\) Ibid., p. 388.


coherence or system, integrating particular items into a structure that makes intellectual sense. And ordinary people take advantage of this aspiration to systematicity and integrity in framing their own legal arguments – by inviting the tribunal hearing their case to consider how the position they are putting forward fits generally into a coherent conception of the spirit of the law. In this way too, then, law conceives of the people who live under it as bearers of reason and intelligence. Even in conflict, they are conceived not as mad dogs at each other's throats, but as rival bearers of reason and intelligence, thinking adversarially about the basis of social order.

Now, of course, this does bring us slap-bang up against the conceptions of the Rule of Law that are preoccupied with predictability. For argumentation of this sort can be unsettling and the procedures that we cherish often have the effect of undermining the certainty that is emphasised on the formal side of the Rule of Law ideal.

An argument may bring something new into the world, a new way of looking at things; and for all we know a panel of judges may be persuaded by it. The upshot of argument is unpredictable, and to the extent that legal process sponsors argumentation, it sponsors uncertainty in the law.

Still, there is no getting away from it. This is not the Rule of Law versus something else. As the late Neil MacCormick pointed out, law is an argumentative discipline and no analytic theory of what it is and what distinguishes legal systems from other systems of governance can afford to ignore this aspect of our legal practice. A fallacy of modern positivism, it seems to me, is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors and institutionalises. The institutionalised recognition of a distinctive set of norms may be an important feature. But at least as important is what we do in law with the authoritative norms that we identify. We don’t just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a process of argument back and forth, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us. And legal procedure facilitates and sponsors that form of argumentativeness.

I know the demand for clarity and predictability is made in the name of individual freedom – the freedom of the Hayekian businessman in charge of his own destiny who needs to know where he stands so far as social order is concerned. And he may be disturbed – his investment plans may be disturbed – by unsettling and unpredictable consequences of adversarial argument in law. But think about it. With the best will in the word, and the most determinate seeming law, circumstances and interactions can be treacherous. From time to time, the free Hayekian individual will find himself accused of some violation or delict. Or his business will be subject – as he thinks, unjust or irregularly – to some detrimental rule. Some such cases may be clear; but others will be matters of dispute. An individual who values his freedom enough to demand the sort of calculability that the Hayekian image of freedom under law is supposed to cater to, is not someone who we can imagine always tamely accepting a charge or a determination that he has done something wrong. He will have a point of view on the matter, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. And when he brings his point of view into play, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins: legal argumentation and the facilities that law’s procedures make for the formal airing of arguments.

Courts, hearings and arguments – those aspects of law are not optional extras; they are integral parts of how law works; and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to truncate what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence.

6. Premises

I cannot cover every aspect of this topic: it is as wide as legality itself. But a third thing I want to emphasise is the way law provides not only the occasion for thoughtfulness and the terms that channel it, and not only the procedures that structure it in formal settings, but also the premises with which it works.

In our individual political thinking, in our moral deliberation, we are privileged as autonomous beings to choose our starting points and argue from whatever set of premises we find compelling. Some begin with God, others with utility, others with some idea of self-fulfillment, and still others begin with some ancient conception of virtue. And as we proceed from our different starting points, our arguments are something of a cacophony as people talk across each other following different and often mutually unintelligible trajectories. This is the problem of public reason that has exercised John Rawls and his followers.

Law, on the other hand, sponsors a mode of argumentation in which premises are to a very large extent shared, and pathways of thought charted out on a common basis, at least in their initial stages. The point is obvious enough in the case of constitutional and statutory provisions, where the text of an enactment provides all of us, grappling with a given issue, with the same point of departure in our interpretive arguments. It is less easy, but no less important to see how this works in the case of precedents too. And this is the last topic I want to address.


43 Often the interpretation of a legal provision is not just a matter of seeing directly how it applies but of how it will interact with other legal provisions and doctrines in complex argument.
When jurists defend *stare decisis* – the idea that we should respect and be constrained by the principles laid down in previous decisions – the defence is usually in terms of predictability. We enhance the certainty of the law – and the determinate guidance that is afforded to those who live under it – by insisting that courts regard themselves as bound in most cases by the principles of their own earlier decisions in similar cases. As I said earlier, the argument is not just about respecting the expectations that may have been invested in a particular decision or line of decisions, but allowing sufficient stability so that actually expectations can form in the first place.

But it can’t just be a matter of making legal outcomes more predictable. Once again, we owe to Ronald Dworkin (this time the Dworkin of *Law’s Empire*) the observation that predictability – in the straightforward sense of allowing us to predict legal outcomes reliably in advance – can hardly be regarded as the ground of our interest in precedents, because in the practice of law we worry away at the meaning of precedents, their interaction with one another, and their bearing on the cases we are currently dealing with, long after any element of predictability has evaporated. The predictability account cannot explain what Dworkin called ‘the constant and relentless concern judges show for explicating the “true” force of a ... precedent when that force is problematical.’ He says our judges actually pay more attention to precedents than the expectations theory would dictate. Indeed (and I am paraphrasing him) we would judges to lose interest in precedents once their holding, or bearing on future cases, became difficult or controversial, because then we should not suppose that any settled expectations had formed around them. ‘The general power of precedents to guide behavior will not much be jeopardised if judges refuse to follow them when the advice they give is garbled or murky.’

True, certain precedents – you might think of them as super-precedents – contribute powerfully to legal predictability by pinning down major major premises of law in particular areas. This has been pointed out by scholars like Richard Fallon and Henry Monaghan in the debate about *stare decisis* in American constitutional law. The background here is that – motivated largely by concern about the continuing authority accorded to the abortion decision in *Roe v. Wade* – some conservative law professors have suggested that *stare decisis* should have less force in constitutional law where serious individual rights or other constitutional values may be betrayed by sticking with a constitutional precedent that is mistaken, a betrayal that could not possibly be justified by the pragmatic considerations that are associated with certainty and predictability. In response, Fallon and Monaghan reminded their readers of how much American constitutional law is structured by precedent and how much of the legal framework structuring modern governance in the United States might unravel if old precedents were always up for grabs. The cases they cite include the prospect of revisiting the holdings that established things like the application of the Bill of Rights to the states or the constitutionality of the use of paper money. What these precedents do is limit the range of what can be up for grabs in legal argument; they specify outer limits on where legal argument can go, even while they do not themselves directly determine the result of any litigation that is likely to come before a modern court.

With more mundane precedents, however, it seems to me that the role of established case law is not to determine outcomes in cases with any degree of certainty, certainly not in appellate cases, but rather to provide substantive points of departure that people can use when they argue those cases through. I say points of departure rather than major premises. Unlike statutes and the provisions of written constitutions, cases do not easily disclose the principles of their decision. Often we have to first argue our way upwards through the cases to arrive at the principles they stand for before we can do anything like treating those principles as major premises and arguing downwards from them in a syllogistic fashion. Still, there is a sense in which we share starting points in this dynamic of argument. We argue on the same page, even when we are adversarially opposed to what someone else is making of a line of cases.

I suppose someone obsessed with intellectual autonomy might worry about forms of thoughtfulness that take their premises as given. That may seem, in Kantian terms, *heteronomous* thoughtfulness, not partaking of – indeed compromising or undermining – the intellectual autonomy that is human thinking at its best. But many modes of thought are like this. Theological argument proceeds in this way, by reference to certain inescapable creedal and biblical commitments; but it remains a domain of thoughtfulness. Creedal propositions (of the Nicene Creed, for example) do not determine the outcome of theological argument. But still they constrain and direct it, providing inescapable starting points, axioms and a good number of theorems which are to have a non-negotiable presence in any respectable argument. And scientific argument is sort of like law too in this regard: one proceeds within the framework of existing scientific consensus, building one’s own work on the accepted results that have come in from other laboratories, so that scientists can pursue their results and findings as a community not just as an array of intellectually autonomous thinkers.

### 7. Picking up the threads

Let me now draw some of these threads together. I have mentioned three main ways in which law sponsors and facilitates public thoughtfulness: first, in its use of standards rather than rules as the norms that govern behaviour; secondly, in the procedural structuring of public adversarial argument in court hearings; and thirdly, in providing through texts and precedents many of the axioms and theorems that enter into legal reasoning.

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These are not marginal characteristics of law. They are central to it – business as usual in the law – though it is my lament that they are none of them made prominent in the most influential jurisprudence of our day, which in many law schools in America and in the United Kingdom remains positivist and analytical. Positivism in the tradition of Hart remains committed to viewing law as a system of rules; it gives scant consideration to procedural aspects of legal practice; and it says next to nothing about the importance of stare decisis. More generally, it treats disagreement about the law and inconclusive legal argumentation as a marginal phenomenon, mostly stemming from the accidental use of terminology too vague to determine hard cases.48

8. Modes of thoughtfulness

The modes of thoughtfulness I have alluded to under these three headings are not the only forms of thoughtful deliberation that a society needs; legalistic thinking is not the only desirable mode of thoughtfulness in government.

We do need what is often excoriated as discretion – thoughtful discretion, sometimes technical expertise, sometimes policy-oriented either as a matter of implementation or in an awareness of what is politically and administratively possible, sometimes value-oriented in the choice of policy – we need discretion in all these senses, in the hands of administrative agencies and their coteries of expert and experienced officials. And that, I concede, is not what the Rule of Law can supply.

Some think that the mission of the Rule of Law is to stamp that out and minimise such discretion; replacing it with clear and determinate rules administered by courts, or at the very least cultivating a posture of suspicion towards it. Maybe. On the other hand, as Professor Davis pointed out, administrative discretion is here to say.49 And law has a role to play in authorising it, channelling it by providing criteria, and bounding its outer limits with basic constraints of justice. My point is that even that role for law is played out as a form of legal thoughtfulness – legal thoughtfulness constraining a different form of administrative thoughtfulness – rather than in terms of the Rule of Law imposing upon the administrator a set of mechanically-applied determinate rules. Sometimes the role of courts here is simple deference to administrative decision-making; but when administrative decision-making is called in question, it is important that we have thoughtful rather than mechanical ways of challenging it under the auspices of the Rule of Law, and the modes of argumentation that I have been talking about in this lecture are crucial for that.

The other distinction that I think is important is between legalistic thoughtfulness and the broader style of political deliberation needed in the public realm of a flourishing democracy. Some have toyed with the prospect of seamless continuity between the two. Ronald Dworkin said once that ‘[w]hen an issue is seen as constitutional,’ – he was speaking of the United States, for example – ‘the quality of public argument is often improved,’ because the terms of legal argumentation inform the terms of public discussion ‘in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables.’50 I guess this is part of the process that Alexis de Tocqueville referred to when he remarked that ‘[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one.’ He went to suggest that as a result parties feel obliged to borrow legal ideas and language when conducting their own daily controversies. ... Judicial language thus becomes pretty well the language of common speech; the spirit of the law starts its life inside schools and courtrooms only to spread gradually beyond their narrow confines; it insinuates itself, so to speak, into the whole of society right down to the lowest ranks until, finally, the entire nation has caught some of the ways and tastes of the magistrate.51

I am not as enthusiastic about this as either Dworkin or de Tocqueville. Public debate often does perfectly well without a forensic structure.52 In many ways, legalistic pathways of thought are too stilted for the purposes of general civic deliberation. My point throughout this lecture has been that legal pathways and legal structures make a particular contribution in the work that the Rule of Law has to do, not that they epitomise every kind of thoughtful deliberation that we need in politics. Even when we need formality in public debate, what we sometimes need are the rather differently shaped procedures of parliamentary deliberation, rather than forensic procedure. And there is a further problem, which I cannot discuss in this lecture, of how to relate that legislative discourse to the broader, looser and radically less structured mode of deliberation that we hear (and that we need) in civil society, among political parties, in social movements, on the streets, and in the media.

Anyway, from the fact that legalistic thoughtfulness is no substitute for the thoughtful deliberation we need in public political discourse, it certainly does not follow that legalistic thoughtfulness is unimportant. For in the areas and to the extent that we want to insist on government constrained by law, or in the areas and to the extent that we want a social and economic environment structured by law, we need to understand that constraint and that structuring as being done by law in the thoughtful ways that law operates rather than mechanically and thoughtlessly in the service of some exalted ideal of predictability.

Let me say finally that I don’t want to denigrate predictability values altogether. In my remarks here I have wanted to redress a balance, not strike the other side out. Elements of clarity and certainty are often important in the law, but nowhere are they all-important, and such importance as they have does not justify side-lining or ignoring other more thoughtful aspects of legal practice in our conception of the Rule of Law.

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49 See Davis, Discretionary Justice, pp. 27 ff.
50 Dworkin, Freedom’s Law, p. 345.
51 Alexis de Tocqueville, Democracy in America, trans. Gerald E. Bevin
Can the two sides perhaps be reconciled? In his later writings, particularly in his trilogy, *Law, Legislation and Liberty*, F.A. Hayek announces that he was turning his back on thirty years of ‘deeply rooted prejudice’ – his own deeply rooted prejudice – that clear codified legislation would increase the predictability of the law. He speculated that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.55

Thinking through the abstract issue of what a fair order of mutually-adjusted intentions would involve so far as the settlement of the instant cases is concerned may enable the judge to come up with a result more congruent to the expectations of the parties than his application of some enacted rule according to its terms. I cannot go into Hayek’s argument in any detail here, but it’s a challenging possibility, and well worth the attention of those who continue to cite Hayek as philosophical authority for associating the Rule of Law with a rule-based conception of predictability.

In the end, though, it is a matter of tension and balance within the Rule of Law. I don’t think what I am doing is introducing a rival political ideal to compete with the Rule of Law – in the way that (say) democracy might sometimes compete with the Rule of Law. Of course we must bear in mind Joseph Raz’s dictum: the Rule of Law is not the sum of all good things.54 The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organise their economies around free markets and private property to the extent that this can be done without seriously compromising social justice, and we want them to be governed in accordance with the Rule of Law.

Even considered as a limited concept – one star among others in the constellation – the Rule of Law is a contested concept, and this paper is intended to contribute to that contestation.53 Also, ‘law’ connotes many different things; as I said, there are many tools in law’s tool box. Different things may come to different people’s minds when we imagine the rule of law. For some it may be the rule of a constitution that has been in place for decades or even centuries. For others it is the rule of a recently enacted statute. For others still, it is the rule of common law. Aristotle famously remarked that ‘a man may be a safer ruler than the written law, but not safer than the customary law.’

I have tried not to rely on new-fangled ideas intended to transform the Rule of Law out of all recognition. I have tried to limit myself to elements centrally and incontestably associated with the core of legal practice – elements (like due process) whose absence from contemporary positivist jurisprudence and from recent philosophical accounts of the Rule of Law looks, in retrospect, curiourser and curiourser. I have been offering, not just a theory of thoughtfulness in government (and then calling that ‘the Rule of Law’), but an account of the way in which practices and institutions, which everyone recognises as legal, help to sponsor, channel and discipline that thoughtfulness. That is why I was so anxious to distinguish this form of thoughtfulness from other notions of thoughtfulness that we need.

9. Conclusion

Aristotle exasperated generations of readers of his *Politics* when he inserted this observation into his discussion of the Rule of Law:

He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, [and] the law is reason unaffected by desire.56

It’s a challenging observation (to say the least) and in the past, when I have taught the history of the Rule of Law to law students, I have tended to pass over it in silence.

Some formalists I know – some of the Toronto formalists – say that what is crucial here is that law must be articulated without reference to the substantive quality of the ends or polices that are being pursued – that’s desire – and they are hoping to sponsor an account of legal argument unaffected by desire.57 If there were more time I would question the austerity of that sort of formalism on grounds of basic sanity. But it is Aristotle’s connection of law to reason that intrigues me, for it is not primarily a natural lawyer’s connection between law and the eternal verities of reason, but between law and the god-like activity of reasoning. We reason together using the forms, channels and points of departure that law provides, and when we celebrate being ruled by law what we are celebrating in large part is that sort of influence of reason in human affairs.

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