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Thoughtfulness and the Rule of Law

Jeremy Waldron¹

1. Law's Obtuseness

We want to be ruled thoughtfully. Thoughtfulness—the capacity to reflect and deliberate, to ponder complexity and to confront new and unexpected circumstances flexibly, with an open mind, and to do so articulately (sometimes argumentatively or even adversarially) in the company of others—these are among the dignifying attributes of humanity, man at his best (men and women at their best) in politics.

But does the quest for thoughtfulness in government mean endorsing the rule of men rather than the rule of law? To be ruled by law rather than by men has been an aspiration of the Western political tradition since the time of the ancient Greeks. But it was the Greeks who noticed a possible incompatibility. 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."² Thoughtfulness—when we get it—is an attribute of human rulers. 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 being ruled by men.

Of course, in many ways it is a false contrast. Laws are made by men (made by people), interpreted by people, and applied by people. And in some of those capacities human thoughtfulness *is* paramount. Law-making, when it is done explicitly, is a thoughtful business. And though every legislator no doubt hopes his works will endure, the legislative mentality at its best can represent a flexible application of human intellect to the shifting challenges faced by a society. That's what I have argued in *The Dignity of Legislation* and elsewhere.³

Historically, though, proponents of the Rule of Law have tended to be suspicious of legislation for that very reason. It's too flexible; in an assembly of

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² Plato, *The Statesman* (Politikos) Julia Annas and Robin Waterfield eds. (Cambridge UP), p.59.

³ Waldron, *Dignity of Legislation* (Cambridge UP, 1999) and Waldron, "Principles of Legislation" in *The Least Examined Branch* ed. Bauman and Kahane.

representatives, said Hobbes, it changes haphazardly with every variation in the legislature's political composition—different men, different laws.⁴

The same point was made in 1992 by the Supreme Court of the United States in the case of *Planned Parenthood v. Casey*.⁵ What would happen, said Justice O'Connor, 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. Wade*⁶—which some of them had previously disclosed a thoughtful inclination to revisit.)

There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. ... **[Exceeding that limit] 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.⁷

And it would be less convincing for the Court to parade itself as representing “the character of a ... people who aspire to live according to the rule of law.”⁸

In any case, whether or not laws are made and changed thoughtfully, there is still the issue of thoughtlessness in the way they are administered. Laws don't apply themselves; it is people who interpret 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 Rule of Law aims to ensure that law is administered with as little independent input from the judge as possible. Whether she is thoughtful or not, the judge is not supposed to bring her own subjective thinking into play; she is supposed to be bound rigidly 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 law-makers is to be literal-minded in the way we

⁴ In many cases, says Hobbes, where legislative disagreement is resolved by voting, “the Votes are not so unequal, but that the [defeated party] 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 business may again be brought to agitation, that so what was confirmed before by the number of their then present adversaries, the same may now in some measure become of no effect ... It follows 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 mindes, 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* 137-38 (Howard Warrender ed., Oxford Univ. Press 1983).

⁵ 505 U.S. 833 (1992)

⁶ Cite.

⁷ Pincite.

⁸ Pincite.

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 own, or by sticking rigidly to the text they produced, even though its calligraphy was framed for utterly different circumstances (a few colonies clinging to the edge of a largely unexplored continent with a population less than that of modern New Zealand).

Even if it's recent legislation that is being interpreted, textualists insist that judges cannot be trusted with adding thoughtful independent input. After all, different judges think in different ways. 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.⁹

2. Clarity and Certainty in the Rule of Law

Law may be obtuse, rigid, stubborn and in its application mechanical—but, people will say, “Well, at least it is *predictable*; we know where we stand with a law that is applied, constantly and faithfully whatever the subjective opinions of the judiciary.” And this, it is said, is not just an result of the Rule of Law. This is as close as we can get to what the Rule of Law means. “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.”¹⁰

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*.¹¹ (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.¹²

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? 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

⁹ Cite to JW, “Lucky in your Judge.” 9 THEORETICAL INQUIRIES IN LAW (2008), 185-216

¹⁰ Carothers “The Rule of Law Revival in *Foreign Affairs* (1998).

¹¹ Cites. Tom Bingham, *The Rule of Law* (Allen Lane 2010), shortly before he died.

¹² Robert S. Summers, “Principles of the Rule of Law,” *Notre Dame Law Review*, 74 (1999), 1691.

law that governs them is predictability in the conduct of their lives and businesses. Bingham quoted Lord Mansfield:

In all mercantile transactions the great object should be certainty: ... it is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.¹³

and he went on to observe in his own voice that “[n]o one would choose to do business, ... involving large sums of money, in a country where parties’ rights and obligations were undecided.”¹⁴

Lord Bingham does not speak of Hayek in his book, but in many ways Friedrich von Hayek’s work—especially his early work on the Rule of Law, in *The Road to Serfdom* and *The Constitution of Liberty*—has been decisive in pushing this element of predictability to the fore. “Stripped 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.”¹⁵ Philosophically, the idea is that although there may be no getting away from legal constraint in the circumstances of modern life, still freedom is possible if people know well in advance what the law is and can plan and work around its requirements.¹⁶ This element of predictability has been very prominent in law and development studies, with the World Bank and other global institutions treating it as indispensable in the creation of a secure environment for investment in developing countries.¹⁷ Whether we think of contracts, property rights or personal rights, determinate legal rules, applied according to their terms, are supposed to give each citizen certainty and security as to what he can rely on in his dealings with other people and the state.

Accordingly, the Rule of Law is supposed to involve rules rather than standards (I am thinking of Justice Scalia’s famous article from 1989, “The Rule of Law as a Law of Rules”),¹⁸ determinate rather than open-ended language, *ex ante* clarity rather than laboured and tendentious interpretations, and closure rather than continued deliberation.

¹³ *Vallejo v. Wheeler* (1774) 1 Cowp. 143, 153; cited by Bingham at p. 38.

¹⁴ Bingham, p. 38.

¹⁵ Hayek, *Road to Serfdom*, p.

¹⁶ See, especially, Hayek, *The Constitution of Liberty* 153 and 156-7.

¹⁷ Cites from JW “Legislation and the Rule of Law.”

¹⁸ Cite.

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. So it is violated when outcomes are determined thoughtfully by official discretion or when the sources of law leave us uncertain about what the rules are supposed to be.¹⁹ If vagueness, uncertainty, and discretion become endemic in our system of government, then not only will people's expectations be disappointed, but increasingly they will find themselves unable to *form* expectations, and the horizons of their planning and their economic activity will shrink accordingly.

So there you have it. A conception of the Rule of Law—very influential—that seems to cherish the things that are liable to be disrupted by what I am calling thoughtfulness in governance. The contrast is clearest of course in the continuing debate about the relation between law and discretion. Since Dicey, the Rule of Law has been viewed as an anti-discretion ideal, attacking the proliferation of discretionary authority in the agencies of the administrative state. Now, there is a lot to be said in defence of discretion.²⁰ But that is not where I am going with my argument today. Instead I want to indicate ways in which the predictability conception sells short the idea of the Rule of Law itself. There is more to law and more to what we value in legality, than rules, determinacy, closure, and certainty.

Now normally, when a legal scholar says that, what they are promising to do is to develop a more substantive conception of the Rule of Law, imbued perhaps with convictions about justice held by them and their friends.²¹ But that also 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 was 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 formal and procedural features of the Rule of Law that are much more amenable to legal thoughtfulness. And they are what I want to talk about today.

3. Lay, academic, and professional views

I am acutely conscious that in talking the Rule of Law, I am referring primarily to a body of academic literature written by scholars, who are on the one hand detached

¹⁹ 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. Bingham, pp. 44-6.

²⁰ 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.

²¹ Laurence Tribe of Harvard Law School is on record as saying that he rejects Justice Scalia's exaltation of an ideal of legal formalism under which regularity and predictability and closure count for more than substantive justice." That, says Tribe, "is not my notion of the Rule of Law at all." (Tribe, Revisiting the Rule of Law, *New York University Law Review*, 64 (1989), 726, at p. 728.)

from the actual practice of law, and on the other hand detached also from the way in which Rule of Law ideas circulate outside legal philosophy, among the citizenry at large.

I have written elsewhere about the dissonance between academic and lay understandings.²² The pages of the law journals devoted to this topic often read like a set of footnotes to the scholarly work of Lon Fuller, and they emphasize the formal features that Fuller drew attention to: clarity, constancy, prospectivity, and generality. It is understandable that philosophers will focus on these formal attributes: it enables them to show off their special talents in abstract, analytic argument. But, important as they may be, the formal ideas are not always what ordinary people, newspaper editors and politicians have in mind when they clamour for the Rule of Law. Often what they are concerned about are procedures and institutions. When people called for a restoration of the Rule of Law recently in Pakistan, their concern was for the independence of the judiciary. When we demand the Rule of Law for Guantanamo Bay, we are not calling for clarity or prospectivity; what we want is an adequate system of hearings in which detainees will have an opportunity to confront and examine the evidence against them. The Rule of Law is as much about procedure as it is about form. .

The gap between academic and practitioners' understandings of the Rule of Law is also troubling. Though practitioners will often join in the demand for certainty and predictability, they know very well that anything approximating "mechanical jurisprudence" is out of the question. Law is an exceedingly demanding discipline intellectually, and the idea that it could consist in the thoughtless administration of a set of operationalized rules with determinate meanings and clear fields of application is of course a travesty. It is curious that we philosophers underestimate both the technicality and the effort of intricate thought that mastery of law represents; and practitioners and judges in the room may feel amused as this legal philosopher struggles to find a home within an overly abstract account of the Rule of Law for an acknowledgment of the thoughtfulness that everyone knows is required to fulfil the intellectual demands that law makes on its real-world practitioners – a fine example of what Jeremy Bentham once called "a grandmother egg-sucking instruction." All I can say is bear with me if I am stating the obvious—because it needs to be stated clearly and forcefully in the environment in which the principle of the rule of law is reflected upon and made explicit.

²² Waldron, "The Rule of Law and the Importance of Procedure," forthcoming in *Nomos 50: Getting to the Rule of Law* (2011), available at

So: what are the more thoughtful aspects of the Rule of Law? There are many things we could consider. I want to focus on three aspects in particular that are wrongly neglected or denigrated in the philosophical discussions. The first is the use of standards, as opposed to rules, to stimulate and channel thoughtfulness in the application of law. The second is the way in which the legal procedure sponsors and orchestrates forms of *argumentative* thoughtfulness in the courtroom. And the third is the role of *stare decisis*—precedent—in providing something like shared premises for the sort of thinking-in-the-name-of-us-all that distinguishes legal thoughtfulness from (say) the tendentious and partisan thinking of an individual participating in politics. So: standards, procedures, and precedents. These are my headings.

5. Rules versus standards

Cass Sunstein once observed that “[l]aw has a toolbox, containing many devices.”²³ He said—and I agree—that it is probably a mistake to identify the Rule of Law with just one kind of tool. Rules with their strict logic and their descriptive and numerical predicates, are one kind of tool; but enacted standards, which use value terms like “reasonableness,” are another. Both are tools of law. And there is no particular reason to associate the Rule of Law with the former category only, as though for example, the Eighth Amendment to the US Constitution with its terminology of “cruelty” and “excessiveness” 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 a standard is a norm requiring some evaluative judgment on the part of the person applying it, whereas a rule is presented as the end-product of evaluative judgments already made by Parliament. A posted speed limit of 70 mph represents a value-judgment 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 made by the law-applier. Now, by the law-applier I don’t just mean the police and the magistrate in traffic court: I mean in the first instance the subject himself—the driver—who is tasked under the standard with figuring out what a reasonable speed will be and monitoring and modifying his behaviour accordingly.²⁴

²³ Cite

²⁴ For the idea of self-application as a most important moment in the legal process, see HENRY M. HART AND ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge and Philip P. Frickey eds., 1994) at 120.

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 that was appropriate. Sometimes enactments requiring a “reasonable speed” are challenged on grounds of vagueness.²⁵ But in the US—where vagueness is a ground for constitutional challenge—courts have often have upheld the use of standards rather than rules, 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 like a rural highway.²⁶ It’s a familiar way in which law can partner itself, in changing circumstances, with the thoughtfulness of those to whom the legal norms apply.

The traffic example is 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.

Now, 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 clarity²⁷—and therefore they undermine the Rule of Law. 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 arbitrariness and uncertainty that results.²⁸ These terms offer no determinate guidance, they don’t let people know in advance exactly where they stand. They seem to leave us at the mercy of the discretion of officials and courts, second-guessing our own futile attempts to figure out how these norms will be authoritatively applied.

But if we are supposed to infer from this that when standards are in play we might as well not have law at all, then I beg to differ. It is a mistake to regard norms of this kind as simply blank checks for official discretion, as though the most they told the citizens to whom they were addressed to was that they should

²⁵ Some jurisdictions eschew speed limits altogether, and just tell their drivers to proceed at a reasonable speed on all roads. 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 appropriate speed-- *State v. Stanko*, 974 P2d 1132.

²⁶ Mention my article on *State v. Schaeffer* 96 Ohio St. 215; 117 N.E. 220 (1917). -- “Vagueness and the Guidance of Action,” forthcoming in Marmor and Soames (eds.) *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011). Available at <http://ssrn.com/abstract=1699963>

²⁷ LON FULLER, *THE MORALITY OF LAW* (1964), p. 68. —“t[h]e desideratum of clarity,” said Lon Fuller, “represents one of the most essential ingredients of legality”

²⁸ Hayek, R to S

prepare themselves for the arbitrary imposition of a value judgment by those in power. 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. The sign that says “Drive at a reasonable speed” does tell the driver something. It tells her:

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 mobilizes the driver’s resources of practical intelligence—a mobilization that might not take place if the law-maker had not promulgated the standard. It guides her agency in that way, even if it leaves it up to her to determine the appropriate behaviour. It is law requiring and triggering thoughtfulness, rather than law superseding thoughtfulness and crowding it out.

And sometimes standards also *channel* and organize our thoughtfulness. A human rights 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 call for 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, a standard directs our practical reasoning down certain pathways 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 normative structure and channelling for the thoughtfulness they are designed to elicit.²⁹

²⁹ 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 or degrading treatment”—the task of the courts is in effect to replace the standard with rules developed through a succession of cases. Such an approach regards the standard as an inchoate rule, formulated in half-baked fashion by the lawmaker, awaiting 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 ideas of degradation and inhumanity, which are moral in character. But now we simply consult the precedents and the set of rules that they generate, abandoning any of the guidance in our evaluative thinking that these particular moral predicates might provide. -- This is based on *Inhuman and Degrading Treatment: The Words Themselves (the Coxford Lecture)*, 23 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE (2010), 269-286 (also in TORTURE, TERROR AND TRADE-OFFS).

(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 a discussion of what he called “weak discretion” in a famous article from 1967³⁰ to his more recent advocacy of what he calls “the moral reading” of terms like these in the constitution of the United States.³¹ 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.)

6. Formal Procedures

A second regard in which law as such might be associated with thoughtfulness has to do with procedural due process—the highly formalized procedures through which 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 procedure.³²

I spoke earlier of the difference between lay images and philosophical images of law and the Rule of Law. In the imagination of most ordinary people, law is represented by the courtroom—the dramatic, ritualistic way in which opposing bodies of evidence and opinion confront each other in court. (Think of the influence of the ubiquitous American television show, *Law and Order* -- even in the United Kingdom now.) 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 courtroom process, with a view to (or in

³⁰ Dworkin, *The Model of Rules*, pp. 32 ff.

³¹ Dworkin, FL

³² See *The Rule of Law and the Importance of Procedure*, forthcoming *Nomos L: Getting to the Rule of Law* ed. James Fleming (New York University Press, 2011). Available at <http://ssrn.com/abstract=1688491>

It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence. In *The Concept of Law*, H.L.A. Hart conceives of law in terms of the union of primary rules of conduct and secondary rules that govern the way in which the primary rules are made, changed, applied and enforced. When he introduces the concept of secondary rules, he does talk of the emergence of ‘rules of adjudication’ in the transition from a pre-legal to a legal society: he says these are ‘secondary rules empowering individuals to make authoritative determinations of the question of whether, on a particular occasion, a primary rule has been broken’. (Hart, *The Concept of Law*, op. cit., p. 96) But his account defines the relevant institutions simply in terms of their output function—the making of ‘authoritative determinations of whether a primary rule has been broken.’ There is nothing on the distinctive process by which this function is performed. Hart acknowledges that of course secondary rules will have to define processes for these institutions (ibid., at 97). But he seems to think that this can vary from society to society and that nothing in the concept of law constrains that variety. A Star Chamber proceeding *ex parte* without any sort of hearing would satisfy Hart’s definition; so would the tribunals we call in the antipodes ‘kangaroo courts’; so, for that matter, would a Minister of Police rubber-stamping a secret decision to have someone executed for violating a command. I think there is a considerable divergence here between what these philosophers say about the concept of law and how the term is ordinarily used. Most people, I think, would regard hearings and impartial proceedings, and the safeguards that go with them, as an essential rather than as a contingent feature of the institutional arrangements we call legal systems.

dread of) legal proceedings, even if it is not actually transacted in the courtroom itself.

So: let's think of the way we structure adjudicative hearings—the formal events like trials that are tightly structured to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides. The parties are given the 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 all this primarily in terms of fairness and fact-finding, but we can think of it also as a way of maximizing the role of reason and thoughtfulness in the settlement of disputes.

Here I want to draw on some work by 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.³³ 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.

The distinguishing characteristic of courtroom procedure, he said, is not the impartial office of judge. There are all sorts of impartial judging functions that don't involve the presentation of reason and argument at all: he mentions umpiring in baseball or judging in an agricultural fair, which are not functions structured “to assure ... the disputants an opportunity for the presentation of proofs and reasoned arguments.”

Again, it may be objected to Fuller's characterization that we find opportunities to present reasoned arguments in all sorts of non-judicial contexts, in election campaigns for example. But, says Fuller, this objection fails to take account of the element of assurance. In judicial hearings this form of participation is institutionally defined and assured. How is it assured? Among other ways by the requirement that a judge give reasons for his decision, which Fuller says is provided not just to encourage the judge to be thoughtful, but because *without* such a requirement, the parties would have to just “take it on faith that their [reasoned]

³³ (His work on this essay is light years in quality beyond anything you find in Hart's writings on procedure.)

participation in the decision[-making] has been real, [and] that the arbiter has in fact understood and taken into account their ... arguments.”

So—with Fuller—I think it is important to think of adjudicative procedure as “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”

I know that courtroom process can seem cumbersome. To someone whose image of thoughtfulness privileges the unstructured working of the human intellect—autonomy, spontaneity and flashes of insight—the laborious and ritualized proceedings of the courtroom may seem the antithesis of the sort of thoughtfulness we should be looking for. And in some areas that may be right. Sometimes, as Fuller puts it, adjudication is an ineffective instrument for certain governmental functions, and we must look for other more open modes of thoughtfulness.³⁴ We need not deny this in order to recognize that, nevertheless, where it is used, law’s 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, it should nevertheless 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 shouting match or a shooting match.

Let me take these points about procedure one step further. The institutional and proceduralized character of judicial process makes law a matter of *argument*. Law presents itself as something that a person 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 coherence or system, integrating particular items into a structure that makes intellectual sense. And litigants are supposed to 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 into a coherent conception of the law in the area they are dealing with.

But this argumentative aspect certainly does bring us slap-bang up against the conceptions of the Rule of Law that are preoccupied with predictability. Argumentation can be unsettling and the procedures that we cherish often have the effect of undermining the certainty that is emphasized on the formal side of the

³⁴ Fuller, *The Morality of Law*. I am reminded of Fuller’s own caution against over-insisting on the use of judicial procedures: “As lawyers we have a natural inclination to “judicialize” every function of government. ... 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.”

Rule of Law ideal.³⁵ An argument may bring something new into the world, a new way of looking at things; and for all we know a judge may be persuaded by it. The upshot of argument is unpredictable, and to the extent that legal process *sponsors* argumentation, it sponsors a degree of uncertainty in the law.

Still, there is no getting away from it. Law is an argumentative discipline and no analytic theory of what distinguishes legal systems from other systems of governance can afford to ignore this aspect of our legal practice.³⁶ 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 institutionalizes. Rules for the recognition of a distinctive set of norms may be important. But at least as important is what we do with the recognized norms we identify. We don't just obey them or apply the sanctions they ordain; we argue over them, 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 to the cases that come before us. And courtroom procedure facilitates, structures and sponsors that form of argumentativeness.

I know the demand for predictability is made in the name of individual freedom—the freedom of the Hayekian businessman who needs to know where he stands so far as social and economic regulation is concerned. And he may be disturbed—his investment plans may be disturbed—by unsettling and unforeseen consequences of adversarial legal argument on some matter of interest. But think about it. With the best will in the world, and the most determinate seeming law, circumstances can be treacherous. From time to time, our free Hayekian individual will find himself accused of some violation or delict. Or his business will be subject—as he thinks, unjustly or irregularly—to some detrimental legal requirement. Some such cases may be clear; but others will be matters of dispute. And 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 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 tendentiousness

³⁵ I have discussed this argumentative aspect of Dworkin's conception of the Rule of Law in Jeremy Waldron, "The Rule of Law as a Theater of Debate," Justine Burley (ed.), *Dworkin and his Critics* 319 (Oxford: Blackwell Publishing, 2004).

³⁶ Cite to Neil MacCormick

matches his own. And so it begins: legal argumentation and the loss of certainty that argumentation can lead to.

7. Premises

A third thing I want to emphasize is the way law provides not only the terms that channel our thoughtfulness, and the procedures that structure it in formal settings, but also the premises with which it works.

In our individual moral and political thinking, we are privileged as autonomous individuals to choose our own starting points and to argue from whatever set of premises we find compelling. Some begin with God, others with utility, still others with some modern idea of self-fulfilment. And as we proceed from our different starting points, our arguments back and forth 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.³⁷

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.³⁸ It is less easy, but no less important to see how this works in the case of precedents too.

Now, when jurists defend precedent, *stare decisis*—the idea that we should be constrained by principles laid down in previous decisions—the defence is usually in terms of predictability. We enhance the certainty of the law, they say—and the determinate guidance that is afforded to those who have to live under it—by insisting that courts regard themselves as bound in most cases by their own earlier decisions..

But it can't just be a matter of making legal outcomes more predictable. Once again, we owe to Ronald Dworkin (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 precedent, because in the actual practice of law we worry away at the meaning of precedents, and their bearing on the cases we are currently dealing with, long after any element of predictability has evaporated. The predictability

³⁷ Rawls, *Political Liberalism*

³⁸ 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.

defence cannot explain what Dworkin called “the ... relentless concern judges show for explicating the ‘true’ force of a ... precedent when that [‘true’] force is problematical.”³⁹ Our judges pay much more attention to precedents than the expectations theory would dictate.⁴⁰

True, certain precedents—you might think of them as super-precedents—do contribute powerfully to legal predictability by pinning down *major* major premises for 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.⁴¹ (The background here is that—motivated largely by concern about the continuing authority accorded to the abortion decision in *Roe v. Wade*⁴²—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 of the legal framework structuring modern governance in the United States might unravel if old precedents were always up for grabs. The examples they cite include the prospect of revisiting cases that established things like the applicability of the Bill of Rights to the states or the constitutionality of the use of paper money.⁴³ 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 first have to 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 deductively downwards from them in a syllogistic

³⁹ Dworkin, LE, pp. 157-8

⁴⁰ Ibid., p. 130. Indeed (and I am paraphrasing him) we would expect 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 jeopardized if judges refuse to follow them when the advice they give is garbled or murky.”

⁴¹ Cite to Fallon and Monaghan

⁴² Cite.

⁴³ Monaghan 744.

fashion. Still, there is a sense in which we share starting points in this back-and-forth 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

Now, once again, I suppose someone obsessed with intellectual spontaneity might worry about forms of thoughtfulness that take their premises as given. That may seem, in Kantian terms, *heteronomous* thoughtfulness, not partaking of—but instead undermining—the intellectual autonomy that is human thinking at its best. But again, we need to understand legal argument not as thoughtfulness for all purposes, but as a specific way in which we are enabled to argue *together* without immediately talking at cross purposes.

8. Pick up threads

Let me draw some of these threads together. I have mentioned three main ways in which law sponsors and facilitates public thoughtfulness: first, in its common use of standards rather than rules as norms that govern behavior; secondly, in the procedural structuring of public adversarial argument in trials and other hearings; and thirdly, in providing through texts and precedents a common set of starting points for legal reasoning.

These are not marginal characteristics of law – they are central to it; business as usual, which is why I insist they have to be associated with the Rule of Law; -- though it is my lament that they are none of them made prominent in the most influential forms of positivist jurisprudence. Positivism in the tradition of H.L.A. Hart remains committed to viewing law as a system of rules; it gives scant consideration to the procedural aspects of legal practice; and it says next to nothing that helps understand the importance of *stare decisis*.

9. Modes of thoughtfulness

We need to head to a conclusion. 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 evincing technical expertise, sometimes policy-oriented thought either on matters of implementation or pursuant to experience of what is politically and administratively feasible—we need discretion in all these senses, in the hands of administrative agencies and their coteries of expert and experienced officials. And I concede, that is not what the Rule of Law can supply.

Sometimes the role of courts may be simply one of deference to administrative decision-making. But that is not always the case. Law does have a role to play, in authorizing discretion, channelling it by providing criteria for its

exercise, and bounding its outer limits with basic constraints of justice. And these roles, I want to insist, are played out as forms of legal thoughtfulness. On the occasions when administrative discretion *is* called in question, it is important that 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 defined are crucial for that. So my picture is one of legal thoughtfulness constraining a different form of administrative thoughtfulness—rather than the Rule of Law shutting down thoughtfulness altogether.

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 a 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.”⁴⁴ I guess this is part of the process that Alexis de Tocqueville referred to when he remarked that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁴⁵ Remember, Tocqueville went to suggest that as a result

all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in their daily controversies. ... the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, so that the whole people contracts the habits and the tastes of the magistrate.⁴⁶

I am not as enthusiastic about this as either Dworkin or de Tocqueville. Public debate often does perfectly well without a forensic structure.⁴⁷ In many ways, legalistic pathways of thought are too stilted for the purposes of general civic deliberation;⁴⁸ 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 epitomize or supplant every kind of thoughtfulness that we need in politics.

⁴⁴ Dworkin, *Freedom's Law*, 345.

⁴⁵ Alexis de Tocqueville, *Democracy in America* (New York: Alfred Knopf, 1994), Vol. I, 280.

⁴⁶ De Tocqueville cite.

⁴⁷ See discussion in JW, L&D, Ch. 13 at 289-91

⁴⁸ Refer to JW, *Core of the Case*, at ___ and also JW, “Public Reason and ‘Justification’ in the Courtroom,” 1 *Journal of Law, Philosophy and Culture* (2007).

Anyway, from the fact that legalistic thoughtfulness is no substitute for the thoughtfulness we need in public political discourse, it doesn't 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.

I don't want to denigrate predictability values altogether. I 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.

Can the two sides perhaps be reconciled? In his later writings, particularly in Volume I of his trilogy, *Law, Legislation and Liberty* (1973), F.A. Hayek announces that he is 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 speculates that judicial decisions may in fact be more predictable if the judge thinks the underlying issues through for himself, "even when [his conclusions] are not supported by the letter of the law, than when he is restricted to deriving his decisions only from [doctrines that] have found expression in the written law."⁴⁹ 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 much more congruent to the expectations of the parties than his application of some enacted rule according to its terms. I can't go into Hayek's argument in any detail here, but I *do* believe that his rethinking on this point is worth the attention of those who continue to cite him 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 famous observation: the Rule of Law is not the sum of all good things.⁵⁰ It 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 organize their

⁴⁹ F.A. Hayek, *Law, Legislation and Liberty: Volume I -- Rules and Order* (University of Chicago Press, 1983)

⁵⁰ Raz: "The Rule of Law and its Virtue."

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. The Rule of Law does not guarantee the satisfaction of any of these other ideals.

Also, we know that, even considered in this limited way—one star among others in the constellation—the Rule of Law is a contested concept.⁵¹ (This paper is intended to contribute to that contestation.)⁵²

I have tried not to rely too much 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, curiouser and curiouser. I am offering not just a theory of thoughtfulness in government (and then labelling that “the Rule of Law”). I am offering an account of the way in which practices and institutions, which everyone recognizes as legal, help to sponsor, channel and discipline that thoughtfulness. That’s why I was so anxious to distinguish this form of thoughtfulness from other notions of thoughtfulness that we need.

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.

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

Some formalists I know say that what is crucial here is that law must be articulated without reference to anything anyone wants i.e. the substantive ends or policies that are being pursued—that’s desire. They promise to give us an account of legal argument unaffected by desire. 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 between law and reason that intrigues me—for this is not primarily a natural lawyer’s association of law with the eternal verities of reason. It

⁵¹ See Waldron ROL Contested

⁵² Also, “law” connotes many different things. 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.”

is an association of law with the god-like activity of reasoning. Reasoning the verb, not reason the noun. Reasoning is something we do together using the forms, channels and points of departure that law provides for us, and when we celebrate being ruled by law what we are celebrating in large part is that sort of influence of reasoning, and our participation in reasoning, in the way we are governed.