England, embodied in practice and institutions, is less presentist than our own reliance on a document. Americans' agonized hand-wringing over our relation to our past only comes about because we see our *Constitution* as something other than who we are and what we do — a written object. I understand and agree with Rubenfeld's view that a constitution must be a commitment over time. But I do not believe that a writing makes it more durable. As Rubenfeld's own theory has it, the written words of the actual historical document become less important than the way in which those ideas have been incorporated through history in our institutions. To believe that the writing embodies the commitment would lead to positivism and textualism that run counter to Rubenfeld's own 'paradigm case' views about interpretation. Writing, in short, is a dangerous metaphor for Rubenfeld as well as an inapt one. What makes the commitments enduring is our continued practice of committing ourselves to them, over time, in life, not in writing.

Conclusion

I was keen to review this book because I think it takes an ambitious and important step in rethinking the relationship between democracy and constitutional law. The book's central point, that self-rule must be rule over time, in a trajectory determined by a commitment, deserves thought as it reframes the debate over the role of constitutional law in a democracy, the relative legitimacy of democratic institutions (especially the legislature and the judiciary), and the process of interpreting and applying law. I hope it will be taken on by the legal community and become the basis of a renewed commitment to articulating how it is that our commitments in the past can bind us into the future.

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On Law and Legal Reasoning

Fernando Atria
(Hart Publishing, 2002)

When the Rule Hits the Road

Many years ago, when I was clerking for a judge, I told my co-clerk that, ultimately, how the judge came out in the case didn't matter, as long as we got the rule right. 'No way,' she replied, 'it's not what the rule says that

matters, but how it hits the road.' My co-clerk was right, and, in this respect, so is Atria's book.

In this densely-argued text, Atria makes the case that conceptual theories of law have mistakenly focused on the sources, character, and formulation of rules instead of their application. As a result, theorists have been misled into arguing that law is source-based, authoritative, sticky, exclusionary, etc, if the meaning of its rules is (or can be) clear; and law is not source-based, certain, predictable or law-like if the meaning of its rules is (or must be) ambiguous or full of gaps. The philosophical argument about the nature of law has been derailed, in Atria's view, into an argument about the clarity of natural languages and the possibility of interpretive certainty.

Instead, Atria concludes, we should recognize that the extent to which legal norms are formalistic or not is not a function of the language in which the norm is formulated, or the legal authority attached to the institution promulgating it, but is a matter of *degree* based on how it is applied to particular cases. This degree of formalism cannot be predetermined by the formulation of the rule or discovered through an analysis of the legal materials. Instead, the degree to which law is 'sticky' or 'defeasible' is a matter of the place law holds in the society and the 'image of law' its practitioners adhere to as a matter of politics and culture.

Atria blends careful analytic dissection of contemporary legal theorists like Raz, Hart, and MacCormick with historical examples from Roman law to slowly build the case for these conclusions. The arguments are significant and provocative for legal theory: law does exclude some reasons not explicitly articulated in the positive law materials, but never all reasons. Therefore, law is never entirely separate from the general normative background or entirely source-based, as the positivist tradition would have it, but neither is it merely identical with the normative and political background, as a rule-sceptic would have it. Law does exclude some background reasons but not others. What sorts of background reasons are excluded varies depending upon the legal community's ideals of law, and is not itself determined by the legal materials in that community, or by a philosophical concept of law.

In Chapter One, Atria sets the stage by arguing that legal theorists have been misled by the analogy between game rules and legal rules into assuming that legal rules are necessarily or conceptually exclusionary. But Atria believes the game analogy is not apt. The reason why you can't raise normative arguments to keep your chess opponent from taking your queen, but you can raise normative arguments to keep the bank from foreclosing on your house, is because these two kinds of rules, Atria asserts, belong to qualitatively different kinds of institutions. Games *regulate* in order to *constitute* a new form of practice. Not adhering to the rules means that you cannot participate in the game, which is, after all, the whole point. By

contrast, legal rules *constitute* practices (contracting, renting, punishing) in order to *regulate* pre-existing behavior. The point of the legal rules is not just to play the legal game, but to improve the underlying human world. So, in their application, legal rules do not necessarily exclude extra-legal considerations in the same way game-rules do. Legal institutions, in sum, are instrumental in a way that games are not. The fact that they are instrumental means that rule-formalism would be self-defeating in law, just as it is self-sustaining in games. This is not to say that a legal system may not be formalistic. Atria argues that the law of ancient Rome was more game-like, because in that setting, law was not understood instrumentally, but constitutively. Law was part of the world, not a tool for improving it. Modern law, by contrast, Atria argues, is not about constituting a world, but regulating it.

In Chapters One, Three and Four, Atria gives a sustained argument for the importance of application over interpretation, engaging the work of most of the key positivist theorists. Representative is Atria's argument against Hart's understanding of 'hard' cases as 'penumbral' cases in which the meaning of the rule is not clear. Invoking Fuller's example of applying the rule against sleeping in the train station to the commuter who nods off, Atria notes that the meaning of the rule in that case is perfectly clear — the commuter is sleeping in the train station. There is no interpretive problem. Instead, the problem is that we don't believe, for background reasons, that we ought to apply the rule in this situation. Although Atria makes Fuller's point against Hart, he also disagrees with Fuller's rationale that to understand the meaning of the rule requires an analysis of its purpose. The meaning, Atria objects, is clear — sleeping means sleeping. If we were playing a game in which one loses by falling asleep in a train station, the commuter would lose, and no 'ambiguity in the rule' would be found. Because legal rules *can* be applied in this formalistic way, Atria argues, the problem is one of application, not interpretation.

In Chapter Two, Atria takes on Raz's concept of legal authority. If law is to be authoritative in Raz's sense, then it must, by virtue of its source, and without consideration of extra-legal reasons, be able to tell someone how to act in a particular case. And, if there is no law on point, then the person will have to consider extra-legal reasons in order to resolve the case. Atria counters, rather ingeniously, that the existence of a gap in the positive law does not necessarily mean that the case is a 'hard' one. Sometimes, a gap in the law merely means that the plaintiff/prosecutor has no claim, and the court must dismiss the case (and has no discretion to decide otherwise). Other times, however, a gap in the law does require the marshaling and evaluation of extra-legal reasons. The legally authoritative materials, however, cannot help a decision-maker distinguish between 'hard' gaps and

'easy' gaps, and therefore, cannot provide an account of when a court may exercise discretion and when it may not.

> In short, legal gaps produce a dilemma for the sources thesis: either they do not exist, and then all cases are regulated by source-based rules, or they exist in an amazing quantity: not only stealing electricity, but also gardening, wearing black clothes, sleeping at night, ... and an enormous number of other actions which are not explicitly forbidden nor explicitly allowed would constitute, if brought before a court, 'unregulated cases', meaning that the court would have discretion to solve them in the most appropriate way. Thus, when looked at from the point of view of legal reasoning, the sources thesis implies either formalism or rule-scepticism (86).

In Chapters Five to Eight, Atria explains how a legal rule can be somewhat sticky, that is, independent of normative considerations not specified in the rule, yet not independent of all of them, and why the law cannot specify the conditions of its own application. He first has to answer the question why the exception does not swallow the rule — or, to put it differently, why the judge's application of the rule does not change the rule or make it just a rule of thumb. He goes through the standard objections to rule-utilitarianism, and a similar problem in discourse ethics, to demonstrate the difficulty — why obey a rule if every time it is normatively undesirable one abandons it? Ultimately, he says, the rule-applier must balance the value of predictability against the 'appropriateness' of the rule in the case, by gauging the extent to which the case is 'normal.' But the determination of when a case is 'normal' is not one that can be determined by the form or clarity of the rule or by a rule about applying the rule. So what does determine when a rule should be followed or not? The normative background of the practice of law.

Atria again uses Roman law to illustrate the difficulty we have in reconstructing these background understandings that determine what cases are clear, what arguments are appropriately legal, and when rules are to be defeated by norms. The Roman legal materials alone do not help us, but leave us wondering why the formulae of oral contracts were applied so formalistically, for example, when written contracts were never developed. What we need is not just an understanding of Latin, Atria says, but 'to think, to see the world, as a Roman' (160). This understanding would give us an 'image of law', an idea about the relevant place of law in a social world and about the features of experience that are legally relevant. Only in that way would we know how to apply Roman law as the Romans did. Atria then reiterates the impossibility of leaving such normative background considerations out of legal reasoning and concludes with some comparative examples of how legal argumentation can be more or less formalistic, and how what counts as a 'legal reason' can change with history and culture.

While I do think Atria is right to focus on the application of legal rules instead of their formulation or source, I believe he makes his case somewhat easier than it ought to be by implicitly assuming a plain-language theory of meaning. He argues that the meaning of a word is (or includes 'at least') the 'standard' instances of its use. I believe this is a fallacy. While it is true that, in the partial absence of context, we will presume a 'usual' context in which to understand a word, words do not mean only what they mean in that 'usual' context, and may mean something quite different. And the inferences about 'usual' context that we draw when we read words in legal rules, like the determination of whether a case is 'normal,' often include deep normative commitments.

Assume, for example, that Martians took over the world. They allow us to keep our legal institutions, but provide us with a new set of legal rules. One of these rules is, 'People with blonde hair may not be lawyers.' On the basis of this 'plain meaning' we exclude a blonde-haired lawyer from the profession. But then, two more cases come before us, as judges. In one case, the person is a natural blonde who has dyed her hair brown. In the other, the person is a brunette who has dyed her hair blonde. Based on the rule and on our prior decision, one or the other or both must be excluded from the profession. What is the meaning of blonde here? Is there a 'usual' context for us to use to determine its meaning? Or isn't it the case that we look for normative clues — that is, why do we care about blondeness here? Is this a race-based statute? Or is this an aesthetic-based statute? Even to discern the statute's 'plain meaning,' it seems to me, requires some understanding of the normative commitments behind the discrimination of blondeness and non-blondeness. And, when we see the second and third cases, even the first 'plain meaning' case becomes problematic. Are we sure that this first case was properly decided? Or should we simply give the first defendant an opportunity to dye her hair? In other words, once we figure out how to apply the statute in the second and third cases, the first case becomes harder, too. We are no longer as confident about what the 'plain meaning' of blonde is to be in this context. There is a normative basis to the 'blondeness' distinction that must run all the way down to its very meaning. And since we don't understand the normative world of the Martians, we cannot even hope to understand the significance of blondeness to the Martians, let alone apply the statute. Moreover, these questions are quite to the side of the background anti-bias norms in our own legal tradition that might suggest we shouldn't apply the statute at all.

In other words, is it only the application of Roman law that we cannot understand, or is it also the understanding of Latin (as the Romans understood it) that we cannot understand? In short, while I agree with Atria that the background normative understanding of the world and the place of

law in it is necessary to the application of law, I would argue that the same goes for understanding the *meaning* of law.

For the same reason, I believe Atria overstates the extent to which rules of games, or rules of ancient Roman law, can be 'understood' apart from their background normative commitments. While I take (and admire) his important point that in both games and ancient law, the rules are constitutive, not instrumental, that does not mean that we can understand what these rules mean apart from an understanding of the practices of football players and ancient Romans. Indeed, part of our understanding of these rules *is* that rule-wrangling in games is bad sportsmanship, and mucking up the ancient Roman law is offensive to the gods. As Atria would agree, the formalism is itself justified by the deeper normative commitments; it doesn't 'stand apart' from normative commitments. But I would argue further that this knowledge affects not just whether the rules are *applied* formalistically but how we understand their meaning. Suppose, for instance, that in ancient Rome an oral contract is a prayer to the gods. If this is true, then it is no wonder the ancient Romans never thought to establish written contracts. No wonder the verbal formulae were sacrosanct. It is hard to imagine that these background understandings wouldn't affect the meaning (and not just the application) of the rules. For example, a 'mumble' might still be a 'plain meaning case' of an oral contract, if it is only the gods who must hear. But a verbal 'fumble' would not, even if understood by the other parties present. What is 'clear' and 'plain' about the meaning of the rule has got to be dependent upon the contextual understanding of its terms, not a dictionary definition. Even in formalistic systems, the rules are still not applying themselves, but they are applied in the way they are because of the world in which they are embedded. I don't think, ultimately, Atria would disagree with this way of putting it, but at times in the book, he may overstate the 'autonomy' of rules in such systems. (Compare Atria 'The possibility of legal systems like Ancient Rome's shows that no general statement about legal norms being impossible to apply without grasping their purposes can be true' (105), with '[i]f we wanted to understand an alien society's image of law, we would have to start by trying to understand their practices from their point of view' (222)).

The other difficulty that arises by trying to retain a plain-meaning account of what a statute 'means', and then allowing 'normative considerations' to trump the statute in certain applications, is that every time a court interprets a statute, it must raise the further question of whether it can 'sever' the 'improper' applications from the statement of the rule. In its worst guise, a court would invalidate every statute it finds inappropriate to any context out of a concern that the one inappropriate application cannot be severed from the statute. Much more commonsensical, it seems to me,

would be to say that the statute merely 'does not apply' to the inappropriate case; not that it applies, but is trumped by other considerations. Wittgenstein's example, 'teach the children a game,' is instructive here. Strip-poker is a game, on a dictionary-definition understanding of the term, but strip-poker is an inappropriate game to teach children. Do we say that the rule is trumped by 'other considerations,' or that the meaning of 'game' in this context did not include strip poker? If we say that the rule applies to strip-poker, then we must ask whether the court has authority to sever this aspect of the rule from the rest of its 'appropriate' applications. In any event, it is not at all clear to me that Fuller's account of meaning is 'plainly false' (113). The philosophical dispute about to what extent meaning is contextual and normative is by no means resolved.

But disagreements aside, what is wonderful about this book is its insistence upon looking at the law in action and application, as well as its insistence on the inextricability of legal form from legal context. Especially for readers from a common law background, the asides and examples from Roman law are helpful and enriching. I was especially intrigued by the comparative insight that ancient Roman law was qualitatively different from our own understanding of law in that it was non-instrumental. Atria goes on to say that early Roman law has this non-instrumental character because it was understood to be part of the world, of divine, not human origin. Because one cannot know the purposes of the gods, Atria explains, one could not mess with this law, and one applied it formalistically. Law of human origin, on the other hand, is based on human purposes, which remain to be accounted for in its application. Hence, the more we understand the law as of human making, the more amenable we are to correcting its application in light of its reason (50–59). This point, of course, would suggest Atria's conclusion: that positive law ought to receive a less formalist application, but it also suggests that natural law should receive a more formalist application. This counter-intuitive insight is powerful, especially given that the opponents of positive law theory generally use the specter of formalism as a weapon. Yet, Atria makes clear that both the modern positivist and non-positivist share the view that law is a tool, not a goal. What is left unstated, however, is the conclusion: if law is a tool, this is a blow to law, for law can then have no authority except insofar as it serves other normative purposes. The law becomes servant, rather than master or ideal.

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