

Introduction

In a dark time, the eye begins to see.

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WE LIVE IN a profoundly complex and often disheartening time. People all around the globe feel lost and anxious. I have seen this anxiety first-hand as a university leader, facing an explosion of mental health problems amongst students and staff alike. Mine is by no means a unique experience. Across education, especially in the secondary and post-secondary sectors, friends and colleagues face the same explosion. And multiple reports suggest that a mental health crisis is affecting young adults in all walks of life, and all around the world.²

A global pandemic, the increasingly powerful effects of climate change, hard-to-understand new technologies and networks, and various aspects of globalisation have contributed, but the distemper of our times has complex causes. One of the contributors to our great unease is a widely perceived deficit of political legitimacy that has made it easier for populist nationalists and other authoritarians to undermine established and emerging democracies alike. These politicians offer narratives based on lies – and their ability to sell them is abetted not just by vehicles like social media, but often by a nostalgic longing for a better past, a simpler time with easier truths.

If we are to address these anxieties by better understanding them and acting to lessen their underlying causes, we must restore belief in our collective ability to build healthier societies. We must recognise our shared history of making progress, flawed though the current reality is

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and always will be. If we simply accept, and do not find ways to counter-balance narratives of decline and conflict, we systematically disempower emerging generations. Faith in the slow growth of collective human wisdom is admittedly hard to reinforce when many histories are being rewritten as limiting stories of dispossession and damage, of victors and victims, of inevitable destruction. But even this disruptive contemporary historiography has some positive elements, for it at least reflects a greater participation by once-excluded groups in the conversations that can build democracy and public accountability. True inclusion of diverse voices in our public discourse must be a part of our efforts to build towards healthier societies.

A more specific way to recover a sense of purpose and hope is to embrace an action-oriented pragmatist ethos. In so doing, we recognise the constant refining of our understanding of reality through rational and rigorous discourse that is also empathetic and tolerant. We use our concrete human experience to reconsider and reform our practices. As we solve problems together, we build greater social cohesion and a sense of optimism. The pragmatist ethos is particularly important as we seek to restore belief in, and respect for, the rule of law, which, although always imperfect, is still one of the great achievements of modern humanity; one that has been denigrated and systematically undermined in our era. It is to this effort, to reform and revitalise the rule of law, that this book is dedicated.

A loss of faith in the rule of law is not just an effect of the broader anxiety and confusion around us. In turn, it contributes in especially negative ways to the widespread sense that the world is crumbling – that reason and shared values are lost, and that simpler answers and autocratic leaders are the only way to rescue meaning and a sense of equality in our lives. A particular threat is the pervasiveness of an instrumental view of law as merely a “tool” to be wielded to achieve whatever ends are sought by a client, be it an individual, a corporate entity or a state. The amelioration of our collective distress therefore demands that the legal profession engage in serious self-examination.

As any legal scholar or political theorist will know, the world is not exactly bereft of rule of law discourse. Whether it is in relation to human rights and civil liberties debates, worries about the future of democracy,

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projects of legal and judicial reform, or concerns over the growth of populist sentiment, the “rule of law” is regularly invoked by academics, politicians and journalists alike. One could even argue that the concept is over-used while being simultaneously under-specified.

It behoves any writer wishing to explore the subject to explain what is new in the treatment; to argue why another article, much less a book, is needed. So bear with me as I set out briefly the context in which I am writing and you are reading, and suggest what you might gain by working your way through this book. The details of the argument will be set out in Parts II and III.³

In the Western world, particularly the Anglo-American world, we have inherited two profoundly conflicting attitudes towards the rule of law, one triumphalist and the other dismissive. These attitudes have been shaped by underlying assumptions about the very nature of law. Historically, the dominant perspective has understood law as the command of a sovereign, a *right to rule* over others. Hannah Arendt, in my view one of the most independent-spirited and fruitful thinkers of the last century, argued that this understanding of law was a direct inheritance from the Jewish and Christian “imperative conception”, law as a direct expression of God’s will.⁴ It follows naturally from this conception that law is an expression of power, understood as the capacity to control other people and essentially to force them to do as the sovereign wills. Later, of course, the role of “sovereign” was replaced with the more abstract “sovereignty”, which could be vested in national communities and their legislatures, not only in single persons or oligarchies. But the essence remained, and as Arendt explained, philosophers – and I would add many political and legal theorists – came to assume that “the most crucial political issue is, and always has been, the question of Who rules Whom?”⁵ Government within the state became an institutionalised expression of sovereignty, “the rule of men over men”.⁶ What is more, the idea of rule over others was inherently expansionist. Such rule “has an inner need to grow”.⁷

A key subsequent development is that the concept of freedom became associated with a commitment to what might be called “individual sovereignty”; personal freedom comes to be seen as antithetical to the competing sovereignty of government and laws. Politics is nothing

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more or less than the struggle for power over others, and law is an instrument of that power, no matter in whose hands it lies. If this is correct, the rule of law exists to limit and guide the exercise of power by some people (exercisers of sovereignty) over others. It exists primarily to uphold personal freedom in the face of power.

But there has always been another way to explain the relationship between power and law, “whose essence did not rely on the command-obedience relationship”.⁸ In this understanding, citizens consent to the law that governs them – not having been forced by power to accept it – so that if there were any form of “obedience”, it would be to the law itself and not to any specific person or group.⁹ Arendt goes further to argue that it is a mistake to conflate the ideas of “power” and “strength”. The latter is an individual characteristic, a “property inherent in an object or person”. We often discuss power as if it were an expression of that kind of strength. For Arendt, however, power is “never the property of an individual”; it is “the human ability not just to act but to act in concert”. Power, vested in the group, can always overwhelm strength.¹⁰ The rule of law in such a context would exist not only to create restraints on men with strength. Rather, one might see it as a vehicle through which we ensure that people continue to *want* to support and obey those exercising sovereignty on the people’s behalf. In so doing, it facilitates the human ability to act in concert; it helps to constitute social power.

Yet the dominant Anglo-American attitude still understands the object of any rule of law principally as the effective control of those who rule over others. Thinkers who adopt this view typically argue that law must be situated in an eternal and universal source of authority, be it a deity, inherent human dignity or reason itself. Only that external source can prove strong enough to discipline power. On this conception of law, the rule of law would possess much substantive content, being an instrument through which timeless values – from wherever derived – could shape the present and project into the future. The “rule of men over men” would be constrained by those values, be they expressed as human rights, fairness in adjudication, substantive due process or even participatory democracy.

The other side of the argument is also populated by people who think that law is a form of sovereign, or perhaps elite, control but who argue

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that no constraining universal source of law is possible. If law is nothing but a contingent instrument of power, understood as “rule over” others, and validated through the ability to enforce – ultimately with violence – law is not an expression of values at all. Its “source” is only the ability to impose the sovereign will. The rule of law therefore becomes a meaningless construction, simply another way of expressing the rule of power.

In this book I articulate an altogether different understanding of law and the rule of law. I am not alone in seeking this territory. Arendt herself argued that:

The common dilemma – either the law is absolutely valid and therefore needs for its legitimacy an immortal, divine legislator, or the law is simply a command with nothing behind it except the state’s monopoly on violence – is a delusion.¹¹

As we shall see, various legal theorists have sought out what is often called a “procedural” rule of law that claims neither extensive values-based content nor the status of “command” enforceable through violence. What is new here is a detailed working through of how that approach makes sense in a broader framework of pragmatist thought. I link together powerful insights from various disciplines into a coherent expression of what I describe as a “modest rule of law” that makes sense in our deeply plural world.

This formulation of the rule of law is grounded in an interactional understanding of law itself, where law is built through social interactions and upheld by continuing practices of legality that accord it legitimacy. As Arendt suggests, law requires continuing consent that must be earned. It must serve as its own source of authority. This version of the rule of law – pluralist, inclusive and limited in both aspiration and content – could help us to address various sources of anxiety that trouble our era without claiming any imperial legalistic right to rule our complex national and global societies. It would do so by establishing a framework that encourages social stability, but that also facilitates communication and collaboration. It would serve as a rich resource in guiding change through societal debates on contentious issues, and providing signposts towards healthy institutional design. Of course, it also disciplines the exercise of authority, and material and political power.

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In Part I of the this book, I examine some of our era's most widespread sources of anxiety. After distinguishing the ideas of uncertainty and risk, I argue that we live in a time of deep uncertainty (far more troubling than the calibration of risk) that heightens all forms of anxiety, social and personal (Chapter 1). In Chapters 2–4, I explore three particular sources of anxiety that I think are shaping our societies in complex and worrisome ways. I look first at populist nationalism, then at particular forms of globalisation and, finally, at disruptive technologies and their attendant dominating network platforms. I do not pretend to be an expert in these three areas, but I want to set the scene for what can and must be done to address the anxiety and pessimism of our times. For those who are indeed expert in these topics or those who simply take the conditions I describe in Part I as read, a skim of the first three chapters might suffice. Others less familiar with the details of the developments I describe, and the anxieties they seem to prompt, might wish to pursue a more careful reading.

Part II is the conceptual heart of the book. I begin in Chapter 5 with Aristotle's insight that human beings gain practical wisdom not only by following rules, but in the mutual creation and building up of practices. In their interactions, people learn by reflecting upon those practices and reasoning over time. Building on Aristotle, the philosophical pragmatists showed us that human actions are oriented to purposes and that we desire to contribute meaningfully to society. I explore how knowledge is built up and shared in society, and I offer a pragmatic understanding of the concept of truth.

In Chapter 6, I describe how social practices are shaped by “communities of practice” that share an interest or even a passion for something like law, football or the further development of artificial intelligence. In their interactions, communities of practice learn how to perform the practice better, following rules that constitute and shape the practice. The intellectual traditions that I canvass reveal a unique type of “authority” in our social world, one not discussed in the influential catalogue proposed by Max Weber. Emanuel Adler denominates this form “epistemic practical authority”. It is continuously reshaped through social discourse and action. Ours is not a world of static “being”, but of dynamic “becoming”.

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In Part III of the book, I address my central preoccupation: what is law's role in our world of becoming? I suggest in Chapter 7 that law is, quite simply, a wellspring of practical wisdom. Part of our intellectual inheritance is an approach to the rule of law that recognises its ability to chasten power over others, while not missing out on other contributions that the rule of law can make, and not disconnecting law from parallel sources of social action. In Chapter 8 I detail an understanding of law that recognises its essentially horizontal nature, requiring reciprocity between the governing and the governed. I describe how law is built and sustained, and how it is subject to degradation, even destruction.

Building on an interactional conception of law, I offer a version of the rule of law for today that is largely procedural in content, informed by internal criteria of legality. It does not seek to define or promote a single conception of the good life. It is, however, rooted in and seeks continuously to buttress two interlocking aspirations, for human autonomy and human communication, leading to the possibility of cooperation within societies. This rule of law rejects both “legalism” – a view that law uniquely *controls* social action – and a faith in a common but dangerous caricature of the scientific method. A rule of law rooted in socially created common knowledge that is therefore attuned to cultural difference. A rule of law that delivers on its promises through the constant reinforcement of daily practice. A rule of law that is not triumphalist, but that aspires to continual societal improvement working collaboratively with other social and political forces. This rule of law is a potentially powerful form of “epistemic practical authority” that can help point the way out of our current anxieties.

Finally, I argue in Chapter 9 that there is a future for the practice of law, but that it will look quite different from the popular picture of the amoral “hired gun”. The lawyer of the future will be focused upon the exercise of prudential judgement, giving advice rooted in deep practical knowledge. She will be less a technical expert, though content expertise will still be relevant, and as much a socially attuned pragmatic thinker. She will be called upon by her peers and by the wider society to think through and always consider the ethical implications of her work. In her day-to-day experience, she will also be an assessor of practices and a purveyor of normative and institutional design. But to be absolutely

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clear, she will not be heroic in her aspirations. She will understand that her contributions to society are only part of a wider set of political, social and cultural practices that are needed to uphold order, foster effective communications in society and allow the building of institutions that support healthy social life, benefitting citizens now and into the future.

The conclusion rehearses the key elements of the argument to provide a thorough summary of the book.

Notes

- 1 Theodore Roethke, “In a Dark Time”, from *The Collected Poems of Theodore Roethke* (New York: Doubleday, 1961).
- 2 See, e.g., Jennifer Rigby, “Almost half of young adults at clinical risk of mental health disorders in ‘profound crisis’, study shows”, *The Telegraph*, 15 March 2021, available at: www.telegraph.co.uk/global-health/climate-and-people/almost-half-young-adults-clinical-risk-mental-health-problems; Mitchell Prinstein, “US youth are in a mental health crisis – we must invest in their care”, *APA Website News*, 28 January 2022, available at: www.apa.org/news/press/op-eds/youth-mental-health-crisis; and UNICEF, “UNICEF report spotlights on the mental health impact of COVID-19 in children and young people”, *UNICEF Website News*, 5 October 2021, available at: www.unicef.org/india/press-releases/unicef-report-spotlights-mental-health-impact-covid-19-children-and-young-people.
- 3 I am indebted to an anonymous reviewer for the encouragement – it was really a well-deserved shove – to clarify the “why” of the book in an introduction, and for concrete suggestions as to how best to shape an answer to the question.
- 4 Hannah Arendt, *On Violence* (New York: Houghton Mifflin Harcourt, 1970), 39 [herein-after *Arendt On Violence*], and see her discussion of the concept of power as privileged in political philosophy at pp. 35–7 (noting that for J. S. Mill, “obedience” is the first lesson of civilisation). I should note that although there are many important arguments in *On Violence* that are instructive today, the tone of the work, at least in relation to contemporary understandings of racial inequality, is problematic. But I do not believe that any of the insights I am discussing here are thereby undermined. It is as if *On Violence* were written in two distinct but sometimes overlapping voices, one focused on the formidable challenges of the 1960s to the authority of universities and public authorities, the other on timeless issues of philosophy.
- 5 *Arendt On Violence*, 43.
- 6 *Arendt On Violence*, 35 (quoting Max Weber) and 51.
- 7 *Arendt On Violence*, 74.
- 8 *Arendt On Violence*, 40.
- 9 *Arendt On Violence*, 40–1.
- 10 *Arendt On Violence*, 44.
- 11 *Arendt On Violence*, 97.