



September 14th, from 4-7 pm  
Lester Pollock Room, FH, 9th Floor

# Colloquium in Legal, Political, and Social Philosophy

Conducted by

Jeremy Waldron and Liam Murphy

Speaker: **Jeremy Waldron, New York University**  
Paper: **FACES OF THE RULE OF LAW**



Note to NYU Colloquium: This is a first draft; apologies for various infelicities. There is too much self-citation; this is because I am trying to get a sense of what I have been thinking about these matters. And there are many more questions (about 100 by my count) than there are answers. It's an exploration, not an argument. There is a brief discussion of what prompted it all in footnote 53 on pp. 22-3. Thanks to Sam Scheffler for some help in that initial discussion.

## **FACES OF THE RULE OF LAW**

**Jeremy Waldron<sup>1</sup>**

### **Part I: Three Faces**

What holds the rule of law together as a respectable ideal in political morality? We have always known it comprises a number of distinct principles; think of Albert Venn Dicey's three principles of the rule of law as embedded in the British constitution,<sup>2</sup> or the eight principles of Lon Fuller's inner morality of law.<sup>3</sup> I have become convinced that, besides this aggregation of principles with the very specific work that they do, the rule of law also embraces two or three distinct orientations towards government and the ordinary people subject to its authority. Fuller's "inner morality of law" (with its eight principles) is one such orientation. The requirement that the state and its officials submit themselves to legal constraint is another. And the insistence that ordinary people, non-state actors, obey the law and accept legal sanctions when sanctions are warranted is a third (or an arguable third). What relation do these orientations have to one another?

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<sup>1</sup> University Professor, NYU School of Law.

<sup>2</sup> A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (Liberty Books, 1982), [redacted], lists his three principles as follows: "(1) no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land; ... (2) no man is above the law ... here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ... and (3) the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."

<sup>3</sup> LON FULLER, *THE MORALITY OF LAW* (Yale University Press, Revised edition, 1967). See the list on p. 5 below.

After years of studying and teaching the idea of the rule of law, I find myself puzzled. We pretend that the rule of law is a unified list, but it's not. And not much has been written on this; it's as though there's a secret about these disparate orientations and we don't want it to get out. That's why I'm asking: Is this plurality of perspectives irreducible? Can we boil the three faces of the rule of law down to a single normative proposition or perhaps an interlocking set of propositions? If not, can the ideal hold itself together? Does it matter whether it can? That's what I would like to consider.<sup>4</sup>

So, now: what exactly does the rule of law require, and who does it require it of? Most of us would say: the rule of law is a principle or a set of principles *that are supposed to constrain the state*. It "requires the state to operate within a framework of law ... and not in an arbitrary or ad hoc manner."<sup>5</sup>

**The Constrained State conception** faces the government and its agencies with demands like the following:

- we are to be governed under law;
- state officials are to be held accountable to the same rules through the same institutions as the rest of us;
- the independence of the judiciary is to be maintained so that the courts can impose legal accountability;
- the government is to acknowledge and accept legal restrictions upon its authority;
- not even officials at the highest level of government are immune from legal accountability;
- indeed, no one is exempt from legal accountability by virtue of their exalted place in the hierarchy of authority.

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<sup>4</sup> The terminology of *faces* of the rule of law is suggested by John Tasioulas' article *The Rule of Law* in *THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW*, which titles its first section "The Many Faces of the Rule of Law." (ed. Tasioulas CUP 2020), 117. Sometimes though I will use "facets"; and sometime "conceptions."

<sup>5</sup> Jeremy Waldron, *The Rule of Law*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*.

Of course there's a problem about the last two or three items on this list: How can the ruler, who is the source of all positive law in a community, be constrained by law? Thomas Hobbes was not the first or the last to argue that

[t]he Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civil Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will.<sup>6</sup>

The rule of law requires that a polity figure out a way to overcome this difficulty. Constitution-framers have to figure out a way to make the constraint conception work. This is a central part of the agenda for constitutional design under the constraint orientation of the rule of law.

An awful lot of the rule-of-law literature—particularly rule-of-law literature outside legal philosophy—focuses on this business of imposing effective limits on the state. For example, E.P. Thompson identifies the rule of law with “the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims”—that’s what he said in *Whigs and Hunters* was “an unqualified human good.”<sup>7</sup> He had in mind restrictions on “the exercise of direct unmediated force (arbitrary imprisonment, the employment of troops against the crowd, torture, and those other conveniences of power with which we are all conversant).” Others have insisted on the importance—and the difficulty—of bringing legal restraint to bear on authoritarian regimes.<sup>8</sup> There is even phraseology for regimes that have functioning courts which apply the law to

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<sup>6</sup> Thomas HOBBS, *LEVIATHAN*, Richard Tuck ed. (Cambridge University Press 1996), 184. For a much earlier statement to the same effect, see AQUINAS, *SUMMA THEOLOGICA*: “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 no coercive power save from the authority of the sovereign.” [Aquinas cite]

<sup>7</sup> E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT*, 265 (1975).

<sup>8</sup> *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsberg and Tamir Moustafa eds., 2008).

ordinary people, but no effective legal constraint on government: that, it is said, is rule *by* law, not rule of law.<sup>9</sup>

But is it only the government that is faced with rule-of-law demands? The rule of law is sometimes thought to make demands on ordinary people too.

The **Law and Order conception** demands

- that we the people in our individual capacities should be law-abiding,
- that the state should do what's necessary to ensure that the laws are obeyed by ordinary people
- that we should do what the law requires of us even when we disagree with it (pay our taxes, curb our tempers, slow down, act with reasonable care, refrain from overthrowing elections, and so on),
- that we should not take the law into our own hands, but submit our disputes to legal institutions
- and that we should accept legal sanctions and liability when we are found to have violated legal rules or obligations.

These principles seem to present the rule of law in a somewhat different light, something more like *law and order*. The government is still involved, for it makes and enforces the rules. And it is surely part of the law-and-order conception that the state must maintain and exercise a credible power of deterrence, effective enforcement, liability, and retribution. However, with law-and-order in view, it is ordinary people who are faced by the demands of the rule of law in the first instance. Their compliance is what's at issue. So what is the relation between this people-facing understanding of the rule of law and the state-facing conception with which we began.

Even if we put law-and-order aside (just for a moment) and concentrate on the state-facing aspect of the rule of law, there is another question. When the rule

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<sup>9</sup> See, e.g., Thomas Carothers, *The Rule-of-Law Revival*, FOREIGN AFFAIRS (1998) and Jeremy Waldron, *Rule by Law: A Much-Maligned Proposition* available at <https://ssrn.com/abstract=3378167> and also in my new collection, THOUGHTFULNESS AND THE RULE OF LAW (forthcoming, Harvard University Press, December 2023).

of law faces the state, it seems to do so in different ways. Ensuring legal constraint and accountability for our rulers and for governmental acts is one thing. But where, for instance, does Lon Fuller's conception of the inner morality of law fit in?<sup>10</sup>

Among legal philosophers, Fuller's conception is regarded as the essence of the rule of law.<sup>11</sup> The constraint idea gets a mention, but nothing like the scrutiny that Fuller's conception commands. In Fuller's conception, the rule of law makes certain demands on the *manner* in which power is exercised over us: it is to take the form of rules that guide our conduct and establish our expectations in advance. The idea is that as well as being constrained by law, the state is also faced with restrictions on the manner in which it operates. Fuller's eight principles of what he called the inner morality of law have to do with the *how* of governance.

**Fuller's conception:** we are to be governed by norms or orders that are:

- general in character, or at least derived from general norms;
- public, and certainly not kept secret from those to whom they are directed, even if they have to be filtered through the work of specialist legal advisors;
- prospective in character, not retroactive or retrospective;
- reasonably clear and determinate, as opposed to vague or ambiguous;
- reasonably stable, not changing so frequently that people have trouble keeping up with them;
- consistent, at least in the sense of non-contradiction and perhaps also in the broader sense of being coherent in principle;
- practicable, that is, not making impossible or unreasonable demands;
- reliable as a guide to the actions of officials;
- and enforced through the determinations of legal tribunals following procedural due process.<sup>12</sup>

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<sup>10</sup> LON FULLER, *THE MORALITY OF LAW* (Revised edition, 1967), Ch. 2.

<sup>11</sup> Fuller himself only occasionally uses the phrase "the rule of law" in his classic discussion in *THE MORALITY OF LAW*. See *ibid.*, 209-11 and 218-19.

<sup>12</sup> The inclusion of this element in Fuller's conception—and the array of procedural principles unfold from it—is argued for in Jeremy Waldron, *The Rule of Law and the Importance of*

This all involves a somewhat more academic understanding of the rule of law; it directs attention to the analytics of a particular task within the legal system—law-making. The rule of law, on this account, faces the government with a moral requirement to legislate respectfully, to enact laws—whether in legislatures, courts or agencies—in ways that can guide the conduct and engage the agency of the subjects who will be affected.

Like the first conception we considered, Fuller’s principles are supposed to constrain the state. In Fuller’s initial presentation, we study the failures of King Rex, an incompetent legislator in Fuller’s affecting little fable.<sup>13</sup> Fuller’s idea is that *the state* is to observe publicity, prospectivity, stability and so on in its legislative and regulatory activities. The inner morality of law is a state-facing morality, albeit one that is imposed for the sake of guidance and predictability that accrue to individuals from rules that satisfy these requirements. But Fuller’s principles affect states in quite a different way from the constraint conception; they operate at a different level and in a different spirit. They don’t require the government to submit to law (though they certainly are not opposed to that); they require the government to submit to a certain discipline of law-making, and that’s a different matter.

Fuller’s conception can be seen as facing legislators with something like the rules of their craft. John Finnis says that “the rule of law” is the “name commonly given to the state of affairs in which a legal system is legally in good shape”—fit for purpose, as it were.<sup>14</sup> And according to Raz, “[c]onformity to the rule of law ... is essential to the realization of [law’s] direct purposes. It is “the law’s own virtue,” and it is indispensable for achieving the goals we want to use law to achieve, at least if we want to do so in a way that respects people’s agency:

These [goals] are achieved by conformity with the law which is secured ... by people taking note of the law and guiding themselves accordingly.

Therefore, if the direct purposes of the law are not to be frustrated it must be

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*Procedure*, in GETTING TO THE RULE OF LAW, NOMOS 50 (2011), also in my new collection THOUGHTFULNESS AND THE RULE OF LAW (Harvard University Press).

<sup>13</sup> FULLER, MORALITY OF LAW, 33-38.

<sup>14</sup> FINNIS, NATURAL LAW AND NATURAL RIGHTS, 270.



capable of guiding human behaviour, and the more it conforms to the principles of the rule of law the better it can do so. <sup>15</sup>

So stated, it is an attractive ideal. It can even be offered as an understanding of what means for something to *be* law. Not only do we say that laws should be general, prospective, stable etc., but we can also phrase it as: nothing really counts as law unless it is general, public, prospective, etc. This has led to some controversy: is Fuller saying that there cannot be secret laws or that a retroactive law is a contradiction in terms? It looks as if he has tacked on a sort of *lex iniusta non est lex* codicil to his inner morality.<sup>16</sup> Either way, it doesn't appear to have anything to do with imposing limits on the state or requiring government and its officials to submit themselves to law. That seems to be a concern altogether separate from the aims of Fuller's eight principles.

Both the constraint conception and Fuller's conception face questions about content. Notoriously, Fuller's conception can be applied to norms and orders with all sorts of contents. It looks like laws that are unjust or oppressive can satisfy his requirements: we have had experience of an apartheid legal system; some say they can imagine a Nazi state satisfying Fuller's eight principles. Now Fuller balked at this. He speculated that a lawmaker's following his principles would make it more likely that substantially just laws will emerge. Many doubt this. For some, this is the only point of interest in Fuller's conception; for the rest of us, it is but one thing among others in the significance of Fuller's inner morality. But it still doesn't give us any substantial overlap with the other conception. Even if doing things the right way means you end up doing the right thing, it need not do so by bringing the constraint perspective into play. A would-be tyrant may just find himself unable to act unjustly under the auspices of Fuller's principles; it need not be because the tyrant acknowledges that he is bound by law not to do so.

Indeed, a similar issue about substance can be concocted for the constraint conception. When we imagine the state as being bound by law, is it the mere fact of its being bound that matters, or is it something about the content of the

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<sup>15</sup> Raz, *The Rule of Law and its Virtue*, 225.

<sup>16</sup> FULLER, *THE MORALITY OF LAW*, 39: "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."



constraint? A monarch may be bound by religious duties; that is different from being bound, say, by respect for human rights. Should we argue—in some sort of twisted analogue of Fuller’s claim—that a state that starts off just being bound (by whatever constraint) will end up being bound by constraints of the right sort, i.e., the constraints that justice and human rights substantially require?

Anyway, there you have it: a rather congested understanding with at least three possible faces presented by the rule of law:

1. The constraint conception, requiring that the state and its officials must be bound by law.
2. Fuller’s conception: the rule of law as a set of requirements on how individual laws present themselves to those whom they constrain.
3. The law-and-order conception: the rule of law as a requirement of legal compliance incumbent upon ordinary people.

Conceptions (1) and (2) are probably the best-known, and this problem of the different faces that the rule of law presents would present itself even if we were only concerned with these two. But (3) adds an edge of controversy. Should (3) be included at all? How sternly should it be construed? It is my hope that figuring out the logic of the rule of law’s different faces will help us resolve some of these controversies.

Other theorists may identify additional faces of the rule of law.<sup>17</sup> Also there may be controversies about the contents and implications of a given face. For example, should Fuller’s account be read as including procedural concerns as well

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<sup>17</sup> See Richard Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REVIEW 1 (1997) for an alternative array. See also Brian Tamanaha’s book *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), where there is a chapter entitled “Three Themes.” Tamanaha associates the rule of law with (1) government limited by law and with (2) formal legality in the sense stipulated by Fuller. And then Tamanaha adds a third: the rule of laws not men. “The inspiration underlying this idea is that to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals—whether monarchs, judges, government officials, or fellow citizens” (ibid., 123.) This third conception looks for forms of law that are not the product of willful exercises of human power: custom and common law, for example, rather than legislation. I wish there was time to add in some discussion of this theme, but the paper is already too long and too confusing..

as concerns about the form of the law?<sup>18</sup> (Some may want to read a procedural concern as a different sort of face presented by the rule of law.) The constraint conception might or might not be viewed as comprising the institutional structures that have been established to make it viable—the independence of the judiciary, for example. And there are other controversies too: Should the implementation of the rule of law be sensitive to social and historic circumstances?<sup>19</sup> Should the law-and-order idea be seen as prohibiting (or frowning upon) amnesties after a period of illegality? Does the constraint idea imply opposition to “big government”? Where does the rule of law’s hostility to administrative discretion fit in? Is it an implication of the constraint conception or Fuller’s approach or is it a separate facet altogether? What about anti-corruption? That’s an increasingly prominent target in rule-of-law studies. Can it be brought under the auspices of any of the other concerns?

Though there are these controversies, I don’t want to present the faces I have listed as necessarily mutually exclusive. Most of us have been assuming that (1) and (2) can co-exist—though how exactly is something we haven’t bothered to explain. (3) offers itself as an addition, not an alternative. I hope that the discussion that follows will help us untangle some of these conundrums and illuminate some of these connections.

## **Part II: Facing Different Ways**

I have said that these conceptions face in different directions or face, in a given direction, in different ways. What do I mean by “facing”? It’s a term of art; let me explain what I have in mind.

When I talk about which way the rule of law faces I mean, first, to identify what sort of conduct by what sort of person acting in what sort of role or capacity the rule of law is supposed to affect. Inasmuch as the rule of law is a normative doctrine, whose conduct is affected by the norms that it comprises? Who is it incumbent upon to respect the various demands of the rule of law? In what

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<sup>18</sup> Waldron, *The Rule of Law and the Importance of Procedure*. See above, note 12.

<sup>19</sup> See Joseph Raz, *The Politics of the Rule of Law*, in his collection *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* (Oxford University Press, 1994), 370.

capacity does it address them? Officials, lawyers, citizens, who?<sup>20</sup> Who (if anyone) has the responsibility to uphold and enforce it? Does it apply to individuals or is it a basis for designing a system? It may be a little misleading to say, for example, that the constraint conception constrains officials one by one. It may be better to think of it as constraining constitutional design. It faces the state, but since it is also about the constitution, it necessarily faces the entire constitutional community.<sup>21</sup>

Our understanding of the addressees of the rule of law also has to take account of the secondary requirements it imposes. For example, although the law-and-order conception presents the rule of law as a set of demands made upon ordinary citizens, the government enters the picture very quickly as an enforcer. The work of police and prosecutors is very important in this understanding of the rule of law. And actually, the same is true for the constrained-state conception. When we say, for example, that no one is above the law, we are partly referring to government officials as targets; they must not be permitted to escape legal liability by virtue of their place in the apparatus of power. But if this is to work then there must also be governmental officials ready to prosecute other government officials and enforce the law against them. The constraint conception will only work if there is a well-established apparatus of legal constraint, ready to be wheeled out if necessary to curb abuses by government.<sup>22</sup> And if the government has responsibilities in this regard, then citizens have responsibilities too as voters and tax-payers. We have to keep our heads in the midst of this iteration of different levels of responsibility—identifying the first tier, the second tier, and the third tier of responsibilities within the same conception.

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<sup>20</sup> In some jurisdictions, notably New Zealand, “the rule of law” is presented as part of the content of lawyers’ ethical obligations: “Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations: ... the obligation to uphold the rule of law and to facilitate the administration of justice.” (Section 4 of the Lawyers and Conveyancers Act (NZ) 2006.)

<sup>21</sup> In Britain, the statute that established the Supreme Court of the United Kingdom—Constitutional Reform Act 2005 (UK), section 1(a)—states that nothing in the Act is intended to adversely affect “[t]he existing constitutional principle of the rule of law.”

<sup>22</sup> Brian Tamanaha, *Functions of the Rule of Law* in THE CAMBRIDGE COMPANION TO THE RULE OF LAW (Meierhenrich and Loughlin eds. 2021) 227, argues that government can be constrained only if there are robust “functioning bureaucratic legal institutions (prosecutorial, judicial) widely disbursed at various levels and settings of government, along with a vigilant civil society that demands officials abide [by] law.”

As we distinguish these various faces from one another, one basis for distinction is the target or addressee; a second basis is the kind of normativity involved. We think of the rule of law as a normative ideal or requirement. But normativity covers a multitude of sins. We have to ask: What kind of normativity? Does a rule-of-law principle confront its addressees in the spirit of a simple normative requirement (e.g., *this* ought not to be done)? Is it like a deontic demand? A Nozickian side-constraint? A policy value? A rather good idea? A good reason? A lament, a basis for regretting certain changes?<sup>23</sup> Or what? Is it just a matter of value-laden description, with limited implications for what anyone or any body is required to do?<sup>24</sup> Various NGOs produce rule-of-law rankings: the World Justice Project is the best known. It doesn't generate a list of prescriptions. But it encourages businessmen and others to rely on its grading of various countries as they ponder investment opportunities.<sup>25</sup> These distinctions all enter into the way that I characterize various faces of the rule of law.

Under the Fullerian approach, there is the well-known plurality of eight principles of the inner morality of law. But there is a more fundamental pluralism already present in the Fullerian approach: the distinction between how the law's demands on its subjects are couched, framed, etc. and how the law's assurances are given. And that includes people's assurances against each other (e.g., security of property) and people's assurances against the state. Facing is not just a matter of normative direction and normative back-up; it is also a matter of "For whose sake are these demands imposed? Who is supposed to be reassured or secured by these demands?"

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<sup>23</sup> Get Dicey quote: "*Decline in Reverence for Rule of Law*: The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges, and by a marked tendency towards the use of lawless methods for the attainment of social or political ends." – from 1915 Preface to INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION.

<sup>24</sup> Refer to the philosophical debate about the relation between evaluation and prescription. [E.g., critiques of R.M. Hare.]

<sup>25</sup> Cf. Robert Barro, *Democracy and the Rule of Law*, in B. Bueno de Mesquita and H. Root, eds., *GOVERNING FOR PROSPERITY*, Yale University Press, 2000: "[T]he willingness of customers to pay substantial fees for this information is perhaps some testament to their validity."

For a normative principle can face more than one way: it may face one person or entity as a matter of duty and another person as a matter of right, securing for them the benefit of the duty. If we were to consider the relation of Fuller’s conception to a conception of the rule of law that emphasized the importance of predictability and security, we could treat those two conceptions as bound tightly together in a posture of correlativity. Fuller’s state-facing requirements are intended for our benefit. We are beneficiaries of the rule of law: we are supposed to benefit in our liberty and security from government and its officials being constrained in this way. In this sense Fuller’s rule of law considers the way in which law impacts on the individual subject—human persons, businesses, corporations, etc. It insists that we are to be told clearly and prospectively what we must do if we are to be and remain in good standing with the law. It also indicates what we can rely on, so far as our legal position vis-à-vis others is concerned and vis-à-vis the state.<sup>26</sup> All this is secured by the state acting in a certain way.

But are we also bound by it? Do we have duties under the rule of law? In some ways, this is analogous to questions about whether we (ordinary individuals) have duties under human rights principles or whether all such duties are incumbent on the state. Indirectly we may have human rights duties—since we as voters mustn’t call for violations and we as taxpayers must be ready to pay the cost of rights (both fiscal and opportunity costs).<sup>27</sup> If government is constrained then we—who have influence over our government—must be constrained also. But perhaps there are no direct duties incumbent on citizens (that is, right-bearers), “no direct horizontality” in human rights theory.<sup>28</sup> Is this true in the case of the rule of law? If the rule of law encompasses law-and-order, then the rule of law imposes

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<sup>26</sup> It is possible to place too much emphasis on the predictability/guidance aspect. This is the theme of the title track *Thoughtfulness and the Rule of Law* in my new collection *THOUGHTFULNESS AND THE RULE OF LAW* (Harvard University Press, forthcoming December 2023).

<sup>27</sup> **Cass Sunstein and Stephen Holmes on the cost of rights.** See also the discussion of the spread of rights-based responsibilities in Global Citizenship Commission, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21<sup>ST</sup> CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD*, Gordon Brown ed. (Open Book, 2016), 71-79.

<sup>28</sup> **Note that this is a contested issue in human rights theory.** Citations?

duties on individuals with regard to legal requirements incumbent on them. But even if it doesn't, individuals' duties may still be involved at a second or third tier.

How far-reaching is this array of rights and secondary duties? If we do have duties under the rule of law, do we also have—in respect of each other's performance of those duties—rights that there will be enforcement? Does the rule of law require the state to guarantee to us that law will be enforced? If so, who is this duty owed to? Is it motivated by other individuals' need for predictability? Or, is it broader than that, amounting to a more general civil interest in law-abidingness? Is there a duty based on fairness, given that others are curbing their pursuit of self-interest for the general good?

### **Part III: Method**

We know the rule of law is a complex ideal, and it's a controversial one too. But are there limits on its complexity? Does the rule of law require simplicity? Why would it?

Does it matter if the rule of law's complexity appears haphazard? Can't we just weave the various themes I've mentioned into a single formulation? After all, they are not inconsistent. In teaching, thinking, and writing about the rule of law, I have tended to just run two of the themes together—Fuller's and the constraint conception—as though they added up to a single broad understanding. It is not hard to find a formula which will take in both sets of requirements. But perhaps the response should be: verbal dexterity is not enough;<sup>29</sup> we want theory and understanding.

There is a general difficulty with inquiries like this. How can we answer questions like these, since there is no canonical statement of what the rule of law requires that could be used to verify any of the claims we make? There is no canon—just the exploration of a loose heritage. As Richard Fallon puts it: “The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may

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<sup>29</sup> I believe Tamanaha in *Functions of the Rule of Law*, 221 runs (1) and (3) together in simple juxtaposition when he says: “The rule of law exists in a society when government officials and the populace are generally bound by and abide [by] law.”

be less clear today than ever before.”<sup>30</sup> We have invented a sort of rule-of-law canon, with Dicey, Hayek, Fuller, Raz, and so on. But that’s what brought us to this difficulty. It doesn’t help us out of it.

So what do we do? Perhaps we can begin with the *phrase* “rule of law” (though even that is hardly canonical either, “legality” being a semantically different alternative).<sup>31</sup> Is there a literal understanding of the phrase “the rule of law” that we can use to figure out what—or even part of what—that ideal comprises? Joseph Raz toyed with this in his essay “The Rule of Law and its Virtue.” He said: “‘The rule of law’ means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.”<sup>32</sup> That seems to favor (3) the law-and-order orientation or at least the inclusion of law-and-order among the other facets. But then Raz went on to acknowledge that “in political and legal theory it [the rule of law] has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.” And that, as we have seen is a different idea.

We might use a method related to the *telos* of the rule of law. Attempts have been made to figure out overarching values which make sense—or partial sense—of the rule of law’s requirements. Martin Krygier says that “[t]he proper place to start” in an inquiry like this, “is with the question why, what might one want the rule of law for? not what, what is it made up of?”<sup>33</sup> He is surely right. But the difficulty remains: we may want (1) for one set of reasons, and (2) for another set of reasons, and (3)... etc. Still, we will give this approach a try, in Parts IV and V.

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<sup>30</sup> Fallon, *Rule of Law as a Concept in Constitutional Discourse*, [cite](#). Mention too the observation in Waldron, *Rule of Law* in STANFORD ENCYCLOPEDIA OF PHILOSOPHY that “[t]he Rule of Law is a working political idea, as much the property of ordinary citizens, lawyers, activists and politicians as of the jurists and philosophers who study it. The features that ordinary people call attention to are not necessarily the features that legal philosophers have emphasized in their academic conceptions”—

<sup>31</sup> For an exploration of the differences, see Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GEORGIA LAW REVIEW* 1, at 10 (2008), reprinted in my collection *THOUGHTFULNESS AND THE RULE OF LAW* (forthcoming 2023).

<sup>32</sup> Raz, *The Rule of Law and its Virtue*, 212.

<sup>33</sup> Martin Krygier in *NOMOS 50: GETTING TO THE RULE OF LAW* (2011), 67-8: “the rule of law is not a natural object, like a pebble or a tree, which can be identified apart from questions of what we want of it.”



It both helps and doesn't help that each of the first two faces we are considering presents us with a list—the 8 or 9 ideas associated with Fuller's inner morality of law, and the 3 or 4 points that go with the constraint account.<sup>34</sup> The rule of law is largely a matter of lists. For years now—at least since the time of A.V. Dicey—it has presented itself as a list: three principles in Dicey's account, eight in Lon Fuller's inner morality of law, eight also in Raz's discussion which varies in some respects from Fuller's; eight in John Finnis's account (which mostly overlaps with Fuller's); four in John Rawls's outline in *A Theory of Justice*, and eight factors in The World Justice Project's conception (again quite different from the octuples presented, respectively, by Fuller, Raz, and Finnis.)<sup>35</sup> Some of the principles fit together: for example, most of those on Fuller's list; and maybe also Dicey's principles fit together—or at least the first two, the third has always seemed rather out of place.<sup>36</sup> Others are more eclectic and give the impression of being cobbled together: the World Justice Project in particular just assembles a grab-bag of things that seem important.<sup>37</sup>

Once the list-ishness is acknowledged, why can't we just cumulate the lists and conceptions that we already have, to form a sort of master-list? So: the rule of law involves two or three things, plus eight things, plus one thing, plus four things, plus another eight things. The list that results may be not be much more eclectic or ad hoc than some of the lists that are already in play. There would be some overlaps. But we would be acknowledging frankly that, for the most part, the rule of law is just one damned thing after another. So, for example, one approach to (3) might simply consist in adding law-and-order to one or both of the existing lists (1)

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<sup>34</sup> See the lists on pp. 2 and 5 above.

<sup>35</sup> DICEY, LAW OF THE CONSTITUTION, [redacted]; FINNIS, NATURAL LAW AND NATURAL RIGHTS, \_\_; FULLER, THE MORALITY OF LAW, [redacted]; JOHN RAWLS, A THEORY OF JUSTICE, 206-14; Raz, *The Rule of Law and its Virtue*, [redacted]; and World Justice Project (available at <https://worldjusticeproject.org/rule-of-law-index/factors/2020/>)

<sup>36</sup> DICEY, LAW OF THE CONSTITUTION, [redacted]: “(3) the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”

<sup>37</sup> **List from WJP 2023**: Constraints on government powers; Absence of corruption; Open, transparent government; Fundamental rights; Maintenance of order and security; Regulatory enforcement; Access to civil justice; Integrity of the criminal justice system; Customary Justice.

or (2), and asking, “What’s wrong with that?” There doesn’t seem to be anything more arbitrary about that than the formation of an eclectic list in the first place—especially because, as I have said, there is no canonical master list to discipline such list-making.

Of course we might disagree about this item or that item, or about the weight they should have in respect of one another when some trade-off is inevitable. But remember: I am not putting these facets forward as competing conceptions, each aiming to crowd out the others. The idea is unification. True, the rule of law is a contested concept, as well as a complex one.<sup>38</sup> And I am tracing some contestation in this paper, notably with the law-and-order conception. But mostly I am trying to explain how these different faces of the rule of law can co-exist theoretically, not which is to be ascendant.

So why not juxtapose (1) and (2) and then perhaps just add in the various elements of (3)? Would that be a problem—to frankly acknowledge that the rule of law is not just one thing but a series of perhaps unrelated demands, with not much more in common than that each of them makes some reference to law? At least one other political ideal seems to work like that: human rights, which is quintessentially list-ish and comprises an array of items (often twenty or more)<sup>39</sup> that don’t seem to have much more in common than that they convey demands of considerable importance in behalf of the human individual.

We could approach the rule of law this way. But, unless time is terribly short, we might as well explore whatever room for argument there is. We should see if it is possible to cobble together some sort of well-thought-through unified understanding.

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<sup>38</sup> See Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, in CAMBRIDGE COMPANION TO THE RULE OF LAW, ed. Jens Meierhenrich and Martin Loughlin (Cambridge University Press, 2021). See also Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?* 21 LAW AND PHILOSOPHY (2002), 137, and Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, [redacted].

<sup>39</sup> For some discussion of the significance of rights’ list-ishness, in comparison to what is often the tight theoretical unity of a theory of social justice, see Jeremy Waldron, *Socioeconomic Rights and Theories of Justice* 48 SAN DIEGO L. REV. 773 (2011).

#### **Part IV: Constraints on the State and Fuller's Inner Morality**


Let's begin with the two traditional approaches. In scholarly circles, (1) the constraint approach and (2) Fuller's approach are the best-known understandings of the rule of law. As we have seen, both of them make demands upon the state, though they face the state with their different demands in different ways. I want to spend some time now on the relation between (1) and (2), if only to show that there *is* a difficulty here. There has not been nearly enough discussion of the relation between the two. These traditional faces of the rule-of-law are often juxtaposed; seldom carefully related to one another; there is virtually no effort to show explicitly how they fit together. That's in part a *mea culpa*: I write incessantly about this stuff and I'm not sure I have ever satisfactorily settled this in my own mind.

##### **(i) Points of contact**

It is not hard to come up with a few possible points of contact. Fuller's principle of generality can be mapped onto Dicey's second principle—organized under the constraint conception—of there being one law for all, binding even officials in the government. (Unfortunately, however, Fuller's generality, being purely formal, will also permit an abstract principle of governmental immunity, provided it is stated in general terms.) The idea of the rule of law as a fundamentally state-constraining enterprise is perhaps captured by the last of Fuller's eight principles of the inner morality of law: congruence.<sup>40</sup> Also, if one follows the suggestion I have made elsewhere—that Fuller's conception should be expanded to include genuine procedural elements<sup>41</sup>—this may hook up to institutional ideas like the independence of the judiciary, which are also important for the constraint conception. Looking in a different direction, the first of Dicey's principles, which emphasizes the ordinary procedures of ordinary courts, can be seen as part and parcel of what Fuller's proceduralism implies, or it can be seen as what's involved in effective constraints upon government. And finally, to the extent that the constrained-state idea depends on constitutionalism, the fact that the American constitutional law and Bills of Rights elsewhere emphasize principles of

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<sup>40</sup> Give definition of "congruence" in *The Morality of Law*, 81-2: "congruence between the rules as announced and their actual administration."

<sup>41</sup> See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, .

prospectivity, clarity, and procedural due process may indicate a significant connection.

But these points of contact, though real, don't really satisfy me in my (perhaps corrosive) curiosity about deep connections between the first and second faces of the rule of law. They don't seem to go to the essence of the matter.

## **(ii) Underlying values**

I mentioned Krygier's insistence that we approach the rule of law in terms of the values it is supposed to serve. Are there deep values underlying (1) and (2)? I think there are. Let's start with (2) Fuller's conception. The inner morality of law is not just a matter of efficiency. Fuller's principles are not just craft principles, though they are like craft principles. They represent a sort of checklist that a competent law-maker will consult. But if they are rules of a craft, it is a moral craft and they convey the importance of certain values. There has been a lot of work on the values underlying Fuller's conception. They have been identified as liberty, security, and dignity. Of these, the liberty element seems to be present in the foundations of (1) as well, though one needs a very loose understanding of liberty to see them as having very much in common.

Let me explain that. Liberty is benefited in different ways under the two facets of the rule of law. If there is a liberty-based justification for (1), it will be something like this: there is likely to be more personal liberty if government is subject to constraint; fewer things will be prohibited; and liberty consists in the silence of the laws. This involves a negative conception of liberty, in which state action is seen the main threat to liberty, so that restraints on state action equal restraints on the state's ability to limit liberty, thus diminishing the threat that the state can pose. By contrast, Fuller's orientation promises something more like positive liberty—that is, well organized, well-informed planning, fostered by legal predictability; being able to use one's knowledge to organize one's life. In this it is similar to Hayek's positive conception of liberty in his earlier work:

The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. The law tells him what facts he

may count on and thereby extends the range within which he can predict the consequences of his actions. At the same time it tells him what possible consequences of his actions he must take into account or what he will be held responsible for.<sup>42</sup>

It's still individual liberty, but it's an understanding of liberty that emphasizes the quality of rational choice not just the lack of obstacles. Understood in this way, liberty under law has a lot in common with security<sup>43</sup>—a safe harbor or, in another metaphor, the law as “a causeway upon which, so long as he keeps to it, a citizen may walk safely.”<sup>44</sup>

What about dignity? Joseph Raz cites dignity as the rationale of (2),<sup>45</sup> but what he actually says about dignity indicates that he mainly has well-informed liberty in mind: “Respecting human dignity entails treating humans as persons capable of planning ... their future. ... [R]especting people’s dignity includes respecting their autonomy....” By contrast, when Fuller mentions dignity as a foundation for his inner morality, it does not translate readily into anything like the liberty that’s at stake in (1). It is more like respect conveyed in the manner in which one’s actions are guided:

Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.<sup>46</sup>

This is a subtle value associated with respect and focused on the agent’s understanding of and engagement with a norm laid down for them. It is, by the way, a different idea from Fuller’s speculation that if you follow the principles of

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<sup>42</sup> F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960),     .

<sup>43</sup> Cf. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, ed. Anne Cohler et al (Cambridge University Press, 1989), Bk. 11, Ch. 6, p. 157: “Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security on political liberty as security.”

<sup>44</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS*, as quoted in Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 *GEORGETOWN JOURNAL OF INTERNATIONAL LAW* 353 (2006).

<sup>45</sup> Raz, *The Rule of Law and its Virtue*, 221: “[O]bservance of the rule of law is necessary if the law is to respect human dignity.”

<sup>46</sup> FULLER, *THE MORALITY OF LAW*, 162.

the inner morality of law you are less likely to enact unjust laws. The connection between the two is a connection made by Finnis:

A tyranny devoted to pernicious ends has no 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.<sup>47</sup>

With this, one catches glimpses of an anti-tyranny principle both in the constraint conception and in Finnis's and Fuller's understandings of the inner morality of law. But it is a rather loose connection.

### **(iii) Presupposition**

Here is the best I can come up with in the way of a more substantial connection between (1) the constraint conception and (2) Fuller's conception. It has to do with the fact that (1) does not just envisage the state being *constrained*—constrained any old how—but in particular its being constrained *by law*. It wouldn't be enough for the state to be constrained by mob action,<sup>48</sup> or economic motivations, or the imprecations of bishops, or even just political checks and balances. On the account I am offering, the relation between (1) and (2) would be that (2) tells us about the sort of thing, the sort of mechanism, that we want government to be constrained by. We want the state to be constrained by norms that satisfy Fuller's principles. We need something like (2) in place in order to develop (1) as a powerful and appealing ideal. We want there to be something like law in the community and we want *that* to be the mechanism that constrains government.

Or (or perhaps *and*), there is the institutional character of the constraint: the importance of political power being limited *by the judiciary*. This interpretation focuses as much on the institutional locus of constraint as on the form of the rule that expresses the constraint. Again, the thought is that we want government to be constrained, not just by any old institution (like some echelon of the military or

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<sup>47</sup> FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 273.

<sup>48</sup> Think of Lewis Namier's characterization of the political system of 18<sup>th</sup> century England as "oligarchy tempered by riot."

fear of what the colonels will do) but by institutions of a particular sort: *legal* institutions. We can put these two points together by envisaging a government checked by law (in the way laws are characteristically framed) as administered by legal institutions (in the way that courts etc. characteristically operate).

We might add to this a third dimension. For purposes of perspective (1), perhaps the rule of law has to be understood also as the rule *of a legal system*. It must be understood not just as a few rules here and there, administered by agencies who are occasionally woken into action, but as a systematic framework.<sup>49</sup> Put crudely, there must be lots of laws, all over the place, administered as a system. I don't mean the rule of law requires any particular quantity of laws, but it must be viable as a system—a system of norms and a system of institutions—as well as satisfying the Fuller requirements. The image conveyed by the rule of law is one of dense thickets of rules and procedures: Robert Bolt's saying in *A Man for All Seasons*, "This country's planted thick with laws..."<sup>50</sup> Admittedly, this is a delicate idea to work through. The rule of law does not require that there be more laws rather than less. We have already seen that it is often thought to be a liberty-promoting ideal, with liberty consisting in Hobbes's phrase largely in the silence of the laws. Is there an optimal number of laws? Is there a range of events that need to be law-regulated?<sup>51</sup> I raise these questions at this stage only to indicate how hard we need to think about the meaning of the term "law" when we contemplate a state being constrained by the operation of such a complex formation.

So where have we got to? The drawback with what we have is that it can all too easily be read as putting (1) in the driver's seat, and construing (2) as ancillary to it. It is certainly not immediately obvious that there are analogous links in the other direction. If we start off with (2) Fuller's concern for publicity, prospectivity, clarity, stability etc., is there anything in that concern that would drive us toward the position that (1) it is important for government to be constrained by law? I want the law *as applied to me* to be clear, stable, etc., something whose

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<sup>49</sup> See NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* (Oxford 2005), 13.

<sup>50</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS*, [redacted].

<sup>51</sup> Cf. Hart on the minimum content of natural law as suggesting a necessary agenda for legal regulation: HART, *THE CONCEPT OF LAW*, 93-100.



predictability I can count on, something that respects me as an agent. That's a reason for me to be concerned about the formal character of the criminal law and the obligations it imposes and private law inasmuch as that too is supposed to define my rights and duties. But I can be satisfied with all this, and yet not worry a bit about whether government is subject to limits in its own action or not?

Some theorists distinguish between the rule of law and rule by law.<sup>52</sup> It is not always clear what this prepositional distinction is supposed to amount to, but one common account focuses on the possibility that law and legal institutions may be set up and operated by a ruler to order relations among citizens themselves and the policing of the demands placed by the regime on citizens' conduct, but that the ruling officials in doing this need not accept that the laws apply to them. Theorists who use this distinction imagine that this is a viable approach, though they mostly deplore it as falling short of the rule of law in sense (1). To the extent that this is so, there seems to be a wide gap between (1) and (2). (2) can be satisfied through rule by law, not rule of law.

On the other hand, the principles set out in (2) *are*, as we've noted, principles in some sense binding on the state. *The state* is not to legislate retroactively, *the state* is to make sure its laws are clear and stable, and *the state* is to operate procedurally correct institutions for dispute resolution. These obligations are not exactly what the proponents of (1), the constraint conception, have in mind, but they are not nothing. A state that follows (2) in regard to the legal system that it administers is a state that has to get used to doing things in a certain way, and hence not following certain strategies of governance that might otherwise be tempting. The state's acceptance of this discipline sets it on the road, as it were, to the acceptance of constraint in sense (1).

## **Part V: The Place of Law and Order**

Now let's ask how (3) the law-and-order idea might be related to these two other inter-connected themes?<sup>53</sup> Let's begin by acknowledging that it's an open question

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<sup>52</sup> See the discussion in Waldron, *Rule by Law: A Much-Maligned Proposition*.

<sup>53</sup> Here's what stirred my thoughts in this discussion. In a paper presented at the NYU Colloquium in Legal, Political, and Social Philosophy on November 17, 2022, Sarah Song (of the JSP Program at the University of California, Berkeley) discussed what she presented as a

whether law-and-order is even comprised in the rule of law. Calling it “an open question” is not meant to be a sneaky philosopher’s trick of inferring “false” from “not obvious.” I think it really is an open question, and exploring it will be a large part of what the rest of this paper involves. And yes, the answer may well be that some version of law and order *is* comprised in the ideal we call the rule of law.<sup>54</sup>

Some rule-of-law theorists simply will not countenance the law-and-order conception. Gerald Postema is an example. Postema thinks of the rule of law as primarily an ideal of legal constraint upon government (which is where we began at the start of this paper), and he believes any preoccupation with whether or not *citizens* are obeying the law is a distraction from that. “Law and order,” he says, “is a distortion of the rule of law because the first and governing concern of the

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dilemma facing those (like her) who advocate amnesty for undocumented migrants who have come to the United States. The paper was co-authored by Irene Bloemraad and the two of them made a powerful case that social justice requires amnesty programs like the Immigration Control and Reform Act of 1986 or the program envisaged in the US Citizenship Bill of 2021.<sup>53</sup> Nothing less than far-reaching amnesty, they argued, can cope with the overwhelming inequities and dysfunction of our immigration system.

Unfortunately, however, the very idea of amnesty seems to put us on a collision course with the rule of law, for it means that people are being rewarded for law-breaking. It means too—and this was presented as part of the rule of law difficulty—that amnesty policies have the effect of incentivizing law-breaking in the future. Song and Bloemraad had several answers to these objections, including a suggestion that in some ways immigration amnesties might actually *serve* the rule of law rather than derogate from it. Legalization can promote consistency and predictability in law-enforcement. By clearing administrative and judicial back-logs it can provide a reset, a sort of fresh administrative start for the system.

I raised questions in our discussion at the Colloquium about whether the rule of law really had any fundamental bearing on his debate. For as I saw it, the objection to amnesty was based most prominently on an understanding of the rule of law that insisted on legal compliance by ordinary persons who are subject to the laws of the land and demanded rigorous enforcement measures in cases of disobedience. Even assuming that would-be immigrants contemplating our laws from afar have a duty to comply with them (as though they were ordinary subjects of our laws), there was room for doubt, I said, as to whether a requirement of compliance is a necessary part of our understanding of the rule of law. Does the rule of law embrace a requirement of law and order? That’s where this paper comes in....

<sup>54</sup> Near the beginning of Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, I casually offered the following observation: “[T]he Rule of Law is not just about government. It requires also that citizens should respect and comply with legal norms, even when they disagree with them. When their interests conflict with others’ they should accept legal determinations of what their rights and duties are.” Did I speak too quickly in this article in crediting law-and-order as part of the rule of law? That now is what I want to examine.

rule of law is not with broken rules but with the abused power.”<sup>55</sup> Is Postema right about this? I thought so once, when I first considered the rule-of-law horn of Song and Bloemraad’s dilemma, and I said so at the Colloquium.<sup>56</sup> But having thought more about it in the ensuing months, I am less sure.

Postema takes exception to the *tone* of law-and-order. He says that politicians use the phrase “law and order” when the forces they command quash disruptive social behavior, with only a veneer of legal warrant. We associate the phrase with over-zealous, even unconstitutional law-enforcement: stop and frisk, coercive interrogation, mass incarceration, lying prosecutors, and so on.

But can the rule of law do any of the other work it is supposed to do if law is not generally obeyed, if the rule of law does not exact general obedience. Even if law-and-order considered on its own is an inadequate account of the rule of law, might it not be a necessary *part* of it or something presupposed by it? Postema won’t abide this either: he says that law and order “is not merely an incomplete rendering of the idea of legality; it is a distortion of it.”<sup>57</sup> Is he right to treat it so dismissively?

And is law-and-order necessarily repressive? Might we not say that the end of securing obedience is one thing, and the use of repressive means to achieve it is another? A principled commitment to the former should not necessarily commit the defender of the rule of law to an “anything goes” approach to the latter. Actually, I think Postema sees this. As though to balance the account that he gives, he quotes a prominent Australian constitutionalist, Geoffrey de Quincy Walker, as saying that “the rule of law prevails ... where all individuals and all groups recognize an obligation to comply with law and act accordingly.”<sup>58</sup> That’s not the brutal apparatus of arbitrary orders, manifest force, and mass incarceration;

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<sup>55</sup> GERALD J. POSTEMA, *LAW’S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW* 54 (2022): “[W]e must distinguish legality, or rule by law, from ‘law and order.’ This slogan, used in highly politicized contexts, is not merely an incomplete rendering of the idea of legality; it is a distortion of it.”

<sup>56</sup> At the Colloquium discussion referred to in footnote 53, above. [Check]

<sup>57</sup> POSTEMA, *LAW’S RULE*, 54.

<sup>58</sup> Postema is citing GEOFFREY DE Q. WALKER, *THE RULE OF LAW* (Melbourne University Press, 1988), 3.

but it does seem to be something possibly compromised by citizens treating the law as of no account.<sup>59</sup>

Or consider the prospects for moderation on the following more specific issue. It might be thought that the rule of law, on the law-and-order conception, prohibits civil disobedience (for example, in civil rights cases), cutting off and repressing that important part of civic participation. And it might be thought that that this counts against law-and-order. Two points in response. First, the best-known case on this, *Walker v. City of Birmingham*, upholding the law-and-order dimension, complained mainly not about disobedience as such, but about disobedience without prior recourse to legal process.<sup>60</sup> Secondly, it is possible to adopt a more moderate position—allowing disobedience but insisting that the actors concerned show respect for the law even in the midst of their disobedience. In our thinking about civil disobedience, we might say that the rule of law conveys only a *prima facie* prohibition on law-breaking and that conscientious law-breakers can always find a method to convey publicly their respect for the law.<sup>61</sup> That is a more moderate position (than the *City of Birmingham* opinion), but it is still a version of the law-and-order approach.

Similarly for any response that wants to distance the rule of law from the prospect of our being coerced by legal authority. Certainly, the rule of law is *concerned* with law enforcement and legal coercion. It can't possibly ignore that. If there is going to be punishment, then the rule of law will want to surround it with the strictest safeguards: the principle of legality; *nulla poene sine lege*; and so on. But the importance of those safeguards neither means nor presupposes a rule-of-law requirement that the law *be* sternly enforced or that people must *be* punished when they have failed in their legal obligations. There may be principles that require this, but they need not be comprised under the rule of law.

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<sup>59</sup> POSTEMA, LAW'S RULE, 15-16.

<sup>60</sup> *Walker v. City of Birmingham* 388 U.S. 307 (1967), at 327: "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for the judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom" (Stewart J. for the Court).

<sup>61</sup> See Martin Luther King, *Letter from a Birmingham Jail* available at [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html)

As you can see, I am going back and forth on this matter. Maybe the rule of law *does* require general obedience. Can the rule of law do any of the other work it is supposed to do if law is not generally obeyed? Even if law and order, considered on its own, is an inadequate account of the rule of law, might it not be a necessary *part* of it or something presupposed by it? Postema won't have this: he says that law and order "is not merely an incomplete rendering of the idea of legality; it is a distortion of it."<sup>62</sup> Nevertheless, we ought to explore these possibilities.

In what follows I want to consider, (i) the suggestion that familiar conceptions of the rule of law presuppose something like general obedience and enforcement. Then (ii) I'll consider whether law-and-order along with one or both of the other two conceptions emerges as an implication of a more general ideal. Finally, (iii) I want to consider the possibility that the law-and-order approach might just constitute a free-standing truth about the rule of law, presupposition or no presupposition, implication or no implication. (Exploration of this third possibility will not be easy, for it is not clear how we would make a case for this possibility given the overall untidiness of the rule of law as an ideal.)

### **(i) What the other faces presuppose**

The presupposition possibility, if it is sustained, will resonate with what we established in Part IV in the relation between the constraint conception and Fuller's conception. There are differences. In arguing from (1) the constraint conception to (2) Fuller's conception, the argument was that the rule of law looks for constraint of a particular kind, not just any old kind. But in arguing from (1) the constraint conception to (3) the law-and-order conception, the additional thought has to be that we want state to be constrained *by law as a going concern in which everyone is already being constrained and playing their part*. If ordinary people are by and large ignoring the law or flouting it, then the whole business of using law to constrain the state and its agencies will fall rather flat. At worst, it will suggest the pathos of applying legal restraints to well-meaning government officials—and officials alone—in what is otherwise an anarchic or criminal society. Maybe people could get the benefit of the state being constrained by law even though ordinary folks themselves behaved like anarchists.

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<sup>62</sup> POSTEMA, LAW'S RULE, 54.

But it will be difficult. Government bound by law, must mean that law enforcement people at least are willing to act against violators in government. Tamanaha argues that the state can be constrained only if there are robust “functioning bureaucratic legal institutions (prosecutorial, judicial) widely disbursed at various levels and settings of government, along with a vigilant civil society that demands officials abide law.”<sup>63</sup> Perhaps this is possible only if enforcement officials have the experience of using their resources against the infractions of ordinary people. (We talked a little about this earlier.)<sup>64</sup>

Often the argument that the state needs to be constrained by law—that it ought to be subject to legal constraint—is more like what we argued for in Part IV: we don’t want government just to be constrained, it must be constrained *by law*. Law is the thing that protects people from each other, and enables them to be assured in the possession of their liberty. And we get all this only if law is actually working, which means only if most people are accepting and abiding by it. That’s the apparatus we want government to be constrained by—the machinery, the going concern, up-and-running, that is already protecting us from one another. That seems to me to come close to a presupposition relation from (1) to (3).

What about (3) as a presupposition of (2) Fuller’s approach? If people are not by and large obeying the law—or treating it as something to be obeyed—then we may say that it matters little whether law is, in its form, capable of guiding their actions or engaging their agency and dignity in the appropriate way. What does it matter if laws are inconsistent or retroactive or unstable or lack generality, if people take no notice of them anyway? It is only on account of the kind of presence that law is going to have in people’s lives, via their best efforts to comply with it, that Fuller’s principles become salient.

Still, this logic of presupposition is morally rather weak. A presuppositional link does not convey the normative force of the primary rule-of-law conception. It doesn’t give us the *importance* of compliance by ordinary people. At best it suggests that only if most ordinary people comply is it worth bothering with any of the rule of law’s demands.

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<sup>63</sup> Tamanaha, *Functions of the Rule of Law*, 227.

<sup>64</sup> See above text accompanying note 22.

To give the presuppositional connection some moral oomph, we need to see why it might matter to others. In Part Four, we considered the other side of Fullerian action-guidance: it doesn't just engage the agency of those to whom it applies; it also secures as a matter of right the predictability and assurance that people need in navigating an array of complex legal rules. These correlative advantages of the rule of law can be gotten only if there is fairly general compliance. If we assume that this is the reason that the rule of law's demands are normatively speaking a matter of urgency, then we may say that the virtue of law-and-order is that it enables the value of the rule of law to be achieved. So, for example, suppose we argue for Fuller's conception on the grounds that the rule of law makes possible the predictability that people are counting on. Then we will have a normative argument for law-and-order. We say to each person: "Nothing but ordinary folks complying for the most part with the law will generate the sort of calculable social order that is necessary for individual freedom generally." We can then demand of each person that they play their part in generating this good.

Whether we look to (1) the constraint conception or (2) Fuller's conception, we see some sort of presupposition of law-and-order. It is still pretty indeterminate. We don't know how much compliance is necessary<sup>65</sup> or what the effect of our disobedience will be. It is like the case that Socrates imagines the laws of Athens putting to him as he contemplates the possibility of unlawful escape from an unjust sentence of death:

Imagine that I am about to [escape], and the laws and the government come and interrogate me: "Tell us, Socrates," they say; "what are you about? are you going by an act of yours to overturn us—the laws and the whole State, as far as in you lies? Do you imagine that a State can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and overthrown by individuals?"<sup>66</sup>

The problem is familiar. People often ask law-breakers: what if everyone did that? But, equally, law-breakers respond: what if most people do *not* do that, just me?

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<sup>65</sup> Cf. H.L.A. HART, *THE CONCEPT OF LAW*, 3<sup>rd</sup> edition, 113-15 on the amount of compliance required for a viable legal system. However, viability is one thing: being necessary for securing other aspects of the rule of law is another, and the latter may be more demanding.

<sup>66</sup> PLATO, *THE CRITO*, [pincite](#).



*My* not obeying the law—which is all I can take responsibility for—doesn't mean that there won't be law or that it won't be effective enough to make the other faces of the rule of law matter. It all depends what everyone else is doing and what the effects of my action will be; and it depends how much compliance there has to be in order for the public good of legal calculability to be secured. In the Socratic formulation, it depends on the significance of the phrase “as far as in you lies.” There might be a Richard Kraut-like argument in circumstances where respect for law is precarious and we are dangerously near a tipping point.<sup>67</sup> That may have been Socrates's position amidst the upheavals of contemporary Athens. But most circumstances are not like that. Anyway, that's about the best I can do with the methodology of presupposition.

## **(ii) An implication from a unified ideal**

I said earlier that our ability to come up with a formulation that comprises all three or even just two of our faces of the rule of law doesn't by itself solve the problem of the relations between them. Verbal juxtaposition still leaves us with the question of what explains or characterizes the associated terms.

It is possible, however, that some unifying formulations may help us towards this understanding. Consider, for example, these phrases from Dicey: “no one is above the law... every man, whatever be his rank or condition, is subject to the ordinary law of the realm.”<sup>68</sup> In Dicey's hands, these formulations are a way into his insistence that officials must be legally accountable for their actions. But in and of themselves they also convey an attractive image of a fully law-governed community, in which the law binds everyone indiscriminately with the constrained-state conception deriving from that and the law-and-order conception too. I remain unsure in my own mind whether this is exactly the sort of connection we want. But we shouldn't dismiss it.

Brian Tamanaha's formulation—“the rule of law exists in a society when government officials and the populace are generally bound by and abide [by]

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<sup>67</sup> RICHARD KRAUT, *SOCRATES AND THE STATE* (Princeton University Press, 1984), Ch. 5.

<sup>68</sup> See footnote 2 above.

law”<sup>69</sup>—differs from this because it looks a bit cobbled together—mere conjunction of (1) and (3)—rather than pointing to the substance of a general conception which can fully inform the particulars that derive from it. But Tamanaha does go on to elaborate the substance of such a conception in this eloquent description of a law-governed society:

A society in which the populace and government officials are generally bound by and abide [by] law gives rise to an individual and collective sense of security and trust. People ... go about their daily affairs implicitly reassured by an assumed legal backdrop that provides them with a sense of security in their persons and in their social, cultural, economic, and political affairs. ... A seminal function of the rule of law is to provide a general sense among the populace of a well-organized background structure for activities, and the sense that a measure of legal redress exists should things go wrong. ... This sense is especially necessary in mass urban societies when people rely on and come in contact with a multitude of strangers through extended networks of interaction. To appreciate the significance of this legal background, imagine if people were exposed to a high risk of assault or robbery, real property was not widely titled, contracts were hardly utilized, injuries to person and damage to property were left unaddressed, political and government offices were subject to capture and rent seeking, etc. – insecurity and uncertainty would color many interactions. Several or all of these conditions plague societies that lack the rule of law.<sup>70</sup>

Certainly, Tamanaha is right that there is a theme like this in the law-and-development studies. When we look to create the rule of law in a developing nation or a newly democratic one, we try to create a pervasive culture of law-abidingness in the society as a whole. We don’t reckon on establishing just (1) or (2) or both, by themselves, without having fostered a general commitment to legality among the population. Apart from anything else, the guarantees implicit in (1) and (2) seem paper-thin if law in general does not have a hold on the attitudes and actions of the citizenry generally.

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<sup>69</sup> Tamanaha, *Functions of the Rule of Law*, 221. See also note 22 above.

<sup>70</sup> *Ibid.*, 222.

More needs to be done to fill out this argument. But it strikes me as being in the right ballpark. It combines the points we have developed by way of presupposition with Tamanaha’s attractive idea of a fully law-governed society.

### **(iii) A free-standing principle?**

If we are not satisfied with the strategies explored so far, then what about the following? Thinking back to what’s been said about the list-ishness of the rule of law, why not simply posit a free-standing principle (or set of principles of) of law-and-order as an important but distinct component of the rule of law, and leave it at that? You may say, “Look. We can’t just *posit* something, can we?” Well, Dicey did; he just added that weird third principle about constitutional induction?<sup>71</sup> And—though it’s not our subject-matter—people posit principles of the rule of law all the time to embody their favorite substantive values. They just announce that the rule of law requires freedom of religion or fair labor relations or whatever their favorite value happens to be.

But I am unhappy with any account that just has us making things up. I think we should show that there’s *got* to be something like *this*—the law-and-order element that we are positing—in the moral significance we attach to law. We have to explain why the other rule-of-law faces don’t give us what we want. Or that without law-and-order—or whatever element we are positing—they leave our understanding of the rule of law feeling rather empty and insubstantial.<sup>72</sup> And even that may be too loose. For there’s a danger of using “the rule of law” to cover

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<sup>71</sup> DICEY, LAW OF THE CONSTITUTION, [redacted]: “The ‘rule of law,’ lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts...”

<sup>72</sup> Cf. the “empty vessel” argument about rule-of-law in apartheid South Africa in Arthur Chaskalson, *Remarks at the World Justice Forum*, July 2008: “[T]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalized discrimination, vested broad discretionary powers in the executive, and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is ‘an empty vessel into which any law could be poured.’”

everything of value pertaining to law—e.g., everything relating to the penal system. As Tom Ginsburg has remarked, “‘Rule of law’ programming has become shorthand for all interventions targeting legal institutions, a synonym for work on the ‘the justice sector.’”<sup>73</sup> Is rule-of-law objectionably empty if it doesn’t encompass everything law-related in our scheme of values? Or do we want other principles of legal significance brought to bear in other ways?

### **Part VI: Other Values in Political Morality**

We must consider, finally, the relation of the rule of law and its various faces to values other than the rule of law. As we explore the relations between these various conceptions, (1), (2), and (3), we should be mindful that the rule of law is not the be-all and end-all of political morality. It is but one of a number of stars in the constellation of our ideals. Others include human rights, democracy, social justice, human security, market freedom, and so on. Someone eventually has to ask what the relation is between the various faces that the rule of law presents to those whom it addresses, and the faces presented by other values in the constellation of our political ideals.

One such value is political obligation, which addresses the question of the moral reasons we have for obeying the law. Are those reasons based on consent, fair play, the common good, or the sustenance of just institutions? It’s tempting to treat political obligation as a quite separate fount of value and principle in our political philosophy. But I have yet to see a good explanation of that. In my experience, discussions of the rule of law and discussions of political obligation tend to stand aloof from one another—wrongly so.

There will certainly be aspects of political obligation that are not captured in the rule of law ideal—for example, the obligation to support the state and contribute to its defense and welfare (even when this is voluntary, i.e., when it is not compulsory as a matter of law). And there are aspects of the rule of law that won’t really play much of a role in discussions of political obligation. At best, then, there’s a partial overlap. But I am disinclined to put too much weight on this separation. It may be that the gap between discussions of the rule of law and

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<sup>73</sup> Tom Ginsberg, *In Defense of Imperialism? The Rule of Law and the State-building Project*, in *NOMOS 50: GETTING TO THE RULE OF LAW*, [redacted] (2011)

discussions of political obligation is an artifact of the way we set up our academic disciplines: rule of law in jurisprudence; political obligation in political philosophy. And that too may need to be questioned.<sup>74</sup>

### VII: An Unsatisfying Conclusion

I am sorry this exploration has been so inconclusive. I do think it would be a pity if readers concluded that the rule of law has decomposed into a mishmash of various perspectives. It's a prospect that Richard Fallon described—

the Rule of Law might be seen as an analytic jumble that can foster nothing but confusion until its diverse and competing values are disaggregated. In short, it might appear that the Rule of Law, upon analysis, is easily reducible into component parts, all reasonably independent of each other, and that there is no larger whole worth retaining.<sup>75</sup>

—and that might be grist to the mill of Judith Shklar's confession that ideological abuse and analytic equivocation are leading her to the conclusion that no further intellectual effort need be wasted “on this bit of ruling-class chatter.”<sup>76</sup>

To avoid a conclusion like that, I have tried to establish a bit of structure. I have followed some leads and investigated a couple of presuppositional relations back and forth between the constraint facet and the Fullerian facet. And some presuppositional relations also between those two faces of the rule of law and the possible third one—the law-and-order conception. Maybe it was too much to hope that we would secure a unified, dense, and powerful understanding of analytic relations among the three faces (or the arguably three faces) of the rule of law that I have been considering. There is more work to be done. But we have certainly got ourselves to something more than arbitrary juxtaposition.

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<sup>74</sup> See the discussion in Jeremy Waldron, *Legal and Political Philosophy*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, Jules Coleman and Scott Shapiro eds. (Oxford University Press, 2002), 352-81.

<sup>75</sup> Fallon, *The Rule of Law as a Concept in Constitutional Discourse*,  .

<sup>76</sup> Judith Shklar, *Political Theory and the Rule of Law* (1987), in a collection of her papers, POLITICAL THOUGHT AND POLITICAL THINKERS, ed. Stanley Hoffman (University of Chicago Press, 1998), 21. See also the discussion of Shklar's verdict in LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW (Cambridge University Press, 2014), 68-9.