To appear in Eleanor Cowan, Kit Morrell, Andrew Pettinger, and Michael Sevel (eds), *The Rule of Law in Ancient Rome* (Oxford University Press, forthcoming 2025).

The Rule of Law: A Thought Pattern

Michael Sevel[1]

Senior Lecturer in Jurisprudence

University of Sydney Law School

ABSTRACT

The interdisciplinary revival in rule of law studies over the last quarter century has produced an impressive diversity of views about the ideal's content, priority, and value. That diversity has sometimes encouraged the skeptical view that it has no conceptual core or nature, and is either 'essentially contested' or else only empty political rhetoric. I argue that amongst the various views about the rule of law developed over the centuries, there is a discernible, recurring thought pattern upon which the many variations have been proliferated. Whatever else it is, the rule of law is realized when a political community has an efficacious legal system with certain enabling and pervasive characteristics, which protects its members from something presumed in that community to be undesirable, often identified as the arbitrary exercise of power. I explain and illustrate each aspect of this pattern, and draw a few lessons about how it guides, or fails to guide, current rule-of-law debates.

I. Introduction

While there is some evidence that the rule of law was achieved, at least to some degree, around the Mediterranean before the flourishing of Athens in the fifth century BCE,[2] the appearance of the first extant systematic reflections about it coincided with the very beginnings of legal and

[1] I thank the Institute of Advanced Study, Durham University, and the Bingham Centre for the Rule of Law for generous support in writing this chapter.

[2] Cf. Michael Gagarin, *Early Greek Law* (University of California Press, 1989).

political philosophy: in the writings of Plato and Aristotle.[3] Plato proclaimed in his late work, *The Laws*, that "Where the law is subject to some other authority and has none of its own, the collapse of the state…is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise…"[4] And Aristotle, only slightly less metaphorically, argued that "the one who bids the law to rule, then, would seem to be bidding the god and the understanding alone to rule, whereas the one who bids a human being to do so adds on a wild beast as well…That is why law is understanding without desire."[5] These invocations of the idea that law can constrain political power reverberated through the Western traditions: through centuries of European politics, through the works of the various continental and British jurists and philosophers, and finally, during the transformative twentieth century, throughout the rest of the world. Most of the conceptual variations that followed those of Plato and Aristotle did not spring directly from politics or political movements, but usually from the going genres of political and legal philosophy of the day: from Cicero to Locke and Montesquieu, from Dicey to Hayek and Fuller.

And yet, as Lovejoy once said, "ideas are the most migratory things in the world. A preconception, category, postulate, dialectical motive, pregnant metaphor or analogy, 'sacred word', mood of thought, or explicit doctrine, which makes its first appearance upon the scene in one of the conventionally distinguished provinces of history (most often, perhaps, in philosophy) may, and frequently does, cross over into a dozen others."[6] The 'migration' of the concept of the rule of law occurred only very recently. It began in the realm of practice. References to it, and

[3] There were also occasional observations by the Greek historians. See J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press), 24-26.
[4] *The Laws* 715d (tr. Trevor J. Saunders)
[5] *Politics* 1287a28-31 (tr. C.D.C. Reeve).
[6] Arthur O. Lovejoy, "Reflections on the History of Ideas," *Journal of the History of Ideas* 1(1): 3-23 (1940).

claims made about it, in politics have increased dramatically over the last several decades, starting with the post-World War II 'law and development' movements spawned by the United States and other Western democracies, to effect legal reforms in their image throughout the developing world. Later, the fall of Communism in the late 1980s accelerated these movements, and confirmed the rule of law as one of the political ideals *du jour*.[7] The "rule-of-law revival" in international and domestic politics was soon under way.[8] It is now a mainstay of modern political discourse and often considered one of the few shared values across diverse political communities.[9]

Systematic attention to the concept within and across *the academy* was not far behind these political developments. In the post-war period, there were several forays into the topic by legal and political theorists whose central concerns were usually elsewhere, yet their often brief and inchoate discussions have by now become part of the modern canon of rule-of-law thought.[10] And from the mid-1990s, the 'rule-of-law-revival' spread through the university; scholars across the academy quickly took great interest in it through their own disciplinary lens. Less than a decade after the fall of Communism, Paul Craig was already able to write, plausibly, that "there is a voluminous literature on the rule of law which examines the concept from almost every

[7] For a useful historical overview, see David M. Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future," in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).
[8] Thomas Carothers, "The Rule-of-Law Revival," in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, 2006).
[9] Cf. Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004), 1 ("…there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the 'rule of law' is good for everyone.") and Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in James Fleming (ed.), *Getting to the Rule of Law: Nomos L* (NYU Press, 2011), 3 ("The Rule of Law is one star in a constellation of ideals that dominate our political morality…").
[10] See Friedrich Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), Lon Fuller, *The Morality of Law*, 2nd ed. (New Haven, Yale University Press, 1969) [originally published 1964], John Rawls, *A Theory of Justice*, Rev. Ed. (Belknap Press, 1999) [originally published 1971], 206-213, E.P. Thompson, *Whigs and Hunters* (London, 1975), 258-266, and Joseph Raz, "The Rule of Law and its Virtue," *Law Quarterly Review* 93 (1977).

conceivable perspective."[11] There are now burgeoning literatures on the topic (as well as on closely related ones, such as judicial independence and corruption) within economics, history, philosophy, political science, sociology, anthropology, international relations, and of course law and government.

These parallel 'revivals' in politics and the university have had two notable side effects on theorising about the rule of law and what it requires. One is a perhaps growing tendency to view the very idea of the rule of law with a certain deflationary suspicion. This ranges from an outright hostility and dismissiveness toward the very idea,[12] to suggestions somewhat less hostile but which still carry a whiff of scepticism – that the rule of law is an 'essentially contested concept' and related claims.[13] This suspicion is partly rooted in the chaotic unfolding of both revivals, that is, both the apparent deep indeterminacy of the meaning of 'the rule of law' in political discourse, as evidenced by the unending, incompatible claims made by those in and around governments about what it requires or forbids or brings about, as well as the wide diversity of more reflective views that one observes in writers across the many participant academic disciplines.

The other effect has been more constructive: to try to make some principled sense out of the chaos. This tendency has produced occasional attempts to see recurring themes and argumentative strategies across large bodies of rule of law scholarship. A number of philosophical distinctions have been introduced, among them one between 'formal' (or 'thin')

[11] "Formal and Substantive Conceptions of the Rule of Law; An Analytical Framework," *Public Law* [1997], 467.
[12] Cf. Judith Shklar, "Political Theory and the Rule of Law," in *Political Thought and Political Thinkers* (University of Chicago Press, 1998).
[13] Jeremy Waldron's "Is the Rule of Law an Essentially Contested Concept (in Florida)?", *Law and Philosophy* 21 (2002) was as much a cause as an effect of this recent trend. It is worth emphasizing that the notion of an essentially contest concept, as first introduced in 1956 by W.B. Gallie, is not at all a sceptical one, though many writers have taken it as such.

and 'substantive' (or 'thick') theories, in an attempt to regiment the growing literatures into a coherent framework.[14] Others have made more taxonomic and impressionistic distinctions to categorize the many scholarly views.[15] And still others have taken a much-needed historical approach, to excavate the genealogy of the most popular modern conceptions.[16] These efforts have been influential and continue to shape debates. For example, the general tendency to schematize rule-of-law theorizing is evident in three major reference works, either just published or forthcoming, which go even further in trying to bring about some degree of order and coherence in light of the proliferation of theories in recent years.[17]

So far, the second, constructive tendency has been the dominant one, and rightly so. Scepticism about the rule of law is tempting. It is rather easy to assemble pairs of contradictory claims about the rule of law in practice (eg, that the very same exercise of power either strengthens or weakens the rule of law) or even what it is in theory (eg, that the rule of law either does or does not require observance of human rights standards or democratic governance), often presented to motivate such scepticism. However, arguments against the force of such examples are in the end unnecessary. For such scepticism is cast immediately in doubt when one considers those continuous traditions of thought which have brought us the very idea, from the ancient

[14] The earliest such attempt was Craig, above n10. For the most recent treatments of the thick/thin distinction, see Jørgen Møller, "The Advantages of a Thin View" and Adriaan Bedner "The Promise of a Thick View", both in Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law* (Edward Elgar Publishing, 2018).
[15] See, eg, Richard Fallon, "'The Rule of Law' as a Concept in Constitution Discourse," *Columbia Law Review* 97(1) (1997), who suggests four historically rooted "ideal-typical conceptions" around which to organize all rule-of-law discourse.
[16] See Paul Burgess's chapter in this volume, his "Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics," *Hague Journal of the Rule of Law* 9: 195-209 (2017), and Pietro Costa, "The Rule of Law: A Historical Introduction," in P. Costa and D. Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, 2007), 73-149.
[17] See Michael Sevel (ed.), *The Routledge Handbook of the Rule of Law* (Routledge Press, forthcoming), Martin Loughlin and Jens Meierhenrich (eds.), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, forthcoming), and Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law* (Edward Elgar Publishing, 2018).

Greeks onwards. It is here that the value of the historical approaches becomes evident; they help us see more clearly that despite passing political rhetoric and the many disciplinary academic treatments of the rule of law, there is not only historical but also conceptual continuity in its development over the centuries and across various legal and political cultures.

My approach here will be similarly constructive, but from a perspective which attempts to, in a sense, transcend the historical one, to an even higher level of abstraction. For upon examination of the historical conceptions we can discern what I call a recurring *thought pattern* about the core of what the rule of law is. I do not claim that this pattern is exemplified in every conception in the Western tradition; for example, as I will explain, it is not found, without remainder, in some of those developed from the mid-twentieth century onwards. However, it does capture a line of thought present in most conceptions developed before, and some during, the twentieth century. The pattern is intended as precisely that, a kind of schema, rather than a definition or conclusive account. By identifying the pattern, it may then provide a general template for thinking about the rule of law across academic disciplines, as well as across historical conceptions, and to help clarify how each of those conceptions diverges from or approximates the pattern.[18] A distillation of the pattern may also help clarify and sharpen questions about matters of growing political concern, eg, why and how the rule of law is of value, and the ways in which it is achieved or destroyed.

[18] Gallie argued that essentially contested concepts require an "exemplar," that is, a kind of "prototype" or "tradition or set of traditions" around which contestation about the meaning of a concept proceeds. See W.B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* (1956), pp 176 and 182. Waldron (above n 12, pp 157-158) expresses doubt that an exemplar is required for such concepts, and in any case denies, without argument, that there is an "exemplar" of the concept of the rule of law in any relevant sense. The pattern I identify in what follows may be considered such an exemplar; of course, recognizing the existence of an exemplar does not itself commit one to the view that the rule of law is essentially contested.

II. The Pattern

Let us begin then from the highest (indeed, one may think, nearly contentless) level of generality, and then proceed downwards to fill in the details. The most abstract discernible pattern among claims about the rule of law is that, whatever it is, it avoids or prevents something from happening: *X prevents Y*. This is exemplified in Aristotle's account with which we started: the rule of law somehow prevents the "wild beast" in human nature from controlling the exercise of political power. It is also implied when Locke writes that legislative authorities must not make law arbitrarily and "[are] bound to dispense justice, and to decide the rights of the subject, by promulgated, standing law, and known authorized judges" or else a community will end up in a situation even worse than lawlessness.[19] That is, he thought that the rule of law, by design, prevents backsliding into a "state of nature." And when J. S. Mill writes, echoing the lessons of Magna Carta, that "the aim…of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty,"[20] he had in mind what modern political philosophers call 'negative liberty', which already has within it the idea of prevention or limitation. To have negative liberty is to be free from the interference of others (here specifically those with political power) in exercising the rights one already has, by law or nature. So the rule of law is, here again, supposed to limit or prevent something: interference with the free and reasonable exercise of one's rights and capacities.

And yet, even from this small set of examples, one can observe a more complex pattern emerge than simply that the rule of law prevents something taken to be undesirable. For what is obscured in these impersonal formulations are the various relations which the rule of law is said to mediate between distinguishable persons or groups of people within a community. It is an

[19] John Locke, *Second Treatise of Government,* s. 136.
[20] J.S. Mill, *On Liberty* (Prentice-Hall, Inc., 1994), p 4.

ongoing debate as to how best to identify these groups; contrasts between 'ruler' and 'ruled', the empowered and the powerless, those vested with legal powers and those who may suffer because of their use or misuse, are all familiar ways of doing so, though each suggests considerably different conceptual (as well as perhaps political) commitments. More on that in a moment; the present point is that the enriched pattern displays a triadic relation between the rule of law and two groups, such that the law mediates relations between them and, in fact, in some way *protects* one from the other: *X protects Y from Z*. *How* the rule of law discharges the function of protection also continues to be an intensely debated issue, as we will see. But to encompass the broadest range of interpretations, 'Z' here represents the more general idea of something bad or undesirable happening, and happening *to* Y, brought about by the other group, or some of its members. Thus, as a first approximation, the general, recurring thought pattern about the rule of law is:

When the rule of law prevails in a political community,

a) That society has law (ie, a legal system) and the law 'rules', such that
b) When it (the legal system) has certain characteristics,
c) It (again, the system) protects members of that community
d) From something regarded as bad or undesirable.

I discuss each of these features in turn.

a) The society has law (ie, a legal system) and the law 'rules'.

That the rule of law requires law in a community – I use 'legal system' interchangeably, though not without some controversy[21] – may seem a trivial truth, hardly worth mentioning.[22] And yet, even here there are a variety of views. The claim, first, raises the question of the relation between the concepts of law and the rule of law. Since the rule of law seems the more complex idea which contains as a component the concept of law, one may suppose that the latter is the explanatorily and logically prior one.[23] But some have argued there is no such priority, and that the fact of law and the ideal of the rule of law come "as a package."[24] This is nonetheless consistent with the core idea of the rule of law being a legalistic ideal: as being the (or perhaps only an) ideal specific to law, and not to norms or normative systems of any other sort.

However this may be, there is a second interpretation of the claim which is not at all trivial or obvious. On its face, the idea is descriptive, as about the necessity of the presence of law in a community for the ideal even to be possible. But another way to understand it is as an implicit political, and indeed moral, judgement to the effect that there *ought* to be law in a community. That is, the rule of law requires the claim that law is a superior means of, for example, dispute resolution and social order, than the alternatives.[25] Given the importance of the British jurisprudential tradition as a transformative moment in the Western tradition of the rule of law – from Harrington and Locke, to Dicey and Hart – this might be taken to smack of imperialist

[21] Cf. Joseph Raz, *The Concept of a Legal System*, rev ed. (Clarendon Press, 1980) who argues where there is law, there is a system of law of which it is a part. For a contrasting view, see Keith Culver and Michael Giudice, *Legality's Borders* (Oxford, 2010).
[22] Cf. Martin Krygier, "Approaching the Rule of Law," in *Missing in Action:* (2011), who finds it obvious but also worth pointing out.
[23] Cf. Joseph Raz, "The Rule of Law and its Virtue," in *The Authority of Law,* 2nd ed. (Oxford University Press, 2009).
[24] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43:1 (2008), p 10.
[25] The assumption arguably runs through many discussions of the rule of law, but is most clearly articulated in Andrei Marmor, "The Rule of Law and its Limits," *Law and Philosophy* 23 (2003), pp 2-5. It does seem to be a guiding assumption, for example, in the many ongoing efforts to bring about the rule of law by international organizations in countries around the world.

assumptions about legal forms being a mark of "civilization", and praiseworthy for that reason.[26] The case for these connections between theoretical and political assumptions has been convincingly made.[27] Nonetheless, even in the postcolonial world, the claim may by now seem a platitude not requiring an argument; this may explain why arguments in support of it are rarely given. And yet, such an argument is needed, if only to answer now familiar objections that the law is itself an instrument of oppression,[28] or that, in any case, disputes can be reliably and equitably resolved without traditional legal institutions.[29]

A final point about this aspect of the pattern is in regard to the last clause: that law must "rule." This is not the tautology it appears; rather, it refers to the need for *efficacious* law. It is perhaps part of the everyday concept of law that where it is proper to even speak of valid law, there must be law that is "in force." Some theorists take that to mean that there is at least a credible threat of the use of coercion by law-applying institutions to compel compliance with legal requirements.[30] Writers on the rule of law commonly go further and require that there should be actual widespread obedience to the law among members of a community.[31] The efficacy of law from a rule-of-law perspective is said to involve recognition and *use* of the law and its institutions, perhaps also accompanied by some belief in their legitimacy. The theorists who make such claims very often do not have a nuanced view of what obeying the law involves,

[26] Cf. Hart's famous argument for his positivist account of law which uses the device of a "simple form of social control" which he calls a "pre-legal" society, "a small community closely knit by ties of kinship, common sentiment, and belief," and as such proves "defective and will require supplementation" in order to have law properly so called. See *The Concept of Law*, 3rd ed. (Clarendon Press, 2009), pp 92-99.
[27] See Dylan Lino, "The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context," *Modern Law Review* 81(5) (2018) and Coel Kirkby, "Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961," *American Journal of Legal History* 58 (2018).
[28] Cf. Evgeny Pashukanis, *Law and Marxism: A General Theory* (London: Ink Links, 1978).
[29] Cf. Robert Ellickson, *Order Without Law* (Harvard University Press, 1991).
[30] But see Grant Lamond, "Coercion and the Nature of Law," *Legal Theory* 7 (2001).
[31] "'The rule of law' means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it." Raz (above n 23), p. 212. Others who share the view are Fuller (above n 10), Hayek (above n 10), and Waldron (above n 9).

so it is difficult to assess whether their views are plausible.[32] The more general question of what relationship the rule of law brings about between the law and the community for which it is law is, however, an important recurring question, on which more below.

(b) When it (the legal system) has certain characteristics.

Theorists of the rule of law have been by far most concerned with determining which features the law must have to discharge the protective function referred to in features (c) and (d) of the pattern. And it is primarily the jarring diversity among such lists that encourages talk of the rule of law as "essentially contested." Lists of the relevant features have varied widely in both length and content. Writers have most commonly espoused lists of three to eight features,[33] while some lists run to as many as ten,[34] and as few as one.[35] Despite the diversity, there are, however, certain recurring themes. For example, many rule of law theorists since Aristotle have held that it requires that the laws of a system are sufficiently *general*, both in respect of regulating kinds of conduct (rather than specific, singular acts) and groups of people (rather than a single, or a limited set of, individuals).[36] The overriding importance of generality has recently been questioned, given that certain sorts of particularity feature in many well-entrenched forms of law, such as executive orders, acts of attainder, and some standard forms of common law adjudication.[37] And yet, the concerns of many theorists who emphasize the generality of law

[32] Cf. Michael Sevel, "Obeying the Law," *Legal Theory* 24 (2018).
[33] Fuller (above n 10) and Raz (above n 23) both suggest eight features; Hayek (above n 10) and A.V. Dicey (*Introduction to the Study of the Law of the Constitution*, 8th ed. (McMillan and Co., 1982) both suggest three features.
[34] Waldron, above n 9.
[35] Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy," *Oxford Journal of Legal Studies* (2004), pp 23-37.
[36] Aristotle, Cicero, Locke, Dicey, Hayek, and Fuller, among many others, express such views.
[37] See Timothy Endicott, "The Generality of Law," in Luis Duarte D'Almeida (ed.), *Reading HLA Hart's* The Concept of Law (Hart, 2013), and Raz (above n 10).

really lie elsewhere, i.e., in there being *equality* under the law. This kind of equality is distinct from social, political, or economic equality in referring to simply the consistent application of a law across the relevant class of persons or kind of conduct. Some writers have identified this 'legal equality' with the abstract principle of 'treat like cases alike';[38] others have doubted the validity of the latter principle while still recognizing the importance of generality in law.[39] A common assumption of many theorists who include generality as a perennial feature of the rule of law is that general rules are themselves productive of, or in any case facilitate, their consistent application across cases, and thereby discourages *ad hoc* applications, or the disregarding of general rules altogether.

Another common theme of such lists is that law must be knowable by those to whom it applies. Writers variously argue that the rule of law requires that laws are sufficiently public, promulgated, or 'declared'. Precisely what is meant by such terms accordingly varies widely. Some theorists, such as Hobbes, say that a person must be able to "take notice of the law" in the sense of the law being intelligible to that person. Thus the rule of law in this aspect does not extend to the mentally impaired and comatose, in virtue of their inability to render the law intelligible to themselves.[40] More often, the requirement of promulgation is construed as an imperative on lawmakers to craft law so that its content – the rights, obligations, or permission contained in it – may be ascertained by anyone of normal capacities, but in particular by the people who are the bearers or addressees of those rights, duties, and permissions. The requirement also extends downstream from legislative activity, ie, that there must be sufficient distribution of legal information among the community whose law it is. On that score, it may

[38] See Hart (above n 26) and John Rawls *A Theory of Justice,* rev. ed. (Harvard, 1999), section 38.
[39] David Lyons, "On Formal Justice," *Cornell Law Review* 58 (1973).
[40] See Thomas Hobbes, *Leviathan*, Chapter 26.

seem that the rise of the internet and increasingly vast electronic legal databases have strengthened the rule of law worldwide. However, some theorists have argued for limits to the value of promulgation; for example, if a law reproduces the content of a non-legal norm that is already widely known by other means, its successful promulgation bears little on strengthening the rule of law.[41]

Beyond these common themes, there is great variety among lists of rule-of-law features. One broad trend in the development of such lists over the last century is their increasingly close connection to the activity of judges, both in their making and application of the law. Dicey famously wrote in the 1880s that a central aspect of the rule of law is that judges regularly enforce ordinary individual rights by applying antecedently declared law in ordinary tribunals. Over the century that followed, theorists emphasized the importance of a range of procedural norms recognized and regularly followed by judges in hearing and deciding cases.[42] Perhaps the strongest of such views is one which argues that the courts should "have review powers over implementation of the other principles…to ensure conformity to the rule of law."[43] That is, it is judges who bear a special, perhaps unique, responsibility in sustaining and strengthening the rule of law throughout the rest of the legal system. It is likely not a coincidence that these views have been developed within the common law world where judges have long been thought to play a special role in the life of the law, though they are intended to apply more broadly, to legal systems of any sort.

The lists have also varied as to *which* aspects of a legal system of the political community they concern. It is at this point that perhaps the most entrenched distinction in writings on the

[41] Fuller (above n 10), pp 49-51.
[42] See, Waldron (above n 9) and T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism," *Law Quarterly Review* 115 (1999).
[43] Raz (above n 10), p 217.

rule of law is made, between 'formal' (or 'thin') and 'substantive' (or 'thick') theories. It is said that formal theories "focus on the proper sources and form of legality," whereas substantive theories "include requirements about the content of the law (usually that it must comport with justice or moral principle)."[44] However, there do not seem to be pure examples on either side of the distinction. The most popular lists of rule-of-law features considered to be 'formal' often go well beyond "proper sources and form." And more 'substantive' accounts often incorporate a range of 'formal' features.[45] Indeed, even the most commonly cited features of the rule of law appear to be *so* heterogenous that it is doubtful that the formal/substantive distinction helps illuminate anything of significance.

Consider Fuller's oft-cited list of eight features.[46] Both 'generality' and 'clarity' relate directly to the semantic content of laws: in the former case, to the logical features of terms referring to its objects of regulation, and, in the latter, as one relative to linguistic standards of intelligibility which may vary across communities or even individuals. 'Promulgation' refers to a particular epistemic relation between laws of a system and those who live under it. Both 'prospectivity' and 'consistency' refer to further logical properties of laws and their relations: the former to the temporal direction of application, the latter to the coherence of the content of both the laws and their logical consequences. 'Practicability', or the requirement that laws do not demand the impossible, is also a relational notion, but a relation between the substantive requirements, permissions, or prohibitions contained in a law and the capacities of a person to act. Such capacities may be defined relative to circumstances – for example, the ability of a person to act or affect events in the past, or to fulfill incompatible requirements simultaneously –

[44] Tamanaha (above n 10), p 92.
[45] See, eg, Tom Bingham, *The Rule of Law* (Penguin Books, 2010).
[46] Fuller, above n 10.

or may relate to a person's finite natural capacities (their strength, endurance, attention, and so on). What Fuller calls 'stability' is a property of the legal *system* as a whole, rather than of individual laws, indeed, a relational property between the content of the laws of a system and the passage of time. 'Congruence' between declared law and its official application is, as Fuller says, perhaps the most complex feature,[47] being a relation between the content of laws and the actions (as well as perhaps the deliberations) of various institutional actors.

So described, these features are not obviously about the 'proper sources and form' of law at all. In fact, it is difficult to identify any common theme of 'formality' that unites them. If the intended contrast with 'substantive' theories is that substantive theories include features that are grounded in the moral value of the content of the law, the distinction is similarly elusive. As has often been pointed out, 'formal' features are also closely related to various moral values and constraints. For example, much has been written recently on the value of clarity as well as the intentional lack of it, ie, vagueness in the law.[48] And it has been argued that realizing formal features indirectly respects the dignity of persons, often thought to be of intrinsic value.[49] The alleged formal/substantive distinction among competing accounts of the rule of law therefore remains obscure, and its usefulness doubtful, in making sense of that diverse field of views.

(c) The system protects members of that community

Whatever the list of characteristics which law must have to achieve the rule of law, theorists agree that law with those features performs a protective function. The diversity of views here is regarding how, for whom, and by whose actions, the rule of law discharges this

[47] Fuller (above n 10), p 81.
[48] See Timothy Endicott, "The Value of Vagueness," and Jeremy Waldron, "Vagueness and the Guidance of Action," both in Andrei Marmor and Scott Soames, *Philosophical Foundation of Language in the* Law (Oxford University Press, 2011), and Hrafn Asgeirsson, "On the Instrumental Value of Vagueness in the Law," *Ethics* 125(2) (2015).
[49] See again Raz (above n 10) and Waldron (above n 9).

function. We can discern two sorts of approaches to these questions. One is a 'top-down', institutional approach in which persons granted law-applying and enforcement powers within legal institutions (such as judges) exercise those powers to protect the basic rights and freedoms of people whose institutions they are. Not surprisingly, the common law-centric conceptions I referenced above take this approach, by entrusting judges with the responsibility of protecting members of the community both from each other as well as from (other) legal officials who may engage in wrongdoing. A second, 'bottom-up' approach is that the rule of law empowers members of a community to protect themselves by way of engaging such institutions. This is the approach taken by the historian E.P. Thompson, on the basis of which he famously claims that the rule of law is an "unqualified human good."[50] His legal history of eighteenth century England is one in which ordinary citizens used common law courts to enforce, and in some cases to create, rights for themselves; this involved those citizens coming to see themselves as legal persons, with standing to engage with the forms of law to advance their own (legally-protected) interests. In the modern world of rule of law 'promotion' and international policy, this 'bottom-up' approach is often expressed by concerns that there is widespread 'access to justice' in a community, an umbrella term which refers to not only access to courts (itself a broad term encompassing efficient and competent courts, as well as the costs of using such courts, such as filing fees), but also access to competent lawyers and legal advice, among other things.[51]

These two approaches are clearly compatible; indeed, they may be complementary within the same theory. Judges are well-situated to ensure that citizens are empowered both to argue their rights in court and to challenge court decisions if necessary. And judges can of course

[50] E.P. Thompson, *Whigs and Hunters* (Penguin Books, 1975), p 266.
[51] For an overview, see Benjamin van Rooji, "Bringing Justice to the Poor, Bottom-Up Legal Development Cooperation," *Hague Journal of the Rule of Law* 4(2) (2012).

exercise review powers over administrative and executive action, as well as judicial actions in lower courts. And yet different variations on the pattern make one or the other approach more salient and important in achieving the rule of law.

A final note. I have used the terms 'citizens' and 'members of a community' interchangeably, though they are clearly not equivalent. There has been, in fact, precious little discussion about whom the rule of law is meant to protect: whether citizens (wherever they may be, inside or outside a territory), all persons within a given territory at a given time, or a broader class which may include persons who live under other legal systems – for example, those living in immediately adjacent states, or persons from near or far seeking refuge or political asylum from within, or from outside, a state. Who is considered to be within the 'community' for purposes of explaining how the rule of law serves its protective function will have consequences for how it discharges that function, as well as for what accountability relations there are that determine who has moral standing to protest when it does not.

(d) From something regarded as bad or undesirable.

However the rule of law performs its protective function, what it protects members of a community *from*, according to the pattern, is presumed to be politically, and on most views morally, undesirable. It may appear there is consensus across theorists about what the undesirable thing is. References to the 'arbitrary use of power', if not always by the name, are strikingly common as the problem for which the rule of law is a, indeed the, solution.[52] The appearance of consensus, however, falls away once it is asked of various writers what is meant

[52] Cf Aristotle (above n 5), Locke (above n 19), Hayek (above n 10), Raz (above n 10), Fuller (above n 10), Martin Krygier, "The Rule of Law: Pasts, Presents, and Two Possible Futures," *Annual Review of Law and Social Science* 12 (2016), and Paul Gowder, *The Rule of Law in the Real World* (Oxford, 2016).

by 'arbitrariness'. Remarkably, there has been very little sustained reflection on what it is, even in the face of a number of questions which arise immediately upon consideration of the idea. For example, does such abuse of power involve only the exercise of power created or recognized by law (for example, a legal power to legislate, or the use of executive power)?[53] Or is it also about the abuse of political power, whether or not that power is regulated or even countenanced by the law? Are the standards by which to determine whether the exercise of a power is arbitrary provided by the law or by an independent political morality?

Only very recently have principled answers to these questions been developed.[54] The answers are primarily of two sorts. One assumes that both legal and merely political power can be exercised arbitrarily, and such arbitrariness should be understood from the point of view of those who may be vulnerable to suffer as a result of it. For example, an exercise of power is arbitrary if it is not subject to control or regulation by established general rules or via accountability relations with other power holders or, especially, with the powerless. Or it is exercise of power which does not allow those vulnerable to it to predict it or comply with it, and thus rendering them unable to plan their lives in light of it.[55] A more capacious variation of this approach is to see arbitrariness as any exercise of power which is in some way disrespectful to any person's right, interest, or expectation, where disrespect is to be understood as failing to attribute the significance to something it does in fact have.[56] A second approach to arbitrariness

[53] If answered in the affirmative, it is an open question whether arbitrariness, at least the sort most relevant to the rule of law, concerns only the exercise of *public* powers rather than also private ones (for example, the making of contracts). See Lisa M. Austin and Dennis Klimchuk (eds), *Private Law and the Rule of* Law which begins to challenge the "public law presumption" in influential accounts fo the rule of law. The rule of law in employment relationships is discussed in Julian Sempill, "The Lions and the Greatest Part: the Rule of Law and the Constitution of Employer Power," *Hague Journal of the Rule of Law* 9 (2017), but more general questions around the rule of law and private powers have yet to be addressed.

[54] For a useful critical overview, see Krygier (above n 52).

[55] See Krygier (above n 52), pp 18.5-18.6.

[56] Julian Sempill, "Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power," *Journal of Law & Politics* 31 (2016), pp 366-374.

is to argue that only a valid legal power can be exercised arbitrarily, such that when so exercised it is to act contrary to, or even with indifference towards, the reasons which generally justify the existence of the power.[57] Sometimes these reasons will be given explicit expression in the, for example, in judicial reasoning or the texts of statutes or constitutions. But often they are not, and exists implicit reasons of policy or political morality. Similarly, a prohibition on arbitrary exercise of power may be established in law, or only in other, practiced political or cultural norms. This approach is independent of whether there are such legal norms sanctioning arbitrariness. Yet arbitrary exercise of power is possible only if the law has, as it were, provided the opportunity for it by establishing powers which are liable to be abused.

The first, capacious approach underlies many of the popular lists of rule-of-law features discussed under part (b) of the pattern, though it has puzzling consequences. It has been said, and oft-repeated, that if the rule of law is simply the rule of the good law, an entire social and political philosophy is required to explain and understand it. But if so, it ceases to be an independent political ideal, distinguishable from other perennial ideals (human rights, justice, equality, and so on); and yet, that it is so distinguishable is commonly supposed in both academic and political discourse.[58] So a purely content-based conception of the rule of law is untenable. The present problem is in the end the same but of the opposite valence: if arbitrariness just is disrespectful (ie, *bad*) uses of power, then the problem for which the rule of law is a remedy is the rule of the bad law. Thus, if the rule of law tempers or mitigates disrespectful exercise of power (in all its various forms), then to believe in it is not to believe "that good should triumph",[59] but rather that evil should be defeated. But the rule of law, again, ceases to be one

[57] See Timothy Endicott, "Arbitrariness," *Canadian Journal of Law and Jurisprudence* 27(1) (2014), and Raz (above n 10).
[58] Raz (above n10), p 211.
[59] Ibid.

among the many ideals that the law may achieve, but as just another stopgap against the world becoming generically worse.[60]

The second approach to arbitrariness, focused on the abuse of powers granted by law, seems to avoid this puzzle but is far more modest, and perhaps too modest, in its explanatory ambitions. On this view, the rule of law ensures that power-holders exercise power within the legally defined boundaries of those powers. The boundaries are in turn defined by the reasons which justify the power. The virtue of the approach is that it fixes rather precisely the domain in which the rule of law fails or succeeds: in the exercise of powers created or recognized by a legal system. The principal vice, however, is that it leaves unexplained much that scholars and observers of politics often identify as just the sort of arbitrariness which the rule of law is meant to curtail. This includes, for example, the erosion of political norms by power-holders through legal means, often by legislation, usually in pursuit of the ideology of a political party or other ruling minority. Such norms may not bear the marks of legally valid parts of the system, but can be of profound importance in ensuring the stability, and even social cohesion, required for the efficient functioning of a set of legal institutions.[61] The question is how to understand arbitrariness in a way which accounts for the historical and salient contemporary forms of 'abusive' but legally permissible norm-erosion, as well as those of exercising power which upsets expectations and is indifferent to human dignity, but in a way which does not lead us back to the puzzle of merely avoiding evil. These questions notwithstanding, and despite the variety

[60] As part (d) of the pattern states, whatever the rule of law prevents is regarded as bad or undesirable. However, the frequent reference to the relative notion of 'arbitrariness' suggests that the explanation of its badness or undesirability will also be relative to the context of law and its institutions, rather than to unqualified 'harm' or 'indignity'.

[61] See David Landau, "Abusive Constitutionalism," *University of California, Davis Law Review* 47 (2013) for discussion of a range of modern and historical examples.

of approaches, the arbitrary use of power remains the enduring problem to which the rule of law is supposed to be the solution.

III. **Further Observations**

With the pattern now in view, there are many fruitful observations to be made about its relation to recent discussions of the rule of law. I will limit myself to three. The first is that this pattern leaves aside entirely one modern thought about the rule of law and its value, of increasing popularity since the mid-twentieth-century emergence of the various international law and development movements I mentioned earlier. The thought is that the rule of law has the capacity to *bring about* a wide array of further social and political goods. It has been said, for example, that the rule of law "combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of justice, opportunity, and peace – underpinning development, accountable government, and respect for fundamental rights."[62] Such declarations are often unclear as to what precisely is the supposed relation between the rule of law and those alleged further goods: whether the rule of law guarantees them, merely promotes them, sets conditions favourable for their attainment, and so on. The unclarity, however, has not prevented policymakers from including the rule of law as a standard component of economic development plans of nations around the world. The thought pattern I have sketched, however, is silent as to whether the rule of law has, or even tends to have, any of these further positive effects. Indeed, the pattern is compatible with any alleged benefits that may follow from it, across virtually any contingent set of political arrangements or circumstances. What effects the rule of law will

[62] World Justice Project Rule of Law Index 2019, p 7, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019.

actually have in a particular society is a question best left to the social sciences. The pattern merely provides a stable reference point from which to pursue those empirical questions.

Second, the thought pattern makes no assumptions about the deeper philosophical foundations of the rule of law. There is a stark contrast between, on the one hand, the sweeping political claims about the inherent value of the rule of law and, on the other, the relatively austere philosophical claims made about its conceptual roots. Joseph Raz, for example, argues that the requirements of the rule of law can be derived from a single, abstract idea: that the law must be capable of guiding the behaviour of its subjects.[63] The law provides standards of action, and the rule of law ensures that it functions as such in the reasoning of those subject to it. Even if this much is uncontroversial, going any further requires substantive philosophical arguments as to what law is and does. Raz himself has developed such views, which have been much discussed.[64] But in the long history of the idea of the rule of law, there has been persistent disagreement on these and related questions. And yet, the recurring thought pattern can be found in writers with incompatible, indeed radically different, conceptions of law.

Third, the pattern is also neutral as to whether and how the rule of law is of moral value. Again, by now much has been written about the alleged difference between 'formal' and 'substantive' theories. The latter, but not the former, is said to require that the content of the law satisfy certain moral standards. As I have noted, the distinction is itself dubious and likely not illuminating. However, the question of the value of the rule of law remains. One reason to think the pattern is *not* neutral on the question is that it already contains within it the thoroughly moralized notion of protection from something regarded as bad or undesirable. And yet care

[63] Raz (above n 9), p 212.
[64] See Joseph Raz, *The Authority of Law*, 2nd ed (Oxford, 2009), *Between Authority and Interpretation* (Oxford, 2008), and *Ethics and the Public Domain* (Oxford, 1994).

should be taken even here. According to some views in moral and political theory, there is no positive moral value in merely avoiding a catastrophe. And insofar as the rule of law accomplishes this, it can at most be only a "negative virtue" of law,[65] a view which has sometimes been taken about the value of justice.[66] The pattern is compatible with this sort of view as well as others which ascribe more robust moral value to preventing arbitrariness, or indeed ones which ascribe no value to it at all. The question of the actual moral value (or disvalue) of whatever the rule of law prevents or protects against, and the value of that prevention, is left not to the social sciences, but to more general theories in moral and political philosophy.

IV. Conclusion

Given that the concept of the rule of law is now of interest to scholars working in many academic disciplines, the thought pattern I have articulated may not only facilitate its further migration from philosophy to other disciplinary quarters, but also enable its development in light of such interdisciplinary treatment. We are now in a stage of rapid development in thinking about the rule of law; perhaps in time, especially given the modern trend of supposing that the rule of law produces further goods, rather than only preventing discrete evils, the recurring pattern will undergo change. But for now the pattern serves as a fixed reference point for further conceptual, historical, and social scientific investigations. Not long ago it was said that "we have reached the stage in which no purist can claim that truth is on his side and blame the others for

[65] Raz (above n 10), p 224.

[66] See eg Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge, 2002), II.II.i.9 ("Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit.") For a modern endorsement of the view, see Stuart Hampshire, *Justice as Conflict* (Princeton, 2000).

distorting the notion of the rule of law."[67] I have attempted here a modest purism, by identifying a stable pattern of thought to be found in many writers on the rule of law in the Western tradition, one salient in the history of political thought about the rule of law in its most abstract form, exemplifying aspects of its conceptual core.

[67] Raz (above n 10), p 211.