THE CONCEPT OF THE RULE OF LAW

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By

COURTNEY TAYLOR HAMARA, B.A.

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AUTHOR: Courtney Taylor Hamara, B.A. (McMaster University)

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ABSTRACT

The Rule of Law is an important and prevalent concept in current legal and political discourse on both national and international levels. It is frequently used by politicians, states and the news media to criticize or commend states and governments for the legitimacy or illegitimacy of legal and political actions and decisions. However, few are on the same page when it comes to explaining just what the Rule of Law is.

The fact that people generally, politicians and academics frequently employ this concept for which no one holds the same conception is problematic. Meaningful communication cannot occur unless the participants engaged in communication understand the terms of the discussion. It is rather distressing that we continue to discuss legal and political legitimacy in terms which are vague and ambiguously defined.

If we do not want to find ourselves succumbing to pure political rhetoric, it is time to investigate and refine our understanding of this important concept. My goal in this thesis is to demonstrate that though the discourse is pervaded by disagreement and a lack of clear insight, this state of affairs is neither desirable nor inevitable. By employing some basic methodological considerations for evaluating concepts, including considerations of current and historical usage, the analysis of raw material and by engaging in careful conceptual analysis, it is possible to narrow the scope of what is meant by the term "the Rule of Law," thus enabling meaningful discourse.

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DEDICATION

This project is dedicated to my three monkeys: the endearing, golfing space cadet with the random one-liners who lets me sleep in his uncomfortable bed while he sleeps on the floor, the people-pleasing, hardworking, hockey-playing aerospace engineer with a heart of gold, and the gruff but hilarious, unreliably reliable, seemingly drunk when sober electrician with a truck named *Rambo*. Your unwavering faith in my genius, while I am not exactly sure what it is based on, warms my heart and keeps me smiling.

Ryan, Chad and Dylan, *vous êtes mes raisons.*.

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INTRODUCTION

It is undeniable: the Rule of Law is a significant and pervasive ideal in contemporary law and politics. In fact, it has been called "*the most* important political ideal today."[1]

In order to successfully promote political programmes, decisions and courses of action, governments, politicians and international organizations must formulate them in terms that are palatable to their nations and to the international

[1] This claim is made by Brian Tamanaha, a contemporary legal and political scholar who has written a timely and accessible book entitled *On the Rule of Law: History, Politics, Theory.* (Cambridge, Cambridge University Press, 2004). Hereafter, *On the Rule of Law.* Quotation from book synopsis; emphasis added.

Jeremy Waldron has also called it "one of the most important political ideals of our time." Jeremy Waldron, "The Concept and the Rule of Law." (September 24, 2008). *Georgia Law Review*, Forthcoming; NYU School of Law, Public Law Research Paper No. 08-50. Available at SSRN: http://ssrn.com/abstract=1273005. Hereafter *Concept.* 1.

community. In the past, we have seen political agendas articulated in terms of liberalism, capitalism and democracy, most of which have been well received, particularly by Western communities. However, there have been differences of opinion; a variety of political leaders and regimes have supported contrasting ideals such as conservativism, socialism or communism and authoritarianism, some with good reason. Unlike other ideals exported by the West, the Rule of Law has not met its ideological match in any significant way.[2] Granted, there may be some that support the arbitrary exercise of power, but I have yet to see a widespread commitment to it or an argument instantiating it as a contrasting political ideal.[3]

While it might be going a bit far to say that the Rule of Law is *universally* accepted, it has indisputably achieved unprecedented support.[4] This widespread support, in turn, has given rise to its unmatched rhetorical power. The Rule of Law is the currency of today's politics. Therefore, it is how politics are being

[2] I do not mean to suggest that the Rule of Law is a uniquely Western idea with no precedent in Asia, South America, Africa or the Middle East. Nor do I mean to suggest that the West is trying to "sell" the Rule of Law to other societies. However, my research does consider the history in terms of the Western canon; due to the length constraints of this project I did not expand the scope of my investigation.

[3] To clarify: it seems to me that the Rule of Law is a unique ideal in the sense that it has no contrasting political ideal that has garnered widespread support, as in the case of capitalism and communism, for example. This unique feature of the Rule of Law, its nearly universal acceptance, supports my conclusion that the Rule of Law is seen as a morally significant political ideal and value.

[4] Acceptance does not entail that it has been likewise successfully implemented: only that it is considered to be *prima facie* good and worthwhile.

packaged, so that they can be successfully sold to a world eager to validate itself. It has been used to attempt to justify a variety of political positions – sometimes even on both sides of the same conflict: from the war in Iraq, to the American detention camp at Guantanamo Bay, the conflict between the Israelis and Palestinians, conflicts in Uganda, Zimbabwe and Columbia, all have been discussed and evaluated in terms of the Rule of Law. This term has the power to impress, persuade, convince, satisfy and justify.

Unfortunately, in its recent popularity, the Rule of Law has become the equivalent of a buzzword: it is in vogue. Richard Bellamy writes: "As Joseph Raz has noted, some accounts of the rule of law use the term as a catch-all slogan for every desirable policy one might wish to see enacted."[5] It both sounds important and profound, and people believe in its importance and profundity. Although disparate regimes and jurisdictions appeal to the Rule of Law to legitimate or justify their institutions and actions, it is frequently accused of having no determinate meaning. Former American President Eisenhower said: "The clearest way to show what the Rule of Law means to us in everyday life is to recall what has happened when there is no Rule of Law."[6] Granted, this quotation does go

[5] Richard Bellamy, "The Rule of Law and the Rule of Persons." *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy.* Cambridge: Cambridge University Press, 2007. 54.

[6] Dwight David Eisenhower, American President, 1953-1961.

some way toward implying a view on the Rule of Law. By asking the listener to "recall what has happened when there is no Rule of Law," Eisenhower invokes the idea of abhorrent situations and regimes such as Nazi Germany. However, on the other hand, it is reminiscent of Justice Potter Stewart's infamous comment on hard core pornography: it is hard to define, but "I know it when I see it,"[7] which has been the brunt of many critiques, and has become illustrative of the need for clarity in institutions such as law. Another example of its indeterminacy comes from Helen Yu and Alison Guernsey, in an article attempting to *explain* the Rule of Law. They write: "The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions."[8] While indeterminacy and vagueness plague the Rule of Law on one side, scholarly disagreement about what the term means is pervasive, and plagues it on the other.[9]

I think it was Uncle Ben, of *Spiderman* fame, who is credited with saying, "with great power comes great responsibility,"[10] and I find this outlook

[7] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[8] Helen Yu and Alsion Guernsey, "What is the Rule of Law?" *University of Iowa Centre for International Finance and Development.* http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml.

[9] In chapter two I will discuss current scholarly disagreement in depth by focusing on the theories of Joseph Raz, John Finnis, Matthew Kramer and Jeremy Waldron.

[10] Though, devoted fans of Marvel's *Spiderman* comic books have protested that this is an "urban legend" on that basis that in the original comic books, this is not a direct quote from Uncle Ben, nor is the popular phrase a verbatim quotation of the relevant caption. http://goodcomics.comicbookresources.com/2006/12/07/comic-book-urban-legends-revealed-80/.

particularly apt in these circumstances. The Rule of Law has become a powerful rhetorical tool in contemporary society, and as a philosopher and as a citizen of the world I think that there exists a responsibility to clarify this concept in order to ensure that our most important and salient political discussions and decisions have meaning and merit, not just force.[11]

Philosophy is particularly amenable to the aim of clarifying, analyzing and reflecting upon concepts, and it is a suitable tool to use in fulfilling our responsibility with respect to the Rule of Law. As Isaiah Berlin eloquently wrote:

> The task of philosophy, often a difficult and painful one, is to extricate and bring to light the hidden categories and models in terms of which human beings think (that is their use of words, images and other symbols), to reveal what is obscure or contradictory in them, to discern the conflicts between them that prevent the construction of more adequate ways of organising and describing and explaining experience.[12]

The goal of this project is to apply philosophical conceptual analysis, as briefly outlined above by Berlin, to the Rule of Law in the service of reflectively narrowing the scope of its meaning, so that it may facilitate effective

[11] It is particularly important to clarify this term *now* because of how much it is being used in current law and politics, and the rhetorical force it has recently developed.

[12] Isaiah Berlin, "The Purpose of Philosophy," Henry Hardy, Ed. *Concepts and Categories: Philosophical Essays*. (London: Pimlico, 1999) 10.

communication in the realm of contemporary national and international law and politics.

In the first chapter, I acknowledge and outline the contributions of a few well respected contemporary scholars in legal and political philosophy who have tackled the Rule of Law: Joseph Raz, John Finnis, Matthew Kramer and Jeremy Waldron. The aim of the chapter is to reveal the deep disagreement that surrounds the concept by demonstrating that even (and particularly) the scholars who have actually given it due consideration come to vastly different conclusions. Given the current pervasiveness of the term, I consider this disagreement unacceptable. It is necessary to come to some sort of convergence about what the Rule of Law is if we are going to communicate effectively about important national and global issues.

In order to narrow the scope of what counts amongst the fundamental components of the concept, I propose engaging in philosophical conceptual analysis. I break the analysis down into two parts: the collection of relevant raw material and the analysis of that material. In chapter two, I investigate the contemporary and historical usage of the concept 'Rule of Law'. While this investigation does not yield a single answer to the question either, I argue that considering usage is nevertheless central to clarifying the meaning of concepts. In chapter three, I proceed to discuss a few kinds of analysis. First, I identify ways of

evaluating raw material as it is being collected. I point out that it is not necessary to consider unreflective opinions, and that it is *prima facie* important to consider widespread ones. Second I discuss what I call external and internal conceptual coherence. Once raw material has been sorted, it is important to determine whether or not remaining opinions and theories illuminate or confuse the concept's relation with associated concepts. It is also necessary to investigate whether or not these opinions and theories are internally consistent. I think that a number of opinions and theories on the Rule of Law, including some of those proffered by the contemporary scholars discussed in chapter one, may be discounted by following this analysis and I offer some reasons in support of each conclusion.

It is my hope that this kind of philosophical reflection on the Rule of Law will facilitate more meaningful and successful political discussions and decisions. I conclude by sketching my own understanding of the Rule of Law, based on what I have learned during the course of this project, and I attempt to defend this position from a few criticisms.

CHAPTER ONE

Pervasive Disagreement: The Current State of Rule of Law Discourse

1.1. *"What is the Rule of Law?"*

Despite its prominence and the frequency of appeals to it in contemporary legal and political discourse, there is no short answer to this question. There is a serious lack of consensus with respect to the state of affairs that 'the Rule of Law' denotes, and I think this is the case for two reasons: first, virtually every scholar who has taken it upon him or herself to comment on the Rule of Law in the last fifty years has stipulated yet another definition and developed another theory of the term. Olufemi Taiwo points out that "[it] is very difficult to talk about the

'rule of law'. There are almost as many conceptions of the Rule of Law as there are people defending it."[13] At first glance, this may not seem in any way extraordinary; scholars are constantly stipulating definitions about the concepts that they use. However, it is usually the case that when this occurs, especially if the concept to be clarified is not the focal concept of the work in question, scholars will turn to the account of another who has already analyzed the subject in depth. For instance, if one were going to briefly discuss distributive justice in the context of a larger work, one might make use of John Rawls's understanding of distributive justice as he worked with the concept in great detail.[14] In Rule of Law discourse, however, this has not been the pattern of behaviour. Most scholars have dealt with the Rule of Law as a footnote to a larger project on topics such as law, politics or democracy.[15] Yet most have insisted upon stipulating a definition and developing a theory that, while usually possessing some features of a previous understanding of the Rule of Law, is ultimately distinct. The second reason contributing to the cluttered state of Rule of Law discourse is that disagreement in

[13] Olufemi Taiwo, "The Rule of Law: The New Leviathan?" *Canadian Journal of Law and Jurisprudence.* Vol. XXI, No. 1 (January 1999). 151 – 168. 154.

[14] See John Rawls, A *Theory of Justice.* Revised Edition. (Cambridge: Belknap Press, (1971) 2003.)

[15] For instance, see Joseph Raz, *The Authority of Law.* (Oxford: Clarendon Press, 1979.), John Finnis, *Natural Law and Natural Rights.* (Oxford: Clarendon Press, 1980.), Matthew Kramer, *Where Law and Morality Meet.* (New York: Oxford University Press, 2004.), Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy.* (Cambridge: Cambridge University Press, 2007.)

the form of unique stipulative definitions and disparate theories is not limited to the work of a few scholars: there are a *lot* of scholars who have commented on the Rule of Law in the last fifty years. Therefore, anyone who seeks to gain a comprehensive understanding of what the Rule of Law is has a significant amount of work to do. First and foremost they must be able to sift through the large number of varied definitions of and theories on the subject.

Every concept is evaluative insofar as it picks out a set of things that are contained within it and excludes everything that does not claim membership in that set and every act of selection presupposes some criterion or other and is in some sense, therefore, evaluative. Consider some of the suggestions that scholars have made as to what the Rule of Law evaluates: On some accounts, the Rule of Law merely evaluates whether or not there is law in a given society.[16] On other accounts, it is the *merits of law* that are evaluated.[17] Some scholars think that to claim that the Rule of Law exists in a society says nothing of the moral worth of law in that society.[18] Some think that it is a value, though not a moral value,[19]

[16] Matthew H. Kramer. "On the Moral Status of the Rule of Law." *Where Law and Morality Meet.* New York: Oxford University Press, 2004. 172-222.

[17] This view is similar to that of John Finnis. According to Finnis, the Rule of Law is "the name commonly given to the state of affairs in which a legal system is legally in good shape.... [It is] the specific virtue of legal systems." See Finnis 270.

[18] Kramer 172-222.

[19]Joseph Raz. "The Rule of Law and Its Virtue." *The Authority of Law.* (Oxford: Clarendon Press, 1979.) 210-232.

while others regard it as among the highest political ideals.[20] In other words, there is no consensus as to what state of affairs constitutes the Rule of Law. Thus, it seems appropriate that Jeremy Waldron has called the Rule of Law an "essentially contested concept."[21] In fact, the only thing that seems to consistently garner agreement within Rule of Law discourse is that there is pervasive *dis*-agreement within Rule of Law discourse. As a result of the current number of incommensurable theories on the Rule of Law and the confusion that results, it *seems*, as Joseph Raz aptly points out, that "we have reached the stage [in Rule of Law discourse] in which no purist can claim that truth is on his side and blame the others for distorting the notion of the rule of law."[22]

The aim of this chapter is to acquaint the reader with some of the better known, contemporary positions on the Rule of Law in order to demonstrate the variance that pervades the discourse. By examining a few different theories, specifically those of Joseph Raz, John Finnis, Matthew Kramer and Jeremy Waldron, it will become apparent that understandings of the Rule of Law in contemporary legal and political theory are diverse and sometimes even

[20] According to Jeremy Waldron, "The Rule of Law is one of the most important political ideals of our time." "The Concept and the Rule of Law." 1.

[21] Jeremy Waldron. "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy* 21 (2002): 137.

[22] Raz 211.

contradictory, and as a result seem to be more of a hindrance than a help in answering the question "What is the Rule of Law?"

Before delineating the positions of our four contemporary scholars on the Rule of Law, it is necessary to summarize some of the work of Lon. L. Fuller, whose discussion of the inner morality of law has become a starting point for many engaged in Rule of Law discourse, including Raz, Finnis, Kramer and Waldron, whose work is considered in the rest of the chapter.

1.2. *Fuller and "The Morality that Makes Law Possible"*

In the late 1950s and early 1960s, Lon L. Fuller, a Professor of Law at Harvard University, was engaged in a debate about the nature of law with the Professor of Jurisprudence at Oxford University, H.L.A. Hart. While Hart, a legal positivist, maintained that there were no necessary connections between law's existence and validity and its merits,[23] in his 1964 monograph, *The Morality of Law*, Fuller sought to demonstrate that there are "necessary *substantive* moral constraints on

[23] According to Les Green, a well known proponent of legal positivism himself, "Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits ... The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it." (Green, "Legal Positivism." Stanford Encyclopedia of Philosophy).

the content of law."[24] While the success of his ultimate goal is debatable, Fuller's discussion of the conditions for the existence of law has become canonical for anyone interested in legal theory.

Fuller understands the proximate function of law to be the guidance of human conduct. He says, "the purpose I have attributed to the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules."[25] In the second chapter of *The Morality of Law* he argues that there are at least eight conditions, each of which must be fulfilled to a substantial degree, in order for law to be able to achieve this function. Corresponding with the eight criteria of legality are eight ways to fail to make law, which he clarifies via the now infamous parable of Rex, a ruler whose good intention to make law is upset in each of the eight different ways. Fuller writes:

> Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which

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[24] Kenneth Einar Himma, "Natural Law." *Internet Encyclopedia of Philosophy: A Peer-Reviewed Academic Resource*. http://www.iep.utm.edu/n/natlaw.htm.

[25] Lon L. Fuller, "The Morality That Makes Law Possible." *The Morality of Law*. Revised Edition. (New Haven: Yale University Press, (1964) 1969.) 146.

> not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[26]

Related to the eight routes to failure or "disaster," there are eight desiderata towards which a legal system must strive if it is to succeed as such.[27] First, in order to successfully guide the behaviour of subjects, a system must be a system of rules. Second, these rules must be made available to the public, whether by promulgation or other methods. Third, the rules must be prospective as opposed to retrospective in order to guide behaviour; for no one is capable of obeying a rule if it has not yet been enacted. Fourth, the rules must be understandable as opposed to hopelessly convoluted and incomprehensible. If the rules are written in gibberish, then they do not communicate anything to subjects about what they ought to do or not do. Fifth, the rules must not contradict one another; they must be compatible or coherent. One could not be guided by the system if it requires the performance of an action but also prohibits that same action. Sixth, the rules must only require actions that subjects are capable of performing. They cannot require the impossible; otherwise they are not rules that can actually guide

[26] *Ibid* 39.

[27] *Ibid* 41.

behaviour because a subject cannot be guided to do what he cannot possibly do. For instance, a rule requiring a human being to fly without the aid of technology or some kind of flying device, such as a glider, cannot guide anyone's behaviour. Seventh, the rules must be relatively stable and not change at an unreasonable rate; if citizens cannot keep pace with the rules, then they will not be able to guide their actions by them. Finally, eighth, there must be congruence between the rules as announced and their actual administration. If there is a rule against murder, then those engaged in murder must be made to answer for their actions. If this fails to be the case, subjects might be able to guide their actions by the rules, but after a short while obedience will become fruitless as subjects will become frustrated with rules whose consequences are not enforced.

According to Fuller, a *total* failure of any one of these eight criteria does not result in bad law, it results in no law. If any one of these criteria is not fulfilled at least in part, it is nonsensical to suggest that any subject should guide his or her behaviour by the law. He explains this point by referring to each of the eight criteria:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at

> some point obedience becomes futile – as futile, in fact, as casting a vote that will never be counted.[28]

While each criterion must be fulfilled to a substantial degree, Fuller acknowledges that a partial or occasional failure of any of the eight criteria is practically unavoidable. "Congruence [for example] may be destroyed or impaired in a variety of ways," admits Fuller, "[such as] mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power."[29] He also suggests that there may be instances where retroactive laws are necessary to preserve legality overall, though he stipulates that this only makes sense in the context of a system of prospective laws ;[30] this is another example of an occasional failure of one of the eight criteria which is acceptable. Further, he says, enabling people to make both short and long term plans is desirable, but that does not entail that complete ossification of the law is also desirable. What is desirable is a balance between the ability to change the law, which is always necessary as society changes and develops, and legal certainty.

In summary, Fuller outlines eight criteria and provides arguments for why he thinks each must be fulfilled to a substantial degree in order for a system to be

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[28] *Ibid* 39.

[29] *Ibid* 81.

[30] *Ibid* 53.

able to achieve its aim of guiding the behaviour of citizens. Complete failure of any one of the eight criteria results in a complete failure of law, and he maintains that the partial failure of some of the desiderata is unavoidable and necessary to avoid ossification of law. While Fuller never actually makes reference to the "Rule of Law" in his work,[31] legal scholars who follow him often take his understanding of the inner morality of the law as a basis for their theories of the Rule of Law as we shall see.

1.3. *Raz and "The Rule of Law and Its Virtue"*

Joseph Raz, a pre-eminent, contemporary legal philosopher, provides an account of the Rule of Law in *The Authority of Law*. Raz begins his discussion of the Rule of Law with a "basic idea" which is similar to Fuller's: he suggests that "the law must be capable of guiding the behaviour of its subjects,"[32] and that the doctrine of the Rule of Law derives from this basic point. His doctrine of the Rule of Law comprises a number of principles that obtain when a system is accurately characterized as being under the Rule of Law. The enumerated principles are similar in some ways to Fuller's eight criteria of legality. However, unlike Fuller, who appears to be making universal claims about what must obtain for law to exist, Raz insists that his principles are context dependant, insofar as they "depend

[31] There is one exception in footnote 1 on page 39 where he refers the reader to Georg Simmel's account of the Rule of Law.

[32] Raz 214.

for their validity or importance on the particular circumstances of different societies."[33] According to Raz, the principles that he outlines are not exhaustive; they are simply some of the important ones that come to mind upon initial reflection:

> 1. All laws should be prospective, open, and clear.
>
> 2. Laws should be relatively stable.
>
> 3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
>
> 4. The independence of the judiciary must be guaranteed.
>
> 5. The principles of natural justice must be observed.
>
> 6. The courts should have review powers over the implementation of the other principles.
>
> 7. The courts should be easily accessible.
>
> 8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.[34]

Fuller's influence is evident here, especially in the first two principles. Raz acknowledges this, and comments that "his [Fuller's] discussion of many of the principles is full of good sense," however he cites "a difference of views on conflicts between the laws of one system" as his reason for abandoning Fuller's articulation of them.[35] The first of Raz's principles integrates three of Fuller's

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[33] *Ibid.*

[34] *Ibid* 214-219.

[35] *Ibid* fn 7, 218. The difference of views that Raz alludes to is that according to his own theory, many laws are of *prima facie* force only. Conflicts do not represent inconsistencies: it is

desiderata: prospectivity, publicity or promulgation, and clarity of laws. The second of Raz's principles suggests that the laws ought to be relatively stable over time. By understanding Fuller's reason for incorporating each of the eight criteria of legality, it is evident why Raz would choose to incorporate at least some of these principles into his own account: they provide a basis for law's ability to guide conduct. The last six of Raz's principles do not, at first, seem to coincide with any of Fuller's. However, I think that some of them can be understood as attempting to articulate something similar to Fuller's eighth criterion: that there must be congruence between the law and its application. For instance, one of the reasons Raz suggests that the judiciary must be independent – his fourth principle – is that if judges are free from "extraneous pressures" then they will only be subject to the law, and so they will be more likely to act in accordance with it. Essentially this point can be expressed in terms of the necessity of having congruence between the law and its application: the requirement of an independent judiciary might be dependent on a particular context, which Raz mentions pertains to all of the principles he derives from the basic idea. The same can be said of the fifth principle, which requires the observation of principles of natural justice.[36]

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possible that two laws conflict, though they then need to be balanced against one another to determine which has conclusive force in the situation in question. See 59-61.

[36] *Ibid* 216-217.

Finally, like Fuller, Raz recognizes that conformity with the principles of legality is a matter of degree, and that complete conformity is impossible and that maximal possible conformity is undesirable:

> Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal ... After all, the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.[37]

While Raz believes that the Rule of Law is a social goal, he does not think it is the ultimate goal or the only social goal worth pursuing, and suggests that it must be balanced against other social goals.

1.3.1. *The Rule of Law as a sharp knife*[38]

The most infamous part of Raz's discussion of the Rule of Law is the analogy he draws to a sharp knife. What Raz attempts to demonstrate with the sharp knife analogy is that the Rule of Law can be used for both good and evil ends, but that it is still a value. Consider the following:

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[37] *Ibid* 229.

[38] Raz explains that the Rule of Law is designed to minimize the harm that might exist because of the existence of the legal system. "The law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger created by the law itself ... Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself." *Ibid* 224.

> Of course, conformity to the rule of law also enables the law to serve bad purposes. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good–making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law.[39]

For Raz, a society which succeeds in having the Rule of Law, insofar as it has a system of rules, which are promulgated, prospective and clear, is not automatically a morally good society: a society may fail with respect to any other enumerated social and political ideals, but it may succeed in having the rule of law. In this sense, the Rule of Law is a tool which can be used to guide the behaviour and actions of citizens, and as a tool, it can be used for morally good, evil, or neutral ends. So, if we evaluate the Rule of Law with respect to the ends which it brings about, it is not necessarily a morally good thing.

However, Raz suggests that law cannot be good law without the Rule of Law, just as a knife cannot be a good knife unless it is also sharp. Therefore, though the Rule of Law is not sufficient for good law, is necessary for it; and therefore it is morally relevant, and not completely neutral.

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[39] *Ibid* 225.

> The special status of the rule of law does not mean that conformity with it is of no moral importance. Quite apart from the fact that conformity to the rule of law is also a moral virtue, it is a moral requirement when necessary to enable the law to perform useful social functions; just as it may be of moral importance to produce a sharp knife when it is required for a moral purpose. In the case of the rule of law this means that it is virtually always of great moral value.[40]

1.3.2. *The Rule of Law and protection from arbitrary power*

Raz thinks that arbitrary power is broader in scope than the Rule of Law. In other words, when the Rule of Law is characterized as being opposed to arbitrary rule, Raz interprets this as being opposed to only part of what might constitute arbitrary rule. The Rule of Law entails the existence of rules, which provide a framework for what may and may not be done without penalty, but it does not restrict the content of those rules. Therefore, Raz notes that "many forms of arbitrary rule are compatible with the Rule of Law."[41] For instance, a sovereign can be motivated by "whim or self-interest" in his creation of the general rules governing society, or may institute slavery without violating the Rule of Law.[42]

Though the Rule of Law does not restrict the content of laws, Raz, following F.A. Hayek, thinks it is nevertheless a valuable thing insofar as it allows subjects to plan their lives. It does this by providing the parameters within

[40] *Ibid* 226.

[41] *Ibid* 219.

[42] *Ibid* 221-222.

which subjects may plan, and assures them that these will not change without notice. By allowing subjects the ability to plan, Raz thinks that protecting against the formal abuse of power contributes to their well-being, autonomy and dignity as human beings. He claims that observance of the Rule of Law is "necessary if the law is to respect human dignity."[43] "It is clear," he continues, "that deliberate disregard for the Rule of Law violates human dignity." In other words, violations of dignity by law are not necessarily *contra* the Rule of Law for Raz, but violations of the Rule of Law are necessarily violations of dignity: in this way the Rule of Law is necessarily linked to moral goodness.

Providing a degree of certainty for citizens is a central concern of the Rule of Law according to Raz, and he sees this Hayekian formulation as one of the clearest and most powerful. Hayek defines the Rule of Law in this way:

> Stripped of all technicalities this 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 authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[44]

In summary, Raz understands the Rule of Law to be neutral with respect to the ends that it achieves, yet necessary for achieving good ends. He suggests there is value in this. Further, he argues that as it is always valuable have a framework

[43] *Ibid* 221.

[44] *Ibid* 210 – quoting Hayek, *The Road to Serfdom*, 54.

of rules to function within, the Rule of Law contributes to human dignity, and is also good in this sense.

1.4. *Finnis: In pursuit of the common good*

John Finnis's earliest monograph, *Natural Law and Natural Rights* (1980) was published one year after Raz's *The Authority of Law*. Like Raz's work, Finnis's book is not primarily devoted to a discussion of the Rule of Law, but to other topics within the philosophy of law, in particular a defence of Natural Law Theory. However, that has not stopped Finnis's work or Raz's for that matter from becoming authoritative in discussions on the Rule of Law. While Raz and Finnis hold very different views on the topic of the concept of law, there are some similarities between their accounts of the Rule of Law; however, *they* take themselves to be disagreeing about much of what they have to say on the subject, as is evident from Finnis's critique of Raz's sharp knife analogy.[45] For starters, Finnis frames the Rule of Law in a positive light as a morally good state of affairs, and belittles attempts to frame it as neutral. Consider how he characterizes the Rule of Law: it is "[the] name commonly given to the state of affairs in which a legal system is legally in good shape ... [it is] the specific virtue of legal

[45] However, despite their professed disagreement, they articulate similar or compatible positions more often than one might expect. They seem to share the "basic idea" of the Rule of Law, though their differing opinions about the concept of law itself are at odds.

systems."[46] The Rule of Law, for Finnis, obtains when the legal system is working as it should – working to promote justice and the common good. "The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The Rule of Law is thus among the requirements of justice or fairness."[47]

According to Finnis, there are certain conditions that all human beings have an interest in obtaining and maintaining, such as "life and health, knowledge, and harmony with other people."[48] These goals are intrinsically desirable for oneself and for all other people, and as such, Finnis calls them "intelligible intrinsic goods" or "aspects of human flourishing." He argues that practical reason suggests that law is the appropriate means by which to achieve these ends. Finnis describes a state of anarchy or state of nature where "the more strong, cunning and ruthless prey on the less, education of children (which calls for resources outside the family) is difficult to accomplish, and economic activity remains stunted by the insecurity of holdings and the unreliability of undertakings." He suggests that all have an interest in avoiding such circumstances, and that,

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[46] Finnis, *Natural Law Natural Rights*, 270. There is nothing in this quotation, however, with which Raz would disagree (consider fn 33 above).

[47] *Ibid* 273.

[48] Finnis, "Natural Law Theories." *Stanford Encyclopedia of Philosophy*. Section 1.1.

> [to] articulate that need is to state the reasons for instituting and supporting political authority, notably state government and law, on condition that these institutions carry on their legislative, executive and judicial activities substantially for the common good of the inhabitants of the relevant territory, rather than the interests of a segment of the population unfairly indifferent or hostile to the interests and wellbeing of other segments.[49]

In other words, the whole point of implementing law is to avoid the evils that exist in a state of anarchy and to achieve those common interests that all people share. When law is achieving its proper ends, understood in this way, then Finnis understands the Rule of Law to exist.

Nothing morally good is guaranteed by subscribing to the Rule of Law if it is understood to be equivalent to Fuller's eight desiderata, and Finnis, like Raz, recognizes that the law may satisfy these criteria but nevertheless be susceptible to use for iniquitous ends. However, the use of law for iniquitous ends is an *abuse* of a means that is supposed to be used to achieve the common good. According to Finnis, Fuller's eight desiderata "hang together" because

> they are implications or specifications of the aspiration and duty to treat people as presumptively entitled – as a matter of fairness and justice – to be ruled as free persons.... The normal result of such fairness in the procedures of making and maintaining the law will be to strengthen the law's efficacy, too.[50]

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[49] *Ibid* 1.2.

[50] *Ibid* 1.3.

Finnis laments that Fuller's text seems to give more emphasis to efficacy than to fairness. As a result, he thinks that other scholars, such as Hart, Dworkin and Raz, have read Fuller as demonstrating that the Rule of Law is morally neutral, when, in fact, that was not Fuller's aim. Though Finnis concedes that it is a conceptual possibility that the Rule of Law be used for iniquitous ends, he challenges the idea that it is ever practically used in this way. He argues:

> A tyranny devoted to pernicious ends has not self-sufficient reason to submit itself to the discipline of operating consistently through the demanding processes of law, granted that the rational point of such self-discipline is the very value of reciprocity, fairness, and respect for persons which the tyrant, *ex hypothesi*, holds in contempt.... None of these types of tyranny [exploitative, ideological or both] can find in its objectives any rationale for adherence (other than tactical and superficial) to the disciplines of legality. For such regimes are in business for determinate results, not to help persons constitute themselves in community.[51]

Furthermore, Finnis sees the abuse of law as unlikely, since to use it for evil would be for tyrants to place unnecessary constraints upon their own actions. He says that the Rule of Law "is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom to manoeuvre."[52] Therefore a tyrant's use of the Rule of Law seems strangely counterproductive to Finnis. While he concedes that there is a bare logical or conceptual possibility of the Rule of Law being used for iniquitous ends, he is not

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[51] Finnis, *Natural Law Natural Rights*, 273-274.

[52] *Ibid* 274.

interested in such unlikely possibilities, but rather with practical reason, and thinks that it is a mistake to see the Rule of Law as a neutral instrument like Raz's sharp knife.

Along with Raz and Fuller, Finnis goes on to suggest that "the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good."[53] "Sometimes," he says, "the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by departing temporarily but perhaps drastically, from the law and the constitution."[54] This echoes some of the comments made by Fuller that suggest, for example, that there may be occasions where it is necessary to introduce retroactive legislation to preserve legality overall. It is also similar to Raz's comments that while the Rule of Law is a goal, it is not the ultimate or only goal of a society, but one of many which must be balanced against others.

Like Raz, Finnis provides a very complicated theory of the Rule of Law; just when you think you have got a handle on the complete picture, the theory seems to slip through your fingers. It is very difficult to reconcile, in particular, two of his basic commitments to the Rule of Law. First he says that the Rule of Law denotes the state of affairs that obtains when law is functioning as it is

[53] *Ibid.*

[54] *Ibid* 275.

supposed to, meaning law is functioning as a means towards achieving common goods. However, on the other hand, Finnis acknowledges that conceptually the Rule of Law can be perverted and used for iniquitous ends, as suggested by Raz and Kramer. In other words, the problem is that Finnis is claiming both that the Rule of Law is an end, on the one hand, and a means to an end on the other.[55]

One way of making sense of this might be to tweak Finnis's theory a bit and suggest that the thing which can be used towards heinous ends is *law*. *Law* in turn can culminate in the Rule of Law, if used correctly, or not the Rule of Law, if used incorrectly. In this sense the Rule of Law would remain a moral ideal, and an end, while law would be the neutral means to achieving that end.[56] If we understand the connection between law and the Rule of Law in this way it is clear that Fuller's criteria would be requisite for law, but would not necessarily produce the Rule of Law; though Finnis suggests that law is *likely* to produce the Rule of Law.

[55] If, however, Finnis thinks the Rule of Law has internal moral virtues that it necessarily achieves when it exists, as well as a relationship with other external moral values, which are *typically* though not necessarily achieved when the law is functioning as it should be, then it is possible that he does not have a problem here. While it seems clear what the internal moral values might be – dignity, justice, etc. – I am unclear as to what the external moral values might be, and so cannot decisively say whether I think this saves him from the problem I raised. Thank you to Wil Waluchow for raising this possibility.

[56] Neutral in the sense that it could be used to achieve both a good and an evil state of affairs.

1.5. *Kramer and the neutrality of the Rule of Law*

Matthew Kramer, a legal positivist, sees the Rule of Law as "nothing more and nothing less than the state of affairs that obtains when a legal system exists and functions."[57] In Kramer's case, the Rule of Law evaluates whether or not a society can be said to have law, and not the moral quality of a legal system. Kramer's main thesis with respect to the Rule of Law is that it does not have any inherent moral value. He takes Fuller's eight desiderata outlined in *The Morality of Law* as sufficient for the existence of the Rule of Law. He writes "the rule of law as understood throughout this book [*Where Law and Morality Meet*] is admirably encapsulated in Fuller's eight principles of legality."[58] In other words, he says, "*The state of affairs constituted by the substantial fulfillment of those precepts* [outlined by Fuller] *is the rule of law.*"[59]

By "substantial fulfillment" Kramer means nothing more than that each of the criteria are achieved to a reasonable degree. In other words, like Fuller, Kramer appreciates that unwavering adherence is not possible nor is it desirable. He admits that "any regime of law, including a benignly liberal-democratic regime, will fall quite a way short of adhering perfectly to Fuller's precepts."

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[57] Kramer 172.

[58] *Ibid.*

[59] *Ibid* 173 – emphasis added.

On the basis of the stipulated understanding of the Rule of Law as the sum total of Fuller's eight criteria Kramer proceeds to demonstrate how the Rule of Law is "not an inherently moral ideal"; it is neutral and may be used for morally good and morally iniquitous ends.[60] He argues that prudential considerations might motivate evil legal systems to use the Rule of Law to govern subjects; it is arguably more effective than arbitrary rule. Kramer's paramount question is:

> If the officials who operate a morally deplorable system of governance are motivated purely by prudential considerations relating to the consolidation of their own power and the exploitation of the citizenry, will they have solid reasons for abiding by rule-of-law requirements to a significant extent?[61]

He answers this question in the affirmative so long as the society in question is larger than a handful of families and exists over a sustained period of time. Kramer suggests that "by engaging in extra-legal brutality, officials will have weakened citizens' punishment–centred incentives for compliance with the law."[62] In other words, he reasons that officials who adhere to Fuller's eight criteria will have given their citizens greater reasons to comply with their laws than societies where punishment is doled out extra-legally. He continues:

> What my previous writings on the rule of law have claimed is that ruthlessly self-interested officials will have strong reasons to

[60] *Ibid* 173.

[61] *Ibid* 174.

[62] *Ibid* 193.

> maximize the punishment-centred incentives for citizens to conform to legal directives, and that the officials can best act upon those reasons by cleaving to Fuller's eighth principle.[63]

Kramer thinks that since the Rule of Law can obtain in a society while there are deviations from it – a legal system can tolerate some retroactive laws and still continue to be successful – this can also be applied to evil regimes. The point is, if rulers deviate here and there from Fullerian criteria, it does not mean that they have abandoned the Rule of Law, as I have already noted.[64] Though Kramer believes that legal systems must be normative rather than purely coercive,[65] on occasion rulers may break from that normativity, as they may occasionally break from other conditions, and this will not be a complete turn from the Rule of Law.

Raz and Finnis among others argue that the certainty provided by the Rule of Law is important because it enables people to plan their lives, and as such contributes to their well-being. The rules offer the parameters of their freedom. This has been identified as a good thing, by such scholars and therefore they attribute some moral goodness to the Rule of Law. In his discussion of the Rule of Law, Kramer refers to such an argument advanced by Nigel Simmonds. Simmonds argues:

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[63] *Ibid* 195.

[64] *Ibid* 180.

[65] *Ibid* 217.

> Compliance with the eight principles is a morally desirable feature of a legal regime because, amongst other reasons, it provides interstices of liberty within which the citizen can act freely, without the risk of interference. This not only provides the necessary framework for purposeful and creative activity, but also provides secure areas of freedom which may be exploited for the purpose of opposing the existing regime (which is, of course, one reason why evil regimes are unlikely to favour Fuller's principles).[66]

Kramer, however, does not think that the non-arbitrariness which obtains from Fuller's criteria amount to anything moral. He does not think that they necessarily provide for freedom and liberty in any way, though they often might. Kramer gives examples where freedom is severely limited even though the Rule of Law is in place[67]: "First, a legal system can bestow a suffocating extensive degree of protection on each individual against the eccentric behaviour of other people."[68] For instance, individuals could be given more legal duties than legal liberties. "Second [...] the rule of law will typically be administered by an elaborate governmental apparatus, which can monitor and regulate people's behaviour with stifling efficiency."[69] Kramer notes that Simmonds maintains that even if there are a lot of laws, the laws will still provide domains of freedom for each person, but Kramer claims that this is not necessarily the case.

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[66] *Ibid* 197 – quoting N.E. Simmonds, *Central Issues in Jurisprudence*. Second Edition. (London: Sweet & Maxwell, 2002). 238.

[67] *Ibid* 200.

[68] *Ibid* 213.

[69] *Ibid* 214.

So, for Kramer there is no direct link between the Rule of Law and a morally good state of affairs. He also argues that there is no indirect link which bestows moral importance on the Rule of Law. Contra Raz, Kramer argues that though the Rule of Law might be a necessary, though not a sufficient, condition for good governance, it is also a necessary though not a sufficient condition for effective evil governance. Since conceptually it is no more linked with a good state of affairs than a bad one, Kramer thinks it makes no sense to append any sort of morality to it.

1.6. *Jeremy Waldron and a procedural account of the Rule of Law*

Jeremy Waldron's analysis of the Rule of Law begins with an observation of what contemporary audiences mean by the term. This leads him to the conclusion that "the Rule of Law is one of the most important political ideals of our time."[70] He writes: "The Rule of Law is seen as a fragile but crucial ideal, and one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in a country's laws or constitution."[71] This quotation demonstrates that Waldron understands the Rule of Law to be the opposite of the exercise of arbitrary power.

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[70] Jeremy Waldron, "The Concept and the Rule of Law." (September 24, 2008). *Georgia Law Review*, Forthcoming; NYU School of Law, Public Law Research Paper No. 08-50. Available at SSRN: http://ssrn.com/abstract=1273005. Hereafter *Concept*. 1.

[71] *Ibid* 4.

This is an aspect of the Rule of Law that we have already encountered in the work of Raz and Finnis, and they understand the Rule of Law's necessary antithesis to arbitrary power as providing for a morally good state of affairs.[72] Waldron also buys into the Hayekian idea that there is freedom where there is law insofar as it enables people to know what they will and will not be prosecuted or punished for and how they can legally engage with the government and one another. As Waldron says, "knowing that each one can count on the law's protecting certain personal property rights [etc.] enables each citizen to know what he can rely on in his dealings with other people and the state."[73] However, for Waldron the Rule of Law does not just protect against formally arbitrary exercises of power, as it does for Raz, but goes further and protects citizens against some exercises of substantive arbitrariness by requiring certain procedural constraints.

Waldron acknowledges that the formalist version of the Rule of Law, akin to what is suggested by Raz and Kramer, is most influential in legal philosophy; however, he notes that the proceduralist conception, of which he takes himself to be a proponent, is more heavily emphasized by political discourse. He points out that there is a disparity between what legal philosophers emphasize and what ordinary people expect from the Rule of Law.

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[72] In Raz's case it is opposite to certain kinds of arbitrary power.

[73] Waldron, "Concept", 5-6.

In "The Concept and the Rule of Law," Waldron argues for two propositions: 1. "our understanding of the Rule of Law and our understanding of the concept of law ought to be much more closely connected than they are in modern jurisprudence."[74] 2. "our understanding of the Rule of Law should emphasize not just the value of settled, determinate rules and the predictability that they make possible, but also the importance of the procedural and argumentative aspects of legal practice."[75] Further, he argues that the above two propositions are connected.

Waldron spends a large part of the article outlining the essence or necessary conditions for the existence of a legal system. His first criterion is the existence of courts: "institutions which apply norms and directives established in the name of the whole society to individual cases."[76] This involves the existence of fair hearings, among other things. In some sense this is reminiscent of Raz's principles of the Rule of Law. While Raz does not make the existence of courts a principle in and of itself, he does identify the independence of the judiciary and the accessibility of courts as among his conditions. However, Waldron's

[74] *Ibid* 4. I do not know on what basis he thinks this is necessary: most scholars' conceptions of law and the Rule of Law *are* quite intimately related. Consider the scholars I have introduced in this chapter.

[75] *Ibid.*

[76] *Ibid* 20.

insistence that courts apply laws which are established in the name of the whole society is much more Finnisian than Razian.

The second criterion he requires is the existence of general public norms, which must be established in the name of the whole society. Again, this condition, which pops up a number of times in his article, is very much in line with how Finnis thinks laws ought to be created and applied.

Third, Waldron identifies positivity as a requirement. This entails an acknowledgement that laws are man-made and not discovered from some external, perhaps divine, source. While this sounds very positivist of him, Waldron will not go so far. He claims to be interested only in the "central" concept of law, from which he excludes instances of law that are often considered abominations, and these are the very instances of law that positivists deliberately include in their understanding of the term. Within this discussion of positivity, Waldron makes a case for the necessary existence of legislatures, which are the means by which the laws are created. His incorporation of legislatures within this criterion is further evidence that this list is context dependent, as he claims.

Fourth, he argues that the law must present itself as oriented to the public good. He says, "we recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole

society and to address matters of concern to the society as such."[77] This, again, is Finnisian in its orientation towards the public good, though the idea that the law must present itself in a certain way is reminiscent of Raz's conception of authority and its relation to law. Raz argues that whatever it might *actually* be, the law must present itself as legitimate practical authority. However, I think that Waldron is after more than appearances. He seems to be saying that not only must the law *present* itself in such a way, but that the public will not recognize dictates as law unless they consider them to be in their collective interest.[78]

Fifth, and finally, is the requirement of systematicity. The law builds on itself, Waldron explains; it presents itself as a unified enterprise of governance. One might understand this requirement as being in some ways akin to Neil MacCormick's requirement of coherence or Dworkin's theory of law as integrity.[79] MacCormick suggests that the law must constantly strive to be a coherent system with every law passed and every court decision made. Dworkin, similarly, suggests that legal adjudication is an exercise in identifying the decision

[77] *Ibid* 32.

[78] This also distances Waldron from positivism, especially as it is articulated by scholars such as Kramer.

[79] See Ronald Dworkin, "Integrity" and "Integrity in Law." *Law's Empire.* (Oxford: Hart Publishing, 1998).176-275; and Neil MacCormick, "Coherence, Principles, and Analogies." *Rhetoric and the Rule of Law: A Theory of Legal Reasoning.* (New York: Oxford University Press, 2005.)189-213.

which will "show the positive law in the best possible light."[80] First a decision must "fit" with the existing legal material. In order to do this, Dworkin suggests imagining that all the laws are traceable to a single (infaillable) individual (the purpose of this is to circumvent the problem of multiple authors with multiple intentions). Second, for Dworkin, a legal decision must meet the requirement of "justification"; the decision to take is the one that best comports with political morality. In this way, MacCormick and Dworkin hold the same basic idea as Waldron that the law should be understood as a coherent system, which continues in its coherence with the introduction of each piece of legislation and each legal decision.

Waldron explains that all five of the criteria for law that he has mentioned are to be interpreted with respect to degree: "I think that we can call something a legal system if it satisfies a recognizable minimum along these five dimensions". In this, he is also not unlike Fuller, who recognized that all his enumerated criteria could never be achieved all of the time.

Waldron admits that the account of law that he has provided is "certainly not a purely descriptive account."[81] He claims that his account

[80] Ronald Dworkin, "Law's Ambition for Itself." *Virginia Law Review*. 71(2): March 1985. 173-187. 176.

[81] Waldron, "Concept", 38.

> is not promising to say what is conveyed by every intelligible use of the word "law." It is an explication of the central concept of law, which needs to be understood in itself, as background to our necessarily more jaundiced understanding of these other degenerate, exploitative, and backhanded uses of the term.[82]

While Waldron is not providing a "purely" descriptive account of law, his account is meant to be descriptive to a certain degree. He is trying to describe the "central" way we use law: what we mean when we are using it reflectively, with a full appreciation of the term.

So how does Waldron's analysis of law pertain to the Rule of Law? He suggests that what he has outlined as the central case of law is consistent with "the most prominent requirements" of the Rule of Law ideal.[83] He explains: "I believe that one can understand these two sets of criteria – for the existence of law and for the Rule of Law – as two views of the same basic idea."[84] However, he indicates that there is a difference between the two concepts, and this seems to be in terms of the degree to which they fulfill his enumerated criteria: "Usually a reproach in terms of the concept of law indicates we are thought to be in danger of falling short of some minimum threshold is, while a reproach in terms of the Rule of Law

[82] *Ibid* 41-42.

[83] *Ibid* 47.

[84] *Ibid* 49.

represents continuing upward pressure along each of these defining dimensions."[85]

While Waldron describes his account as procedural, it certainly has some implications for the content of what may be a law. There is nothing neutral about his understanding of the Rule of Law; it is morally good and a political ideal to be sought after. In this sense his account is quite similar to Finnis's, and I have been noting some similarities along the way. However, while Finnis describes the Rule of Law explicitly as an end, Waldron conceives of it as a collection of procedures, and so it seems more like a means to an end on his account. However, his insistence on collective public interest as a "central" feature of law suggests that the law will necessarily attain a good state of affairs, if it is working as it should.

In this chapter I outlined a variety of theories posited by contemporary theorists on the Rule of Law with the purpose of demonstrating the variance in the conclusions of even the most reflective persons. In the next chapter I will begin to provide criteria for narrowing the scope of acceptable theories in the hopes of moving towards a situation where the Rule of Law will be a more universally meaningful term.

[85] *Ibid* 50-51.

CHAPTER TWO

Identifying the Raw Material for Conceptual Analysis

In chapter one, I outlined some of the current positions scholars hold on the Rule of Law; I considered the work of Lon Fuller and the theoretical models of the Rule of Law espoused by Joseph Raz, John Finnis, Matthew Kramer and Jeremy Waldron. What became apparent in the first chapter is that, currently, there is little consensus on what state of affairs the Rule of Law denotes even from the most reflective population: they have not brought us very far in answering the question: "What is the Rule of Law?"

On a fundamental level, this an undesirable situation: there is no agreement about what the concept 'Rule of Law' signifies, yet it is invoked incessantly by politicians, the media and scholars. I do not believe that successful communication is possible under these circumstances, and this situation has resulted in a discourse where participants are in danger of talking past one another.

While undesirable, I do not think that this state of affairs is by any means *unavoidable*. In fact, I think that the radical disagreement about what the Rule of Law denotes is evidence of undisciplined conceptual theorizing. Therefore, in this chapter, I intend to sketch some very basic methodological points about where we ought to obtain the raw material for conceptual analysis, which I think have been partially disregarded by many current theorists engaged in Rule of Law discourse. I suggest that in order to move towards a shared understanding of the Rule of Law, it is necessary to re-evaluate the plethora of disparate theories on the basis of their ability to incorporate and make sense of current and historical usages of the term, which are two important sources of raw material for conceptual analysis. I am not suggesting that there is a capital-T truth of the matter to be discovered; instead, my goal is to recommend ways to narrow the scope of disagreement so that we may begin to discuss the Rule of Law in more meaningful ways.

In order to evaluate the conceptions of the Rule of Law currently on offer, and see if we can come to enough of a consensus to enable meaningful conversation, I make two related and basic recommendations about where to derive the raw materials for the analysis of any concept. I argue that these ought to be taken into account when engaging in philosophical conceptual analysis, even if the conceptual analysis we are engaging in is not painstakingly meticulous, but rather for more practical purposes. The first step towards clarifying a concept is to identify how it is currently used; based on this first point, I will consider the current usage of the phrase "Rule of Law."

The second step is to consider how a term has been used historically. Since continuity exists with respect to the use of the term over time, there is likely to be some kind of continuity in that term's meaning. The Rule of Law certainly has a long history; it has been a topic of interest for scholars at least since Aristotle debated the desirability of "the rule of law and not of men" in the *Politics* more than two thousand years ago.[86] As per the second step, I will briefly investigate the history of the Rule of Law by considering the views of Plato, Aristotle, and Cicero from antiquity, Aquinas from the Middle Ages, Locke and Montesquieu from the early modern period, and Hayek from the twentieth century. Two

[86] Aristotle. *Politics*. Book III. In the Politics, Aristotle argues that the Rule of Law "is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law."

streams of thought dominate the history of Rule of Law discourse, and I will discuss (i) the Rule of Law, not of Man and (ii) formal legality as they are outlined by the philosophers who supported them.

This chapter will close with a brief evaluation of the theories presented in the first chapter on the basis of whether or not they have been successful in incorporating the raw materials suggested here into their own conceptions of the Rule of Law.

2.1. *Why engage in conceptual analysis?*

Before I outline the current and historical usages of the Rule of Law, I want to say something about why it is important to analyze concepts at all.[87] First, it seems important to engage in the analysis of concepts in order to ensure that participants in an argument or debate (or simply in a conversation) are actually talking about the same thing and not talking past one another. According to Michael Giudice:

> The ultimate goal of conceptual analysis [...] is improved understanding.... First [...] philosophical analysis of existing concepts or participant understanding aims at revealing confusion and disagreement, with the goal of clearing a way for the construction of more adequate theories or models with which to understand ourselves.

[87] While I recognize that the viability of conceptual analysis as a philosophical method is a debate in itself, it is not something I have space to engage here. For the attractions and objections to conceptual analysis, see Eric Margolis and Stephen Laurence, "Concepts." *Stanford Encyclopedia of Philosophy*. First published Nov 7, 2005; substantive revision Feb 22, 2006. http://plato.stanford.edu/entries/concepts/#ConConAna.

> Even if new or better concepts are not easy to find or develop, recognition of the limits or pitfalls of existing concepts is progress.[88]

Though the concept in question may not be *easily* clarified, as Giudice points out, recognizing the existence of confusion or vagueness about its meaning is the first step to eliminating that confusion, and moving towards a situation where the concept can be meaningfully employed.

When there are two or more variations of the same term at play, when concepts have not been clarified, for example, it can seem like there is disagreement between participants when it is actually not the case. The current debates on pornography and its relationship to harm might help illustrate this point. Feminists including Catharine MacKinnon and Andrea Dworkin are known for their specialized definition of pornography. This definition stipulates that pornography involves degradation, humiliation and a variety of violent actions usually perpetrated on women.[89] Conversely, they stipulate that 'erotica' is sexually explicit material which depicts respectful relations between participants. However, their proposed definition is not a reportive definition of pornography: it does not define pornography in the way that the majority of people use it. Most

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[88] Giudice, Michael. *The significance of contingent relations in the philosophy of law.* Ph.D. Dissertation. McMaster University (Canada), 2005. See 15-16 for a complete discussion of the four ways philosophically-constructed theories can improve understanding.

[89] For their full definition of what constitutes pornography, see Andrea Dworkin and Catharine A. MacKinnon. *Pornography and Civil Rights; A New Day for Women's Equality.* Minneapolis: Organizing Against Pornography, 1988. 25 March 2006. <http:www.nostatusquo.com/ACLU/dworkin/other/ordinance/ newday/TOC.htm>.

ordinary language users understand pornography as sexually explicit material intended to arouse its consumer, which would include both what feminists call pornography, and what they call erotica. The fact that these feminist authors rely upon a non-conventional understanding of pornography creates scenarios where their work faces resistance on the basis of a lack of shared understanding, and creates confusion within the discourse. In fact, the debate on pornography (in the sense that MacKinnon and Dworkin stipulate) and the debate about pornography (as it is usually understood), are two separate debates, but the use of the term 'pornography' in both cases obscures that fact.

In a nutshell, analyzing concepts is important in order to enable meaningful communication and debate between persons. This is the case both when a concept is itself the *direct* subject of debate, and also when what is being discussed relies on shared understandings of more fundamental concepts. This idea is well summarized by Nicos Stavropoulos. "Discussion about the nature of something," he writes, "presupposes an understanding of what *counts* as that something."[90]

Quentin Skinner's paraphrase of Joel Feinberg nicely captures the aim behind analyzing concepts. He writes, "The goal of conceptual analysis [...] is

[90] For a discussion of H.L.A. Hart's approach to the conceptual analysis of law see Nicos Stavropoulos. "Hart's Semantics." *Hart's Postscript: Essays on the Postscript to The Concept of Law.* Second Edition. Jules Coleman. Ed. Oxford: Oxford University Press, 2001. 69 – emphasis in original.

thus to arrive, by way of reflecting on 'what we normally mean when we employ certain words', at a more finished delineation of what we had better mean if we are to communicate effectively, avoid paradox and achieve general coherence."[91] I think this is an important goal with respect to the Rule of Law; as it seems to be a significant concept for people engaged in legal and political discourse, thus it is very important that we strive to use it legitimately and effectively.

2.2. *Raw material for analyzing the Rule of Law*

With the foregoing in mind, I will proceed to make two related and simple recommendations for engaging in conceptual analysis. While each suggestion may appear almost trivial, there are a number of theorists who seem to have failed to take each or both of these points into consideration when theorizing about the Rule of Law.

2.2.1. *Current Usage as Raw Material for Conceptual Analysis*

First, it is important to consider how a term is currently being used if, as Wittgenstein argued, the meaning of a word is its use in ordinary language. In other words, a word without a use has no meaning. Admittedly, as Stavropoulos points out, "actual usage is not, as it stands, *sufficient* for correct explication of

[91] I think Skinner's explanation of Feinberg's quotation is clearer than Feinberg's quotation on its own. See Quentin Skinner. "The idea of negative liberty: philosophical and historical perspectives." *Philosophy in History: essays on the historiography of philosophy*. Richard Rorty et al. Eds. New York: Cambridge University Press, 1984. 199 (footnote 21); and Joel Feinberg. *Social Philosophy*. Englewood Cliffs: Prentice-Hall, Inc., 1973. 2.

meaning, as it is usually too unruly or haphazard, and may rest on incomplete understanding or be affected by general epistemic impediments."[92] Language users certainly have not come to a state of reflective equilibrium with respect to all of the concepts in their repertoire. If this was the case, conceptual analysis would be largely unnecessary. Investigating the current usage of a term provides raw material for conceptual analysis. Further, it is desirable for the concept in its analyzed form to maintain some kind of familiarity for average language users, since the overall goal of the analysis is to illuminate the 'contents' of the concept and thereby improve communication and understanding. Stavropoulos continues:

> Actual usage sets limits [to the analysis of concepts]: the principle cannot fail to fit actual usage, except to the extent that it orders and ensures consistency of such usage. The principle cannot introduce distinctions never made in the course of or entailed by actual usage, nor can it collapse distinctions actually made or entailed. Ambitious analysis therefore must track actual understanding.[93]

I will return to some of his points regarding analysis in the third chapter. For now, I maintain that beginning with ordinary language use provides a good foundation for achieving the goal of conceptual analysis.[94]

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[92] Stavropoulos 81- emphasis added.

[93] *Ibid.*

[94] I think that this is the appropriate place to begin despite some concerns that the reader may have at this point. First of all, a term may have different meanings in different contexts: 'star' could mean a gravitational field of gases burning billions of miles away from the Earth; it could mean the shape, with five or more points; it could just be understood as a pin-prick of light in the night sky; or perhaps one might think of an entertainer (musician or actor) as a star. Because a term might have a variety of current usages does not mean that this is not the correct place to begin

2.2.2. *Current Usage of the Rule of Law*

I would like to begin with an observation about the way the phrase "Rule of Law" is currently understood in society. It *is* true that there seem to be many people who have absolutely no idea what the Rule of Law means. But one has only to listen for it in political speech and in the news media, listen to those who are using it to get a sense of the immense support that it garners. Earlier, I suggested that it seemed to be an evaluative concept, but that scholars could not agree about what it was meant to evaluate, and whether or not that evaluation was morally loaded or neutral. If we look to politicians, journalists, people writing editorials and bloggers, among others, it seems for the most part that the Rule of Law is understood as evaluating legal systems in a morally significant way. It functions

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collecting raw data. It simply means that the data will have to be sorted – and while this might be a harrowing task, its difficulty does not indicate that the wrong raw material has been considered.

There is also the possibility that individuals are not descriptive in their use of terms, but rather revisionary – it is meant to be used for some purpose. Therefore, the material collected may consist of data that is reported based on what individuals take to be the case from experience, but it may also consist of data that is constructed to serve a particular end. On this point, first of all, I think that instances of constructed concepts are likely to be much less prevalent that otherwise; average people are unlikely to be constructing their concepts to serve a particular purpose, especially if they see this understanding as at odds with the accepted understanding. It is more likely the case that it is scholars who revise concepts in this way – and, again, this is data that can be broken down and analyzed to determine whether or not it ought to be retained for the final analysis. If the conception on offer is so revisionary that it is miles away from ordinary usage, it may be discarded in the final analysis. I discuss this more in chapter three.

Finally, the fact that many concepts are persuasive or evaluative does not cause any problems at this point. I think that it is important initially to collect a broad cross section of data to evaluate. The fact that some people might use the *Rule of Law* in a morally loaded way, such as the way we use *justice*, and that others might not use it in that way, but in a more descriptive way, such as the way we use *chair,* does not concern me at this point. These are problems to be addressed after the collection of such data.

as a political ideal; at least, that is how people tend to talk about it. Regimes are criticized for violating the Rule of Law. Others are praised for striving to achieve it. It is globally recognized that the Rule of Law sets a desirable standard for governments. The evidence of this is that most societies in the world currently attempt to justify their actions with respect to the Rule of Law. One of the most important indicators that the Rule of Law is viewed as an important norm is the fact that governments suspected of violating it still try to couch their actions in its terms.

Politicians and states are criticized for violations of the Rule of Law: consider its invocation with respect to US actions at Guantanamo Bay. There are attempts to implement the Rule of Law in developing countries through initiatives like the World Justice Project,[95] and such initiatives are typically met with praise and support. This is evident from the broad spectrum of world leaders who express respect for it. It is globally recognized and many states attempt to justify their actions on such terms. Overall, we seem to think that the Rule of Law is a good thing to have, and an ideal to aspire to.[96]

[95] http://www.worldjusticeproject.org/

[96] At this point, I am beginning to demonstrate that the Rule of Law is viewed as something of value by contemporary societies. However, does value entail *moral* value? I think in this case it does. First, acknowledgement of its desirability seems to be widespread, and people seem to think that without it, justice cannot be served (and justice is typically understood as a morally evaluative term). The Rule of Law has the potential to seriously affect the fundamental interests that people

Brian Tamanaha, in the Introduction to his book *On the Rule of Law*, provides the reader with a broad cross-section of comments from current world leaders endorsing the Rule of Law. From the former American President, George W. Bush, to former President Vladimir Putin of Russia, from Chinese leaders to Robert Mugabe of Zimbabwe, Indonesian President Abdurrahman Wahid, President Mohammed Khatami of Iran, Mexican President Vicente Fox Quesada and Afghan warlord Abdul Rashid Dostum – everyone has expressed a commitment to and the desirability of the Rule of Law.[97]

Jeremy Waldron has argued that "the Rule of Law is one of the most important political ideals of our time." "Open the newspaper," Waldron challenges, "and you will see the Rule of Law cited and deployed – usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy."[98] He points to articles from the New York Times, The Times (London), The Financial Times and American case law to demonstrate this point. You will see Waldron's point even if you consider briefly what has been said with respect to the United States' war on terror and treatment of detainees at Guantanamo Bay alone: "The Rule of Law has yet to be reinstated

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have, and in that sense it is morally relevant to their lives. Thank you to Wil Waluchow for bringing this point to my attention.

[97] Tamanaha, 1-2.

[98] Waldron, "Concept", 1.

in the U.S. battle on terror. The problem started when the (Bush) administration rejected the Geneva conventions, which are intended to apply to every armed conflict in the world."[99] Consider a second example:

> The Supreme Court has not closed the doors of justice to the detainees imprisoned at Guantanamo Bay. This is a major victory of the Rule of Law and affirms the right of every person, citizen or non-citizen, detained by the United States to test the legality of his or her detention in a U.S. Court.[100]

And a third:

> In the name of national security, the Bush administration has eroded the Rule of Law and the system of checks and balances in the United States, both fundamental principles in any democracy. In our America, we will not tolerate illegal spying or torture. The ACLU calls on the Human Rights committee to join us in our effort to hold the U.S. government accountable.[101]

The message is clear: the Rule of Law is important, and its violation ought not to be tolerated, by Americans or any other population.

Among the innumerable sources discussing the Rule of Law, I found an article that suggested that no liberal democracy would be successful unless its

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[99] Barbara Olshansky, American human rights lawyer.

[100] Michael Ratner, attorney and president of the Center for Constitutional Rights (CCR), a non-profit human rights litigation organization based in New York, New York.

[101] "ACLU Calls on U.N. Human Rights Committee to Hold U.S. Government Accountable." *American Civil Liberties Union.* <http://www.aclu.org/intlhumanrights/gen/24500 prs20060313 .html>. 13 March 2006. Retrieved 25 August 2009. Ann Beeson, distinguished human rights advocate and litigator, quoted.

citizens and officials had respect for the Rule of Law[102], a project organized by the government of Canada with a budget of $6.5 million dollars for strengthening justice and the Rule of Law in Afghanistan[103], another article that criticized the recent attempt of the Liberal and NDP parties of Canada to form a coalition government as "an attack on the Rule of Law and the Constitution."[104] Again, it certainly seems that the Rule of Law is something desirable: we tend, at least here in the West, to view liberal democracy as a desirable form of government (if not as the only worthwhile form of government), and if it depends for its success on endorsement of the Rule of Law, then by extension, it seems we ought to be committed to the Rule of Law.

The World Justice Project (WJP), funded by and associated with the American Bar Association, has some pretty specific things to say about the Rule of Law. The WJP "is a multinational, multidisciplinary project to strengthen the rule of law for the development of communities of opportunity and equity." According to the WJP, the Rule of Law is necessary as a foundation for societies that are safe and provide valuable life opportunities for citizens and promote

[102] Avishkar Govender, eThekwini-Durban, KwaZulu-Natal, South Africa SADC – AU.

[103] <http://www.afghanistan.gc.ca/canada-afghanistan/projects-projets/institutions3.aspx>.

[104] <http://www.thehilltimes.ca/members/login.php?fail=2&destination=/html/cover_index.php?display=story&full_path=/2008/december/15/lugosi/>.

equality. The project also supposes that "multidisciplinary collaboration" is the best way to cultivate the Rule of Law. While the project provides funding and opportunities for the advancement of Rule of Law scholarship as well as for the implementation of initiatives designed to support the Rule of Law in a variety of ways, it has also developed "The Rule of Law Index," which measures a country's adherence to the Rule of Law. According to the WJP:

> The Index assesses the rule of law based on detailed factors and subfactors, drawn from the Universal Declaration of Human Rights and other international instruments summarized in the following four statements, which constitute the WJP's definition of the rule of law:1) The government and its officials and agents are accountable under the law; 2) The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; 3) The process by which the laws are enacted, administered and enforced is accessible, fair and efficient; 4) The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[105]

By assessing countries via the Index, the WJP hopes to be able to better guide efforts to strengthen the Rule of Law around the world.

I think it is fair to claim that the Rule of Law is currently understood as not only morally good, but as a political ideal, and a very important one at that. It is widely recognized and endorsed, and from that one can estimate its importance.

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[105] <http://www.worldjusticeproject.com/>.

But it is also important *because* its importance is widely recognized and endorsed; it is one of the terms by which most societies currently evaluate themselves and one another, and this widespread usage gives it significant force.

2.2.3. *Historical Usage as Raw Material for Conceptual Analysis*

It is important to consider not only current but also the historical usage of a term as part of the raw materials for conceptual analysis. While it is true that concepts develop over time, it is also undeniable that if there is continuity of *use* over time, there is likely to be some kind of continuity with respect to how a term is used and understood. In the case of the Rule of Law there is a long and rich history to consider: the term has existed at least since antiquity when Aristotle debated the desirability of "the rule of law and not of men" in the *Politics* more than two thousand years ago.[106] There are a variety of related themes that can be extracted from the discussions of the Rule of Law over the centuries, but most of them centre on the idea that the Rule of Law is in some way the antithesis of the arbitrary use of power. This idea, however, has been interpreted in a number of different ways. In what follows, I shall focus on the two most prominent understandings of the Rule of Law as the antithesis to the arbitrary exercise of power in order to illuminate the concept's history: first I shall consider the Rule of

[106] Aristotle. *Politics*. Book III. In the Politics, Aristotle argues that the Rule of Law "is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law."

Law as opposed to the Rule of Man and second, the Rule of Law as formal legality.

2.2.4. *The Historical Usage of the Rule of Law: Rule of Law, not of Man*

In *Politics*, Aristotle, like Plato before him in *Laws* and *Statesman*, was concerned with outlining the way society ought to be set up and function in order to maximize people's ability to live well and achieve the good. This idea is also echoed later in the work of Cicero and St. Thomas Aquinas. Endorsing the Rule of Law is a crucial part of the social and political recommendations made by these philosophers, and, in particular, is meant to safeguard against the dangers of tyranny.

The Rule of Law is seen as desirable in this case since it is characterized as objective and in accordance with reason, and as such is contrary to the Rule of Man, which is characterized as arbitrary and "subject to the unpredictable vagaries of [individual rulers]." To live under the Rule of Law "is to be shielded from the familiar human weakness of bias, passion, prejudice, error, ignorance, cupidity, or whim" which are associated with the Rule of Man.[107] A sovereign or ruler who rules in accordance with the Rule of Law appeals to factors external to himself – existing rules, principles and reason – when creating legal norms and adjudicating

[107] Tamanaha 122.

disputes. A sovereign or ruler who typifies the Rule of Man does not appeal to factors external to himself, but only to internal factors such as his own needs, desires or predilections. Thus, it is evident how the Rule of Man might devolve into tyranny.

For Plato, Aristotle, Cicero and Aquinas, a society is rightly governed when the interests that drive it are the interests of the community, as opposed to the interests of a particular person or group of people. According to Cicero, "laws were invented for the well-being of citizens, the safety of states, and the calm and happy life of humans."[108] For Aquinas, law is "an ordinance of reason for the common good, made by him who has care of the community."[109] According to these philosophers, it is a perversion for a government to rule with an eye to private interests: it is unjust and is likely to lead to the ruin of a society. Consider the following from Aristotle's *Politics*:

> And the rule of law is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. For magistrates there must be, - this is admitted; but then men say that to give authority to any one man when all are equal is unjust.... He who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a

[108] *Laws*, Book II, 11.

[109] *Summa Theologica*, Treatise on Law, question 90.

> wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[110]

The Rule of Law, for Aristotle, is preferable to the Rule of Man because it would be unjust for one or a few to rule all the rest since all men are relatively equal and to endorse such a hierarchy would be to erroneously place some above others.[111] Importantly, he acknowledges that men must *participate* in the Rule of Law, but that their role is as servants of the law. If, instead, men attempt to subject the law to their will, then the rule becomes the Rule of Man, which may lead to tyranny and towards a society where people are hindered from achieving the good. Consider similar sentiments articulated by Plato:

> [We] must not entrust the government in your state to any one because he is rich, or because he possesses any other advantage, such as strength, or stature, or again birth: but he who is most obedient to the laws of the state, he shall win the palm.... And when I call the rulers servants or ministers of the law, I give them this name not for the sake of novelty, but because I certainly believe that upon such service or ministry depends the well or ill-being of the state. For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer.[112]

Plato, like Aristotle, argues that men ought to be subjects of the law rather than the other way around. Those that should be placed in charge of the rest of society

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[110] *Politics*, Book III, 16.

[111] Unfortunately, Aristotle's understanding of "all men" was restricted due to the era in which he lived.

[112] *Laws* IV, 715.

are those who are "most obedient to the laws of the state" and attempt to uphold rules, principles and reason, which are characteristic of systems under the Rule of Law, in the name of the common good. Plato, more directly than Aristotle, describes how the well being of society depends upon this type of rule and is endangered by rulers that assume superiority over law.[113]

For these philosophers, the word 'law' is often used in a very restricted sense. "Law properly so-called" only exists when it is devised by a person of the correct pedigree, in accordance with already established rules, principles and right reason and with an eye to the concerns of the entire community being governed.[114] For Aquinas, law has to be derived from divine and eternal law in

[113] Though the Rule of Law was seen as the correct route to take in order to ensure the continuance of the state and in enabling well-being of citizens, it was not always seen as an ideal state of affairs. Plato amongst others advocated for something like a society under the Rule of Law, but he by no means considered it to be the ideal. Because laws are static and general they are not attuned to the particularities that arise in actual cases. According to Robin Letwin, for Plato, the "law is necessarily a second best alternative to the ideal, which is a ruler of perfect wisdom who can make the right decision for every particular question. If such a ruler were available, it would be [...] ridiculous to hamper him by legal codes."[113] However, since the existence of such a ruler is not a practical possibility, human beings are fallible Plato supports the idea of the Rule of Law as the most likely route to success for society.

To reiterate, a ruler of perfect wisdom would be the ideal for society, as he or she would enable well-being and the pursuit of the good in society. However, the Rule of Law I shall call the practical ideal, for a human ruler of perfect wisdom is unattainable – there is no such person as Dworkin's mythical super-judge Hercules - and it provides the next best way to achieve well-being and the good. The Rule of Man, however, does not provide a pathway to achieving such things, but is rather the pathway to tyranny.

[114] Each philosopher offers slightly different conditions; what I have articulated is the general case.

order to be considered "properly" called law. Cicero did not acknowledge law unless it accorded with right reason and justice. He writes:

> [Those] who wrote decrees that were destructive and unjust to their peoples, since they did the opposite of what they had promised and claimed, produced something utterly different from laws; so that it should be clear that in the interpretation of the word "law" itself there is the significance and intention of choosing something just and right.

While each philosopher outlines slightly different restrictions on what counts as law "properly so-called," none of them denied the existence of positive law that was not "properly so-called" as an entity. No one denied that laws motivated by private interest, for example, could be created, and that such laws were still recognizable as part of a legal system. Some philosophers, such as Plato and Aristotle, even advocated obedience to such laws, even if they were not law "properly so-called," in the name of maintaining order in society. However, the existence of laws that could not properly be called laws detracts from the Rule of Law, and enough of them are evidence of a society under the Rule of Man: positive law that does not meet the conditions outlined by these ancient and medieval philosophers could still be used by tyrants to govern.[115]

[115] If the reader feels the foregoing requires some clarification, consider the following: Plato's ideal system is one in which a wise, reasonable and just Philosopher King issues all commands and adjudicates all disputes as he sees fit. This system would not contain any general rules; it is presumed that the ruler would have the capacity to appropriately deal with each individual case. Though justice would be served perfectly in this ideal state of affairs, it is not the Rule of Law. For these philosophers, the Rule of Law is a practical ideal – considering the fact that there are no wise Philosopher Kings to adjudicate each particular dispute perfectly in accordance with justice and the common good – the Rule of Law is considered the next best thing.

The inevitability of human participation

At this point it is necessary to pause and address one of the most important criticisms of this way of understanding the Rule of Law. Aristotle and Aquinas – though they were committed to the Rule of Law – as well as Thomas Hobbes, among others, suggest that it is logically impossible for a sovereign to be limited by law, since the law depends on the authority of the sovereign and "for the plain

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In a sense, it has two requirements: 1. that the laws are made and adjudicated with an eye to the common good, that they attempt to serve justice and fairness and that they conform with Right Reason; and 2. the existence of *laws* – general rules which apply to all cases indiscriminately. (Plato was rather formalist in this sense: under the Rule of Law the laws must be applied as they are written. There is not room for personal judgment). Therefore, though a society ruled by a Philosopher King might be the ideal, it would not be considered the Rule of Law, because there would be no general rules (laws).

A second point of clarification: if laws are passed that do not meet the rich criteria outlined by these ancient and medieval philosophers, they are still *laws*, just not "properly so called." What this entails is that they do not contribute to the existence of the Rule of Law. Instead, they contribute to a society under the Rule of Man. So, a tyrant may use *laws* to achieve his purposes, but these laws are not proper because they do not contribute to the Rule of Law.

Plato argues that one ought to obey the laws in any case because he thinks that order is preferable to disorder, even if that order is maintained by Rule of Man. The hierarchy for Plato is: just and wise Philosopher Kings are the ideal, the Rule of Law is the next best thing (and practically more possible than the first ideal), the Rule of Man (by the use of law) is next, and finally disorder is the least desirable circumstance for society.

What about situations where the lawmakers intend to make law in accordance with Right Reason, justice and the common good, but they do not actually achieve it? What are we to do with such cases? There *is* a difference between unsuccessful, good faith attempts to comply with the Rule of Law and ruling without these considerations in mind. The second is clearly a case of the Rule of Man. The first however, is a problem to which I cannot give a satisfactory answer to at this point. The only thing I can say is that there are bound to be mistakes, and it is not one law that makes or breaks a system of the Rule of Law. If the majority of laws are law "properly so called" then the system would be Rule of Law even if there were a few bad eggs here and there. When the balance tips though, presumably a society would become Rule of Man.

reason that the law may be altered at the lawmaker's will."[116] Further, laws do not exist, nor can they be applied without human interpretation and participation. Jean Hampton articulates this idea:

> A rule is inherently powerless; it only takes on life if it is interpreted, applied, and enforced by individuals. That set of human beings that has final say over what the rules are, how they should be applied, and how they should be enforced has ultimate control over what these rules actually *are*. *So human beings control the rules*, and not vice versa.[117]

So it seems that we can never escape the problems that derive from human involvement in law, which are intended to be circumvented by adhering to the Rule of Law. According to Tamanaha, "the inevitability of such participation provides the opportunity for the reintroduction of the very weakness sought to be avoided by resorting to law in the first place."[118] In other words, since we cannot escape the human element in law, it does not make sense to suggest that this way of understanding the Rule of Law is viable.

Aristotle was one of the first philosophers to identify this problem, despite his support of the Rule of Law and not of Man. He defined the sovereign as someone who was not himself subject to any other, and therefore thought that it

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[116] Tamanaha 48.

[117] Jean Hampton, "Democracy and the Rule of Law," in Ian Shapiro, ed., *The Rule of Law* (New York: NYU Press 1994) 16 – emphasis in original.

[118] Tamanaha 123.

was logically impossible for the sovereign to be limited by positive law. Aquinas took up this question and while he agreed with Aristotle that it was logically impossible for the sovereign to be limited by positive law because the positive law was derived, in part, from the sovereign, he argued that the sovereign could and should subject *himself* to the law. It is important to remember that at the time that these authors were writing, most of the power was contained within a group of people or entrusted to a king; they did not have the same concept of a separation of powers that we do today. Consider the following passage from the *Treatise on Law* where Aquinas discusses whether all are subject to the law:

> The sovereign is said to be exempt from the law, as to its coercive power; since, properly speaking, no man is coerced by himself, and law has not coercive power save from the authority of the sovereign. Thus then is the sovereign said to be exempt from the law, because none is competent to pass sentence on him, if he acts against the law.... But as to the directive force of law, *the sovereign is subject to the law by his own will, according to the statement ... that whatever law a man makes for another, he should keep himself....* Hence, in the judgment of God, the sovereign is not exempt from the law, as to its directive force; but *he should fulfil it to his own free-will and not of constraint.* Again the sovereign is above the law, in so far as, when it is expedient, he can change the law, and dispense in it according to time and place.[119]

So, according to Aquinas, because there is no other human being suitable to pass judgment on the sovereign, he is therefore exempt from the law's coercive power. However, one reason for the sovereign to observe the dictates of law in Aquinas's

[119] *Summa Theologica*, Treatise on Law, q. 96, art. 5. emphasis added.

time is that there is one who is competent to judge everyone including the sovereign: God. Because God rewards the good, right and just, and punishes those who promote injustice and unfairness and who "say and do not,"[120] there is at least one reason why the sovereign should subject himself to his own laws. However this does not speak to the problem of normative constraints on the sovereign, only practical ones. For Aquinas, it is not that the sovereign ought to fulfill his duties for fear of sanction, but instead because it is required.

This also does not speak to contemporary legal systems: there is no one God whose word is accepted by all – or the majority – of a society in many cases. Many current systems also differ from ancient and medieval ones insofar as the role of the sovereign, historically occupied by one or a group of individuals, is divided into an executive, a legislative and a judicial branch, together making up a government. Different branches of government are responsible for filling different functions and this is one way that we have learned to keep all of the government powers in check. It is also the case that those rulers and governments who do not hold themselves to the same standards they set for their subjects run the risk of alienating those under their rule and provide fuel for revolutionary activities, which can result in the loss of their power. Thus, it is politically desirable, in order to maintain political power, to subject oneself to the same rules and

[120] *The Holy Bible.* NRSV. (Mat 23:3-4).

regulations as one's subjects. However, though this is more contemporary, it is also a practical and not a normative solution to the problem.

The fact that human participation is unavoidable in law does not inevitably reduce the Rule of Law to the Rule of Man, or mean that the Rule of Law is *prima facie* impossible. I have so far been discussing situations in which sanctions and checks and balances are employed in order to ensure that rules are followed. However, while sanctions add an extra element of assurance, it is not the case that they must necessarily exist in order for people to be persuaded to follow rules or principles. In *A Common Law Theory of Judicial Review: The Living Tree*, Wil Waluchow demonstrates that it is conceptually possible to talk about normative restrictions on a sovereign, even in the case where the executive, legislative and judicial responsibilities are assumed by one person.[121] He considers the example of Regina, a sovereign who performs all three functions, but who is also limited by a constitution. Waluchow points out that there is an important distinction to be made between *de facto* and *normative* freedom. It is true that a solitary ruler has *de facto* freedom to create and change rules and adjudicate according to her will. But having the *de facto* freedom to do so does not entail having *normative* freedom. If there are rules that pertain to her and limit her power, she does not

[121] For an illuminating discussion of the conceptual and practical limits on rulers and governments see Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*. (Cambridge, Cambridge University Press, 2007), particularly chapters two and three.

have the *normative* freedom to break them if we can take a cue from Waluchow and Hart and accept the working definition that rules are "prescribed guides for conduct or action. They set general normative standards for correct behaviour or conduct."[122] Regina's case is somewhat analogous to the cases that the ancient and medieval scholars have discussed insofar as there are normative requirements placed on the sovereign by the people or by God.

What about a ruler like Rex, another example of Waluchow's, who is the solitary ruler of a society and is not limited constitutionally or otherwise? While Rex may not be normatively obligated to follow any rules, he still may *choose* to follow those rules and laws that he sets for his subjects or those that he sets for himself in particular.[123] He may have an interest in justice, fairness and the prosperity of his community, and so decide to appeal to rules, principles and reasons external to himself in order to achieve these goals. So, while there may be limited ways of ensuring the existence of the Rule of Law by coercion or force, it is nonetheless possible despite the fact that human participation is inevitable.

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[122] *Ibid* 32.

[123] One might object that if the sovereign can *choose* to follow the rules and laws, then he may also choose *not* to do so, and so we are back to the problem of the Rule of Law devolving into the Rule of Man. However, while there may not always be normative or practical constraints on the sovereign's actions, the mere fact that he *can* act other than in accordance with his own whims and preferences is significant. The Rule of Law is not a non-starter; a sovereign *may* rule in accordance with the common good.

Substantive importance

It would be anachronistic to attempt to categorize the Rule of Law, not of Man as a substantive rather than formal approach to the Rule of Law since the distinction did not exist for the philosophers and in the eras that have just been considered. Philosophy, science and religion were not seen as separate investigations as they are today, and communities shared customs as well as standards of morality: concepts such as moral pluralism did not exist. As a result of the time, there was no question of law being divorced from morality and justice; it was understood as being intimately linked to their pursuit. Nevertheless, one cannot deny that this conception of the Rule of Law has substantial importance.[124]

One of the most significant aspects of this understanding of the Rule of Law is that the content or substance of the laws which promote the Rule of Law is restricted. Laws cannot have just any content and still contribute to the Rule of Law as is evident from the emphasis that philosophers from this tradition place on achieving the common good. The restraints they place on what can be law "properly so-called" are important because they identify which laws can contribute to the Rule of Law. It might be useful to think of the Rule of Law (as opposed to the Rule of Man) as an end rather than a means. It is an end that can

[124] I think it may be anachronistic to call the Rule of Law, not of Man substantive (as opposed to formal), but it clearly places substantive restraints on what kind of law counts towards the Rule of Law. This will be important to keep in mind to contrast with the next historical trend: formal legality.

only be reached by adhering to certain content restrictions, among other things. Because of the nature of these content restrictions – the necessity of having an eye to the common good, being in accordance with right reason and moral principles – it is acceptable to say that in this sense, the Rule of Law is a moral ideal. It denotes a morally good state of affairs, rather than a morally neutral one. The next trend that I will consider is very different in this sense; it does not place content restrictions on rules and has therefore been called morally neutral.

2.2.5. *The Historical Usage of the Rule of Law: Formal Legality*

The second historical theme is another way of understanding the Rule of Law as the antithesis of the exercise of arbitrary power: it is the Rule of Law as rule *by* law or formal legality. Both Jeremy Waldron and Brian Tamanaha identify this sense of the Rule of Law as "favoured by legal theorists" and it is the conception held by the majority of post-Enlightenment legal theorists working on the subject. Its recent popularity is rather unsurprising as it is also the understanding of the Rule of Law that is arguably most compatible with liberalism and capitalism.[125]

This sense of the Rule of Law emphasizes the characteristics and the benefits of rules, where a law counts as a type of rule and the aim of rules is

[125] Tamanaha explains formal legality's link with capitalism at 119. He writes: "With respect to capitalism, public, prospective laws, with the qualities of generality, equality of application, and certainty, are well suited to facilitating market transactions because predictability and certainty allow merchants to calculate the likely costs and benefits of anticipated transactions."

generally thought to be the guidance of human conduct. Recalling Lon Fuller's eight criteria of legality is useful here, as they provide criteria required of *all* rules with the capacity to guide. For instance, rules are general and universal in character, rather than particular, insofar as they apply to a category of cases without exception.[126] They also must be public, prospective, understandable and relatively stable.[127] Finally, there must be congruence between the rules as they are expressed and their application. This means, not only that individuals will be able to foresee what is expected of them, but also that the sovereign or government must operate in accordance with the rules that they set. Defined by these criteria, rules are able to provide predictability and certainty for individuals about what is expected of them and the consequences that will follow if they do not meet the requirements.

The Rule of Law in this second sense means the rule or governance of a community through the use of laws (rules), rather than by arbitrary or particular commands, which cannot provide standing guidance to individuals. This

[126] Though, sometimes exceptions are stipulated within the rules themselves. For example, there is a rule (a traffic law) which requires North Americans to drive on the right-hand side of the road except when they are either (i) passing another vehicle or (ii) driving on a divided highway, etc. If I am safely passing another vehicle by driving on the left-hand side of the road, I have not violated the rule, because the rule includes its own exceptions.

[127] For a more complete discussion of Fuller's criteria for legality (the necessary criteria for rules that guide conduct) see chapter one.

understanding of the Rule of Law has been articulated most clearly by F.A. Hayek, who writes:

> Stripped 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 authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[128]

The Rule of Law, in this sense, is desirable because when people have rules to structure their lives, their interactions with others and with the government, they are able to make plans, both short and long-term, around the existing rules. The ability to make plans is thought to be valuable because it allows individuals to exercise their autonomy, and by doing so contributes to their dignity as individual persons and potentially to their well-being.[129]

In this way many theorists have argued that freedom does not exist without law. Without law, each is subject to the unpredictable impulses of others and the arbitrary whims of lawmakers and adjudicators.[130] Hayek saw no freedom

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[128] Hayek, *Serfdom*, 72.

[129] In current philosophical literature, there is much discussion of human dignity as fundamental for governments to protect and preserve. It is thought that by exercising one's autonomy, among other things, contributes to a person's dignity. Personal autonomy requires that a person have meaningful choices to make about the way he or she is going to pursue the good in their own lives. Living a life of dignity means that others respect one as a unique human being having equal moral worth to others. For in depth discussions of autonomy and dignity consider the work of Meir Dan Cohen.

[130] While it is conceptually possible that people will act predictably and in good faith towards one another, practically speaking this does not satisfy these philosophers. What is more,

in such a way of life, nor did Montesquieu, who argued that "liberty is a right of doing whatever the laws permit." [131] John Locke, one of the foundational figures of liberal theory, also understood freedom as requiring law. He writes:

> Freedom of men under government is, to have a standing rule to live by, common to everyone in society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.[132]

His articulation of what freedom requires is very much in line with the Rule of Law as formal legality.

The advent of liberalism had an important impact on the concept of the Rule of Law: the individual, rather than the community became the relevant unit in discussions of social, political and moral issues. The rise of the middle class meant that rules had to be created so that individuals could predict the result of their interactions – particularly their commercial interactions – with others, whereas prior to this time kings and lords had mediated between their own subjects. As a result, the Rule of Law also had to be able to accommodate value and moral pluralism, because a tolerance for pluralism is what allows each individual to pursue his or her conception of the good.

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human beings tend towards organizing themselves with rules, whether legal rules or social rules and conventions.

[131] Baron de Montesquieu, *Spirit of Laws*, (Book XI, s.3).

[132] Locke, *Second Treatise of Government*, Chapter 2, (s. 23).

Another important development was the gradual separation of church and state, which increasingly saw people pursuing their own conceptions of what was moral and valuable, and moving away from a community oriented Christian ethic. Because there was no longer a communal morality, legal institutions had to find another way of appealing to the population, and a more robust system of legal rules could achieve this. Formal legality is, in this sense, contrary to the historical understanding of the Rule of Law, not of Men, which was focused on the community and did not need to allow for the possibility of multiple perspectives of the good.

Formal Legality and Morality

One of the most frequently debated topics in Rule of Law discourse is whether or not the Rule of Law, understood as formal legality, has any necessary connection to moral goodness. Above, I outlined the reasons that this sense of the Rule of Law is seen as desirable: the certainty and predictability associated with it provide for expressions of autonomy, and are related to dignity and well-being. It is even compatible with value and moral pluralism, which enables individuals to strive to achieve what each considers to be the good.

The same characteristics, namely the absence of content requirements, which enable formal legality to be compatible with pluralism, also enable it to be compatible with the aims of evil and iniquitous regimes. Because it makes no

substantive demands on the content of legal rules, this understanding of the Rule of Law is "open to a range of ends."[133] As I observed in the first chapter, the fact that the Rule of Law as formal legality is open to being used in the service of a variety of ends, its moral worth has been seriously questioned. There are those, such as Joseph Raz, who argue that it is a virtue insofar as it entails an appreciation of the individual as an autonomous, rational being, who is capable of following rules, and that its necessary, though not sufficient, connection with good law makes it morally significant. On the other side of the argument, scholars, such as Matthew Kramer, maintain that formal legality is just as useful for the aims of an iniquitous regime as it is for the aims of a just one. Kramer also argues, as discussed earlier, that a necessary connection with morality is not significant in this case since there is also a necessary connection between formal legality and efficacious immorality.

Brian Tamanaha offers yet another point of view on the moral neutrality of formal legality. He maintains that it is contrary to the long tradition of the Rule of Law (the Rule of Law, not of Man) which finds its motivation in the attempt to restrain the sovereign from tyrannical rule. According to Tamanaha, "such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules, to include the understanding that there were

[133] Tamanaha 94.

certain things the government or sovereign could not do."[134] He recalls that the limits imposed by law historically had moral substance derived from shared customs and principles, Christian morality, right reason, and the good of the community. "Formal legality," he argues, "discards this orientation": the government can do anything that it desires as long as it enacts a legal rule first, in this way maintaining the Rule of Law. Further, if the government decides to do something that is not currently legally permitted, it may change the law to allow for the desired action, as long as it meets the criteria that enable rules to guide the conduct of individuals.[135]

2.3. *Evaluating Current Scholars on their use of Raw Material*

The aim of this chapter has been to recommend two categories of raw material that ought to be considered when doing conceptual analysis – the current usage and the historical usage of a term – and to discuss the Rule of Law in these contexts. I have demonstrated that current usage of the phrase "Rule of Law" denotes a morally good state of affairs and that it is a political ideal.

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[134] *Ibid* 96.

[135] *Ibid.* Tamanaha does not distinguish between different branches of government in this criticism of formal legality. With the implementation of a separation of powers his concerns would likely be diluted, practically speaking. A separation of powers is meant to provide restraint on each organ of government, so the "government" does not really do anything it desires, such as change the rules on a dime, because it is made up of many individuals involved in different branches. However, a separation of powers has not been discussed as necessary for the existence of the Rule of Law, so conceptually, his concerns remain valid.

The Rule of Law's historical lineage is very complex, and I have attempted to distinguish two of the most prominent veins of thought. The first, the Rule of Law, not of Man, is supported by much of the earliest scholarship on the subject: from the writings of Plato and Aristotle to St. Thomas Aquinas. This position holds that the Rule of Law denotes an end state of affairs achieved by the creation and observance of laws (general rules) that are oriented towards the common good. I have identified the emphasis on orientation to the common good as having substantive importance. The second vein, formal legality, is apparent in the writing of many liberal scholars including Locke, Montesquieu and Hayek. The most important feature of this sense of the Rule of Law is that its emphasis is on a society structured by rules, and the rules provide freedom for the individual. Formal legality, as its name may suggest, is concerned with the form and not with the substance of the rules; it is silent on the question of what the content of laws ought to be. Because of this, its connection with morally good states of affairs has been questioned, and its compatibility with the aims of evil regimes has been acknowledged.

I would now like to briefly consider the contemporary scholars discussed in the first chapter – Raz, Finnis, Kramer and Waldron – to discern whether or not they have taken this material into account when theorizing about the Rule of Law. As I argued earlier, I think that a successful theory of the Rule of Law needs to be

able to take account of the raw materials outlined in this chapter in order to have an adequate foundation for conceptual analysis.

With respect to the current usage of the Rule of Law, the theories proposed by Jeremy Waldron and Matthew Kramer seem rather straightforward to evaluate. While current usage does not include all of the criteria that Waldron thinks are necessary for both law and the Rule of Law, his assertion that the Rule of Law is a political ideal is very much in line with it. This fact is unsurprising as Waldron makes explicit appeals to current understandings of the Rule of Law to provide a foundation for his theory. Kramer, on the other hand, offers a theory that seems to completely ignore current understandings of the Rule of Law. He asserts that what he means by the Rule of Law is no more and no less than Fuller's eight criteria of legality, which can be used equally in the service of evil and the service of good. What is more, he argues that the Rule of Law has no necessary connection to morality insofar as the "freedom" it provides, might not actually obtain.

John Finnis and Joseph Raz both offer nuanced theories of the Rule of Law, and while it at first appears that Finnis's understanding is in line with current usage and that Raz's is not, upon further inspection, it is possible to argue the opposite as well. While Finnis suggests that the Rule of Law is the name given to the state of affairs where the law is functioning as it ought to, namely in the

service of the common good, he also backtracks at one point and admits that the Rule of Law may be used in the service of self-interested and even evil aims. However, his attempt to incorporate moral value into his theory of the Rule of Law demonstrates that he has taken into account a perspective at least akin to the current perspective, even if his theory seems to have problems with overall coherence. This is an issue I take up in chapter three. Conversely, at first it is difficult to read Raz as asserting anything but the neutrality of the Rule of Law. His example of the sharp knife has become infamous in arguments supporting such an understanding of the concept. However, Raz does maintain that the Rule of Law is a value, albeit not a moral value, and in this way I think he tries to make room for understandings which link the Rule of Law to some desirable state of affairs.

In terms of their adherence to historical understandings of the Rule of Law our four contemporary scholars are all over the place. For the most part, Raz's theory is in line with formal legality. He emphasizes the way laws may be used to achieve a variety of aims, not all of them in the service of the common good or justice. He also specifically references Hayek, the important twentieth century economist and philosopher discussed in the section on formal legality, as providing the clearest articulation of the Rule of Law. Raz seems to have accommodated one of the historical streams of the Rule of Law quite well. It is

unfortunate, however, that he does not acknowledge the existence of the other stream of thought or explain why he selects formal legality as the one to base his theory upon.

Kramer's work also falls in line with formal legality, as he is adamant that the Rule of Law is content neutral. Unfortunately, Kramer does not refer whatsoever to any historical work on the Rule of Law to support his theory. He bases his position largely on Lon Fuller's eight criteria of legality. However, as I have already noted, while Fuller's work has been heavily cited in Rule of Law discourse in the last fifty years, he did not take himself to be discussing the Rule of Law, but law *simpliciter*. So Kramer's account, while *compatible* with the historical understanding of the Rule of Law as formal legality, does not seem to provide evidence that he gave much thought to the history of the concept.

Finnis's theory of the Rule of Law is not only commensurable with the Rule of Law, not of Man conception, some of the theoretical work is so similar that it is evident that he has drawn upon the work of the ancient scholars and Aquinas in developing his theory of law and the Rule of Law. His discussion of the common good and the Rule of Law as the appropriate end of law fits nicely in line with this historical trend. There is a small point of contention in Finnis' theory, surrounding whether or not he considers the Rule of Law to be an end or a means when he concedes that it might be used for illegitimate aims. While it is a

confusing point in his theory, it is evidence that he also considered the formal legality trend in the Rule of Law's history.

Waldron's theory is rather problematic in terms of its ability to account for historical understandings of the Rule of Law. While it is certainly not a theory of formal legality – Waldron is very interested in content and procedural restrictions on law – it is not a really theory that is compatible with the Rule of Law, not of Man trend either. The requirements Waldron outlines for law and the Rule of Law are very context dependent on modern Western liberal democracies. While he does suggest that norms ought to be oriented towards the public good, he also attempts to include in his conception more modern institutions of government such as courts and legislatures as we currently understand them – institutions that did not exist in the same way in ancient Greece or medieval Europe. In this way his account is both commensurable with and at odds with the Rule of Law, not of Man.

In the next chapter, I will discuss what to do with the raw material considered here, and how to analyze the material to further reduce the scope of what counts as a viable theory of the Rule of Law.

CHAPTER THREE

The Evaluation of Raw Material and Conceptual Coherence

3.1. *Conceptual Analysis: Recapitulation*

In the last chapter, I outlined some of the raw material, namely current and historical usage, which ought to be taken into account when doing conceptual analysis. I identified the "Rule of Law" as a political ideal based on the most popular trend in its current use. I also identified two major trends of thought in the history of Rule of Law discourse: (i) the Rule of Law, not of Man – a state of affairs where lawmakers and adjudicators engage in the law via general rules with an eye towards the common good, and (ii) formal legality – a conceptual tradition in Rule of Law discourse which is primarily interested in the characteristics of

rules and which makes no content requirements of them. I argued that, whatever else one might take into account when doing conceptual analysis, the current usage of a concept as well as its history ought to be among those things. I ended the chapter by taking stock of whether or not there is evidence to suggest that the contemporary scholars discussed in the first chapter, Raz, Finnis, Kramer and Waldron, considered the raw materials that I identified. I found that there was a wide variation on whether and to what extent each had taken account of these in his theory of the Rule of Law.

Gathering raw material is not the end of conceptual analysis: it is only the beginning. As I demonstrated in the previous chapter, all of the raw materials – theory, history, and the understanding of individuals, among other things – do not always point to the same conclusion about what features make up the core of a particular concept. In fact, agreement between all of these sources is highly improbable. So it is unsurprising that in the case of the Rule of Law the raw materials do not point to the same conclusion. It is important to appreciate, however, that because the analysis may be difficult due to the variety of material under consideration it does not mean that the wrong material is being considered.

As I mentioned, not all of the raw material will point toward the same conclusion; fortunately, some of it can be discounted. The information gathered needs to be sorted and evaluated before it can be put together in a way that has the

potential to illuminate the concept in question. How is it that one ought to go about sorting through raw material and evaluating it? In this chapter I will identify two phases of analysis, each involving two suggestions, which can be employed to narrow the scope of the appropriate raw material under consideration, which have the potential to lead to a more refined conception of the Rule of Law.

After gathering the appropriate raw material comes the analysis itself, and this can occur in two phases. First, raw material is often sorted and evaluated as it is collected: in anything less than a book length project, and often even then, one must carefully select which raw material to consider as not every opinion can or should be part of the final analysis. There are at least two factors to take into account when reflecting upon which material to include in the analysis at this level. One, it is *prima facie* important to consider opinions which are widespread because, as I have already pointed out, it is important in conceptual analysis that the theorized concept be in line with participant usage as much as possible. Two, it is acceptable to eliminate unconsidered opinions. An opinion may be unconsidered for a variety of reasons: for example, it may be based on little or no knowledge or it may be obviously incoherent.

In the second phase of the analysis, the remaining material will be considered for coherence: both external conceptual coherence and internal conceptual coherence. The concept in question ought to cohere with other related

(external) concepts, and they may perhaps illuminate one another. It is also important to make sure the concept is internally consistent or coherent: that some of the things believed to be necessary do not conflict with other necessary features of the concept.

Overall, the goal of conceptual analysis is to achieve something like "reflective equilibrium"[136] with respect to a particular concept, in this case, with respect to the Rule of Law. While the raw materials I have considered and the analyses that I will recommend in this chapter may not point to a unique solution to the question, *What is the Rule of Law?* they will certainly facilitate narrowing the scope of what counts as central, and thus enable more meaningful discussions about the Rule of Law. As Michael Giudice recalls, "conceptual analysis also shares the goal of theories in general, in that it seeks to explain, organize, and structure what could otherwise be a disparate collection of features of social life,"[137] and in so doing, it enables meaningful and important conversations and debates, this is particularly important in the areas of politics and justice.[138]

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[136] As Wil Waluchow put it: "Again, I say 'something like' because I do not wish to become embroiled in the intricacies of Rawlsian exegesis." (223, fn 12).

[137] Giudice 15.

[138] Of course when engaging in reflective equilibrium, one usually goes back and forth between stages, because nothing determined at an earlier stage is immune to revision on the basis of new information. While it is likely useful to proceed in the order I recommend here, there is nothing to prevent one from revisiting conclusions drawn at earlier stages based on the discoveries made at later stages of the analysis.

3.2. *The Initial Analysis: Separating the Wheat from the Chaff*

The aim of this section is to outline two ways to evaluate raw material in the initial phase when it is being collected: discarding unconsidered opinions and making note of widespread ones. My decisions about what material to include in the discussion of current and historical usage from chapter two were motivated by such evaluations, and hopefully it will become clear why I chose the material I did to incorporate into that chapter.

3.2.1. *Eliminating Unconsidered Opinions*

In the investigation of current and past understandings of a concept, one is likely to encounter quite a range of opinions and positions. These understandings serve as a good starting place for conceptual analysis: one does not want to end up with a conception that is detached from the way people usually understand it since this will not enhance, but rather frustrate good communication. However, it is not the case that all opinions will be relevant to the final analysis; some may be discarded. Giudice nicely summarizes the idea that while usage must be the beginning of conceptual analysis, there remains work for philosophers to do after the collection of material. He writes:

> In the explanation of concepts of social phenomena such as law, ordinary or participant understanding serves initially but only roughly to define the category or subject matter.... Initial views [...] give philosophers a point of departure but also a responsibility....

> Philosophers must also ask whether there are questions which participants have not thought about or perhaps are puzzled about....[139]

By considering things that individuals (participants) have not, such as whether their conception is based on partial or false information, or if it is particularly uncommon or atypical, it is possible to eliminate some opinions from those that will ultimately contribute to the theorized concept.

As W.J. Waluchow points out in his recent book, *A Common Law Theory of Judicial Review: The Living Tree*, it is possible for individuals to hold inconsistent beliefs especially when they are *unreflective* about the set of beliefs that they hold. While Waluchow discusses moral opinions in particular, I think his point can be broadly applied to opinions about what a concept entails as well. Consider what he says:

> It is a commonplace in moral philosophy that an individual's personal morality, so understood, can be internally inconsistent, based on false beliefs and prejudices, and otherwise subject to rational critique. It is also a commonplace that it is an ongoing task of moral life to explore and adjust one's personal morality so as to avoid such deficiencies, the source of what we earlier termed 'evaluative dissonance'.[140]

Similarly, individuals can have partial knowledge, no knowledge or false beliefs, etc., about the concepts that they use to categorize and make sense of the world. The degree of thought that an individual gives the various phenomena that they

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[139] *Ibid* 11-12.

[140] Waluchow 223.

use their concepts to denote will vary, as will philosophers' reflections on what a concept means, especially with respect to whether the term is significant to him or her, or to his or her line of work. It will also vary with respect to the frequency with which it is used or comes into play in his or her life. When asked about the meaning of a particular concept some persons will report what they have heard others say, perhaps their friends or the news media; some, such as experts in a particular line of work, may have personal insight into more technical uses of a term; some, such as politicians or religious fundamentalists, or anyone else with a particular agenda, may invent a meaning to suit a particular purpose, and others, such as philosophers and other scholars, may put a great deal of effort into analyzing the concept from top to bottom.

Admittedly, it will be difficult to determine in the case of the Rule of Law when opinions are really unconsidered and when people have reflected on them to some degree since there are already quite a number of explanations and opinions about its meaning. Still, we might be able to point to exceptional opinions about the Rule of Law as unconsidered if, for instance, they are in no way shared by others. Perhaps someone holds the view that the Rule of Law is a part of Greco-Roman mythology and denotes a state where goddess of law and justice, *Themis* (Greek) or *Iustitia* (Roman), usurps the King of the gods, *Zeus* (Greek) or *Jupiter* (Roman), and rules in his place. Literally, this is an instance of the "Rule of Law,"

where law personified as *Themis* or *Iustitia* rules over the other gods and human beings. However, this could be discounted for a number of reasons: there is no such story in Greco-Roman mythology; there are not a large number of people who share this understanding of the term; and the story does not attempt to capture the Rule of Law as a concept which continues to be used today in any way.[141]

We also might discount the opinion that the Rule of Law has no meaning – that it is empty political rhetoric. While it has been used in a rhetorical way in politics, today and throughout history, the opinion that it has no meaning is a non-starter. It cannot be combined with other information that has been gathered about the concept: it is directly at odds with any attempt to investigate the meaning of the term and antithetical to the aim of this project.

The purpose of this section has been to demonstrate that individuals may be unreflective about some of the information they understand themselves to possess. Opinions may be constructed, based on partial, faulty, biased or no information, though sometimes it can be difficult to determine when and if any of the above is the case. Nevertheless, there are some opinions that *are* clearly

[141] Such opinions are likely to come from lay persons who do not have much or any background in the relevant discourse. These are the kinds of opinions that are not relevant to the final analysis.

unconsidered or unsuitable for the investigation at hand and these can be appropriately discounted as we sift through the available raw material.

3.2.2. *Widespread Opinions*

While widespread opinions may not be the same as well-considered, coherent opinions, they still deserve serious consideration by virtue of their widespreadness. Recall, in conceptual analysis it is important to keep the analyzed concept as close to participant usage as possible, especially if Wittgenstein was correct, at least to some degree, that "meaning is usage." Giudice reinforces this point in his work, saying, "philosophers must also not depart too far from ordinary or common understanding, especially when we have reason to believe that it is not confused or mistaken."[142] Thus, if there appears to be significant shared meaning, it is *prima facie* worth consideration, though that does not mean it ought to be exempt from further analysis.

3.3. *Analyzing the Remainder: Conceptual Coherence*

Once the raw material has been initially sorted, it is logical to move onto the more rigorous analyses which make up the second phase of conceptual analysis as I am presenting it here.[143]

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[142] Giudice 11-12.

[143] I would just like to reiterate that there is nothing to prevent one from returning to earlier stages of the analysis.

3.3.1. *External Conceptual Coherence*

By external conceptual coherence I mean to suggest a consistency among concepts: when a concept coheres with others it is compatible and harmonizes with related concepts. In order to grasp my meaning, it may help to think of this as *inter*-conceptual coherence (as opposed to *intra*-conceptual coherence, which I discuss later in the chapter). When external conceptual coherence obtains, each of the related concepts can benefit from the illumination that results from their comparison and contrast.[144] What is more, to fully grasp a concept it is *necessary* to engage in an investigation of how it relates to and differs from others. According to Giudice, who is also taking account of social phenomena:

> Philosophically-constructed theories may supply a better understanding of a social phenomenon by exploring its relations with other related phenomena.... it is important not to collapse these important social phenomena into each other, but also that there are revealing distinctions and connections between these phenomena which contribute to a broad understanding of social life.[145]

Thus, as Giudice points out, while there are benefits to a coherent web of related concepts, there are also important drawbacks that occur when the web displays inconsistencies such as an unexplained overlap or the collapse of two or more concepts representing distinct but related phenomena into one another.

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[144] By "related" here I simply mean concepts that are topically related: in this case the domain is social, political and legal concepts which attempt to define phenomena in social, political and legal experience.

[145] Giudice 15.

When working with concepts which at first appear indeterminate, or have fuzzy boundaries, as seems to be the case with the Rule of Law, the temptation to begin by considering other related concepts, usually ones which have been more closely studied, is heightened.[146] While I am not criticizing this as a starting point (it is actually quite a reasonable way to begin), one must take care to remember that the consideration of related concepts in and of themselves is not the end of the investigation. The unexplained overlap and collapse of concepts introduces confusion instead of the clarification desired by conceptual analysis. To avoid unexplained overlap or collapse, related concepts must be contrasted with the concept in question, in this case, the Rule of Law. Giudice admits that: "concepts which prove difficult to grasp on first thought are so often because the phenomenon they seek to explain or determine shares similarities and connections with other closely related phenomena." (12) Indeed, the Rule of Law appears to share similarities and connections with many other social and political ideas, and has been considered in tandem with law, democracy, liberalism and human rights, among other ideas.

There is also the possibility that an individual might not only collapse two ideals, but could make a category mistake with respect to the concept they are

[146] This is a temptation, but also a reasonable place to begin one's inquiry. How do we know that law is distinct from the Rule of Law? While it may not be clear at first how concepts are similar and how they are distinct, I think that it is helpful to let the fact of distinct terms guide our inquiry.

attempting to define.[147] Perhaps someone suggests that the Rule of Law is a particular document, such as a constitution, or a particular institution, such as the legislature of a government. While such things might be relevant the concept of the Rule of Law in some way, the Rule of Law is not the equivalent to the Canadian Constitution. Documents, institutions and ideologies are all different in kind, and to equate an instance of one with an instance of another only perpetuates uncertainty.

However, even when there is no obvious category mistake being made, overlapping and collapsing of concepts do occur. Unfortunately, the seemingly intimate connection between the Rule of Law and law, in particular, has created considerable confusion within Rule of Law discourse, and there has been an overwhelming tendency to significantly overlap and even collapse the two

[147] I do not have an in depth knowledge of "category mistakes" strictly speaking. Nonetheless, I mean to suggest that it is a mistake to ascribe to the Rule of Law the particular attributes of another kind of entity. Gilbert Ryle, in *The Concept of Mind* (1949), "famously considered absurdities to be the key to detecting category differences." His test for category differences involved the identification of absurdities: "two expressions (or rather what they signify) differ in category if there are contexts in which substituting one expression for the other results in absurdity." Thus, it should be possible to demonstrate that the Rule of Law is of a different *kind* than institutions or documents. It seems absurd to say, for instance, that 'The *Rule of Law* (as opposed to a *legislature*) is a type of representative deliberative assembly with the power to pass, amend and repeal laws.' Automatically the need to shift from *a* to *the* indicates that the two terms are not equivalent. It is also absurd to say that '*The Rule of Law* (as opposed to a *constitution*) is a set of rules for government, which can be codified in a written document.' While it is the case that a rule (or many individual rules) of law may be written down, it is not the same as suggesting that *the* Rule of Law can be written down. Again there is also the shift from the generic *a* to the particular *the*, indicating the Rule of Law is a unique entity. For more information on Ryle and category mistakes, see Amie Thomasson, "Categories."*Stanford Encyclopedia of Philosophy*. First published 3 Jun 2004; substantive revision 5 Jan 2009. Retrieved 30 Aug 2009.

concepts. I suspect the reason for the collapse goes something like this: In order to determine what the "Rule o f Law" is it is necessary to first investigate "law" since "law" is part of "Rule of Law," grammatically speaking. Once the concept of law has been developed, the Rule of Law may be derived, at least in part, from it. Conversely, it is impossible to determine what the Rule of Law is without first grasping law *simpliciter*, since law appears to be one of the component parts of the Rule of Law. Unfortunately, this has ended in a collapse of the two terms for many theorists. The result is uncertainty with respect to both concepts: as readers, we are unable to determine in many cases where law leaves off and the Rule of Law begins.

I think the enthusiasm with which the debates about the concept of law have proceeded over the last 50 years has contributed to the tendency to consider the Rule of Law as derivable from law, rather than considering the Rule of Law in its own right.[148] There has been much investigation into the concept of law, and the concept of the Rule of Law seems like a natural place to attempt to apply some of the insights about law generally. Recall that all of the contemporary scholars that were considered in the first chapter are primarily concerned with the concept of law, and only derivatively concerned with the Rule of Law. What is more, this is not uncharacteristic of the philosophical work being done on law and

[148] I am not suggesting that an investigation of law is irrelevant to the Rule of Law, but that it must not be the end of an investigation on the Rule of Law.

the Rule of Law generally. Broadly speaking, those theorists who work on the concept of law from the perspective of the positivist tradition of H.L.A. Hart have maintained that the Rule of Law is morally neutral: like law, it is not inherently moral.[149] On the other hand, those who favour a more robust understanding of the concept of law, such as natural lawyers, among others, find the Rule of Law to be a morally robust concept. One of the implications of deriving one concept from another is that the derived concept is in danger of becoming redundant, and this has occurred in Rule of Law discourse to a surprising degree. Scholars who find such redundancy acceptable seem to be ignoring the fact that the Rule of Law has a rich conceptual history and a distinct current use that is not identical to the history or current use of law. To reduce one concept to another is certainly not clarificatory in a way that enables communication and understanding; law and the

[149] I find this strange, especially in the case of the positivists working in the Hartian tradition. Hart was committed to a descriptive explanatory approach in investigating social phenomena, law in particular. If this was the preferred methodology of the tradition, it does not seem as though it has been consistently applied in the case of the Rule of Law. Hart took into account ordinary usage in his account of law, but positivists to follow who have commented on the Rule of Law have not started their investigations with ordinary usage, but rather with their conclusions about the nature of law. They appear to be deviating from Hart's methodology. With respect to Hart's methodology Jules Coleman explains, "... investigation of usage serves to provide us, in a provisional and revisable way, with certain paradigm cases of law, as well as helping us to single out what features of law need to be explained. Descriptive sociology enters no at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is not theorize." See Jules Coleman, *The Practice of Principle.* (Oxford: Oxford University Press, 2001). 200.

Rule of Law, like democracy and liberalism, are distinct ideas, and it does no service to the discourse to collapse them.[150]

Waldron points out in his essay, "Grammar suggests that we need to understand the concept of law before we can understand the Rule of Law." However, he disagrees with this approach: "It is after all an accident of usage that the particular phrase "the Rule of Law" is used for the ideal." He suggests that it might have been called the "principles of legality" instead.[151] While I agree with his first statement, I am not sure about the second. I think that it is true that the concept of law will inform understandings of the Rule of Law insofar as these two terms must be compatible in some way, but, as previously mentioned, this does

[150] Waldron claims that there is "a natural correlation" between positivism and formalist conceptions of the Rule of Law and between richer concepts of law and Rule of Law ("The Concept and the Rule of Law" 64). "Conceivably the correlation could be shaken loose by an insistence that the concept of law and the Rule of Law are to be understood quite independently of one another.... Or we could imagine some positivist sticking dogmatically to [a positivistic concept of law], but acknowledging the importance of a separate Rule-of-Law ideal that emphasized procedural and argumentative values. But those combinations seem odd: they treat the Rule of Law as a rather mysterious ideal – with its own underlying values, to be sure, but quite unrelated to our understanding of law itself. It is simply one of a number of ideals (like justice or liberty or equality) that we apply to law, rather than anything more intimately connected with the very idea of law itself" (*Ibid*). I think that Waldron is creating a bit of a false dilemma here. The Rule of Law is an independent concept "with its own underlying values," but that does not mean it is completely *un*related to law. They ought to be *compatible*, not identical or unrelated. For my part, I do think that one can remain a legal positivist while acknowledging a more morally robust concept of the Rule of Law. I will discuss my position further in the conclusion to this project.

[151] Waldron, "Concept", 9-10.

not entail that they are the same. However, Waldron proceeds as though it were the case that law and the Rule of Law must be understood as a "package."[152]

Waldron ultimately concludes that law and the Rule of Law lie on the same spectrum: the same criteria are required for both, though the Rule of Law achieves the criteria to a higher degree. "Those who are familiar with the Rule of Law," he explains, "will have noted that what I have called the defining characteristics of law are also the most prominent requirements of that ideal."[153] More explicitly, he states, "I believe that one can understand these two sets of criteria – for the existence of law and for the Rule of Law – as two views of the same basic idea."[154] I find this problematic. He does not introduce a *principled* distinction between the two concepts, and as a result, the Rule of Law and law are difficult to identify as distinct on his model. Is he guilty of *completely* collapsing law and the Rule of Law? Perhaps not due to his insistence that they lie at different points on the spectrum; but he has certainly overlapped the two terms to a significant degree, which makes it difficult to compare and contrast them. What

[152] Perhaps his point is that we ought to investigate the concept of law in order to illuminate the Rule of Law, but not *because* of their grammatical similarities. If this is the case, I find it an acceptable claim.

[153] Waldron, "Concept", 47. For a paper that is supposed to discuss and illuminate the concept of the Rule of Law, Waldron seems to assume that his reader already has an intuitive sense of what it is, and so can see the connection between what he has argued for law and the concept of the Rule of Law. I think that he needs to do more work on the Rule of Law in its own right before comparing it to law.

[154] *Ibid* 48.

is troubling is that Waldron seems to accept this overlap/collapse, and he is by no means the only scholar guilty of this kind of redundancy.

Kramer also admits to using his theory of law to inform his account of the Rule of Law. While this is an acceptable place to begin, he goes too far and suggests: "[Many] of my analyses in support of legal positivism have aimed to show that the rule of law is not an inherently moral ideal."[155] Unfortunately, he does not explain what the connection is between legal positivism and the Rule of Law, and why analyses of positivism should shed any light on the moral composition of the Rule of Law. Why must the neutrality of a theory of law extend to one's conception of the Rule of Law? What is more, the sum of the criteria which he calls the Rule of Law are synonymous with Fuller's eight criteria for legality: without which Fuller claimed *law* could not exist. It is unclear why Kramer gives no account of his choice to make use of the Fullerian criteria of legality as the conditions for the Rule of Law. If the Rule of Law is simply Fuller's eight criteria of legality for Kramer, then his conception of the Rule of Law seems to reduce to law *simpliciter*,[156] as Fuller's arguments in favour of

[155] Kramer 173.

[156] Kramer thinks that the Rule of Law criteria, though not moral in nature, are ones in terms of which legal systems can be evaluated, more or less instrumentally. He thinks that whether we have law and whether and to what extent the system which qualifies as law fulfils the Rule of Law criteria are two separate though related questions. However, I am unclear as to how these are separate questions if the criteria for law are the same criteria for the Rule of Law. Perhaps, like Waldron, he intends for them to exist on a spectrum: law must fulfil a minimum of the criteria,

these criteria aimed to demonstrate that the law cannot exist without them.[157] By stipulating that Fullerian criteria of legality are synonymous with the Rule of Law, Kramer effectively collapses the two concepts.[158]

As Raz has dealt with a number of related concepts and ideas in great detail, such as the concept of authority, the concept of a legal system, practical ethics and whether or not there is a duty to obey the law,[159] he is well versed in comparing and contrasting concepts. Recall that he holds the basic idea that "the law must be capable of guiding the behaviour of its subjects."[160] If Raz agrees that something like Fuller's criteria of legality are necessary for subjects to be guided, and acknowledges that his own enumerated principles are more robust than what mere guidance demands, he might very well be able to differentiate between law and the Rule of Law. However, if he sees the basic idea as connected to the Rule of Law alone, it is not possible within the scope of this project to determine

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while the Rule of Law strives to achieve the criteria more substantially. Still, I would like to see a principled distinction made between the two concepts. If the criteria are the same, what is to prevent us from saying the Rule of Law exists whenever law exists and vice versa?

[157] Recall that Fuller himself says nothing about the Rule of Law; he takes himself to be debating the conditions for law with H.L.A. Hart.

[158] If these two concepts are not the same for Kramer, then he needs to provide an argument explaining why Fuller's eight criteria of legality are better understood as the conditions for the Rule of Law than for law.

[159] See Raz's many publications: *The Authority of Law* (1979); *The Concept of a Legal System* (1980); *Ethics in the Public Domain* (1996); just to name a few.

[160] Raz 214.

whether or not he has collapsed or overlapped the two concepts as I have not given an account of his theory of law.[161]

I think that Finnis does the clearest job of not collapsing the two concepts. First of all, while he has a strict definition of what counts as law "properly so called," he admits that positive law *can* be created without considering the common good. However, such laws would not contribute to the Rule of Law. The *telos* of laws which are created with an eye to the common good is the Rule of Law; it obtains when laws are being made and adjudicated as they ought to be. By inferentially identifying law as a means, and the Rule of Law as an end, it is possible to see the distinction between the two concepts quite clearly.[162]

I would like to briefly discuss the position of another scholar whose perspective on the Rule of Law lends itself to the current critique. Richard Bellamy is also responsible for seriously overlapping two concepts: democracy and the Rule of Law. He argues, "in many respects, the rule of law is simply rule by democracy."[163] The Rule of Law understood as democracy provides a clear-cut example of what I am warning against by recommending that concepts be tested

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[161] Raz's "basic idea" or "basic intuition" about the guidance of subjects via law pertains to the Rule of Law in particular. See Raz 210-214.

[162] I still have reservations about Finnis's account insofar as it does not make sense to suggest that the Rule of Law can be co-opted by tyrants if it is itself described as an end. See Finnis, *Natural Law Natural Rights*, 273-275.

[163] Bellamy 53.

for external coherence. I think that both concepts, the Rule of Law and democracy, illuminate one another when they are not conflated.[164] Proponents of democratic theory sometimes build conditions into their conception of democracy that are meant to protect societies against consequences that might obtain from a tyranny of the majority. Whether or not this has been successful is a discussion for another time. However, I think constraints on the democratic procedure might instead be characterized as the exercise of the Rule of Law, if one understands the Rule of Law as providing for the common good. Even so, simply conceiving of the Rule of Law as something distinct from democracy allows it to exist in relation to a variety of models of political organization simultaneously. This is desirable if one takes into account the concept's history: medieval Europe, the time in which Aquinas was writing, was definitely not democratic, but they *did* have a conception of the Rule of Law. However, there is no denying that democracy has the potential to supplement the Rule of Law in striving to create and maintain a morally good society.[165]

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[164] I am not suggesting that Bellamy has no reason for making the claim that he does, and it is beyond the scope of this project to fully investigate his views, however, by overlapping the two concepts, he perpetuates misunderstanding.

[165] Before discussing internal conceptual coherence, there is an objection that I must consider: What if the Rule of Law and law actually do denote the same concept? I do not think this is much of a possibility considering the foregoing investigation. However, if it is the case, I think the burden of proof rests with those scholars who believe it. For such a position to be probable it must be argued for and the two concepts must not be collapsed without explanation. Thank you to Colin Macleod (University of Victoria) for bringing this possibility to my attention, during the presentation of a previous incarnation of this idea (CS-IVR, Congress 2009).

3.4. *Internal Conceptual Coherence*

Internal conceptual coherence, or intra-conceptual coherence, focuses on one opinion, theory or conception of a particular concept and aims at a harmonious relationship among its constituent parts. In other words, theorists and philosophers desire to achieve a logical, orderly and consistent relation of parts whereby the whole concept or theory is intelligible. Testing for internal conceptual coherence is primarily reserved for more complex theories or models since simple opinions which lead to absurdity or are obviously in coherent are usually discarded at the first level of analysis as unconsidered opinions.

Questioning the internal coherence of a theorized concept or model is what many scholars do when they are trying to refute another's position. It can take the form of questioning the truth of assumptions and premises, or demonstrating that the premises and assumptions lead to a conclusion not intended by the original scholar. For example, one might try to demonstrate that the premises lead to an absurdity, a contradiction, to a result the original scholar was not aiming to prove, or even to the antithesis of what he or she was trying to prove. Essentially when we test for internal conceptual coherence, we are looking for any defect that will be detrimental to a theory to the point that it must ultimately be discarded, or at least reconstituted. For example, a conception of the Rule of Law which suggests that it is a state of affairs where there are no lawmakers at all – perhaps to avoid

the inevitability of subjective participation in and manipulation of law – is internally problematic: it reduces to a bit of an absurdity. Because the existence of law depends upon the existence of some lawmaker, if there are no lawmakers then there can be no law. Positive law requires a human lawmaker or lawmakers, and even divine law requires a divine lawmaker such as God. If there are no lawmakers, then there can be no law. In a state of affairs without both lawmakers and laws, it seems meaningless to suggest that this is a manifestation of the Rule of Law.[166]

A more concrete example, and one that I have already outlined, comes from Matthew Kramer. Recall Kramer's argument against the moral relevance of formal legality. He argues contra Simmonds, and Raz and Hayek by association, that an infrastructure of rules does not entail a situation that has any moral worth since such an infrastructure is just as necessary for effective evil regimes as for good ones. Kramer demonstrates that theories advanced by scholars who hold the law to be necessary for a morally good state of affairs, and so morally relevant, can be used to demonstrate the opposite state of affairs, namely that law is also

[166] Admittedly this may not be the best example to illustrate my point. It could be argued that God is an objective lawmaker thereby circumventing the problem of subjective participation in and manipulation of law. However, assuming that He is a subject, hopefully my example can help illuminate my discussion of internal conceptual coherence to a small degree.

necessary for efficacious evil systems. His analysis can be understood as a critique of the internal coherence of opposing positions on the Rule of Law.[167]

Let us again consider the four contemporary scholars from the first chapter and see whether there is anything about their theories of the Rule of Law which might plausibly lead to internal incoherence.[168] As I have said before, I think that Finnis's theory, while it takes into account a good deal of raw material, is possibly internally flawed because he seems to associate the Rule of Law both with means and ends. It is an end for Finnis insofar as it is the state of affairs which obtains when the law is functioning as it ought to – via general rules with the aim of supporting the common good of a community. However, if the Rule of Law is an end, then it cannot also be a means; it cannot be *used* to perpetuate iniquity. Again the reason this seems to be the case is Finnis's admission that it is conceptually possible, though he maintains that it is unlikely, that the Rule of Law can obtain in an iniquitous regime. If it can do that, it appears to be a means to an end rather than an end itself. However, if Finnis means to suggest that having an eye to the

[167] Another example, which might help illuminate this discussion, is Hart's refutation of Austin's command theory of law. Hart argued that Austin's theory could not account for some legal systems, democratic ones in particular. Thus, he was able to find a flaw in Austin's theory that lead to it being discarded by most legal theorists. For Hart's complete arguments against Austin see H.L.A. Hart, *The Concept of Law*. Second Edition. (Oxford: Oxford University Press, 1961).

[168] Testing for internal coherence can be a long and meticulous process: scholars spend years trying to disprove the theories of their opponents! Here I will only be able to make some cursory comments on the flaws apparent in the four theories under discussion. Comprehensive treatment of each theory is beyond the scope of this project.

common good will not always yield morally good state of affairs, perhaps because the society is between a rock and a hard place, so to speak, then there is the possibility that the regime may not be morally good, while still having the Rule of Law. Recall that he does say that "the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good."[169] Overall, his theory is very nuanced, and I hope I am correct in giving him the benefit of the doubt and acknowledging that his theory is internally coherent from my current point of view.

Kramer's theory can be criticized on the ground that he does not provide an argument for his definition of the Rule of Law. Thus, there is no reason to accept his most basic assumption. Though his reasoning from that initial assumption is valid, if his assumptions are not accepted then despite the validity of his arguments, one is unlikely to accept his conclusions as sound.

My concern with Raz's and Waldron's theories is that they seem to include conditions for the Rule of Law that appear contingent rather than necessary. While it is not necessarily the case that the conditions they offer are contingent rather than necessary, they ought to provide arguments supporting this

[169] Finnis, *Natural Law Natural Rights*, 274.

fact.[170] Why should one accept that courts and legislatures, the independence of the judiciary, and the easy accessibility of courts are necessary features of the Rule of Law, even in our current context? Why must the law be established in the name of the whole society? Why must law be positive law – why can it not be passed down through divine sources? And why *must* it be systematic? Without further argument, I am not entirely convinced that each of these is a necessary condition for the Rule of Law.

However, the conditions that they list might be saved by what I am going to call *natural necessity*, as a derivate of Hart's discussion. I will expand the range of this term to cover other natural facts which make certain features associated with the Rule of Law necessary in relation to them. While democracy and the existence of open and fair courts might not be identical with or necessary for a society under the Rule of Law, it is possible to understand these institutions as having a contingent but important connection to the Rule of Law by viewing them as safeguards for its preservation. They might even be naturally necessary for its existence, given what we know about humanity, what human beings are capable of knowing, and whether or not we are infallible. I would like to draw upon the work of H.L.A. Hart to help me clarify what I mean by *natural necessity*.

[170] An investigation of a concept is not limited to an investigation of its necessary features – contingent features are also important for understanding it. However, for clarity's sake, it is important to distinguish between necessary and contingent features.

When Hart was engaged in his debate with Fuller over the necessary connection between law and morality, he articulated a "minimum moral content of natural law," which was based on facts about the reality of human beings and their environment the implications for law. For instance, Hart thought that given the fact that there are limited resources, "some minimum form of the institution of property" was necessary in law. He writes, "It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil."[171] Because there will be competition for these resources, it is necessary to institute rules about property in order to maintain organization in society. However, as Hart notes, the fact of limited resources is a *contingent* fact; "things might have been, and might one day be, otherwise."[172] Similarly, given what is true about what human beings can know (we are not Dworkin's super judge Hercules, nor are we Platonic philosopher kings), we are unlikely to come up with acceptable conclusions without reasoning through situations. And this is a fact, albeit contingent, that we recognize as true about each other, though, as Hart points out, "*things might have been, and might one day be, otherwise.*"[173] Therefore, we require reasons, arguments and justifications

[171] Hart 196.

[172] *Ibid* 194.

[173] *Ibid*, emphasis added.

to understand the law, to have the capacity to be guided by it, and to communicate with others about it. This is what I mean by *natural necessity*. I think that if Raz and Waldron do not have persuasive arguments for the necessity of some of their enumerated requirements, it is possible to understand some of them as naturally necessary. While there are many interesting questions surrounding the relevant contingent features of a concept, it is important not to confuse them with the core or essential features.

The aim of this chapter has been to outline some ways that can be used to evaluate raw material both at the initial stage of collection and at the later stage where well considered theories and models can be evaluated for coherence. It seems that, as in the last chapter, the theorists considered in chapter one have achieved a range of external and internal conceptual coherence. However, if we want to achieve a situation where communication about the Rule of Law is meaningful and effective, we ought to take these methods of evaluation along with the relevant raw material seriously.

CONCLUSION

4.1. *Conclusions and Aspirations*

This project was initially motivated by my desire to discover what the Rule of Law is. As a student of legal philosophy I felt compelled to investigate the meaning of this concept, particularly since it appears in much of the theoretical literature that I have the benefit of studying. As a global citizen I also felt the need to understand the Rule of Law since its presence in current law, politics and the news media is pervasive. For me, these two motivations are undeniably related; I believe that gaining an understanding of the Rule of Law is critical as the theoretical discussions of it can and do play an important role in contemporary law and politics. A concept as central to contemporary law and politics as the

Rule of Law deserves careful consideration and it is important that we – scholars, politicians, and citizens – consider it carefully in order to facilitate meaningful discussions about it, the conditions that determine its existence, whether or not it is intrinsically valuable, and if it is a justifiable goal for societies.

So, what *is* the Rule of Law? Over the course of this thesis, one of the conclusions I have come to is that there is anything but an easy answer to this question. Contemporary theorists provide no uniform answer; in fact, contemporary theoretical opinions on the Rule of Law, though all provide valuable insights, are quite varied and thus are a confusing and difficult place to begin one's search. Contemporary scholars assert a variety of propositions about the Rule of Law, many which are impossible to reconcile with one another: the Rule of Law has been identified as synonymous with democracy;[174] it has been described as nothing more than a state of affairs where general rules are used effectively to govern.[175] Others propositions include: the Rule of Law must be closely tied to a concept of law,[176] that it is a moral political ideal,[177] and also that it can be co-opted by evil regimes and used as a means to achieve iniquitous

[174] Bellamy 53.

[175] Kramer 172 -173.

[176] Waldron, "Concept", 4.

[177] *Ibid* 1.

ends.[178] Still other scholars suggest that it is an end in itself,[179] that it is a value, though not a moral one,[180] and that it is necessary for freedom.[181]

Though the indeterminacy that pervades Rule of Law discourse is undesirable because it inhibits meaningful communication between parties, it is not unavoidable. In order to sort through the chaos that is contemporary Rule of Law discourse, I have provided some standards and methods by which opinions and theories about the Rule of Law can be evaluated. My purpose in doing so is to bring a measure of clarity to the theoretical discourse and to narrow the scope of what might actually be contained in the concept in order to allow for more meaningful discussions and debates in the legal and political arenas.

First, I recommended considering current and historical usage as raw material for the conceptual analysis of the Rule of Law. In the second chapter, I demonstrated that currently the Rule of Law is widely understood as a political ideal, a moral good, a value, and something worth striving for. With respect to its historical roots, I identified two trends of thought that have persisted over time. The first, I called the *Rule of Law, not of Man*, and it represents the position that

[178] Kramer 174, 194-195.

[179] Finnis, *Natural Law Natural Rights*, 270.

[180] Raz 225.

[181] Raz 210; Hayek, *Serfdom*, 54.

lawmakers and adjudicators ought create and adjudicate law, in the form of general rules, with an eye to the common good of a community. The second trend, I called *formal legality*, and it represents the position that the existence of an institution of rules provides for freedom (or at least for a degree of certainty) as individuals are able to plan their lives around a set of general rules. Both are strong traditions of thought within the discourse, though as I pointed out, neither has escaped criticism.

In the third chapter I identified ways of sorting through raw material both as it is being collected, and once unconsidered opinions have been discarded. I argued that not all opinions need to be taken into account, particularly if they are unconsidered, but that widespread opinions are *prima facie* worth consideration since we are searching for a conception that takes into account current usage as much as possible. When analyzing more complex positions, I suggested that it was important to test for external and internal conceptual coherence, to ensure that the concept was not at odds with associated concepts and that it was internally sound.

By considering current and historical usage, analyzing raw material and engaging in careful conceptual analysis, it is possible to narrow the scope of theories and models of the concept of the Rule of Law that meaningfully contribute to the discourse. Because meaningful communication requires that

participants are similarly familiar with the terms of the discussion or debate, my aim has been to provide a way of evaluating and ultimately discarding opinions and models of the Rule of Law that prevent such communication.

4.2. *Attempting to answer 'The Question'*

I want to close by bringing together what I have learned about the Rule of Law from this thesis, and offer my own answer to the question *What is the Rule of Law?* While this work is somewhat tentative and supplemental to my thesis generally, it is based on some of the conclusions that I have come to in the rest of the project about the requirements of conceptual analysis.[182] My perspective on the Rule of Law takes into account the current and historical usage of the term, and I will discuss why I think the *Rule of Law, not of Man* trend, as opposed to *formal legality*, ought to be the preferred paradigm for understanding this concept. I also delineate my conception of the Rule of Law and its relation to law, which I believe to be externally coherent and free of redundancy.

The Rule of Law is a political ideal that describes an end state of affairs where law as a system of general rules is employed in a way that justifies its existence and authority over a community of people. This is in accordance with the way the term is used generally in contemporary society: it is seen as

[182] If my own point of view is found to be wanting or refutable it does not impugn the work I have done on this thesis generally, nor does it bear on my initial conclusions about what must be taken into account in order to successfully evaluate the concept of the Rule of Law.

something of value and fundamental to the well functioning of society and the justification of government. In the sense that the Rule of Law is an end, I am in agreement with Finnis who defines the Rule of Law as "[the] name commonly given to the state of affairs in which a legal system is legally in good shape," and by "good shape" he means that laws ought to be directed towards the common good.[183] As such, I understand the Rule of Law to be an inherently moral ideal since its existence precludes some arbitrary uses of power in a substantial way.[184]

My understanding of the Rule of Law is commensurable with the most general trend in the discourse: the Rule of Law is the antithesis of the arbitrary exercise of power: its existence entails that a degree of certainty is present in society, which is useful for citizens as they plan their lives, whether they are making short or long-term plans. A system of general rules allows citizens to foresee to some degree how they may or may not interact with other citizens and with the government.

The Rule of Law is not an all-or-nothing concept. By this, I mean that it obtains in degrees, as is the case with many other political ideals. For example, a particular democracy may not live up to the *ideal* that is democracy, where every person has the right to vote and exercises that right, but we may nevertheless

[183] Finnis, *Natural Law Natural Rights*, 270.

[184] An explanation of why I think this is the case will be addressed later in this section.

understand a system as an example of democracy if, on balance, it requires and attempts to implement the input of the general population. Since the Rule of Law exists on a similar kind of spectrum, it makes sense to talk about "violations" of the ideal without concluding that it ceases to exist. The existence of the Rule of Law is dependent upon the many actual laws and decisions that are applied in a given society. It is possible, and even likely, that one or a number of laws or legal decisions may be at odds with the common good in any given system. This may occur for a variety of reasons: perhaps a court makes a mistaken decision, a legislature misinterprets the interests of the population, or a lawmaker or an adjudicator has some personal agenda that undermines their commitment to the common good. Admittedly, it will sometimes be difficult to determine whether a particular law or decision supports the Rule of Law or detracts from it. While this may be problematic in a practical sense, it should not lead us to question the theoretical coherence of such an idea.

Law and the Rule of Law are definitely related concepts; there is no doubt about that. They are, however, two separate concepts and denote two separate ideas. Law, in the form of general rules, is necessary, but not sufficient, for the Rule of Law. As I mentioned above, the Rule of Law is an end state, which can only be achieved via law. Law is a means, a neutral tool, and while it can be used to support the Rule of Law it can also be used for a variety of other ends, some of

them quite odious to consider.[185] Sometimes law is used to achieve the Rule of Law and sometimes it is not.

I do not think, as Waldron suggests, that there is "a natural correlation" between one's view of law and one's view of the Rule of Law in the sense that one must have a rich conception of law, including certain substantive and procedural constraints, in order to hold a rich conception of the Rule of Law.[186] He claims that this "natural correlation" exists between legal positivism and formalist conceptions of the Rule of Law and between richer concepts of law and Rule of Law.[187] He admits that

> conceivably the correlation could be shaken loose by an insistence that the concept of law and the Rule of Law are to be understood quite independently of one another.... Or we could imagine some positivist sticking dogmatically to COL1 [legal positivism's concept of law], but acknowledging the importance of a separate Rule-of-Law ideal that emphasized procedural and argumentative values.

However, he argues,

> those combinations seem odd: they treat the Rule of Law as a rather mysterious ideal – with its own underlying values, to be sure, but quite unrelated to our understanding of law itself. It is simply one of a number of ideals (like justice or liberty or equality) that we apply to

[185] In this respect I remain a legal positivist: both just and unjust laws and legal regimes do exist, and it does a disservice to the clarity of the discourse to suggest otherwise.

[186] In particular, one which takes the Rule of Law to be more than formal legality implies.

[187] Waldron, "Concept", 64.

> law, rather than anything more intimately connected with the very idea of law itself.[188]

I think Waldron is mistaken on this point. "Shaking loose" the correlations he insists upon does not lead us to the conclusion that the Rule of Law is a "mysterious ideal" or that it is "unrelated to our understanding of law itself." It is necessary to understand law and its uses in order to grasp how the Rule of Law may be secured. What is more, I do not see anything terribly mysterious about suggesting that the Rule of Law obtains when law is directed towards a certain end. They are two concepts which are related, cohere with one another and are not reduced to the same set of criteria.

Clearly my understanding of the Rule of Law is more in line with the historical trend which I called the *Rule of Law, not of Man* than with the trend of *formal legality*. I think that this way of understanding the Rule of Law is more viable for a number of reasons: the Rule of Law, not of Man coincides more closely with current usage than formal legality; I think that the challenges faced by the Rule of Law, not of Man are possible to overcome, and I think that the content neutrality of formal legality challenges the boundaries of conceptual coherence.

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[188] *Ibid.*

Recall that the two major challenges to the *Rule of Law, not of Man* are 1) that laws are created and adjudicated by human beings, and therefore the human element in law is inescapable and thus the Rule of Law is no different than the Rule of Man, and 2) that with the advent of liberalism governments asserted a position of neutrality towards what counts as the good and how individuals within society ought to live their lives, which is incompatible with the idea of an enforceable 'community' morality, which is part of the Rule of Law, not of Man trend. I spent some time in the second chapter demonstrating that the first concern, which has been discussed by philosophers such as Aristotle, Aquinas and Hobbes, is not a devastating critique. The fact that human beings are inevitably tied to law by way of its creation and adjudication does not lead to the collapse of the Rule of Law into the Rule of Man. There may be practical restraints on political and legal professionals, such as the separation of powers, which limit their power and jurisdiction and so restrict their ability to legislate, etc., according to whim or prejudice. There may be normative restraints upon officials in religious societies or in today's constitutionally constrained governments. Finally, there may be a commitment on the part of lawmakers and adjudicators to take seriously the interests of the community, a kind of self-imposed norm or rule, coupled with a decision not to submit to their own personal whims and biases.

Let us turn to the second challenge to the Rule of Law, not of Man: liberalism – which is prevalent in today's societies – suggests that the government ought not to dictate what is good or what kind of life individuals ought to lead. It supports (moral) pluralism. Though it is true that liberalism is committed to neutrality on the topic of what is good and what kind of life one ought to lead, human beings do inevitably share some fundamental moral positions. This has been both directly and indirectly argued in a variety of ways by theorists such as H.L.A. Hart, John Finnis, Wil Waluchow and even Thomas Hobbes.

Recall Hart's suggestion that there is a minimum moral content of natural law determined by, what he calls, natural necessity.[189] Hart suggests that given the basic facts of human existence, such as our vulnerability and approximate equality, the fact of limited resources and the epistemic limits of human beings, law must provide for certain situations: for instance there ought to be some kind of rules against killing and inflicting bodily harm and law must provide some norms governing property. Finnis suggests that there are certain conditions that all human beings have an interest in obtaining and maintaining, such as "life and health, knowledge, and harmony with other people."[190] These goals are desired by all people, and as such, Finnis calls them "intelligible intrinsic goods" or "aspects

[189] See Hart's discussion in Chapter 9: "Laws and Morals" *The Concept of Law*. 185-212.

[190] Finnis, "Natural Law Theories." *Stanford Encyclopedia of Philosophy*. Section 1.1.

of human flourishing". What we can derive from the comments of Hart and Finnis is that there are certain things which people require and value: for example, life, a degree of security, health and justice. Thus, despite our many differences and the fact of moral pluralism in liberal societies and around the world, we may identify common values which have moral significance.

Wil Waluchow has argued quite convincingly in *The Living Tree* that it is possible to identify something he calls a "community's constitutional morality." While his concept of a community's constitutional morality is a subset of wider community morality, his discussion of true moral commitments and the possibility of overlapping consensus are pertinent for grasping the possibility of a morality that transcends particular cultural and moral positions. As Waluchow describes it, a community's constitutional morality "consists of the moral norms and convictions to which the community, via its various social forms and practices, has committed itself and that have in some way or other been drawn into the law via the rule of recognition and the law it validates."[191] Norms which have been drawn into law in most, if not all societies, include things like prohibitions against killing and norms organizing claims to property, etc. as Hart pointed out. If Waluchow makes a successful case, and I think he does, for the possibility of a community's constitutional morality despite the fact of moral pluralism, I think

[191] Waluchow 227. For a broader discussion of a community's constitutional morality, see Chapter 6: "Common Law Constitutionalism" *The Living Tree*, 216-271.

the case can be extended to support the idea that there are common elements of human morality, such as the elements suggested by Hart and Finnis, which make the Rule of Law, and not of Man a viable conception of the Rule of Law. This rescues us from the conclusion that liberal societies require a conception of the Rule of Law, such as formal legality, that is value neutral.

One of the reasons that I think the Rule of Law, not of Man is a more viable conception of the Rule of Law than formal legality has to do with how law's existence and implementation is justified. In order to illustrate what I mean, I turn to the work of Thomas Hobbes, who provides a fruitful starting place. Consider what Hobbes has to say about the hypothetical state of nature:

> In [the state of nature] there is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death. And the life of man, solitary, poor, nasty, brutish, and short.[192]

For Hobbes, fear is the antithesis of a dynamic and productive society. According to Samuel Scheffler, Hobbes suggests not only that "fear is incompatible with social life," but also that "it is *only* within a stable political society that the

[192] Hobbes, *Leviathan*, Chapter 13, paragraph 9.

miserable condition of unremitting fear can be kept at bay."[193] When citizens are fearful in a deeply pervasive way they are more likely to react to one another, and to the government if there is one in place, as though they were in a state of nature. When one is afraid, trusting others becomes problematic, and, as Hobbes notes, this has implications for the progress of society. Conversely, a healthy functioning society is one where there is no fear.

Avoiding fear and uncertainty and obtaining security, which is required for the prosperity and development of society, are the reasons that Hobbes suggests individuals are motivated to engage in a social contract. The fear of death, in particular, he says, is the first of "the passions that incline men to peace."[194] Hypothetically, once all the individuals have consented to the contract, which stipulates that authority over all persons is grated to a sovereign, a sovereign is charged with maintaining the contract between all persons in society. Hobbes' sovereign possesses absolute power, and the "only right individuals retain is to resist the sovereign if they are threatened with death."[195] Hobbes is correct

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[193] Scheffler 4-5, emphasis in original.

[194] Hobbes, *Leviathan*, Chapter13, paragraph 14.

[195] Tamanaha 47.

Scheffler admits that fear does not dissipate when a social contract is enacted, but he describes how the character of the fear changes. It is not fear to engage with other member of one's society, etc., but the fear of sanction, which is of a different kind, and is not the kind of deep rooted terror that brings individuals to the social contract. He says, "the concentration of power in a sovereign produces a redistribution of the capacity to inspire fear, and this makes social life possible. On the one hand, people's attitudes toward one another need no longer be dominated by

practically speaking when he claims that in order for society to function there must always be someone or some decisions-making mechanism which has the final word on legal decision. But I think that he is mistaken in his belief that "the only right individuals retain post-contract is to resist the sovereign if they are threatened with death." Contra Hobbes, direct fear of death is not the only reason that persons experience fear.[196] If one is part of a society where one's rights to life, a degree of liberty, safety and health are not secured, then one has reason to fear death, bodily harm or unjustified incarceration indirectly. The rationale is that if individuals cannot be certain that some of their rights will be upheld, it is natural if they begin to fear other rights will be violated as well.[197] Those things we value, whether we talk about them as natural necessities or aspects of human flourishing, must be protected in order for citizens to feel that the law is *justified*, not that they are simply justified in following the law – as might be the case in a regime of terror. Hobbes argues that people hypothetically place their trust in a sovereign for the purpose of obtaining a degree of certainty and security, with which they can do many things which contribute to their well-being, such as own

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fear and mistrust, and so the development of social relations is no longer inhibited. On the other hand, everyone has reason to fear the sovereign's power, and hence to obey the sovereign's laws, and so the social order is stabilized." 12.

[196] I am not referring to minor fears or discomforts or anxieties, but pervasive fear and distrust.

[197] I am talking loosely about legal rights and those which derive from natural necessity, and one may consider examples of terrorist regimes if that helps to bring my point across.

property, trust others and create relationships. Therefore a sovereign who does not uphold the commitment to a society which provides for these things to some degree is guilty of not observing the terms of the contract.[198]

I think that the Rule of Law is good because it obtains when the minimal conditions that are necessary for subjects to live meaningful lives are met to some degree. I do not think it is so rich that we must exclude most historical systems from approximating it, which is important since claims were made about it as early as antiquity and through the Middle Ages. I wholeheartedly acknowledge that there must be general rules rather than arbitrary governance, but these cannot be completely content neutral; they must provide for a minimal amount of protection for citizens. Even Hobbes could concede that a law which stipulates that all Jewish men, women and children are to be rounded up and exterminated would free those persons from their duty to abide by the social contract. Such a law could not function under the Rule of Law despite the fact that it may fit all the conditions to make it law since people cannot live without fear in a society that requires their destruction.

My perspective on the Rule of Law is rooted in a justification, not just an explanation, for the existence of law. This is why I find Hobbes's position useful for getting my own conception off the ground. However, I disagree with some of

[198] Just to be clear, my opinion here deviates from Hobbes's.

his subsequent discussions about the authority of sovereign, and the rights retained by persons subject to the contract. When law is justified to those ruled, the Rule of Law exists in some degree. The Leviathan which I count on to deliver the Rule of Law is one where the very concerns which motivate the move from a hypothetical state of nature to society are considered and accounted for by the sovereign. I think formal legality is a stepping stone in this process – there must be an effective system of general rules in place – but it is not the end of the story, as it does not provide the content necessary to justify the system, which makes sense of its status as a morally significant political ideal.

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