BOOK REVIEWS

The Rule of Law in America
Ronald A. Cass
Baltimore: The Johns Hopkins University Press, 2001, 214 pp.

The idea of the rule of law is powerfully engrained in our constitutional culture. Indeed, as Ronald A. Cass, dean and professor of law at Boston University School of Law, points out in his new book, *The Rule of Law in America,* it is so engrained that, amidst all the passions of the contested 2000 election, both Al Gore and George W. Bush "were prepared to accept courts as the ultimate arbiters of matters crucial to their ambitions." Certainly, the foreknowledge that court decisions would be accepted in a contest to lead the most powerful government on Earth sets the United States apart from the majority of nations.

But what do we really mean when we invoke the rule of law? Has there been an erosion of the rule of law in the United States? And, if so, what should be done in the way of implementing corrective measures? These three questions are at the heart of Cass's book.

On the first point, Cass dissects in considerable detail each of the crucial elements of any "rule of law" regime worthy of the name. In his view—and that of the majority of commentators, ancient and modern—those elements are (1) fidelity to rules, (2) of principled predictability, (3) embodied in valid authority, (4) that is, external to individual government decisionmakers. Putting those elements together somewhat less formally but nevertheless elegantly, Cass explains that the rule of law "pulls society in the direction of knowable, predictable, rule-based decision making, toward limitations on the alignment of power with legitimacy." Reduced even further to its elemental core, the rule of law implies a system in which the exercise of government power against individuals is constrained by what Cass calls "extrinsic rules of principled predictability."

Our Founders, of course, with their attention focused on curtailing the arbitrary exercise of power, understood those rule-of-law prerequisites very well. In Federalist No. 62, one of the essays in the *Federalist Papers* whose authorship is not known with certainty, the author (thought most likely to be James Madison) wrote: "Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed."

Cato Journal, Vol. 22, No. 2 (Fall 2002).

Cass's explication of what the rule of law means is entirely serviceable, especially for those not already steeped in jurisprudential theory. But it is on the second question—are we witnessing an erosion of the rule of law?—that the book makes its most significant contribution to our present understanding. Through reasoned and dispassionate argument, Cass asserts that, in the main, most judges "feel inhibited from moving outside the bounds of authoritative sources even when their intuition strongly suggests that a particular outcome is just." By examining empirical data, such as high settlement and low appeal rates, indicative of judicial actions that fall within a narrow range of predicted outcomes, he goes a long way toward proving his case.

Without doubt, in most cases there is some degree of running room for the exercise of judicial discretion, because the case is not "on all fours" with controlling authority. But most of the time, as a result of constraints ranging from reversal aversion and desire for approval from professional colleagues to the sheer volume of cases on the dockets and their prevailing ordinariness, judges act principally as "translators of the law." By this, Cass means that judges adhere closely to the text, as they understand it, in performing their interpretative tasks. In one of the many instances in which he employs instructive analogies, Cass contrasts the prevalent translator mode of judging with that advocated by Ronald Dworkin, which Cass labels the "chain-novel" model. In the chain-novel mode, a judge is relatively unconstrained by existing text, taking his or her principal task to be the employment of creative impulses in the service of the continuing evolution of the law as a normative work in progress. Indeed, in his seminal 1985 work, *Law's Empire,* Dworkin makes no bones about where real power resides under the chain-novel model of judging: "The courts are the capitals of law's empire, and judges are its princes."

Cass freely acknowledges that not all judges fit the "translator" mold, and even the ones that largely do sometimes stray into the chain-novel mode. It is landmark Supreme Court decisions, of course, that attract the most public attention. Cass highlights a few cases, including *Brown v. Board of Education,* in which he believes the outcomes are rooted more deeply in moral principles than in analysis of the existing external legal authorities. But, according to Cass, these are the exception, not the rule.

What about the Supreme Court's *Bush v. Gore II* decision that effectively ended the 2000 presidential contest? Wasn't that a prime example of a "political" decision? A full discussion of *Bush v. Gore* is beyond the scope of this review. Suffice it to say that Cass's analysis, consistent with the judicious tone of his book, is measured. In his view, the four dissenters had the better legal argument on the remedy question, that is, whether to simply stop the recount process. That aspect of the decision gives some sway to the "law as politics" contention. But Cass points out, as I have elsewhere as well, that despite differences of party and perspective, all the justices except John Paul Stevens and Ruth Bader Ginsburg agreed on the substantive issue—that the indisputably different stan-

dards being used by local election boards in counting votes violated the Constitution's equal protection guarantee. That is an important point. In further mitigation of the charge that the five-justice majority decision was political, Cass also observes that the case presented unusual issues in a context unlikely to recur, and that a decision had to be reached quickly. In a constitutional case of such moment, I am not sure those factors ought to carry that much weight in the debate over whether the decision was based more on law or politics.

As to the third question, in the last part of *The Rule of Law in America*, Cass examines the extent to which current problems, such as excessive punitive damage awards and increasingly abusive discovery and class action practices, undermine public confidence in the rule of law. While offering some modest suggestions for reform, he maintains that ill-informed press coverage often fuels public perceptions that exaggerate the extent of the problems. For example, there was widespread reporting in the popular press about the almost $3 million verdict against McDonald's for serving too-hot coffee that burned 79-year old Stella Liebeck when it spilled. And the same goes for the $4 million verdict against Dr. Ira Gore's BMW dealer for not disclosing that his new car had been repainted to cover some scrapes. Cass points out that few people know that McDonald's had received many hundreds of complaints about coffee spill burns before Ms. Liebeck filed her lawsuit or that McDonald's served its coffee 20 to 30 degrees hotter than the norm in restaurants. And few know that Dr. Gore ultimately settled his claim for $54,000, or $3.95 million lower than the initial eye-catching award.

Cass cannot be faulted for calling our attention to the fact that, often, public perceptions outrun the true extent of the legal system's problems. But perhaps he would agree that there is enough that needs fixing—for example, out-of-control mass tort litigation that increasingly substitutes for what should be policymaking by elected representatives—that public perception concerning the workability of our legal system indeed is being put at some risk. When the system allows entire industries to be decimated by class action suits, without at the same time providing a swift and sure means to compensate those with legitimate and provable claims, an important component of the legal regime is in need of repair.

Similarly, even though the appellate process often serves to correct exorbitant jury verdicts, there is enough randomness and arbitrariness in the process to play havoc with the notions of predictability and due notice inherent in a rule-of-law regime. It is difficult to square the October 2002 jury verdict against Philip Morris awarding $28 billion in punitive damages to a California smoker with a rule of law regime in which courts are supposed to remedy individual wrongs and legislatures are supposed to decide whether, as a matter of social policy, the sale of certain products should be banned. No matter that the jury verdict is almost certain to be reduced substantially on appeal. Having set forth the case that, for the most part, the rule of law ideal in the United States commands respect,

perhaps Cass next can turn to a more fulsome analysis of the problem areas he identifies and offer a more detailed set of reform recommendations.

Another point that could have benefited from more explication is the relationship between the rule of law and economic prosperity. By limiting undue interference from the state and curtailing the arbitrary exercise of discretion by government officials, the rule of law provides individuals with the breathing space they need to pursue their livelihoods and better themselves in the manner they see fit. Certainly, economic prosperity ultimately is dependent, for instance, upon the extent to which individuals remain free to own, use, and exchange property absent excessive government intrusion. The positive relationship between economic prosperity and a rule of law regime is one that developing countries especially need to heed.

It is not surprising, then, that F. A. Hayek placed such emphasis on the rule of law in *The Road to Serfdom.* There, to come back around to definitional first principles, Hayek explained that the concept "means that the 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 authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."

All in all, Dean Cass has done well to remind that if we assert too often, without a sound basis, that judges in the United States act unconstrained by the rule of law, we may actually create a self-fulfilling prophecy. With expectations for adherence to neutral principles of law lowered, more and more judges may be tempted "to try a hand at creating the legal solutions they deem best suited to solve whatever problems they see." If that were to happen, it would be a tragedy not only for us here at home, but for those abroad who look to the United States as an example of a constitutional republic in which the rule of law prevails.

Randolph J. May
The Progress and Freedom Foundation

Back-Alley Banking: Private Entrepreneurs in China
Kellee S. Tsai
Ithaca, N.Y.: Columbia University Press, 2002, 316 pp.

There is a popular saying in China: "Whenever there are policies from the top, the bottom produces counterstrategies" (*shangyou zhengce, xiayou duice*). According to Kellee Tsai, that has certainly been true of China's informal network for private-sector capital. In response to discriminatory government policies, private entrepreneurs throughout China have created an intricate system of "back-alley banking" to finance household- and firm-level ventures. Tsai, a political scientist at The Johns