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Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law

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NEUTRALITY ISN'T NEUTRAL: ON THE VALUE-NEUTRALITY OF THE RULE OF LAW

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I. INTRODUCTION

"*The very definition of a republic is an empire of laws, and not of men*."

—John Adams, *Thoughts on Government*[1]

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 and one finds some argument over the precise conditions that it encompasses, 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 be held as accountable to the law as are ordinary citizens.[2]

Moreover, few challenge the Rule of Law as a worthy ambition. In the words of one recent author, the ideal has become very close to "a universal secular religion."[3] While those in charge of a given legal system may not

1. JOHN ADAMS, *Thoughts on Government: Applicable to the Present State of the American Colonies*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 288 (C. Bradley Thompson ed., 2000).

2. This is not meant as a careful statement or a definite embrace of these as opposed to other conditions sometimes put forth (such as access to courts, to a fair trial, or the right to a jury), so much as a reminder of the sorts of conditions widely thought to constitute the Rule of Law. In the modern era, the ideal is perhaps most closely associated with Albert Venn Dicey, who expounded the fundamental precepts of the unwritten British constitution. ALBERT V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (E.C.S. Wade ed., Macmillan and Co. 1939) (1885). For fuller discussion, *see, e.g.*, LON L. FULLER, THE MORALITY OF LAW (1964); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 101–86 (2007); TOM BINGHAM, THE RULE OF LAW (2010); Andrei Marmor, *The Rule of Law and Its Limits*, 23 J. L. & PHIL. 1 (2004); Richard H. Fallon, Jr., "*The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); and Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 1 (2010).

3. *Pillar of Wisdom*, THE ECONOMIST, Feb. 13, 2010, at 84 (reviewing TOM BINGHAM, THE RULE OF LAW (2010)) (quoting Bingham).

always live up to their professed devotion to it, one is hard-pressed to find explicit denials of the ideal's propriety.[4] 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.[5] Insofar as they view it as desirable, they do believe it has some value, of course. Where scholars differ is over the exact character of that value, in particular, whether the Rule of Law offers moral value. Many believe the strength of the ideal stems precisely from its moral 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 may install acutely disparate content in their laws.[6] 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 organizations—to nurture the Rule of Law.[7] Antonin Scalia conveys this value-neutral perspective when he cheers, "[l]ong live formalism. It is what makes a government a government of laws and not of men."[8]

Is it?

I think not. Part of 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

4. JOSEPH RAZ, *Formalism and the Rule of Law*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 309 (Robert George ed., 1992).

5. *See, e.g.*, KRAMER, *supra* note 2; RAZ, *supra* note 4; as well as others discussed in Part III.

6. *See* TAMANAHA, *supra* note 2, at 94–95; *see also* RAZ, *supra* note 4, at 309.

7. The concept has received considerable attention from economists, of late, particularly from the school of New Institutional Economics. *See, e.g.*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). De Soto's book generated interest in the legal conditions most conducive to economic growth. *See also Order in the Jungle*, THE ECONOMIST, Mar. 15, 2008, at 83–85 (discussing economists' attention to the Rule of Law).

8. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed., 1997) (emphasis added). John V. Orth notes an understanding of the Rule of Law as "having no defined, nor readily definable, content." DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1093 (1980) (quoting JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 31 n.34 (2003)).

actually thwarts our ability to enjoy the benefits that it can and should provide.[9]

That is a rather large thesis, however, and one whose full vindication would require an in-depth defense of the political and moral premises on which it stands. My principal aim in this Article is thus somewhat more modest: to call attention to the fact that the Rule of Law is an ambiguous ideal. More exactly, its ideal-ness is ambiguous. Is it an ideal which, when satisfied, delivers a positive good? A state of affairs desirable in its own right? Such that a government that provides the Rule of Law is, in virtue of that, morally superior to a government that does not? Or is its value relative to the particular ends of the government that it serves, a strictly internal and instrumental value, such that a regime that conforms to Rule of Law standards is not thereby better than alternatives in any very robust sense?

While the latter position may be easier to defend, our invocations of the Rule of Law tend to assume that its value is the former, worth fostering in its own right. And many who claim that the Rule of Law is value-neutral actually treat it as if it is good in a "bigger" way than that reflected in its being a useful instrument. It is this denial of the Rule of Law's larger moral value that I find suspect. Although I do hope to make strides in bringing readers to see the infirmities of the value-neutral conception, my primary goal here is simply to expose the ambiguity and to clarify the ways in which the Rule of Law is and is not value-neutral as well as the ways in which the Rule of Law is and is not an ideal. The question we will be examining is, in effect: where does the Rule of Law get its goodness? If the Rule of Law is an ideal, what makes it so? What is the source of its propriety? Correlatively, exactly what type of value does it offer? What I will find is that the Rule of Law is either less neutral, or less valuable, than we ordinarily suppose. If it is an ideal in a way that transcends its instrumentality and is thereby worthy of support in its own right, then it is not neutral. Alternatively, if it is not valuable in anything beyond a

9. Among those who (either more or less directly) have weighed in on this question of the ideal's value-neutrality are Raz, Fuller, Fallon, Kramer, Paul Craig, Michael Sevel, Robert S. Summers, Mark Bennett, Nigel Simmonds, John Finnis, Ronald Dworkin, Richard Epstein, David Richards, Michael S. Moore, and Randy Barnett. My own 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. *See* FALLON, *supra* note 2, at 21. I am not sure that my theory is the same as Fallon's, 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 VI, however.

system-centric, strictly instrumental way, then it is not especially valuable and worthy of encouragement—in other words, it is not all that ideal.

The stakes of all this should be apparent. On questions of international assistance, investment, and diplomacy, the Rule of Law has become something of a gold standard of legitimacy. Domestically, as well, over the last decade in the U.S., many on both the left and right have charged our government with serious breaches of the Rule of Law, whether in regard to detention and surveillance policies adopted in the "war on terror," the powers assumed by central bankers at the Federal Reserve and Treasury Departments in the face of the 2008 financial crisis, uses of Presidential signing statements, executive privilege, "reconciliation" processes for enacting legislation, or the Supreme Court's ruling in *Bush v. Gore*.[10] My contention is that a hazy grasp of the character of the Rule of Law will naturally infect our understanding of its precise requirements and the value that is attained by satisfying them. Without a clear understanding of the value of this ideal, we cannot accurately identify its necessary conditions, and thus we will lack a sound basis for judging whether a given government is or is not upholding it.

Broadly, this Article is in four parts, with the middle being the meat of it. First (in Part II), I sketch the basic appeal of the longstanding ideal of the Rule of Law. Next (in Parts III and IV), I present the principal arguments on behalf of a value-neutral conception of the ideal and try to show the failings of these arguments. Third, (in Parts V and VI) I make the positive case for the Rule of Law as a moral good and directly address several objections to this view. And in the final portion (Parts VII and VIII), I clarify my position in light of the two chief ways of understanding the ideal and briefly indicate the damage done by harboring misconceptions about its value. The analysis in both the critique of value-neutrality and the defense of the Rule of Law's moral character relies heavily (implicitly, when not explicitly) on the nature of objectivity in this context and on the principle that form follows function. An appreciation of these, in turn, should help us to see that denials of moral value in the Rule of Law inevitably incorporate such values, however inadvertently.

Several 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

10. In his dissent in *Bush v. Gore*, Justice Stevens wrote that "the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the Rule of Law." Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

Rule of Law.[11] While that should be plain from what I have said already, it may bear emphasizing: my subject is the *ideal* of the Rule of Law (which is the way the term is typically used), the Rule of Law insofar as it is considered a worthy, desirable state of affairs.

Second, while the discussion will be organized around defending my view that the Rule of Law is not value-neutral, the pursuit of the several clashing arguments on that should serve to make clear the ambiguity that it is my principal object to expose.

Further, it is difficult to label certain figures vis-à-vis value-neutrality because their own language sometimes reflects the very equivocal character of discussions of the Rule of Law that I am examining. While at least one author has acknowledged ambiguities in the literature,[12] the general lack of attention to the different possible meanings of the ideal cautions against taking any characterization of a specific figure as definitive. Fortunately, nothing significant hinges on this, since my purpose is not so much to indict particular authors, as to issue a more general caution to all of us to be precise in identifying the value that we attribute to a legal system that provides the Rule of Law.[13]

Finally, and more controversially, legal philosophy rests on political philosophy, in my view. Consequently, as I indicated above, I cannot conclusively demonstrate 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, I do think it will be helpful to acknowledge certain premises that I am taking for granted.

The purpose of government, I believe, 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,[14] his claim to be free

11. My distinction relies on that between the normativity of reason and the normativity of morality. *Cf.* RAZ, *supra* note 4, at 323. On the dispute as over the moral character of the Rule of Law, *see* TAMANAHA, *supra* note 2, at 95–96, 91–101, and 102–13.

12. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211–12 (1979).

13. Insofar as different things are often thought to be valuable in a variety of possible ways—e.g., intrinsically, instrumentally, valuable as a necessary condition for a greater value, as an enhancer of a value, a constituent element of a value and so on—the attribution of value to the Rule of Law could represent several different meanings.

14. This is a widely (albeit not universally) accepted understanding of rights' essential character, and historically, the conception that prevailed among the American Founders. *See generally* SCOTT D.

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 each man is an end in himself and that the initiation of force against a man is morally wrong.[15] Inasmuch as a legal system is intended to protect individual rights, its mission is a moral one.[16] And that mission, I shall argue, should inform our understanding of what the Rule of Law is.

Preliminaries aside, my animating thought, again, is that if we do not understand the full character of the Rule of Law, we will not understand what is necessary to provide it. Correspondingly, we will credit regimes as supplying the Rule of Law and thereby warranting respect that in fact do not. And, closer to home, we will credit government practices as maintaining the Rule of Law that do not. In the process, we will fail to secure the protections that the ideal can and should offer. We will settle, unwittingly, for the Rule of Men.[17]

II. THE APPEAL OF THE RULE OF LAW

> "*[H]e 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[18]

The Rule of Law is widely agreed to consist of several formal conditions. One need not investigate each to appreciate the basic appeal. It can be distilled, I think, in a handful of essential elements.

GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

15. I explain and defend these claims in TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM (1995), building on the analysis of Ayn Rand. AYN RAND, *Man's Rights*, *in* CAPITALISM: THE UNKOWN IDEAL 367 (1967) (appendix); AYN RAND, *The Nature of Government*, *in* CAPITALISM: THE UNKOWN IDEAL 378 (1967) (appendix).

16. This does not mean that its job is to enforce all of morality. Rights govern only the subset of moral questions that identifies individuals' moral jurisdiction over certain domains, rather than the morally correct exercises of that authority within one's legitimate jurisdiction. For clarification, *see* SMITH, *supra* note 15 (referencing Chapter 1 focusing on pages 18–23).

17. In this vein, see Tamanaha's recent article observing that quantitative studies of how well judges uphold the Rule of Law expose the need to clarify the basic meaning of the concept. Brian Z. Tamanaha, *Devising Rule of Law Baselines: The Next Step in Quantitative Studies of Judging*, DUKE L. J. (Online Edition), Feb. 4, 2010.

18. TAMANAHA, *supra* note 2, at 9 (citing ARISTOTLE, POLITICS, BOOK III 1286 (c. 384 B.C.E)). *See also* ARISTOTLE, POLITICS, BOOK III, at 1287 a28–b6, 1282 b1–12 (Ernest Barker, trans., Clarendon Press 1946) (c. 384 B.C.E) (concerning the Rule of Law more broadly).

A. Rules

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.[19] 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.[20] All of these benefits attach to a system of legal rules, as to any other.

Further along these lines, the Rule of Law is rule *by* law, which entails regulation of the future by the past.[21] 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.[22]

B. Rejection of Arbitrary Rule

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 enacted 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 spurns such principles; those in power refuse to be bound by such considered reflection or by any rules that issue from it. Correspondingly,

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19. For good discussion of these and other features of rule systems, see LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 11–15 (2008). *See also* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 S. CT. ECON. REV. 1, 11–14 (2003).

20. More precisely, we leave these behind as reasons that should determine whether or not to comply with the rules in a particular case.

21. *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 112, 141 (2005).

22. 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. Essentially, this first part of the Rule of Law's appeal is what Justice Scalia has expressed. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

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,"[23] 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 dissolves. Because the rulers employ whatever reasoning they like in order to serve whatever ends they like, no division is respected between questions of legality (conformity with the relevant rules) and questions of substantive policy. 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 the person in power would prefer in that case.[24]

This opposition to the arbitrary use of government power was prominent on the minds of the 17th and 18th century thinkers who championed the Rule of Law (although not always under that express label). Seared by experience of monarchs who toyed with the law,[25] Coke, Blackstone,[26] Grotius,[27] Pufendorf,[28] Locke, and others advocated principles that grounded a legal system in reason, rather than the will of particular rulers.[29] Locke expressly condemned arbitrary power as

23. KENT GREENAWALT, LAW AND OBJECTIVITY 142 (1992) (emphasis added).

24. 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." TAMANAHA, *supra* note 6, at 13 (quoting Justinian). Greenawalt also discusses this basic idea. *See generally* GREENAWALT, *supra* note 23. James Madison worried about this fusion of the individual ruler's will with the law when he opposed the Alien Enemies Act by warning that it would blur powers and "leave everything to the President." Richard Boyd, *The Madisonian Paradox of Freedom of Association*, 25 SOC. PHIL. & POL'Y, July 2008, at 252. Under it, "His will is the law." *Id.*

25. As one example, J. M. Kelly cites arbitrariness as the core complaint against the Stuarts. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 232 (1992).

26. *See, e.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW (Bernard C. Gavit ed., Washington Law Book Co. 1941) (1764–1769).

27. *See, e.g.*, HUGO GROTIUS, THE RIGHTS OF WAR & PEACE (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

28. *See, e.g.*, SAMUEL PUFENDORF, OF THE LAW OF NATURE & NATIONS (1672).

29. Edward Coke reflected a widespread belief in writing that "reason is the life of the law, nay the common law it selfe is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason." EDWARD COKE, THE INSTITUTES § 138 (1628). Consequently, "No man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason." *Id.*

incompatible with the ends of society and government[30] and thus explains the executive's power as the power *of the law* rather than of the man, personally.[31] Correspondingly, he elaborates on the benefits of "promulgated standing laws," "known authorized judges," "standing rules," and "declared laws,"[32] arguing that rulers are to govern by "promulgated established laws, not to be varied in particular cases, but . . . one rule for rich and poor, for the favourite at court, and the countryman at plough."[33]

A. V. Dicey, whose 1885 book put the modern concept of the Rule of Law more securely on the intellectual map, emphasizes the absence of arbitrary power as a distinguishing feature of the English constitution.[34] And in presenting the three "points of view" from which the Rule of Law can be understood, he writes that the Rule of Law means:

> [I]n the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.[35]

The point is that, both historically and today, when concerns about limiting the discretionary powers of government officials remain at the

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30. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 72 (C.B. MacPherson ed., Hackett Publishing Co. 1980) (1690).

31. *Id.* at 79.

32. *Id.* at 71–73.

33. *Id.* at 75. The idea of the Rule of Law did not begin in this era. It enjoys a much longer history, uneven both in clarity of the concept and in levels of support for it. Several in the ancient world observed important features of the ideal. In Plato's *Laws*, for example, the Athenian stranger insists that the authorities be "*ministers* of the law" because he is

> persuaded that the preservation or ruin of a society depends on this more than on anything else. Where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing heaven sends on a society.

PLATO, LAWS, *in* THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 715d (Edith Hamilton & Hamilton Cairns eds., A.E. Taylor trans., 1961). Kelly's *A Short History of Western Legal Theory* offers an excellent review of the ideal's waxing and waning in different periods. *See generally* KELLY, *supra* note 25. For discussion of differences in the ancient and modern notions of the Rule of Law, see Judith Shklar, *Political Theory and the Rule of Law*, *in* RULE OF LAW: IDEAL OR IDEOLOGY 1 (Allan C. Hutchinson & Patrick J. Monahan eds., 1997); TAMANAHA, *supra* note 2.

34. Dicey, *supra* note 2, at 173.

35. *Id.* at 215.

core of debates over respect for the Rule of Law, the rejection of arbitrary rule is a vital part of the Rule of Law's apparent propriety.[36]

C. Objectivity

The contrast with the Rule of Men also highlights another facet of the ideal's basic appeal: its objectivity.[37] In this context, a few aspects of that are especially salient.[38]

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 to guide individuals' decisions; to be subjected to critical debate (facilitating 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.[39]

Another aspect of objectivity is the requirement that the laws not be applied erratically, 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. Objectivity in the law

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36. Raz recognizes this contrast as basic, though he also contends that certain forms of arbitrary rule are compatible with the Rule of Law. *See* RAZ, *supra* note 4, at 219, 224. Dicey and Arthur R. Hogue provide good discussions of how the tradition of British common law, despite being largely unwritten, provided the Rule of Law. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 53–54, 251–52 (1985); *see generally* DICEY, *supra* note 2. To a considerable extent, this reflected the conviction that the Rule of Law was the rule of reason. In a context that presupposed wide agreement on what reason would counsel about the proper understanding of the laws, the need to write rules down was less pressing than it has seemed in many other societies. Francis Fukuyama has also recently offered a historical portrait of the ideal of the Rule of Law. *See generally* FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER (2011).

37. Notice that Aristotle's characterization of the law as "reason unaffected by desire" suggests this rejection of the subjective in law. ARISTOTLE, *supra* note 18.

38. Matthew Kramer distinguishes several possible types of objectivity, all of which he sees as vital to the Rule of Law. For example, mind-independence in weaker and stronger forms; determinate correctness; uniform applicability; trans-individual discernability; impartiality; truth aptitude. KRAMER, *supra* note 2, at 82–100 (2007). He characterizes each of these as more or less ontologically, epistemically, or semantically oriented. While I would not endorse all of his characterizations, they are helpful to consider, to sharpen our notion of objectivity. For more on my own view of objectivity, see Tara Smith, *"Social" Objectivity and the Objectivity of Value, in* SCIENCE, VALUES, AND OBJECTIVITY 143–71 (Peter Machamer & Gereon Walters eds., 2004); Tara Smith, *The Importance of the Subject in Objective Morality: Distinguishing Objective from Intrinsic Value*, 25 SOC. PHIL. & POL'Y, Jan. 2008, at 126.

39. Sotirios Barber and James Fleming are among the many who emphasize the Rule of Law's providing a sense of predictability, security, and control over one's life. SOTIRIOS BARBER & JAMES FLEMING, CONSTITUTIONAL INTERPRETATION—THE BASIC QUESTIONS 183 (2007). *See also* THE FEDERALIST NO. 1, at 3–7 (Alexander Hamilton).

allows a person to know both the content of the legal rules and that *they* are the standard to which he will be answerable.

Devotion to the Rule of Law further 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 their essential rights, and insofar as two cases or two thousand cases are the same vis-à-vis relevant laws, the legal system's treatment of these cases should be the same. In this way, too, the Rule of Law maintains objectivity.[40]

All of this should help us understand why Aristotle casts the fundamental alternative in such stark terms.[41] The Rule of Law is the rule of men *qua* rational animals, using reason in adopting a set of legal rules and in subsequently adhering to them, logically applying them 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."[42]

III. THE CASE FOR A VALUE-NEUTRAL RULE OF LAW

While the propriety of the Rule of Law is widely accepted, many deny that morality plays a role in it. Matthew Kramer holds that the Rule of Law "is not an inherently moral ideal."[43] Joseph Raz captures the essence of this view when he writes:

> It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on

40. 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. Insofar as an objective legal system is a single, integrated ideal, both proper form and content are essential to providing it. I discuss the importance of this substantive dimension somewhat more fully in Tara Smith, *Objective Law*, *in* AYN RAND: A COMPANION TO HER WORKS AND THOUGHT (Allan Gotthelf & Gregory Salmieri eds., forthcoming 2012) [hereinafter *Objective Law*].

41. ARISTOTLE, *supra* note 18.

42. *Id*.

43. Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 CAMBRIDGE L.J. 65 (2004) [hereinafter *Moral Status*]. *See also* KRAMER, *supra* note 2, at 102.

> the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[44]

Advocates of this value-neutral conception point to several considerations in support of it. Let me recount the most plausible of these arguments, admittedly 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. The late Chief Justice William Rehnquist, for instance, believed that we could not logically demonstrate the superiority of any value judgments.[45] This subjectivism about values naturally extends to the domain of law, precluding the possibility that an objective legal system could be based on objective value. Robert Bork also takes this view.[46] Others deny the possibility of objectivity itself. Richard Posner, at least at times, seems to regard the Rule of Law as something of a farce, holding that a judge's interpretation of law is "as much creation as discovery."[47] Many legal pragmatists

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44. Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. Rev. 195, 211 (1977). I will return to questions about Raz's exact position later.

45. William H. Rehnquist, *The Notion of a Living Constitution*, *in* READINGS IN THE PHILOSOPHY OF LAW 544–45 (John Arthur & William H. Shaw eds., 4th ed. 2006) He writes that "there is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given sanction of law." *Id.* Political value judgments acquire "whatever moral claim they have upon us as a society" entirely through their enactment, rather than through "any independent virtue they may have." *Id.* at 544. See also Barber and Fleming's discussion of Rehnquist's view. BARBER & FLEMING, *supra* note 39, at 23.

46. Bork's view is slightly more complicated, as he denies being either a moral relativist or skeptic, though the disclaimer is belied by his discussion on the preceding pages. ROBERT H. BORK, THE TEMPTING OF AMERICA 253–59 (1990). It is also challenged in other places. *Id.* at 4–6, 74–84, 171–76.

47. Richard Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, *in* THE BILL OF RIGHTS AND THE MODERN STATE 435 (Geoffrey R. Stone, Richard A. Epstein, & Cass R. Sunstein eds., 1992). *See also* RICHARD POSNER, HOW JUDGES THINK 240–41 (2008); BARBER & FLEMING, *supra* note 39, at 174–85 (discussing Posner and other pragmatists). In a 2003 book in which he embraces "pragmatic

believe that no alternative to such judicial creation exists.[48] The point is simply that if one is skeptical of moral validity itself, one will correspondingly be skeptical of the moral authority of any particular 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 the Rule of Law a proper desideratum, a universally appropriate aspiration.[49]

Notice how this can be teamed with the previous argument. If values are inherently subjective—*à 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 and, instead, simply furnishes the common ground or ground-rules within which those value-charged differences will be addressed.

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. Even Todd

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liberalism," Posner denies that pragmatists are relativists or skeptics (though they do doubt that skepticism and relativism can be *proven* wrong). RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY ix, 8 (2003). A pragmatic judge does not deny Rule of Law values, Posner explains, but refuses to "reify" them through "blind conformity to preexisting norms." *Id*. at 12, 61. A pragmatist judge will weigh the good consequences of adherence to Rule of Law virtues "against the bad consequences of failing to innovate . . ." *Id.* at 63–64. This means, in other words, that the Rule of Law will be respected *sometimes*. One should read all of this with salt, however, given Posner's further qualifications that "legal pragmatism is not always and everywhere the best approach to law." *Id*. at 94. Posner also adds that a pragmatic judge might periodically employ the rhetoric of formalism—an antithetical approach—as part of a pragmatic strategy. *Id.* at 19. One naturally wonders when a pragmatic theorist might be doing the same.

48. *See* POSNER, HOW JUDGES THINK, *supra* note 47, at 255; BARBER & FLEMING, *supra* note 39, at 174–76.

49. *See* TAMANAHA, *supra* note 2, at 94.

Zywicki, who opposes the value-neutral view, cites the separation of powers as an integral component of the Rule of Law.[50] To conceive of the Rule of Law as a moral good would convert it into a partisan ideal,[51] 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, and so on) are obligated to enforce and abide by the rules that have been legally enacted rather than their personal beliefs about which rules should have been enacted. Governance by law transcends individuals' differences over such issues. A moral conception of the Rule of Law, however, would compromise law's distinctive character.

C. 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.[52] 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 will of the people from governing.[53]

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50. *See* Zywicki, *supra* note 19, at 15. Compare the longstanding "political questions" doctrine, Luther v. Borden, 48 U.S. 1 (1849) (explaining the political question doctrine as articulated by Chief Justice Taney), which distinguishes certain disputes as beyond the province of the court, whose role, he wrote, is "to expound the law, not to make it." *Id.* at 41. For a recent discussion of this doctrine, *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*, 169 WASHINGTON LEGAL FOUNDATION, CRITICAL LEGAL ISSUES WORKING PAPER SERIES 1 (Jan. 2010), *available at* http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf.

51. Fallon, *supra* note 2, at 23.

52. All parties who are suitably eligible, that is.

53. This concern animates much of the criticism of the Court's decision in *Bush v. Gore*, 531 US 98. Separately, Sunstein makes significant use of this type of argument in his defense of Judicial Minimalism. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS (2009).

D. Avoid Unnecessary Contention

A different argument for locking out morality (though one inspired by some similar concerns) 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—its authority as something more worthy and enduring than the results of the latest political scrum. 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.

E. 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. 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.[54] 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 noble ends.[55] The very label calls attention to it being the rule of the law—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.[56] Even under an immoral

54. JOSEPH RAZ, *The Rule of Law and its Virtue*, *i*n NATURAL LAW THEORY: CONTEMPORARY ESSAYS 225 (Robert George ed., 1992). Strictly, it is sharpness that makes a knife effective, and it is the Rule of Law that makes a legal system effective. For fuller amplification of Raz's view, see Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. OF JURIS. 1, 1–15 (2003), and Raz, *supra* note 4.

55. KRAMER, *supra* note 2, at 103. *See also id.* at 102, 143.

56. Kramer 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

regime, we benefit from this. The tyranny of a dictator whose repressive rules are administered systematically, with meticulous regularity, is preferable to chaos or to 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.

IV. CRITIQUE OF THE VALUE-NEUTRAL ARGUMENTS

While most of these arguments carry an initial plausibility, they do not fare well under scrutiny. Two of them rely on premises beyond the scope of immediate concern, so let me begin by commenting only briefly on these.

A. Objectivity of Moral Judgments & Place of Democracy

The first defense of a value-neutral Rule of Law, which denies either 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 would fall, 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 unattainable, then the very idea of something's being a "proper" legal system—either morally or by some other standard—is bankrupt. But that is 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. (That is, the case for democracy's being the paramount principle of proper government.) The U.S. is not, in its

groups." *Id.* at 164, 210. This view of a legal system will naturally influence one's view of the Rule of Law, more narrowly.

fundamental character, a democracy. (Nor should it be, in my view.) 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.[57]

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 refrain from treating people in ways that we have no right to treat them—in other words, to respect their rights. 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. Insofar as the U.S. Constitution does mark individual rights as beyond the tides of majorities' fluctuating desires, however, it should suffice here to recognize that any conception of the Rule of Law that hinges on its service to democracy risks elevating a secondary feature of our system to unwarranted prominence.

B. Is Objectivity Value-Neutral?

Let us turn to the arguments that focus more directly on the nature of 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 V, 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

57. On this as the Founders' view, see documentation in, among others, BARNETT, *supra* note 14, at 32–39; James Madison, *Property* (1792); James Madison, *Sovereignty* (1835); CORWIN, *supra* note 14; GERBER, *supra* note 14.

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.[58]

C. An Apolitical Legal System

This should also help us to see how the claim that law should be apolitical 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. The police should enforce the laws on the books in the relevant jurisdiction (concerning the rights of protestors or abortion providers or hand gun owners, for instance), rather than the laws that they wish had been enacted. 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, as I am urging, does not license particular government officials' rogue injection

58. This need to smuggle in values is apparent in James Buchanan and Roger Congleton's attempt to defend the "proper principle for politics" as generality, conceived as procedural rather than substantive and as institutionalized in the Rule of Law. JAMES M. BUCHANAN & ROGER D. CONGLETON, POLITICS BY PRINCIPLE, NOT INTEREST xix, xx–xxi (2003). A politics guided by this principle would constrain "agents and agencies of governance to act nondiscriminatorily, to treat all persons and groups of persons alike, and to refrain from behavior that is, in its nature, selective." *Id.* at xii. Buchanan and Congleton's claim is that our politics would be "made better" if political action were so constrained. *Id*. This invites the obvious question: better by what standard? They are tacitly relying on a notion of what the governing values are.

of their personal political preferences into the law's operation. 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 or the rights of minorities, for example, 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.[59] 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 need to be careful to specify the exact way in which certain values properly influence the Rule of Law, it is too sweeping to claim that the Rule of Law must be shorn of all values.

An example from a different field might be helpful in exposing the ambiguity of "apolitical" and "value-neutral." Consider objectivity in scientific research, such as in testing a drug's effectiveness in treating a disease or the safety of a particular mechanical device. Studies deliberately structured so as to reach certain pre-ordained conclusions are clearly skewed by values in a way that sabotages those studies' objectivity. Value-neutrality about the results of such research—and correlatively, about the appropriate methods of conducting it—*is* completely appropriate.[60] At the same time, however, what constitutes an objective study of a particular question depends on the reason for conducting the study, which necessarily reflects a value placed on the acquisition of that knowledge. In that sense—as in my claim about the Rule of Law—objective research is not value-neutral. Indeed, if it were, we would have no basis for determining how to structure the research so as to generate valid findings. The point is that a literal, thoroughgoing value agnosticism

59. The claim is not that meaning is a function entirely of context, but that text alone is insufficient. For a defense of this view, see David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988); DAVID O. BRINK, *Legal Interpretation, Objectivity, and Morality*, *in* OBJECTIVITY IN LAW AND MORALS 12–65 (Brian Leiter ed., 2001); Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning is Not Objective*, 1 CONST. COMMENT. 1, 26 (2009); Tara Smith, *Why Originalism Won't Die: Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159 (2007).

60. Studies designed deliberately to "corroborate" pre-chosen conclusions are not truly research, yielding *conclusions*, at all, but exercises in public relations.

in a legal system would prevent it from serving any desired purpose and thus leave us with no reason to obey that system.

D. Unnecessary Contention

This also exposes the error of the "controversy costs" rationale for value-neutrality.[61] 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. 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 in order to serve a morally worthy 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. (Even the choice to bracket certain issues relies on a view of which issues are legitimately bracketable.) Legal rules allow certain actions and punish others.[62] 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 by the affected rightholders.)

The upshot is that to say that the Rule of Law is value-neutral is to say that forcing human beings to act against their will is value-neutral. It is not. When what is in question is the use of government power, to be amoral is immoral. We shall see this more clearly in Part V.

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61. Discussed at *supra* Part III.D.

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

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 is the most compelling of the defenses of value-neutrality, I think. To respond to it, let me address its two chief ideas separately.

First, the insistence on the instrumental value of the Rule of Law carries an undeniable common sense appeal. We all recognize the phenomenon of instrumental value; couldn't maintenance of the Rule of Law simply be such a value? Respect for the Rule of Law in this strictly instrumentalist sense admittedly might be compatible with a range of political systems, not all of which are necessarily good when considered from a wider, "all things considered" perspective. But maintenance of the Rule of Law improves a legal system's likelihood of realizing its larger ends. As such, it is a good. The Rule of Law could be a value, in other words, without being unqualifiedly good or bringing the full package of qualities that characterizes a proper legal system.

Certainly, I would not deny that it is often useful to recognize the practical utility of a certain way of doing things or to designate that "instrumental value."[63] Yet that is an extremely limited, localized type of value, and we err in supposing that possession of such utility makes a legal system in any wider sense desirable. In trying to tease the Rule of Law's "idealness" solely out of its instrumentality, this defense of value-neutrality actually strips the Rule of Law of the type of value that warrants external encouragement. Granted, a legal system that sought to use its power in perfectly appropriate ways and thus serve all those ends of government that I would endorse as correct would, if it failed to respect the (proper) formal conditions of the Rule of Law, fail to actually advance those ends. The Rule of Law is indispensable to effective, good

63. Nor do I mean to imply that the Rule of Law, properly understood and respected, delivers everything one could want from a proper legal system. A system conscientiously dedicated to a correct understanding of both the Rule of Law's conditions and a legal system's larger purpose could contain some serious mistakes in the contents of its laws, for example. Mistakes that are honest or well intentioned are mistakes, nonetheless, that would mar the legal system's ability to fulfill its function. The Rule of Law is an important virtue of a proper legal system, but it does not represent comprehensive perfection.

government; it is a prerequisite for a properly functioning legal system. It is not itself a part of what makes a legal system good, however—good in anything beyond an internal, system-confined way. It, alone, does not render a legal system one worth having. Thus the localized value pressed in this instrumentalist defense is not the value taken to be at stake when we urge the Rule of Law. In this specific context, in other words, when we are assessing the merits of different possible legal systems, to demonstrate the instrumental value of the Rule of Law is too meager to warrant the credit that we ordinarily award to those governments that provide the Rule of Law.

As for the other prong of this defense of the Rule of Law's value-neutrality—the claim that regularity in a legal system is preferable to arbitrariness—it 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 is arbitrary when it is adopted without reason, on a non-rational basis.[64] 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 the substance of 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, thus the system is not arbitrary in that respect. 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.[65]

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64. Some of the definitions of "arbitrary" provided by the Oxford English Dictionary include:

(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.

THE OXFORD NEW ENGLISH DICTIONARY: VOLUME I, A–B 426 (Henry Bradley et al. eds., 1933). Also bear in mind that the arbitrary is not the only alternative to the rational. Honest mistakes by a person who is trying to be rational can be irrational.

65. In the context of laws that are oppressive, the regularity in application that is normally a good

Consider the issue from a different perspective. 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 (fundamentally) by reason, however, we should not expect him to comply with reason (regardless of how many of his past actions may have superficially resembled rational action). 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.[66]

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, bridge, or etiquette, for instance, or those of a sorority or a political party). What particularly distinguishes legal rules and what makes attention to their moral character imperative is 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 designed well, rules can offer definite benefits, as noted earlier.[67] Adherence to policies that have been thought through in advance can be a much more effective means of

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thing is no longer necessarily a good thing. Exceptions from repressive restrictions can be of greater value than those restrictions' more consistent enforcement. For discussion of how irrational principles cannot be rationally applied, see Tara Smith, Lecture at Objectivist Conference in San Diego: How Activist Should Judges Be? Objectivity in Judicial Decisions (July 2005).

66. In a different context, Gordon makes the somewhat related observation that the Rule of Law is "not a technology, a module of specific legal practices that can simply be implanted in a society and expected to start working as advertised, grinding out predictable enforcement of legal rules . . ." GORDON, *supra* note 2, at 464. Its efficacy, on Gordon's view, depends on surrounding beliefs and institutions. My thought here is that a despot does not have the type of informing beliefs that can bring the benefits of the Rule of Law, even if his policies do bring certain short-term conveniences to those under his thumb.

More broadly, that it is understandable that some people might prefer living under the regularities of a systematic despot to the uncertainty of an erratic one does not render the latter an objective good or mean that that constitutes the value of the much-praised ideal of the Rule of Law.

67. *Supra* Part II.A.

furthering an end than reliance on case-by-case calculations. A rational regime of rules has built in 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, *as long as* other, more important conditions have been satisfied. They are not valuable regardless of the content of the rules or the ends that that system furthers, however. Systematic-ness is not an end in itself. When formal regularity is proper, it is so in order to serve a good purpose. Indeed, we understand legitimate exceptions to rules by appeal to rules' purposes.[68] 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, crucially, it has a job. A legal system is something that we pursue to accomplish a task considered worthwhile independently of that system itself. In the case of law, it is a uniquely significant task: 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 joining a baseball league or bridge tournament and thereby committing himself to abide by the relevant sets of rules. It is important by the nature of man—by man's need for freedom in order to reason and prosper. 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.[69]

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.

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68. 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 not in its own right but in order to further a separate purpose.

69. 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. The full picture in this paragraph again relies on prior arguments. For some of those underlying arguments, *see generally* SMITH, *supra* note 15; TARA SMITH, *Humanity's Darkest Evil: The Lethal Destructiveness of Non-Objective Law*, *in* ESSAYS ON AYN RAND'S ATLAS SHRUGGED 335–61 (Robert Mayhew ed., 2009) [hereinafter *Humanity's Darkest Evil*].

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. A system of legal rules can legitimately demand people's obedience only when it is designed so as to serve the morally necessary mission of government. That is the source of law's authority. Apart from its doing that, a legal system loses all claim to anyone's allegiance.[70]

V. 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 has emerged 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, and so on, 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.

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70. 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.

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.[71] Whether a method is actually objective depends largely on what it is seeking to accomplish. Accordingly, if respect for the Rule of Law purports to provide objectivity, 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.

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, as the means of attaining 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, as Raz observes. 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.

In law, as in many areas, form follows function.[72] While a legal system's purpose will not dictate every detail of its proper implementation,[73] not *any* formal characteristics will be compatible with a

71. Recall the discussion of neutrality.

72. John Adams observed as much in writing that we cannot sensibly consider the best form of government without clearly understanding the end of government. ADAMS, *supra* note 1, at 287. (This thought was implicit in my critique of objectivity as value-neutral in Part IV.B.)

73. On some decisions, the government has equally legitimate alternatives.

legal system's actually serving its function. In order for a legal system not only to function as an effective rule system but also to serve its specific substantive purpose, it must have certain formal features.[74] 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 overriding goal of maintaining equal distribution of wealth, retroactive changes to laws governing property rights or taxes could be expedient measures that a legal system's formal conditions should not rule out. Insistence on equal application of laws might similarly impede its aim.

To see the point 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 and to punish all violators equally harshly, for instance, so as to make their obedience most probable. Further, such regularity might be 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 certain 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 that all should honor. These "reasons" for a

74. It is noteworthy that Dicey, whose treatment of the Rule of Law is widely regarded as seminal to the contemporary understanding of it, defends it largely on the grounds of its substantive benefits, treating a legal system's formal and substantive features as intimately entwined. DICEY, *supra* note 2, at 116–18, 121, 219. *See also* HOGUE, *supra* note 36.

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. (Insofar as he is a dictator, some of them must be unfounded.)[75]

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, let me 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. 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 laws' content simply by specifying that under certain circumstances, people will have one set of legal rights and obligations, while under other circumstances, they would have some other set. Just as we have laws declaring that all people in a particular category will have certain rights or responsibilities (e.g., all males who reach age 18 or all who wish to drive an automobile), so an egalitarian regime could enact laws that would adjust a person's legal property when it reached certain thresholds (akin to tax rates being pegged to income levels). 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 doesn't want to treat people equally? What if that is not part of this government's agenda? Suppose it does not recognize human beings as rightbearers or as alike in any significant way that would call for 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 those at the helm of a theocracy, dedicated to the legal implementation of a code of conduct set by some holy scripture, suddenly discovering serious errors in their previous understanding of that code and in some of the corresponding

75. Another possibility 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?

laws. To correct these, the government changes course immediately, giving people neither advance notice nor protection from punishment for actions which, at the time they were taken, were 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 his will to mere mortals' convenience.[76]

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, and seizing their family members—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?

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76. Hogue makes a similar point, observing that "[d]octrines of the supremacy of law and of judicial precedents cannot thrive in the presence of a divine-right monarch claiming to be supreme lawgiver as well as supreme administrator." HOGUE, *supra* note 36, at 243.

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 (such as honoring the glory of Allah, respecting the sanctity of the individual, or optimizing the collective welfare).

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*, in order 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 simply 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—seemingly the 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 six 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 even 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 National Football League 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.[77] Similarly, the rules governing voting procedures for a

77. Rules governing such things as schedules, draft order, and the parameters and severity of penalties.

political system or for a hiring committee will be shaped by (and thus guide us in the manner that 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? (e.g., 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 selected? 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.[78] 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 more than the alternative, our condition without its rules. And on law, again, the point is that a particular legal system's substantive mission determines which formal conditions are appropriate for that system.

B. The Law's Morally Salient Means

Thus far, I have focused on the purpose of the Rule of Law to spotlight its moral value. Yet even more basic to its moral character is the means by which legal rules are enforced. Indeed, the widespread belief that it would be unfair to enforce laws that did not meet Rule of Law conditions itself reflects awareness of this. The reason that it would not be fair is the means employed: physical force. Subjection of a man to force requires moral justification. Because this is the means by which legal rules are enforced, the Rule of Law requires moral license. We glimpsed this fact earlier; let me now elaborate.[79]

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78. For certain purposes, such as in war games training where military personnel learn to successfully adapt to radically changing conditions, it might make sense to employ morphing rules. This would allow kinds and degrees of unpredictability that would be unacceptable in a country's voting system—unacceptable, that is, in light of other values.

79. Contrast this with Fuller, who rejects the coercive nature of law as one of its defining features. FULLER, *supra* note 2, at 108. While every arena of activity has its instruments, he claims, they are not the proper focus of study. Thus he describes a legal system as, more broadly, "the enterprise of subjecting human conduct to the governance of rules." *Id.* at 106.

To do things by law is to do them by force (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 these 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 fabric of legal work. If a government is to be 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 those rights. When a formal condition of the Rule of Law is breached, the harm done is not "value-neutral."[80] Consider the requirement of clarity in the law, for example, the avoidance of ambiguous language. While laws whose meaning is not clear fail 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

80. I am assuming a proper formal condition.

a matter of the law's guidance being clumsy. 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 may be subject to legal penalty.[81]

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 and those rights are infringed, in the process. Individual 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.[82]

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 institute legal rules that do not reflect a view of the proper relationship between the government and the individual.[83] And 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

81. I discuss examples of non-objective law more extensively in *Objective Law*, *supra* note 40, and *Humanity's Darkest Evil*, *supra* note 69. Some of the U.S.' offending laws concern "indecency" on the airwaves, a "hostile environment" at the workplace, and "predatory pricing."

82. Strictly, of course, it is those people responsible for such laws who fail to fulfill the relevant duties imposed by Rule of Law conditions.

83. For a good discussion of this, see Thomas Bowden, *The Empty Constitution*, 4 *in* THE OBJECTIVE STANDARD, Summer 2009, 21–46.

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, brute 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 to conflicting laws or to retroactive laws or to laws that are 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.

VI. 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 and 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 need not have value-laden designs; its conditions need not 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 which values should be promoted by its governance. Consider 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. Even that view privileges the results of that purported value-neutrality more than the results that would come from non-neutrality—that is, from shaping the legal system on the basis of certain values. It treats *those* effects, of neutrality, as tolerable—which is a tacit value judgment, a preference for those effects over the alternatives. To put the point differently: neutrality, in practice, is not neutral. Thus the values that are actually advanced through its adoption need to be defended.

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 under consideration) 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 H.L.A. Hart famously pointed out, many of which address how to accomplish certain ends rather than whether to take certain actions.[84]

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

84. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

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, specific types of public notice, and the like), they do not coerce 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 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 various 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 secondary type of rule, 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

underlying government power. My freedom to act in a particular way with other willing parties is taken away from me unless I follow orders.[85]

I can imagine a reader balking at this on the grounds that some such restrictions are necessary for a government to do its job and for people to coexist in an orderly, peaceable way. I agree. What is muddled in this objection, however, are two distinct questions: one, of whether the government's action in enforcing a particular restriction constitutes coercion; and another, of whether, among those actions that *are* coercive, a specific action is justified.

An action need not be unjustified in order to constitute coercion. Correlatively, by calling a government policy coercive, I am not condemning it. I am not criticizing government for employing coercion, but am simply recognizing that it does employ coercion, even in the enforcement of various secondary rules. Insofar as a restriction is *legally* imposed, it is demanded by force; force is its device of implementation, its instrument for compelling obedience. Consequently, to require something by law itself requires moral sanction.[86]

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85. It is also significant 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. Correlatively, government must always be concerned with manner of exercise.

I would suggest that the basic considerations that should guide relatively specific "manner of exercise" rules are (and this is rough): (1) Concern for what is necessary to assure that one person's apparent exercise of his rights does not actually infringe on others' rights (in which case the first person would not truly have the supposed right or its legitimate exercise would not extend as far as initially supposed), and (2) The practical facilitation—where large numbers of people's actions naturally affect one another's scope of action—of the conditions necessary for *any* rightholder's ability to exercise the relevant rights in a peaceful, orderly, rights-respecting way (such as is seen in the need for rules coordinating people's participation in an election or in the criminal and civil justice systems). Wherever particular "manner of exercise" restrictions are needed, what is crucial is that the government devises these in a way that does not employ arbitrary criteria, extraneous to its proper purpose and authority.

86. Further subdivisions within secondary rules exist, in some of which the coercive character of the law can be even more obscured. Compliance with some procedures, for example, creates rights (such as a legal right to tax-exempt status), rather than enables respect for a person's pre-existing right. Given this, though, it might seem that acquisition of that newly minted right *is* purely optional and voluntary, such that the government, by offering a prize that the parties could not otherwise enjoy, is not employing coercion in enforcing the relevant rules governing that acquisition.

A full response to this depends on deeper premises concerning the proper role of government and proper uses of a legal system. What authorizes a government to be in the prize-awarding business? How is such activity essential to its fulfilling its mission of protecting individual rights? If it is not necessary in order to do that (which is what I would argue), then in doing so, it is using its coercive power in ways that exceed its authority and thus violate some individuals' rights. In the tax exemption example, coercion is used against some members of society (those who do not comply with the requisite procedures and are compelled to pay taxes) and not others (those who do "play to not pay," in effect). This discrimination is arbitrary *by the standard* of the government's proper function and reason

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 sovereign, as final, rather than continually revisiting 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 moral character is the reason for which we have the law. 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 overall 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. (As

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for having the power that it does. Those favored by such a law may see no coercion or ground for complaint; those not so favored do have such ground, whether or not they recognize it.

This kind of case *is* very complicated, and a definitive resolution would require several rounds of argument addressing its technical complexities, questions about the practical implementation of all laws, as well as larger questions about the authority of government. However labyrinthine the path from law to coercion is in some cases, ultimately, it remains coercion by which a legal system offers any legal protection, recognition, award, or other legal status. Thanks to Michael Sevel and Thomas Bowden for prodding me to consider some of the complexities surrounding this issue.

noted earlier, an essentially proper system may contain some flaws.)[87] 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*. It is a whole whose moral character I am urging, and the character of the system is not interchangeable with the character of any one of its parts. 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 while its morality is something else.[88] 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).[89]

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87. *See Humanity's Darket* Evil, *supra* note 69.

88. The much-quoted statement of 19th century jurist John Austin was that "the existence of law is one thing; its merit or demerit is another." Brian H. Bix, *Legal Positivism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 29 (Martin P. Golding & William A. Edmundson eds., 2005) (quoting John Austin). Positivism is generally thought to consist of two principal theses. The first, the Sources Thesis, holds that what counts as law in a given society is completely a matter of social fact or convention. The second, the Separation Thesis, holds that there is no necessary connection between law and morality, i.e., no necessary moral constraints on the existence of a legal system. Law consists of those rules that are posited, in other words, not subject to any further test of moral quality. Others have provided more elaborate accounts, though for our purposes, this adequately conveys the basic idea.

89. *Cf.* RAZ, *supra* note 4, at 324–25 (concerning Raz's critique of Weinrib in "Formalism").

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 thing as the rule of a legal system. A legal system might fail to 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. (Posner observes that the Rule of Law is misleadingly named, because it is "a normative notion rather than a description of what all law has in common.")[90]

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 respect.

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 goes unfulfilled. (Recall the damage done by ambiguous law, for example, discussed earlier.) 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 important 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, however, 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,

90. Richard Posner, *Hayek, Law and Cognition*, 1 N.Y.U. J. OF L. & LIBERTY 153 (2005). *See also* RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 281 (2004).

however, to hold that both of these stem from a moral concern and that they must work in tandem to accomplish the legal system's job.

In short, *contra* Positivist worries, my claim is not about whether a reputed legal system exists, but about 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. One can deny that the Rule of Law constitutes a set of *existence conditions* for a legal system, in other words,[91] without joining the value-neutralists, who deny that the morality of the Rule of Law is implicated in its being an ideal. Morality may not be necessary for something to be law, but it is necessary for the Rule of Law to be an ideal (in more than a completely internalized, system-relative way, as we saw earlier).

VII. TAKING STOCK

I have presented a number of arguments and counter-arguments. To clarify where things stand, it may be helpful to pose again the basic question as I framed it at the outset: is one particular legal system better than alternative legal systems just because it respects the formal conditions of the Rule of Law? Simply in virtue of that fact?

Because the question is equivocal—"better" in what respect?—my response must speak to each of its primary meanings.

At one level, the answer is no: such a system is not morally superior to the alternative. It will be better in a certain respect, namely, in serving whatever particular substantive ends that system adopts. But its doing that does not make it an *ideal* in the salient sense. Following Raz's analogy, to treat it as if it did would be like rewarding a person for acquiring a knife (or rewarding a nation for acquiring weapons). The value of that acquisition obviously depends on how the tool is likely to be used (which is why the world does not universally applaud Iranian progress toward nuclear weapons capabilities, for instance). The Rule of Law is not a freestanding moral ideal. Instrumental efficacy is possible in the absence of worthy ends. It merits no special honor, however.

At the same time, I have also suggested that if a regime is deliberately respecting the *proper* formal conditions of the Rule of Law, then it *is* morally superior to the alternatives—because those conditions are themselves determined by their expected service to the proper moral ends

91. As Fuller and Kramer hold, for example. *See* Fuller, *supra* note 2, at 39, 96; *Moral Status*, *supra* note 43, at 65.

of the exercise of government power. Any apparent tension between my answers simply testifies to the ambiguity that infects most discussion of the Rule of Law. We eliminate the tension by respecting the relevant distinction: If the value of the Rule of Law is understood as purely instrumental, implying nothing about the larger value of the legal system's ends or its overall desirability, then for one system to provide the Rule of Law while another does not does not make the first regime better than the other in anything beyond the trivial sense that an effective legal system will, indeed, be more effective than a non-effective legal system. If, alternatively, the Rule of Law is understood as an ideal in a richer, extra-instrumental way that reflects a system's commitment to the appropriate substantive ends of government, then it will be morally better.[92]

Now defenders of the value-neutral view might object that Raz does not seem to say that a system is good or better than others solely in virtue of its maintaining the Rule of Law. His claim, quoted in Part III, is that a system that is worse, overall, can still excel in the specific respect of satisfying Rule of Law conditions. The Rule of Law is the "specific excellence" and the "inherent virtue" of the law by which we can evaluate a legal system *qua* legal system.[93]

While this might seem to narrow Raz's claims about the value of the Rule of Law to merely instrumental value, bear in mind that Raz also regards the law as a moral institution. He writes: "That law is a morally valuable institution is part of its nature. There is a moral property, being morally valuable, which all law has by its very nature."[94] This is rather a strong claim. The law's "task," moreover, is to realize "moral goals," and the law's "intrinsic excellence" is its "possession of moral legitimacy," of "legitimate moral authority."[95]

What this suggests is that a virtue of a legal system—which the Rule of Law emphatically is, for Raz—is a virtue of a morally valuable institution. And that, as such, it does morally good work. In other words, the Rule of

92. Notice an asymmetry: It could be bad to violate Rule of Law conditions (morally bad, if and when the substantive values pursued by a government are themselves good and are thus thwarted by Rule of Law violations) without its being the case that respect for the Rule of Law's formal conditions is a positive moral good. *By itself*, such respect is morally indifferent.

93. RAZ, *supra* note 12.

94. Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 11 (2003). This comes in a later piece than the other, but Raz has not to my knowledge disavowed anything in the earlier discussion.

95. *Id*. at 12. "The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized." *See also id* at 14–15.

Law *is* good in a more than instrumental way, given that the law itself is a "morally valuable institution" whose ends are "moral goals." If one attempts to rescue Raz from this reading by insisting that moral value is not the source of the larger, non-trivial goodness of the Rule of Law—of its propriety as an ideal—we return to the question: then what is?

Now here, again, one might try to defend the neutralist position by pointing out that Raz says that the Rule of Law is "*morally* neutral in being neutral as to the end to which the instrument is put."[96] But I have not denied *that* view to him; it is exactly what it means to hold that the value of the Rule of Law is non-moral. The problem I find in his position is: having denied that moral value to the Rule of Law, what is Raz's basis for still regarding the Rule of Law as an ideal? (That is, a wider and important ideal?) Lest one suspect, at this stage, that perhaps Raz does not regard the Rule of Law as in *any* way ideal, this is belied by the way he routinely speaks of it. To cite just a few examples: He proceeds in the very paragraph following this assertion of its moral neutrality to write that "conformity to the rule of law is also a moral virtue;"[97] earlier in that same piece he writes that "conformity to the rule of law is one among many moral virtues which the law should possess."[98] Raz also describes as among the "more important" of the principles that "can be derived from the basic idea of the rule of law"[99] (principles concerning the law's clarity, stability, prospectivity, etc.) one holding that "the principles of *natural justice* must be observed."[100] At best, one would have to say that his exact position is somewhat difficult to pin down.

To be fair, the issue itself is slippery. But the essential equivocation remains. Those who proclaim the purely instrumental, value-neutral status of the Rule of Law[101] typically proceed to treat that ideal as valuable in a richer way, as more admirable than a system's mere possession of an effective tool would warrant. In short, the neutralist view does not supply enough to underwrite the Rule of Law's constituting an ideal. For the Rule of Law to offer value of a sort that is appropriately encouraged and rewarded, that value must be imported from the worthiness of its ends. Without that, the Rule of Law is a "virtue" only in a completely internalized, uninteresting way. This does not deny the value in studying

96. RAZ, *supra* note 12, at 226 (emphasis added).
97. *Id*. at 226.
98. *Id*. at 225.
99. *Id*. at 217.
100. *Id*. at 217 (emphasis added).
101. Again, I am not especially interested in refuting Raz, in particular.

what makes a rule system effective. It simply recognizes that that is a different value from what is learned from studying what makes a rule system—or allegiance to it, or the efficiency of its operation—itself valuable. Discussion of the "ideal" of the Rule of Law too often slides indiscriminately between the two.

VIII. THE DAMAGE

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 be in a position to secure it. We will misidentify its requisite conditions, consider its conditions satisfied when, in fact, they are not and, in the process, fail to gain the protections that distinguish the Rule of Law from the Rule of Men. (Indeed, a false conception of the Rule of Law can be more damaging than outright rejection of the ideal. It lends the respectability of the Rule of Law—the presumption of legitimate authority—to legal 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 truly are.[102])

A value-neutral Rule of Law is thus both untenable in theory and destructive in practice. It is important to appreciate that 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; what forms of publicity meet the promulgation condition; what tensions between two laws constitute an unacceptable internal inconsistency and what tensions, if any, should be accepted as reflecting "the need to strike a balance." These determinations are inevitably influenced by the larger values that one seeks to protect through respect for those conditions.[103] 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

102. GORDON, *supra* note 2, at 453 (noting that the "culture of legality" encourages law makers to fortify their policies with the law's "legitimating magic").

103. The point of publicizing laws will naturally inform the extent of publicity one should give them, for example.

is used. It normalizes reliance on the subjective values that particular officials happen to supply.[104] 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 is what it is.

IX. CONCLUSION

In a fully proper legal system, the point of having the Rule of Law—of insisting that a particular set of formal conditions be respected—is a value: namely, to confine the exercise of government power to its legitimate purpose. When that broader ideal is not sought, maintenance of what would otherwise be a good thing (respect for those conditions) is not. The goodness of a legal system's efficacy—goodness that would constitute that system's being an *ideal*—is completely dependent upon the ends that it advances. Efficacy in the service of vice is no virtue.

The view that the Rule of Law is properly regarded as an ideal simply on account of its being instrumentally valuable misleadingly segregates the internal virtues of a legal system from the virtue of the system of which they are a part. Such an instrumentalist reading of the Rule of Law is too meager to underwrite its honored place on the world stage.

What I have called the value-neutral position (which denies moral value in the Rule of Law) harbors an untenable tension: commending the Rule of Law as an ideal, as proper, at the same time that it denies the source of its propriety. By detaching its analysis of a proper legal system from the larger role that that system is to fulfill, it strips the Rule of Law of its claim on us. In truth, I have argued, we cannot understand the elements of a proper legal system apart from understanding the reason for having it. And that—the purpose for having a legal system along with the means by which law is enforced—*makes* the Rule of Law a moral issue. This does not deny that the conditions of the Rule of Law are formal. It does claim that appropriate formal conditions are what they are because of the system's substantive aims. Properly, all aspects of a legal system, formal and substantive, must work together for that system to fulfill its function. But its function drives the rest.

The attempt to construct a set of value-neutral conditions for the Rule of Law cannot escape the fact that any set of formal conditions *will* reflect values. A given set of formal conditions will, in the course of being

104. The good or bad intentions of these people are not the issue.

respected, inescapably further some values and impede others, however random, unsystematic, and unplanned as these effects may be. My contention is that because, in its actual effects, neutrality is not neutral—because values cannot be kept from influencing how individuals are treated by a legal system—they should not be hidden. To obscure the role of values in the Rule of Law only diminishes our prospects of reaping its actual value. If we do not squarely confront what these values are, we cannot ensure that appropriate values guide a legal system to provide the safeguards that it should.