

## Value-Neutrality & the Rule of Law

Tara Smith  
Department of Philosophy  
University of Texas at Austin

Philosophy, Politics & Economics Workshop  
George Mason University  
February 18, 2010

- 1 – Introduction (p. 2)
- 2 – The Appeal of the Rule of Law Ideal (p. 4)
  - a. Rule System
  - b. Rule by Law Requires Discipline
  - c. Superiority to the Rule of Men
  - d. Objectivity
- 3 – The Case for a Value-Neutral Rule of Law (p. 7)
  - a. Skepticism about Objectivity
  - b. The Objective Just Is the Value-Neutral
  - c. The Rule of Law Should be A-Political
  - d. Neutrality Facilitates Democracy
  - e. Avoid Unnecessary Contention
  - f. Rule of Law's Value is Purely Instrumental
- 4 – Critique of the Value-Neutral Arguments (p. 11)
  - a. Objectivity of Moral Judgments & Place of Democracy
  - b. Is Objectivity Value-Neutral?
  - c. An A-Political Legal System is Untenable
  - d. Unnecessary Contention
  - e. The Value of Instrumental Value
- 5 – The Core Case for the Moral Fiber of the Rule of Law (p. 18)
  - a. The Law's Moral Purpose
  - b. The Law's Morally Salient Means
- 6 – Objections to the Moral Conception (p. 28)
  - a. The Value-Neutral is Not Value-Void
  - b. Not All Law is Coercive
  - c. A Moral Reading Dilutes Law's Authority & Efficacy
  - d. Positivists' Charge: Conflating Law and Good Law
- 7 – The Damage of a Value-Neutral Rule of Law (p. 34)

Draft of Tuesday February 9, 2010

## **1. Introduction**

John Adams wrote that “The very definition of a republic is an empire of laws, and not of men.”<sup>1</sup> What is the difference? And why does it matter?

One finds little disagreement among legal scholars concerning the basic distinction between the Rule of Law and the Rule of Men. While the conditions necessary for the Rule of Law can be specified in slightly differing ways, its essence is uncontroversial. The Rule of Law requires that legal rules be set, fixed, and publicly known in advance. They must be clear, non-contradictory, and stable, general in scope and applied to like cases alike. They must be prospective rather than retroactive. Their authority is supreme – not only in name, but in fact, in the actual operation of the legal system. This entails that government officials are held as accountable to the law as are ordinary citizens.<sup>2</sup>

Moreover, few challenge the Rule of Law as a worthy ambition. While those in charge of a given legal system may not always live up to their professed devotion to it, one is hard pressed to find explicit denials of the ideal’s propriety.<sup>3</sup> What is disputed, however, is the second question I posed: why does the Rule of Law matter? What is its advantage over the alternative, the Rule of Men?

Many regard the Rule of Law as value-neutral. Insofar as they view it as desirable or as a proper goal, they do believe it has some value. Where scholars differ is over the exact character of that value – in particular, whether the Rule of Law offers moral value.<sup>4</sup> Many believe the strength of the ideal stems precisely from its neutrality. The reason it can be an appropriate goal for regimes across the globe is that it does not commit a society to any particular ideology. The conditions that mark the Rule of Law are completely formal; they concern the procedural features that a system of legal rules must possess in order to be able to guide people in a desired direction. What that

direction is, however, is not determined by the requirements of the Rule of Law itself. Thus, allegedly, the Rule of Law is an ideal that transcends substantive differences over political philosophy and moral creed and is properly adopted by nations that install acutely disparate content in their laws. And, indeed, this image dominates international affairs, where emerging and reforming nations are encouraged – quite materially, by the IMF, World Bank, and a variety of government and non-government institutions – to nurture the Rule of Law. Our own Antonin Scalia conveys this value-neutral perspective when he cheers, “Long live formalism. *It is what makes a government a government of laws and not of men.*”<sup>5</sup>

Is it?

I think not. What I wish to argue here is that the neutralists are mistaken – and that theirs is a costly mistake. Governance by the Rule of Law is a valid ideal only because it is a moral good that serves a morally worthy purpose. The conception of the Rule of Law as value-neutral actually thwarts our ability to enjoy the benefits that it can and should provide.<sup>6</sup>

A few preliminaries: I will use the term “value-neutral” as a shorthand for the view I oppose, but it is the moral value of the Rule of Law that is in dispute; the neutralists do not deny that there is value in respecting the Rule of Law. And that is also worth emphasizing: my subject is the *ideal* of the Rule of Law, the Rule of Law insofar as it is considered a worthy, desirable condition.

Further, and more significant: legal philosophy rests on political philosophy. I cannot defend the moral character of the Rule of Law without relying on certain presuppositions concerning the nature of morality and the nature of government. What constitutes a proper legal system logically depends on the function of government, since a legal system is the means of carrying out that function. While the defense of the relevant suppositions would be a major, separate project that I cannot undertake here, I should acknowledge certain premises that I am taking for granted. Most saliently...

The purpose of government, on my view, is the protection of individual rights (and the purpose of law is to establish the mechanisms through which this can be best accomplished). Rights reflect a moral principle. A man's rights are his moral title to freedom of action.<sup>7</sup> More exactly: his claim to be free of others' initiation of force, so as to be able to rule his own life. The belief that we possess rights is premised on the conviction that the initiation of force is morally wrong.<sup>8</sup> Inasmuch as a legal system is intended to protect individual rights, its mission is a moral one.<sup>9</sup> And that mission, I shall argue, should inform our understanding of what the Rule of Law is.

I will begin by reviewing the basic appeal of the Rule of Law and presenting the principal arguments on behalf of a value-neutral conception of it. I will then explain the failings of these arguments, and proceed to make the positive case for the Rule of Law as a moral good. After addressing reasonable objections to my view, I will briefly indicate the damage done by harboring this misconception.

My animating thought is that if we do not understand the full character of the Rule of Law, we will not understand what it requires – what is necessary to truly provide it. Correspondingly, we will credit regimes as supplying the Rule of Law and as warranting respect, that in fact do not, but that need to be reformed in significant ways. Closer to home, we will credit uses of law (certain government practices) as maintaining the Rule of Law that in fact, do not, and thereby surrender the protections that that ideal can and should offer. We will settle, unwittingly, for the Rule of Men.

## **2. The Appeal of the Rule of Law Ideal**

“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. ... The law is reason unaffected by desire.”

Aristotle, *Politics*, Book III<sup>10</sup>

The Rule of Law is widely agreed to consist of several formal conditions. One needn't investigate each in depth to appreciate the basic appeal. I will distill that appeal here to a handful of essential elements.

#### a. Rule System

Part of the attraction rests in the fact that the Rule of Law offers all the advantages provided by any system of rules. Within their domain, rules simplify decision-making processes, provide a definitive standard for the resolution of disputes, and allow effective coordination among people who wish to interact in ways that are facilitated by predictability and regularity.<sup>11</sup> Typically, moreover, if something is respected as a rule, people follow it without revisiting the merit of its content, without reconsidering whether it is an advisable rule. To be governed by rules is to accept their authority as decisive, leaving behind debates about what each rule should command.<sup>12</sup> All of these benefits attach to a system of legal rules, as to any other.

#### b. Rule by Law Requires Discipline

Further, the Rule of Law is, among other things, rule *by* law, which entails regulation of the future by the past.<sup>13</sup> Decisions made by earlier lawmakers govern indefinitely, unless altered through specified procedures. As such, governance by law is a discipline. To adopt laws is to commit to acting only within their constraints; to subsequently abide by those laws is to honor that commitment.<sup>14</sup>

#### c. Superiority to the Rule of Men

The heart of the appeal of the Rule of Law, however, is best revealed by contrast with its fundamental alternative, the Rule of Men. Because it is inescapably men who make and enforce the laws of a given society, the Rule of Law truly concerns how men treat the laws that have been erected in their society.

The Rule of Law represents men acting by principles, adhering to pre-meditated conclusions about proper uses of government power. The Rule of Men, by contrast, spurns such principles; those in power refuse to be bound by such considered reflection or rules that issue from it. Correspondingly, whatever the laws officially on the books, living under the Rule of Men is as good as living under no law, since those men treat the laws as tissue, empty words that impose no genuine constraints. They assert their ability to have their way as all the “authority” they require. While, under the Rule of Law, the application of legal sanctions depends on how a person “conforms to rules specified in advance rather than on the *ad hoc* judgment of someone after the event,”<sup>15</sup> under the Rule of Men, the *ad hoc* reigns supreme. Notice, too, that when the Rule of Law is replaced by the Rule of Men, the distinction between legal questions and political questions is obliterated. Because the rulers employ whatever reasoning they like to serve whatever ends they like, no division between questions of legality (conformity with the relevant rules) and questions of substantive policy is respected. Decisions about how to “apply” laws in a given case are rendered no different in kind from decisions about what the laws should be – or, more simply, what outcome one would prefer, in that case.<sup>16</sup>

#### d. Objectivity

This alternative to the Rule of Law highlights the ideal’s objectivity. In this context, a few aspects of that are especially salient.<sup>17</sup>

First, under the Rule of Law, the rules are knowable – they are “out there,” open to inspection, publicly available for all to be aware of. This enables the rules truly to guide individuals’ decisions; to be subjected to critical debate (which can facilitate reform); and to serve as the standard by which government officials are held accountable for their conduct. It also ensures a certain degree of constancy, inasmuch as laws that were altered frequently or without warning would not be knowable.<sup>18</sup>

Another aspect of objectivity here is the requirement that the laws not be applied erratically or arbitrarily, depending on the idiosyncrasies of the particular men who happen to hold the relevant legal power. The Rule of Law insists on like treatment of like cases, and the relevant likeness is: by the law (i.e., as determined by the criteria that law sets forth). Thus the laws are knowable, and *what* one knows is that they are the standards to which a person will be answerable.

Devotion to the Rule of Law reflects the conviction that government power must be kept within objectively valid limits. It also reflects a desire for fairness. The knowability of the rules that a person will be held responsible to obey and their consistency in application are necessary in order to provide people with a fair chance to comply with the law and thus avoid the government's penalties. It is only right, we think, that all are held answerable to the same set of known-in-advance rules that are applied in the same known-in-advance ways. Insofar as the subjects of a given legal system are the same, morally, in our essential rights, and insofar as two cases or two thousand cases are the same vis-a-vis relevant laws, the legal system's treatment of them should be the same. In this way, too, the Rule of Law maintains objectivity.<sup>19</sup>

All of this should help us understand why Aristotle casts the fundamental alternative in such stark terms. The Rule of Law is the rule of men *qua* rational animals, using reason in adopting a set of legal rules and in adhering to them logically, across a multitude of actual cases. The Rule of Men forsakes reason, thereby delivering us to the desires of the powerful, "the element of the beast."

### **3. The Case for a Value-Neutral Rule of Law**

While the propriety of the Rule of Law is widely accepted, many people deny that morality plays a role in this.<sup>20</sup> They point to several considerations as supporting a value-neutral conception. Let me recount the most plausible of these arguments, in highly compressed form.

#### a. Skepticism about Objectivity

One basis for denying a moral dimension to the Rule of Law is broader skepticism about the objectivity of morality. William Rehnquist, for instance, believed that we could not logically demonstrate the superiority of any value judgments. That subjectivism naturally extends to the domain of law, precluding the possibility that an objective legal system could rely on elements of morality.<sup>21</sup> Others deny the possibility of objectivity itself. Richard Posner regards the Rule of Law as something of a farce,<sup>22</sup> holding that a judge's "interpretation" of law is as much creation as discovery.<sup>23</sup> Many legal pragmatists believe that no alternative to such construction exists.<sup>24</sup> If one is skeptical of moral validity itself, one will correspondingly be skeptical of the moral authority of any particular regimen of law.

#### b. The Objective Just Is the Value-Neutral

A quite different reason for denying the morality of the Rule of Law is the belief that objectivity demands this. Many believe that the objective, in any realm, simply is the value-neutral. Accordingly, some contend that neutrality is the very thing that renders Rule of Law a proper desideratum, a universally appropriate aspiration.<sup>25</sup>

Notice how this can be teamed with the previous argument. If values are inherently subjective (a la Rehnquist) and disputes about values are not subject to definitive resolution, then a legal system should refrain from taking sides that it cannot demonstrate to be objectively justified. The Rule of Law is desirable, correspondingly, because it does just that, appropriately bypassing such disputes. While decisions about contentious moral questions must be made, they should be left to the political arena; by having a legal system that steers clear of these, we preserve the system's objectivity. In short, the Rule of Law is a proper ideal precisely because it brackets value controversies, instead, furnishing the common ground – the ground-rules – within which those value-charged differences will be addressed.<sup>26</sup>

#### c. The Rule of Law Should be A-Political



Closely related, one might think that it is part and parcel of being the Rule of Law that a legal system be devoid of moral commitments; it should be apolitical (and thereby, amoral). Indeed, we routinely distinguish the judicial branch, whose role is to guard the application of law, from the political branches precisely on this basis.<sup>27</sup> To conceive of the Rule of Law as a moral good would convert it into a partisan ideal,<sup>28</sup> forfeiting its stature above disputes over what a government's rules and policies should be. Judges abuse their position, we readily agree, when they rule in ways that advance their political preferences at the expense of the relevant law. All officers of the legal system – INS agents, CIA agents, county tax collectors, cops on the beat – are obligated to enforce and abide by the rules that have been legally enacted rather than their personal beliefs about what rules should have been enacted. Governance by law transcends individuals' differences over such issues. A moral conception of the Rule of Law, however, abandons law's distinctive character.

#### d. Neutrality Facilitates Democracy

Yet another defense of a value-neutral Rule of Law views it as indispensable to democracy. To the extent that a society seeks to be ruled democratically, it can succeed only when the Rule of Law functions as a set of norms that does not take sides on fractious moral issues. In order for the will of the people to truly be sovereign, deliberation and decision-making must be open, fair, and equally available to all parties.<sup>29</sup> This entails that the legal system not favor any moral values about which the people themselves disagree. Its doing so would stack the deck and prevent the democratic will people from governing.

#### e. Avoid Unnecessary Contention

A different argument for locking out morality is purely pragmatic: don't borrow trouble. Avoid unnecessary contention. Since it is not necessary to resolve all moral differences in order to enjoy a smoothly functioning legal system, it would be a mistake to tax the reserves of people's respect for the system by trying to do that. Controversy is expensive, especially when the issues

contested are deeply felt, as political issues often are. It is costly to good will, to people's willingness to cooperate, and to respect for the legal system's legitimacy – for its authority as more worthy and enduring than the results of the latest political scum. Consequently, we should confine our differences over the values relevant to government policy to the political arena. It is an error and a danger to infect the groundwork for a law-governed society with divisive moral values.

f. Rule of Law's Value is Purely Instrumental

A final line of reasoning contends that to view the Rule of Law as anything other than value-neutral is to fundamentally misunderstand what the Rule of Law is. The Rule of Law is a procedural template; its conditions concern the mechanics by which a system of legal rules is administered. Joseph Raz has likened the Rule of Law to a knife, a useful tool which can be put to good or bad purposes, but which itself is morally indifferent.<sup>30</sup> Matthew Kramer agrees that “the essential attributes of the rule of law are protean in their substantive moral-political bearings,” equally capable of being recruited for wicked or for noble ends.<sup>31</sup> The very label calls attention to the rule of law – it is rule of the rules that have been enacted, whatever the moral worth of those rules may be.

On this view, the Rule of Law – Rule of Men divide is not concerned with the content of law; correlatively, it is not concerned with the morality of law. The value of the Rule of Law is purely instrumental. Maintenance of its conditions allows social coordination.<sup>32</sup> Even under an immoral regime, we benefit from this. The tyranny of a dictator whose repressive rules are administered systematically, with meticulous regularity, is preferable to chaos or the arbitrary. This is the value that the Rule of Law provides. It allows people to know what to expect. Taming certain variables through governance by a system of rules that is strictly enforced and widely obeyed establishes an order and predictability that facilitates fruitful cooperation among people, allowing coordination of complex activities. These are substantial benefits. Accordingly, the argument runs, what is worthwhile about the Rule of Law stems not from its moral quality, but from the clarity,

predictability, and stability that rules as such provide. No particular moral character is needed for the Rule of Law to commend itself.

#### **4. Critique of the Value-Neutral Arguments**

While most of these arguments carry an initial plausibility, they don't fare well under scrutiny. Two of them rely on premises beyond the scope of immediate concern, so I will comment only briefly on these.

##### a. Objectivity of Moral Judgments & Place of Democracy

The first defense of a value-neutral Rule of Law, which denies the objectivity of moral judgments or the objectivity of all judgments, raises some of the most fundamental questions in philosophy. Clearly, if values are by their very nature incapable of objective validation, any assertion of the objective value of the Rule of Law falls alongside all the rest. That larger dispute sheds no distinctive light on the requirements of a proper legal system, however, so I will leave it aside. Indeed, if objectivity is a bogus notion, then the very idea of a "proper" legal system – either morally proper or by some other standard – is bankrupt. But that's an argument for another day.

The other argument that engages issues beyond our scope is the contention that the Rule of Law must be value-neutral in order to underwrite democracy. What is important to note here is that this argument can be no stronger than the argument for democracy itself, and that, I think, is a weak one. The US is not, in its fundamental character, a democracy. Nor should it be. While our system does include a role for the people's will, it is a limited role, subordinate to the parameters marked out by the Constitution. The purpose of government is the protection of individual rights.<sup>33</sup> The Constitution establishes the basic mechanisms of a legal system designed to do that. While it leaves certain decisions to be made by the preference of the majority (such as the choice of representatives), majority power is always circumscribed by the sanctity of individual rights. The conviction that each man is morally sovereign over his own life stands above the place for

democratic decision-making. Indeed, the reason for allowing the people's will to decide certain issues (and only those issues) is to respect individual rights, to refrain from treating people in ways that we have no right to treat them. One need not deny the legitimacy of democratic procedures for some issues to see that complete subservience to the popular will – a system that was first and foremost a democracy – would be antithetical to the purpose of government.

All of this obviously relies on thrashing out the proper purpose of government and the foundations of individual rights. But insofar as the US Constitution does mark individual rights as beyond the tides of majorities' fluctuating desires, any conception of the Rule of Law that hinges on its service to democracy mistakenly elevates a secondary feature of our system to undeserved prominence.

#### b. Is Objectivity Value-Neutral?

Let us turn to the arguments more narrowly focused on the Rule of Law. First, consider the contention that the objective simply is the value-neutral. This argument relies on a hollow conception of objectivity. I will address objectivity further in Part 5, but for now, we can see the error by thinking about neutrality.

Neutrality is not an end in itself. Proper decision-making in any realm is determined, in large measure, by what one is seeking to accomplish. When neutrality is appropriate, it is so in order to serve some end regarded as valuable. Consider a frequent form of neutrality, impartiality in a selection process. If a college admissions policy, for instance, seeks to be impartial or non-discriminatory, it tacitly relies on an understanding of what such neutrality consists of. Toward which characteristics should those making admissions decisions turn a blind eye? Toward an applicant's race? His sex? Sexual orientation? Grades? SAT scores? Physical disability? Cognitive disability? For any set of answers, we can reasonably ask why the school should ignore these aspects of the applicants' profiles and not others. The answer to that question will reflect the goal that

animates the policy, the particular value that is sought through its use. A policy of neutrality has a purpose, in other words, and it is that value that determines the contours of the neutrality that is adopted.

This dependence on value applies to neutrality in a legal system as much as in any other enterprise. It is a confusion to revere a means toward the achievement of one's end (which neutrality about certain aspects of one's alternatives typically is) as if it carried independent weight. This, however, is what insistence on the value-neutrality of the Rule of Law ideal does. Only by ignoring the value sought through certain forms of neutrality can neutrality itself seem desirable. When neutrality is appropriate, it is so in order to serve a valued purpose.

### c. An A-Political Legal System is Untenable

This should also help us to see how the claim that law should be a-political rests on a partial truth, from which it draws an invalid conclusion. Some values are inappropriate in the operation of a legal system, as it observes. But this argument confuses the appropriate neutrality of certain elements within a legal system with the legal system as a whole. Recognition of the moral character of the Rule of Law does not license particular government officials' injection of their personal values. The fact that values should not play that role does not show that values should play no role, however. Judges, for instance, must recognize the values that are implicit in the law in order to understand the law accurately and apply it objectively. When a judge is called on to apply a particular law (concerning copyright or immigration, for instance), if he does not appreciate the purpose of the law and the guiding principles of the system of which these are a part, he will not understand its proper application in hard cases. The meaning of any law depends on its context, and principles and purposes – which reflect values – are essential elements of that context.<sup>34</sup> The fact that it is sometimes difficult to tell whether a judge is honoring values in the law or is, instead, tailoring his “reading” to reflect his own values does not negate the difference between the two. (Sometimes,

alas, it seems rather easy to tell.) In short, while we may need to articulate more precisely which values appropriately exert influence in the Rule of Law, it is too sweeping to claim that the Rule of Law must be shorn of all values.

#### d. Unnecessary Contention

This also exposes the error of the “controversy costs” rationale for value-neutrality. (“Avoid Unnecessary Contention,” I called it.) The purpose of a legal system is to protect individual rights, but that cannot be done without the system’s taking a stand on which rights individuals possess and what rules are appropriate to safeguard them. It would defeat the point of the enterprise to sidestep disagreements about that very issue. It is true that popular respect for the basic legitimacy of a legal system is important to its enduring vitality; wide and deep discontent will bring its decay. Consensus *per se* is decidedly secondary to the principles that should govern us, however. The “cost” of disagreement must be paid, if we are to have a legal system that does its job. Indeed, the establishment of a legal system is a declaration that disagreement over some of its features is worth bearing because the system is needed, to serve a moral mission.

The idea that controversy is the *summum malum* to be avoided fundamentally inverts the role of government. It treats agreement about uses of government power as more important than the validity of those uses. There is no way to avoid confronting the proper and improper uses of government power (contentious though some of those uses may be).<sup>35</sup> Legal rules allow certain actions and punish others.<sup>36</sup> To attempt to determine which actions should fall on which side of this divide independently of values (or: of controversial values) bespeaks indifference to the obligation to use physical force exclusively as a means of respecting individual rights. It subordinates that obligation to consensus. (And if the consensus allows government to infringe on rights, that is a “cost” that *will* be borne: the affected rightholders will suffer it.)

The upshot is, to say that the Rule of Law is value-neutral is to say that the use of force against human beings is value-neutral. It isn't. When what is in question is the use of government power, to be amoral is immoral. (We shall explore this more fully, from a different angle, in Part 5.)

#### e. The Value of Instrumental Value

Finally, we can consider the idea that the Rule of Law is worthwhile strictly for its instrumental value, as devoid of moral character as a knife. Even a regime of law that is oppressive in what it demands, so long as it is regular and predictable, is preferable to the vagaries of arbitrary law – capricious rules, erratic enforcement – or of living without law. The rule of a despot, insofar as he satisfies the formal conditions of the Rule of Law, has value.

This proposal suffers from two fatal defects.

First, invalid law *is* arbitrary, however outwardly regular its mechanics. Arbitrariness is not entirely a function of the method by which something is done. A conclusion (or decision, belief, or action) is arbitrary when it is adopted without reason, apart from rational basis.<sup>37</sup> That presupposes an understanding of what constitute good reasons or the right kinds of reasons, however. And that, in turn, depends on the purpose of the project that the action is meant to further. Attention to substance, in other words, to what a set of rules is doing, is ineliminable from assessment of those rules' arbitrariness. However regular the application of law – however steadily enforced, clearly promulgated, and the like – law that is non-objective in its foundation remains arbitrary. Granted, a given official who scrupulously enforces the rules of a legal regime is not allowing his personal whims to dictate what behavior is permitted, so the system is not arbitrary in that regard. Yet if the ultimate arbiter of what the rules are is nothing more than the will of the persons wielding sufficient power to have their way, then the system remains – at its root and in its essence – arbitrary. It lacks valid authority.<sup>38</sup>

A proper legal system is justified and shaped by man's need for government. What justifies the rule of the despot? Nothing. Nothing rationally grounds it. What enables it to prevail, in practice, is raw physical might. Given that a despot is not a man who governs himself by reason (not fundamentally), however, we have no reason to expect him to comply with reason, however many of his past ways happen to have resembled actions that reason would have counseled. If a legal system's formal requirements are not maintained because of their rational validity – because of their necessity in fulfilling the proper function of government – then however uniform their operation in the past, that regularity is merely accidental – a matter of convenience, rather than conviction. It does not reflect any commitment to the salient principles and thus provides no basis for expectations of “regularity” in the future. The irrationality of its roots is a wild card, ever-ready to defy expectations, according to the ruler's fancy.

The second problem with the “even the rule of bad law is good” rationale is its blindness to the stakes involved. A proper understanding of the Rule of Law requires an understanding of both the nature and authority of rules and the nature and authority of laws as a distinctive type of rules (rules of government as opposed to rules of baseball, or bridge, or etiquette, for instance, or of a sorority or a political party). What particularly distinguishes legal rules and what makes attention to their moral character imperative is the fact that they are imposed by force. Regardless of a person's choosing to subscribe to these rules, a government holds the authority to make him obey, on pain of loss.

Consider rules in general for a moment. When well-designed, rules can offer definite benefits. Adherence to policies that have been thought through in advance can be a much more effective means of furthering an end than reliance on case-by-case calculations. A rational regime of rules has built into it careful reflection on the full implications of various options that a person can expect to encounter.



One need not deny the potential value of such forethought and regularity to deny that system *per se*, considered independently of what a given system does, is a value. The order and stability provided by having a system of laws are valuable – other things being equal. Or more exactly: when more important conditions have been satisfied. They are not valuable regardless of the content of the rules or the ends that that system furthers. Systematic-ness is not an end in itself. Formal regularity is proper, when it is, in order to serve a good purpose. (Indeed, we understand legitimate exceptions to rules by appeal to rules' purposes.)<sup>39</sup> The value of the Rule of Law stems, fundamentally, from its service to proper ends.

Rule of Law values (service to order, predictability, and so on) are genuine. Getting a system right in its mechanics, so that it can operate effectively, is critical to its ability to do its job. But it has a job – that is what we must not lose sight of. A legal system is something that we pursue for a reason, to accomplish a task considered worthwhile independently of that system itself. In the case of law, it is a uniquely significant reason: it is a necessity for respecting each individual's freedom to rule his own life. The Rule of Law is not important by some subjective standard that a man might take or leave, as he might take or leave like joining a baseball league or entering a bridge tournament and thereby committing himself to its rules. It is important by the nature of man – by man's need for freedom, in order to flourish. The Rule of Law is critical to implementing the kind of government that is necessary for man's flourishing. This means, though, that it has no value independently of the kinds of laws it regularizes.<sup>40</sup>

It is important, in short, not to reduce the Rule of Law to simply the rule of rules. While value can be gained from rules in many domains, the Rule of Law enjoys a distinctive moral authority – reflected in its legitimate enforcement by force – that renders its effects all-important. Valid law is necessary to fulfill the function of government. The rules of a legal system, correspondingly, must satisfy both the requirements of coherent rule systems and the requirements

established by the substantive mission of that government. To omit concern with the latter would betray law's reason for being. And it would mean the government's assuming an authority to which it has no title. The only reason that a system of legal rules can legitimately demand people's obedience is its being designed in such a way as to serve the morally necessary mission of government; that is the source of law's authority. Apart from its doing that, it loses all claim to anyone's allegiance.<sup>41</sup>

## **5. The Core Case for the Moral Fiber of the Rule of Law**

Much of the case for the moral fiber of the Rule of Law emerges in my critique of the arguments for its neutrality. Nonetheless, it is important to appreciate the core case for the morality of the Rule of Law in its own right. My thesis, again, is that the Rule of Law is a valid ideal that should command our allegiance only because of its moral propriety. The support for this can be framed around two central points: both the purpose of the law and the means by which law is enforced require its moral propriety. While I will treat each of these in turn, truly, they are not fully separable.

### a. The Law's Moral Purpose

Most people believe that the conditions required by the Rule of Law are necessary in order for a legal system to give people a fair chance to comply with its strictures. The reason we insist on advance notice of the laws, their straightforward expression, internal consistency, etc., is the presumption that it would be unjust not to assure these features. Because the government's function is to protect individual rights, justice demands that the rules that govern us honor such conditions. But this suggests that it is a moral judgment that dictates them.

Now one might object that Rule of Law conditions actually reflect the desire for objectivity, rather than for moral values. Whatever the moral character of a legal system, the Rule of Law demands that its rules be objectively specified and enforced. But this is not a moral issue.

The problem, however, is that objectivity cannot be divorced from substance. In any domain, what “being objective” consists of cannot be understood apart from what it is that one is being objective about and from what a person is trying to do in an objective manner. (Recall the discussion of neutrality.) Whether a method is actually objective depends largely on what it is seeking to accomplish. If respect for the Rule of Law purports to provide objectivity, accordingly, we cannot determine whether it does so without presupposing a purpose that such respect is meant to serve. Indeed, if someone proposed a very different account of the formal conditions necessary for the Rule of Law, we could not assess its adequacy without relying on assumptions about what we are after. That goal would inform the criteria of assessment. Moreover, notice that retroactive laws might serve very nicely to advance *certain* ends, if respecting people’s rights were not a concern. If a regime were essentially egalitarian, for instance, wed to the paramount goal of equal distribution of wealth, retroactive changes to laws governing property rights or taxes could be expedient measures that the Rule of Law should not rule out. Insistence on the formal condition of equal application of laws might similarly impede that aim.

My point is, in the case of law, once we consider the purpose that will allow us to identify criteria of objectivity, we find that values are inescapable. The moral propriety of that purpose is essential if the use of law, to attain it, is to be justified. Some of the criteria of objectivity may be dictated by the requirements of a rule system’s ability to work effectively and truly guide, enabling people to plan their activities with knowledge of what they can expect from government. (We will return to this later.) Law does more than guide, however. It does not merely suggest or encourage certain behavior. It compels it. Correspondingly, it brings in moral stakes which inform what constitutes its objective administration.

A legal system is a tool. It is the mechanism through which a government performs its function. That tool holds no claim on us apart from the legitimacy of the government using it. The

Rule of Law is a genuine ideal only if that government enjoys valid authority and is serving its proper function, the protection of rights. Correspondingly, the Rule of Law warrants respect insofar as the government is doing what it is charged to do – and only what it is charged to do. What is salient here is that that function is a moral one. The government is to protect us against an evil, the initiation of force, and to place the retaliatory use of force under objective control. As such, it is a good. A government's reason for being is moral. This informs the proper form of its laws as well as their substance.

As John Adams also observed, we cannot sensibly consider the best form of government without clearly understanding the end of government, reflecting the fact that in law, as in many areas, form follows function.<sup>42</sup> While a legal system's purpose will not dictate every detail of its proper implementation,<sup>43</sup> not any formal characteristics will be compatible with a legal system's actually serving its function. In order for a legal system not only to function as an effective rule system but to serve its specific substantive purpose, it must have certain formal features.

To see this more clearly, consider: Why should a dictator – a ruler scornful of individual rights – want the Rule of Law? What might he get out of running a system that satisfies those formal conditions?

A few possibilities suggest themselves.

Perhaps he simply likes order, predictability. He is the kind of person who is more comfortable knowing what to expect, keeping surprises to a minimum. A legal system that administers his commands according to the familiar conditions concerning generality, internal coherence, advance notice, and so on, seems most likely to give him that.

Perhaps, alternatively, he thinks that by virtue of such regularity, he can gain better compliance with the rules he issues, that his subjects will more consistently submit to his will. If he has very definite desires about how he would like his subjects to behave, it makes sense to make

those clear to them, to punish all violators equally harshly, etc., so as to make their obedience most probable. Further, such regularity is efficient, exacting fewer resources to subdue recalcitrants and operate as desired.

The Rule of Law might also seem to offer a different benefit, namely, the appearance of justice. Because of its superficial similarities with some characteristics of a just regime, this look-alike gives his system moral credibility. Keeping up the façade by maintenance of Rule of Law conditions helps to disguise the substantive injustice underneath, leading people to suppose that his is a just system, worthy of their submission.

What is significant is that none of these answers supplies sufficient reason to conclude that the Rule of Law is objectively good – that it is, in fact, a worthwhile ideal which all should honor. These “reasons” for a dictator’s adherence to Rule of Law formalities are all contingent upon his peculiar beliefs and desires, which themselves, of course, could be completely unfounded.<sup>44</sup> (Insofar as he is a dictator, some of them are unfounded.)

The larger point, again, is that the formal requirements of the Rule of Law do not constitute an objective ideal independently of what they serve. When they are ideal, they are so only by presupposing the value of that which they advance. If they are understood as completely value-neutral, they forfeit their claim on us.

Before proceeding to the second leg of the case for the Rule of Law’s morality, we should revisit a claim I made rather quickly, that retroactive laws or the unequal application of laws might advance the aims of certain governments, such as an egalitarian one. I used this example to support my contention that such formal conditions should not be taken as fixed requirements for any legal system, regardless of its values. Pursuing a question about my claim should prove instructive.

One might protest that my example does not reveal anything about the form of law, since differential treatment of individuals could be built into the content of the laws by simply specifying

that under certain circumstances, people will have this set of legal rights and obligations, while under other circumstances, they would have this other set. Just as we have laws declaring that all people in a particular category will have certain rights or responsibilities (these rules apply to everyone who wants to drive a car, for instance, or to all males who reach age 18), so an egalitarian regime could enact laws that would adjust a person's legal property when it reached certain thresholds (measured either in absolute or relative terms). Respect for such laws need not violate any formal conditions concerning equal application or retroactivity, however, thus my example does not warrant conclusions about the need for value in the Rule of Law.

At first blush, this objection seems fair enough. Yet, we may ask, what if a given regime didn't want to treat people equally? What if that were not part of this government's agenda? Suppose it does not recognize human beings as rightsbearers or as alike in any significant way that would make sense of equal application or fair warning requirements. For some purposes, unequal treatment (of smarter people, or wealthier people, or those deemed more informed about certain issues or closer to god, or of a regime's friends and enemies) might be much more advisable. Or imagine a theocracy, dedicated to the legal implementation of a code of conduct set by some holy scripture, suddenly discovering serious errors in its previous understanding of that code and in some of its corresponding laws. To correct these, it changes course immediately, giving people no warning before the drastically different laws take effect and no protection from punishment for actions which, at the time they were taken, had been legally permissible. In this scenario, *ex post facto* requirements and punishments might be not only permissible, but mandatory, since a delay in enforcing strict compliance would delay doing God's will and might offend the deity, by subordinating the task of honoring his will to mere mortals' convenience.

Along similar lines, we might wonder, what if, according to the theocrats, some people are properly above the law – a priestly caste, God's anointed, or the enlightened, theological kings?

Perhaps the rulers sincerely believe not simply that different rules are appropriate for different types of people, but that some people stand above answerability to any manmade rules. On what grounds should such a regime impose equal application constraints on its laws?

One more case: regardless of whether religion sets the agenda, what if a dictatorial government wants to use the legal system to hurt its opponents? Its policy is: “They give us a hard time by resistance or criticism; we give them a hard time by shutting them up, locking them up, seizing their family members, etc. – without their having violated any laws.” It uses its power to punish its enemies, denying them all legal protections. (This government is not in the business of affording “protections,” as it does not recognize rights.) Its aim is simply to control, to have things its way.

Given such an agenda, why should it profess to respect conditions of generality of scope or equal application, when in practice, it treats the laws as if they apply to some people, but not others? Indeed, professing certain virtues of your legal system and then failing to deliver is likely only to create trouble. Why should such a regime bother to announce laws in advance, for that matter, to promulgate the rules and thereby set itself up for rebuke, when it fails to respect them? By the same token, why should it make any of its rules clear? Or pretend that that is desirable? The murkier a law’s meaning, the greater the range of pretext for its abuse.

Now at this stage, one might well think that we are no longer talking about a regime interested in the Rule of Law; this “legal system” is a sham. A scheme that does not insist on the bare minimum of clarity and promulgation of its rules could not possibly function to govern a group of people. If people cannot know the rules, how can they be guided by them? What I am describing here, in other words, fails even to be a rule system (let alone a legal system). It seems reasonable to suppose that certain formal conditions are required by the nature of rule systems as such; these must be satisfied in order for the rules to function effectively simply as rules. Then, on top of this, the

additional conditions that are appropriate in a legal system will depend on the substantive purpose of that government (be it the glory of Allah, respecting the sanctity of the individual, optimizing the collective welfare, etc.).

Such a conclusion would be premature. What will count as a rule system – what is effective enough – depends (in part) on why we are adopting the rules, in the first place. When it makes sense to adopt a rule system, it makes sense for a reason, to do something, if only to organize or coordinate people. But even those ends, bland and value-vacant as they might seem, require answers to corollary questions: organize how? Coordinate in what way? Why not just continue to have people do as they like? What are we trying to prevent, or gain, by bringing rules into our affairs, at all? Notice that the knowability of rules – that seemingly barest of conditions – is desirable if one recognizes an obligation to give people a fair chance to comply with the rules or, in law, an obligation to give people ways of avoiding having force used against them. But it would not be essential to advance *any* possible agenda. Similarly, what constitutes the requisite “regularity” of a rule system will vary, for different purposes. We frequently praise the stability and predictability provided by the Rule of Law, yet even these can be construed in more or less rigid ways, measured by different yardsticks. Does either demand total and permanent immutability of laws? Variations could be regular, after all, if we changed the rules on a pre-announced schedule, such as every nine months. Perhaps laws should be rotated periodically, to allow minorities to have their way some of the time or to assure that no group is completely “shut out” in a democracy.

What we are seeing is that the seemingly innocuous guidance sought from any system of rules cannot be value-neutral, since it is inescapably guidance in some direction, toward certain ends. The NFL tinkers with its rules, from time to time, in order to promote the competitiveness of games or parity among teams, or to encourage passing-oriented offenses or to minimize the incidence of concussions.<sup>45</sup> Similarly, the rules governing voting procedures in a political system will be shaped by



(and thus guide us as they do, because of) the value placed on different types of outcomes. Is it more important to allow those on the losing side of an election some influence on what happens afterward, or to have the majority completely determine the outcome? (This is reflected in decisions about winner-take-all vs. winner-take-some procedures.) Should strength of preference for top candidates, or strength of antipathy toward others, weigh more heavily in who is elected to office? Or should degree of agreement among voters about the acceptability of any candidate, however tepid that support, carry the day?

The answers to these questions and correlatively, our understanding of what is sufficiently and suitably regular or stable for a rule system to genuinely govern, all reflect judgments about values. We cannot understand what a rule system should be and insist that it have any particular features unless we first understand what we want out of it.<sup>46</sup> Just as form follows function for a legal system, so form follows function for a rule system. That more abstract concept also presupposes a purpose – an end that is valued (valued more than the alternative, our condition without its rules).

## **2. The Law's Morally Salient Means**

Thus far, we have focused on the purpose of the Rule of Law to spotlight its moral value. Yet what is even more basic to its moral character is the means by which legal rules are enforced. Indeed, the widespread belief that it would not be fair to people to enforce laws that didn't meet Rule of Law conditions itself reflects awareness of this. The reason that it would not be fair is the means employed: physical force. No one may subject a man to force except on morally justified grounds. Because this is the means by which legal rules are enforced, the Rule of Law requires moral license. We glimpsed this earlier; let me now elaborate.<sup>47</sup>

To do things by law is to do them by force (through its direct application or threat thereof). That is not a knock on government, but a statement of fact. The law commands people to do certain things regardless of their will, on pain of penalties imposed by force. (We'll garnish your wages; we'll

restrain you from seeing her; we'll put you in prison.) That is legitimate, for certain purposes – but only for those purposes. Indeed, it is because the initiation of force is not morally permissible that we establish government to protect us against it. If it is to fulfill that function properly, however, government must establish rules and practices that do not themselves violate the rights they are intended to protect. Because force is not generally permissible and may only be used against a person on narrow grounds, the operation of a legal system requires moral license.

To put the point from a slightly different angle: because the distinctive means of fulfilling the law's function is the use of force, to make legal rules is to rely on suppositions about what we are entitled to force people to do. Insofar as the rules are for the purpose of prohibiting certain types of actions and insofar as prohibiting actions *via* force is a moral issue, to make laws is to take a stand on moral questions. This is inescapable, in the nature of legal work. If a government is morally justified, its uses of force must be morally justified. So, accordingly, both the content of its laws and their formal administration must be justified by adhering strictly to its mission. In order for the Rule of Law to be an ideal that societies should aspire to and respect, therefore, it cannot be simply the rule of any group that happens to like routines resembling those embraced by Rule of Law conditions. It must be morally superior to the Rule of Men. The stakes – individuals' title to be free from the initiation of force – demand that.

It is important to appreciate that deviations from the Rule of Law, remote and impersonal as such formal abstraction can seem, sabotage the function of government. Departures from the Rule of Law's conditions mean that the government is not effectively protecting individual rights and worse, because of its authority to achieve its ends by force, becomes a positive threat to people's rights. When a formal condition of the Rule of Law is breached, the harm done is not "value-neutral."<sup>48</sup> Consider the requirement of clarity in the law, for example, the avoidance of ambiguous language. While the threat created by laws whose meaning is not clear fails to give people notice of

what rules they will be legally accountable to (since ambiguous language could be interpreted in differing ways), the problem is not simply a matter of the law's guidance being clumsy.<sup>49</sup> In failing to issue unequivocal rules, the government is depriving people of their rightful freedom. Ambiguous rules tell people to confine their actions to what the relevant law allows – under the two or three or more ways that the vague law might reasonably be construed. When a law can assume multiple meanings, the actions corresponding to each of those meanings is subject to legal penalty.<sup>50</sup>

If, as is conceivable, each of these several types of actions is properly restricted, the law should clearly say so. If their *de facto* prohibition results, rather, from sloppy construction of legal language, lawmakers disdain their obligation to protect individual rights. Those rights are infringed, in the process. People's freedom is wrongly constricted.

The point is, law that violates the formal condition of clarity commits a moral offense. It should not be hard to see how the breach of other appropriate formal conditions (concerning internal consistency or promulgation or retroactive laws, for instance) would also abridge individual freedom.

The Rule of Law cannot be value-neutral. To make rules is to make choices about the kinds of actions that will be permitted and punished by the sanctions of that rule system. In the case of law, because of the mechanism of enforcement, these rules reflect judgments about which types of actions should be respected as rightfully a man's own to rule and which may be controlled by others. It is impossible to install legal rules that do not reflect a view of the proper relationship between the government and the individual.<sup>51</sup> What is important for my purposes is that the inescapably moral character of these decisions pertains to law's formal features as much as to its content. Certain methods of constructing and administering a legal system (allowing secrecy or ambiguity or inconsistency, for instance) would be antithetical to the purpose of government and the legitimacy of that system's authority.

Let's return to the bigger picture. The alternative between the Rule of Law and the Rule of Men is, in its essence, the alternative between the rule of reason and the rule of force. In this context, the rule of reason amounts to the rule of rights. Reason demonstrates the need for a government whose mission is the protection of individuals as ends in themselves, sovereign over their own lives. The Rule of Law offers rule by the conclusions of reason about proper uses of government power.

The Rule of Men, by contrast, is rule by might – by muscle power, sheer, brute force – force whose use is not governed by reason but is as random, subjective, and arbitrary as those wielding it. The violation of any of the Rule of Law's conditions means that the government's power to force people to act in particular ways is unleashed from the discipline of rational restraints. When, in defiance of the Rule of Law's conditions, we are subject to vague laws or conflicting laws or retroactive laws or laws applied to some members of a society but not others on no objective basis, some men are using the power of government to control other men in defiance of the reason for which, and the right by which, they hold that power. Might is making right. This is not merely a breach of empty niceties of form. The Rule of Men is wrong. It deprives individuals of something that is theirs. And the Rule of Law – maintenance of appropriate formal conditions – is morally good.

## **6. Objections to the Moral Conception**

The value-neutral camp is unlikely to surrender without a fight. Addressing the strongest of its likely objections may clarify my thesis but also, I hope, fortify its grip.

### a. The Value-Neutral is Not Value-Void

One objection might charge that I am battling a straw man by confusing the view that a legal system is value-void with the view that it is value-neutral. On the value-void view, values play no role in the Rule of Law and, correspondingly, exert no influence over what the ideal requires. This is

untenable, an opponent might agree. To hold that the Rule of Law is value-neutral, however, is to say that some values exert themselves through its maintenance, but which values those are is of no consequence and need not be implied by the constituent elements of the Rule of Law. The Rule of Law does not require one particular set of values over another. On this view, some values are involved, insofar as adherence to any set of rules will carry certain effects and those will have some degree of moral desirability (positive or negative). But it needn't have value-laden designs; its conditions needn't seek to advance any single set of values in order to provide the Rule of Law. This is the sense in which the Rule of Law is value-neutral.

While the distinction invoked is valid, this argument does not rescue the value-neutral position. For it is guilty of colossal context-dropping. It ignores the fact that legal rules, unlike others, are forcibly imposed on people. Because legal rules are imposed through physical compulsion, they bear a burden of moral justification that other rule systems do not. Correspondingly, one cannot acknowledge a place for values in a legal system (as the value-neutral position described here does), without providing an account of what values should be promoted by its governance. Even the modest claim that the effects of the Rule of Law in a given society will naturally carry some impact on values but that values should not determine the content or the form of the laws that we adopt privileges the results of that neutrality more than that which could be gained by non-neutrality, i.e., by restricting the character of the legal system on the basis of certain values. It treats those effects as tolerable – which is a tacit value judgment, a preference for those effects, over the alternatives. To put the point differently: neutrality, in practice, isn't neutral.

The larger fact is, the use of force against innocent individuals cannot be justified value-neutrally. One cannot be indifferent (neither in good conscience nor in logic, given the type of rules that we are talking about) to the kinds of effects that are brought about through the enforcement of

laws. Thus the difference between “value-void” and “value-neutral” does not make the Rule of Law’s alleged neutrality any more viable. This type of rule system must pass moral muster.

b. Not All Law is Coercive

A second objection might target my appeal to the coercive character of law by contending that this attributes to all law a feature that attaches only to some. While a legal system does threaten force if a person fails to comply with certain of its strictures, other of its rules do not stand on that threat. A legal system includes numerous secondary rules, as Hart famously pointed out, many of which address how to accomplish certain ends rather than whether to take certain actions.<sup>52</sup> I can avoid the government’s penalties by obeying its prohibitions on theft and assault, for instance, or by complying with its demand for a tax payment. My decisions of whether to marry, to adopt, or to bequeath my estate are made under no such compulsion, however. While laws stipulate the procedures by which to obtain legal protection for these relationships (by requiring witnesses, types of public notice, and the like), they exert no coercion against me, either way. Thus, the objection is, a legal system’s work is not uniformly conducted by means of force. Consequently, the fact that the use of force might always require moral justification does not entail that the use of law always requires moral justification. The activities of a legal system comprise a broader range.

The failing of this argument, I think, is a superficial understanding of the way in which a legal system operates. One could only make secondary rules appear detached from coercion by ignoring the context within which they function.

How are secondary rules enforced? Ultimately, by force. It is true that no one is compelled to engage in these voluntary, legally optional transactions. Anyone who does wish to marry, adopt, or bequeath, however, must comply with the stipulated regulations. If he fails to, he will not acquire legal protection of the relevant relationship. Bear in mind that engaging in the activities subject to procedural laws is an exercise of rights. The person who wants to marry or adopt a child is doing

things that he is entitled to do, pursuing his happiness without infringing on the rights of anyone else. He should not, therefore, have to pay a special price to have this exercise of his rights be protected.

To be clear: this is not an objection to rules that may be necessary to facilitate the government's protecting of certain relationships. It is to say, though, that the underlying sanction of these procedural requirements is, like that of all laws, the threat of a loss. Through this type of secondary rules, the government decrees that a person will not be free to enjoy what is his as he sees fit unless he complies with its stipulations. A man will be punished – deprived of something that is his – unless he pursues his ends this way, by conforming to the government's specifications. This amounts to a “do this, or else” ultimatum in the same way, fundamentally, as a legal system's primary rules imposing direct prohibitions and requirements (“pay your taxes or go to jail”). The fact that, in the cases of some laws, the operative coercion is buried beneath layers of choices does not mean that it is absent. The optional nature of the action for the sake of which certain procedures are required (the fact that government does not require anyone to marry or to adopt) does not alter the coercive nature of the relevant government power. My freedom to act in this way (with other willing parties) is taken away from me, unless I follow orders.<sup>53</sup>

### c. A Moral Reading Dilutes Law's Authority & Efficacy

A different type of objection might contend that my view fails to appreciate the requirements of effective rule systems. Insistence on the morality of the Rule of Law would undermine a legal system's ability to function as a system. For any system of rules to work, individuals must accept its directives as rules – sovereign, final – rather than continually revisit the advisability of particular rules to determine whether or not they should be obeyed. Insisting on the moral character of law, however, seems to invite that very kind of ceaseless reconsideration. Such a practice would defeat the point of having laws by depriving them of their rule-distinctive authority.

By treating laws as defeasible presumptions rather than definitive restrictions, it would keep open questions about permissible behavior to which those rules are the answer. In the name of serving the purpose of the law, in other words, the requirement of morality would actually work against it.

Here, a partial truth is used to support a conclusion that does not follow. The governance of a legal system cannot permit those ruled by it to choose which rules are worthy of obedience on a case-by-case basis. Such a course would, undoubtedly, prevent it from serving its purpose. It would equally defeat the purpose of a legal system, however, to set aside its moral character as immaterial. For that character is the reason for which we have the law; its mission is moral. It is senseless to adopt standards for the operation of law independently of its reason for being.

Maintenance of a proper legal system requires that we attend to both the propriety of its content and the conditions necessary for its efficacy as a system. Second-guessing individual laws and picking and choosing which to obey would undermine it. But the reason to respect a rule system's sovereignty stems from the character of the rules, not the other way around. When the rule system in question is a legal system, we cannot be indifferent to its moral character. This is not to sanction disobedience to particular laws with which an individual finds fault. It is to say that the moral quality of the rules cannot be subordinated to the system as an end in itself.

When a legal system is morally justified, it does warrant obedience as a system.<sup>54</sup> Insofar as the Rule of Law is not simply the rule of rules and insofar as its use of force is permissible only when it enjoys moral sanction, however, its authority is different from that of rule systems subjection to which is entirely voluntary (such as rules of a game or club). The law – uniquely – enjoys the moral authority to make a person do things, like it or not. For this reason, its rules require the warrant of morality. This makes it not only acceptable but imperative that we concern ourselves with the moral character of its exercises of that authority. The morality of its formal conditions is a part of that.



#### d. Positivists' Charge: Conflating Law and Good Law

Finally, a serious objection might arise from the perspective of Legal Positivism. My view seems to imply that a legal system that purports to provide the Rule of Law but fails to embody a certain moral character is not genuine law. This essentially amounts to the assertion of the Natural Law view of law, failing to acknowledge (as Positivists do) that the existence of law is one thing, its morality, something else.<sup>55</sup> My view thus seems to conflate the Rule of Law with the rule of good law. Of course, opponents will say, the rule of good law is a good thing, but that hardly warrants conclusions about the Rule of Law itself. At best, one might think, defense of my thesis requires delving into a much broader discussion than I have provided here (and staking a Natural Law position which Positivists will regard as hopeless).<sup>56</sup>

In fact, however, it is the objection that fails to appreciate a salient distinction. For my claim does not concern whether a purported legal system is, in fact, a legal system (the issue at the heart of the Natural Law – Positivism debate). It concerns, rather, whether a legal system lacking a certain moral fiber is truly an ideal. (Bear in mind that the Rule of Law is not the same as the rule of a legal system. A legal system might not satisfy Rule of Law conditions; they impose a higher standard and measure a legal system's virtue. That is why international bodies reward the Rule of Law.)<sup>57</sup>

I have argued that the reason to erect a legal system is to serve a purpose that is moral, namely, the protection of individual rights. This is a moral purpose insofar as rights represent an individual's moral authority to rule his own life free of others' initiation of force. Any legal system that compromises its commitment to provide that because it eschews concern with the moral dimension of its administration is not a rule system that we have reason to seek or reason to obey.

Human beings need the protection of an objectively valid legal system in order to have their freedom respected. When the requirements of the Rule of Law are not met, we do not gain that value. However proper the content of the laws, that mission is unfulfilled. (Recall the damage done

by vague law.) But what this reveals is that in denying that the Rule of Law is value-neutral, we are not adding a requirement of moral goodness to the concept. Rather, we are simply recognizing that what is at stake in the alternative between meeting and not meeting Rule of Law conditions is a moral good. If it is right to respect Rule of Law conditions, it is right because doing so helps to do a morally proper job. And those conditions are what they are because of their moral service.

To say all of this does not equate the Rule of Law with the rule of good law. What it does is recognize that the Rule of Law is superior to the Rule of Men on moral grounds. To reject the Rule of Men is to reject a particular kind of immorality in the exercise of coercive power. That rejection is right – justified – because arbitrariness in the exercise of such power is wrong. It does not conflate the concern with the substance of a legal system and concern with the formal features of a legal system, however, to hold that both of these are ultimately moral concerns.

In short, contra Positivist worries, my claim is not about whether a reputed legal system exists, but whether it warrants the label Rule of Law, which designates an ideal. The use of that term conventionally designates a good thing, a desirable state of affairs. My contention has been that if it is to actually be that, it must embody a certain moral value.

## **7. The Damage of a Value-Neutral Rule of Law**

Suppose I am right in contending that the Rule of Law is not a value-neutral ideal. What hinges on this? What is the harm of thinking otherwise?

Essentially, the erosion of individual rights. That is the value protected by an objective legal system. If we do not properly understand what the Rule of Law is, however, we will not in a position to secure it. We will consider its conditions satisfied when in fact, they are not, and we will, in the process, lose the protections that distinguish the Rule of Law from the Rule of Men. Indeed, a false conception of what the Rule of Law is can be more damaging than outright rejection of the ideal, because it lends the respectability of the Rule of Law – the presumption of legitimate authority – to

legal systems and government practices that do not warrant it. Under the illusion that they are governed by the Rule of Law and enjoy its protections, people will not realize how vulnerable their rights are.

A value-neutral Rule of Law is thus not only untenable in theory, but destructive, in practice. Anyone who claims to be respecting the Rule of Law's "value-neutrality" in upholding its conditions must tacitly rely on some values in determining what satisfies those conditions – in deciding what constitutes equal treatment of like cases, for instance, or an equal vote in an election, or what forms of publicity meet the promulgation condition or what tensions between two laws constitute an unacceptable internal inconsistency and what tensions should be accepted as reflecting "the need to strike a balance." These determinations are inevitably influenced by the values one seeks to protect. To pretend that they aren't has the practical effect of allowing values that are not authorized by the government's mission to dictate how government power is used. It normalizes reliance on the subjective values that particular officials happen to supply.<sup>58</sup> Deference to law that has been conceptually stripped of its moral character, in other words, is actually deference to assorted legal officials' preferred uses of their power. It is thus as subjective as the Rule of Men. Indeed, that's what it is.

## **Conclusion**

*Still to be added*<sup>59</sup>

## Notes

**NB: these are extremely incomplete, and contain numerous notes to myself**

---

<sup>1</sup> John Adams, *Thoughts on Government*, in *The Revolutionary Writings of John Adams*, ed. Brad Thompson, Indianapolis: Liberty Fund, p. 288.

<sup>2</sup> **STILL SORT OUT & FILL IN:** This is not meant as a careful statement so much as a reminder of the sorts of conditions widely thought to constitute the Rule of Law. The ideal is perhaps most closely associated with Albert Venn Dicey, whose *An Introduction to the Study of the Law of the Constitution*, 1855, expounded the fundamental precepts of the unwritten British constitution.

For fuller discussion, see, among others, Dicey, Lon Fuller, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, New York: Cambridge University Press, 2004; Matthew Kramer, *Objectivity and the Rule of Law*, New York: Cambridge University Press, 2007, chapter 2; Andrei Marmor ... ; Ian Shapiro collection?; Richard Fallon, especially pp. 3 and around p 7 (**CHECK**); ?Raymond Wacks, *Law – A Very Short Introduction*, New York: Oxford University Press, 2008, p. 9. F Hayek; Oakeshott; Bruno Leoni. **Check Gordon recent piece**

I also discuss this ideal in “Objective Law,” *Ayn Rand: A Companion to Her Works & Thought*, eds. Allan Gotthelf and Gregory Salmieri, Oxford: Wiley-Blackwell, forthcoming 2010.

<sup>3</sup> Joseph Raz makes the same observation in “Formalism and the Rule of Law,” *Natural Law Theory: Contemporary Essays*, ed. Robert George, Oxford: Clarendon Press, 1992 p. 309.

<sup>4</sup> **PHRASING:** Raz similarly distinguishes the normativity of reason from the normativity of morality, “Formalism,” p. 323. For discussion of this issue, see Tamanaha, 95. Among those who either directly debate this issue or whose work indicates a significant stand on it are Raz, Fuller, Fallon, Kramer, Paul Craig, Michael Sevel, Robert S. Summers, Mark Bennett, Nigel Simmonds, John Finnis, Ronald Dworkin, Richard Epstein, Frank Michaelman??, David Richards, Michael S. Moore, Randy Barnett.

<sup>5</sup> **FILL IN:** Scalia, *A Matter of Interpretation*, p. 25, italics added. Somewhat similarly, “The ‘Rule of Law’ has been defined as ‘a concept of the utmost importance but having no defined, nor readily definable, content.’” David M. Walker, *The Oxford Companion to Law*, New York: Oxford University Press, 1980, p. 1093, quoted in John V. Orth, *Due Process of Law*, 2003, Lawrence, KS: University Press of Kansas, p. 31, note 34.

<sup>6</sup> **WORK ON:** My view seems to be something like what Fallon calls the Substantive Ideal Type Model of the Rule of Law, the idea that the Rule of Law implies intelligibility of law as a morally authoritative guide to human conduct, 21ff. I am not sure that mine is the same as this, though, particularly because some of his characterizations of the Substantive Ideal Type Model suggest that moral authority is necessary for forms of law to be intelligible as legal, which seems to commit it to a Natural Law thesis that my thesis, I think, does not entail (and on which I wish to take no stand here). I will revisit Natural Law in addressing an objection in Part 6, however.

<sup>7</sup> **ADD SOURCES – Gerber et. al.? & check my work elsewhere documenting & discussing this:** This is a widely accepted understanding of rights’ essential character, and historically, the conception that prevailed among the American Founders. See Randy Barnett, *Restoring the Lost Constitution – The Presumption of Liberty*, Princeton: Princeton University Press, 2004.

<sup>8</sup> **ADD REFERENCES TO OTHER SOURCES??:** I explain and defend these claims in *Moral Rights and Political Freedom*, Lanham, MD: Rowman & Littlefield, 1995, building on the analysis of Ayn Rand, in “Man’s Rights,” and “The Nature of Government,” *Capitalism: The Unknown Ideal*, New York: Penguin/Signet, 1967.

<sup>9</sup> **WORK ON:** This does not mean that its job is to enforce all of morality. Rights govern only a subset of moral questions, concerning individuals’ moral jurisdiction over certain domains, rather than the morally correct exercises of that authority. For clarification, see my *Moral Rights and Political Freedom*, pp. ?? . **Add other??**

<sup>10</sup> Aristotle, *Politics*, Book III, 1286, cited in Tamanaha, p. 9. Also see Book III, 1287a28-b6, and, concerning the Rule of Law more broadly, 1282b1-12.

---

<sup>11</sup> For good discussion of these and other features of rule systems, see Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*, New York: Cambridge University Press 2008, pp. 11ff? **CHECK pages**

<sup>12</sup> **MAKE SURE ACCURATE:** More precisely, we leave these behind as reasons that should determine whether or not to comply with the rules in a particular case.

<sup>13</sup> Cf. Jed Rubenfeld, *Revolution by Judiciary*, Cambridge, MA: Harvard University Press, 2005, pp. 141, 112.

<sup>14</sup> By “abide” here, I mean to deliberately obey the law because it is the law, as opposed to taking actions that happen to conform with the requirements of the law.

<sup>15</sup> **FILL IN BIB DATA:** Kent Greenawalt, *Objectivity in the Law* (title??), 142.

<sup>16</sup> Greenawalt also discusses this basic idea, p. 12. **CHECK MY SOURCE ON THIS:** (*Companion paper?* p. 13?) The Roman emperor Justinian expressed this view well in declaring that that which has the force of law is that which “has pleased the prince,” whereas the prince himself “is not bound by the laws.”

<sup>17</sup> **WORK ON:** Matthew Kramer distinguishes several possible types of objectivity, all of which are vital to the Rule of Law, in his view, p. 231, e.g., mind-independence (which itself comes in weaker and stronger forms); determinate correctness; uniform applicability; trans-individual discernability, impartiality; truth aptitude. See pp. 82ff.

He characterizes some of these as more ontologically orientated, others, as epistemically or semantically geared.

**RE-CHECK his pages & discussion:** While I do not agree with all of his characterizations, they are helpful to consider, to sharpen our notion of objectivity. **ADD my Pitt & SPP pieces**

<sup>18</sup> **FILL IN BIB DATA:** Sotirios Barber and James Fleming are among the many who emphasize the Rule of Law’s providing a sense of predictability, security, and of control over one’s life, *Constitutional Interpretation – The Basic Questions*, p. 183. *?Also See Federalist 1 on this?*

<sup>19</sup> In a fuller account of an objective legal system, I would explain the way in which the content of law, as well as its form, must be objectively justified. I discuss the importance of this substantive dimension somewhat more fully in “Objective Law.” Insofar as objective law is a single, integrated ideal, both proper form and content in a legal system are essential to providing it.

<sup>20</sup> **??DO??** List some advocates of value-neutral view? E.g., Kramer, pp. 102 , 103, 143.

<sup>21</sup> **CHECK** Barber and Fleming around p. 23; **find more direct cite of Rehnquist?? Add Bork?**

<sup>22</sup> Barber and Fleming, p. 174. **CHECK PAGE**

<sup>23</sup> Posner, “Legal Reasoning from the Top Down...” p 435?? **FILL IN CITE**

<sup>24</sup> **CHECK** Posner, *How Judges Think*, p. 255. **SORT OUT:** Barber & Fleming: 174.

B&F primarily discuss Posner and Stanley Fish as their examples of pragmatism; **?mention?** that Posner frequently cites Jerome Frank; / 176 Posner is skeptical about moral reality / **LOOK INTO** Posner speech called “Pragmatism vs. the Rule of Law,” Bradley lecture, given at American Enterprise Institute, January 1991.

<sup>25</sup> Tamanaha, p. 94.

<sup>26</sup> **CHECK** if Rehnquist, Posner, Fish, explicitly say this **ALSO CHECK Barber & Fleming** as attributing this to some of them

<sup>27</sup> Cf. the longstanding “political questions” doctrine, articulated by Chief Justice Roger B. Taney in *Luther v. Borden*, 48 U.S. 1 (1849), which distinguishes certain disputes as beyond the province of the court, which is “to expound the law, not to make it.” For a recent discussion of this doctrine vis-a-vis environmental law, see Laurence H. Tribe, Joshua D. Branson, Tristan L. Duncan, “Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political

Questions Doctrine,” Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 169, January 2010. [http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribes\\_WP.pdf](http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribes_WP.pdf)

<sup>28</sup> **FIND PAGE** in Fallon.

<sup>29</sup> All parties who are suitably eligible, that is.

<sup>30</sup> Raz, “The Rule of Law and its Virtue,” *The Authority of Law*, Oxford: Clarendon Press, 1979, p. 225. Raz’ full view today is, based on his more recent writing on this, difficult to determine. See Raz, “About Morality and the Nature of Law,” 48 *American Journal of Jurisprudence* 1, 2003, p.p. 1-15, as well as “Formalism and the Rule of Law,” note 3 above.

<sup>31</sup> Kramer, *Objectivity and the Rule of Law*, p. 103. Also see 143.

<sup>32</sup> Cf. Kramer, who characterizes “the cardinal function of any legal regime” as that of “directing and channeling human behavior,” and “to direct and coordinate the behavior of countless individuals and groups,” pp. 164, 210. This view of a legal system will naturally influence one’s view of the Rule of Law, more narrowly.

<sup>33</sup> I mean both the proper purpose and the actual purpose embraced by the Founders of the US government. Again, this rests on arguments beyond the scope of this paper. For discussion of both the history and the philosophical propriety, see Barnett, *Restoring the Lost Constitution*, especially pp. 32-39, for historical documentation; Scott Gerber, *To Secure These Rights – The Declaration of Independence and Constitutional Interpretation*, New York: NYU Press, 1995; James Madison’s essays on *Property*, 1792, and *Sovereignty*, 1835, and Rand, “The Nature of Government” and “Man’s Rights.”

<sup>34</sup> **FILL IN BIB DATA – add Dworkin? Fleming? Others? OCON lecture on JIN?**: The claim is not that meaning is a function entirely of context, but that text alone is insufficient. See David O. Brink, “Legal Theory, Legal Interpretation, and Judicial Review,” *Philosophy & Public Affairs*, 17, no. 2, spring 1988, pp. 105-148; “Legal Interpretation, Objectivity, and Morality,” Brian Leiter, ed., *Objectivity in Law and Morals*, pp. 12-65; and my “Why Originalism Won’t Die: Common Mistakes in Competing Theories of Judicial Interpretation,” *Duke Journal of Constitutional Law and Public Policy*, spring 2007, pp. 230-287 (also at <http://www.law.duke.edu/journals/DJCLPP/>) and “Originalism’s Misplaced Fidelity: ‘Original’ Meaning is Not Objective,” *Constitutional Commentary* volume 26, 1 (2009) pp. 1-57.

<sup>35</sup> Note that even the choice to bracket certain issues relies on a view of which issues are legitimately bracketable.

<sup>36</sup> Among the other things that different sorts of legal rules do; this is not to exclude secondary rules, which we will return to later.

<sup>37</sup> Among the definitions of “arbitrary” provided by the *Oxford English Dictionary*: **DOUBLE CHECK QUOTES**  
 “1. To be decided by one’s liking; dependent upon will or pleasure; at the discretion or option of any one.  
 2. *Law*. Relating to, or dependent on, the discretion of an arbiter, arbitrator, or other legally-recognized authority; discretionary, not fixed.  
 3. Derived from mere opinion or preference; not based on the nature of things; *hence*, capricious, uncertain, varying.  
 4. Unrestrained in the exercise of will; of uncontrolled power or authority, absolute; *hence*, despotic, tyrannical.”  
 (Also bear in mind that the arbitrary is not the only alternative to the rational. Irrationality can take the form of honest mistakes, in a person’s effort to be rational.)

<sup>38</sup> **WORK ON:** Rand thought that objectively invalid content of law amounts to the same, in its effects, as the rule of a capricious dictator. *Objectively Speaking – Ayn Rand Interviewed* **CHECK HER EXACT THOUGHT & FILL IN DATA.**

Further, notice that in the context of laws that are oppressive, the regularity in application that is normally a good thing is not, necessarily. Exceptions from repressive restrictions can be of greater value than those restrictions’ more consistent enforcement. For broader discussion of how irrational principles cannot be rationally applied, see my **OCON lecture? also in WOWD? OMF? Also: ?Give gist of argument?**

---

<sup>39</sup> Similarly, the familiar practice of forgiving a breach of the letter of a law on the grounds that the law's spirit was honored reflects appreciation that rule following is valuable, when it is, not in its own right but in order to further a separate purpose.

<sup>40</sup> I do not mean to imply that a legal system must be perfect in order to be fundamentally just. If its flaws are few and relatively minor, the system can function effectively (and essentially, properly) to fulfill its role. Also, the full picture in this paragraph again relies on prior arguments. See my discussion in *Moral Rights and Political Freedom* and in "Humanity's Darkest Evil: The Lethal Destructiveness of Non-Objective Law," *Essays on Ayn Rand's Atlas Shrugged*, ed. Robert Mayhew, New York: Lexington Books, 2009, pp. 335-361.

<sup>41</sup> Again, more exactly: apart from its responsible efforts to do that. Perfection in the execution of a government's mission cannot be a condition of its legitimacy.

<sup>42</sup> Adams, "Thoughts on Government," p. 287.

<sup>43</sup> On some decisions, the government has equally legitimate alternatives.

<sup>44</sup> Another possibility, of course, is that a given dictator gets his kicks from confusing people; he is a practical joker who enjoys setting people up to expect one thing, and then delivering quite another. In this case, why should his legal system include conditions of consistency in application or equal treatment of like cases?

<sup>45</sup> Rules governing such things as schedules, draft order, what sorts of actions will be penalized and with what harshness.

<sup>46</sup> For certain purposes, such as in war games training military personnel to successfully adapt to radically changing conditions, it might make sense to employ morphing rules, allowing kinds and degrees of unpredictability that would be unacceptable in a country's voting system – unacceptable, in light of other values.

<sup>47</sup> Contrast Fuller, who rejects the coercive nature of law as a defining feature of law, p. 108. While every arena of activity has its instruments, he claims, they are not the proper focus of study here. Thus he describes a legal system as, more broadly, "the enterprise of subjecting human conduct to the governance of rules," p. 106.

<sup>48</sup> I am assuming a proper formal condition.

<sup>49</sup> Some of our offending laws concern "indecentcy" on the airwaves, a "hostile environment" at the workplace, and "predatory pricing."

<sup>50</sup> I discuss examples of non-objective law more extensively in "Objective Law," *Ayn Rand: A Companion to Her Works & Thought*, eds. Allan Gotthelf and Gregory Salmieri (Oxford: Wiley-Blackwell, 2010), and in "Humanity's Darkest Evil."

<sup>51</sup> **FILL IN DATA:** For a good discussion of this, see Thomas Bowden, "The Empty Constitution," *The Objective Standard*, summer 2009. **pp? volume?**

<sup>52</sup> **ADD reference to** Hart on secondary rules.

<sup>53</sup> **Valid? Think through:** Also recognize that every exercise of a right is optional, not only those that are subject to procedural restrictions. All legitimate exercises of rights – whether I use my freedom to play Guitar Hero, climb a rock, read a book, open a restaurant or make a pilgrimage to Mecca – must conform to a certain manner of exercise, namely, not infringing on others' rights. Where further conditions are legally required, however, individuals' choices concerning how to exercise their rights are receiving different degrees of protection from the government. To do *this*, the law says, you don't need to satisfy any additional requirements, whereas to do that, you do. A valid government has no basis to discriminate in that way.

<sup>54</sup> Bearing in mind that an essentially proper system may contain some flaws.

<sup>55</sup> **PHRASING & FILL IN BIB DATA:** The much-quoted statement of 19<sup>th</sup> century jurist John Austin was that "the existence of law is one thing; its merit or demerit is another." Positivism is generally thought to consist of two principal

---

theses, the Sources Thesis that what counts as law in a given society is completely a matter of social fact or convention, and the Separation Thesis that there is no necessary connection between law and morality, no necessary moral constraints on the existence of a legal system. Law is those rules that are posited, in other words, not subject to any further test of moral quality. **FILL IN & SORT OUT:** See Brian Leiter and Jules Coleman, *Blackwell Companion to the Philosophy of Law*; Cite Mark Murphy, pp. 25-26.; ??Bix p 29?

<sup>56</sup> Cf. part of Raz's critique of Weinrib in "Formalism," pp. 324-325.

<sup>57</sup> **Need all this??:** An ambiguity in the phrase "good law" may also muddy things. That term could refer either to the goodness of each of the individual laws of a legal system or to the system's overall character. As noted earlier, a legal system could contain flawed laws while still being, in its essence, good. The fact that a system intended to ban inappropriate uses of force might not succeed perfectly does not mean it is the same in kind as a system that lacks such intent. The difference between a legal system that is severely flawed and one that is marginally flawed is also significant. The immediate point is that in claiming that the ideal of the Rule of Law is itself morally good, I am not saying that its operation in a given legal system must be morally flawless.

<sup>58</sup> The good or bad intentions of these people are not the issue.

<sup>59</sup> Thanks to ...