

Political Theory and The Rule of Law

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It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter. There is much to be said for this view of the matter. From the perspective of an historian it is, however, irrelevant. The Rule of Law did, after all, have a very significant place in the vocabulary of political theory once, so important in fact that it may well be worth recalling. Moreover, since legal theorists still invoke and argue about it, there may also be some point in comparing its present intellectual status with its original meaning. This may turn out to be not only an exercise in recollection, but also a diagnostic experiment. In the following pages I shall try to show that there are two quite distinct archetypes of the Rule of Law and that these have become blurred by now and reduced to incoherence because the political purposes and settings that gave them their significance have been forgotten. With some interpretive licence I shall attribute the two models to Aristotle and Montesquieu respectively. Then I shall suggest that contemporary theories fail because they have lost a sense of what the political objectives of the ideal of the Rule of Law originally were and have come up with no plausible restatement. The upshot is that the Rule of Law is now situated, intellectually, in a political vacuum.

The Rule of Law originally had two quite distinct meanings. It referred either to an entire way of life, or merely to several specific public institutions. The first of these models can be attributed to Aristotle, who presented the Rule of Law as nothing less than the rule of reason. The second version sees the Rule of Law as those institutional restraints that

prevent governmental agents from oppressing the rest of society. Aristotle's Rule of Law has an enormous ethical and intellectual scope, but it applies to only very few persons in the polity. Montesquieu's account is of a limited number of protective arrangements which are, however, meant to benefit every member of the society, though only in a few of their mutual relations. It is not the reign of reason, but it is the spirit of the criminal law of a free people. Aristotle's Rule of Law is, in fact, perfectly compatible not only with the slave society of ancient Athens, but with the modern "dual state". Such a state may have a perfectly fair and principled private law system, and also a harsh, erratic criminal control system, but it is a "dual state" because some of its population is simply declared to be subhuman, and a public danger, and as such excluded from the legal order entirely. They are part of a second state, run usually by different agents of the government, but with the full approval of those who staff the "first" of the two states. Such was the government of the United States until the Civil War and in some ways thereafter. Such also was Nazi Germany and such is South Africa today. I mention only these states because they are part of "the Western tradition", and are included in its legal development. There are no remnants of a Byzantine past to confuse the historical picture here.

In contrast to Aristotle's rule of reason, Montesquieu's Rule of Law is designed to stand in stark contrast not only to simple "oriental" despotism but also to the dual state with which he was well-acquainted, as his remarks on modern slavery show. If it is to avoid these conditions, the Rule of Law must take certain types of human conduct entirely out of public control, because they cannot be regulated or prevented without physical cruelty, arbitrariness and the creation of unremitting fear in the population. Coercive government must resort to an excess of violence when it attempts to effectively control religious belief and practice, consensual sex and expressions of public opinion. The Rule of Law is meant to put a fence around the innocent citizen so that she may feel secure in these and all other legal activities. That implies that public officials will be hampered by judicial agents from interfering in these volatile and intensely personal forms of conduct. The judicial magistracy will, moreover, impose rigid self-restraints upon itself which will also enhance the sense of personal security of the citizenry. They will fear the office of the law, not its administrators. Commerce, unlike religion, was not among the areas immune to governmental control. That is because Montesquieu's justification for limited government was grounded in a psychology, not in a theory of public efficiency or natural rights. His view of limited government could be called the rule to control criminal law. Contemporary legal theory still relies quite heavily on these two

original models, but they have tended to ignore every political reality outside the courtroom or hurled the notion of ruling into such abstraction that it appears to occur in no recognizable context.

In Aristotle's account the single most important condition for the Rule of Law is the character one must impute to those who make legal judgments. Justice is the constant disposition to act fairly and lawfully, not merely the occasional performance of such actions. It is part of such a character to reason syllogistically and to do so his passions must be silent. In the course of forensic argument distorted syllogisms will of course be urged upon those who must judge. That indeed is in the nature of persuasive reasoning, but those who judge, be they few or many, must go beyond it to reason their way to a logically necessary conclusion. To achieve that they must understand exactly just how forensic rhetoric and persuasive reasoning work, while their own ratiocination is free from irrational imperfections. For that a settled ethical character is as necessary as is intelligence itself.

The benefit to society of judgments made by men of such character is considerable. Without such justice no one is secure in his material possessions and even in his social values. Moreover, in the structure of politics the presence of men with such a mind-set, most usually middle-class moderates, has the effect of inhibiting the self-destructive proclivities that tend to afflict most regimes. The rule of reason depends decidedly on the capacity of the sane to persuade others to practise some degree of self restraint and to maintain the legal order that best fits the ethical structure of a polity. To have a stable system of restraining rules would seem to put enormous burdens on just men in their daily conduct. They are required, in addition to their ratiocinating and political skills, to possess the psychological ability to recognize the claims of others as if these were their own. The just man sees the merits and deserts of others exactly as if he himself were making a claim on those grounds. He draws no difference between himself and another or between two other opposed claimants. He can see all the demands of others and his own on a perfectly equal footing. When he is asked to decide a dispute or punish a wrong he sticks as closely to the rules as possible, because that is how he would want to be treated as a litigant. His task is simply to restore the previous balance and no irrelevancy may disturb his determinations. Without Aristotle's confidence in syllogistic reasoning this picture of perfect judgment would not make sense, nor would its claim to rationality stand. It is, however, part of a very powerful psychology as well. The powers of reasoning are part of the whole mentality of a man who has the capacity and inclination to see all claims impartially. That is not only required for judges, but of anyone who engages in fair exchanges, but it is clear that

the supremely just activity on which everyone in society depends is epitomized by judging in courts of law. For it is there that justice is activated into legality. The rationality of this procedure is made especially plausible since it is a form of social control that applies to only a very limited part of the population and then to only some human relationships. Women and slaves are not governed by the norms of either justice or law. These people like children are part of a domestic economy that is ordered on more personal lines. Moreover, there are relations of friendship and magnanimity which may involve other aspects of the best male character than its justice, which does not distinguish between friend and foe. The point that seems to me to matter most for Aristotle's understanding of the Rule of Law, is its concentration on the judging agent, the dispenser of legal justice, the man or men of reason and of syllogism put to work in the arena where everyone else is driven by physical or political appetite. On their shoulders rests the responsibility for preserving the basic standards of the polity in their daily application, and for maintaining reasonable modes of discourse in the political arena. The picture is one of mediation, far more than of social control with all its uncertainties. Control is left to the masters of the domestic sphere.¹

For an altogether different picture of the Rule of Law one cannot do better than to look at Montesquieu's version. While Aristotle's Rule of Law as reason served several vital political purposes, Montesquieu's really has only one aim, to protect the ruled against the aggression of those who rule. While it embraces all people, it fulfils only one fundamental aim, freedom from fear, which, to be sure was for Montesquieu supremely important. Its range is thus far narrower than Aristotle's Rule of Law, but it applies to far more people, to everyone to be precise. To realize the objectives of this kind of Rule of Law does not require any exceptional degree of virtue. The English, among whom Montesquieu saw it flourish, were far from admirable in many respects in his view. All that was needed for the Rule of Law in Europe, given its many fortunate historical and geographic circumstances, was a properly equilibrated political system in which power was checked by power in such a way that neither the violent urges of kings, nor the arbitrariness of legislatures could impinge directly upon the individual in such a way as to frighten her and make her feel insecure in her daily life. With religious opinion, consensual sex among adults and the public expression of public opinions decriminalized, the only task of the judiciary was to condemn

1 See especially *Nicomachean Ethics*, Book V, *Rhetoric*, Book I, ss. 1366b-1370a, 1373b-1377b and *Politics*, Book III, ss. 1285b-1287b and Book IV, ss. 1295a-1296b.

the guilty of legally known crimes defined as acts threatening the security of others, and to protect the innocent accused of such acts. Procedure in criminal cases is what this Rule of Law is all about. That is what makes the imperative of the independence of the judiciary also comprehensible. The idea is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests, and persecutive inclinations upon the judiciary. The magistrate can then be perceived as the citizen's most necessary, and also most likely, protector. This whole scheme is ultimately based on a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law. Rome chose war and lost everything. If France were to choose world monarchy and war instead of the English path to liberty and law, it too would be doomed to a deadly despotism. That is the fate that the Rule of Law, as the principle of legality in criminal cases fortified by a multitude of procedural safeguards, was capable of averting. It is very much "made", indeed, planned law. For all his respect for mores and customs, "inspired" rather than invented, as instruments of social control, Montesquieu was far too aware of the need for conscious political action to trust history to take care of Europe. He knew that judicial systems did not grow. They serve known purposes and are chosen and defended.²

This version of the Rule of Law is evidently quite compatible with a strong theory of individual rights. Indeed, in America that was to be the case. It is not, however, in the first instance a theory of rights. The institutions of judicial citizen protection may create rights, but they exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society. The Rule of Law is the one way ruling classes have of imposing controls upon each other. Even so passionate a critic of the English ruling classes of the 18th century as E.P. Thompson, after all, agrees with him on that point. England was not a gulag society and its political classes had to some degree shackled themselves.³ That is what was then meant by the Rule of Law.

The most influential restatement of the Rule of Law since the 18th century has been Dicey's unfortunate outburst of Anglo-Saxon parochialism. In his version the Rule of Law was both traditionalized and formalized. Not entirely without encouragement from Montesquieu, but wildly exaggerated, he began by finding the Rule of Law in-

2 *De l'Esprit des Lois*, Chs., VI, XI, ss. 3, 4, 6, 18, 19; XIX, ss. 12, 14, 16; XXVI, s. 20.

3 E.P. Thompson, *Whigs and Hunters* (London, 1975), pp. 258-269.

herent in the remote English past, in the depth of the early middle ages. Its validity rested on its antiquity, on its having grown, rather than being badly made, as was the case among the unfortunate countries of the Continent, especially France and Belgium. Its second pillar was that all cases were judged by the same body of men, following a single body of rules. The judges of the common law courts had slowly developed a suitable system, so that England had escaped that threat to liberty, administrative law, in which legally qualified tribunals dealt specifically with cases involving civil servants. Of the criminal law only habeas corpus mattered to Dicey, but the political arrangements of the English constitution did concern him. They were part of the Rule of Law. The Rule of Law was thus both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it. Not the structure or purposes of juridical rigour, but only its forms became significant for freedom. No wonder that Dicey thought England's law and freedoms were already gravely threatened. If its liberty hung on so slender a thread as the avoidance of new courts to deal with new kinds of cases, the end was indeed at hand. The one political issue that worried him very little was the consequences and the nature of war and the militarization of politics.⁴ That was, of course, Montesquieu's overriding concern, and the events of our century have amply justified him. Nevertheless, it is Dicey's shadow that hangs over both the libertarian invocation of the Rule of Law and the radical attack upon it. One need think only of Friedrich von Hayek and Roberto Unger, for example, at present.

The other current adaptation of the Rule of Law also has roots in the last century. Its origins are in the court-centred American jurisprudence of Gray, but divorced from his positivism. The Rule of Law remains the rule of judges, but collectively and potentially individually, their decisions amount to a rule of rationality. It is not perhaps as coherent as Aristotle's rule of logic, but the resemblance is clear. Without some sort of political and philosophical setting such as Aristotle had provided, however, this new rule of courts floats in a vacuum. That is one of the frequently noted weaknesses of the late Lon Fuller's "inner morality" of law, and it afflicts those early essays of Ronald Dworkin in which Herculean judges maintain the Rule of Law single-handedly. Nor does the private law bias of these theories help to integrate into the Rule of

Law those aspects of social control that Aristotle's rule of reason had originally left to the masters of claimless people.

No defender of the Rule of Law has inherited more of Dicey's apprehensions than Hayek, but unhappily he has abandoned the latter's not inconsiderable historical learning.⁵ In its place we get a theory of knowledge. The Rule of Law is necessary in Hayek's view, not because there are recurrent dangers of oppression and persecution, such as Montesquieu and even Dicey feared, but because of mankind's irreducible ignorance. Since it is impossible for us to predict the consequences or the form of the actions of each one of the members of society at any given time, it is also utterly impossible for us to plan our collective existence. Fortunately, if we set up general guide-lines that attempt no more than to keep us from colliding as we go about our own projects, we will prosper in spite of our limited knowledge. These governing guidelines are what Hayek calls the Rule of Law. Their main achievement is to facilitate the free market, but there are other benefits as well. By internalizing these minimal rules of social conduct we become more intelligent. Far from being anarchical a "spontaneous order" can be expected to emerge as individuals freely adjust their personal choices to these essentially "right of way" rules. Indeed, there is an evolutionary process that is set in motion by these numberless personal acts or adaptations. A natural selection of rules and traditions can be expected as the result of aggregate individual mini-experiments. This is, however, possible only as long as the rules are purposeless, that is, as long as they have no social end in view. They adjust, they do not order. They must only direct activities in order to avoid unnecessary conflict, collision and unwanted damage. Moreover, they must not be too rigid. For though predictability is the main end of such law, it must not stifle technological change, but rather, help people to adapt to its demands. Why that is not purposive political action is not clear. It is also difficult to see why we are able to plan the vast enterprises that have created modern technologies and the business and manufacturing organizations that realize them, if we are so ignorant of the probable future. Nevertheless, it is Hayek's belief that a "constructive rationalism" has since the early modern era misguided us into believing that we could plan our social future, and even regulate the market. It has inspired attempts to impose artificial legislation upon society which never realizes its stated ends, but does much to disturb and impoverish

⁴ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 1927), pp. xlii-xlviii and 324-401.

⁵ See specifically, F. A. Hayek, *Law, Legislation and Liberty* vol. 1 (Chicago, 1973); Vol. 2 (Chicago, 1974), pp. 133-152; and vol. 3 (Chicago, 1979), pp. 104, 155-169. John Gray, *Hayek on Liberty* (Oxford, 1984), J. W. Harris, *Legal Philosophies* (London, 1980), pp. 128-139 and 245-251.

the "spontaneous order". This does not, however, seem to apply to the regulation of criminal conduct and law, about which Hayek is extremely vague. There we can no doubt predict, plan and even legislate. Of our ability to wage war we hear even less.

Originally Hayek thought that the continental legal code system was more suitable as a social facilitator, but eventually he came to see the common law as more likely to be slow but sure in developing those few but necessary rules to an ever-advancing economy. It was at one time capable of setting those formal and impersonal guide-lines which allowed the "spontaneous order" of the market to advance without impediment. Public planning for social purposes is not, however, the only threat to this Rule of Law. Intellectual arrogance is joined by primitive feelings of tribal loyalty and communal attachments that express themselves in nationalism to hamper the rational evolution of the "spontaneous order". The latter is not the work of mindless or affective individuals. On the contrary, it is the outcome of the choices made by the most rational members of society. For these do not exercise their intelligence upon public objects which no mind can encompass in any case, but limit their calculations to their own plans, which they can realize. They can do this presumably in spite of all those other agents of whose activities they must remain ignorant.

Hayek is quite right in refusing to think of himself as a conservative. He is no defender of authority or hierarchy, nor does he pine for those familial and communal traditions that the conservative critics of liberalism accuse it of having destroyed. His "spontaneous order" is in no sense related to these emotional bonds. His Rule of Law is not meant to unite society, or to give it common aspirations. Quite the contrary. It exists to prevent inefficiency, irrationality, irregularity, arbitrariness and ultimately oppression. For once the "constructive rationalists" who try to reform society discover that their artificial policies are doomed to failure, they invariably resort to totalitarianism in order to maintain their power and to continue their disastrous rule. This is not, in fact, how the fascist, Nazi or Soviet regimes of our century came about. Without war, ideology, the survival of military classes and values, and much more, these phenomena cannot even begin to be explained. But then Hayek offers no historical proof for any of his theories. They are the working out of his unfalsifiable assumptions about human ignorance and its necessary political consequences.

For legal theory the significant feature of this version of the Rule of Law is not just its abstractness, but its scope. General and impersonal rules are not there to protect rights, which Hayek regards as too rigid, nor does it serve the modest ends tied to an institutional order that Mon-

tesquieu had in mind. It does far more than to make the citizen feel secure from the agents of coercive government. It sustains the free market economy, and that "spontaneous order" is itself the foundation that all other aspects of the society as a whole rest upon. Everything else is derivative. This construct has not only no relation to any historical society, it basically implies that justice has been impossible under any other circumstances. At some remote time in the last century it is said to have prevailed, but as Dicey already claimed it was already in decline in Britain and in America.

The negative mirror image of the Dicey-Hayek model of the Rule of Law can be found among the radical legal critics of liberalism, most notably Roberto Unger.⁶ For him also the Rule of Law is the entire legal order of the liberal state. It was in force until the coming of the welfare state, and its purpose and character were as Hayek describes them, but instead of functioning to protect a spontaneous order of any kind, it served to mask hierarchies and exploitation, and the destruction of the pre-capitalist communities. The overt inspiration of the liberal rule of law, according to Unger, is what Hayek takes to be its reality, generality of rules with uniformity of application, enforced by a judiciary separated from the rest of the government. And, like Hayek, moreover, Unger thinks that this system has failed and indeed never could have lasted. Indeed, it never was "real". It begins in early modern Europe as a bad bargain between the merchants and the monarchical bureaucrats who are already operating a stable legal code in order to stabilize royal rule. The merchants would have preferred to establish their own order of rules apart from this state apparatus, which would have been more responsive to their real needs, but they were unable to escape the embrace of the pre-existing bureaucracy. It was not a good deal for them, but it was the best bargain they could get. Their second failure was that they were never able to infuse society with the spirit of liberalism, so that their legal order could not achieve any degree of legitimacy. The pluralism of interest groups and the free market never could arouse the sorts of attachments that the religious and communal loyalties that liberalism had undermined could so easily summon. The Rule of Law was, therefore, from the first deprived of any basis of social support. Not that it deserved to be de-

⁶ Roberto M. Unger, *Law in Modern Society* (New York, 1976), pp. 52-57, 66-76, 166-181, 192-216 and 238-242. "The Critical Legal Studies Movement", (1983), 96 *Harvard Law Review* 563-675. See also Duncan Kennedy, "Form and Substance in Private Law Adjudication", (1976), 89 *Harvard Law Review* 1685-1778. David Kairys ed., *The Politics of Law* (New York, 1982).

fended, since from the first it was a mere mask. This reading of Max Weber passes for history, but, in fact, it is no less abstract than Hayek's account of the Rule of Law. It, moreover, agrees with Hayek's view of the incompatibility of primitive loyalties and the Rule of Law. Nor would there be any differences about the consequences of the judiciary being forced to choose between competing interest groups in the course of its procedures. Hayek would, of course, require them to stay out of such disputes, since it is not the function of his kind of legal order to get involved in making political choices. Unger thinks that this is inevitable, however, while Hayek merely thinks that it was a dreadful mistake that need not have happened. Interest groups could, in his view, have been left to work out their own problems. The result of the failure to leave them to it is what Unger calls "particularistic judgments". With that the fiction of judicial generality and neutrality are exposed for what they always were, shams, and any remaining public trust in the liberal Rule of Law must and should go. Nor can the governments of welfare states maintain the pretense that they are limited by rules. They do not merely serve one or another faction, they do so quite openly. In any case, the possibility that the Rule of Law might still be self-validating is destroyed by the realities exposed by both pluralism and the welfare system which reveal all the hierarchies and injustices of civil society. This is Hayek's lament and Unger differs from him only in regarding the collapse of the liberal order as a hopeful step to a far better political future. That the efficiency-minded and pragmatically open-minded policies of the welfare state spell the end of the Rule of Law was in fact already Dicey's message. The one question his heirs ought to answer is why citizens of Anglo-American and other welfare states are not as oppressed as he predicted they were bound to be.

In his later writings Unger has come to adopt an even more indignant tone in denouncing the Rule of Law. He now sees it, as he did not in his earlier analysis, as a pure ideological cloak that must be ripped off to expose the fraudulence of the entire ideology of the Rule of Law. As one of the spokesmen for "Critical Legal Studies", he now regards formalism, the belief in a gapless, impersonal legal system as the chief ideological screen behind which a "shameless" liberalism hides. In fact it is the servant of sinister interest groups, and its talk of rights is merely hypocrisy. That emerges as its most reprehensible public vice. The word ideology is moreover used here as a term of abuse that is meant to reveal the hypocritical and egotistical character of legal liberalism. A hierarchical and atomizing policy is the reality of liberalism, fairness and legal impartiality. The object of legal scholarship is to find the weak spots in the system and to put forward claims and to demand ever-new personal

rights that will destabilize the whole system. The field of battle is to be the law school, where a co-operative union of teachers and students will set an example of how a more fraternal society would look. They would also suggest how less individualistic solutions to current legal cases might be devised.

That the reform of the law-school curriculum might alter American law is not a new idea. Case by case social renewal does imply a recognition that the legal system has a certain autonomy from the liberal political society in which it operates, an assumption that this critical and denunciatory analysis of the Rule of Law does not support. It is a protest that is in any case entirely within the tradition of American inter-generational conflict, which Samuel Huntington has recently described so well. It takes the form of a Manichean contest between the actuality of American politics and its promise.⁷ And given the general cultural value attached to sincerity, especially among the young, the chief accusation is always hypocrisy. The call is for purity and there is a deep anti-institutional strain, recalling the creedal traditions of sectarian Protestantism. The hierarchies will eventually tumble and the American dream will be vindicated. It will also be a relatively painless transformation, since it will be conducted mainly through the existing legal structures. The success of this project is guaranteed by a simple faith in moral progress. From a functionalist social perspective one could argue that critical legal student-teacher ventures have served to sustain the existing legal profession by helping radical new college graduates to adjust to the alien and disliked culture of the law school and eventual professional world slowly and without too great a psychological cost. They have thus been eased into integration rather than hurled into it, which might have been far more disruptive for them and other people around them.

There is of course nothing new or odd in seeing courts and lawyers as members of the political society in which they perform both mediating and control functions as parts of a single political continuum on which other public agencies are also placed according to their degree of court-likeness or "tribunality".⁸ It does not follow that courts do not have their own characteristic procedures or roles, nor that these constitute some sort of fraudulent charade to hide the actuality of oppression. The bench and bar have political tasks to perform and their practices constitute an

7 Samuel P. Huntington, *American Politics and the Promise of Disharmony* (Cambridge, MA., 1981).

8 Among political theorists see Judith N. Shklar, *Legalism* (Cambridge, MA., 1964), and more recently Martin M. Shapiro, *Courts* (Chicago, 1981) which again takes up the notion of a continuum.

integral part of an ongoing order. To judge one must obviously consider the viable alternatives and possibilities. This can be scorned as a craven "objectivism", devised to squelch the radical ardour of the pure. But why should one not estimate the current cost of innocence? That is not the utopian way of proceeding, and indeed Unger's vision, with its explicit rejection of historical argument, is not falsifiable or subject to deliberation. It is like all faiths, a take it or leave it proposition. In that it also resembles Hayek's view of the Rule of Law as a cure-all. For on the basis of his belief in universal ignorance it is just as impossible to know the consequences of *not* pursuing a given line of action as of pursuing it. The fact that X seems to have failed as a social policy does not mean that doing non-X is bound to be a beneficial course of action. That belief is also grounded on blind faith and oddly it also is a belief in human progress. It is, however, scarcely cynical in the latter years of our century to find such beliefs aberrant. This consideration ought not to be taken as a complacent assurance that the Rule of Law need not concern us, or that America is beyond reform. It does imply that destabilizing the existing system of civil liberties and rights, and the individualistic ethos that sustains them in the hope of building a truly fraternal order does not make sense. It shows little grasp of the fragilities of personal freedom which is the true and only province of the Rule of Law.

If Montesquieu's model has suffered at the hands of a historical theory, Aristotle has been abused no less. In his case also political and philosophical abstraction has done the damage. The rationality of judging, divorced from the ethical and political setting in which he described it, becomes as improbable as the liberal archetype when it is ripped out of its context. No two writers illustrate these difficulties better than America's two most representative legal theorists, the late Lon Fuller and Ronald Dworkin.

Both Fuller and Dworkin concentrate entirely on the rationality of judging, and especially as it is done by judges in the highest courts. The Rule of Law as the rule of reason is for both very much the expression of the authoritative judgments of appeals court judges, or often, of the justices of the United States Supreme Court. It has little to do with the realities of our municipal court system, especially as it operates in our cities. It is, however, not designed to describe the way the legal order actually works, but to demonstrate its rational potentiality, although this is not clear in Fuller's book, which often claims to be an account of the historical character of legal institutions. The point of significance for the notion of the Rule of Law here is, however, that rationality is to be found entirely in the arguments that judges must and do offer in defence of their decisions. While the emphasis on the rationality of arguments is

Aristotelian, the divorce of the judge from the normative and political context within which his ratiocinations take place is not. The result is a level of abstraction so high as to make these models politically irrelevant.

In Fuller's version the legal order seems to cover the entire governmental process in its scope. It does more than merely protect the free market as it does in Hayek's ideal world. Fuller's definition is far more encompassing. His Rule of Law is designed to cover all social conduct. And its "inner morality" is due entirely to its defining characteristics. Law must be general, promulgated, not retroactive, clear, consistent, not impossible to perform, enduring and officials must abide by its rules. Unlike Aristotle, Fuller did not specify what sort of society would be ruled by such a legal system, nor did he offer a very clear picture of its other historical institutions for social control and coercion. One may guess that he had not thought very deeply about any polity other than the United States. And as a legal ideal for us there is little to either accept or reject in this conventional list of lawyerly aspirations.⁹ It is its moral status that, in the total absence of an ethical argument, seems unsure. Aristotle, after all, gave us reasons for the ethical and rational character and functions of the Rule of Law. In itself Fuller's inwardly moral law not only may, but has been, perfectly compatible with governments of the most repressive and irrational sort. The very formal rationality of a civil law system can legitimize a persecutive war-state among those officials who are charged with maintaining the private law and its clients. That was certainly the case in Nazi Germany, whose legal caste were perfectly ready to ignore the activities of the new court, police and extermination system as long as "the inner morality" of their law could remain unaffected.¹⁰ The paradox of slavery, that made the slave both a human person, and the property of another, created a "dual state" in the pre-Civil War America as well, and it was just as irrational. No one can be three-fifths of a human being and two-fifths of a thing as the "federal ratio" had it in the original Constitution. Nor is the prohibition against murdering slaves, since they were people, compatible with their non-person status before the rest of the legal system, not to mention the exclusion

9 Lon L. Fuller, *The Morality of Law* (New Haven, 1964), pp. 33-94 and 152-170. "The Forms and Limits of Adjudication" (1978-79), 92 *Harvard Law Review* 353-409. Robert S. Summers, "Professor Fuller's Jurisprudence and America's Dominant Theory of Law", *ibid.*, pp. 433-449.

10 Ernst Fraenkel, *The Dual State* (New York, 1940), one of the few older studies of the Third Reich that remain valid. See also, Martin Broszat, *The Hitler State*, introduction by John W. Hiden (London, 1981), pp. 328-345.

from the guiding principles of the political order as a whole.¹¹ Such a legal system is as rational as the political order that it sustains. It may be a model of "inner morality" by virtue of the consistency and other marks of morality of the decisions of its judiciary, but it is still irrational. In a liberal society in the modern age slavery is irrational no matter how rigorously and impartially it is imposed upon the black population, and however free and secure its white citizens may be under a partial Rule of Law. The "inner morality" of the law far from imposing the rule of reason that it is supposed to create, may well serve to render political irrationality more efficient and more attractive to those who benefit from it. The "dual state" remains, moreover, a constant possibility in our century. Encouraged no doubt by its gradual disappearance in the United States, Fuller came to believe that law was bound in time to rationalize politics generally. Politics, he believed, is about purposes of the electorate and its officials and law structures these. There is here a theory of moral progress no less profound than Hayek's. It is, to be sure, difficult to imagine what else could sustain the notion of the Rule of Law as the proven agency of reason.

To an increasing degree the more recent essays of Ronald Dworkin absolve him from similar charges of political and historical fantasizing. It is clear that only a polity that has made a public and enduring commitment to something like the Declaration of Independence can be said to sustain his model of a legal rule of reason. He has not, in fact, singled that document out explicitly, but the primacy of equal rights, which is his basic norm, has no more enduring or better known public grounding. The Declaration may not be the law of the land, but it is surely not just any old pamphlet either. And when one considers the enormously reviving and invigorating role that it has played in the drama of political rights in America from the Revolution, through Jacksonian democracy, to Abolitionism and the implementation of constitutional rights since then, it is not fanciful to say that its function is to be an unalterable supra-legal source of justification for equal rights. It stands for a constant attention to the preservation and enhancement of equal rights by courts and citizens alike. It is not, therefore, the equal rights aspect of Dworkin's theory that is at issue here. It is his vision of the rule of reason generated solely by Herculean judges, in a political and ethical vacuum that is as troublesome as Fuller's "inner morality" of the law. Even with the justifiable assumption that in America, at least, though not in other political

societies, rights are the dominant ethos, it is clear that the rule of reason cannot be sustained simply by the rational arguments that judges must offer in deciding both hard and easy cases.

The supremely competent judge in Dworkin's model of the rule of legal reason does not look, and his inventor does not look, at the political context within which he decides cases or that indeed generates the cases that come before him. He may live amid that mass of irrationality that is our tax and immigration law, the decadence of administrative agencies and the perpetual threat of and preparation for war, but the Rule of Law and the rule of reason will reign if judicial decisions are grounded in appropriate rules, principles and standards and rationally defended. The province of judicial action is indeed a very wide one. In choosing which of the two parties before him is right the truly knowing judge need not only look to rules to come to a rational decision, he may also ground his argument on the principles inherent in the political order of which he is a member and to its implicit standards of political morality. In doing so he does not legislate or exercise discretion, because his arguments are derived from a hierarchy of norms, not from considerations of policy, efficiency, or public welfare. Dworkin, of course, knows that policy choices can easily be translated into the language of principles. Indeed legislators and private persons do it all the time. The rationality of judicial discourse, nevertheless, does depend on this formally normative characteristic. As long as it remains within the limits of normative logic its rationality cannot be impugned.¹² Applied to a very limited group, and given the very specific ethical functions that Aristotle assigned to the Rule of Law, syllogistic judicial logic could well be said to have been the model for ruling by reason. But can it do so in the world into which Dworkin has pitched it, especially considering the kinds of controversies and political struggles in which his program must inevitably embroil the judiciary? The judiciary is not alone in claiming a rational standing, other agencies of government also have their share of "tribunality", that is, principled reasoned decision making. Even in terms of normative justification they may have rationally argued standards as grounds for not deferring to judicial decisions on rights or on anything else. Moreover while, indeed, every judicial decision grants and denies a claim, so do most political, and many private domestic ones. All these have a claim to rationality, but not to precedence. And few political struggles are more bitter than those that are fought over the question of "who decides?"

11 Willie Rose Lee, *A Documentary History of Slavery in North America* (New York, 1976), pp. 175-223.

12 Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge, MA., 1977), pp. 14-45, 81-130, and 291-368.

Once the members of the judiciary are involved in this sort of political struggle their claim to a special and higher rationality dissolves, however elegant and principled their decisions in specific cases may be. Indeed the erosion of public trust that such political struggles must bring with them is likely to prove far more debilitating to the judiciary than to other institutional agents, and so to diminish any rational strength they might bring to the political system as a whole. But that is only a policy-course decision. The rationality of the system as a whole is, however, crucial. The only political order in which the kind of principled reasoning that Dworkin attributes to the rational judge is possible at all, is of necessity a representative democracy, and as such it is particularly given to jurisdictional and open-minded interminable disputes. The ability of Hercules to prevail in such a polity depends less on the rationality of his specific style of argument than on his power, which is in any case what his name implies. The rationality of his office depends not merely on the rational quality of his decisions, but far more on his relatively aloof place in the political order as a whole. Moreover, others may well propose not only policies but principled arguments that are as rigorous as his own. The final decision between them cannot ultimately be settled by anything other than by political conflicts of uncertain outcome. Even if Dworkin were to identify reason and syllogistic argument as closely as Aristotle did, he could not without a comparable account of the process of persuasion in politics and of coercive social control show that the rationality of judicial decisions promotes the rule of reason throughout society, or even the legal rule of equal rights.

Is there much point in continuing to talk about the Rule of Law? Not if it is discussed only as the rules that govern courts or as a football in a game between friends and enemies of free-market liberalism. If it is recognized as an essential element of constitutional government generally and of representative democracy particularly, then it has an obvious part to play in political theory. It may be invoked in discussions of the rights of citizens and beyond that of the ends that are served by the security of rights. If one then begins with the fear of violence, the insecurity of arbitrary government and the discriminations of injustice one may work one's way up to finding a significant place for the Rule of Law, and for the boundaries it has historically set upon these the most enduring of our political troubles. It is as such both the oldest and the newest of the theoretical and practical concerns of political theory.