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The Promise of the Rule of (Environmental) Law

A Reply to Pardy's Unbearable Licence

Jocelyn Stacey¹

Introduction

"The Environmental Emergency"² argued that environmental issues confront lawmakers as an ongoing emergency. The complexity of environmental issues and the possibility of catastrophe mean that it is not always possible for lawmakers to foresee an environmental catastrophe or to know in advance how to appropriately respond. The implication of the environmental emergency perspective is that administrative discretion is unavoidable in environmental law. "The Environmental Emergency" argued that a public-justification conception of the rule of law is capable of providing legal constraints on the exercise of this discretion because it requires that all government decisions be publicly justified on the basis of core common law principles.

Those subscribing to a libertarian position are likely to object to the argument advanced in "The Environmental Emergency." Libertarian or classical liberal positions rest on a formal conception of the rule of law, a theory of limited government, and a strong emphasis on private property rights.³ As such, libertarians are opposed to the delegation of extensive discretion to the executive branch of the state. For example, Richard Epstein writes, "the cumulative demands of the modern social democratic state require a range of administrative compromises and shortcuts that will eventually gut the rule of law in practice, even if the state honors it in

¹ Assistant Professor, Allard School of Law, University of British Columbia. Thanks to colleagues at the University of British Columbia, Allard School of Law and the McGill Faculty of Law for their helpful feedback on this reply.

² Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 OHLJ xx [Stacey, "Environmental Emergency"].

³ See e.g. Eric Mack, "Libertarianism" in George Klosko, ed, *The Oxford Handbook of the History of Political Philosophy* (Oxford: Oxford University Press, 2011) 673; FA Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) at 140-3; Richard A Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge: Harvard University Press, 2011) [Epstein, *Design*]; Libertarians argue that environmental protection can be assured by vindicating private rights through common law property, contract and tort actions: Richard A Epstein, *Simple Rules for a Complex World* (Cambridge: Harvard University Press, 1997); Bruce Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1:1 JSDLP 29.

theory.”⁴ In Epstein’s view, the ambitions of “the modern social democratic state,” which include environmental protection and land use management, inevitably succumb to, amongst other things, biased decision-making, retroactive laws and misplaced judicial foci as government attempts to respond to mounting social challenges.⁵ The libertarian position poses a serious, though not insurmountable, challenge to the public-justification conception of the rule of law that I introduce and defend in “The Environmental Emergency.” This reply takes the libertarian critique seriously.

As a libertarian,⁶ Bruce Pardy could have mounted this kind of challenge in his response to “The Environmental Emergency.” Unfortunately, his critique represents a regrettably missed opportunity for the Osgoode Hall Law Journal to be a site of serious academic exchange. Indeed, Pardy’s response impedes such an exchange through a gross mischaracterization of my argument. For example, I am said to argue “that the state of the natural world is incompatible with the rule of law.”⁷ I am accused of arguing for the nonsensical view that “unconstrained executive discretion is legitimate because it is constrained.”⁸ His response to my article is dismissive and condescending. In his view, I have “lost the will to abstract”⁹ and I “wildly extrapolate [from the challenges posed by the ambiguity of language] to abandon the enterprise of expressing rules and reasons that limit the power of those who govern.”¹⁰ He calls my argument “a cop out”¹¹ and “a process of doublethink that would make George Orwell spin in his grave.”¹² In his view, my position is akin to that of “Henry VIII,”¹³ leading to the comment “Off with her head.”¹⁴ He finds my argument “amusing.”¹⁵

⁴ Epstein, *Design*, *supra* note 3 at 12.

⁵ *Ibid* Chapters 11-13.

⁶ Bruce Pardy, *Ecolawgic* (Canada: Fifth Forum Press, 2015) at 75-6 [Pardy, *Ecolawgic*]. *Ecolawgic* is a self-published monograph that is advertised by a website of the same name, complete with a 10-point “Manifesto”: <http://www.ecolawgic.com>.

⁷ Bruce Pardy, “The Unbearable Licence of Being the Executive” (2015) 52:3 OHLJ xx at 8 [Pardy, “Unbearable”].

⁸ *Ibid* at 14.

⁹ *Ibid* at 12.

¹⁰ *Ibid* at 13.

¹¹ *Ibid* at 12.

¹² *Ibid* at 15.

¹³ *Ibid* at 6.

¹⁴ *Ibid*.

¹⁵ *Ibid*. at 17.

I was surprised by the level of vitriol and insult in Pardy's response. It was all the more surprising because Pardy was a double-blind external reviewer of my article. He had the opportunity to raise his concerns in that capacity, but declined to do so. Instead, he shifted from the position of being a presumptively impartial peer-reviewer to that of a polemical adversary, and along the way was allowed to essentially co-publish his critique of the article with the article itself. I am glad now to have the opportunity to reply.

In contrast to Pardy's critique, this reply seeks to contribute constructively to a conversation about the meaning and purpose of the rule of law in the environmental context. It does this in three ways. First, this reply reclaims the environmental emergency framework and defends this framework against the libertarian critique. Part I argues that, by focusing on the administrative state, environmental libertarianism does not supply a theory of law that adequately accounts for the possibility of catastrophe. Conversely, if one accepts that emergencies can be governed by a substantive conception of the rule of law, as Pardy seems to do, then the administrative state can also be governed by a substantive conception of the rule of law. Part I, in short, reestablishes the essential connection between emergencies and everyday discretion and demonstrates that the environmental emergency framework does considerable theoretical and analytical work.

Second, this reply examines Pardy's and my divergent views on why the rule of law is something worth having in the first place. Part II contrasts the libertarian understanding of autonomy with the understanding of autonomy that underpins the public-justification conception of the rule of law. On this basis, it defends the public-justification conception against the charge of arbitrariness and argues that this conception is at home in Canadian public law.

Third, this reply sets out future directions for an environmental research agenda based on the public-justification conception of the rule of law. Part III accomplishes this task by taking up Pardy's objection that the existing state of Canadian environmental law undermines the aspirational conception of the rule of law that I defend. It argues that a commitment to this conception of the rule of law has considerable potential to secure greater environmental protection by subjecting all public decision-makers to the obligation to publicly justify their

decisions. It points to where greater attention is needed to better understand these linkages between rule-of-law theory and environmental law practice.

I. The Challenge Posed by the Environmental Emergency

This part reclaims the environmental emergency from Pardy's confounding characterization of the original argument. A central objective of "The Environmental Emergency and the Legality of Discretion in Environmental Law" was to draw out the implicit rule-of-law assumptions in Canadian environmental law. It argued that conceiving of environmental issues as an ongoing emergency forces us to re-examine our most basic assumptions about law and how it governs the environment. This argument was framed using Schmitt's challenge; that is, the challenge to show how emergencies can be governed by law. "The Environmental Emergency" argued that Schmitt's challenge allows us to unpack different assumptions about the rule of law and how it can govern the emergency. It argued that a public-justification conception of the rule of law offers a full response to Schmitt's challenge.

The crux of "The Environmental Emergency" is that environmental issues constitute an ongoing emergency for the purposes of theorizing about the rule of law.¹⁶ Environmental issues share the epistemic features of an emergency. We cannot reliably predict which environmental issues contain the possibility of a catastrophe or know in advance how to respond. It is not that ecosystems are in a perpetual state of emergency, as Pardy suggests.¹⁷ Rather, their unpredictable nature confronts human decision-makers as an emergency when we are faced with an unexpected catastrophe that demands an immediate response.¹⁸ Moreover, because some catastrophes are unknowable in advance, we cannot always distinguish specific environmental issues and subject them to special rule-of-law requirements. All environmental issues are therefore subject to Schmitt's challenge. Schmitt theorized that the emergency lies outside the law.¹⁹ Accordingly, the challenge for those committed to the ideal of subjecting all

¹⁶ Stacey, "Environmental Emergency", *supra* note 2 at 5.

¹⁷ Pardy, "Unbearable", *supra* note 7 at 12, 20.

¹⁸ As Pardy notes, there are multiple reasons why the state will respond to any given emergency. In extreme cases, it will be to protect human life. In other cases, it will be to prevent human suffering, prevent the loss of biodiversity or ecosystem function. In a democracy, it is likely to be many of these (contested) reasons all together.

¹⁹ Carl Schmitt, *Political Theology*, translated by George Schwab (Cambridge, Mass: MIT Press, 1985) at 6.

political action to the rule of law, is to demonstrate, *contra* Schmitt, how the law can govern the emergency.²⁰

Pardy critiques the environmental emergency argument on two fronts. On the one hand, he claims that the emergency argument is irrelevant to my primary concern, which is the ordinary and everyday exercise of administrative discretion.²¹ On the other hand, he dismisses the environmental emergency because he thinks it obvious that the emergency is (or can be) governed by law.²² The claims need to be unpacked, and it is far from clear that they are consistent.

The administrative state is a central concern of libertarians. The administrative state departs from the formal conception of the rule of law in significant ways. Administrative decision-makers wield significant policy and lawmaking powers; individual rights are adjudicated upon, not by independent judges, but expert and partial tribunal members. From the libertarian perspective, the complexity of environmental issues is best addressed by individuals through free market transactions, not public institutions. As Epstein puts it:

“Repeat the same exercise of voluntary exchange and cooperation countless times, and achieving social welfare is a task that will take care of itself. Why? Because the regime of freedom of contract works well for most small-numbered transactions that rest on a stable distribution of property rights.”²³

The current state of Canadian environmental law is far out-of-step with this conception of the rule of law. Accordingly, libertarians, such as Pardy, argue the solution is to eliminate the administrative state.²⁴

The problem with this argument is that it does not account for the actual chance of an emergency, i.e. the fact that some environmental issues contain the unforeseeable possibility of a catastrophe and it is not possible to know in advance how we ought to respond. The point of using Schmitt’s challenge was to highlight the fact that a commitment to governing through pre-

²⁰ Stacey, “Environmental Emergency”, *supra* note 2 at 8-9.

²¹ Pardy, “Unbearable”, *supra* note 7 at 15.

²² *Ibid* at 3-4.

²³ Epstein, *Design*, *supra* note 3 at 32.

²⁴ Pardy, “Unbearable”, *supra* note 7 at 21.

existing legislated rules cannot account for the inevitable discretion that will need to be exercised in response to an emergency. Eliminating the administrative state does not answer the question of how emergency powers can be governed by law.

Pardy addresses this in his response. Pardy suggests that, when an environmental catastrophe strikes, its response would be governed by statute, perhaps the *Emergencies Act*, or alternatively by the Crown's prerogative. Pardy writes,

whether there is a statute providing for the power or whether the Crown is exercising its common law prerogative in the absence of a statute, courts may determine whether such an emergency exists; and thus have jurisdiction to determine whether the power applies in particular situations and whether the Crown has acted within those powers.²⁵

He moves too fast. He does not elaborate the basis of the court's jurisdiction over these matters. The emergency perspective requires that we unpack the possible sources of authority to see which can meet Schmitt's challenge.

Take, in the first instance, the *Emergencies Act*.²⁶ The Act, as is characteristic of framework emergency legislation, delegates sweeping powers to the executive to act in times of crisis. Nonetheless, as Pardy rightly notes, the court possesses an interpretive and enforcement power that, when exercised, ensures that the executive stays within the boundaries set out by the statute. In other words, the court maintains legislative supremacy by ensuring that the executive does not act as a law unto itself. However, the statute does not provide many bases on which the court might intervene. The statutory language permits the Governor in Council to declare an emergency when it "believes, on reasonable grounds," that an emergency exists.²⁷ It further permits the Governor in Council to take emergency action that it "believes, on reasonable grounds, is necessary."²⁸ So long as the Governor in Council offers *some* reasons to support its belief that the measures were necessary, *any* reasons are sufficient to formally comply with the statute. As I documented in the environmental context,²⁹ and as David Dyzenhaus and others

²⁵ *Ibid* at 4.

²⁶ *Emergencies Act*, RSC 1985, c 22 (4th Supp).

²⁷ *Ibid* ss. 6, 17, 28, 38.

²⁸ *Ibid* ss. 8, 19, 30, 40.

²⁹ Stacey, "Environmental Emergency", *supra* note 2 at Part II.B.

have documented in the national security context,³⁰ judges who understand their role in purely formal terms consistently capitulate to executive pressure. They will not probe the executive's reasons for its decision and therefore do not effectively constrain the exercise of executive discretion.

This conception of the rule of law—the formal conception of the rule of law—fails Schmitt's challenge. It fails because it turns the rule-of-law into a façade, or a thinly veiled cover, for executive discretion.³¹ The unpredictable and extreme nature of emergency precludes specific legislated rules and requires the exercise of discretion. Because the legislation fails to dictate the response, the court's role, on this view, is only to ensure that the executive formally complies with the letter of the statute. Pardy agrees with me that a rule-of-law façade, or the creation of legal grey holes, is a problem.³² But he does not articulate a clear basis on which the courts ought to intervene. He emphasizes the role of precedent in judicial reasoning.³³ Yet a commitment to precedent, when that precedent fails to meaningfully constrain executive discretion, leaves the rule of law hollow.

More promising is Pardy's suggestion that the common law has the potential to constrain the exercise of discretionary powers.³⁴ Unfortunately, Pardy does not elaborate how the common law does or ought to govern the exercise of emergency powers (other than to follow precedent). He leaves us wondering why judges, not a democratically elected legislature or an expert executive, ought to have the last word on what constitutes an emergency or an appropriate emergency response. Common law constitutionalism—the rule-of-law theory that I endorse and explicate in the second half of “The Environmental Emergency”—supplies this answer.

³⁰ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) [Dyzenhaus, *Constitution*]; Jonathan Masur, “A Hard Look or a Blind Eye: Administrative Law and Military Deference” (2005) 56 *Hastings LJ* 441.

³¹ It also fails because it does not explain how there is any legal constraint on the decision to suspend legal order (*i.e.* the decision to ignore the *Emergencies Act*).

³² Pardy, “Unbearable”, *supra* note 7 at 20.

³³ *Ibid* at 13, 16.

³⁴ Note, however, that Canadian judicial review of prerogative powers is far more nuanced than Pardy lets on with his reference to the Case of Proclamations 1611. See *e.g.* *Black v Chretien*, 54 OR (3d) 215 (OCA); Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012).

Common law constitutionalism posits that “the rule of law is a rule of fundamental constitutional principles that protect individuals from arbitrary action by the state.”³⁵ The common law is a source of these fundamental constitutional principles, which evolve with the community as they are tested, refined and redefined over time through the process of iterative common law reasoning. They are constitutional principles in the sense that compliance with these principles is constitutive of law. What counts as law—that is, which public decisions have legal authority—is determined by their compliance with these core common law principles. Public officials are under a rule-of-law obligation to publicly justify their decisions, that is to demonstrate through reason-giving that their decisions are consistent with fundamental constitutional principles. Two of these common law principles are reasonableness and fairness and they operate to protect those subject to the law from arbitrary decisions. And, as its source is the common law, it cannot be suspended and replaced by a separate emergency legal regime during a time of crisis.³⁶

We are now in a position to see how a substantive conception of the rule of law constitutes legality all the way down: from an existential climate crisis to a discretionary fisheries permit. Common law constitutionalism meets Schmitt’s challenge. It provides an answer to the question of how all exercises of political power—including emergency response powers—can be subject to the rule of law. It also provides an explanation for Pardy’s observation that prerogative powers can be subject to the supervision of the courts.

Pardy misses the underlying connection between the emergency and the administrative state. Adapting or eliminating the modern administrative state does not answer the challenge posed by the emergency, the ever-present possibility of an environmental catastrophe. And if, as he seems to accept, the emergency can be governed by law, then he also has at his disposal the

³⁵ Dyzenhaus, *Constitution*, *supra* note 30 at 2. See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 2.

³⁶ Being common law, however, it is subject to being overridden by clear and unequivocal statutory language. However, as compliance with core common law principles is constitutive of law, when a legislature chooses clearly and unequivocally to override those principles, it undermines its claim to legality. In other words, such a statute would be legally valid but would not have legal authority. Dyzenhaus analogizes this to the way in which s.33 of the Charter operates as it overrides a finding of unconstitutionality, but does not render an unconstitutional statute constitutional: Dyzenhaus, *Constitution*, *supra* note 30 at 206, 211.

legal tools needed to subject *all* discretionary powers to a robust conception of the rule of law. He simply chooses not to use them.

II. The Aspirations of the Rule of Law

This part addresses the heart of my disagreement with Pardy. That disagreement is over the meaning of the rule of law and how Canadian environmental law can realize rule-of-law ideals. Pardy and I agree that the basic commitment to governance under the rule of law can ensure a measure of environmental protection. We also agree that, at present, Canadian environmental law is in dire need of reform to comply with the rule of law. We fundamentally disagree, however, on how the rule of law can be realized in Canadian environmental law. This part responds to Pardy's assertion that a common law constitutional conception of the rule of law is a license for arbitrariness. It argues that common law constitutionalism gives rise to a requirement of public justification. This requirement imposes meaningful obligations on public officials that protect the autonomy of those subject to the law and enable their participation in the project of elaborating the content of the law.

Libertarians understand autonomy as freedom from state interference.³⁷ The formal conception of the rule of law serves to protect autonomy, understood in this way, by requiring state action to comply with the formal features of the rule of law: publicly announced, general, clear, prospective and stable rules that are enforced consistently with the stated rule.³⁸ These formal features prevent the state from treating people arbitrarily—using them as means to ends—because it must act through impersonal, abstract and prospective rules.³⁹

Pardy gives libertarianism a distinctly ecological spin. His account is designed to mirror the systems dynamics of biological competition and the free market. He writes:

³⁷ Hayek, *supra* note 3 at 133 ff (on freedom as the absence of coercion); Richard A Epstein, *The Classical Liberal Constitution: The Quest for Limited Government* (Cambridge: Harvard University Press, 2014) at 35 (referring to “classical liberal ideal of negative liberty”) and Chapters 21, 22 (on economic freedoms); Pardy, *Ecolawgic*, *supra* note 6 at 72, 76.

³⁸ Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969). Relied on by Epstein, *Design*, *supra* note 3 at 19 ff.

³⁹ Hayek, *supra* note 3 at 153.

In ecosystems and markets, there is no notion of common good, equality of outcome or distributive justice. ... No one expropriates a squirrel's nuts for redistribution. The squirrel loses his nuts only to larger squirrels who [*sic*] take them by force. The use of state coercion to redistribute resources opposes system dynamics. ...⁴⁰

Pardy's aspiration for the rule of law is to create and maintain a survival-of-the-fittest, winner-takes-all society. It is openly hostile to notions of distributive justice,⁴¹ dismissive of collective reasoning⁴² and disconnected from any theory of democracy.⁴³ Moreover, in his account, environmental protection is only assured when there is a sufficiently motivated and capable individual who can defend in court her (property) rights against "permanent" and "unnatural" ecological interference.⁴⁴

The public-justification conception of the rule that I introduced in "The Environmental Emergency" also seeks to protect individuals from arbitrariness. But, unlike Pardy, it builds on the republican notion of autonomy as non-domination, or the idea that individuals should not be subject to the arbitrary will of another.⁴⁵ The rule of law, from this perspective, protects individuals both from arbitrary decisions and the threat of arbitrary decisions. The strengths of this conception of autonomy have been articulated and defended elsewhere and will not be rehearsed here.⁴⁶ Non-domination is a conception of autonomy that gives primacy to human agency and equality. It is this notion of autonomy that is presupposed by the version of common law constitutionalism that I defend.

Public decisions that are not publicly justified on the basis of core common law principles are arbitrary. Common law constitutionalism guards against this arbitrariness by imposing a requirement of public justification on all public decision-makers and by requiring appropriate

⁴⁰ Pardy, *Ecolawgic*, *supra* note 6 at 75.

⁴¹ *Ibid.*

⁴² Bruce Pardy, "Environmental Assessment: Three Ways Not to Do Environmental Law" (2010) 21 JELP 139 at 141-2.

⁴³ *Ecolawgic* only references democratic accountability when he is critiquing other theories: Pardy, *Ecolawgic*, *supra* note 6 at 4, 82, 85 and 91.

⁴⁴ *Ibid* at Chapter 5, Part C; Pardy, "Holy Grail", *supra* note 3.

⁴⁵ David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill L J 491. Republicanism as elaborated by Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999) and Henry S. Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002) at 30-5.

⁴⁶ Pettit, *supra* note 45 at Chapter 3.

institutional channels (including, but not limited to the courts) for challenging decisions that are perceived as unjustified. Decision-makers must disclose reasons that justify their decisions, and moreover, these reasons must be consistent with core constitutional principles of fairness and reasonableness. When they are not reasoned in this way, courts and other reviewing bodies (such as appeals tribunals) have a basis on which to intervene. Publicly justified decisions, i.e. decisions that are fair and reasonable, protect the individual's status as an autonomous and equal subject before the law. But the process of public justification also enables the individual to participate in the development of the law because it provides mechanisms through which individuals can contest public decisions on the basis that they do not in fact reflect core constitutional principles.

The public-justification conception of the rule of law is inherently participatory. The participation of the individual subject to the law is made internal to the rule of law in two respects. In the first instance, the individual's autonomy interest must always be in the contemplation of the public official because she must issue reasoned, not arbitrary, decisions.⁴⁷ In the second instance, the formal features of the rule of law ensure that the content of the law is communicated in a way that can be understood, deliberated upon and contested by the legal subject.⁴⁸ The rule of law, in other words, ensures the legal subject knows where he stands in relation to the law, and can plan his life accordingly, but it also ensures that he is entitled to participate in the project of elaborating the content of the law that he is subject to. A system of law that is comprised of rules that comply with the formal requirements of law (general, prospective, public, etc) respects the autonomy of those subject to the law. But a system of law that includes an administrative state with extensive discretionary powers can also comply with the rule of law by ensuring that when those delegated powers are implemented they are publicly justified.

The public-justification conception does not "object to the concept of rules,"⁴⁹ as Pardy asserts. Environmental rules that comply with the formal features associated with the rule of law fulfill the requirements of public justification; they respect and enable the autonomy of those subject

⁴⁷ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford and Portland: Hart Publishing, 2012) at 2, 134; Fuller, *supra* note 38 at 210, 219.

⁴⁸ Hoi Kong, "Election Law and Deliberative Democracy: Against Deflation" (2015) 9 JPPL 35 at 41.

⁴⁹ Pardy, "Unbearable", *supra* note 7 at 12.

to the law. Environmental rules are unproblematic from the perspective of either the formal or public-justification conception of the rule of law. But what the environmental emergency reveals is that any *theory of law* that is based solely on rules is wholly inadequate, and glaringly so in the face of environmental catastrophes and complex, ever-changing environmental issues. As I explained in the original article, the formal features that comprise the formal conception of the rule of law cannot meaningfully constrain a necessarily discretionary, emergency response.

The public-justification conception of the rule of law goes hand-in-hand with theories of deliberative democracy. Deliberative democrats emphasize the collective democratic project of generating reasoned decisions through public deliberation.⁵⁰ They argue that persuasion is “the most justifiable form of political power because it is the most consistent with respecting the autonomy of persons, their capacity for self-government.”⁵¹ Deliberative democrats accordingly seek to delineate conditions for ensuring public decisions can be guided to the extent possible by persuasion achieved through actual deliberation.⁵² Democracy, on this view, is more than just majority rule. It is a process of public decision-making that strives to treat individuals as free, equal and capable of giving and receiving reasons for collective action.⁵³ The rule-of-law requirement of public justification thus fits comfortably within a deliberative democracy. It requires “a culture of justification,”⁵⁴ in which public officials are expected to offer reasoned justification for their decisions and in which those subject to these decisions are empowered to challenge them when they are not justified in accordance with fundamental principles. All public institutions must be part of this project of justification, meaning that on this view, realizing the

⁵⁰ Jürgen Habermas, *Between Facts and Norms*, translated by William Rehg (Cambridge: MIT Press, 1996); Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 3; John S. Dryzek with Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford: Oxford University Press, 2010) at 3.

⁵¹ Amy Gutmann, “Democracy” in Robert E. Goodin, Philip Pettit & Thomas Pogge eds, *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell Publishing, 2007) 521 at 527. See also Habermas, *supra* note 50 at 306 (what he calls the “unforced force of the better argument”).

⁵² Gutmann & Thompson, *supra* note 50 at 100.

⁵³ Joshua Cohen, “Deliberation and Democratic Legitimacy” James Bonham & William Rehg eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997) 67 at 75.

⁵⁴ Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South African Journal on Human Rights* 32; David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 *South African Journal on Human Rights* 11. See also David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford: Clarendon Press, 1991) at 263-4 (on the connection between common law constitutionalism and the reason-giving legislature).

rule of law is a collective effort amongst legislators, judges, administrative decision-makers and the individuals that accept or contest their decisions.

A libertarian might respond, as Epstein does, by arguing that public-justification, while nice in theory, does not work in practice. Epstein writes:

Discretion is, to many people, the better part of valor. But not in public affairs, where discretion leads to the creation of indefinite property rights that invite political maneuvering of the types that traditionally have marred areas of labor and land use regulation.⁵⁵

In other words, Epstein points out that our public institutions fail. They succumb to capture by powerful interests and the courts are not always capable of providing an effective check on their exercises of power.⁵⁶

Indeed, some public institutions do fail. And some are likely to be more susceptible to capture than others. But these failures are not inevitable and “The Environmental Emergency” offered examples of institutions endeavouring to ensure public justification.⁵⁷ To be clear: nothing in the public-justification conception of the rule of law undermines a commitment to governing through legislated rules that comply with the formal features of the rule of law. The environmental emergency framework and the public-justification conception that follows from it are deliberately agnostic about whether we should attempt to address any particular environmental issue primarily through abstract, general rules or by delegating significant discretion to administrative decision-makers (of any sort).⁵⁸ This is not because I do not have views on the forms of regulation that are best suited to address individual environmental

⁵⁵ Epstein, *Design*, *supra* note 3 at 191-2.

⁵⁶ See also Cass R Sunstein and Adrian Vermeule, “Libertarian Administrative Law” (2015) 82 *University of Chicago Law Review* 393 at 416.

⁵⁷ Stacey, “The Environmental Emergency”, *supra* note 2 at 51-3.

⁵⁸ See also: Hoi Kong, “The Deliberative City” (2010) 28:2 *Windsor Yearbook of Access to Justice* 411 at 417-9. Even where Pardy thinks we agree, I am afraid we do not. Contrary to his response (Pardy, “Unbearable”, *supra* note 7 at 20-1), I do not think that independent expert decision-makers are necessarily bad. Any complex society must rely extensively on experts to function. “The Environmental Emergency” argued that independent experts cannot redeem the formal conception of the rule of law (at 41-2). At the risk of repetition, independent expert decision-making complies with the rule of law when it is publicly justified. Independent experts, just as any administrative decision-maker, must offer reasons that demonstrate to those affected that their decisions are fair and reasonable.

problems; I do. It is because these views are part of the democratic debate that is ensured by the rule of law. They are not internal to the rule of law itself.

Public justification means that whenever the state comes in contact with the lives of individuals it must offer reasoned justification for its decision and that the decision can be challenged on the basis that it fails to show that the decision has legal warrant consistent with constitutional principles. This amounts to a license for arbitrariness only if one adheres to the libertarian's prior belief that state interference with the private relations of individuals is inherently suspect. Public justification, in contrast, takes seriously the idea that individuals and the institutions in which they participate can collectively reason about decisions affecting the environment, while also respecting each individual's right to be free from arbitrary public decisions.⁵⁹

Government decisions that are publicly justifiable may well interfere with the property rights of private parties. Under the libertarian's preferred conception of freedom—freedom as non-interference—such decisions may arguably compromise the freedom of the individuals they touch. However, under the republican conception of freedom that underwrites the public-justification conception of the rule of law—freedom as non-domination—such decisions do not compromise freedom, precisely because their publicly justifiable nature entails that they are not arbitrary. Under the republican conception of freedom, an interference compromises freedom only if it arises from the decision that is unjustifiable and therefore arbitrary.

III. Public Justification in Environmental Law

Parts I and II responded to Pardy's confused assessment of the primary argument in "The Environmental Emergency." Relying on the emergency framework, I clarified that a common law constitutional conception of the rule of law can respond to Schmitt's challenge and thus provide an account of the rule of law capable of governing the environment. I further elaborated the theory behind common law constitutionalism, how it gives rise to a requirement of public justification, and why this is a superior conception of the rule of law to the one advanced elsewhere by Pardy. This Part turns to Pardy's direct criticisms of the public-justification conception of the rule of law. In particular, I take up the role of reasons in environmental law

⁵⁹ See generally, Richardson, *supra* note 45.

and the potential for creative institutional design. These matters are ripe for future environmental law scholarship that seeks to expand upon the common law constitutional conception of the rule of law.

Pardy observes that many administrative decision-makers do not offer reasons for their decisions and that, when they do, these reasons may be inconsistent with previous decisions. In his view, current practice undermines the conception of the rule of law that I advance in “The Environmental Emergency.” This argument is perplexing given that the account that I defend is aspirational in nature.⁶⁰ The fact that administrative decision-makers currently do not offer public reasons for their decisions does not mean they cannot. When they fail to offer public reasons that adequately justify their decisions, they fail to comply with the rule of law.

An interesting question is what might “count” as adequate reasons in light of the variety of environmental decisions that are made in Canadian environmental law. Important decisions are often made by way of orders in council, regulation or environmental permits. The reasons for the decision may therefore need to take an unconventional form which may further contribute to judicial reluctance to engage directly with the reasoning underpinning these decisions.⁶¹ While I cannot answer this question satisfactorily in the scope of this reply, it is important to note that the requirement to offer reasons need not come from the court.⁶² Indeed, in many instances the legislature has been the more proactive institution and legislated a reason-giving requirement. The federal *Species at Risk Act*, for example, requires the Governor in Council to offer reasons when it declines to protect a species under the Act.⁶³ In some cases, the executive might implement a reason-giving requirement on its own initiative, as is the case with the *Cabinet Directive on Regulatory Management*, which requires a publicly available regulatory

⁶⁰ Stacey, “The Environmental Emergency”, *supra* note 2 at 45-6 (noting the ways in which the Supreme Court has fallen short of this conception) and at note 203 (explicitly stating that the public-justification conception is aspirational). For a nice articulation of how the rule of law can be understood as both practice and aspiration, see: Nigel E Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), in particular at 52-4.

⁶¹ Stacey, “The Environmental Emergency”, *supra* note 2 at 34-35 (offering examples of judicial reluctance to engage with the reasons for environmental decisions).

⁶² Pardy, “Unbearable”, *supra* note 7 at 7 (citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193).

⁶³ *Species At Risk Act*, SC 2002, c 29, s 27(1.2). Note that arguably the Governor in Council does not need to give reasons for a listing because it has implicitly accepted the publicly-available expert assessment of the species (s 25). Therefore public justification is offered in both instances.

impact analysis prior to proposing new regulations.⁶⁴ I offer these examples not because they are ideal instances of reason-giving in environmental law, but rather because they suggest a commitment on the part of the legislature and executive, at least in some cases, to governing in accordance with a public-justification conception of the rule of law.

Pardy notes that, even where reasons are offered, administrative decision-makers are not subject to a requirement to adhere to precedent in the same manner as courts. But it is worth asking why they are not. Part of the answer lies in persistence of the formal conception of the rule of law, which treats the administrative state as a legal grey hole.⁶⁵ In contrast, subjecting administrative decisions to a robust conception of the rule of law requires a considerable increase in attention to the machinery of the administrative state and how individual decisions are made.

A close examination of these decisions may reveal that no two environmental decisions are exactly alike, due to the complexity and evolving nature of environmental issues. Yet the public justification conception requires that each decision be reached in the same manner. It requires that each decision reflect its statutory purpose, taking into account prior adequately reasoned precedents, and if necessary justifying departure from those precedents on the basis of relevant considerations. When decisions are not supported by this kind of public reasoning—as many, if not most, environmental decisions currently are not—they do not comply with the rule of law. As I noted in the original article, the concepts of reasonableness and fairness require further elaboration in the context of environmental law.⁶⁶ They will be contested and sometimes messy, as they are in other areas of administrative law. But the process of contesting and refining the requirements of reasonableness and fairness in any given case is precisely the aim of a democratic conception of the rule of law. The persistence of the formal conception in environmental law has impeded the development of these common law requirements in the environmental context.

⁶⁴ Canada, Her Majesty the Queen in Right of Canada, *Cabinet Directive on Regulatory Management*, (1 April 2012) < <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/cdrm-dcgr-eng.asp#cha1> > accessed 17 February 2016.

⁶⁵ Stacey, “The Environmental Emergency”, *supra* note 2 at 32-36.

⁶⁶ *Ibid* at 47, 50. Elsewhere I have argued that they ought to be informed by deliberative-democratic interpretations of environmental principles: Jocelyn Stacey, *The Constitution of the Environmental Emergency* (DCL Thesis, McGill University Faculty of Law, 2015) [unpublished].

Finally, Pardy takes issue with the implications of the public-justification conception for the separation of powers and institutional design. As should be clear, Pardy and I fundamentally disagree about whether we ought to strive for a strict separation of powers or embrace the potential for creative institutional design as a way of promoting individual autonomy and meaningful participation in environmental governance.⁶⁷ Understanding autonomy as non-domination, as set out in Part II, opens up the possibility for institutional experimentation that can further the project of public justification. Courts play a central role in maintaining the rule of law by requiring that other institutions publicly justify their decisions. But understanding the rule of law in this way allows for a better understanding of how diverse institutions—environmental appeals tribunals, auditor generals, ombudspersons, amongst others—also play an important role in maintaining the rule of law of law.⁶⁸ These institutions are all “strands in a web of public justification,”⁶⁹ which subject the full range of public environmental decisions to scrutiny that a generalist court on its own cannot provide.

It is worth noting, in conclusion, that the public-justification conception of the rule of law has significant and immediate practical implications. The most obvious implication is that it provides a legitimate basis on which courts can intervene when environmental decision-makers have failed to justify their decisions in accordance with fundamental common law principles. To offer one example, the recent wave of judicial decisions that have legitimized the National Energy Board’s flawed decision-making process demonstrates the need to advance a theory of law that requires reasoned environmental decisions that reflect core common law principles.⁷⁰ More generally, it also supplies a legal framework within which virtually any public environmental

⁶⁷ See also Evan Fox-Decent, “Democratizing Common Law Constitutionalism” (2010) 55 McGill LJ 511 (defending a theory of common law constitutionalism in which the separation of powers is irrelevant).

⁶⁸ Stacey, “The Environmental Emergency”, *supra* note 2 at 52-3. Note that in *Western Canada Wilderness Committee v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 808, the Court held that the Board was the appropriate forum but went ahead and decided the matter anyway, denying any distinctive role to the Board.

⁶⁹ David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 305.

⁷⁰ *Sinclair v. Canada (National Energy Board)*, 2014 FCA 245; *Quarmby v National Energy Board of Canada*, 2015 FCA 19 (leave to appeal refused); *Quarmby v Canada (AG)*, 2015 CarswellNat4252 (SCC) (leave to appeal refused); National Energy Board, “Court Challenges to National Energy Board or Governor in Council Decisions” (*City of Vancouver v NEB and Trans Mountain Pipeline ULC*), online: NEB <<https://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html>> (leave to appeal refused).

commitment, however half-hearted, should be taken as evidence of a commitment to public-justification and used as a basis for deriving more robust legal requirements than are currently recognized in Canadian environmental law.⁷¹

Conclusion

Pardy and I share three common premises about environmental law. We both maintain that environmental issues are properly situated within the theory of complex, adaptive systems. We agree that this understanding of ecological complexity, in turn, presents a challenge for realizing the rule of law in the environmental context. We also agree that it is nonetheless possible to remain committed to environmental governance under the rule of law. I argue that these three premises can be explored by understanding environmental issues as an ongoing emergency. Pardy disagrees. However, this reply has argued that Pardy's critiques miss their marks. The emergency perspective allows us to unpack the rule-of-law assumptions implicit in the deep administrative structures, if not the current practice of Canadian environmental law. And, more importantly, it provides a foundation for building a robust conception of the rule of (environmental) law, one that requires every public environmental decision to be justified on the basis of core constitutional principles.

⁷¹ I am thinking here of initiatives like the Alberta Environmental Monitoring and Reporting Agency, criticized for its lack of independence and legislated structure (Shaun Fluker, "Protecting Alberta's Environment Act: A Keystone Kops Response to Environmental Monitoring and Reporting in Alberta" (2014) ABLawg, online: <http://ablawg.ca/2014/01/02/protecting-albertas-environment-act-a-keystone-kops-response-to-environmental-monitoring-and-reporting-in-alberta/>) and the federal government's *Federal Sustainable Development Act*, SC 2008, c33, which authorizes certain (weak) reporting and planning requirements. The exception to this statement would be where legislation clearly and unequivocally limits or eliminates common law requirements of fairness and reasonableness.