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HYPERLEXIS AND THE RULE OF LAW

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Abstract
On a popular understanding, the rule of law is valuable because it enables people to plan their lives. However, planning conceptions of the rule of law are undermined by the sheer quantity of legal rules, regulations, and policies characteristic of modern administrative states. Under conditions of hyperlexis, people cannot reasonably be expected to reliably use the law as a guide to conduct. Rather than conclude that the rule of law is inimical to the administrative state, however, I defend an alternative conception of the rule of law. On what I term a contestatory conception, the rule of law requires an adequate opportunity to challenge decisions made by officials in the exercise of their legal powers. The animating idea of a contestatory conception of the rule of the law is that officials should relate to citizens in the space of reasons rather than merely through the exercise of power.

The rule of law is a concept that commands broad popular support, despite the lack of consensus as to what is meant by it. This raises the suspicion that the rule of law is more of a slogan than a substantive commitment.[1] It would be an exaggeration, however, to hold that the rule of law is an empty concept. For one thing, it is associated with a familiar cluster of ideas—such as certainty, predictability, and planning—that hold broad appeal. A society characterized by the rule of law is one where official action is certain and predictable, and consequently one in which citizens are able to use the law as a way of planning their lives. There are, to be sure, many other disputes about the rule of law, including about its content, whether it is of intrinsic or merely instrumental value, as well as its relation to justice and legality. Regardless of one's position on those issues, however, there is broad agreement that a central feature of the rule of law is a society governed by rules—determinate and knowable in advance—that people can reasonably rely on as a guide to their practical reasoning.

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1. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137 (2002).

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I shall refer to this as the planning conception of the rule of law. The first part of this paper elaborates on the planning conception, while the next part focuses on the significant epistemic challenges created when hyperlexis prevails—that is, under conditions in which the profusion of law swamps individuals' ability to use the law as a guide to their conduct. The problem of hyperlexis is not that law is secret, or obscure, or constantly changing. It is simply that there is too much of it. In the third and fourth parts of the paper, I argue that hyperlexis gives us reason to emphasize an older conception of the rule of law: the rule of law as contestation. The defining preoccupation of the contestatory tradition is ensuring that a government relates to its citizens in the space of reasons rather than through power alone. While planning and contestation are often conjoint ideals, hyperlexis can drive a wedge between them; under those circumstances, the significance of contestation waxes as that of planning wanes. Finally, in Section V I consider the relation between the *rule* of law and the *concept* of law. Some legal theorists, such as Joseph Raz and Scott Shapiro, have suggested that once we know what law is, then we will also know what it is to enjoy the rule of law—it is the widespread presence of law in organizing social affairs. The value of the rule of law is fully determined by the value of legality. In contrast, a contestatory conception of the rule of law opens a gap between the rule of law and legality. On this view, the rule of law is a substantive political value, one that includes but is not exhausted by the value of governance through law.

I. THE RULE OF LAW AS PLANNING

According to a planning conception of the rule of law, the rule of law does not prevail unless the law is sufficiently certain, and known sufficiently far in advance, that people can reasonably be expected to plan their actions in light of the law. On this view, the rule of law means that law is capable of guiding the practical reasoning of those subject to it. On views of this kind, it is not merely desirable that people be able to use the law to plan their lives. Rather, if people cannot reasonably be expected to plan their lives in view of the law, then they do not live in a society in which the rule of law prevails.

The core of a planning theory can be illustrated with the aid of an example. Suppose I know that you are disposed to invite me for dinner tomorrow. Excited, I write down a rule for you to follow, the upshot of which is that you are obliged to invite me for dinner tomorrow. Later, and without learning of my rule, you invite me to dinner. This example highlights three features of a planning theory. First, the rule I make clearly fails to guide your conduct, even though had you known about the rule, and accepted my authority to make it, it could have done so. For my rule to guide your conduct, it is not enough that you *could* have inquired whether I had made such a rule, and, receiving an affirmative reply, could have conformed

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your behavior to it. Just as it is too demanding to require people to have encyclopedic knowledge of the law, it is too accommodating to settle for the mere logical possibility that a law, were it actually known, could guide conduct. At the very least, a planning conception requires that the law is reasonably accessible to those whose conduct it is meant to shape.

Support for the reasonable accessibility standard can be gleaned from the principle, endorsed by planning conceptions, that law must be publicly promulgated. After all, even secret law has the capacity to guide conduct, in the counterfactual sense that had you known about it, you could have used it to guide your conduct. That planning theorists, such as Fuller, regard this as insufficient suggests that what is at issue is not the mere logical possibility of guidance, but how reasonable it is to expect guidance. Since there is no reason for you to think that I may have made a rule requiring you to invite me to dinner, it would be quite unreasonable to expect you to know about, much less comply with, any such rule. Thus, the capacity to guide behavior that planning conceptions emphasize is best interpreted as reflecting a normative judgment about what is reasonable to expect of others—in particular whether it is reasonable to expect someone to use the law as a guide to conduct.[2]

Second, planning theories do not need to insist on encyclopedic knowledge of the law. For my rule to guide your conduct, it is sufficient that you know the rule that applies to you in this specific context; you do not need to know all the other rules I have made for everyone else, or that apply in other contexts.

Finally, following Raz, we can distinguish between merely *conforming to* the law and *obeying* the law.[3] Your decision to invite me to dinner *conforms to* the rule I have made for you, but it is not an instance of obeying that rule since the rule did not guide your practical reasoning. (For the same reason, it would also not qualify as disobeying my rule if you didn't invite me to dinner.) From the point of view of your plans, my rule is completely inert.

In light of these considerations, the core of a planning conception can be presented somewhat more precisely. A planning theory requires that: conditional on the existence of a law L regulating an action A, someone who is subject to L can reasonably be expected to take L into consideration when deciding whether to A.

Hayek gave clear expression to the planning conception when he wrote that, "[s]tripped of all technicalities [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the

2. *See* Timothy Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. L. & JURIS. 1, 2 (1999) (describing capacity to guide behavior as the "organizing principle" of the rule of law).

3. As Raz puts it, a person "obeys the law only if part of his reason for conforming is his knowledge of the law." JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 214 (2009).

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authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[4] It is precisely because law seeks to shape conduct that the rule of law has been celebrated as an important bulwark of liberty. If law merely directed you to do whatever you were inclined to do anyway, then law could hardly be an incursion on your liberty. The threat to liberty is more plausible when law commands obedience. When the law commands obedience, prospectivity, clarity, and predictability are paramount. Thus, Hayek's complaint that the modern administrative state would be constantly changing its directives to fit the "actual needs of people as they arise," and demanding answers to questions that "cannot be answered by formal principles only."[5] Not only would this require government to constantly prioritize some people's interests over those of others, undermining a government's duty of impartiality, but it would render planning extremely difficult, since the regulator's directives "would have to be decided on the basis of the full circumstances of the moment," rendering them highly unpredictable.[6]

Fuller's famous account of the rule of law is another version of a planning conception. Fuller insisted that under the rule of law, law must take the form of rules and be public, prospective, clear, noncontradictory, possible to comply with, and reasonably applied. Taken together, these values reflect a view of law as a guide to the practical reasoning of those subject to it. The "aim" of law, Fuller writes, is "to lay down rules by which people may guide their conduct."[7] As Colleen Murphy puts it, by satisfying the Fullerian requirements, lawmakers ensure that "[c]itizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke."[8]

Planning conceptions of the rule of law have long historical roots. Holmes's prediction theory of law is closely related to the planning conception of the rule of law. Bentham's criticism of judge-made common law ("dog law") rests on his complaint that judicial lawmaking fails to provide people with adequate notice about what the law requires of them, and operates in an excessively ex post facto manner.[9] Further back still, one might

4. F. A. Hayek, The Road to Serfdom (Bruce Caldwell ed., U. Chi. Press 2007) (1944), at 75–76.

5. Hayek, The Road to Serfdom, *supra* note 4, at 77.

6. *Id.* at 79–80. *See also* Hayek, The Constitution of Liberty (1960), at 222 ("[A]ll coercive action of government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible.").

7. Lon L. Fuller, Anatomy of the Law (1971), at 88; *see also* Fuller, The Morality of Law (1969), at 35–36, 53 ("[l]aw has to do with the governance of human conduct by rules").

8. Colleen Murphy, *Fuller and the Moral Value of the Rule of Law*, 24 Law & Phil. 239, 241 (2005).

9. Jeremy Bentham, *Truth Versus Ashhurst; or, Law as It Is, Contrasted with What It Is Said to Be*, *in* 5 The Works of Jeremy Bentham 231 (John Bowring ed., 1843).

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understand Locke's contrast between the virtues of "declared and received laws" and the evils of "extemporary dictates and undetermined resolutions" at least partially in these terms. Part of the reason government power should be "exercised *by established and promulgated laws*," Locke insists, is that "the people may know their duty, and be safe and secure within the limits of the law."[10]

Moreover, the planning conception is shared even by those who otherwise disagree about the rule of law's value. For instance, Raz understands the rule of law in planning terms: "the law must be capable," Raz writes, "of guiding the behavior of its subjects."[11] Yet, unlike Fuller, Raz understands the rule of law as primarily of instrumental value. Thus, even among those who disagree about the rule of law's value, a planning conception nonetheless grounds what they take themselves to be disagreeing *about*.

Finally, the planning conception is reflected in a familiar range of legal norms, such as the norm against overly vague laws (which make it too difficult for people to know what is required of them), the norm against retroactivity (which unsettle expectations that people formed in light of what the law previously allowed), and the judicial attitude disfavoring mistake of law (presuming that reasonable people will inform themselves of the law or else act at their peril). The principle that law must be certain and predictable is a general principle in the European Court of Justice, the European Court of Human Rights, and the legal systems of many European jurisdictions.[12]

II. HYPERLEXIS

In modern administrative states, large swaths of human life, from work to family to housing, are profusely and minutely regulated. Hyperlexis, the condition of overwhelming proliferation of law, appears to be an inevitable feature of such states.[13] A bewildering array of lawmakers—legislatures, courts, tribunals, administrative agencies, municipalities, and government bodies of all kinds—generate a vast amount of law at a dizzying pace. These sources of law constantly generate statutes, case law, regulations, ordinances, directives, policies, orders, and principles on a vast range of topics. Given the expansive

10. JOHN LOCKE, *The Second Treatise: An Essay Governing the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 137, 161 (Ian Shapiro ed., 2003). *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

11. RAZ, *supra* note 3, at 214. Raz has recently revised his account of the rule of law, acknowledging that "while the law aims to guide, its ability to do so is much less securely connected with the rule of law principles . . . than is often assumed." *The Law's Own Virtue*, 39 OXFORD J. LEGAL STUD. 1 (2019).

12. James Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy*, 15 TULSA J. INT'L L. 541, 545 (2007).

13. The term appears to have been coined by Bayless Manning. *See* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); *see also* Peter Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992) and, more recently, Mila Sohoni, *The Idea of Too Much Law*, 80 FORDHAM L. REV. 1585 (2012).

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scope of modern regulatory states, governing everything from traffic to food safety to social equality to fisheries, and given the ever-increasing bureaucratization of public life, it seems reasonable to regard hyperlexis as a normal, rather than aberrational, feature of the modern regulatory state. Gillian Hadfield expresses the underlying idea succinctly. As Hadfield puts it, our everyday world is "flooded with law":

> [H]ow our children are supposed to be treated in school, what lenders are supposed to tell us when they sell us a mortgage, when our employers can and cannot change our conditions of work or pay, what is fair play in consumer markets. . . Every time we sign a document, click a box that says "I agree," enter a retail shop, or get on a local bus we navigate a world that is defined by legal obligations and rights.[14]

To give a rough sense of the scale of hyperlexis, consider that printing out the United States Code would run to approximately 79,000 pages.[15] This code covers copyrights to crimes, taxes to agriculture, school lunches to flood insurance. It does *not* include the Code of Federal Regulations—another fifty titles, covering topics from food and drugs to highways, homeland security to public contracts. It also does not include state, municipal, or international law. Nor does it include judge-made common law, or judicial interpretations of statutes and regulations. Scholars in other jurisdictions have made similar observations; Crawford notes, for instance, that it is "unremarkable" for Australian statutes to consist of hundreds of pages, in some instances exceeding 10,000 pages for a single statute.[16] Moreover, as any lawyer can affirm, legal rules can be quite complex, with common terms defined in either a hyper-technical, or conversely, extremely vague manner; statutes may be ambiguous, overlapping, or conflicting; and they may grant officials "discretions upon discretions."[17] The result is a law that regulates vast swaths of ordinary life, at great length, with both a significant degree of complexity and uncertainty.

Hyperlexis is not solely a matter of law's range, prolixity, or complexity; it is also a matter of the rate of change. The federal tax code in the United States, for instance, has been revised over 15,000 times between 1987 and 2010, which approaches a rate of two revisions every single day.[18]

14. Gillian Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urb. L.J. 129, 131–132 (2010). Skepticism about the degree to which people actually know the law stretches back at least to Austin's time. *See* John Austin, Lectures of Jurisprudence (1879), Lecture 25, 497.

15. 78,755, to be precise. The United States Code can be downloaded here: http://uscode.house.gov/download/download.shtml. The downloaded set of files occupies 185MB.

16. Lisa B. Crawford, *The Rule of Law in the Age of Statutes*, 48 Fed. L. Rev. 159, 165 (2020).

17. *Id.* at 169; *see also* Anthony Burrows, Thinking About Statutes: Interpretation, Interaction, Improvement (2018), ch. 3.

18. This figure is drawn from the President's Economic Recovery Advisory Board's Report on *Tax Reform Options: Simplification, Compliance, and Corporate Taxation* 3 (August 2010), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Tax-Reform-Options-2010.pdf.

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Crawford notes that the Australian Parliament now enacts hundreds of acts a year, and frequently amends many more—with the Income Tax Assessment Act 1997 (Cth) having been subject to ninety-three separate amendments over a five-year period, or on average an amendment every three weeks.[19] A careful study of criminalization in the United Kingdom found that over 1,300 new offenses were created between 1997 and 1998, and over 1,700 new offenses were created between 2010 and 2011.[20] Similar efforts in the United States are hampered by the fact that American federal law is so complex, disorganized, and voluminous that it is difficult even to determine how many crimes there are, much less how much it changes; one (now somewhat dated) report estimated that there are approximately 4,500 offenses in federal law carrying a criminal penalty, and about fifty to sixty new offenses created by Congress each year.[21] The lack of a general sunset provision further amplifies these problems.[22] Moreover, the problem of legal complexity is exacerbated in contexts in which people commonly cross jurisdictional lines, whether for work, leisure, or migration. Every time one crosses state lines, one becomes subject to a new body of statutory, regulatory, and common law.[23] It is unlikely that many people bother to acquaint themselves with the law—even just the criminal law—of every state they enter.

To be sure, these are crude indicators. Perhaps they overstate the problem as many laws and regulations are directed at officials and actors in highly specialized roles, rather than at the general public.[24] Experts and officials are arguably better placed to deal with complexity, change, and abundant law than are laypeople.[25] To address this concern, consider a type of law paradigmatically directed at the general public rather than specialized audiences—criminal law. In Canada, most of the "criminal law" is contained in a single federal statute, the *Criminal Code*. The most recent

19. Crawford, *supra* note 16, at 162, 164.

20. James Chalmers & Fiona Leverick, *Quantifying Criminalization*, *in* CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 54, 65, tbl.2.1 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2014). However, the large majority of these offenses pertain to people in specialized roles rather than to the general public. *Id.* at 74, tbl.2.8.

21. John Baker, *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes.

22. BURROWS, *supra* note 17, at 116; GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

23. Manning, *supra* note 13, at 770.

24. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

25. Robert Goodin, *An Epistemic Case for Legal Moralism*, 30 OXFORD J. LEGAL STUD. 615, 622 (2010). However, as Crawford has noted, one might question this assumption, in part because a significant number of officials may occupy high-turnover positions that do not allow for the development of expertise, in part because of the substantial costs in time and resources of keeping up to date with the law, and in part because rational and coherent legislation becomes much more difficult in the face of hyperlexis. Crawford, *supra* note 16, at 182. A recent member of the Law Commission for England and Wales reports that, prior to consolidation, sentencing law was so complex that many trial judges—presumably, "experts" on sentencing—were imposing unlawful sentences. BURROWS, *supra* note 17, at 113.

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annotated print edition of the Criminal Code runs to 2,540 pages. It contains over eight hundred provisions, many of them containing numerous sub-provisions. Not all of these provisions create substantive offenses, but many do. Many of the essential terms—notably mens rea terms—are either implied or undefined, requiring a reader to consult decided cases and/or apply canons of statutory interpretation. Thus, to be familiar with the Canadian criminal law, it is not sufficient to simply know the contents of a 2,540-page statute; one must also stay abreast of judicial interpretations of various portions of that statute. Finally, the Criminal Code contains only federal crimes, and does not include the provincial "quasi-criminal" offenses, which of course vary by province.

Some efforts have been made to assess lay knowledge of law, including criminal law, more directly. The results are not encouraging. Studies have found varying rates of legal knowledge across a wide range of subject matters.[26] This is true even of the most high-salience features of substantive criminal law (legal drinking age, definition of sexual assault, age of consent) among undergraduate students.[27] One survey instrument found that only one-third of respondents knew the age of consent in their jurisdiction, and that none could accurately define statutory rape.[28] Another looked at states that had adopted diverging rules regarding duties of rescue, retreat, and reporting known felons, and found that typically residents did not know which rule was the law in their state.[29] Other surveys have found widespread ignorance of sentencing, with barely half of respondents in one survey able to identify a single offense that triggered a mandatory minimum.[30] Similarly, studies of lay knowledge of rights upon arrest and the right to counsel have found "substantial confusion" on those topics.[31]

26. Catrina Denvir, Nigel J. Balmer & Pascoe Pleasence, *When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?*, 35 J. Soc. Welfare & Fam. L. 139, 146, 154 (2013) (finding that a majority of respondents had "partial" or complete ignorance of their rights (n = 1,760), and that 58 percent of those who initially claimed to know their rights were able to accurately describe them in a follow-up question).

27. Sandy Jung, Heather Ahn-Redding & Meredith Allison, *Crimes and Punishment: Understanding of the Criminal Code*, 56 Can. J. Criminology & Crim. Just. 341, 341–366 (2014).

28. Heather Ahn-Redding et al., *What Do Students Really Know About Criminal Justice?*, 41 Int'l J. L., Crime & Just. 405, 414 (2013). Although respondents were able to correctly classify cases of sexual intercourse with a 15-year-old as prohibited, they were no better than random in cases involving 16-year-olds.

29. John M. Darley, Paul H. Robinson & Kevin M. Carlsmith, *The Ex Ante Function of the Criminal Law*, 35 Law & Soc'y Rev. 165, 190 (2001). Exceptionally, Texans appeared to know that Texas law allows the use of deadly force in defense of property. *Id.* at 175. However, neither length of residence nor level of education appeared to improve knowledge of law. *Id.* at 176–177.

30. Julian V. Roberts, Nicole Crutcher & Paul Verbrugge, *Public Attitudes to Sentencing in Canada: Exploring Recent Findings*, 49 Can. J. Criminology & Crim. Just. 75, 89 (2007) (reporting a "general lack of awareness" of mandatory sentences in Canada); Kirk R. Williams, Jack P. Gibbs & Maynard L. Erickson, *Public Knowledge of Statutory Penalties*, 23 Pac. Soc. Rev. 105, 105–128 (1980).

31. M.W. Patry et al., *When Both Sides Are Mistaken: Layperson and Legal Professionals' Misconceptions of Canadian Suspects' Legal Rights Upon Arrest*, 32 J. Police & Crim. Psychol. 56, 56–65 (2017).

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Looking more broadly, the English and Welsh Civil and Social Justice Survey found that, out of approximately 2,000 adults who reported facing a problem in one of eighteen categories (consumer complaints, immigration, neighbor disputes, unfair police treatment, and so forth), nearly two-thirds stated that they did not know their rights.[32] Other studies have found a mixed picture, with reasonably good legal knowledge in some areas, and quite poor legal knowledge in others.[33] Admittedly, these studies suffer from a range of methodological limitations. Some focus only on people who are actively experiencing a legal problem; others sample only small, and potentially unrepresentative, portions of the population; and the significance of cross-jurisdictional movement remains to be fully explored. Nevertheless, while it is by no means conclusive, the clear tendency of the available evidence is that there is a high level of ignorance of the law, even on common, important, and high-stakes legal issues.

Criminal law, immigration, landlord-tenant, income tax, family, employment, and human rights law all address commonplace scenarios that ordinary people are liable to encounter at some point in their lives, and hence are contexts where the appeal of a planning theory of the rule of law would appear to be at its zenith. And yet even in these contexts, law is prolix, complex, and uncertain; and, perhaps unsurprisingly, there is some reason to believe that lay knowledge of the law, even in public-facing, high-stakes domains, is very imperfect and limited. This is the condition I have labeled hyperlexis.

III. THE EPISTEMIC COSTS OF HYPERLEXIS

Under hyperlexis, a great deal of law is like my hypothetical rule requiring you to invite me to dinner. Your actions may end up conforming to the law, but it is often difficult to argue that your actions were guided by law. This is because you are not aware of the law that applies to some action you are considering. Moreover, your ignorance of law is entirely reasonable. In the case of my rule obliging you to invite me to dinner, your ignorance is reasonable because you have no reason to think I would take it upon myself to make such a rule; in the case of legally regulated actions, ignorance of

32. Catrina Denvir et al., *Informed Citizens? Knowledge of Rights and the Resolution of Civil Justice Problems*, 41 J. SOC. POL. 591, 599 (2012).

33. *See* Jo Casebourne et al., *Employment Rights at Work – Survey of Employees 2005*, Employment Relations Research Series, No. 51 (London: Department of Trade and Industry, 2006) (finding variable levels of knowledge regarding a range of employment rights in the United Kingdom); ANNE BARLOW ET AL., COHABITATION, MARRIAGE AND THE LAW: SOCIAL CHANGE AND LEGAL REFORM IN THE 21ST CENTURY (2005) (finding high levels of ignorance about whether cohabitating couples in the United Kingdom qualify as married); Hazel Genn et al., *Tribunals for Diverse Users*, Department for Constitutional Affairs Research Series 1/06 (London: Department for Constitutional Affairs, 2006) (finding weak levels of understanding about the operation of, and access to, a range of specialized tribunals).

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law is often entirely reasonable because hyperlexis raises the cost of ascertaining the law.

Of course, a planning theory should not expect people to have an encyclopedic knowledge of the law. The issue is not knowing all the laws; it is knowing whether any legal rule applies at all, and then determining its content. Recall that the criminal law in Canada consists of hundreds of enactments, and even the most basic commentary—which is often required to understand how the law is likely to be applied by courts—runs to thousands of pages. And that is just criminal law, to say nothing of property law, contract law, labor law, or landlord-tenant law. In all of these contexts (and no doubt others as well) the law creates rights and duties on natural persons engaged in perfectly ordinary activities. If familiarizing oneself with the law were a modest undertaking, then perhaps it would be unreasonable not to make that effort. But under conditions of hyperlexis, the effort required to familiarize oneself with law's intricacies is overwhelming. If anything, it is the insistence that one learn the law before acting that seems unreasonable. Otherwise put, under conditions of hyperlexis, what reason counsels is ignorance, rather than knowledge, of law.[34]

In any case, it is likely that few defenders of planning theories really believe that it is reasonable to expect private citizens to ascertain the law for themselves. This is what experts are for: if you are sick, you are better off seeing a doctor than spending years becoming a doctor yourself. Similarly, if you have legal problems, you are better off hiring an expert—paradigmatically, a lawyer, but also real estate agents, accountants, financial advisors, union representatives, and so on—who can advise you. Perhaps this is all that a planning theory requires: that people are not prevented from retaining the service of advisors to guide them through the law's intricacies. However, the financial costs of obtaining legal advice, even from nonlawyers, can be quite significant. Based on household expenditures on legal services, Hadfield has estimated that American households in 2005 had access, on average, to under two hours of legal services.[35] Looking beyond legal services, consider that the Internal Revenue Service currently estimates that filing personal income taxes requires eleven hours and $210 on average (seven hours and $130 for nonbusiness filers).[36] Survey data suggest similar figures for

34. It may (or may not) be true that the criminal law would become significantly more difficult to enforce if ignorance of the law were a more widely recognized excuse. However, that is a distinct question from whether people are reasonably expected to know the law.

35. Hadfield, *supra* note 14, at 146. As Hadfield puts it, Americans "face a legal world that is thick with legal structure but thin on legal resources." *Id.* at 151. *See* Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (1999), ch. 3 (finding that a minority of people facing "justiciable problems" sought professional legal advice).

36. *See* IRS 1040 and 1040-SR, Instructions (2019), https://www.irs.gov/pub/irs-pdf/i1040gi.pdf. As recently as 2008, the IRS estimated that average filers were spending over twenty-six hours—more than half a working week—on tax preparation. *See* IRS 1040 Instructions 89 (2008), https://www.irs.gov/pub/irs-prior/i1040gi–2008.pdf.

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Canada.[37] In the aggregate, Americans are reported to spend 7.6 billion hours preparing and filing their taxes; expressed in monetary terms, that comes out to approximately $140 billion, or 1 percent of annual GDP.[38] In terms of direct financial outlay, Americans are estimated to spend approximately $32 billion on accountants, lawyers, tax preparers, and tax software.[39]

Looking beyond the tax context, consider the wide range of ordinary activities that are subject to extensive legal regulation. Must you hire a driving instructor to advise you whether taking a turn at that speed, under these conditions, is likely, in this jurisdiction, to be regarded as reckless operation of a motor vehicle? A contract lawyer to advise you before you click on an adhesion contract on a website? A criminal lawyer when you are contemplating sexual relations with another person? The law may be omnipresent, but that does not mean that *lawyers* must be as well. Such a view of the rule of law would do little to quiet suspicions that the rule of law is of value primarily to the wealthy.[40]

One way of lowering the costs of obtaining legal knowledge is to shrink the range of subjects regulated by law. There are sometimes independent reasons to doubt that current levels of legal regulation are necessarily optimal. Criminal law is again a prime example. Criminal lawyers and theorists commonly argue that modern criminal law has become unreasonably extensive, stretching far beyond the bounds of traditional *mala in se* crimes to regulate all sorts of conduct that does not violate basic rights, such as consuming small amounts of marijuana, driving with a broken taillight, or selling individual cigarettes out of untaxed cartons.[41] This is not an exclusively libertarian view. Antony Duff, for instance, argues that criminal law is a manifestation of a community's deeply held norms of civil order. On Duff's view, the criminal law embodies the widely shared norms of the people to which it applies. It is only in aberrant cases that criminal law guides practical deliberation by holding out the possibility of punishment as a reason to desist; in the normal case, it expresses the outcome of what most people in the community would regard as upstanding conduct.[42]

37. *See* François Vaillancourt, *The Cost to Canadians of Complying with Personal Income Taxes*, FRASER INSTITUTE 17 tbl.4a (Apr. 2010), https://www.fraserinstitute.org/sites/default/files/cost-of-complying-with-personal-income-taxes.pdf.

38. *Tax Reform Options*, *supra* note 18, at 3. Other estimates have put the figure closer to $200 billion, or 1.2 percent of GDP. Youssef Benzarti, *How Taxing Is Tax Filing? Using Revealed Preferences to Estimate Compliance Costs* 3 (NBER Working Paper 23903, Oct. 2017), http://www.nber.org/papers/w23903.

39. *Tax Reform Options*, *supra* note 18, at 41. Sellers of consumer tax preparation software have spent significant sums lobbying against efforts to simplify tax filing through the use of pre-filled forms, a practice used in Great Britain, Japan, Denmark, Sweden, and Spain. *See* Farhad Manjoo, *Would You Let the I.R.S. Prepare Your Taxes?*, N.Y. TIMES (Apr. 15, 2015), https://www.nytimes.com/2015/04/16/technology/personaltech/turbotax-or-irs-as-tax-preparer-intuit-has-a-favorite.html.

40. Manning, *supra* note 13, at 769.

41. DOUGLAS HUSAK, OVERCRIMINALIZATION (2007).

42. *See* R.A. DUFF, THE REALM OF CRIMINAL LAW (2018), at 22 ("[t]he law rather presupposes that we already had ample, normally conclusive, moral reasons to refrain from such wrongs—reasons

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What these critiques share is the sense that modern criminal law departs too frequently, and too dramatically, from widely shared norms and values. Whether that claim is correct or not, it is a difficult claim to accommodate in a planning theory of the rule of law. After all, a planning theory asks people to take the law into account in deciding what to do. Shrinking the criminal law so that it tracks preexisting attitudes and dispositions is the *opposite* of planning: rather than using law to shape what people do, what people do is used to shape the law.[43] Alternatively put, while making the criminal law track widely shared norms and values fosters conformity to law, it does little to promote guidance by law. It is akin to my rule requiring you to invite me to dinner: you may conform to that rule but are not guided by it. More generally, if law simply makes explicit what is already (mostly) implicit in social norms, then law is (mostly) redundant from the point of view of guiding action.[44] Hence, responding to hyperlexis by shrinking the scope of the law risks undermining the planning conception's focus on law's role in guiding action.

More realistically, law and conduct evolve together, with the content of law partially determined by a society's widely shared norms, and the content of those norms, in turn, partially shaped by a society's legal rules.[45] The plausibility of an account along these lines casts further doubt on a planning theory's singular focus on guidance by law. The coevolution of law and conduct suggests that the rule of law depends on (mere) conformity as much as guidance, potentially even more so. The relative significance of guidance as against conformity is determined by the degree to which law is used to create new norms divided by the degree to which it is used to embody existing ones.

One final observation. The appeal of a planning theory could be bolstered by investing more to ensure that people are aware of the law that structures their day-to-day lives, whether through explicit instruction or through acculturation. "Living within law's bounds," as Margaret Martin has pointed out, "is not simply a matter of choosing to treat legal norms

to which it does not purport to add"), 208 ("the initial way in which the substantive criminal law . . . aims to dissuade us from wrongful conduct is a matter not of deterrence, but rather of reminding us of the good reasons that we already have to refrain from the conduct that it defines as criminal"). *See also* Goodin, *supra* note 25 (and note Goodin's alternating references to law as a "guide" to conduct, and law as "tracking" morality).

43. Fuller, The Morality of Law, *supra* note 7, at 59 (describing criminal law as "most obviously and directly concerned with shaping and controlling human conduct"), 92 (observing that rule-of-law values are less significant when "law merely brings to explicit expression conceptions of right and wrong shared in the community").

44. *See* Frederick Schauer, The Force of Law (2015), at 49 ("When the law tells me to do what I would have done anyway, the law's commands are no more causally consequential than commanding my highly food-motivated dog to eat . . . . If we are interested in obedience to law, we must focus on law's effect on people who, but for the law, would have done something other than what the law commands.").

45. My thanks to Aziz Huq for this point.

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as reasons for action: it is often a matter of education and socialization."[46] Nevertheless, given how many areas of everyday life are thoroughly regulated, the extreme prolixity of modern law, as well as its complexity, changeability, and jurisdiction-specific nature, there are likely limits to education as a solution to hyperlexis. Simply listing prohibitions is unlikely to be effective.[47] A technological fix might perhaps be more realistic. Some envision predictive technologies that will replace general law with particularized "micro-directives" tailored to each specific situation.[48] Perhaps less ambitiously, one might imagine that "virtual assistants"—commercial products such as Amazon's Alexa, Apple's Siri, or Google's Assistant—could be trained on vast bodies of statutory law, municipal regulations, judicial opinions, and other sources of law. That would dramatically lower the cost of obtaining legal advice. Instead of consulting a lawyer each time one wanted to engage in a course of action that could potentially attract some form of legal liability, one would need only consult one's virtual assistant. A world in which such technology was ubiquitous, cheap, and accurate might be one in which it would be reasonable to put the onus on private individuals to inform themselves of the law before acting. It would be one way of vindicating a planning conception of the rule of law in the face of hyperlexis. Somewhat ironically, it also suggests that planning theorists should regard technological innovation, rather than lawyers, as central to ensuring the ongoing viability of the rule of law in the modern administrative state.[49]

IV. CONTESTATION

Unlike more familiar challenges to the rule of law, such as authoritarianism and populism, hyperlexis is not an external challenge but rather arises out of legalism itself. Hyperlexis is a normal and predictable feature of any complex administrative state that governs many millions of people, particularly when government is required to act through written law rather than executive diktat, managerial discretion, or deference to scientific expertise on a case-by-case basis. In other words, planning theories face a built-in constraint, as they are most plausible in simpler contexts in which the costs of obtaining legal knowledge are lower, becoming less plausible as governance becomes more complex. If the rule of law is essentially and

46. MARGARET MARTIN, JUDGING POSITIVISM (2014), at 132.

47. As Chalmers and Leverick put it, "there are so many criminal offences that the consolidated list would be of little practical use to anyone, particularly as many regulatory offences might appear almost meaningless were they to appear stripped of context." *Quantifying Criminalization*, *in* CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 55–79, 78–79 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2014).

48. Anthony Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017).

49. *Contra* Raz, who regards safeguarding the rule of law as the special province of courts and the legal profession. *See* RAZ, *supra* note 3, at 226.

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exclusively about planning, then Hayek was right: the modern administrative state is inimical to the rule of law.[50]

This conclusion is hard to square with the idea that the rule of law is of particular value when bonds of kinship, status, religion, or informal community norms no longer suffice for social coordination and dispute resolution. Notably, many of the societies that are commonly believed to most closely realize the ideal of the rule of law also have extensive administrative states, and corresponding levels of hyperlexis. If the rule of law depends on ex ante certainty of the law, then in practice it would be limited to small-scale solidaristic communities—presumably communities that have relatively less need for express rulemaking in the first place. It counts against a planning conception that it implies that the value of the rule of law is inversely related to its feasibility. Consequently, vindicating the rule of law in the age of the modern administrative state should lead us to look beyond planning.

Planning theories emphasize certain, quite intuitive, features of the rule-of-law tradition, namely the plain fact that law can, and often does, serve an ex ante function of guiding human conduct. I do not mean to suggest that planning theories are mistaken in supposing that the rule of law serves such a function. My suggestion, rather, is that under conditions of hyperlexis, another, equally intuitive, feature of the rule of law rises in normative significance—the ex post function of constraining the exercise of official power through law. Under conditions of hyperlexis, the normative significance of justification ex post waxes as that of ex ante guidance wanes. This is not because planning and contestation are incompatible ideals; indeed, it is often the case that by establishing the possibility of one we establish the possibility of the other. Rather, it is because hyperlexis is correlated with the growth of state capacity, both extensively (range of social life) and intensively (degree of regulation), making it all the more important that people who find themselves disadvantaged by the exercise of official power have the means to challenge its permissibility ex post.

Justification ex post is the typical result of contestation, in the sense of a demand by an affected party that an agent explain the legitimacy of her actions. As Waldron has put it, "the lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power"—although, Waldron notes, "[w]e disagree about the ailment, the medicine, and the character of the cure."[51] At the center of a contestatory account of the rule of law is a concern to constrain arbitrary and unreviewable governmental power.[52] It is notable that none of Fuller's eight criteria for the rule of law is concerned with the power of those affected by the exercise of

50. Crawford, *supra* note 16, at 170.
51. Waldron, *supra* note 1, at 159.
52. Brian Tamanaha, On the Rule of Law (2000), at 15–46.

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official power to challenge that exercise.[53] In contrast, whereas a planning theory highlights law's ex ante function in guiding behavior, a contestatory theory highlights law's ex post function in serving as a basis for contestation and public justification.

How does contestation contribute to "tak[ing] the edge off human political power"? Contestation may constrain official coercive power directly, by allowing an affected party to challenge a decision after it has been made. Moreover, the prospect of contestation may encourage officials to favor actions that will stand up to public scrutiny, and in that way may contribute indirectly to constraining the exercise of official power.[54] Within modern legal systems, courts and tribunals are institutions devoted to vindicating a right to contest the exercise of official power, as are a whole host of due process rights, such as the presumption of innocence, the right to challenge evidence and to present one's version of the facts, supplemented by rights to effective assistance of legal counsel as well as, in some cases, to appeal.

Contestation is not the *only* means of resisting the "rule of men." For instance, government by scientific expertise—technocracy—might be thought to achieve similar ends, replacing arbitrary government with enlightened policy. What is distinctive to contestation is the requirement that the exercise of official power be followed by publicly avowable reasons provided both to an aggrieved party and to the public at large. Waldron has usefully drawn our attention to the "culture of argument" that goes along with governance by law. The rule of law, Waldron suggests, goes beyond formal properties of law, and includes in addition the expectation that those subject to official power are entitled to "interven[e] in their own behalf in confrontations with power."[55] Interventions include arguing, sometimes forcefully, about what the law is and what it means, how it should be applied, and when exceptions should be made.[56] This is the gist of contestation. Contestation is the power of those subject to the law to call public officials to account when their interests are affected by the actions and policies of those who make and apply the law, together with the expectation that those called to account will respond with publicly avowable reasons. Hence, the power to call to account is the power to ask for reasons.

53. That said, after conceding that it is unreasonable to expect that everyone will know all the laws, Fuller briefly acknowledges that publicity can facilitate contestation. FULLER, THE MORALITY OF LAW, *supra* note 7, at 51.

54. In a similar vein, Philip Pettit distinguishes (direct) "interventional" control over government from (indirect) "virtual" and "inhibitory" control. *See* Philip Pettit, *Depoliticizing Democracy*, 17 RATIO JURIS 52, 62 (2004); *see also* Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS, NOMOS XLII 105–144 (Ian Shapiro & Stephen Macedo eds., 2000). Standards of review, such as "arbitrary and capricious" in the United States and "reasonableness" elsewhere in the common law world, serve a similar function of incentivizing decision-making that is rational in the sense of being attentive to both the scope of an agency's delegated powers and attentive to the evidence before it in a particular case. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

55. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8 (2008).

56. *Id.* at 56.

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Asking for reasons presupposes that one's interlocutors are rational in the sense of being responsive to reason, as well as reasonable in the sense of being open to interacting with others on terms they could be expected to accept. Not just anything someone says in defense of what he or she does counts as a reason. For a proposition to be a reason is for it to count in favor of, or tend to justify, the action in question.[57] But for a proposition to do that, it must in principle be possible to distinguish between those that do, and those that do not, count in favor of the action. Therefore, the possibility of contestation depends on the possibility, in principle, of distinguishing correct from incorrect uses of a proposition to justify an action. That is why contestation is not merely a matter of registering disagreement with the exercise of official coercive power, but of calling it to account: contestation requires officials to defend their decisions and policies in a manner that admits of objective review under a shared standard. When official action is subject to being called to account in this way, the relationship between those who make the law and those who are subject to it is structured by reasons, not just power, status, or votes.[58]

Contestation provides an alternative basis for familiar rule-of-law norms such as publicity, stability, and determinacy. Consider the case of official action that is governed by a secret law. Secret laws impair contestation, since without public knowledge of what the law is, it is impossible to assess the reasons given in defense of it. Suppose you are charged with an offense but are not told what that offense is. If you do not know the nature of the accusations against you, it will be difficult, if not impossible, to defend yourself; it will be difficult to gainsay an assertion that the elements of the offense (whatever they are) have been made out. Of course, you may still protest your innocence. But that is likely to be ineffectual. "You are entitled to your opinion," Bureaucrat will say. "But, with respect, you don't know what you are talking about." And if the law truly is secret, then Bureaucrat will be right.[59]

57. T.M. Scanlon, What We Owe To Each Other (2000), ch. 1.

58. This account of contestability is indebted to Alon Harel's account of the "right to a hearing." Harel analyzes that right into three incidents: the right to voice a grievance, the right to reasons addressing that grievance, and the "principled willingness" to change one's conduct in light of that grievance. *See* Alon Harel, Why Law Matters (2014), at 205.

59. "Dieses Gesetz kenne ich nicht", sagte K. "Desto schlimmer für Sie", sagte der Wächter. "Es besteht wohl auch nur in Ihren Köpfen", sagte K., er wollte sich irgendwie in die Gedanken der Wächter einschleichen, sie zu seinen Gunsten wenden oder sich dort einbürgern. Aber der Wächter sagte nur abweisend: "Sie werden es zu fühlen bekommen." Franz mischte ein und sagte: "Sieh, Willem, er gibt zu, er kenne das Gesetz nicht, und behauptet gleichzeitig, schuldlos zu sein." Franz Kafka, Der Prozess (S. Fischer ed., 1983), at 11. ["I am not familiar with this law," said K. "So much the worse for you," said the guard. "It exists only in your head," said K; he wanted, somehow, to creep into the guard's thoughts to turn them to his advantage, or take up residence there. But the guard merely said, dismissively, "You will get a feel for it." Franz spoke up and said, "See, Willem, he admits he doesn't know the law while simultaneously claiming to be innocent."] (My translation.)

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The argument can be generalized from secret law to a broader claim about arbitrary power. Suppose that Bureaucrat's decisions are not governed by a secret law, but by no law at all. There is no rule or policy governing Bureaucrat's decisions, but only Bureaucrat's personal judgment as to what seems best in any given case. (King Rex, done stalking the pages of analytic legal philosophy, has now acquired a government job.) In terms of enabling contestation, is this any better than secret law? If anything, it is worse. At least in the case of secret law, there is the possibility that some other official (Judge, say) has access to the law and can use it to evaluate Bureaucrat's decisions. But in the case of Bureaucrat's private judgment, there will be no gainsaying Bureaucrat. No one will be in a position to assess Bureaucrat's judgment by reference to an objective standard; Bureaucrat's judgment is not answerable to any standard beyond itself. Nor does allowing Judge to opine on Bureaucrat's judgment improve matters. Since there is no objective reference point, all this does is replace Bureaucrat's arbitrary judgment with Judge's arbitrary judgment. It is not clear why that would be an improvement.

Public rules imbued with a reasonably determinate meaning thus play a critical role in facilitating contestation. Contestation is not purely about access to courts or tribunals. A legal system that provided litigants with perfect access to courts would still fall short of the rule of law if the law those courts "apply" turns out to amount to nothing more than an official's arbitrary judgment. Public rules enable the parties to a dispute to triangulate their claims in light of a shared, and authoritative, reference point. Law, provided it is public, clear, and consistent, provides a common basis for you, Judge, and Bureaucrat to rationally evaluate whether the law permits or enjoins your conduct. Just as secret law makes it impossible to effectively challenge an official's decisions under that law, so too the absence of a public standard of conduct undermines the possibility of meaningful contestation. It might also undermine describing the official's actions as following a rule, insofar as following a rule requires the conceptual possibility of error—of applying the rule correctly or incorrectly.[60] Be that as it may, having a publicly accessible rule enables the parties to exchange reasons in a manner that allows their relevance and significance to be fairly assessed. To be sure, contestability does not guarantee against *ultimate* arbitrariness, in the sense of injustice. The law that governs the exercise of official power might itself be "arbitrary" from some God's-eye point of view. At least, however, contestability limits arbitrariness in the sense of power untethered to a socially agreed standard encoded in law.[61]

60. This is the upshot of Wittgenstein's "private language argument." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M Anscombe trans., Blackwell 4th ed. 1953), §§244–271.

61. I have been focusing on formal characteristics of statutes and regulations that facilitate contestation. Requirements that courts, tribunals, and officials possessing discretionary powers provide reasons for their decisions perform a similar role by enabling meaningful judicial review. *See, e.g.*, N.L.R.B. v. Metro. Life Ins. Co., 380 U.S. 438, 439 (1965); Int'l Union,

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Familiar features of the rule of law, such as publicity, stability, and determinacy, can be founded on either planning or contestation. Unlike planning, however, contestation is not undermined by hyperlexis. You can contest the application of a law to you even if you did not know ex ante that the law applied to you and were thus in no position to plan around it. Meaningful contestation requires the law to be reasonably knowable at the point of application. Your ability to contest the decisions and policies made by a public official does not depend on your knowing the law in advance. It depends, instead, on your ability to determine whether there are grounds to contest the application of the law to your case. Hence, a contestatory conception of the rule of law does not require guidance; conformity is sufficient, so long as contestation is available in cases of where law and conduct diverge. The epistemic costs of hyperlexis thus do not pose the same threat to a contestatory conception of the rule of law as they do to a planning conception.

That said, the contrast between planning and contestation should not be exaggerated. The rule of law is a complex normative ideal, with no canonical formulation. To borrow an analogy from Waldron, just as there are different conceptions of democracy—for instance, one emphasizes free and fair elections, whereas another is concerned with the quality of public deliberations on matters of common concern—ex ante planning and ex post contestation are differing conceptions of the complex normative ideal of the rule of law.[62] In the case of democracy, these conceptions are in competition with each other insofar as they emphasize different aspects of democracy; but they are not incompatible, as if we had to choose between holding free and fair elections and encouraging public deliberation. Similarly, while I have argued that a renewed concern with contestation is warranted under conditions of hyperlexis, that does not entail that contestation and planning are incompatible values. Indeed, planning and contestation frequently go together. The logical possibility of planning is correlated with the conditions of contestability, in that the features that enable contestation also enable planning: once you have contestation, the logical possibility of planning comes along for free.[63] Moreover, even if ordinary people do not, by and large, use the law to plan most of their

United Auto., Aerospace & Agr. Implement Workers of Am. v. N.L.R.B., 455 F.2d 1357, 1369–1370 (D.C. Cir. 1971); R v. Sec'y of State for the Home Dep't, ex parte Doody, [1994] 1 AC 531 at 565; Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board), 2011 SCC 62, para. 18.

62. WALDRON, *supra* note 1, at 150.

63. Screws v. United States, 325 U.S. 91, 128 (1945) (Rutledge, J., concurring) ("statutory specificity has two purposes, to give due notice that an act has been made criminal before it is done and to inform one accused of the nature of the offense charged, so that he may adequately prepare and make his defense"). Fuller appeared to at least tacitly recognize this point as well. While Fuller generally stresses the conduct-guiding aspect of law, he also acknowledged law's significance in resolving disputes ex post. *See* FULLER, THE MORALITY OF LAW, *supra* note 7, at 55.

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lives, still they do sometimes. Even if it doesn't always pay to do so, sometimes it is worth making the effort to acquire knowledge of the law and plan accordingly; and when this is so, it can only be because the law is, on those occasions, knowable in advance.[64]

Contestability falls squarely within familiar, and ancient, understandings of the rule of law. As Brian Tamanaha writes, on "the broadest understanding of the rule of law, a thread that has run for over 2000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law."[65] Dicey insisted that the "rule of law" "means . . . the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power."[66] Contestability is consistent with this aspect of Dicey's treatment of the rule of law, even if his antipathy toward French *droit administratif*, and his nostalgia for English common law, now seem quaintly parochial.[67] More recently, Timothy Endicott has linked the rule of law to the "the reason of the law," in contrast to government in which law has no "reason distinguishable from the will of the officials."[68] Paul Gowder has argued that officials acting in compliance with the rule of law are entitled to call on state power only "conditional on [ordinary people] having an opportunity to publicly contest and deploy the reasons given by law."[69] It may be that limiting the sovereign by law also makes it possible for people, in principle, to use the law for planning purposes, but that should not obscure the basic concern in the rule-of-law tradition with constraining official coercive action.

Although the role of courts and tribunals has been rightly emphasized in the rule-of-law tradition, it is also important not to overstate their significance. In a democratic society, courts are not the only fora of contestation. Democratic politics are another form of contestation in which reasons are demanded, proffered, and evaluated.[70] Contestation thus shades naturally into more general democratic rights pertaining to free and fair elections, including, for instance, restrictions on campaign financing. A contestatory conception of the rule of law shares Waldron's emphasis on the importance of a "culture" of argument, whether that be in the courtroom or in the public square. A culture of argument encompasses broadly shared

64. However, since a successful challenge to an established a norm is prone to unsettle expectations, the value of contestation is not in all cases aligned with the value of planning.

65. TAMANAHA, *supra* note 52, at 114.

66. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1982), at 198.

67. An "unfortunate outburst of Anglo-Saxon parochialism," as Judith Shklar once put it. Judith Shklar, *Political Theory and the Rule of Law, in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 5 (Allan Hutchinson & Patrick Monahan eds., 1987). Shklar wryly observes that "[i]f [English] liberty hung on so slender a thread as the avoidance of new courts to deal with new kinds of cases, the end was indeed at hand." *Id.* at 6. *See also* DICEY, *supra* note 66, at 332, 338–339.

68. Endicott, *supra* note 2, at 18.

69. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (2016), at 8.

70. Contestation is thus a broader concept than Harel's "right to a hearing," which is specifically judicial in character. HAREL, *supra* note 58, at 191–224.

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understandings about when the exercise of power requires justification, what it would take to provide such a justification, and a shared willingness to consider the reasons given by the other side.[71] For this reason, contestation depends as much on a free press as on access to courts and tribunals; as much on robust protections for political dissent as on due process; as much on the ability of citizens to communicate and mobilize as on access to legal counsel.[72]

To summarize: planning and contestation are not competing concepts so much as different aspects of our complex concept of the rule of law. Like planning, a contestatory conception is capable of vindicating familiar features of the rule of law. However, relative to planning, contestation has a comparative advantage in that it is better able to cope with the epistemic costs of hyperlexis. Contestation does not require guidance by law, but is satisfied by conformity to law, at least when there is a realistic right to contest in ostensible cases of nonconformity. Courts and tribunals are natural loci of contestation, but contestation shades into broader democratic institutions and norms, which create further opportunities for contesting the exercise of official power. Contestation has deep roots in the rule-of-law tradition, in particular in the familiar contrast between the rule of law and arbitrary and unreviewable power. Ultimately, contestation is a means of ensuring that government relates to its citizens in the logical space of reasons, rather than power alone.

V. LAW, AND THE RULE OF LAW

"The rule of law," Raz has claimed, "is the specific excellence of the law."[73] One way of interpreting this claim is as follows: the rule of law is a virtue of a system of government. That virtue is determined by the virtue of legality—what the rule of law is good for is determined by what *law* is good for. So once you understand what law is good for, then you will also understand what the rule of law is good for. On this view, the rule of law is not its own distinct virtue, but rather the virtue of a system of government in which law is ubiquitous.

Scott Shapiro takes such an approach to analyzing the rule of law. Like Raz, Shapiro has claimed that the "autonomous" benefits of the rule of law—generality, publicity, clarity, consistency, nonretroactivity, satisfiability, and stability—flow out of an analysis of legality. Legality, as Shapiro has famously argued, is a type of social planning. The Fullerian rule-of-law virtues of generality, publicity, and so forth are essential to planning. Consequently, Shapiro claims, a mode of government that

71. I am indebted to Margaret Martin for discussion on this point.

72. This connection is particularly clear on contestatory models of democratic control. *See, e.g.*, Philip Pettit, On the People's Terms (2012), at 239–292.

73. Raz, *supra* note 3, at 226.

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ignores the rule of law is "simply not engaged in the basic activity of law."[74] In other words, the virtue of the rule of law is explained in terms of the virtue of legality. Consistent with this interpretation, the rule of law plays a noticeably minor role in Shapiro's treatment of legality. It is, after all, simply what happens when government operates through law.

A planning theory of the rule of law and a planning theory of legality are made for each other. Since the same virtue underpins both legality and the rule of law, it is natural to explain the latter in terms of the former by regarding the rule of law as simply ubiquitous legality. In contrast, contestation is not standardly regarded as an essential feature of the concept of law, meaning it is not so easy to reduce the rule of law to legality. This requires a somewhat more complex account of how the rule of law and legality relate to each other.

Note, however, that while reducing the rule of law to law's ubiquity yields an elegant account of legality, it is surprisingly difficult to pin down what the argument for this reduction is supposed to be. But it needs defense, for it is not self-evident. After all, there are examples of legal practices whose value is emergent—that is, distinct from the aggregate of its applications to particular instances. Consider freedom of expression. It might be that in many cases protected speech is of low value. But even so, one might reasonably believe that the virtue of a general principle of freedom of expression transcends the value, such as it is, of protecting large amounts of petty and malicious speech. The relation between the rule of law and legality might be similar, in that the rule of law, while constituted by a government that generally acts through law, may nevertheless have a value that transcends whatever value is immanent in requiring legal form in particular instances. If the value of legality and the value of the rule of law are related in this way, then one may reject a planning theory of the rule of law without rejecting a planning theory of law.

Of course, opening up conceptual space between the rule of law and legality is one thing; showing that distinction to be substantively plausible is another. After all, perhaps Waldron is right that it would be "odd" to treat the rule of law as completely unrelated to legality, as it would be if it were simply another political virtue, "such as justice, liberty, or equality."[75] Yet while the rule of law and legality are clearly not completely independent values, the contestatory conception I have outlined suggest that they are nevertheless distinct. The distinctive virtue of the rule of law is ensuring that those who wield public power relate to those who are subject to power through intersubjectively ascertainable reasons. That virtue is not entailed by a conception of law as social planning, even though explicit planning in the form of written law facilitates ex post contestation. Thus, unlike Shapiro's account, a contestatory conception suggests that the rule

74. SCOTT SHAPIRO, LEGALITY (2011), at 394.
75. Waldron, *supra* note 55, at 59.

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of law possesses a distinctive significance that cannot be reduced to ubiquitous legality. Ubiquitous legality is necessary but not sufficient for establishing the rule of law.

Is a view along these lines substantively plausible? I believe it is. As I argued above, a government could not vindicate the rule of law if it systematically failed to operate through law. The rule of law requires contestation, and contestation is only meaningful if there are standards of correctness by which the parties can assess when the exercise of power qualifies as "arbitrary." In the context of government, this requires publicly known rules of reasonably determinate meaning—in a word, law. Thus, legality is necessary to the rule of law.

On the other hand, it is entirely possible for government to be thoroughly legalistic while nevertheless falling short of the rule of law. A despotism that brooks no dissent can operate through laws fixed and knowable in advance. The law may enable citizens to predict that they will be just as unfairly treated in the future as they are now. Despotism aside, even if a government treats people fairly, and does so through legal rules that are general, public, clear, consistent, nonretroactive, satisfiable, and stable, that does not yet establish that there is a meaningful ability to contest how government implements its policies. Certain forms of bureaucratic organization may approximate this form. This shows that legality is not sufficient for the rule of law.

Taken together, this line of argument suggests that proponents of a contestatory conception of the rule of law have adequate ground on which to resist the reduction of the rule of law to ubiquitous legality. While the rule of law is not a completely distinct value from legality, it is not the *same* value. The rule of law is a distinctive virtue of a system of government that goes beyond simply ensuring that government action is generally authorized by law.

I end with two observations, one conciliatory and one cautionary. First, legal positivists rightly insist that neither the concept of law nor the rule of law can be a stand-in for a comprehensive political philosophy.[76] After all, the constraint of arbitrary power is but one of several fundamental political ideals. While contestation helps ensure that government relates to its citizens in the space of reasons, contestation alone does not pass upon the quality of the reasons that are accepted as authoritative. Hence, a contestatory conception of the rule of law does not presuppose that contestation will inevitably operate to secure rights, ensure a fair distribution of benefits and burdens, or otherwise further just causes. It describes a condition in which officials are answerable to citizens in the space of

76. The question of whether to construe the rule of law formally or substantively is controversial. For more substantive approaches, *see* GOWDER, *supra* note 69; Julian Sempill, *Ruler's Sword, Citizen's Shield: The Rule of Law and the Constitution of Power*, 31 J. L. & POL. 333, 333–415 (2016).

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intersubjectively accessible reasons, rather than arbitrary will. That is surely significant, but it is not even close to everything we might wish of government.

Secondly, contestation is but one means of constraining the arbitrary exercise of official power. The place of contestation in an adversarial legal culture is prominent, but clearly that does not mean that other means of contestation—most notably through the ballot box—are dispensable. Nor is contestation a panacea. Some forms of official power, such as the power of prosecutors to bring charges, or even more clearly, to *not* bring charges, have proven to be highly resistant to contestation. Moreover, even when official power is open to contestation, the costs of contestation are frequently substantial. Simply creating more procedural rights is unlikely to solve this problem, in part because only sophisticated parties are likely to avail themselves of legal rights, in part because procedural rights are often traded away in the course of contestation, and in part because such rights are prone to making the process of contestation lengthier, more complex, and costlier. Ensuring that contestation remains a meaningful and accessible option is thus an ongoing and unsolved problem for the rule of law.

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