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# FREEDOM, LEGALITY, AND THE RULE OF LAW

JOHN A. BRUEGGER\*

## ABSTRACT

*There are numerous interactions between the rule of law and the concept of freedom. We can see this by looking at Fuller's eight principles of legality, the positive and negative theories of liberty, coercive and empowering laws, and the formal and substantive rules of law. Adherence to the rules of formal legality promotes freedom by creating stability and predictability in the law, on which the people can then rely to plan their behaviors around the law—this is freedom under the law. Coercive laws can actually promote negative liberty by pulling people out of a Hobbesian state of nature, and then thereafter can be seen to decrease negative liberty by restricting the behaviors that a person can perform without receiving a sanction. Empowering laws promote negative freedom by creating new legal abilities, which the people can perform. The law can enhance positive freedom when it prohibits negative behaviors and promotes positive behaviors. Finally, the content of the law can be used to either promote or suppress individual freedom.*

[W]hat law is for is not to abolish or restrain freedom, but to preserve and enlarge it; for in all the states of created beings who are capable of laws, where there is no law there is no freedom.

—John Locke<sup>1</sup>

Despite its seeming simplicity, this quote from Locke's *Second Treatise of Government* encompasses a wide range of complex and multi-faceted issues for the student of liberty. The relationship between law and liberty has been examined, discussed, dissected, and analyzed by philosophers, lawyers, judges, economists, and politicians for centuries.

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1. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 20 (Johnathan Bennett ed., 2008 ed.) (1689).

Despite substantial scholarly attention these disciplines have given to this topic, the conversation is far from over.

This Article examines this complex relationship between law and liberty. The nature of the relationship depends on how one conceives of law and the rule of law. One approach views law as consisting of coercive and empowering laws, and the rule of law as a purely formal concept. The other sees the rule of law as a substantive concept, in which the substance of the laws is part of the validating conditions of law. Which of these two views of law and the rule of law is in operation? Affects how laws can diminish or enhance the freedoms of people.

### I. ON THE NATURE OF THE LAW AND THE RULE OF LAW

The concept of law is often theoretically divided along the lines of natural law and legal positivism.<sup>2</sup> This dichotomy carries over to writings on the concept of the “rule of law,” which are frequently classified as either formal theories or substantive theories, although most do not fall into line so neatly.<sup>3</sup> The purpose of this part is to discuss the concept of the rule of law from both formal and substantive perspectives.

#### *A. Coercive and Empowering Laws as a Means for Classifying the Law*

H.L.A. Hart famously divided laws into primary rules and secondary rules. The latter are mechanisms for creating, changing, or repealing the former.<sup>4</sup> This distinction is useful for understanding the concept, especially compared to John Austin’s command theory.<sup>5</sup> But a new framework is more useful for analyzing the interplay between law and freedom. Under this framework, laws can be (1) coercive laws, (2) empowering laws, or (3) some combination of the two.

As the term is used herein, “coercive laws” are analogous to what Austin called “commands backed by sanctions.”<sup>6</sup> These laws can be formally defined as following the form “If A, then B,” where A is the behavior that the law seeks to prohibit, and B is the sanction that follows

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2. See generally LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. Press, 2d rev. ed. 1969); H.L.A. HART ET AL., *THE CONCEPT OF LAW* 213 (Oxford Univ. Press 2d ed. 1994).

3. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (Kindle ed. 2004).

4. See HART, *supra* note 2, at 213–14.

5. See JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* (Univ. of London 1832). Austin argued that the law can be seen as a command issued by a sovereign and backed by threat of sanctions.

6. *Id.*

performance of A. These laws, either explicitly or with some minor rearranging of their elements, can be understood to state, “If any person performs some action A, the sanction B shall be imposed.” Coercive laws compel one kind of conduct (“not-A”) by prohibiting another (“A”). For example, laws against murder generally follow the form, “If any person performs the action of murder, then the sanction of imprisonment or death shall be imposed.” These laws prohibit murder by threatening imprisonment or death—both effective deterrents.

Empowering laws affirmatively bestow rights, immunities, powers, claims, and privileges.<sup>7</sup> They also take the form “If A, then B,” where A is the conditions of validity, which, if met, confer a legal recognition or protection of B. A and B can also be seen as shorthand for a number of conditions or rights, such as  $A = A_1 \text{ and } A_2 \text{ and } A_3, \dots A_n$ , and  $B = B_1 \text{ and } B_2 \text{ and } B_3, \dots B_n$ . For example, an empowering law governing wills could be framed as “If (A) a person is over the age of eighteen years, of sound mind, not under duress, makes a writing of his testate wishes, and gets said writing witnessed by three people, then (B) the law confers legal validity on such person’s will.” The validating conditions of A must be met to achieve the legal recognition of B.

While both coercive laws and empowering laws can take the form of “If A, then B,” they differ greatly in their effects and purposes. Coercive laws impose penalties for conduct that the regime wants to discourage. In contrast, empowering laws do not compel affirmative action. No empowering laws compel people to make a will—they only state that if someone wishes to make his will legally valid, he must follow the validating conditions. Thus, there is only one way for empowering laws to get from A to B, but there is no requirement to strive for B at all. One can simply not want to do B at all, and thus can ignore the validating conditions of A. Ignoring A in the context of coercive laws, however, will land the person in trouble.

Furthermore, some areas of law are both empowering and coercive. For example, there is no requirement that individual debtors in the United States file for personal bankruptcy (although creditors can force debtors into bankruptcy under certain circumstances).<sup>8</sup> However, debtors shield themselves from their creditors by properly filing for bankruptcy. These laws empower debtors by changing the legal obligations between them and their creditors. But the U.S. bankruptcy code also contains coercive

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7. Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913).

8. 11 U.S.C. § 303 (2016).

elements. Once the debtor decides to undertake bankruptcy, the debtor must truthfully disclose all assets and income to the court and the bankruptcy trustee and must not commit fraud.<sup>9</sup> Violating this rule will result in fines, imprisonment, or other sanctions. Thus, although there is no requirement that the debtor file a bankruptcy action at all, if he does, he must follow the validating conditions of the empowering rules and avoid the conduct prohibited by the coercive rules of the bankruptcy code.

Hart's division of laws into primary and secondary rules can exist alongside this classification of coercive and empowering laws. Primary rules can take the form of coercive laws, empowering laws, or a combination of the two, as shown above. Secondary rules are "meta-laws": they are laws about laws. Secondary rules set forth the conditions through which laws are created, changed, or repealed, and they are usually empowering laws. In order for a federal statute to be created, it must pass by majority vote in both houses of Congress and be signed by the President. Failure to follow these validating conditions does not result in a bad law, or a voidable law, or an invalid law, but rather, no law at all. Congress is under no obligation to create laws at all (in a legal sense, not a moral sense), and if Congress fails to meet the validating conditions for passing a law, there is no sanction imposed. Thus, we can see that this classification system will better explain how the law is related to the concept of freedom, while also accounting for Hart's concept of law.

### *B. The Rule of Law: Formal Necessary and Sufficient Conditions*

Before analyzing what is typically meant by use of the phrase, "the rule of law," it is important to address why this concept is so important to the field of jurisprudence generally. Matthew Kramer has defined the rule of law as "the set of conditions that obtain whenever any legal system exists and operates," and he has concluded that "[e]specially in any sizable society, the rule of law is indispensable for the preservation of public order and the coordination of people's activities and the securing of individuals' liberties."<sup>10</sup>

However, there is widespread disagreement about what "the rule of law" means.<sup>11</sup> Is the rule of law a merely formal concept, akin to how legal

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9. 18 U.S.C. § 521 (2016).

10. MATTHEW H. KRAMER, *THE QUALITY OF FREEDOM* 102 (2003).

11. Brian Tamanaha recognized that, "[t]he rule of law thus stands in the peculiar state of being *the* preeminent legitimating political idea in the world today, without agreement on precisely what it means." TAMANAHA, *supra* note 3, at 74.

positivists would describe the concept of law itself? Or is the rule of law substantive, like natural law theory's description of law? Natural law theorist, Lon L. Fuller, straddles the line between the two, laying out eight "principles of legality."<sup>12</sup> Kramer has noted that Fuller's "elaboration of the eight principles of legality is a permanently valuable contribution to legal philosophy, but some of his arguments in support or explication of his principles are confused or otherwise inadequate."<sup>13</sup> Regardless, Fuller's eight principles are a useful starting point for describing the necessary and sufficient conditions for a formal (non-normative) theory of the rule of law.

Fuller's eight principles require the following: (1) a generality in making rules, (2) laws that are made publicly known, (3) a ban on retroactive legislation, (4) laws that are comprehensible, (5) laws that are not contradictory, (6) laws that are not impossible to perform, (7) some measure of relative stability in the laws, such that constant changes are not being made, and (8) congruence between the rules as announced and their actual administration.<sup>14</sup> A substantive failure in one or more of these criteria, for Fuller, results in something that cannot properly be called a "legal system."<sup>15</sup>

In the most formal, thinnest concept of the rule of law, the law is seen as the mechanism by which the government performs its duties in society. Brian Tamanaha calls this "rule by law," in which the government acts according to pre-determined public rules as opposed to with unfettered discretion.<sup>16</sup> To Fuller's minimum conditions, Tamanaha adds that the law must apply equally to all persons, regardless of wealth, social status, or power.<sup>17</sup> Joseph Raz extended the concept further, arguing that the rule of law must receive support from certain social institutions, such as an independent judiciary, fair and open hearings, and judicial review of legislative and administrative action.<sup>18</sup> A somewhat "thicker" version of the formal concept of the rule of law requires that law be created democratically to be valid. The concept is still formal because the substance of the law itself is not taken into account in determining its legitimacy. An argument for this thicker version is that it classifies

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12. See generally FULLER, *supra* note 2, at 39.

13. MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW 103 (Cambridge Univ. Press, 2007).

14. FULLER, *supra* note 2, at 39.

15. *Id.*

16. TAMANAHA, *supra* note 3, at 1335–41.

17. *Id.* at 1359–78.

18. *Id.* at 1353–59.

totalitarian systems with oppressive legal regimes as lacking the rule of law; the thinner version does not.

*C. The Rule of Law—Formal and Substantive Conditions*

Numerous scholars have criticized the formal concept of the rule of law as lacking in substance. Indeed, according to the formalists, this is the whole point. They argue that the mandates of an evil dictator—which violate citizens’ rights and liberties—should not count as the rule of law. Perhaps the most well-known alternative to a formal concept is the “rights” concept of the rule of law, advanced by Ronald Dworkin. Dworkin accepts the criteria proposed by formalists, but argues that in addition, the substance of the law must capture the moral rights of the community in order for the rule of law to exist.<sup>19</sup> Dworkin believes that the moral background of the community provides resources for deciding hard cases on which the rules alone give conflicting answers or no answers at all.<sup>20</sup> Judges must tap into this background of morality to decide hard cases.<sup>21</sup> A thicker substantive version of the rule of law described by Tamanaha is the “social welfare” concept, which “imposes on the government an affirmative duty to help make life better for people, to enhance their existence, including effectuating a measure of distributive justice.”<sup>22</sup> This concept, perhaps best exemplified by the German *Rechtsstaat*, requires the government to pass laws that improve the lives of its citizens.

The crux of the “rule of law” contains the concept of “rules,” but it goes much beyond just understanding what rules are. Rules are found in numerous non-law situations: rules of a game, rules of etiquette, rules of morality and religion, and rules embodied by cultural customs. Rules, in the legal context, include statutes, court opinions, administrative regulations, rules of civil and criminal procedure, and rules of evidence. However, the “rule of law,” as a phrase, means something more general than these specific “rules of law.”

Generality is a key component of both rules in general and the rule of law in particular. Generality is the first and most important of Fuller’s eight principles. Without generality, in rules of sport or the rules of law,

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19. *Id.* at 1479–1508. See also RONALD DWORKIN, *LAW’S EMPIRE* 192–202 (Harvard Univ. Press 1986).

20. DWORKIN, *supra* note 19, at 192–202.

21. *Id.*

22. TAMANAHA, *supra* note 3, at 1644.

decisions would be made on an ad hoc (and often *ex post facto*) basis. No general rules would exist by which people would be able to structure their behavior. Judges would hand out case specific decisions with no precedential value. Generality allows rules to be abstracted to multiple similar situations involving different parties.

All laws must also have a means of enforcement. Not all laws are commands backed by sanctions. Empowering laws, for instance, do not fit this definition. However, all rules inherently have some mechanism to deal with their violation. Violating rules of etiquette may trigger nothing more than the disapproval of one's social acquaintances. Violating rules of sport may result in a foul, loss of the game, or ejection from the game. Violating religious rules may result in being labeled as a "sinner" or "infidel" by one's fellow church members.

Laws, then, are general rules enforced by the government or those acting with governmental authority. Violating criminal laws could result in jail time. Violating the laws of wills, on the other hand, means only that the court may not uphold the will. Violating rules of law creation, amendment, or repeal will result in those actions not being deemed legal and therefore null. The legal regime, the government, makes these decisions, enforces the law, and imposes sanctions (in the context of laws of prohibition) or recognizes the valid exercise of a power (for empowering laws).

Finally, the rule of law requires that a law be possible, a requirement that encompasses several of Fuller's criteria, including publication, prospectivity, understandability, non-contradiction, and stability.<sup>23</sup> This not only includes physical possibility, but also logical possibility. It is nonsensical to create a "law" requiring a minimum speed of 400 mph on the highway or setting the date for the next election on the 7th Tuesday of February. It is also nonsensical to create a retroactive law prohibiting a person from engaging in a behavior, which occurred four years ago, and punishing that person today for it (Fuller's principle of prospectivity). It is clearly impossible to avoid a behavior today that could be criminalized, and hence punished, in the future. It is also impossible to comply with a law that is not known (except merely by chance). As a result, the law must be made known (Fuller's principle of publication). It is impossible to comply with a law that is written in a language that is incomprehensible (Fuller's principle of understandability). It is impossible to simultaneously comply with laws that are contradictory (Fuller's principle of non-

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23. FULLER, *supra* note 2, at 39.



contradiction). Finally, it is impossible to comply with unstable laws that are constantly changed (Fuller's principle of stability).

Raz's concept of the rule of law is broader than Fuller's. He proposed that there must also be an independent judiciary, fair and open hearings, and judicial review of legislative and administrative action. While the first two can be seen as part of the concept of enforcement, I think the better interpretation is that these criteria are part of Hart's secondary laws and my empowering laws. An independent judiciary acts as a check on the legislature and administration. The judiciary also interprets and enforces the laws, satisfying Fuller's principle of consistent enforcement. But beyond contributing to enforcement, none of these institutions is a necessary or sufficient condition for the rule of law. Laws can be created and enforced without an independent judiciary, fair and open hearings, or judicial review or fair and open hearings.

## II. THE CONCEPT OF FREEDOM

In this part, I examine different coercive laws and empowering laws and analyze their differing effects on freedom, concluding that all coercive laws reduce overall negative liberty to some extent. However, generally, coercive laws prohibiting severe crimes like bank robbery reduce overall negative liberty more so than coercive laws prohibiting minor crimes like jaywalking. Jaywalking normally results in being detained for a few minutes and given a ticket. The restriction on liberty is relatively small. Robbing a bank can result in a prison sentence of ten years or more. This has a greater effect on liberty than does the sanction for jaywalking. The impact these laws have on society is also unequal. The sanction for jaywalking is relatively minor, and the benefit to society is minor as well: to prevent disrupting the flow of traffic and endangering pedestrians and drivers. The sanction for robbing banks is a severe curtailment of freedom, and the benefit to society is to ensure that citizens trust that their money will be safe in the bank. Lack of trust in banks would have dire implications for the economy. Not all restrictions on liberty are created equal.

### *A. Theories of Freedom*

Not all freedom theories are alike. In particular, a common and important distinction is drawn between negative and positive theories of

freedom.<sup>24</sup> The most influential treatment of this distinction is Isaiah Berlin's "Two Concepts of Liberty." However, it strongly favors negative liberty over positive liberty.

### *B. Negative Freedom*

Jeremy Bentham and John Stuart Mill advocated for negative freedom, which holds that an individual is free in the absence of coercion.<sup>25</sup> Negative freedom defines an individual's personal realm of freedom by what is not present, namely, the coercion or interference by another person. As Berlin states, "I am normally said to be free to the degree to which no man or body of men interferes with my activity."<sup>26</sup> If a person wants to leave his house and walk to the neighborhood grocery store, go to his job, or perform any number of activities, such person would have his freedom restricted, according to the negative liberty theorist, by something or someone that interferes with this person's ability to perform these actions.

According to Berlin, the more appropriate question is, "To coerce a man is to deprive him of freedom—freedom from what?" He describes this coercion as "the deliberate interference of other human beings within the area in which I could otherwise act."<sup>27</sup> Coercion does not describe every disability or inability to achieve one's goals—I am not "unfree" to play professional basketball or run at 100 miles per hour, I am just physically unable.<sup>28</sup> Berlin writes, "You lack political liberty or freedom only if you are prevented from attaining a goal by human beings . . . By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom."<sup>29</sup>

Berlin recognized that if this "area of non-interference" were unlimited, "it would entail a state in which all men could boundlessly interfere with all other men; and this kind of 'natural' freedom would lead to social

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24. There are two additional theories of freedom, which I believe can rightly be termed as derivative or combination theories, as they incorporate parts of positive and negative freedom. Republicanism has been described as essentially a negative theory in its own right, although it is usually contrasted with another negative theory, Liberalism. Furthermore, the triadic theory seeks to explain both negative and positive theories as essentially two sides of the same coin.

25. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Kindle ed. 2010). See also JOHN STUART MILL, ON LIBERTY (Kindle ed. 2011).

26. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 3 (Oxford Univ. Press, 1969).

27. *Id.*

28. *Id.*

29. *Id.*

chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong."<sup>30</sup> How do we balance this inherently conflicted position—interference as a necessary evil? Berlin states, "there ought to exist a certain minimum area of personal freedom which must on no account be violated."<sup>31</sup> The boundary of this "minimum area of personal freedom," however, is the subject of much consternation.

A recent contribution to the theory of negative liberty is Matthew Kramer's *The Quality of Freedom*.<sup>32</sup> Kramer sets out an analytic theory of negative liberty that provides a method for measuring and comparing the overall freedom of individuals. Although the portion of his theory related to measuring freedom lies beyond the scope of this Article, it is important to look at Kramer's view of negative liberty itself.

Kramer's theory relies on two postulates, which he calls the F (for freedom) and U (for unfreedom) Postulates.<sup>33</sup> The F Postulate states, "A person is free to  $\phi$  if and only if he is able to  $\phi$ ."<sup>34</sup> The U Postulate is slightly more complicated: "A person is unfree to  $\phi$  if and only if the following two conditions obtain: (1) he would be able to  $\phi$  in the absence of the second of these conditions, and (2) irrespective of whether he actually endeavors to  $\phi$ , he is directly or indirectly prevented from  $\phi$ -ing by some action(s) or some disposition(s)-to-perform-some-action(s) on the part of some other person(s)."<sup>35</sup> The first four chapters of Kramer's book articulate the intricate bundle of ideas bound up in these two postulates. Although not a formal postulate, there is also a third concept that figures prominently in Kramer's theory—the distinction between being "not free" and being "unfree."

Perhaps the most important point made by Kramer is the distinction between specific freedoms and overall freedom. The majority of Kramer's analysis describes specific freedoms in order to properly distinguish those from a person's overall freedom (discussed in the last chapter). Thus, to be free to  $\phi$  is not to be free in an overall sense, but rather, to be free in the specific sense to undertake the specific action, become the specific thing, or exist in the specific state that  $\phi$  represents.

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30. *Id.*

31. BERLIN, *supra* note 26, at 4.

32. KRAMER, *supra* note 10.

33. *Id.* at 3.

34. *Id.*

35. *Id.*

In the context of specific freedoms, Kramer's analysis focuses on the person's *ability* to  $\phi$ . If a person actually does  $\phi$ , then the person was free to  $\phi$  at the time the person did  $\phi$ .<sup>36</sup> However, the converse is not necessarily true. A person is unfree to  $\phi$  only if the tenets of the U Postulate are satisfied—if the person could otherwise be able to  $\phi$  in the absence of some preventing condition caused by another person's actions or disposition-to-perform-some-action. If the person is unable to  $\phi$ , but some other person does not cause the inability, then Kramer would say such person is merely unable, or not free, to  $\phi$ . This distinction has been seen elsewhere in our analysis of negative liberty. If I am trapped in a room and unable to leave because someone has locked the door, then I am unfree to leave. However, if I am trapped in a room because I suddenly suffered a stroke and am unable to physically move my body, then I am not “unfree,” but rather, I am “not free” to leave.

One interesting concept discussed by Kramer that bears repeating here is that freedom to  $\phi$  is a discrete concept. A person can be free to  $\phi$ , unfree to  $\phi$ , or not free to  $\phi$ . A person cannot be a little free to  $\phi$ , or mostly free to  $\phi$ —either that particular freedom exists or it does not. Specific freedom, Kramer argues, cannot exist in a matter of degrees. Suppose twenty-five men are in a room, and one of them is my twin brother.<sup>37</sup> I cannot see the men, but I am assured that there is a four percent chance that any one of the men is in fact my brother. Does this mean that each man is four percent my brother? Clearly not. Each man either is or is not my brother. So, too, with specific freedom—it is an all or nothing event. In this way, it is different from overall liberty. A person may have greater overall freedom than someone else, because he or she has more specific freedoms. However, a particular specific freedom cannot be greater or less—it just is or is not.

### C. *Positive Liberty*

Theories of positive freedom tend to be more varied than the negative theories, if for no other reason than they describe freedom in terms of the presence, as opposed to the absence, of various conditions of freedom. Although there is some similarity among the theories, the diversity that

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36. Bear in mind that this “freedom” is not a normative freedom. If a person does actually  $\phi$ , nothing is said as to whether, in a normative sense, the person is allowed or permitted to  $\phi$ . Thus, a person can be free to shoot someone else if that person has the ability to do so, although certainly such action is not permitted.

37. KRAMER, *supra* note 10, at 175.

does exist can be attributed to what, exactly, each requires to define freedom. The Ancient Greeks and Romans perceived freedom as active participation in the city-state, or *polis*. People were free if they were not slaves, and free men were given the rights (if not the explicit duties) to participate in the conduct of the government.

To Jean-Jacques Rousseau, and many subsequent theorists whom he has greatly influenced, people are born with a certain amount of freedom, or “natural liberty.” In order to guarantee their personal survival, they form associations with each other, which Rousseau describes as, “all, being born free and equal, alienate their liberty only for their own advantage.”<sup>38</sup> These associations are voluntary, not forced. Social duty is based on convention, not coercion. If a person breaks the social compact, he is either liable to punishment or the compact dissolves, and he is restored to his natural liberty. Fundamentally, the contract requires each person to give up his or her own natural liberty in favor of the conventional liberty given to and guaranteed to all. Each person promises to totally alienate himself or herself, together with all his rights, to the general will of the whole community.<sup>39</sup> Each individual in society makes an “advantageous exchange”: security for insecurity, conventional liberty for natural liberty, and an enduring social union instead of individual strength, which may be overcome by someone stronger.<sup>40</sup> Somewhat paradoxically, Rousseau envisions that the social compact can be enforced against those who refuse to obey the general will:

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence.<sup>41</sup>

How can Rousseau force someone into a social compact that such person has not freely chosen? The answer is clear. The people, being the authors of the law (since all power emanates from their consent) have the right to enact legislation to change human nature for the better. As Rousseau

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38. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 6 (G.D.H. Cole, trans., Kindle ed. 1993).

39. *Id.* at 14–15.

40. ROUSSEAU, *supra* note 38, at 29.

41. *Id.* at 18.

states, the legislators are capable “of changing human nature, of transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being,” and “of altering man’s constitution for the purpose of strengthening it; and of substituting a partial and moral existence for the physical and independent existence nature has conferred on us all.”<sup>42</sup> As long as this “legislation for your own good” is approved by a majority vote, the general will prevails.<sup>43</sup> The general will is infallible—“... the general will is always right and tends to the public advantage.”<sup>44</sup>

After Isaiah Berlin’s damning criticism of positive liberty, numerous writers rose to its defense by arguing the concept that liberty was more than an absence of constraints, but rather the presence of certain other conditions. Hannah Arendt argued that freedom is “the *raison d’être* of politics.”<sup>45</sup> For Arendt, “Freedom as related to politics is not a phenomenon of the will . . . Rather it is . . . the freedom to call something into being which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore strictly speaking could not be known.”<sup>46</sup> In other words, to Arendt, freedom is a performance or action:

Freedom or its opposite appear in the world whenever such principles are actualized; the appearance of freedom, like the manifestation of principles, coincides with the performing act. Men *are* free—as distinguished from their possessing the gift for freedom—as long as they act, neither before nor after; for to *be* free and to act are the same.<sup>47</sup>

Thus, freedom is action or performance (Arendt’s “virtuosity”), and politics is the forum in which men act and freedom appears. Freedom is not the absence of restriction, but rather the action of man in the realm of politics. In order to be free, man must perform his actions, which, statistically speaking, are highly improbable. However, man, through his coming into existence in the universe (as a highly improbable event), must continue to create new beginnings with his actions, which is the only way

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42. *Id.* at 35.

43. *Id.* at 93–94.

44. *Id.* at 25.

45. Hannah Arendt, *Freedom and Politics: A Lecture*, 14 CHICAGO REVIEW, no. 1, 1960 at 28 (1960).

46. *Id.* at 32.

47. *Id.* at 33.

to be free of “automatic processes” of the universe that work against freedom.

Charles Taylor introduced the ideas of the “opportunity-concept” and the “exercise-concept.”<sup>48</sup> Negative liberty is an “opportunity-concept,” because with the restrictions removed, the agent has the opportunity to act freely according to his will. Positive liberty, by contrast, is an “exercise-concept,” because in order to be free, the agent must actually do something instead of just having the opportunity (or the potential) to do so.<sup>49</sup> Taylor draws the path from negative liberty to positive liberty as follows:

Indeed, one can represent the path from the negative to the positive conceptions of freedom as consisting of two steps: the first moves us from a notion of freedom as doing what one wants to a notion which discriminates motivations and equates freedom with doing what we really want, or obeying our real will, or truly directing our lives. The second step introduces some doctrine purporting to show that we cannot do what we really want, or follow our real will, outside a society of a certain canonical form, incorporating true self-government.<sup>50</sup>

In other words, positive liberty recognizes that not all restrictions on liberty are equal—“some restrictions are more serious than others, some are utterly trivial.”<sup>51</sup> Taylor criticizes negative liberty because it lacks an element of valuing different desires. People weigh and value all of their desires differently:

This means that we experience some of our desires and goals as intrinsically more significant than others: some passing comfort is less important than the fulfillment of our life-time vocation, our *amour proper* is less important than a love relationship; while we experience some others as bad, not just comparatively, but absolutely: we desire not to be moved by spite, or some childish desire to impress at all costs.<sup>52</sup>

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48. Charles Taylor, *What's Wrong with Negative Liberty?* 213 (David Miller ed., 2006).

49. *Id.*

50. *Id.* at 217.

51. *Id.* at 218.

52. *Id.* at 220.

### III. FREEDOM AND THE FORMAL RULE OF LAW

There are many theories of the “rule of law,” ranging from the most formal versions with no normative component, to the most substantive versions with a complex normative component. This discussion examines the requirements of formal legality, which form the basis of all theories of the rule of law, and then examines how negative freedom relates to individual rights and social welfare theories of the rule of law.

There is one final point that bears emphasis before turning to the individual components of the rule of law. In analyzing each of these, it is important to ask the purpose behind them, and in turn, the purpose behind the rule of law itself. What is the purpose of the rule of law? In other words, what is the purpose of having a set of rules given the status as law, which are subject to enforcement by the state? Economists state the answer to this question is certainty. The rule of law gives the people certainty in their behaviors, the behaviors of others, the behaviors of their government, and the behavior of the economy. With certainty comes planning. If I am relatively certain that my contracts will be enforced, that my personal safety and the safety of my property will be protected by the state, then I am more likely to enter into economic arrangements.

Even if I am not an explicit economic actor, the certainty that the rule of law provides is the foundation for society to exist. Protection of life allows people to travel outside of their homes. Protection of property allows people to have the confidence to meaningfully invest in their property, cultivate land, purchase equipment, build things. Legal recognition and protection of marriage encourages people to marry, which stabilizes the family unit. Traffic codes solve a coordination problem in the transportation industry, building codes give confidence in the safety of structures, government laws/regulations provide confidence in the safety of medications. Without some level of certainty, social and economic development would be likely too risky to occur.

Furthermore, certainty entails the ability to plan. With relative certainty in life, safety, property, contracts, etc, people are able to plan their lives. I am able to maintain gainful employment, buy groceries, keep my money in banks, own a home, own a car, and travel freely, safe in the knowledge that my activities, as long as they are in keeping with the law, will be protected. I can keep money in the bank for my children’s college tuition and have confidence that it will be there years from now when I need it. I am confident that the police will not harass me, or shake me down for money, or take unlawful action against me because someone else paid them to do so. I do not have to travel in a fully armed group in order to



ensure each other's mutual safety and protection. The law protects my actions in the confines of the law, and because of that protection, I can plan a life of freedom within the law.

#### *A. Generality*

The first principle of legality requires that the laws be general in nature. This principle holds that the law, to be rightly called law, must be written and applied generally to the people in the jurisdiction. This does not preclude the creation and enforcement of laws specific in content, as long as those laws apply generally to the entire people, or a specific subset of the people. Laws are general, whereas court orders are specific directives to a particular person. In other words, the requirement of generality in the rule of law should be contrasted with ad hoc court orders that only apply to specific people in specific fact scenarios.

Coercive laws decrease negative liberty because they reduce the number of specific freedoms a person has. However, they can also create new specific freedoms. Prohibiting murder promotes safety. The unfreedom to commit murder is offset by the creation of new specific freedoms. People who would otherwise have stayed at home guarding their family can now leave their homes and engage in numerous activities they could not have done before.

Empowering laws must also meet the generality requirement of the rule of law. These laws do not impose a sanction for noncompliance; they create validating conditions for actions that the people are empowered, but not required, to perform. But they must still be general. If a court order allowed me the right to vote, that would not be a "law," because it is specific only to me. To be a law, it must apply generally to the entire class of people or some generalized subset. Giving the right to vote to all people over the age of eighteen who are United States citizens and are not convicted felons satisfies the requirement, because it applies to a general class of people.

Does this generality increase or decrease the negative freedom of the persons affected? It depends on how such laws will be used. In other words, freedom for Kramer's negative liberty theory requires that a person possess the "ability" to undertake a behavior. Empowering laws create these abilities as legal abilities. Without a law that establishes validity conditions for wills, a person is legally unable to make a will, just as he or she is physically unable to run 100 mph. Empowering laws make people "able" to perform such behavior. And generally applicable laws allow more people to perform these behaviors, increasing negative liberty.

How does generality play into positive liberty theory? As mentioned above, generality in the realm of coercive laws requires that the laws apply to a class of people, in contrast with specific orders, which only apply to particular people. Analyzing this relationship using a content-free version of law, such as “If A, then B” is difficult. The law itself can aid the individual in planning his or her life by being able to predict the behavior of government officials and others in the regime. By following those laws, people in the regime can then plan their lives around the law.

This shows the bigger issue with analyzing the interplay between positive freedom and formal concepts of the rule of law. If Taylor is right that we are free when we are acting in accordance with our “true” or “highest” self, it is difficult to draw any content-free connections between prohibitive laws and positive freedom. The content of those prohibitive laws can either restrict bad behavior such as murder, or good behavior, such as freedom of speech. If the content of the laws is in accordance with our “true” desires and goals, then those laws would promote positive liberty. If the content of the laws restricts such “true” desires and goals, such laws would diminish positive liberty.

### *B. Possibility*

While Fuller thinks “possibility” is separate from other conditions, such as promulgation, prospectivity, understandability, non-contradiction and stability, I think that all of these are different facets of the concept of possibility, and therefore they will be discussed in that light.

#### *1. Promulgation*

Formal legality requires that the laws be promulgated, or made known to the people over whom they will be imposed. If one goal of a legal system is to resolve coordination problems of a complex society and to allow the people to plan their behaviors according to the rules, then the laws must be made known to the people. However, it would be impossible to satisfy this condition completely for every person. Publication of the law does not mean that every person will be able to access it. This access problem is mitigated somewhat by the existence of legal experts—lawyers, judges and administrators—to whom the people can turn to for advice on the law.

What is the relationship between negative freedom and the requirement that the law be promulgated? For the sake of this part, assume that laws can exist whether promulgated or not. Thus, laws exist in a legal regime,

but have not been made known to the people on whom they are imposed. In this limited sense, then, it seems that requiring promulgation of the laws would not affect the negative liberty of the people at all. The same behaviors can be prohibited by the law regardless of whether such laws are made known to the public. However, the burden that this lack of promulgation creates for citizens reduces the amount of negative liberty they enjoy. In a society where laws are created and enforced, but their existence and content remain unknown to the people, the people cannot plan their behaviors to avoid the sanctions. People may feel afraid to undertake any but the most known “safe” behaviors for fear of violating an unknown law. Thus, the people will likely reduce the number of behaviors that they may otherwise engage in for fear of there being a law against it. It is the fear of sanction, not the certainty of it, which causes this. As promulgation increases, people can better plan their behaviors without fearing the imposition of some seemingly random sanction.

Similarly, increasing promulgation of empowering laws also increases negative liberty. Empowering laws can create legally valid rights or powers. As shown above, because these empowering laws create new legal abilities for the people, people enjoy more freedoms. However, as with coercive laws, empowering laws exist whether the people know about them or not. Should these new legal abilities count towards freedom if the people are unaware they exist? Even though the abilities may exist in such a situation, it would be nearly impossible for the people to take advantage of such laws if they were unaware of them. Taylor described negative liberty as an “opportunity concept” in contrast to positive liberty as an “exercise concept.” Even if the people do not actually exercise the rights given in empowering laws, they still possess those rights. However, since the people do not know such laws exist, they do not have the “opportunity” to exercise their rights in accordance with such laws. They do not have to actually exercise those rights, but it seems plausible that there must be some minimal level of knowledge that such rights exist to even claim that the people have the opportunity to follow those laws. Without promulgation, the people are denied knowledge of the opportunity, and without knowledge of the opportunity, the people are denied the opportunity itself.

The effect that promulgation (or lack thereof) has on the relationship between positive liberty and coercive laws is similar to the effect described above with negative liberty. In the case of coercive laws, the law will impose a sanction on a person for violating the law. Without knowing what behaviors the laws prohibit, people will likely reduce all of their behaviors to only the safest ones—those which they have learned in the

past will not result in a sanction by the government. Since positive law requires people to take certain actions to fulfill their higher order desires in accordance with their “true” selves, if the people do not know which actions will result in the imposition of a sanction, they will not pursue those actions which they are not certain will result in sanctions.

In order to maximize positive liberty, people must be able to take actions to work towards realizing their goals. If the threat of sanction looms large, people will always be under the fear of wrongly acting, and they will curtail their behavior accordingly. Therefore, laws that prohibit behaviors should be promulgated in a manner in which the people can access them to plan their lives and fulfill their desires.

Because empowering laws grant rights to the people to be used to better their lives, promulgation is necessary for people to learn of these rights. Empowering laws can add to positive liberty by creating rights or powers in the people. If the validity conditions are satisfied, the government will legally recognize and enforce these rights or powers. If the people never learn of these rights and powers, they will not be able to exercise them, and they will have less positive liberty. Promulgation of empowering laws increases positive freedom.

## *2. Prospectivity*

Prospectivity also helps people to plan their behaviors according to the law. Creating retrospective laws that render unlawful behaviors that, at the time they were performed, were lawful, punishes people who are then powerless to change their behavior to avoid the sanction. This results in arbitrary punishment, because individuals can never know what behaviors performed today will be illegal tomorrow.

Negative liberty increases as the number of behaviors that a person is able to do are not restricted by the government. As each restriction is removed, the person gains an additional specific negative liberty. Paradoxically, retroactive laws do not inhibit behavior on the part of the citizen. At the time such behaviors are performed, they are not the subject of coercive laws that impose sanctions. Thus, the government is not preventing anyone from performing the behavior that at time  $T_1$  is lawful, even though at some later time,  $T_2$ , the behavior is deemed unlawful going back to time  $T_1$ . While the law may be able to time travel, the person performing the behavior cannot. Therefore, there is no restriction on the person’s behavior, and the person is free to perform the behavior at  $T_1$ . Furthermore, unless there is some method whereby the people can predict which behaviors will be retroactively sanctioned at or before  $T_1$  to allow

them to avoid the behavior entirely at  $T_1$ , they will not even be able to curb their behavior at  $T_1$  accordingly.

When the laws are not promulgated, people are afraid to do things they have not done before. With respect to retroactive laws, however, they may not be retroactively punished for their behaviors for days, weeks, months or years. They may be able to perform a particular behavior fifty times before it is suddenly made illegal, and therefore they may not curb that behavior at all.

Retroactivity has different implications for empowering laws. Since empowering laws give legal validity to certain behaviors performed in certain ways, the person performing such behaviors likely would not do so if, under the state of the law at  $T_1$ , the behavior was not allowed by the regime. For example, people would not perform the validity conditions to make an effective will if, under the current law, there is no procedure to make an effective will. People would not perform the behavior hoping that at some arbitrary time in the future, such actions would be given retroactive legal validity by the regime. If there was no mechanism to give legal validity to those behaviors before such behaviors were performed, the people would not perform them to begin with.

The real problem for empowering laws is when a law is retroactively given effect that renders a power or right invalid. In this situation, a person has met the validity conditions enacted into law at time  $T_1$  for the behavior he or she wishes to have legal recognition by the regime, such as making a will, entering into a contract, or casting a vote. At sometime later— $T_2$ —the regime retroactively either repeals the empowering law or enacts additional validity conditions, which the person at  $T_1$  did not meet and could not have anticipated. Thus, at  $T_2$ , which could be weeks, months or years after  $T_1$ , the behavior the person engages in is no longer legally recognized as valid, and is further deemed invalid for the period from  $T_1$  to  $T_2$ . This is especially problematic if, during that interim time period, the person has relied on the will or the contract in conducting his or her affairs.

This type of retroactive legislation suppresses economic activity by increasing uncertainty about what the law is. People who start businesses, enter into contracts, and buy or lease property do so with the expectation that the laws in place at the time they enter into those arrangements will remain in place to protect their property and economic rights. If a business enters into a valid lawful contract at time  $T_1$ , and invests capital and labor into performing the contract, the business expects to obtain the benefits it is due under the contract. If the government at time  $T_2$  makes the contract retroactively illegal or void, thus disrupting the duties and obligations

owed under the contract, businesses will soon be wary of investing any money or entering into any contracts for fear that the same will continue to happen in the future.

If retroactive legislation removes powers granted previously by empowering laws, those acting under the contracts are rendered unfree according to negative liberty theory. This is different than being not free by having their legal rights taken away. In other words, we may be tempted to think of this as the government removing abilities, such that the people are only not free to act under the contract because their legal ability has been removed. This is incorrect. Above, when discussing the effect of promulgation on the negative liberty associated with empowering laws, we saw that making people aware of their powers and rights makes those people aware of their legal abilities under the law, which increases their negative liberty. Under the problem of retroactive legislation, the government has already enacted these empowering laws, thus giving people these freedoms, and then acts again by taking them away. Legally, the government may act to make the laws as if they had never existed at all, but in practical reality, its action takes away a legal ability of the people to act, which renders the people unfree.

What is the connection to positive liberty? In order for people to possess positive liberty, they must be able to undertake certain behaviors that are in accordance with their “true” selves or “higher order” desires, and avoid those behaviors that interfere with this. In order to do this, as stated earlier, the people must be able to plan their behaviors in accordance with the prevailing laws so as to avoid fines or imprisonment. Retroactive coercive laws inhibit this planning because at the time they are undertaken, the behaviors are legal. Therefore, people cannot avoid illegal (and thus “bad”) behaviors when, at the time the behaviors are performed, there is no indication that they will become illegal.

Retroactive coercive laws, if abundant enough, can also be a sign of an unstable legal system or government. These laws severely disrupt the people’s ability to prospectively plan their lives and take action in accordance with freedom, because they are always in danger of arbitrarily losing that freedom, with no ability to predict when that will occur. This haunting specter of retroactivity hangs over the people, who must always be on guard or live in fear of it occurring. What actions should they avoid? There is no way to know. Only prospectively coercive laws can allow the people to plan their lives in such a manner that they can maximize their liberty without tripping across the law and incurring a sanction.

As stated above, retroactivity can influence empowering laws in two respects: (1) by counting as valid actions taken in the past for the

recognition of some present right (not likely), or (2) the retroactive invalidation of a right that was previously attained. Whether the person has entered into a contract that is later called void, or has created a will or trust which are later deemed invalid, the ability of a person to pursue their goals and plan their life becomes nearly impossible when the plans they make are no longer recognized by the regime, and therefore the plans are given no legal effect.

Prospectivity is required to a high degree in any efficient or functional legal system. The goal of a legal system, and the laws therein, is to allow the people a good amount of predictability in society, both in predicting the actions of their fellow citizens and in predicting the actions of the police, courts, and administrators. Retroactive laws destroy this predictability. Retroactive punishment or invalidation of rights serves no benefit to the people, even if it does to the individual leaders of the regime.

### *3. Understandability*

Similar to the concept of promulgation, the people must understand the law in order to obey coercive laws and avoid sanctions. Although negative liberty is increased as the coercive laws—either in number, content, or application—decrease, the people cannot follow the laws if the laws are not understandable. The understandability of the laws is analogous to the promulgation of the laws—in both cases the people must know what is expected of them in order to plan their lives accordingly to avoid sanctions. Incomprehensible laws not only fail to provide the people with this ability to predict and plan, they will also instill a feeling by the people that the government is incompetent and arbitrary.

Additionally, it may be difficult, if not impossible, for the regime to make the laws understandable to all of the people over whom the laws are imposed. In a modern western liberal democracy, the menagerie of laws needed for the society to function can be very complex. If the people are not legally trained, as would likely be the case, it's probable that the people would not understand the majority of the laws. Thus, the principle of understandability is satisfied if the legal experts in society can understand the laws, and the people have access to the legal experts for advice on what the laws mean.

Empowering laws create new legal abilities: a form of negative liberty. However, as with the concept of promulgation, the people cannot have these new legal abilities without knowing about them, or knowing how to exercise them. This is not to classify negative liberty as an exercise

concept, but rather, whether the people take advantage of the empowering laws or not, their existence, and understanding by the people, create the abilities. Therefore, if the people do not understand the rights created by the empowering laws, or do not understand how to exercise such rights, they cannot reasonably be said to possess such rights.

Understandability is crucial to the rule of law, and it contributes substantially to the negative freedom that the people enjoy. The ability to understand coercive laws allows people to plan their lives around the law so that they can live while avoiding sanctions. Furthermore, the ability to understand empowering laws creates new freedoms by allowing people to know what new legal abilities they have and how to exercise them.

In order for the people to plan their lives to maximize their higher order desires and achieve their goals, it is imperative that the people understand the laws. Generality and promulgation will mean nothing if the laws promulgated to the people are incomprehensible—either from being nonsensical, or more likely, from being overly complex. Failure to understand the prohibitive laws will result in sanctions being imposed for reasons unknown to the people. Failure to understand means an inability to plan one's life around the law.

The practical problem posed by understandability was raised above in the part on negative liberty—in any reasonably complex society (certainly in all western liberal democracies) the law is complex. For an average person trying to maximize positive freedom, it would be nearly impossible to understand all of the laws in society without devoting a substantial amount of one's time learning the law. Thus, the understandability criteria can (and must) be met by the reasonable availability of legal experts in society who can understand the law and inform the average person when needed. This will allow the people to maximize their freedom in their own ways without devoting their lives to the law, while still having a resource to assist in any legal questions that arise.

Since empowering laws give legal rights, the people must understand the laws to take advantage of their rights. Failure to understand the rights or powers granted in the law, or a failure to understand the validating conditions of the law will result in the people being unable to take advantage of the rights such laws offer. This will result in a failure of the people to use these empowering laws to achieve their true selves or higher order desires. Again, as the laws become inevitably complex, it may be impossible for the average person to take advantage of the laws without the assistance of legal experts.



#### 4. *Non-contradiction*

Even if the laws are general, are promulgated, are understandable, and are prospective in nature, if the laws contradict or conflict with each other, the people will not know how to act in accordance with the laws. Laws that are truly contradictory and require a person to both perform an action and refrain from performing the same action will result in unavoidable mass confusion and the imposition of arbitrary sanctions. In other words, if the law requires a person to perform some action X or face a penalty, or refrain from performing some action X, or face a penalty, then the person cannot avoid the penalty.

In a system of numerous complex laws, it is possible that contradictory laws may arise purely by accident without any ill will or gross incompetence of the regime. Most regimes have mechanisms that allow them to resolve these conflicts. For example, in the United States, if a federal law conflicts with a state law on the same issue, the federal law is enforced by the principle of preemption. If two laws in the same jurisdiction conflict with each other, courts typically enforce the law more recently enacted, reasoning that the legislature must have meant to repeal the older law. Allowing contradictory laws to stand in a jurisdiction creates problems of enforcement and possibility of performance, which severely disrupts the rule of law.

With respect to negative liberty, the people will gain freedom as the number of coercive laws decreases. However, if the law requires that a person do X or face a penalty and also do not-X or face a penalty, then the action actually performed by the person will not matter. In either scenario, the law is violated and the person is subject to a sanction. This destroys the ability of the people to structure their lives around the laws, and to behave in such a manner that does not result in a sanction against them. As stated above, when the people are unaware of the laws, they will curb their behavior in a manner to avoid acting in any but the safest ways, to avoid the possibility of sanctions for behaviors that are unknowingly prohibited by the government. In the case of contradictory laws, the people cannot even reduce their behaviors to avoid sanctions because the laws are known to them and impose a sanction regardless of their behavior.

Since empowering laws create new legal abilities, which increase overall negative liberty, empowering laws that are contradictory pose a special problem for negative liberty. In order to have contradictory empowering laws, the created right or its validating conditions must be mutually exclusive. In other words, it is not contradictory for the law to require two witnesses to the valid creation of a will, and also require three

witnesses. Wills created under the first law will not be valid under the second, but laws created under the second will be valid under both.

Therefore, in order for empowering laws to be contradictory, the laws would have to bring into existence a right, such as creating a will, and also affirmatively declare that no such right exists under the law. This would be strange. Similarly, if the law required a writing, and also stated that no writing was necessary, then written wills would satisfy both criteria. Contradictory criteria would be to require that wills be written, and also to require that wills never be written. Again, this would be strange legislation. Even if contradictory legislation in the realm of empowering laws would pose no practical problems for the people, it would make the legal regime seem incompetent, which instills a feeling of contempt for the government in the people.

In order to maximize positive liberty, the people must be able to structure their lives in such a way as to avoid sanctions and to take advantage of rights, which allows people to plan their lives in a manner they believe will maximize freedom in accordance with their highest goals. Contradictory laws destroy this ability because the mechanism to avoid sanctions is non-existent. If laws require a person to do some action A and also refrain from performing A, both of which carry a sanction if violated, then the person is stuck with a sanction no matter what. Unavoidable sanctions breed dissent because the people are helpless to avoid the sanction, and therefore they believe that the regime is determined to sanction them no matter what.

Similarly, the people cannot structure their lives to fulfill their goals and maximize positive liberty by taking advantage of empowering laws unless the laws are not contradictory. If there is ambiguity in the law, such that empowering laws seem contradictory, the people will be hesitant to take advantage of such laws until the ambiguity is removed and there is some certainty that the powers people wish to use will be given effect. As shown above in the discussion on negative liberty, it would be conceptually difficult to have truly contradictory empowering laws, but the injection of uncertainty into the use of the empowering laws can detract from the desire of the people to take advantage of and rely on such laws to promote freedom.

### *5. Stability*

Finally, stability in the law is another form of “possibility” in that citizens cannot comply with laws that are changing so frequently as to be unknown at any given time. Stability in the law requires that the law must

remain relatively stable over time, without too many or too frequent changes. Constant changes in the law act to deprive citizens of the ability to predict the requirements imposed by the law from day to day, and if frequent enough, this causes the people to not know the most current version of the law at all. However, absolute stability in the law is impossible. Every legal system must include some mechanism for the repeal, amendment, or enactment of laws. Failure of the law to adapt to a changing society will eventually lead to a law that is no longer relevant or applicable to many current problems. Changes are important, but it is only when the changes in the law become so numerous or occur with such frequency that they begin to destroy the legal system itself.

The problem of instability in the law is similar to the problem of the lack of promulgation or the lack of understandability. If the law is going to create prohibitions on certain actions, followed by a sanction for noncompliance, then the law has to be stable enough for the people to learn and understand the law and plan their future behavior accordingly. Constant changes in the law lead to people not knowing the law with any certainty, and thus either the law is not understandable or is not possible to perform. Furthermore, if the regime is constantly changing the law, the entire regime will seem unstable, not just the law. In some respects, the problem of instability is a larger problem than understandability or promulgation, both of which can be alleviated through the use of legal experts. If the law itself is constantly changing, even legal experts, including courts and administrators charged with resolving conflicts, will not know what the law is. People acting on what they believe is the law will result in sanctions being imposed for behaviors that people thought were legal, but have become illegal.

Furthermore, if the empowering laws change so much that the people cannot take advantage of them, then they never really gain the rights contemplated by those laws. Empowering laws can come into existence (create new rights) or go out of existence (extinguish rights). They can change in their material terms, which change the rights of the people, or the validating conditions can change. Any changes in these rights effects a modification in the negative liberty of the people because these legal abilities can be altered with such frequency that the people are unaware of the change or cannot comply with it. This relates to the problem of promulgation or understanding, where the people do not understand their rights, and therefore cannot exercise them. While negative liberty does not require the people to exercise rights in order to be considered free, it does require that the people possess ability. If the laws change so much that the people do not know their rights, then they have no legal ability, and thus,

they are deprived of the negative liberty associated with those legal abilities.

Finally, if the people know their legal abilities, but the law changes to remove legal recognition from the rights associated with those empowering laws, then the government has removed a legal ability that the people once had, which results in an unfreedom (the government interfering with the legal ability the citizen possessed). Instability in the laws would result in people not being able to take advantage of their negative liberty or in people being stripped of the liberty (associated with those empowering laws) altogether.

Stability in the law requires that the laws must not be enacted, modified or repealed with such frequency that it drastically impairs the citizens' ability to know, understand, and plan their lives around the law. Some instability is desired in the law, because in every legal regime, the law must respond to changing social realities. However, if the changes in the law occur so frequently that even if the people can understand and perform the law, the people cannot rely on the law or plan their lives accordingly if there is a very real chance that the law will change tomorrow. Additionally, frequently changing laws may seem to the people to be a sign of an incompetent legal regime that cannot establish a stable legal system. Stability in the law breeds stability in the regime.

In order for people to use empowering laws to maximize their positive freedom, the people must be able to know the laws and rely on the laws to continue in existence in order to protect their given rights. Frequent changes in the empowering laws results in people not being able to take advantage of the powers such laws grant, or having such powers taken away. In addition to being stripped of rights, a climate of uncertainty will create a citizenry that will not try to take advantage of these laws at all, despite their content. Without government recognition of the rights given by empowering laws, the laws are pointless. Thus, without stability in the law, people cannot pursue their goals with the assistance of the empowering laws.

### *C. Enforced as Written*

The final principle of legality requires that there be some high level of congruence between how the laws are written and how they are in fact enforced. If the goal of a legal system is to manage the coordination problems of a complex society and allow the people some ability to predict the actions of others (other citizens and the government officials), then the people must be able to rely on the fact that the laws will be

enforced according to their terms. A large chasm between the letter of the law and the enforcement of the law is damaging to the rule of law because it damages this predictability. Laws can be inconsistently enforced in a number of ways. Laws can be consistently under-enforced, to the point that the citizenry begins to question whether the laws are actually still laws at all. Furthermore, the law could be consistently enforced at random, so that from day to day the people would not know whether the law would be enforced. This uncertainty damages the rule of law and the legal regime.

Negative liberty can be affected in numerous ways by the laws not being enforced as written. If the laws are very oppressive, but the police and courts do not enforce them oppressively, then liberty can actually be increased by the government not oppressing the people as much as the law would allow. Conversely, if the government enforces the laws more oppressively than the law is written, the negative liberty of the people will decrease. Additionally, if the laws are enforced in an inconsistent and unpredictable manner, then the people will have limited ability to predict the actions of officials and will constantly live under the threat of the government using the laws, properly or not, to oppress them.

Consistency in enforcement is important to the negative liberty of the people, especially regarding coercive laws, because people must be able to predict the behavior of government officials in order to plan their lives accordingly. Even in a regime where oppressive laws are under-enforced, people may rely on that lack of enforcement and then be surprised when the government begins regular enforcement. The people in such a regime cannot safely rely on the under-enforcement of coercive laws. If the law is arbitrarily enforced, the people must conduct themselves as if the law were being consistently enforced, in order to adequately plan for the law. However, inconsistent enforcement will lead the people to lose respect for the regime because the lack of consistent enforcement will be viewed as institutional incompetency. If the government wishes to no longer enforce the laws, then it should change them. If the government cannot change the laws but can fail to enforce them, the entire rule of law is undermined.

Lack of consistent enforcement can negatively affect the freedom created by empowering laws. If the powers and abilities granted to the people in empowering laws are not enforced, then the people's negative freedom will be diminished. People will not enter into contracts, create wills, or use other legal procedures if they are never sure that what they are doing (which may be in accordance with the written law) will actually be given legal effect. The ability to predict the actions of others, including other parties to contracts or government officials charged with enforcing

such contracts, is crucial. Inconsistency in enforcement detracts from the predictability that the rule of law gives the people.

Furthermore, if the government fails to enforce laws that recognize legal abilities of the people, then the practical effect is that the people do not have those legal abilities. The point of empowering laws is to give legal recognition to the rights of the people if certain validating conditions are met. If there is no recognition, even if the validating conditions are met, then there is no point in satisfying the validating conditions. The lack of enforcement destroys the legal abilities associated with empowering laws, and therefore destroys the negative liberty associated with those laws.

Positive liberty is also diminished by the lack of predictability associated with the problem of enforcing laws as written. If the people can never be sure how the laws will be put into action, they cannot avoid coercive laws, or their sanctions, and therefore they cannot structure their lives around such laws. Laws can be either enforced regularly, or not at all for some time period, or enforced in a seemingly random or arbitrary manner. In any of the scenarios, people would be well advised to follow the dictates of the law to avoid sanction, but if the law has a long history of non-enforcement, the people may begin to rely on that non-enforcement in planning their lives. Thus, while the people are seeking to maximize positive liberty in this regime, they must either follow the letter of the law, or fail to do so at their own risk, no matter how small they perceive that risk to be.

A failure to properly enforce the laws can lead to dissent. Inconsistent enforcement of coercive laws can be seen as stemming from an incompetent regime, which may be enforcing the laws arbitrarily. If the people cannot count on coercive laws being enforced, they will not be able to plan their lives under the law. Even if one person follows the letter of the law to be safe, others may be willing to violate the law, knowing that there is a small chance that it will actually be enforced. If these laws protect the property or the safety of the individual, law-abiding citizens may be afraid to participate in society for fear of being assaulted, robbed, or murdered. Clearly, in a regime like this, it would be difficult for people to plan their lives to maximize freedom. Inconsistent enforcement damages the individual's ability to predict the actions of the government or others in society.

Finally, people must have some certainty or predictability in how empowering laws will be enforced in order to use those laws to increase positive liberty. Creating wills, entering into contracts, or establishing corporations are only desirable for those wishing to do those activities

when they can count on a stable government that will enforce their rights under the law. If a regime fails to enforce property rights, or fails to hold people to contracts, the citizens will not be willing to go through the trouble to undertake these activities in the first place. Thus, the empowering laws cannot be used to promote positive freedom if the government fails to uphold its fundamental duty to the people—the legal recognition and protection of their rights under the law.

#### IV. FREEDOM AND THE SUBSTANTIVE RULE OF LAW

Recall that the substantive rule of law (often stylized in capitals as the “Rule of Law,” to set it apart from the formal lowercase “rule of law”) includes some normative measure by which to judge the law, in addition to the merely formal rule of law addressed above. These theories require us to look to something outside of the law to determine whether the law (or legal system) is adhering to the Rule of Law. This is a normative analysis. Even if all of the formal elements of legality are satisfied, the laws/legal system will be considered in violation of the Rule of Law if the laws fail to meet the normative criteria set forth by the theory.

##### *A. Individual Rights Theory*

The individual rights theory holds that a proper Rule of Law must protect the individual rights of its citizens. A regime will violate the Rule of Law to the extent that it uses the formal rule of law to oppress individual rights. The most well-known of these theories is the “rights” concept of the rule of law advanced by Ronald Dworkin. Dworkin accepts the formal rule of law, but argues that in addition, the substance of those laws must capture the moral rights of the community.<sup>53</sup> The law must recognize and protect these individual rights.

Since coercive laws tend to decrease negative liberty by restricting the number of permissible behaviors, a regime adhering to an individual rights version of the Rule of Law must only create coercive laws that do not interfere with the individual rights of the people, such as the rights to freedom of speech, freedom to assemble, and freedom to practice religion. In dictatorial regimes, the government often suppresses dissent by banning criticism of the regime. Protests, rebellious writings, and other subversive exhibitions of individual rights are not tolerated. Coercion suppressing individual rights violates the individual rights version of the Rule of Law.

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53. DWORKIN, *supra* note 19, at 192–202; *see also* TAMANAHA, *supra* note 3, at 1479–1508.

On the other hand, coercive laws can impose sanctions for actions that violate the individual rights of the people. An example of this law would be civil rights laws, which typically provide for both private causes of action and government causes of action against a party that violates the civil rights of others.

Furthermore, negative liberty can be increased by the enactment of empowering laws, as such laws create new abilities. With respect to an individual rights theory, a regime will adhere to this Rule of Law if it enacts empowering laws that confer individual rights (like the U.S. Constitution's Bill of Rights) and then protect the exercise of those rights. By granting people protection from unreasonable searches and seizures, giving them a right to due process of law,<sup>54</sup> a regime will protect the rights of the people and adhere to the Rule of Law. Failure to protect these rights oppresses the people and violates this Rule of Law. Bear in mind, however, that an increase in empowering laws may correlate with a decrease in the negative liberty experienced by others. For example, if a law such as the Statute of Frauds requires certain contracts to be in writing, I am no longer free to enter into merely oral contracts.

Positive liberty requires the person to fulfill his or her higher order desires, and as shown above, the use of coercive laws can aid a person to fulfill these desires by coercing the person to avoid behaviors that block this positive liberty. A regime will adhere to the individual rights version of the Rule of Law if such coercive laws restrict undesirable behaviors and promote desirable behaviors. If the regime promotes individual rights, such that it can claim adherence to this Rule of Law, it must give the people the opportunity to exercise these rights. This relationship, however, assumes that the behaviors prohibited actually work against positive liberty.

Additionally, empowering laws create powers or rights, and if such powers are in line with the higher order desires of the people, such powers promote positive liberty. Individual rights promote positive liberty because such rights support the person in his or her goals and protect the person from oppressive interference from other people and the government. The trade-off here is that if a person previously had an unfair advantage in society, such as in the college admissions process, and the law now levels the playing field by promoting the advantages of others, then the person with the previously unfair advantage may see this advantage disappear, and as a result, find it harder to satisfy his or her higher order desires.

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54. U.S. CONSTITUTION, AMENDMENTS IV, V, XIV.



*B. Social Welfare*

The social welfare theory of the Rule of Law is more substantive than the individual rights theory. To meet its criteria, a regime must not only adhere to the formal rule of law and protect individual rights, but also affirmatively promote social welfare by taking affirmative steps, through the use of the law, to improve the lives of its citizens.

How can the use of coercive laws promote negative liberty in a social welfare Rule of Law? Clearly, laws prohibiting murder, assault, and theft promote social welfare by protecting people and their property. Furthermore, coercive laws can create sanctions for actions that decrease social welfare. However, these coercive laws, like most coercive laws, restrict the negative freedom of the individual to the extent that the individual can no longer perform those behaviors that are now prohibited.

The clear relationship between this social welfare Rule of Law and negative freedom is indicated by looking to empowering laws. The regime can create numerous laws that promote social welfare, such as free universal health care for all citizens, an income redistribution scheme based on the use of the tax code to promote social welfare goals, food benefits, free education, and so on. These programs create new abilities for the people by making these programs available to everyone, and therefore, the people now have new abilities, which is the hallmark of negative freedom. There is a definite trade-off, however. Again, the freedoms gained by redistributing income are offset (and it is unknown whether in whole or merely in part) by the reduction in individual freedom to spend one's income however one chooses. Furthermore, to the extent that these programs are mandatory, they restrict the negative freedom of those who do not wish to participate. Social welfare seeks to promote the overall freedom of society often at the expense of individual freedom.

Coercive laws can also promote positive liberty in a social welfare system. Since positive liberty occurs when the individual realizes (or works towards) his higher goals and desires, laws that sanction behaviors that interfere with socially undesirable behaviors promote such liberty. However, as with negative liberty, there is a definite trade off when legislating for positive liberty. While positive liberty is promoted when social welfare programs give people the opportunity to follow their higher order desires, such programs can also restrict the positive liberty of others. If one person is using his money to further his higher order goals (perhaps, maybe, to own his own successful business), then a redistribution of his money into social welfare programs may promote liberty in those people who benefit from the programs, but it will also reduce this businessman's

ability to own a successful business if his money is being redistributed. Because social welfare seeks to better the people as a whole, sometimes to the detriment of the individual, the freedom gained by all is freedom lost by some.

Thus, coercive and empowering laws can be used to increase or decrease the amount of liberty (either positive or negative) that a person has, depending on the content of the laws and the purpose behind them. Empowering laws confer on people powers to take actions that will be recognized as legally valid by the government. Laws to promote education, health, and social welfare can give people the powers to perform actions that lead to these things. Laws can also negatively impact social welfare and/or individual rights by failing to give people these powers or by creating and enforcing sanctions for people engaging in these activities (such as the education of girls in Taliban-controlled Afghanistan). If we accept a social welfare or rights based version of the Rule of Law, then we must be able to understand how the laws affect social welfare and rights, and be willing to state that the Rule of Law is broken if it fails to meet these criteria.

#### CONCLUSION

Adherence to the rules of formal legality promotes freedom by creating stability and predictability in the law. Stable laws allow citizens to plan their behavior around the law, which increases their freedom. Coercive laws can promote negative liberty bringing order to the Hobbesian state of nature. However, they can also decrease negative liberty by restricting the behavior. Empowering laws promote negative liberty by creating new legal abilities, which the people can perform. The law can enhance positive freedom when it prohibits negative behaviors and promotes positive behaviors. Finally, the content of the law can be used to either promote or suppress individual freedom. Thus, there is a complex relationship between freedom and the rule of law, which, when studied carefully, can be used to learn how the law affects freedom.