

*I argue that we cannot have legal order without judges who have an understanding of legal principles that transcends the law of their land. But this is an understanding of the principles of legality, rather than of the moral content of the law. Moreover, the reason we cannot have legal order without judges is that law must claim not only authority but also legitimate authority over its subjects. It follows that the willingness to engage in any kind of analysis of cases in order to answer questions about what judges should or should not do requires that certain positions sceptical about judicial review openly revise a fundamental commitment – the practically unrealizable commitment to have law without judges. But it also requires the common law tradition, including Ronald Dworkin, to attend more to the independent status of legality. In sum, the focus on the question ‘What is a judge?’ brings with it attention both to the idea of legality and to the specific authority of law.*

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## I Introduction

This symposium on judicial review explores the topic of the legitimacy of judicial review by requiring participants to approach that topic from an unfamiliar perspective. If the world of academic writers on this topic could be divided into two camps – enthusiasts and sceptics of judicial review – it seemed fruitful to the organizers to ask lawyers in the first camp to tackle the subject of what judges should not do and, correspondingly, those in the second camp to ask what judges should do.

The assumption that the world can be so divided is intuitive in the common law world, at least since the founder of legal positivism, Jeremy Bentham, directed his well-known polemics against the tradition of common law thought – the tradition of Blackstone, Coke, and Dicey to which the enthusiasts of judicial review belong. Following Bentham, there is in the United Kingdom and Canada a ‘dissenting’ tradition, associated in the United Kingdom with political scientists and lawyers at the London School of Economics, and in Canada with Osgoode Hall Law School; the dissenters seek to debunk the Whiggish claims of Dicey and his twentieth-century heirs about the virtues of judicial review. Academics in this tradition argue that judges are just another elite, intent on exploiting the indeterminacy of the law to try to curb

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attempts by progressive legislators to establish a welfare state run by expert administrators and not by judges.<sup>1</sup>

It is not so easy, however, on closer inspection, to divide scholars in this way. Even those who seem to fit most easily into the dissenting tradition turn out to be critics of what judges have, in practice, done, rather than willing to go the whole distance of advocating the elimination of the institution of judicial review. For much of the debate about judicial review either turns on actual analysis of cases, in which one argues for or against the legitimacy of judicial review by trying to show how judges got things right or wrong, or presupposes the results of such an analysis. But to argue that judges got things wrong presupposes, just as much as does the argument that they got things right, that there is a standard for right and wrong. It thus also presupposes that judges should be striving to reach that standard, that is, that their role is legitimate as long as they seek to do the right thing, whatever that is; and that the standard is one internal to law – that doing the right thing is doing what the law requires, however one unpacks the idea of law.

There is a way of avoiding this kind of engagement. One can argue that the law of any complex state is so shot through with indeterminacy that public officials have constantly to legislate the content of the law that gives them their mandates. And from this one can conclude that, for reasons of political legitimacy and expertise, it is better that the officials be permitted to get on with their job without any interference from judges. This argument thus issues in the conclusion, at least for the consistent members of the dissenting tradition, that we should abolish judicial review of the administrative state altogether, so that we have, in this domain, law without judges.<sup>2</sup>

However, the idea that we could have law without judges requires some unpacking. It comes, as I have indicated, out of the legal positivist tradition, in which Jeremy Bentham remains the central figure. This tradition understands law as the instrument of the powerful, and thus as legitimate in a democracy, not because law has any inherent claim to legitimacy but because in a democratic, and hence legitimate, political order, law is the mechanism for effective transmission of the judgements of the powerful to law's subjects.

Judges are simply the officials charged with interpreting the law, and their task is to determine a content that can be represented as the one intended by the powerful. Bentham's hostility to the common law

1 See Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 *Osgoode Hall L.J.* 223, especially at 257–67.

2 I owe the insight that legal positivists, deep down, want law without judges to Mike Taggart, with whom I had originally planned to write this paper.

tradition is explained, first, by his sense that common law judges came from an elite that would attempt to resist progressive legislation enacted by a democratic parliament; and, second, by his awareness that such judges would be enabled in their resistance by the myth of their own tradition that the common law contains an artificial reason that both transcends particular laws and controls law's meaning, judges being the exclusive exponents of that reason.

'Law without judges' thus does not mean law without public officials who interpret the law and apply it in particular cases. Rather, it means that the officials who have this task do not come from an elite opposed to democratic reform and do not have any view of themselves as doing anything more than determining the content of the law, with that determination uncontaminated by thoughts such as that there is an artificial reason that should control their understanding of the law's content.

The modern administrative state, of course, complicates this vision of legal order, one in which a commander at the top of the hierarchy – the democratic legislature – transmits its commands to legal subjects, a process facilitated by the officials who faithfully hew to the content of the commander's judgements. In this context, the legislature gives broad mandates to the officials of the administrative state, which makes them effective commanders within their own sphere. There is thus a kind of division of expert labour between, on the one hand, democratic, legislative expertise as to what sorts of policy mandates are appropriate and, on the other, official expertise as to how those mandates are to be accomplished. Within the sphere of official expertise, there will be a further division of labour between a more legislative task of policy development and a more adjudicative task of deciding how to interpret the policy in particular cases. There is, in this state, discretion all the way down, which is not to say that it is necessarily an untrammelled discretion; there may be all sorts of controls on its exercise, but the important thing is that these controls are internal and are exercised by the officials who have the requisite expertise.

It is very difficult to find someone in the dissenting tradition today who is willing to advocate exactly this vision of legal order, and the reason for such rarity is important. Consider, for example, the work of Harry Arthurs, one of Canada's most eminent lawyers and the main figure in the Osgoode Hall dissenting tradition. As a labour and administrative lawyer, with extensive experience of both the administration of statutory labour regimes and the courts' meddlesome intrusions into them, Arthurs has over the years presented a sustained critique of judicial review. But in his 1979 essay 'Rethinking Administrative Law: A Slightly Dicey Business',<sup>3</sup> his most sophisticated and elaborate account of the

3 Harry Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall L.J. 1 [Arthurs, 'Rethinking']. For further discussion see

ills of judicial review, he could not bring himself to the point of advocating the wholesale exorcism of judicial review. Instead, he insisted that judges have a role in legal order as guardians of what he called ‘fundamental,’<sup>4</sup> even ‘transcendent,’ ‘constitutional values.’<sup>5</sup>

This concession by Arthurs indicates something important. As Carl Schmitt argued, in the complex Western societies of the twentieth century, the democratic ‘legislative state’ envisioned by Bentham becomes the ‘administrative state,’ and, much to Schmitt’s satisfaction, this transformation demonstrated the total vacuity of liberal claims about constitutionalism and the rule of law.<sup>6</sup> For we are subject, in such a state, not to the rule of law but to the rule of particular public officials, whatever the internal controls on their decisions. Here it is important to see that the rule-of-law deficit is such on any conception of the rule of law, including the dissenting tradition’s conception, in which the virtue of subjection to the rule of law resides in our subjection to the determinate content of rules whose legitimacy derives from their democratic provenance. Even the heirs of Bentham shy away from that prospect, since it seems so distant from the democratic inspiration of Bentham’s critique of the judiciary of his day; and thus, as we see with Arthurs, the heirs are sometimes driven to cling to some bits of what they would otherwise regard as the wreckage of the common law tradition.<sup>7</sup>

A significant cause of this predicament is the dissenting tradition’s answer to a question that may be conceptually prior to the question of the legitimacy of judicial review: the question, ‘What is a judge?’ This question, somewhat curiously, receives only an oblique answer in much legal theory. Recall that while one way of describing the dissenting tradition is to say that its proponents want law without judges, a more accurate description is that, put positively, they want judges who will limit themselves to conveying the factual content in the judgements already made by the democratic legislature. Put negatively, they want law without judges of the sort envisaged by the common law tradition, that is, judges who regard themselves as the independent guardians of a set

David Dyzenhaus, ‘The Logic of the Rule of Law – Lessons from Willis’ (2005) 55 U.T.L.J. 691, exploring tensions in the work of both John Willis and Arthurs.

4 Arthurs, ‘Rethinking,’ supra note 3 at 21–2.

5 Ibid. at 44.

6 See, e.g., Carl Schmitt, *Legality and Legitimacy*, trans. and ed. by Jeffrey Seitzer (Durham, NC: Duke University Press, 2004).

7 This tendency is perhaps even more pronounced as the administrative state that came into being to implement social-welfare programs became used for other ends, so that the official apparatus could no longer be easily associated with a progressive political agenda. However, appreciation of this point has to be complicated by an awareness that the machinery of administration is often put in place during times of stress – for example, war – and is only subsequently used to implement social programs.

of principles that transcend particular laws and that are to be discovered through the artificial reason of the common law.

In sum, the conception of a judge in the dissenting tradition is Montesquieu's: judges are officials through whose mouths the law speaks its will. This conception of a judge is purely instrumental. Judges are no more than an instrument through which the (factual) content of the law manifests itself in the world.

Now, it might seem that the conception of a judge in the common law tradition is very different. But while Montesquieu's trope is hackneyed, it is so for a reason: It expresses the dominant view of judges in legal theory. Consider Blackstone's definition: judges are 'the depositaries of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.'<sup>8</sup> While judges decide and speak the law, in doing so they articulate what the law has deposited in them.

Nor have things changed much, if at all, in the main reformulation of the common law tradition in the twentieth century in Ronald Dworkin's work. While many passages from Dworkin could be quoted to illustrate this claim, I have, for a reason that will become clear soon, selected one in which he contrasts what he takes to be a positivistic, 'rule-book' conception of the rule of law with his own 'rights' conception:

[T]he 'rights' conception [of the rule of law] assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.<sup>9</sup>

As we can infer from this quotation, the role of judges in Dworkin's conception is reduced to that of transmitting the content of the moral law. It is true that in Dworkin's legal theory judges have to be creative interpreters of what the law requires in order to play this role; they have to decide what interpretation of the positive law relevant to the matter shows the law in its best moral light. But it is also true that the dominant metaphor for law in Dworkin's theory is the old common law

8 Gareth Jones, ed., *Blackstone: The Sovereignty of the Law* (London: Macmillan, 1973) at 50.

9 Ronald Dworkin, 'Political Judges and the Rule of Law' in Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 9 at 11–2 [original emphasis].

idea of a body of morally rational law that judges simply articulate in their decisions. Put slightly differently, judicial decisions are no more than evidence of the law that pre-exists their decision. Hence, while Dworkin's view of what the law is differs significantly from that of the dissenting tradition, his conception of a judge is hardly, if at all, different in its structure. Judges are no more than an instrument through which the (moral) content of the law manifests itself in the world.

We now have in place the basis for my earlier claim that much legal theory approaches the conception of the judge obliquely. First and foremost, one establishes one's conception of law – more accurately, of the law – and then one's conception of a judge is simply whatever attributes it takes for the officials charged with interpreting the law to make it possible for the law to manifest itself in the world.

We have seen that the dissenting tradition's conception of law and of the role of the judge in transmitting its content leads, under the conditions of the modern administrative state, to a description of legal order in which one might doubt, on the tradition's own terms, whether what we have is in fact a legal order, because of the extreme deficit of the rule of law. We might, that is, doubt that order's claim to be legal because of its deficit of legality. It is this deficit that then causes the swing to the common law tradition's alternative conception of law, of the role of judges, and of legality. But that swing is to a vision of legal order that, as the dissenting tradition has long and rightly argued, not only seems to have little grip on the complexity of the administrative state but can lead to judges' imposing a straitjacket of their version of the moral law on its officials.

The reason for my selection of the above passage from Dworkin is that it does more than illustrate his conception of law and hence the way in which his conception of a judge is instrumental: It also reveals the way in which his rights conception of the rule of law seems to leave little, perhaps more accurately no, independent role for the rule of law or legality. The conception seems, that is, to describe not so much an independent ideal of the rule of law as the moral situation achieved when the law, properly so called, rules – the situation in which the content of the law is determined by judges in light of their interpretation of the soundest theory of the law.<sup>10</sup>

I will now explore the possibility that we might be able to avoid the uncomfortable dilemma that requires us to shuttle between the rival conceptions of law sketched above by attending to the question I claimed might be conceptually prior to the question of the legitimacy of judicial

10 For further argument see David Dyzenhaus, 'The Rule of Law as the Rule of Liberal Principle' in Arthur Ripstein, ed., *Ronald Dworkin* (Cambridge: Cambridge University Press, 2007) 56.

review – that is, the question, ‘What is a judge?’ My principal source is the legal theory of Thomas Hobbes, which may seem surprising because of Hobbes’s general reputation as an authoritarian positivist who expressed his vehement opposition to the claims of the common law tradition well before Bentham. But, as we will see, for Hobbes the idea of a judge is prior to the law, though not to legality. The idea of a judge has, that is, to be understood by reference to legality, even in a state of nature. Significant implications follow from this fact, both for understanding the role of judicial review in an actual legal order and for our conception of legal authority.

Most pertinently, we cannot have legal order without judges who have an understanding of legal principles that transcends the law of their land. But this is an understanding of the principles of legality, rather than of the moral content of the law. Moreover, the reason we cannot have legal order without judges is that law must claim not only authority but also *legitimate* authority over its subjects. It follows that the willingness to engage in any kind of analysis of cases in order to answer questions about what judges should or should not do requires that the dissenting tradition openly revise a fundamental commitment – the practically unrealizable commitment to have law without judges. But it also requires the common law tradition, including Dworkin, to attend more to the independent status of legality. In sum, the focus on the question ‘What is a judge?’ brings with it attention both to the idea of legality and to the specific authority of law.

## II *Thomas Hobbes’s conception of a judge*

Hobbes’s first articulation of the conception of a judge comes early in *Leviathan*, in chapter 5, when he says that when two individuals are in a ‘controversy,’ they ‘must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature.’<sup>11</sup> Hobbes clearly regards the passage from which these lines are extracted as the nutshell version of the whole argument of *Leviathan*.

The figure of the judge or arbitrator is central to the solution of the problem of the state of nature. Given the danger of conflict that lurks in every dispute over right and wrong in a state of nature, where there is no public authority to decide such disputes, the parties to any dispute are under an obligation to set up such an authority and then to submit to his judgment. Notice that in making this claim, Hobbes

11 Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge: Cambridge University Press, 1997) at 32–3.

already signals that the individuals in the state of nature are subject to obligations, in this case the obligation to submit disputes to a third party for decision. So, while there is no right reason in the state of nature, there is reason or rationality, which resides in Hobbes's extensive list of the laws of nature, including Law 16, which states the requirement that individuals in the state of nature must, in situations of controversy, '*submit their right to the judgement of an Arbitrator.*'<sup>12</sup>

The right reason that does not exist is public standards of right and wrong that individuals can take as definitive guides to action. The reason that does exist is a kind of procedural rationality that tells individuals how to go about setting things up so as to make it possible to have right reason of the sort that is missing.

Now, in submitting oneself to the decision of an arbitrator, one is submitting oneself quite literally to arbitrary power – to the *arbitrium*, or judgment, of the arbitrator. Since the rule of law is usually contrasted with the arbitrary power of men, and the latter regarded wholly pejoratively, the fact that the root of the word *arbitrary* is the Latin word for the judgment of an arbitrator is curious but little-noticed.

The tension between the idea of submission to judgment, that is, to something positive, and submission to arbitrary power, that is, to something bad, seems to be embedded in the English language. Consider, for example, that the *Oxford English Dictionary* defines *arbitrary* as, first, 'Dependent upon will or pleasure' and, second, as '*Law* Relating to, or dependent on, the discretion of an arbiter.'<sup>13</sup> It gives as the primary meaning of *arbitration* 'Uncontrolled decision,' with the secondary meaning 'The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision.'<sup>14</sup> And the definition of an *arbitrator* is, first, 'One whose opinion is authoritative in a matter of debate; a judge'; second, 'One who is chosen by the parties in a dispute to decide the difference between them'; and, third, 'One who has a matter under his sole control.'<sup>15</sup>

It is no wonder, then, that for Hobbes the idea of submission to arbitrary power is ambiguous. Hobbes does not appear to see any difference in kind between the role of arbitrator and that of judge. But such an equation of the roles can go in two directions. Either one can conclude that judges, no less than arbitrators, decide on the basis of caprice and whim, or one can conclude that arbitrators, no less than judges, perform their role properly when they make their decisions on the

12 Ibid. at 108–9 [original emphasis].

13 *The Shorter Oxford English Dictionary*, 3d ed. (1977), s.v. 'arbitrary.'

14 Ibid., s.v. 'arbitration.'

15 Ibid., s.v. 'arbitrator.'



basis of as objective an assessment as possible of what is in the interests of those subject to the decision.

It is important to see that the first direction, submission to caprice and whim, is not irrational. Indeed, the dominant interpretation of Hobbes is that it is rational to submit to the capricious reasoning of an arbitrator. That is, because it matters more in a conflict that the conflict be resolved by a definitive decision than how it is resolved, it is altogether rational to submit to arbitration, and thus, by parity of reasoning, to the decisions of an all-powerful political sovereign, whatever the content of the decision of the arbitrator or the decisions of the sovereign.

If this interpretation captured the whole of Hobbes's argument, his solution to the problem of the state of nature would be wholly procedural, and his conception of a judge would amount to no more than the person with authority to decide a dispute, however he wanted to decide it. Since in *Leviathan* Hobbes often seems to support, even revel in, this interpretation, there can be no doubt that it is at the least an important element of his argument. But even a quick perusal of Hobbes's laws of nature tells us that it is far from the whole of it, since three of the laws pertain to the natural law duties of an arbitrator, which, like the duty to submit to arbitration, are complete or external duties. Law 11 is the law of equity, that '*if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deal Equally between them.*' And because, says Hobbes, 'every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause,' which gives us law 17. For the same reason, law 18 holds that no man is to be judge who '*has in him a natural cause of partiality.*' Law 19 – the last – is that in controversies of fact, the judge must give credit to the witnesses.<sup>16</sup>

These four laws are both procedural and substantive, in that they affect, without determining, the content of any decision by an arbitrator who is faithful to the moral discipline of his role. Moreover, when the parties submit a dispute to an arbitrator, they do so not only in the expectation that he will give a decision that provides a definitive resolution to the dispute, and so permits them to avoid fighting it out by whatever means they choose, but also in the expectation that the decision will accord with the laws of nature that set out the moral discipline of arbitration. The authority of the arbitrator comes, then, not only from the consent of the parties to abide by his decision but also from the kind of decision that they are entitled to expect.

Notice that the principles that condition the substance of the decision are principles that will figure on most, perhaps all, lists of principles of

16 Hobbes, *Leviathan*, supra note 11 at 108–9.

legality or the rule of law. So if we move from the situation of an arbitrator in a state of nature to the situation of a judge in a civil society, we can put the point just made as follows. In Hobbes, the specific authority of law comes not only from the fact that law provides an institutionally conclusive way of settling a dispute, since it provides determinate conclusions about the obligations of legal subjects, but also from the fact that the law's conclusions will be based on sound reasons, reasons that include the principles of legality.<sup>17</sup> Because, as Hobbes says, all laws require interpretation,<sup>18</sup> it is essential in any legal order that there be a body of public officials who have the authority to interpret the law. And, as Hobbes's description of a good judge tells us, a good judge is one who, in interpreting the positive law, relies first and foremost on his understanding of the laws of nature.<sup>19</sup>

Moreover, one should not think, says Hobbes, that there is anything illegitimate in judges' interpreting the positive law through the lens of the transcendent laws of nature, because it would be a great insult to the ultimate judge, the sovereign, if judges were to suppose that he did not intend, in enacting his statutes, to uphold the laws of nature.<sup>20</sup>

I will now turn to showing the relevance of this conception of the very idea of a judge to contemporary debates about the legitimacy of judicial review.

### III *The forms and limits of adjudication*

We saw above that even in the most asocial context in which an arbitration might take place – Hobbes's state of nature, which is a state stripped of all vestiges of society – the arbitrator is bound, according to Hobbes, to give a decision that responds to the arguments made by the parties, because that is a requirement of the laws of nature, and, of course, the decision

17 I adapt here the illuminating argument in Kenneth Winston, 'Introduction' to Kenneth Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing, 2001) 25 at 36–7. Winston is at this point criticizing H.L.A. Hart and legal positivism in general for focusing exclusively on the first source, whereas Lon L. Fuller, in Winston's view, supposes that we need to focus on both. As I will make clear below, my own view is that Hobbes and Fuller agreed on this important issue.

18 Hobbes, *Leviathan*, supra note 11 at 190–1.

19 'The things that make a good Judge, or good Interpreter of the Lawes, are, first, *A right understanding of that principall Law of Nature called Equity*; which depending not on the reading of other mens Writings, but on the goodnesse of a mans own natural Reason, and Meditation, is presumed to be in these most, that have the most leisure, and had the most inclination to meditate thereon. Secondly, *Contempt of unnecessary Riches, and Preferments*. Thirdly, *To be able in judgement to devest himselfe of all feare, anger, hatred, love, and compassion*. Fourthly, and lastly, *Patience to hear; diligent attention in hearing; and memory to retain, digest and apply what he has heard*.' Ibid. at 195–6.

20 Ibid. at 194.

must be consistent with the other requirements as well. Consent to arbitration precludes the parties from saying ‘I don’t accept your decision because it isn’t in my favour,’ that is, because it does not agree with the party’s evaluation of the balance of reasons. But if the arbitrator flipped a coin to decide the matter, so that it was clear that the decision did not respond to the reasoned arguments made by the parties about the background to their dispute, they would be entitled to say that this was a decision to which they did not consent.

Hence, the idea of arbitration is very far from our common understanding of arbitrariness. The latter understanding takes off from the idea that corruption was for a long time the only basis on which an arbitrator’s decision could be challenged in a court of law. Thus, an arbitrator could decide on a whim, and there would be no legal way of setting the decision aside. But as the history of the procedures adopted for arbitration shows, these procedures were always designed to try to ensure that that the arbitrator’s decision properly responded to the parties’ reasoned arguments. In other words, we should not let the fact that there may have been no formal remedy for flaws in the arbitration process blind us to the fact that there is much more to the role of arbitrator than rendering a final decision. He was expected, as Hobbes makes clear, to follow the laws of nature.

There is an important lesson here for understanding debates about the legitimacy of judicial review of the decisions taken by public officials within the administrative state. In the common law jurisprudence on judicial review, there was for many years a distinction between administrative and quasi-judicial decisions. The former were not generally considered vulnerable to judicial review unless one could show, for example, that the official had been manifestly corrupt, while the latter were considered reviewable, largely on the basis that the public official was required to make his decisions in a court-like fashion, and so his decisions were more amenable to scrutiny by a court. The effect was that in the former category of decisions officials could decide arbitrarily within a very wide scope – they were a law unto themselves, as indeed judges sometimes saw fit to describe the position.<sup>21</sup>

21 See, e.g., Cartwright J. in his dissent in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 167, the leading case in Canada on the application of the rule of law to the administrative state:

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to

But there is an irony here. The phrase a 'law unto himself' comes from the book of Romans in the New Testament, where the context is a discussion of what it means to be judged as a violator of the law. One is not 'just before God,' Paul says, merely because one has heard the law; the issue is whether one has acted in accordance with the law. And thus he says of the Gentiles that when they 'do by nature the things contained in the law, these, having not the law, are a law unto themselves.'<sup>22</sup> That is, where there is no external source of law, no special revelation of one's duties, one is still governed by the laws of nature and will be judged accordingly by God.

In the context of a private arbitration, the parties might have to make do with the thought that an arbitrator is accountable, or largely accountable, only to God or conscience for performance of his natural duties, although one would expect that those with a successful arbitration practice were precisely those who had a reputation not only for expertise but also for fairness and other legal virtues. But in a context where the arbitrator is a public official deciding a dispute about what the law requires, it is obviously inappropriate that he should be able to decide on a whim, or worse. The legitimacy of that kind of decision making, one might say the ongoing consent of those subject to it to be governed by it, depends on the subjects' sense that the official's decision is a legal one, where 'legal' means not only that it is an interpretation of all of the relevant legal materials but also that it meets the requirements of legality.

Of course, the distinction between administrative and quasi-judicial acts is a kind of response to this point, since it says that many public officials are simply not arbitrators. But the problem with this response is that for any contested case that was alleged to fall within the administrative category, the question was precisely whether the official was required to be arbitral or judicial in a way that made his decision amenable to judicial review. And eventually the distinction was dropped, not only because of its question-begging character but also because of a growing public sensibility based on the idea that the decisions of the administrative state should be subject to the rule of law. This sensibility required more of a public official than that he render a decision with a determinate content so that he settled for those subject to the decision what they had to do. It required that when he made his decision, he made it in accordance

commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial.

And at this point Cartwright J. invoked Masten J.A., speaking in *Re Ashby et al.*, [1934] O.R. 421 at 428, saying that the legislature intended the bearer of such administrative discretion 'to be a law unto itself.'

<sup>22</sup> Romans 2:13, 2:14 (KJV).

with a reasonable interpretation of his legal mandate, where the criteria for reasonableness included an appreciation of the requirements of the rule of law or legality as they applied in his context.

A natural concern here is that of judicialization of the administrative state in ways that are not only inappropriate in many administrative contexts but also costly, in that, for example, providing a hearing of any sort or giving reasons of any sort uses up resources that would otherwise be available for distribution by the officials to those who are entitled to them. But while the effect of getting rid of the distinction was to make many more decisions amenable to judicial review on grounds other than, say, manifest corruption, it was significant that it was generally understood that review would be more on a procedural than on a substantive basis: whether the official had made the decision in the right way, for example, impartially and in a way responsive to the arguments of the party or parties.

Moreover, this understanding was general in that it applied across the board. It thus applied as well to decisions that had in the past been considered to be firmly on the judicial side of the distinction. Courts came to consider that their focus in reviewing even the most judicial of administrative decisions should be on the legality of the decisions rather than on their content, and the distinction between administrative decisions and quasi-judicial decisions was replaced with the idea that there is a spectrum of judicial review whose intensity varies from one end to the other. It thus became incumbent on judges to craft a doctrine of judicial deference to administrative decisions, on the basis that judges should uphold a decision not on the basis of their agreement with the administrative interpretation of the law but on the basis that the interpretation meets the requirements of legality.

But as Trevor Allan rightly points in his contribution to this issue, a properly nuanced doctrine of deference cannot distinguish sharply between process and substance, 'because procedure and process merge into substance as the court's scrutiny becomes appropriately intensive.'<sup>23</sup> Allan's analysis in this essay is of situations in which the constitutionally protected rights of individuals are affected by public decisions. However, the normative basis of that analysis – the principle of equality before the law – applies to all decisions made by public officials in a regime of legality. For that principle is at stake even when public decisions do not affect a constitutionally protected right or interest, since there is always a substantive right to have any public decision that affects one's interests appropriately justified as having the authority of law.

23 See T.R.S. Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 *U.T.L.J.* 41 at 49.

This point is best made by Lon L. Fuller, who, as I have argued elsewhere, is the figure in twentieth-century legal thought whose understanding of legality and the role of judges in upholding it is closest to that of Hobbes.<sup>24</sup> In ‘The Forms and Limits of Adjudication,’<sup>25</sup> Fuller, like Hobbes, treats the role of arbitrator and judge as identical.<sup>26</sup> The role of arbiter/judge is central to a mode of social ordering whose central feature is the presentation of ‘reasoned proofs and arguments.’<sup>27</sup> It is not that reasoned argument has its place only in a court, but that the role of judge/arbiter offers a ‘form of participating in a decision that is institutionally defined and assured’:

Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of argument not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason.<sup>28</sup>

On Fuller’s view, the ‘proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.’ This is for him ‘simply an implication’ of the fact that adjudication responds to a process of reasoned argument:

It is not so much that adjudicators decide only issues presented by claims of right and accusations. The point is rather that whatever they decide, or whatever is submitted to them for decision, tends to be converted into a claim of right or an accusation of guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function.<sup>29</sup>

The process of reasoned argument requires, that is, that the person making the argument present it as more than a ‘naked demand.’ It has to be presented as a ‘claim of right,’ that is, as ‘supported by a principle.’ And this has the consequence that ‘issues tried before an adjudicator tend to become claims of rights or accusations of fault.’<sup>30</sup> Thus Fuller regards courts as ‘essential to the rule of law.’ The ‘object of the rule of law is to substitute for violence peaceful ways of settling disputes. Obviously peace cannot be assured simply by treaties, agreements, and

24 David Dyzenhaus, ‘Hobbes and the Legitimacy of Law’ (2001) 20 *Law & Phil.* 461.

25 I use here the abridged version in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing, 2001) 101 [Fuller, ‘Forms and Limits’].

26 See *ibid.* at 102, 118–26.

27 *Ibid.* at 106.

28 *Ibid.* at 109.

29 *Ibid.* at 111.

30 *Ibid.*

legislative enactment. There must be some agency capable of determining the rights of the parties in concrete situations of controversy.<sup>31</sup>

The idea of conversion is key here. Consider, for example, Jeremy Waldron's critique of the foremost legal positivist writing today, Joseph Raz, on the basis that Raz's theory of authority focuses on the lawmaker/legal subject relationship to the exclusion of the lawmaker/official relationship and the official/official relationship.<sup>32</sup> Waldron bases his critique on an exploration of the 'principle of institutional settlement,' described by Henry M. Hart, Jr., and Albert M. Sacks in *The Legal Process: Basic Problems in the Making and Application of Law*.<sup>33</sup>

The principle, Hart and Sacks say, arises out of the fact that in any complex society questions of 'common concern' require settlement if the society is not to deteriorate into the play of force (*i.e.*, violence). Waldron thus remarks that their only argument for the principle is 'Hobbesian' in character. And he draws our attention to what he sees as the non-Hobbesian element within the principle of institutional settlement that matters have to be of 'common concern,' and adds a factor that he has done more than any other legal philosopher today to elucidate – the principle of publicity.<sup>34</sup>

Waldron goes wrong, however, in inferring that Hart and Sacks's argument boils down to one for any institutionalized procedure that results in a decision with a determinate content, since that is not their argument but rather, as he correctly perceives, the argument behind Raz's understanding of authoritative legal reasons. For Raz's view of legal authority is precisely the view taken by the dissenting tradition and, indeed, the positivist tradition more generally, which has it that an authoritative legal reason has the characteristic that its content can be determined by factual tests that do not rely on any idea of transcendent legal principles.<sup>35</sup> To the extent that Raz supposes that there are principles of legality inherent in any legal order, these principles, on his account, are not moral principles; rather, they are principles that assist officials in determining a factual content.<sup>36</sup> In sum, he provides the theoretical account

31 Ibid. at 114.

32 Jeremy Waldron, 'Authority for Officials' in Lukas H. Meyer, Stanley L. Paulson, & Thomas W. Pogge, eds., *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 45.

33 Henry M. Hart, Jr., & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. by William N. Eskridge & Philip P. Frickey (New York: Foundation Press, 1994) at 4 [Hart & Sacks, *Legal Process*].

34 Waldron, 'Authority for Officials,' *supra* note 32 at 48.

35 Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) 194.

36 Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1983) 210.

of law's authority that makes conceptual sense of the dissenting tradition's idea of the judge as the transmitter of the determinate content – the factually determined content – of the positive law.

So the problem with Raz's account is not only that, as Waldron sees, it focuses on the lawmaker/legal subject relationship to the exclusion of the lawmaker/official relationship and the official/official relationship; it is also the case that Raz's account goes wrong from the start in supposing that the lawmaker/legal subject relationship is one in which the lawmaker transmits a command to the subject with a determinate content that it is the judicial duty to disinter.

Once we see this, we can understand why contemporary legal positivists have been forced to understand much of what judges do as involving an exercise of discretion uncontrolled by law.<sup>37</sup> Since, in contested or hard cases, the issue arises precisely because there is no agreement as to what that content is, the law cannot be said to control the judge's decision, which means that ultimately it is the judge's personal moral and political views that determine his interpretation of the law. The difference between the dissenting tradition and Waldron's democratic critique of judicial review, on the one hand, and contemporary legal positivism's philosophy of law, on the other, is only that the former treat the phenomenon of judicial discretion as a reason to reduce or eliminate the institution of judicial review, while for the latter it is simply a fact about law, to be left to political theorists and others to address.

We can also see why it is the case in Raz's work that while he argues that the law not only must claim authority over its subjects but also has to claim legitimate authority, the claim to legitimacy is sustainable not by law's inherent qualities but by an external source. For Raz, law's claim to legitimate authority can be sustained if and only if it is the case that the argument is correct that obedience to the law will serve the subject's interests better than judging the balance of reasons for himself. In other words, law as such or legality does not have authority; authority belongs only to those particular laws that happen to meet an external test for what will serve the subject's interest best.

Waldron is thus also wrong to describe this positivist view of law's authority as Hobbesian. As we have seen, Hobbes supposes that an arbitral or adjudicative procedure should be regarded as fully authoritative when and only when it serves principles of legality that condition its content. Fuller put forward much the same view, and Hart and Sacks largely follow Fuller in their understanding of the point of

37 That is, when legal positivists do not capitulate to Dworkin by adopting the brand of legal positivism known as inclusive legal positivism, which is Dworkin's theory of adjudication with the caveat that it is logically possible that in some legal orders there is no necessary connection between law and morality.



adjudication.<sup>38</sup> What Waldron misses, then, both in Hobbes and in Hart and Sacks, is precisely the moment of *conversion*, the moment when a judge makes the law fully authoritative by ensuring that it is an interpretation not only of all the relevant legal materials but also of the requirements of legality.<sup>39</sup> He reduces, as do legal positivism and the dissenting tradition, the role of the judge, the *iudex* who speaks in the name of legal right (*ius dicere*), to the role of someone who renders explicit the content of a command (*lex*).

In a developed legal order, one of the requirements of taking the role is the requirement on which it may without exaggeration be said that Dworkin's whole theory is built – the requirement that any relevant legal materials be displayed in their best moral light. But, as we have seen, this is only one of the requirements: there are also all the principles that should figure on a list of the principles of legality. Without regard to these other requirements, one risks, as I suggested at the outset, reducing the role of the judge to that of one who speaks in the name of the moral order that explains the positive law, instead of one who speaks in the name of *legal* right or *ius*.

It may be that some or many of these other principles of legality recede rather in many private law disputes, and even in many bill-of-rights-type constitutional cases, where the issue is that of what moral constraints the bill of rights places on the state. One would then have an explanation of why Dworkin's almost exclusive focus on one requirement could take him a very long way. But even in such cases, there will often be an element that is highly visible nearly all the time in that branch of public or constitutional law which we call administrative law, because of the competing claims of jurisdiction, interpretative authority, expertise, and political legitimacy by different sorts of public institutions – the legislature, the components of the administrative state, and the judiciary.

It is for this reason that Fuller said that it is in the field of administrative law that questions of the proper forms and limits of adjudication 'become most acute.'<sup>40</sup> For it is in administrative law that principles of legality are most obviously salient to questions about who is best placed to undertake the conversion process and what the criteria are for telling when such a person or body has failed to fulfil that role.

38 Indeed, their most significant source of inspiration for their view of adjudication is an early version of Fuller, 'Forms and Limits,' supra note 25. Hart & Sacks, *Legal Process*, supra note 33 at 640–7.

39 The positivist propensity in this regard is very well explored by Kenneth Winston in his introduction to the first edition of *The Principles of Social Order*, reproduced in the second edition, supra note 25 at 25–58, esp. at 55–6.

40 Fuller, 'Forms and Limits,' supra note 25 at 103.

There is, of course, the possibility that an issue might be one not fit for conversion because of what Fuller called its 'polycentric' nature,<sup>41</sup> whereby the 'interacting points of influence' that have to be taken into account defy conversion into claims of right.<sup>42</sup>

But whatever one makes of polycentricity, or equivalent claims about problems that are not fit for adjudication because of their political or sensitive nature, it remains the case that the characteristic of that mode of social ordering which we call arbitration or adjudication is that it converts reasoned arguments into claims of right in such a way as to render the decision fully authoritative.

#### IV *Law without judges?*

Waldron's failure to spot the moment of conversion is illuminating. It provides a window into the positivist tradition, which generally regards law as an instrument for transmitting the judgements of those with legal power to those subject to the law in as unadulterated a form as possible. As I have suggested, Waldron can adopt such a view because his political theory argues for the legitimacy of the decision of the legislature in a representative democracy, more or less whatever the content of these decisions. His theory does not make any place for judges properly so called in the legal order because his view is that judges act legitimately when and only when they determine what the legislature intended, using appropriately constructed factual tests.

Put differently, the conversion aspect of the judicial role is left out of his theory precisely because that aspect is illegitimate. In this, Waldron follows Jeremy Bentham, whose legal positivism set out a theory of law in which law's normative force comes not from any qualities inherent in legality but from the role that law can play in a society constructed along utilitarian lines. Law, on this view, has no normative force of its own but draws its normative force from the fact that it is the best medium for transmitting the results of the judgement made in the main political forum, the legislature. Very much the same thought animates the utilitarian founders of the positivist tradition – the law has a claim to legitimate authority when it conveys the results of utilitarian calculation; it also animates Waldron's democratic positivism – law has legitimate authority when its content has been determined by the deliberations of a democratic legislature; and it animates the dissenting tradition, which treats official expertise as the proxy for either utilitarian calculation or democratic deliberation or both. And, as we have seen, it means that in common between all of these positions is the

41 *Ibid.* at 126–36.

42 *Ibid.* at 127. For an important corrective see Jeff King, 'The Pervasiveness of Polycentricity' [2008] P.L. 101.

view that the judge, properly so called, is merely a conduit for the content of determinate judgements made prior to the moment of judgment.

Raz's account of law's authority suggests that only particular laws have authority – those that meet a demanding external test for legitimacy. Law is not in fact authoritative unless, first, its content is such that it can be transmitted by officials, and, second, that content meets the condition set by the test for legitimacy. This, too, may be explained as a kind of relic of a Benthamite political theory of law, despite the fact that Raz, following H.L.A. Hart, regards philosophy of law as essentially a descriptive enterprise. That Raz regards philosophy of law as descriptive has the result that he, unlike Bentham and Waldron, will not describe judicial conversion as illegitimate; rather, with other legal positivists, he describes it as discretionary or quasi-legislative, and thus extra-legal.

There are significant moments in the writings of Hart and Raz where both do approach adjudication in a way that takes seriously the internal point of view of judges, and thus deal more appropriately with conversion.<sup>43</sup> But what these moments show is not the capacity of their theories of law to make a place for judges but, rather, that the very idea of a judge has no real place within these theories. In short, they want law without judges, in that the reduction of the role of judge to the person through whose mouth the factually determined content of the law speaks results in something that is not a conception of a judge. In the terms used a moment ago, *ius dicere* is not *lex dicere*. And, while I cannot make the argument here, that fact makes it debatable whether they have a theory of law at all.<sup>44</sup> But, as I have also indicated, the Dworkinian alternative is also problematic, since the difference between him and legal positivism is that he substitutes 'moral content of the law' for 'factually determined content' in the formulation above.

Put differently, Montesquieu's claim that judges are the mouths through which the law speaks has to be reformulated so that *loi/lex* becomes *droit/ius*: judges are the guardians of legality or legal right,

43 In 'Law and Morals,' Hart acknowledges that there are judicial virtues that judges should 'display' in interpreting the law: 'impartiality and neutrality in surveying the alternatives; consideration for the interest of all those who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision'; H.L.A. Hart, 'Law and Morals' in H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 200. I have argued elsewhere that this passage shows that Hart, when he took the internal point of view of judges seriously, put forward a theory of law that is very close to Dworkin's; see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2d ed. (Oxford: Oxford University Press, forthcoming 2010) at c. 7 [Dyzenhaus, *Hard Cases*].

44 See David Dyzenhaus, 'The Legitimacy of the Rule of Law' in David Dyzenhaus, Murray Hunt, & Grant Huscroft, eds., *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009) 33; Dyzenhaus, *Hard Cases*, supra note 43 at cc. 7–10.

not of the content of the positive law. As Hobbes showed, this conception of a judge is prior to law, in the sense of being prior to any positive legal order. But it is not prior to law in one sense, for it is impossible to conceive of a judge other than by reference to principles of legality, principles that are constitutive of the authority of the judge.

It follows that the answer to the question of what judges should or should not do in any particular positive legal order must take into account the role of a judge in maintaining the authority of law by maintaining that order's fidelity to legality. When it comes to the administrative state, that role requires that there be judicial review; but it also focuses the judicial mind on what judges should be doing – ensuring fidelity to legality or the rule of law.

Correspondingly, academic attention to the same question should also be focused on the topic of legality, a focus that is enabled by rejecting Montesquieu and adopting the very idea of a judge to be found in Hobbes. Indeed, I would venture that any productive exchange on the question of what judges should or should not do is predicated on Hobbes's idea of a judge.