

# The Twilight of Legality

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## I.

My cryptic title may have led you to imagine that I will be talking about Guantanamo Bay, or about the ‘extraordinary rendition’ of people kidnapped by the CIA or MI5 to ‘dark sites’ in Uzbekistan or Algeria, or about the summary execution by special forces or by drones of undesirables in Pakistan or Syria, or perhaps — less in the news, but even more on the rise — about ‘export-processing zones’ in such places as Guatemala and the Philippines, where the police and even the courts often have no writ. These are all places that are made deliberately and officially lawless, places where regimes otherwise purporting to govern by law remove all recourse to law in the name of getting political or economic results. The rise of such legal black holes is certainly symptomatic of a troubling turn in the relationship between government and law, a turn in which it is openly conceded by government that it is only a fair-weather friend to due process of law, and in which official talk of ‘upholding the rule of law’, let alone ‘exporting the rule of law’, seems increasingly hypocritical, and yet also increasingly shameless in its hypocrisy.

These developments are not totally unrelated to what I want to discuss here. But I will come to that later. I want to begin by discussing what you may regard, on first encounter, as a kind of countertendency. It is the tendency known as ‘juridification’, the proliferation of regulation by law and through law, both the growing volume of such regulation and the way in which it is insinuated into ever more corners of our lives. Habermas calls it a ‘colonization of the lifeworld’ by law.<sup>1</sup> I believe, like Habermas, that it is a real and ongoing process in many parts of

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<sup>1</sup> Jürgen Habermas, *The Theory of Communicative Action Volume 2 – Lifeworld and System: A Critique of Functionalist Reason* (1984) 333. See the same volume at 356ff for a detailed account of juridification as a process.

the world today. It creates all sorts of new work for lawyers, even in these economically straitened times. Yet I will suggest, in the end, that it also heralds a deprofessionalization of the legal profession. In all of the sociological aspects of these matters — in persuading you that juridification is a real and ongoing process, and in predicting where it is leading for the legal profession, and so forth — I am but a keen and reasonably informed amateur. My only claim to have a professional contribution to make to the study of the subject is through the various philosophical puzzles that it raises. So, let me use amateur sociology — more charitably characterized as a capacity for critical observation of cultural change — as a vehicle for introducing and tackling some relevant philosophical puzzles, in the hope that the solution to them might in turn help with critical observation, and even with sociological research.

The philosophical puzzle that will interest me most is the one that gives my paper its title. Juridification is steadily, perhaps unstopably, on the rise. Yet legality, it seems to me, is in equally steady decline. How is it possible for those two propositions both to be true? I will try to show you how it is possible by showing you how the two truths are related: how the truth of the first helps to explain the truth of the second. Juridification, I will suggest, can become the enemy of legality. And in the same way, by the same token, more work for lawyers can herald the decline of the legal profession. Or so I will ultimately suggest.

## II.

Let me begin with the simplest way in which juridification can become, and to my mind has become, the enemy of legality.

Modern governments, their hands increasingly tied by the robber-barons of global finance, often try to assert their power with their feet: by kicking out at another high-profile social problem, real or imagined, with another big policy initiative. Usually they come up with an accompanying raft of new laws. Legislative incontinence prevails. Not only is much of the legislation futile and even counterproductive from the start, we are also left with ever more relics of now-forgotten reforms. Between 1997 and 2006, for example, more than 3000 new criminal offences were enacted for England and Wales, while only a tiny number were repealed.<sup>2</sup> In spite of promises from later governments to turn over a new leaf, and maybe even to thin out the statute book, the trend towards throwing new laws at every moral panic that hits the newspapers or social media continues apace, and without much sign of official appetite for tidying up of the resulting statutory flotsam. The criminal law of other jurisdictions appears to have fallen victim to similarly wild legislative abandon. The Illinois criminal code, for example, grew from 23,970 words in 1961 to 136,181 words in 2003, not counting a further 153,347 words covering felonies (never mind misdemeanours) that accumulated

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<sup>2</sup> Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) *Criminal Law and Philosophy* 21.

outside the code.<sup>3</sup> While growth in the number of offences may not be quite as extreme as growth in the number of words, it must still be extreme.

Most of us escape the daily consequences of this massive but pathetic display of legislative machismo only because the law is erratically enforced. This means that in two distinct ways we are not living under the rule of law. First, there is so much law, touching on so many aspects of our lives, that it would be impossible for us to grasp it all, or to follow it even if we could grasp it. Even as a qualified lawyer I can't keep up with the politicians in their impotent zeal to put a stop to things. Every day, I am pretty sure, I commit some petty offences, maybe when I am riding my bicycle or putting out the recycling bins or paying a babysitter. But of what the offences are and how I commit them I am not so sure. It would take a disproportionate amount of time and effort to find out, and it would be impossible to remember what I found out anyway. So even I, legally trained, don't get to use the law as a guide to staying on the right side of it, and even I, legally trained, am increasingly vulnerable to being unexpectedly ambushed by its rules. Such potential for ambush, which makes the law a poor guide for those who are trying to conform to it, is anathema to the rule of law.

Second, as a consequence of the situation I just described, we increasingly rely on petty officials such as tax inspectors and police officers to turn a blind eye to some violations of the law while coming down hard on others. Since there is no way that all this junk law could be enforced consistently, there is increasing pressure for it to be enforced selectively, and increasing latitude for the selection to be done by fear or favour. So big corporations with police-like security departments can enjoy cosy relations with the police that are denied to those who inconveniently protest against their corporate power. This kind of selectivity is also anathema to the rule of law. Under the rule of law, it shouldn't be one law for the powerful and another for the rest of us. Even News Corporation, the Murdoch media empire, was pursued in the UK for its phone-hacking and similar wrongs only because they made the silly mistake of upsetting some very big cheeses.<sup>4</sup> You may say it was always thus. I don't deny it. I only say that the huge expansion of legal regulation is part of what props it up so effectively today. So much law means lots of extra openings to enforce that same law unevenly, including for reasons that are dubious, shadowy, or corrupt. That is not the rule of law but rather what Aristotle correctly placed in opposition to it, namely the rule of man.<sup>5</sup>

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<sup>3</sup> See Paul H Robinson and Michael T Cahill, 'Can a Model Penal Code Save the States from Themselves?' (2003) 1(1) *Ohio Journal of Criminal Law* 169.

<sup>4</sup> It led to the closure of the Sunday tabloid *News of the World*, the prosecution of executives and journalists (*R v Coulson* [2013] EWCA Crim 1026) and the setting up of the Leveson Inquiry: Sir Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (November 2012).

<sup>5</sup> Aristotle, *Politics* 1287<sup>a</sup>19-32. My remarks here may call to mind FA Hayek's broadside against the administrative state in *The Constitution of Liberty* (1960) and other writings. However, my complaint is far narrower than his. Mine extends only to our escalating reliance on the discretionary powers of petty law-enforcement

So now you can see one simple sense in which juridification can be the enemy of legality. A proliferation of law, whether in quantity or in reach, can erode a civilization's prospects of maintaining fidelity to the rule of law. The rule of law is the ideal according to which it is the law that should rule. Some people (we might call them 'law and order types') believe that we live under the rule of law only to the extent that the general public obeys the law. On this view, civil unrest in Ferguson or St Louis is at least as much of a threat to the rule of law as police brutality in quelling it. This invites a defence of the police brutality (even if illegal) in terms of the rule of law itself. Better a bit of rough justice from the cops, say the law-and-order types, than a whole lot of burnt-out cars and looted shops. This is the symmetrical interpretation of the ideal; it condones the authorities in meeting illegality with illegality on a level playing field.

Bernard Williams once argued that a government that simply meets illegality with illegality, or impunity with impunity, or abuse with abuse, or terror with terror, fails in respect of what he calls the 'Basic Legitimation Demand'.<sup>6</sup> I agree. Such a government has, in Williams' words, 'become part of the problem'.<sup>7</sup> Thinking along these lines, I propose an asymmetrical interpretation of the ideal of the rule of law.<sup>8</sup> On this interpretation, the rule of law sets up an unequal struggle between officialdom and the rest of us. The law should be such that ordinary people can obey it, whether or not they actually do. The rule of law is threatened when the law becomes so arcane, so vast, so vague, or so all-pervading, that people can't imaginably use it as a guide to staying on the right side of it, even when they are highly motivated to be so guided. But the rule of law is also threatened, in a different way, when people can't rely on the law to predict how officials will react to their breaches of it. It follows that officials of the law, as distinct from ordinary people, need to follow the law scrupulously for the rule of law to prevail. Their disobedience — including their unscrupulous fear or favour in upholding the law — is a threat to the rule of law in a way in which, or to an extent to which, ordinary law-breaking by you or me is not. In other words, officials of the law have an obligation to obey the law that most of us don't have. That is because, as officials of the law, they have an obligation to uphold the rule of law that the rest of us don't have. We are the beneficiaries of the rule of law; they, when in official capacity, are its functionaries. We should generally laugh at stupid laws. They, poor things, should generally uphold them.

This asymmetry creates an intriguing moral problem for the law, especially but not only the criminal law. On many occasions police officers, prosecutors,

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officials. Not all public officials are petty law-enforcement officials. As later sections will reveal, I have little sympathy for Hayek's wider faith in private powers over public ones.

<sup>6</sup> Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (2005) 3-9.

<sup>7</sup> *Ibid* 4.

<sup>8</sup> For more elaboration of the asymmetrical interpretation of the ideal, see my *Law as a Leap of Faith* (2011) ch 8.

lawyers, and judges have a moral obligation to call me to account for breaking a law which, as they well know, I had no moral obligation to obey. I will not pursue the interesting implications of that claim here.<sup>9</sup> To some it sounds like a contradiction; but not to me. Here I want to concentrate on a different thesis that sounds like a contradiction to some, but not to me. Some say that there is no law without legality, meaning that there is no law without substantial compliance with the ideal of the rule of law. Ronald Dworkin decries the opposite view as nonsensical.<sup>10</sup> But it is far from nonsensical. It is a mundane reality that colours much of life today. The growth of law, I have suggested, eventually threatens the rule of law in two key ways: first, by impeding our ability to avoid falling foul of the law by following it; second, by necessitating vast and inevitably unreliable official discretion in upholding the law. Juridification is at that point, and to that extent, the enemy of legality

### III.

So far I have treated juridification as the proliferation of law. But the story of juridification does not end there. For it is part of the nature of a legal system to be (what is sometimes called) an ‘open system’.<sup>11</sup> It gives effect within the system to norms that are not norms of the system. The most obvious examples are norms of other legal systems which are recognized for various purposes, eg, in determining the validity of a foreign marriage, or in assisting with the enforcement of a foreign court judgment.

These are the most obvious examples, but they are not the most common ones. The most common examples are the norms contained in contracts. These are given extensive effect, in most legal systems, through a law of contract or equivalent. So common is this technique that we sometimes talk as if the contracts themselves are a legal invention and the norms in them are all creations of the law. But contracts, and similar things like disclaimers and waivers, exist apart from the law. They are created by the parties to them. What the law does is to give legal effect to them, albeit within certain limits and on certain conditions. These days, this is probably the most socially important way in which legal effect extends beyond the norms of the law itself. And by this route the ever-growing role of contracts, disclaimers, waivers and such like in our lives forms a big part of the process of juridification. Juridification lies not only in the tide of law itself but the

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<sup>9</sup> I discuss some of them in ‘Relations of Responsibility’ in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (2011), and others in ‘Criminals in Uniform’ in RA Duff et al (eds), *The Constitution of the Criminal Law* (2013).

<sup>10</sup> Ronald Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’ (2004) 24(1) *Oxford Journal of Legal Studies* 1, 25.

<sup>11</sup> The label comes from Joseph Raz, *Practical Reason and Norms* (1972) 152-4. Following Raz, we now part company with Habermas, who adopted Luhmann’s picture of law as a closed (‘autonomous’) system and thereby underestimated the insidiousness of juridification: see Habermas, above n 1, 354.

tide of norms that are not law but that are created with the aim, or at least in the knowledge, of their having some legal effect. Fewer and fewer people will do anything with you (or for you or to you) free of a plethora of terms and conditions drafted with legal effect in mind. And the click-through structure of internet transactions now creates even less space than might once have existed to replace, modify, or renegotiate the terms. They are take it or leave it.

Margaret Radin argues that such take-it-or-leave-it ‘boilerplate’ poses a growing threat to the rule of law. She has many arguments to that effect, which I find cumulatively compelling.<sup>12</sup> But here I want to emphasize just one.<sup>13</sup> It takes its cue from the growing tendency of take-it-or-leave-it boilerplate to oust the jurisdiction of the courts in favour of compulsory arbitration of disputes arising under the contract. The aim is not to remove the legal effect of the contract, for the party who sets the boilerplate terms — let’s call her the ‘vendor’ for short — wants to reserve the legal right to pursue the other party — let’s call him the ‘purchaser’ — through the courts for payment or for return of goods not paid for. And it would not be possible, in most legal systems, to remove the legal effect of the contract respecting the purchaser’s rights under it without simultaneously removing the legal effect respecting the vendor’s rights. So the optimal solution, from the point of view of the vendor seeking effective immunity against suit, is to preserve the purchaser’s primary rights (regarding the vendor’s performance of the contract) but to withdraw the purchaser’s secondary rights regarding the enforcement of those primary rights through the courts, such that any dispute originating with the purchaser is diverted into an arbitration scheme of the vendor’s choosing.

When a legislature attempts to oust the jurisdiction of the courts respecting the legality of actions by public authorities, courts generally do not allow the ouster to take effect.<sup>14</sup> True, they may well allow ouster of the first-instance trial jurisdiction of the courts, where one existed, in favour of alternative dispute resolution (‘ADR’) outside the courts, such as via an ombudsman scheme. But any

<sup>12</sup> Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013). Some of Radin’s arguments emphasize the doubtfulness of the claim that boilerplate transactions are voluntary on both sides and properly serve the ideal of freedom of contract, or of freedom more generally. These arguments repay close attention, but will not concern us here.

<sup>13</sup> See *ibid* 130ff, and with some added detail and focus, Margaret Jane Radin, ‘Boilerplate: A Threat to the Rule of Law?’ in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (2013). A similar critique, which has also influenced what follows, is Judith Resnik, ‘Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights’ (2015) 124(8) *Yale Law Journal* 2680.

<sup>14</sup> Leading cases in common-law jurisdictions: in the UK, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; in Australia, *R v Hickman, ex parte Fox* (1945) 70 CLR 598; in Canada, *Crevier v Quebec* [1981] 2 SCR 220. The leading Federal US decision in *United States v Erika Inc*, 456 US 201 (1982) takes a more relaxed line regarding ouster clauses, except where it is the *constitutional* legality of acts by public authorities that is at issue.

public law ADR procedure is typically subject to case-by-case judicial review at the instance of either party for its compliance with the law, for its procedural propriety, and for the rational intelligibility of its verdicts. Things tend to be different with ADR procedures between private parties arising under contracts. Although in most legal systems the jurisdiction of the courts cannot be ousted altogether, judicial review of the decisions of contractually appointed arbitrators is usually available only on much narrower grounds.<sup>15</sup> The net effect is that the person subject to compulsory arbitration — let's keep calling him the 'purchaser' — may well lose the ability to check the arbitral award for compliance with the terms of the contract according to their correct legal effect. Thus, there is extra latitude for legal error in private law ADR beyond what would normally be permitted in public law ADR. Why should this be so?

You may think that I already gave the best explanation. The ideal of the rule of law is asymmetrical as between nonofficial compliance and official compliance with law. We ordinary folk should laugh at stupid laws; officials, poor things, have to uphold them. In fact, that is a bit of a simplification of what I said. I only claimed that officials of the law have the duty to uphold the law that the rest of us don't have. I am far from sure that every public authority with a complaints procedure, or every complaints procedure for a public authority, falls under that description. Not every public official, after all, is someone with the job of reacting to breaches of the law, and my argument for the asymmetrical interpretation of the rule of law rested on the importance of people's being able to rely on the law to predict how officials of the law will react to their breaches of it.

But let me bracket that point here in order to emphasize another that strikes me as much more important. The vendors who use take-it-or-leave-it boilerplate, and who impose their own arbitration schemes to the exclusion of the jurisdiction of the courts, are not merely potential noncompliers with the law like you and me when we are deciding where to park or whether to pay for our petrol. They are potential noncompliers with a set of contractual norms for which they also seek the special privilege of legal recognition. For reasons that I already gave, the vendor still wants the contract to be legally binding. Why should the law oblige by providing such legal recognition if the norms in the contract are not in turn amenable to legal construction by a court? Why should the norms be given any legal effect if the law does not get to determine what the legal effect is?

I am always amazed at the attitude of my libertarian friends who treat the legal effect of contracts as so very different from other kinds of special perks that

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<sup>15</sup> Here English law is the main outlier: a right of appeal to the courts from an arbitrator on a point of law is enshrined in the *Arbitration Act 1996* (UK) s69. However, the provision allows for contractual ouster of the right. On how this compares with the rationing of review in other jurisdictions, see VV Veeder, 'On Reforming the English Arbitration Act 1996?' in J Lowry and L Mistelis (eds), *Commercial Law Perspectives and Practice* (2005). A notable blow for the finality of arbitrations in the United States was struck by the Supreme Court in *AT&T Mobility v Concepcion*, 563 US 333 (2011).

may be handed out by public authorities. Somehow public housing or public transport is an interference in private orderings. Yet, the public recognition (including enforceability) of contracts is not an interference in private orderings; indeed, it would somehow be an interference in private orderings, my libertarian friends suggest, not to give such public recognition to contracts.<sup>16</sup> The logic of this position escapes me. It is time we understood that public recognition and enforcement of contracts through the law is a system of official support for a particular ideology and for the particular people who profit from it. They are the biggest welfare recipients of all, for they get the most generous and unquestioning handout from the public sector in the form of extensive legal support (whether paid-for or otherwise) for their specialized way of ordering things. Theirs is a featherbedding no different in modality from the legal privileging of a particular religion or a particular caste or a particular sexuality. We should stop imagining that the ideology of contract should get that featherbedding entirely on its own terms. Since it demands the law's generous assistance, contract should get that assistance mainly on the law's terms — subject to the law's take-it-or-leave-it boilerplate, if you like. And the law's terms should include full submission to the rule of law. That means that any effect that the law gives to contractual norms should be an effect that the law, through the courts, ultimately get to determine. And that implies, I suggest, no ouster of the courts' final jurisdiction over questions of law arising under the contract, including its legal construction, which is an integral part of the determination of its legal effects.

You may think that I am making old-fashioned statist assumptions, imagining that all these internet transactions that take place without regard to territorial borders still take place within the old framework of state legal systems, to which their norms are therefore subordinated. I am forgetting, you may say, that the new order does not respect state boundaries. But I have not mentioned the state. If you assumed that the legal systems I had in mind had to be state legal systems, that is your problem, not mine. So far as I am concerned the contracts that contain this take-it-or-leave-it boilerplate requiring vendor-specified final arbitration for all purchaser complaints might purport to be made under Shari'a Law or under Canon Law or under the law of some other non-territorial legal system. The point is only that they are purportedly made under the law of some legal system and hence fall to have their legal effect determined by the law of that legal system. As it happens, most are purportedly made under the law of fairly well-established municipal legal systems, such as the Law of England and Wales or the Law of New York State. We can imagine a world in which the apron strings are cut and the contracts we make with Facebook and Amazon are purportedly made only under Facebook's or

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<sup>16</sup> Isn't this claim essential to Robert Nozick's famous 'Wilt Chamberlain example' in his *Anarchy, State, and Utopia* (1974) 160-4? See GA Cohen, *Self-Ownership, Freedom and Equality* (1995) 230-6. It is certainly essential to Ayn Rand's position in *The Virtue of Selfishness* (1964) 129. Naturally Rand's view, like Nozick's, meets some resistance from within libertarianism: some libertarians reject even the minimal state.

Amazon's own jurisdiction. Then the question will arise of whether Facebook or Amazon has established a legal system of its own. But that world is a long way from our own. At this stage, Facebook and Amazon purport to bind us only by contract, and continue to assert that the contract is intended to have its legal effect in a legal system that is not Facebook's or Amazon's own legal system.

Only once these Leviathans begin to assert a generalized compulsory authority over us, meaning authority irrespective of contract and therefore irrespective of the recognition of what they do in a legal system that is not their own, only then will we have arrived at a truly new order in which multinational corporations are the successors to nation states, and inherit from them the moral obligations of government. At that point (all else being equal) they themselves will be directly bound by the ideal of the rule of law, and under that ideal will naturally need to make provision for judicial review of their official decisions by an independent judiciary, clear and open laws, fair procedures, impartial policing, and so forth. Who knows how all that will work out? We have reason to doubt whether it will work out well. If the current state of play is anything to go by, the ideal of these multinational corporations is juridification without legality. They seek the legal effect of their own normative schemes — their own boilerplate — without any corresponding subjection of those schemes to the demands of the rule of law, and in particular to the principle of open access to the courts for review, by an independent judiciary, of purportedly authoritative applications of the norms contained in those schemes. If they cite the importance of the rule of law — for example, the need to cultivate respect for the rule of law in China or the Middle East — then they too are shameless hypocrites. For they openly favour the evasion of the rule of law in respect of how they treat their customers in their own terms and conditions.

The black holes of legality that are created by compulsory arbitration schemes in take-it-or-leave-it boilerplate contracts are not exactly Guantanamo Bay. Nor are they on a par with the 'export processing zones' in which, as Saskia Sassen puts it, 'an actual piece of [national territory] becomes denationalized'.<sup>17</sup> Yet, they are in the same spectrum. And as more and more of the 'lifeworld' is colonized by take-it-or-leave-it boilerplate, expertly juridified in such a way as to be so far as possible insulated from legality, our lives promise to be more and more like those of the workers in the export processing zones. Perhaps only then, in the twilight of legality, will we begin to value what we lost.

#### IV.

In taking a dim view of compulsory arbitration in consumer contracts, and similar forms of ADR, I have no doubt exposed myself to ire from those who believe that ADR provides greater access to justice. Courts are expensive and slow and difficult for amateurs to work with. Well-qualified arbitrators, mediators and conciliators are capable of greater agility in dispute resolution at lower cost and with better comprehensibility. That is surely to the advantage of all, but especially to the

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<sup>17</sup> Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (1996) 8-9.

advantage of those for whom going to court — at any rate, going to court with effective legal representation — would be an unimaginable luxury or at least a serious economic challenge. In mitigation of the charge that I do not care about access to justice, I want to remind you that I did not attack arbitration or anything else<sup>18</sup> as a first-instance dispute-resolution technique, even in take-it-or-leave-it boilerplate contracts. What I attacked was the tendency to exclude judicial review of arbitrations for errors of law, including errors of contractual construction, errors that would be sufficient to warrant judicial review of public authority decisions. In putting it that way, I am clearly leaving a hostage to fortune, for attempts to limit judicial review even of public authorities (eg, by levying prohibitive up-front court fees) are nothing new.<sup>19</sup> As judicial review of public authorities becomes harder to obtain, however, my critique only becomes more urgent. My claim is not that those who exercise authority bestowed by contract should be subject to legality-review to the same extent as those who exercise public authority. My claim is that both should be subject to searching and accessible legality review.

The word ‘accessible’ here I also plead by way of mitigation in respect of the charge that I care too little about access to justice. I am a noisy believer in nominal court fees and a strong system of taxpayer-funded legal aid for private litigants that is portable between lawyers and that therefore allows the poor to have access, by and large, to the same lawyers as the rich.<sup>20</sup> Until 2011 we had such a system in the UK.<sup>21</sup> Its all-but-complete destruction on flimsy economic pretexts, by our present government and the last is, I believe, only partly driven by lack of interest in the poor and dispossessed. It is also driven by a privatizer’s ideological contempt for the rule of law. The principal aim is to drive many people away from the law, to effectively deter and ultimately remove their recourse to courts and professional lawyers across a large range of matters, and thereby to encourage the rise of a slick and profitable new ADR industry which includes not only an advice and representation function, but more importantly has the capacity to perform the dispute-resolution function itself, formerly the work of the courts, on the open market. For those who share this ideology, replacing the courts with private-sector dispute-resolvers is just like removing the old state monopolies in telecommunications and power generation, replacing them with lean new sectors

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<sup>18</sup> Including negotiated settlement of the dispute. I am sympathetic to Owen Fiss’s position in ‘Against Settlement’ (1984) 93(6) *Yale Law Journal* 1073 but my argument here is in several respects more limited.

<sup>19</sup> Owen Boycott, ‘Plans to restrict judicial review face further concessions’, *The Guardian* (London), 13 January 2015. For some robust judicial pushback against escalating court fees, on rule-of-law grounds akin to those advanced here, see *R v Lord Chancellor; ex parte Unison* [2017] UKSC 51, especially [66]–[102].

<sup>20</sup> Fred Wilmot-Smith’s forthcoming book *Just Justice* captures many of my views and expresses them more powerfully than I ever could. For tasters, see his ‘Necessity or Ideology?’, *London Review of Books*, 6 November 2014, and ‘Court Cuts’, *London Review of Books*, 30 July 2015.

<sup>21</sup> Although there had been significant curtailments and cuts before then: see Sir Henry Brooke, ‘The History of Legal Aid 1945-2010’ in Bach Commission, *The Right to Justice*, Final Report (14 December 2017) appendix 6.

rife with competition and thereby providing, so the ideological narrative goes, a better service for the consumer. Law itself is the final frontier in the wider quest for deregulation in favour of the discipline of the market. (And in case anyone dissents before we reach that frontier, the muscular pioneers of anarcho-capitalism will tell you: no point resisting; it is coming anyway; there will soon be an app for dispute resolution. Tech-determinism is today the favoured way of making those who still believe in the rule of law look like they are going to be on the wrong side of history. Uber, for example, has notoriously favoured that line: the rule of law is so yesterday;<sup>22</sup> Uber is the unstoppable future.<sup>23</sup>)

You can see here one reason why I might be inclined to think that those who associate ADR with access to justice are barking up the wrong tree. They are thereby joining forces with many who do not really care about access to justice at all but only care about a profitable new business opening, in which any noble plan for widening access to justice will ultimately stand or fall on the profitability or unprofitability of its implementation. But I don't want to rest my case on that bleak observation, which could equally be made, *mutatis mutandis*, about almost every development in western progressive politics since 1979. Instead, I want to return to my proper philosophical task by saying a little about the idea, implicit in the foregoing remarks, that access to the courts is all about dispute-resolution. I do not deny, of course, that dispute resolution is an important function of the courts. But as the parable of Solomon is supposed to remind us, facility in resolving disputes is not enough to make an institution into a court of law. There are different ways to resolve disputes and courts exist to resolve disputes in a particular way, viz, by doing justice between the parties according to law.

It is very important to hear all three parts of this: the 'justice' part, the 'between the parties' part, and the 'according to law' part. For it is very tempting to think that so long as the dispute is resolved justly as between the parties, we shouldn't care whether it is resolved according to law or not. Hence, the phrase 'access to justice', which makes it sound as if whether what is done is done according to law is of no independent importance. Its importance lies only in its role as a mechanism for doing justice between the parties. If justice between the parties could be done to the same degree either with law or without law, on this view, we should be indifferent as between the two ways of doing it. So the case for law has to be made, on this view, by showing that justice cannot be done to the same degree without law as with it.

This is a very hard case to make. Some people have tried to make it by arguing that there is an extra kind of justice — legal justice — that one does by

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<sup>22</sup> Eric Newcomer, 'Uber Pushed the Limits of the Law. Now Comes the Reckoning', *Bloomberg Technology* (online), 11 October 2017 <<https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning>>.

<sup>23</sup> Jon Axworthy, 'Cab wars: the Unstoppable Rise of Uber', *Shortlist* (online), 16 July 2015 <<https://www.shortlist.com/instant-improver/cab-wars/61881>>.

virtue of the fact that one is applying the law.<sup>24</sup> Since this is an extra kind of justice found distinctively in the legal process, justice done according to law is more just, all else being equal, than justice done in other ways. Justice done according to law is justice plus extra justice.

There are numerous problems with this view. For present purposes, allow me to focus on just one of them.

As I have just explained it, the view equates justice done according to law with justice done by merely applying the law. But the two are not equivalent. Judges who take an oath to do justice according to law do not thereby bind themselves to do justice by merely applying the law. That would be a daft thing for anyone to bind herself to do since across a large number of cases it is impossible to do justice by merely applying the law, for the simple reason that the law is often unjust and cannot be justly applied. This point was most famously made, and most ably defended, by David Lyons.<sup>25</sup> The only way to do justice with an unjust law is to modify the law to make it more just. When the judge takes an oath to do justice according to law, she binds herself to do justice first and foremost, and to modify the law as she goes along to make it possible to do justice. The words ‘according to law’ are there to determine how — under what constraints — she modifies the law to make it more just. I have argued elsewhere that the most important constraint for judges is this one: judges must make their rulings regarding particular cases, and hence between particular parties, on the footing that the ruling is an application of a legal rule, and that the rule in the case, even if it has just been created to resolve the case, could in principle be reapplied in future.<sup>26</sup> That makes it a breach of her oath for a judge to separate the rule from the ruling either by declaring what the rule is (or will henceforth be) while declining to apply it now; or by denying that there is a rule (or, in other words, claiming that the case under decision is being decided only ‘on its particular facts’). These are also demands of the rule of law, which is the main reason why judges take an oath to submit to them: they are what distinguish the rule of law from the rule of man in the business of doing justice between the parties. And they are also, I suggest, the main things that distinguish adjudication before a court of law from arbitration. In arbitration, there is no similar constraint: there is no requirement that the arbitrator must treat the ruling as the application of a rule, even a rule of his or her own making. The arbitrator is free simply to arbitrate this case on its particular facts only. That is not to say that he or she is not bound by law. If the arbitrator were not bound by law, everything I said about the need for him or her to be judicially reviewable would be unintelligible. No, it is only to say that the arbitrator is not bound by the ideal of the rule of law in the way that the judge is bound by the ideal of the rule of law. It is not the arbitrator’s task to make his or her ruling on the footing that it exemplifies a legal rule.

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<sup>24</sup> Notably, HLA Hart in *The Concept of Law* (1961) 202.

<sup>25</sup> David Lyons, ‘On Formal Justice’ (1973) 58(5) *Cornell Law Review* 833; David Lyons ‘Formal Justice and Judicial Precedent’ (1985) 38(3) *Vanderbilt Law Review* 495.

<sup>26</sup> Gardner, above n 8, ch 8.

If I have all this right, then the difference between judges and arbitrators is not that judges get to do more or better justice between the parties than arbitrators do. It is possible, indeed, that arbitration is capable of doing a more perfect justice between the parties than adjudication in court. For in the hands of a morally suitable arbitrator — unlike in court — justice can be done between the parties entirely uninhibited by the constraint of legality that I have just sketched. In arbitration, perhaps, a more perfect equity can in principle be achieved. So the constraint of legality, it seems to me, does not add any extra justice between the parties, or any extra justice full stop. What it adds, rather, is a dash of legality. Making the case for adjudication in court, then, means making a case for legality as well as justice between the parties, or in other words making a case for legality that does not depend on any necessary contribution that the serving of legality makes to the doing of justice between the parties (or to justice at all).

That, it seems to me, is less of a tall order. The work of judges contributes to the law and to keeping the law in good legal order, ie, in conformity with the rule of law. It thereby contributes to serving the law's primary function. The law's primary function is not to resolve disputes, nor (therefore) to do justice between the parties to those disputes. The law's primary function is to guide us in what we do, whether we are in disputes or not, and that includes to guide us in such a way as to avoid disputes, and hence to avoid the need for justice to be done between us. The doing of justice between the parties in resolving their disputes is a secondary function in case the primary one fails.<sup>27</sup> The point of justice being done according to law, then, is that the performance of the secondary function must also assist with the primary. It must also provide guidance. Whereas the doing of justice between the parties can be conceptualized — a little unfortunately, I think — as a service mainly to those parties, the providing of guidance by bringing their case under a rule cannot readily be so conceptualized. It is mainly a public good. It is therefore subject to the perennial problem of the market undervaluation of public goods. The parties understandably prefer not to pay for it. If they could get the same quality of justice dispensed between them cheaper, without the need for them to bear the extra costs of its being done according to law, they would naturally be tempted to do so.

Arbitration, especially when freed of the yoke of subjection to judicial review, is capable of reducing and even eliminating these costs. Thus, it can be cheaper for the parties. But it may be expensive for the rest of us, for the world at large, because the growth of arbitration as a rival system for dispute resolution threatens to erode the ability of the judicial process to play its role, its public-good role, in maintaining the law in good order, and in particular in maintaining the prominence and authority of the law as a system for guiding what we do when we are not in dispute. Cheap justice, even when it is good justice, is a potential enemy of the rule of law. The rule of law is a public good. To avoid undersupply of that

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<sup>27</sup> Cf Joseph Raz, 'The Functions of Law' in AWB Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (1973), who proposes that the dispute-resolving function is a primary one if and only if the dispute is legally unregulated prior to the point of dispute-resolution.

public good we should provide access to justice by making access to courts of law cheaper by publicly subsidizing them, and not, or at any rate not only, by diverting people to (as it were) organically cheaper alternatives.

There's a gap, of course, between supporting the public good of the rule of law by enabling access to the courts, and supporting it by giving everyone a right of access to the courts in the way that my earlier remarks on judicial review envisaged. To fill that gap we'd need to think about efficacy: about whether giving people a right of access to the courts is an effective way to support the public good. And when we think about that, we'd need to be astute to what I earlier called the asymmetry of the rule of law. Under the rule of law, we should all be able to be guided by the law, whether we are in fact guided by it or not. But some people should actually be guided by the law. Those are the people who try to hold the rest of us to the law, including officials of the law as well as private contracting parties. In deciding whether a right of access to the law is efficacious as a way of supporting the rule of law, we need to think not only about the help that the courts give all of us with understanding the law, via our lawyers or otherwise, but also, and more importantly, about the ability that a right of access to the courts can give us to hold officials of the law and other would-be law-upholders to the strictest standards of the law. If access to the courts is not by right, then the accountability of such people to the law is rendered less potent. They run less risk of being tested by random people who come at them out of nowhere. That is a relief to them, but it is bad news for the rule of law. That one could in principle be held to account in court by just about anyone, and that one does not know when it might happen or at whose instance, is a demanding discipline. You may protest that it is an ambush, and hence (as I put it before) anathema to the rule of law. It is not, however, an ambush by the law. The relevant law may be perfectly clear and easy to follow. The question is whether the powers-that-be have sufficient incentive to abide by it. Giving all a right of access to the courts, complete with affordability, is a possible way to ensure that they do. So it is not surprising that the powers-that-be that wish to hold us to the law, whether they be public or private bodies, are so often lined up in support of our losing the right to do the same to them.

## V.

Law is inevitably complex, time-consuming, and expensive. All law belongs to one legal system or another, and navigating the system is a hard job. Every occasion on which law is invoked is an occasion for more law to be invoked. To use law in doing justice, and indeed to use law satisfactorily in most other ways, requires a kind of expertise which is expensive to acquire and maintain. It also requires time, energy and focus which not all have at their disposal. Every legal system beyond the most fledgling therefore comes with its assembled brigades of legal practitioners, whose principal task is to mediate between the law and its end-users: to sift, analyze, distill, and integrate points of law and legally relevant material, and to manage legal processes. Dispensing with lawyers while attempting to use the law,

especially in court, is often a false economy.<sup>28</sup> It wastes judicial time, prolongs negotiations, compounds misunderstandings, and aggravates disputes. All of this is well-known and of course much bemoaned by people who willingly pay much more over the odds for their fancy holidays, new cars, and cosmetic dentistry.

To be a legal practitioner not only requires special skills. It also requires moral virtues, or at least the ability to emulate them. Minimally, it requires a certain moral sensibility in which questions of justice are foregrounded. Habituation in respect of that sensibility is built into any serious legal education. It helps to explain why a law student should read the cases and not make do with a second-hand account, in a headnote or textbook, of which legal doctrines they stand for. Mastery of legal doctrines is not all that he or she is supposed to take away. He or she is also supposed to develop a sense of what it takes to argue and decide a case in a way that is consonant with what the Bar Model Code of ethics, in the United States, nicely calls the lawyer's 'special responsibility for the quality of justice'.<sup>29</sup> To practice law is not to be a judge but it is, in this respect, to think and act like one.

In this paper, however, I have tried to remind you that this is not enough. Arbitrators too have a mission to do justice between the parties. To that extent they too must share the moral sensibility of a lawyer. That, indeed, is why many of them are lawyers. But arbitrators do not act, when they arbitrate, with the whole moral mission of lawyers. As arbitrators, they lack the extra task of growing and protecting the wider culture of legality. Lawyers working as lawyers — as legal professionals — have that additional task, which they owe only to the public good. A lawyer is, as the Bar Model Code of ethics also says, 'an officer of the legal system and a public citizen'.<sup>30</sup> And that, as the Code hints but does not quite say, is capable of conflicting with her role as 'a representative of clients'.<sup>31</sup> Her mind cannot only be on the interests of her client, or on doing justice for her client, or even on doing justice full stop, without also harbouring potentially inhibiting thoughts about whether she is doing justice according to law, ie, in a way consonant with respect for the rule of law.

In the brief quarter century since I qualified as a barrister, the way that legal practitioners are conceived in the public policy and public culture of the west, and possibly of the world, has changed dramatically. Where lawyers were once thought of as professionals they are now thought of as service-providers.<sup>32</sup> If they are still referred to as professionals, that is probably because we have forgotten what distinguishes a professional and use the word for every white-collar worker. But a professional has a higher calling. She is the servant of nobody in particular, not

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<sup>28</sup> See the comments of Black LJ and Aiken LJ in *Lindner v Rawlins* [2015] EWCA Civ 61.

<sup>29</sup> American Bar Association, *Model Rules of Professional Conduct 2017 Edition* (2017) 1 ('*Model Rules*').

<sup>30</sup> *Ibid* 2.

<sup>31</sup> *Ibid*.

<sup>32</sup> In the UK, big changes in this direction were effected and reflected in the *Courts and Legal Services Act 1990* (UK) and the *Legal Services Act 2007* (UK).

even a succession of different people. She may incidentally provide a service to someone, but it is never just a service to that someone. For she has wider responsibilities.

Some people suppose that we will continue to think of lawyers as professionals in this wider-responsibility way so long as we continue to recognize them as having moral tasks, and in particular ‘a special responsibility for the quality of justice’.<sup>33</sup> However, that particular moral task is fairly easily integrated into the contemporary service-provider model. Getting justice for them, or at least getting them access to justice, is, we might want to say, the main service we aim to provide to our clients. Much harder to integrate into the service-provider model, however, is our special responsibility, as lawyers, for upholding the rule of law. That is because the rule of law is for the most part a public good in which our clients may well have relatively little individual interest. In respect of our role in protecting that public good, fortunately, we are not beholden to our clients or to anyone else. We answer, in this respect, only to the law. In this respect, we are professionals, not service providers.

Andrew Dickson White, who founded Cornell Law School, hoped thereby to furnish ‘lawyers in the best sense’.<sup>34</sup> Lawyers in the best sense are those that serve law in the best sense, and law in the best sense is not the law that we associate with juridification — the proliferation and increasing pervasiveness of legal norms and legally-recognized norms — but rather the law that we associate with the climate of legality, with living under the rule of law. Today’s young lawyers, faced with new assaults upon that climate of the kind I have tried to describe in this paper, have a ‘special responsibility for the quality of justice’<sup>35</sup> going beyond any that the original drafters of the Bar Model Code of ethics could have anticipated. For they face a world more hostile to legality, and yet more wedded to juridification, than any we have seen before. Will they be up to the challenge?

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<sup>33</sup> *Model Rules 1.*

<sup>34</sup> Andrew Dickson White, *What Profession Shall I Choose, and How Shall I Fit Myself for It?* (1884) 38.

<sup>35</sup> *Model Rules 1.*