THE IDEAL OF THE
RULE OF LAW AND
PRIVATE POWER
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ABSTRACT

This paper argues for the inclusion of private power as integral to the ideal of the rule of law, both as a potential source of the sorts of problems the rule of law is enlisted to solve, and as an indispensable contributor to solutions for such problems. If, as the paper argues, arbitrary power is the key danger that the rule of law seeks to avert by effectively tempering the exercise of power, then we must be alert to sources of arbitrary power, whatever their sources and wherever they threaten serious harm. Often such threats come from entities outside governments. Conversely, private power is going to be crucial in relation to effective rule of law solutions as well; first, because law does nothing on its own and legal solutions themselves depend upon extra-legal supports, and secondly because it will often be necessary to draw upon resources quite apart from law to redeem the promise of the rule of law.

KEYWORDS

Rule of law, power, tempering, arbitrary, private, social causality
INTRODUCTION

The argument of this paper proceeds in five stages: It begins with three – usually unexamined but widely held – assumptions of mainstream rule of law thinking, in the light of which private power is typically not part of the story at all, or at most very much overshadowed by the state, and is to be approached at best by analogy with or extension of the main game.

It then sketches an alternative way in which to approach the rule of law, which I recommend as superior in general, and which takes private power out of the closet, both as a potential source of rule of law problems and as a contributor to rule of law solutions.

Section 3 responds to arguments that the state really is special, either qualitatively or quantitatively, as the source of rule of law problems. I deny that this is always and necessarily the case.

Sections 4 and 5 suggest that private power is typically also going to be crucial in relation to effective rule of law solutions as well; first, because legal solutions themselves depend upon it, and secondly because it will often be necessary to draw upon non-state resources to attain the ideal, and the promise of the rule of law.

I conclude with a parable about the rule of law and the theory of waste disposal.

SECTION I

Contemporary rule of law writings typically share three – usually unexamined – assumptions:

1. The first is that governments, or state agencies more generally, are the proper subjects, the primary threats to, and the targets of the rule of law. The domain – the territory – in which the rule of law operates, and where the problems occur to which the rule of law is a response, is to be found in the institutions and
activities of the public political order, government, and state. That is deep in the tradition. Aristotle thought so too.

2. The second assumption is that the rule of law itself is to be found in particular forms, procedures, and arrangements of official legal rules and institutions. These are the means for delivery of the promises of the rule of law. After all, it’s the rule of law, stupid. This conviction stems from more than the word. It conforms to what has come to be known as Miles’ law: where you stand depends on where you sit. With the rule of law, what we understand it to be seems to follow a similar rule. Lawyers sit in law offices, legal academics in law schools, judges in courts, and legal philosophers spend their sitting time reading lawyers, legal academics, judges, and other legal philosophers. That is as it should be, but its effects on how the rule of law has come to be understood by its new and wider audience are not altogether salutary.

For lawyers, sitting where they do, the rule of law is a virtue of the law – an ideal for legal orders. The virtue – to the extent that it is manifest – inheres in a state’s legal order, with its official agencies, rules, procedures, practices, and outputs framing and channeling acts of state. Typically, that is where lawyers start and almost as often it is where they stay. So, in the case of the rule of law, even though lawyers, legal philosophers, rule of law promoters, and others differ greatly over specifics, underlying their differences is an assumption that is so widely shared, so widely assumed, that it is never explicitly discussed, namely that the phrase speaks of both vices and responsive virtues that are internal to the state’s legal apparatus and ways of doing things.

There are many accounts of the specific legal arrangements that add up to make the rule of law, but they almost all have in common this centering of the state, of legislatures and courts, the character of the rules they make and apply, and the behavior of the legally authorized agencies that enforce them. Differences among lawyers’ accounts concern what sub-categorizations of that official legal complex are key.

So, in the talk of practical lawyers, international rule of law reform projects, arguments with the Venice Commission etc., the focus is typically on specific legal institutions and how they are arranged: separation of powers, independence of
the judiciary, clarity, generality, publicity, prospectivity of rules, and so on. In legal philosophy there are extensive and sophisticated discussions about what the *formal character* of the law needs to be to satisfy the demands of the rule of law (Fuller, Hayek, Raz), or what *procedural* elements it needs to have to respect the dignity of the beneficiaries of the rule of law (Waldron), or what moral content should inform legal rules (Dworkin, Allan, Bingham).

Not only lawyers think this way. For obvious reasons, their views and accounts have disproportionate influence. Most people take it to be obvious that, in the rule of law, law must take the lead, that the rule of law concerns the characteristics of official legal institutions etc., and that lawyers, as the experts in that domain, are the ones from whom laypeople should take their cues. Moreover, once the rule of law became something to be “built” by the deliberate concentrated efforts of an industry of rule of law promoters in countries that have never had it or have been denied it or where it is judged to be in poor shape, the obvious source of enlightenment has seemed to be the experts. And they beget the new industry of promoter-experts.

This is what I’ve called the legal *anatomical* approach to the rule of law. Given the starting and directive assumption, it is a state-centered anatomy that is explored. That is where disquisitions on the rule of law start and, unless disturbed, where they stop: the state is not only the subject of rule of law problems, but also the source of rule of law solutions. Rule of law anatomists spend most of their time identifying the relevant legal anatomy, and assuming or inferring what law so made is good for.

Many who make the second assumption about the anatomy of rule of law solutions imagine it is a corollary of the first about the location of rule of law problems: since states are the prime sources of arbitrary power, moulding their legal implements and vehicles into non-arbitrary shapes is the best way in which to temper their power. However, that is not necessarily the case. State power might be the most dangerous animal on the planet, but state laws might not be the best way, and certainly not a sufficient way, to tame it. A free press or active civil society might be more significant. Indeed, the recent book by Acemoglu and Robinson, *The Narrow Corridor*, argues just that. They argue that that putative
corridor within which citizens enjoy liberties protected both by and against the state and other citizens is rarely entered and even more rarely does it endure. One arrives there only with the rare combination of a state strong enough to do what it should – “enforce laws, control violence, resolve conflicts, and provide public services” with “an assertive, well-organized society” that is strong enough to stop it doing what it must not. A shackled Leviathan, not a despotic nor an absent Leviathan, is necessary and society must provide the shackles. Conversely, one might even concede that there can be non-state sources of rule of law concern, but still believe state laws are the best way to cope with them. And that, indeed, is what we do with contract law, etc. Or one can countenance other ways, and what works depends on the context. But that last option – “don’t assume; have a look” – has not been the conventional take on these matters.

3. Instead, it is more common to combine these first two assumptions to lead to a third: Within law, current jurisprudential accounts of the rule of law commonly rest on what, in their book *Private Law and the Rule of Law*, Lisa Austin and Dennis Klimchuk call “the public law presumption” that “the rule of law is essentially a public law doctrine”. As Austin and Klimchuk observe of the laundry lists of contemporary jurisprudence, “a collective effect of these influential formulations of the rule of law, standing as they do in a long philosophical tradition that shares it, is the implicit acceptance that at its heart the rule of law is an ideal concerning the manner in which a government exercises authority, and the institutional structures through which it may do so consistently with that ideal.”

Now, if you are a mainstream rule of law person, and you have been accustomed to believing that rule of law problems are ones of government and rule of law solutions are to be found in public law, private power is unlikely to seem to be your problem or relevant to your solutions. In the main, that is how thinking about the rule of law has developed over millennia, and for the most part it has been unworried that this might be a form of myopia.

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3 Austin and Klimchuk (2014) at 5 (citing Tamanaha (2004), 114: ‘t]he broadest understanding of the rule of law, a thread that has run for over 2000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law’.
But occasionally the question is asked: what about private power? Might it be a source of rule of law problems, and also of rule of law solutions? These thoughts, for they are two not one, are uncommon. Even where they occur and are not rejected out of hand, those who start with conventional rule of law assumptions still draw their understandings of the rule of law out of the standard paradigms. One way is by analogy, and another is by extension.

First, speaking of the domain of rule of law subjects, targets, and the sources of rule of law problems, some draw analogies between features of the central governmental case that generates rule of law concerns, and those of non-state entities. Typically, these analogies are made between governments and large organizations that are argued to operate and look sufficiently like governments that considering them appears to require minimal real deviation from existing paths. The move is a politically significant one, indeed it is a defiant one in a neo-liberal age, but adherents to mainstream paradigms can at least contemplate it without shifting their understanding of the constituent parts of the rule of law too much.

So, one might argue, as the sociologist Philip Selznick⁴ and philosopher Elizabeth Anderson⁵ do, that with the rise of large corporate organizations, with their huge multitudes of employees and dependents, the distance between the nature of private and public organizations, and their powers over those who inhabit them, deal with them, and in other ways depend upon them, has diminished so much that talking about the rule of law in the latter does not require much deviation from the original path. Selznick, who is a real pioneer in this way of thinking, argues that:

Wherever institutional authority is exercised – wherever there is bureaucracy – people need protection from arbitrary rule. Just governance is a moral necessity, in private as well as in public institutions ... When we fail to see the place of law in ‘private’ institutions we withhold from that

⁵ Anderson (2017).
setting the experience of the political community in matters of governance. Selznick believes that is a bad idea, as does Anderson, (who does not mention him, but appropriates his phrase, ‘private government’ for her title, and has given some feisty Tanner lectures that might have benefited from reading him), for whom “Government is everywhere, not just in the form of the state, but even more pervasively in the workplace. Yet public discourse and much of political theory pretends that this is not so.”

Secondly, at the level of the rule of law toolkit itself, apart from analogies there are extensions of existing rule of law principles to private entities. So, Selznick and Anderson ask for various principles and protections of public law to be extended to private government. Thus, Selznick again states that students of law and society are confronted with a special intellectual problem: how to bring legal ideals to the ‘private’ sector of community life. That sector includes autonomous groups and enterprises not formally part of government but exercising a sometimes powerful dominion, often deeply influencing the achievement of full citizenship in a moral commonwealth. The issue is: Can we justify, within the framework of legal theory, the application to private organizations of principles hitherto restricted to public government?

Anderson, for example, argues that “[a] just workplace constitution should incorporate basic constitutional rights, akin to a bill of rights against employers“.

For Anderson, private government offers none of the protections or sources of participation and accountability that public governments do, and the disparity needs to be repaired:

You are subject to private government wherever (1) you are subordinate to authorities who can order you around and sanction you for not complying over some domain of your life, and (2) the authorities treat it as none of

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6 Selznick (1992), 300, 301.
7 Anderson (2017), 70-71
8 Selznick (1969), 35.
9 Anderson (2017), 68.
your business, across a wide range of cases, what orders it issues or why it sanctions you... Private government is government that has arbitrary, unaccountable power over those it governs.\textsuperscript{10}

Anderson admits that not every rule of law measure applied to public governments can be extended to private, but ‘it is easy to exaggerate the obstacles to imposing rule-of-law protections at work’.\textsuperscript{11}

Again, and better known, economists and development agencies find no conceptual difficulty in considering contract and property as central elements of the rule of law, though the potential sources of arbitrary power available to heavyweight contractors and property owners are often ignored. But the excellent essays in \textit{Private Law and the Rule of Law} are full of examples of the appropriateness of such extensions, to property law, contracts, equity, boilerplate... that show us ways forward there.

\textbf{SECTION II}

But what if, at the level of problems, analogies are not obvious because new sources of arbitrary power arise that do not look or operate like those with which we have been familiar? And at the level of solutions, what if the effectiveness and reach of existing legal solutions themselves depend upon congenial arrangements of private power that are beyond the ken of the conventional carpenters of the rule of law? And what if rule of law ideals are often not amenable to solution by extending traditional existing legal tools to them? What if they need the utilization of non-traditional rule of law means, which go unmentioned in the canon? I believe that all these possibilities exist and indeed are proliferating in modern times. They require us to look outside the conventional rule of law tool box, and to start with different questions that in turn are likely to generate different answers.

\textsuperscript{10} Ibid. 44-45.
\textsuperscript{11} Ibid, 67.
I have long thought that there was a better way to start thinking about the rule of law in generals than with the assumptions outlined above. My reasons are not limited to issues of private power, but they have implications for them. I argue for a different way of thinking about the rule of law that starts not with anatomy but teleology and continues not only with law but also with sociology. That is to say, it starts not with some list of legal arrangements that are alleged to make up the rule of law, but first by asking what is the rule of law problem that has led generations to seek solutions, and then by exploring, rather than assuming, where one might find such solutions and what they might be. It makes no initial assumptions about where rule of law problems might arise, and it has no fixed check list of where solutions might be found, or what they will consist of or look like.

On this view, to start with fixed assumptions about where rule of law problems are to be found, and with some pre-formed and often intuitively derived checklist of putative legal solutions to them, constrains thought and blocks imagination. Familiar locations blind us to unfamiliar ones, and features of contemporary legal rules or institutions, which so often are those that just happen to be taken to embody the rule of law in our own time and place, come to be thought of as default settings for its achievement, and even as necessary settings. That can tie us simply to what we happen to know, rather than allow us to explore whether there are other ways of getting where we want to go. It makes it hard to think either that the rule of law might be needed in places that we have not noticed, and served in the absence of familiar legal hardware, or indeed that it might be disserved even where the hardware is present. And it often leads to goal displacement. A predicament looms that has been so aptly noted about the whole rule of law promotion industry – "we know how to do a lot of things, but deep down we don't really know what we're doing." So I recommend that we start by considering the point or end of the enterprise, not the means – we should consider the why before the what.

I think that is true in general, not just in relation to our topic. It makes no sense to start with putative means, unless you've worked out the end in view – the point. In this I am only following the wisdom attributed (according to Professor Google) to

a CEO of the Black and Decker power tool company, who is alleged to have made the profound observation that “People don’t go into a store because they need one of our drills. They go because they need a hole in the wall.” Most rule of law thinking has been obsessed with drills, and then moved out from there to see what they might do. If you’ll pardon the lame pun, I advocate identifying the point we want to make, and work back from there to see what we need in order to make it. If you start with your destination and then ask how best to get there, you might be surprised where it takes you.

To briefly state here the conclusion of a somewhat extended argument, the rule of law is what Jeremy Waldron calls a “solution concept.” So, what is the problem that it is supposed to solve? In this respect, following the tradition, I nominate a dangerous pathology in a particular but pervasive aspect of human interactions: the exercise of power. The problem is the arbitrary exercise of significant power. Arbitrary power is the problem to which the rule of law is suggested as part of the solution. There are two points about that:

1. There is a lot to be said, and a lot has been said over millennia, about why entities are able arbitrarily to exercise serious power that threatens citizens’ liberty, engenders fear (even when, as republicans have insisted, the power is not exercised but remains available and known to be available to power wielders), denies respect for human dignity, and systematically hampers the possibilities of fruitful co-ordination among neighbors and strangers. More can be said, and elsewhere I have tried to say some of it.\textsuperscript{13} Here I just make the fairly uncontroversial and quite unoriginal claim that arbitrary exercise of power is typically and truly obnoxious, and that we have good reasons to value ways of avoiding it. On this view, a special anti-value to which power-wielders are prone and against which some forms of legal institutionalization are thought able to help us avoid, is the propensity of power that is untempered to be exercised in arbitrary ways.

\textsuperscript{13} Krygier (2011).
The promise of the rule of law ideal is that exercises of serious, significant power might be *tempered*, to use another ancient term deeply embedded in rule of law traditions, and one that I find particularly useful. If you start with the *purpose* of tempering the exercise of serious power so it is not arbitrary, rather than with one or another list of putatively defining *means* of fixing up state law, the story develops in a different way. In particular, if arbitrary power is as serious a problem as rule of law thinkers have long suggested, then the way to start is by asking where major sources of arbitrary power might lie in any particular time and place, whatever they might be. Then, as a second step, one should go on to ask how their power might be tempered, and moderated, so that it is not available for arbitrary exercise. There is no reason in principle to assume before looking either where you will find significant possibilities of arbitrary power, what form it might take, or what might be needed effectively to temper it (particularly since that will depend on where you find it and in what form). You have to be prepared for surprises and for changes in all the above categories.

Indeed, given a few obvious truisms about the human condition – among them that times change, circumstances differ, and so too do local traditions which can be sticky, and other such platitudes that are equally obvious to everyone and equally often ignored – it is in principle unlikely that problems can be relied upon always to come from the same place, or that solutions will be found to take some single universal and detailed legal-institutional form, with its elements ready to be itemized and packaged for export, emulation, application and implementation. This is unlikely because solutions will differ with the forms the problem takes, their effects in the world will depend on a lot more than the terms of the law, the law depends for its effectiveness on much else, and often attempts to deal with the dangers of arbitrary power will need to look beyond the law altogether. What works here and now will vary with the facts and circumstances here and now, and so an implication of this way of proceeding is not simply that anatomy comes second, but that it cannot be assumed always to take a single form, and to be found in some rule of law package of legal bits and pieces that conventional rule of lawyers assume, nor indeed to be found where they typically look for it. In this respect, visitors to a hardware store have it easier.

Of course, one might *discover* that some domains are of special concern. But if the problem is arbitrary power, it would need to be shown, and not assumed, that the
state is the one and only place to find it, and state laws of particular conformations are always necessary and ever sufficient ways to temper it. Sometimes they might not be necessary; at all times they will not be sufficient.

On this view, the animating ideal of the rule of law is, in principle, engaged wherever people or organizations are in a position to exercise significant arbitrary power that is liable to harm those subject to it. If untempered arbitrary power is harmful, then in principle the ideal of the rule of law must follow the potential for the exercise of such power, whatever its source, so long as the harms it can do are significant. And they often are. There is nothing a priori about locating the target, or deciding what to do about it. It is an empirical (and theoretical) matter where the problems might arise and where and what solutions might be found. And the question of the forms they might take is equally an empirical and theoretical matter.

Of course, one attends to states because state agencies typically have huge power, some kinds of which are unparalleled both qualitatively and qualitatively, and they have many opportunities and incentives to exercise it arbitrarily. Therefore, they must be of concern to anyone who is concerned about arbitrary exercises of power. But states are not alone in wielding arbitrary power in ways that hurt. So, certainly, the rule of law is an ideal for states and law. it is also an ideal for politics more broadly conceived, which of course most mainstream thinkers would concede, though normally they say little about political solutions, and stick to the lawyers’ rule of law list of anatomical features. And it must also be an ideal for society, which some people find harder to recognize but is, after all, where the effects are felt. As stated by Zipursky:

When we look first at political communities to ask whether the rule of law applies, we tend to be asking a question that does not focus only upon constraints on government power; we are also looking at whether there are constraints on individual behaviour. Likewise, we are not only looking at whether individuals are protected against the overreaching of governmental actors and institutions, but also whether individuals are protected against the
violent, oppressive, or licentious behaviour of other private parties. A political community that did not suffer from an overreaching government could still lack the rule of law if it were a Hobbesian chaos of each against the world, or a stable community of domination by a mighty few.\textsuperscript{14}

On this understanding, deciding whether the ideal of the rule of law is relevant to private power is not a decision about whether something designed for another purpose might be of interest \textit{by analogy} with the Ur-culprit, or extended anywhere out of its normal range, but one which \textit{prima facie} includes any domain, person, or agency with significant power that might be exercised arbitrarily in ways that cause harm. The burden of argument is reversed: the question is not whether the rule of law can be extended beyond its natural domain, but rather whether there is any reason to exclude its reach from what in the first instance falls within its natural domain. This domain, to repeat, extends to any sources of significant power that can be exercised arbitrarily in ways that cause harm. What one is dealing with is not extension, which might or might not be justified, but \textit{direct implication}, which might or might not be narrowed for other reasons. But then you need to provide the reasons, not assume them.

What reasons might they be? What sort of argument might lead one to such a narrow scope in societies where, as Marx already noted, private power is not nothing?

\textbf{SECTION III}

In relation to the first assumption, that the state is the peculiar locus of rule of law problems, many people have believed that there is something special and unique about the state that affects the matter both qualitatively – because states are sovereign entities pursuing goals and employing means perhaps unlike any others – or quantitatively, because of the sheer amount of power resources that states can draw upon.

\textsuperscript{14} Zipursky (2014) 147. See also West (2011).
As for the qualitative dimension, the distinction can be questioned. Today the extensive outsourcing of so many erstwhile governmental activities might suggest otherwise, and Selznick pointed out over 50 years ago that, in many respects, there is less and less functional difference between governmental powers and organizations and those of huge corporations, and therefore the political morality expressed in the former might as well be, and should be, transferred to the latter:

The most important source of the weakness of public-law jurisprudence is the great growth of large-scale organization, both public and private. A striking feature of this development is the convergence of governmental and nongovernmental forms of organization and modes of action. A great deal of government activity is similar to that carried on by private groups. Government today includes many activities and agencies that have little to do with the distinctive functions of a sovereign and to which, therefore, the traditional logic of public law may not properly apply. At the same time, discussions of the modern corporation and trade union, in many ways the representative institutions of industrial society, have increasingly stressed their ‘quasi-public’ status. It is asked quite seriously whether such institutions are really so different from large public enterprises... This raises the question whether we have a theory of public law adequate to deal with the group structure of modern society.\(^{15}\)

In any event, even if such qualitative distinctions were plausible and watertight, it is not obvious why they should serve to restrict the ideal of the rule of law to the sovereign comprehensive domain. The point is that wherever there is the ability to wield serious power there is potential for abuse. The ability to do so arbitrarily with harmful effects is not a governmental monopoly. Indeed, as Selznick and Anderson insist, private corporations are heavy hitters in the power (and the abuse) market too.\(^{16}\) If some category of power wielder is free, at their pleasure,

\(^{15}\) Selznick (1969), 246.
\(^{16}\) See further Sempill (2018). 3
without announcement, and for any reason, to hit plenty of people in the face, it is not to the point that there is another category of power wielder that can hit even more faces. Faces should be protected from hits; this is simple but true.

So perhaps the real issue is quantitative: states just have much more power than non-state outfits. In *The Rule of Law in the Real World*, Paul Gowder makes such an argument. His book is innovative and excellent in many respects, but when you ask what is the target of the rule of law – with whose exercise of power is it properly concerned – Gowder’s answer is firmly conventional: the state. Why so? “[T]he unique significance of state violence generates a unique principle, the rule of law, to guard against its abuse”.17 He recognizes, however, that “the boundary between ordinary citizens and the state can sometimes be quite porous”;18 sometimes non-officials might “have such power that they genuinely compete with the existing government for monopoly control over the use of force in the jurisdiction”.19 So he is prepared to extend the rule of law to non-state actors who can be squeezed into state, or state-like, boxes. When he discusses whether non-state violence in the Jim Crow South might be an exception, he replies that non-state actors’ murders do not need a new concept (correct) but that the real deal is that it is the state’s feasances and nonfeasances which enabled these wrongs to continue; they would not have happened without “the appalling, and instrumental, complicity of state authorities”.20 But that is not always the case.

There is one quick and perhaps cheap retort, that nevertheless applies to more than a few cases. This would be: tell that to the Taliban. If, contrary to fact, it had been the case that the Afghan government had made and sought to enforce its laws in exemplary rule of law fashion over its institutions and officials, and the only problem was the Taliban or Al Qaeda, should we say that the rule of law was fine in Afghanistan, though they might suffer from some problems with private power? And, quite apart from such terrible extreme cases, you do not have to look far to find sources of arbitrary power emanating from “private” entities, which are

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17 Gowder (2016), 18
18 Ibid. 104
19 Ibid. 105
20 Ibid., 106
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quite strong enough for those affected by them to wish something might be done about it and them. Particularly in this age in which states are surrounded by non-state actors above and below them which make a lot of running, does it not make sense to ask whether their acts might raise questions about the ways in which they exercise their great powers, in ways similar to those of errant state officials, whether or not they are, or are like, such officials?

There is, of course, a lot that is special about state capacities and power. Rumours of the death of the state were premature, even before the pandemic and the Russian invasion of Ukraine. These tragic events remind us how important state powers are, both when exercised as they should be and when exercised as they should not be. But as many people knew, even before Marx reminded us, and as we all know when we are talking about anything else except the rule of law, sometimes people, especially the weak, are oppressed by the arbitrary exercise of power by others. Often that happens without the connivance of the state, sometimes it happens against the state, and sometimes it happens when the state is against it. And sometimes it happens in ways we never knew before, for example, through the medium of power over one sort of technology or another.

Once, but far from always, in human history one might have been confident that states were uniquely more powerful than all other forces, and that is why they were rightly the center of attention for anyone concerned with the values of the rule of law. But it is an empirical and variable matter whether threats to those values are going to come from the state, somewhere else, or both. And today things are more complicated, even in nation-states. If non-state power is arbitrarily exercised by oligarchs, mafiosi, warlords, tribal elders, Al Qaeda, NGOs, intimate partners, business executives, currency speculators, international ratings agencies, financial institutions, university administrators, etc., it too has the potential to bring with it the vices of arbitrariness mentioned above. Banks can do a lot of damage too, and in recent relatively unregulated years and countries, they have done. We have an interest in tempering power that has significant public consequence, whoever or whatever wields it.
We have plenty of examples. As Tushnet and Bugarič observe in *Power to the People*:

Private power can limit people’s choices, sometimes more dramatically than public power does: Think of a state that barely is able to keep civic peace, and large employers who offer jobs on the condition that their workers do pretty much whatever the employer wants pretty much all of the time. Or compare the everyday intrusions on privacy emanating from government (traffic cameras, perhaps) with the intrusions on privacy built into the algorithms of our social media giants. Exercising public power against private power can protect individual liberty understood in this way.\(^{21}\)

So, if arbitrariness in the exercise of significant power is a threat to be combated, governmental power cannot be assumed to be the only target; in many circumstances it may not even be the primary target. Sources of arbitrariness and of power are various in many societies. There are numerous societies in which arbitrariness flows as much, or more from, extra-state exercises of power, sometimes aided by suborned official agencies, and sometimes opposed by them. To the extent that non-state organizations, or all sorts of inhabitants of semi-autonomous fields, are in a position to exercise significant power in ways that offend the values of the rule of law, they diminish its sway, whatever the state of official legal rules or institutions. As William Lucy has said:

Arbitrariness can flourish in non-legal contexts just as much as in private law and public law contexts, but it is usually equally objectionable in all. And what is objectionable about it is, in part although perhaps not in whole, that it subverts or undermines many of the values and conditions the rule-of-law ideal is alleged to serve.\(^{22}\)

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\(^{21}\) Tushnet & Bugarič (2022), p. 23.

\(^{22}\) Lucy (2014), 43.
SECTION IV

Broadening the terrain where one might expect to find rule of law problems and targets, to include private power, is the easier part of my argument. But I want also to extend it to our understanding of what is required for effective solutions to rule of law problems as well.

Even staying with conventional notions of law as the vehicle of the rule of law, we must reckon with the extent to which such laws depend for their effectiveness on their relationships with private powers at virtually every level. The great legal anthropologist Sally Falk Moore points out that ‘legislation is based on folk notions of social causality, on ideas of how to make things happen through the use of the power of government’.23 What she says of legislation is no less true of jurists’ accounts of the rule of law. And though jurists typically leave the systematic analysis of social causality to others, among them social scientists, they cannot so easily avoid the problem. Indeed much that they say about what the law is and does, and what it should be and do, depends and must depend on notions of social causality found in law and legal precedents and assumptions, notwithstanding that like most folk notions these are typically implicit, not deeply considered, and often sociologically uninformed. Moreover, the folk notions of both legislators and jurists are not those of folk-in-general, but of legal folk. No surprise that when they think of law and social causality, state law is assumed to stand front and centre.

A few sociological truisms: Unless it is brutally enough administered to pulverize anything in its path – a rare event, even in totalitarian countries, and hard to sustain – the effectiveness of state laws will be heavily dependent on their degree

of synchronisation with social orderings generated from within, and that
generate, non-governmental social networks, arrangements and configurations
of power. Indeed in totalitarian and authoritarian polities, the very lack of
synchronization between exercise of state power and social realities and
possibilities often generates informal practices in the society which at the same
time subvert the official order and try to make up for its inadequacies. Both in
these situations of chronic lack of sync and ones where the mesh is smoother,
one can talk as much of ‘the law in the shadow of indigenous ordering’ as of the
more familiar ‘bargaining in the shadow of the law.’

Whenever law stakes a claim to rule, the upshot of the many potential sources of
private powers, normative, structural, cultural, and institutional overlaps,
collaborations and competitions in every society will differ markedly between (and
often within) societies. Whether and how people will interpret the state’s laws and
respond to them, how highly they will rate in comparison with other influences –
these things depend only partly on what the law says, how it says it, and what the
law is intended by its makers to do. In complex and variable ways, people’s
responses to state law depend on how, in what form and with what salience and
force and communicated residue of initial purpose, that law survives to be able to
penetrate all these intervening media and sources of power, how attuned to it
putative recipients are, and how dense, competitive, resistant or hostile to its
messages they might turn out to be. So much writing on ‘the state’ and ‘law’ and
the rule of law ignores, however, how various are the phenomena and
relationships clumped under these apparently simple and single concepts, and
what happens in between.

Moreover, lest one think this is only significant in pre-modern or developing
societies where social connections are strong, and state law alien and weak, there
is a sense in which the complexities of social causality are even greater in
developed societies with overarching states, than elsewhere. Thus Moore again:

It seems incontrovertible that the more complex a society, and the greater
the appearance of rational control of law, the more delegation there will
be in government and administration and the more areas of discretion and

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semi-autonomous activity there will be in the subparts of the society, formal and ‘informal’ ...

This view of complex society, or of any society, leads one to a paradox. Formal reglementation can control certain behavior, but not the aggregate of behavior in a society. The more ‘rational’ a society seems in its parts, and its rules, and its rules about rules, the thicker the layer of formalism and ideological self-representation to be penetrated to find out what is really going on. ... [O]ver time, reglementary control can be only temporary, incomplete, and its consequences not fully predictable. The study of reglementation is therefore the study of the way partial orders and partial controls operate in social contexts.  

To work out the implications of these sociological realities requires evidence and reflection on matters of social theory and social reality. But how many lawyers and legal philosophers think that is their business? International rule of law promoters have started to think so after repeated bruising disappointments, when their checklists run up against varying social realities. Since the industry is relatively new, that has only happened recently (though with some, at least intellectually, disruptive force), even though sociological reflections on social causality are actually quite old and have not been far to seek. Much of the disappointment found in attempts to sow the rule of law in fallow fields abroad could well have been predicted ahead of time, as indeed it was, by thinkers to whom promoters didn’t listen. And neither sociology of law nor the experiences of rule-of-law promoters has had much resonance among legal philosophers who concern themselves with the rule of law. And yet, to quote Moore one last time, from her 1978 collection of essays published even earlier:

Ordinary experience indicates that law and legal institutions can only effect a degree of intentional control of society, greater at some times and less at

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27 See Hadfield & Weingast (2014); Pritchett & Woolcock (2002); more generally, for disruptions that I favour, see particularly the publications of the Justice for the Poor group in the World Bank, among them by Deborah Isser, Michael Woolcock and their associates; and see http://blogs.worldbank.org/governance/towards-justice-in-development.
others, or more with regard to some matters than others. That limited degree of control and predictability is daily inflated in the folk models of lawyers and politicians all over the world.28

The significance of state law in society must be understood against the background of Galanter’s epigrammatic observation that ‘[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity – home, neighborhood, workplace, business deal and so on.’29

In relation to effecting the rule of law, the lawmakers’ job is over when the messages are sent. The interpreters’, enforcers’, evaders’, ignorer’s, competitors’ has just begun. And there are many other messages, from many other sources, that fill the airwaves. People listen to different ones, in different ways, and don’t listen to some because they listen to others. And there are plenty of others, for all the reasons Moore has explained. Many of them, typically most of them, do not stem from governments. This is all law-and-society 101, but it finds it hard to break into the law and philosophy of the rule of law.

None of this is to say that state law is unimportant. Nor that we should simply upend legal centralism and put some vaguely characterized, bulbous and undifferentiated ‘society’ in its place. In modern circumstances, and virtually the whole of the developed and undeveloped world is affected by those circumstances, the state is a potentially crucial institutional factor in the fate of the whole of society, and its laws are often crucially important. But how important,

28 Moore (2001), at 2. See similarly Galanter (1981), 20: [t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation.

29 Galanter (1981), 17. Compare Selznick (1961), at 84: ‘education, politics, religion, and other social activities are found outside of the specialized institutions established to deal with them. Sociology has located these phenomena “in society,” that is, in more informal and spontaneous groupings and processes.’ Selznick thought the same was true of law.
and even if important, in what ways acts of state and acts of private power work out in the world, are questions whose answers are necessarily and heavily dependent on the plural and complex social, economic and political contexts in which they occur and into which they intervene.

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

To the extent they can temper power, they are properly called upon to support the rule of law – at least in that society. To the extent that they cannot, however – and this extent will vary between societies, times and circumstances – it is not at all clear why we fix on them so, still less try to extend them to places where they might merely have parodic rule of law roles. The challenge for anyone seeking the rule of law anywhere is not primarily to emulate or parody practices that might have worked somewhere, but to find ways of reducing the possibility of arbitrary exercise of power, whatever that takes, what-or-whoever has it, wherever one happens to be.

If barriers to arbitrary power might come from non-state sources as well, in other words, there is no reason a priori to limit one’s attention either to state power or to state-based laws as constraints on arbitrariness of the exercise of such power. To the extent that extra-state institutions, practices, and so on, contribute to diminishing the opportunities for arbitrary exercise of power, they serve the ideal of the rule of law, perhaps more than can the law itself.

State law should be viewed, then, not as the always necessary centerpiece of power, tempering craftsmanship to which other measures are inferior or supplementary addenda, but as one implement among several. In some respects and particular circumstances it is of potentially distinctive importance, but it is
dependent for its success on many other things, and often it is arguably not more important for the achievement of its own goal than these others. That, again, does not make state law unimportant, but it might enable us to see its importance in perspective and as being variable depending on time and circumstances. The state/non-state and public/private divides cannot be the pivots for people who value the rule of law, since the state is not the only power-wielding institution with significant consequence, either as a source of threat or of promise.

To say that the rule of law is strongly or weakly in evidence is to appraise a social state of affairs, with complex and multi-layered elements of various provenances, rather than simply characterizing any particular set of public and legal institutions. You have the rule of law to the extent that power is routinely exercised in ways that are consistent with the ideal, and certain other ways of exercising power – capriciously, willfully, arbitrarily, wildly, etc. – are rare. Since many of the major threats to the ideal of the rule of law come from outside the state, and many means of achieving that ideal are also to be found in the wider society, the rule of law must be sought there too.

The rule of law is conventionally cast as an ideal for states and for law, typically public law. But both its targets and its weapons should be more broadly conceived. The ideal of the rule of law is relevant to all entities in a position to exercise untempered power with harmful effect. And it should be open to any remedies that might help us avoid or reduce such dangers. Significant power can be found in many places, and if one seeks to approach the ideal, one should explore them. One will need all the help one can get, both to make laws effective, and beyond the law. With the important qualification that ought implies can, there is no prima facie reason why non-state power or non-state responses to power should lie beyond the sway of the ideal of the rule of law.
SECTION V

It is a long time since Eugen Ehrlich lifted the lid on the sociological truth that “the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”\(^{30}\) That is much more than a sociological cliché.

In 2005-06 I spent a year at an interdisciplinary center at Stanford. One thing I was writing about there was the experience of rule of law promotion in post-communist societies. One of my colleagues was James House, a sociologist from Michigan, who studied health policy in the United States. One problem that the U.S. faces is that, while it spends much more, absolutely and per head, on health care than any other country in the world, its health results are worse than those of countries that are comparable in other relevant respects. House argued that this problem would not be fixed by focusing on the usual suspects – hospitals, health care, medical technology, drugs, etc. – and trying to improve them. America led the world there already, but the results of all this money, technology, and expertise were disappointing. The cure would have to be sought elsewhere, in education policies, welfare, improving distressed socio-economic circumstances, and so on. The results of that research were later published in a co-authored book, *Making Americans Healthier: Social and Economic Policy as Health Policy*, which explored “a growing paradox between its declining levels of population health relative to other wealthy nations – and even some developing ones – and its burgeoning spending on health insurance and medical care.”\(^{16}\)

At the time, I was struck by parallels between House’s argument and the core assumptions of a certain tradition of socio-legal work, which I have been trying to integrate into thinking about the rule of law of the sort outlined in the previous section. It took a while to gel. Then, at a conference I had organized in 2011 on media, democracy, and the rule of law, I was startled by the argument of a paper John Braithwaite delivered, with the apparently innocent title: “Is Separating

\(^{30}\) Ehrlich (1936), xv.
Powers a Rule of Law Issue?”. He said that was the wrong question to ask. The right one was whether the rule of law is a separation of powers issue. The rule of law “is best thought of as part of a separation of powers rather than the reverse.”

Why should the order matter? According to Braithwaite:

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

I do not agree that the separation of powers is the key normative goal. I nominate tempering power, and the separation of powers as one among several strategies to secure it. But I do want to generalize his point. if arbitrary power is as obnoxious and tempering power is as important as I have suggested, it is not obvious why we should come at them by focusing so single-mindedly on state arbitrariness or legal tempering. If you start with conventional rule of law public law presumptions, you will be limited in where you look for the kinds of pathologies worth fixing and the kinds of fixes worth having. Even where you go beyond those presumptions you will be limited to extensions of or analogies with what you started with.

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I end with a brief parable. For all I know, there is a distinguished tradition of writings on waste disposal, boasting many and lengthy treatises about enduring and pervasive problems, such as leaking toilets, for example.31 Like jurisprudential writings, they are likely to say many things that laypeople do not understand and probably, again like jurists, they will advise technical measures to stop the leaks, that ordinary people do not know much about. But the test remains: does what they advise fix toilets? If the answer is “well they have some, mixed, success with public toilets, but they really have nothing to say about private ones,” one might take that to be a limitation in the theory of plumbing, not a triumph of hydrological achievement, and still less an aspiration. With the rule of law, it seems

31 For one example, see Jamie Bendickson, The Culture of Flushing: A Social and Legal History of Sewage (2011).
mysteriously different. You can do all this public law stuff, and you can admit that it does not deal with a whole range of problems people might want it to address, which are of exactly the kind that it is advertised to cure, and it may not on its own even be the gamechanger in the domains where it is thought to matter, but still the game keeps being played under the old rules. My hope is that we can clean things up as it were, by flushing that way of thinking down the …
REFERENCES


