THE CORRUPTION OF THE RULE OF LAW*

By John Hasnas

Abstract: *The corruption of the rule of law is an ambiguous phrase. It can refer either to the corruption of the value of the rule of law or to the corrupting effect that the commitment to the rule of law produces. This essay explains how both can be the case. The rule of law is one of a cluster of values that liberal political theory requires a morally legitimate government to exemplify. Thus, the rule of law is a component part of a just political structure. However, the phrase "the rule of law" is often used colloquially to refer to most or all of the cluster of liberal values. When used in this way, a duty to obey the law often attaches itself to the concept of the rule of law. It is the association of this duty with the concept of the rule of law when used in its narrow, literal sense to refer to only one of the liberal values that corrupts both those who are committed to the rule of law and the respect for the value itself.*

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I. Professor Smith's Dilemma

Imagine the following scenario. Professor Smith is a world-renowned professor of political philosophy. Smith is widely considered the leading expert on the thought of John Stuart Mill, and is known for his commitment to classical liberal political philosophy. One day, Professor Smith receives a summons to serve on a grand jury, a body of citizens assembled to hear the state's evidence against those suspected of criminal activity and decide whether it is sufficient to issue indictments charging the suspects with the commission of a crime. Consistent with his civic duty, Professor Smith reports to the courthouse on the appointed day. After a brief orientation, Professor Smith and the other members of the grand jury panel are asked to swear the following oath: "I swear that I will give careful attention to the proceedings, abide by the court's instructions, and decide matters placed before the grand jury in accordance with the law and evidence presented to me so help me God."[1] Professor Smith, who as a classical liberal is strongly committed to the rule of law, voluntarily

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[1] See 16A A.R.S. Rules Crim. Proc., Rule 12.1.

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swears the oath and begins his service on the grand jury, which is scheduled to last for a month.

Professor Smith begins his jury service with the expectation that he will be hearing evidence of crimes that are directed against the persons or property of others, such as assault, robbery, burglary, rape, and embezzlement. But he soon learns that almost all the cases that are brought before the grand jury involve victimless crimes such as solicitation and the possession of controlled substances. Day after day, he finds himself approving the indictment of indigent (usually minority) individuals for engaging in consensual but legally prohibited sexual activity, possessing or using illegal drugs, engaging in illegal gambling, and selling banned substances to willing buyers.

Having descended from the ivory tower as a result of his grand jury service, Professor Smith does a bit of empirical research into the functioning of his state's criminal justice system. He learns that the public defenders appointed to represent indigent clients are massively overworked and underfunded. Each of them is assigned more cases than he or she can possibly handle competently, and none of them have adequate financial resources for investigation or to properly prepare a defense. As a result, almost all of the cases result in plea bargains in which the defendant pleads guilty in return for a reduction in sentence.

Over the course of the month, Professor Smith realizes that he is spending most of his time authorizing the state to imprison citizens who have not caused harm to others. As a committed adherent of John Stuart Mill, he finds this distressing. Nevertheless, having voluntarily sworn to "decide matters placed before the grand jury in accordance with the law and evidence presented," he feels compelled to continue to issue indictments against such citizens.

Toward the end of Professor Smith's month of service, the prosecutor asks the grand jury to indict Juan Ramirez for the possession of marijuana. The prosecutor calls the arresting officer as a witness, who testifies that he pulled over Ramirez's car after observing him fail to come to a complete stop at a stop sign, that as he approached Ramirez's car, his trained drug-sniffing dog alerted, and that on the basis of this probable cause, he conducted a search of Ramirez's car and discovered a large package of marijuana in the trunk. Exercising his right as a grand juror to question witnesses, Professor Smith asks the officer why he decided to stop Ramirez for such a minor traffic violation. The officer testifies that he was part of a narcotics task force, and that such traffic stops were standard operating procedure in Ramirez's neighborhood.

Professor Smith then asks the prosecutor a series of questions designed to elicit information about who Ramirez was and why he was being prosecuted. From these questions, Smith learns that Ramirez was a seventeen-year-old high student with no criminal record who was driving his brother's car to school when stopped. His prosecution is

part of a larger operation targeting a Hispanic drug ring, and the prosecutor wants to indict Ramirez to pressure him to give evidence against his brother who could then be pressured to testify against higher-ups in the organization.

Professor Smith asks the prosecutor whether he has any evidence that Ramirez knew the marijuana was in the trunk of the car he was driving. The prosecutor explains that the offense of possession requires no *mens rea*—that the prosecution is not required to prove that the defendant knows or is even negligent with regard to whether he or she is in possession of the relevant substance. Proof of possession is all that is required for conviction.

Reflecting on what he learned, Professor Smith concludes that the police are unfairly targeting Hispanics for an unreasonably strict form of law enforcement, and that indicting Juan Ramirez could ruin the life of a young man who may not have knowingly engaged in any wrongdoing. He recognizes that the prosecutor has presented evidence of a crime that requires him to vote for an indictment if he is to honor his oath. Yet, after a nearly a month of voting to indict those that he does not believe should be subject to punishment by the state, he has reached his breaking point. He decides that he cannot in good conscience vote to indict Ramirez.

Professor Smith not only refuses to vote for Ramirez's indictment, he makes an impassioned plea to the other members of the panel to similarly vote against indictment. His argument is persuasive enough to convince a majority to vote against indictment. Hence, the grand jury refuses to issue a bill of indictment against Juan Ramirez.

This story illustrates the corruption of the rule of law. But note that this statement can be read in two ways. It could be read as asserting that the story illustrates the corruption of the important political value of the rule of law. On this reading, by refusing to indict Juan Ramirez, Professor Smith is elevating his personal beliefs about who should have to stand trial for a crime above the standard embodied in the law. Such action undermines the effectiveness of the law as written, thereby corrupting the rule of law.

However, it could also be read as asserting that the story illustrates how the rule of law is itself a corrupting force—how adherence to the rule of law can undermine an individual's efforts to act justly. On this reading, Professor Smith's commitment to the rule of law—his acceptance of the duty to "decide matters . . . in accordance with the law and evidence"—causes him to spend most of a month helping the state incarcerate citizens who have done no harm to others; something Smith personally considers unjust. In this way, the rule of law is corrupting Professor Smith by making him complicit in what he considers oppressive and possibly discriminatory state conduct.

In this essay, I argue that the first reading is mistaken—that Professor Smith's action does not corrupt the political value of rule of law *when that value is correctly understood*. I also argue that the second reading illustrates

a serious danger—that Professor Smith's action is an example of the corrupting effect of a commitment to the rule of law *when that value is not correctly understood.* Further, I argue that both readings stem from the fact that in the contemporary political environment, the rule of law is used in two different ways with two different referents. I claim that as currently employed, the rule of law has both a strict literal meaning and an amorphous colloquial meaning, and further, that the failure to carefully distinguish between them can cause otherwise well-intentioned people, like Professor Smith, to support unjust and oppressive policies. In this sense, the rule of law is a terribly corrupting force.

II. Two Conceptions of the Rule of Law

Let us begin by distinguishing the literal meaning of the rule of law from its colloquial usage. When used in its literal sense, the rule of law refers to the requirement that a government act through law rather than individual directives or commands. Understood in this way, the rule of law is one of a cluster of values that liberal political theory requires a morally legitimate government to exemplify. Other such values include respect for certain fundamental individual rights, a democratic electoral system, some degree of economic freedom, equal status for all citizens, and perhaps some commitment to social justice. Note that this definition implies that the rule of law is something distinct from a commitment to respect fundamental rights, maintain a democratic electoral system, preserve economic freedom, treat all citizens equally, or attain social justice—something that can be defined independently of these values. When used in its literal sense, the rule of law is a component part of a just political structure.

In contrast to this literal meaning, the phrase "the rule of law" is frequently used in a colloquial sense to refer to a society in which all or most of the liberal political values are satisfied. When used in this way, the rule of law is a shorthand for the liberal conception of a just government. Thus, Ronald Dworkin uses the rule of law to refer to a society that respects certain fundamental rights and the requirement of equal citizenship.[2] Similarly, T. R. S. Allen uses it to refer to a polity in which there is equality of citizenship, respect for fundamental rights, and protection of individual dignity.[3] As Jeremy Waldron points out, in common parlance the phrase

[2] See Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 11–12, 32.

[3] T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (New York, NY: Oxford University Press, 2013), 89–92. See also Tom Bingham, *The Rule of Law* (London: Penguin, 2010), 67 (building respect for fundamental rights into the concept of the rule of law), and Ronald Cass, *The Rule of Law in America* (Baltimore, MD: Johns Hopkins University Press, 2004), 131 (building a commitment to the preservation of private property rights into the concept of the rule of law).

"the rule of law" is "almost always [used] as a benchmark of political legitimacy,"[4] which implies that it exemplifies the full set of liberal values.

The two conceptions of the rule of law can be distinguished by whether we emphasize the word "law" or the word "rule." The literal definition of the rule of law describes a necessary (but not sufficient) condition for a just government. It holds that a just government must exercise its coercive authority—must rule—through law. It emphasizes the importance of law to a just rule. This embodies a commitment to the rule of *law*. The colloquial usage of the rule of law refers to the law produced by a political process in which all or most of the liberal values are satisfied—in which the sufficient conditions for a just government have been met. Law that results from such a process is normatively justified and binding on the citizens. The colloquial usage emphasizes that society should be governed by such law. This embodies a commitment to the *rule* of law.

III. The Rule of *Law*

A. The definition of the rule of law

The rule of *law* refers to a single liberal value—one that is conceptually distinct from a commitment to fundamental individual rights, democracy, private property, equal citizenship, or social justice. What is the distinctive nature of this political value?

At its simplest, the rule of law is the requirement that government act through law rather than personal command. The rule of law prohibits the state from empowering officials to apply coercion according to their personal predilections and preferences. It prohibits rule by prerogative.[5] F. A. Hayek interpreted this to mean that "government in all its actions is bound by rules fixed and announced beforehand . . . [and] is prevented from stultifying individual efforts by *ad hoc* action."[6] Thus, "because the rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the powers of all government, including the powers of the legislature."[7]

Limitation this may be, but it is a rather thin one. Fortunately, it can be thickened a bit because the value we are considering is the rule of *law* not the rule of *rules*. And for rules to be rules of law, they must be part of a legal system, which according to Lon Fuller, means that they must satisfy

[4] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43, no. 1 (2010): 3.

[5] The rule of law "means, in 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 power on the part of government." A. V. Dicey, *The Law of the Constitution*, ed. Roger E. Michener (Indianapolis, IN: Liberty Fund, 1982), 120.

[6] F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), 72–73.

[7] F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago, 1960), 205.

at least eight conditions. To constitute law, rules must be 1) general, 2) promulgated to the public, 3) prospective in operation, 4) intelligible to those to be governed by them, 5) consistent with each other, 6) possible to comply with, 7) relatively stable over time, and 8) enforced according to their terms.[8]

Fuller claims that these conditions are inherent in the concept of law itself. The purpose of law is to regulate the behavior of the members of society. To do this, the law must consist in general rules rather than a series of particular commands. It must be both known and intelligible to those whose behavior is to be guided by it. It must prescribe actions that it is possible for people to perform, which means both that each law must be one that it is possible to obey and that the set of laws cannot prescribe contradictory obligations. It also means that the law must function prospectively and be stable enough to make compliance feasible. And finally, to be effective, the law must be enforced in a way that does not undermine people's efforts to comply with it.

Fuller's contention that a set of rules must satisfy these eight conditions to be law is widely accepted.[9] Thus, the liberal value of the rule of law should be understood as the requirement that all governmental coercion be authorized not merely by "rules fixed and announced beforehand," but by rules of *law* that satisfy Fuller's eight conditions.

Can we thicken the conception of the rule of law even more? Yes. By taking a page from the legal positivists' book, we can add one more

[8] Lon Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969), 39.
[9] See, e.g., John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 270–71:

> A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and b) do actually administer the law consistently and in accordance with its tenor.

See also Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), 17 (The rule of law obtains when "there is a legal system composed principally of quite clearly enunciated rules that normally operate only in a prospective manner, that are expressed in terms of general categories, not particular, indexical, commands to individuals or small groups singled out for special attention . . . The rules should set realistically achievable requirements for conduct, and should form overall some coherent pattern, not a chaos of arbitrarily conflicting demands"); H. L. A. Hart, "Problems of the Philosophy of Law," in *Essays in Jurisprudence* (Oxford: Oxford University Press, 1983), 88, 114 (The rule of law requires that "the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation"). See also John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 207–209.

layer to the ply. The Positivists argue that whether something is law or not is determined by its pedigree—by whether it was produced in accordance with the officially recognized procedures for making law in the relevant jurisdiction,[10] or, to use H. L. A. Hart's terms, whether it would be recognized as valid law by the jurisdiction's rule of recognition.[11] Without entering the lists over the adequacy of the positivists' jurisprudential claims, we can profitably appropriate a bit of their insight. Doing so allows us to conclude that the liberal value of the rule of law should be understood as the requirement that all governmental coercion be authorized not merely by "rules fixed and announced beforehand," and not merely by rules of law, but by *properly enacted* (or perhaps *legally valid*) rules of law.

With this, we have probably reached a stopping point. Some theorists would go further, claiming that the concept of the rule of law carries an implicit procedural component. Such theorists assert that the rule of law would be vacuous without impartial courts that can decide whether the government's actions conform to the properly enacted rules of law. Thus, the existence of a court system is inherent in the concept of the rule of law.

I resist this extension for three reasons. The first is that it is too parochial. Court systems like those currently employed by most Western democracies are indeed a mechanism for deciding whether government actions correspond to the properly enacted rules of law. But they are not the only such mechanism. All that is required is that the relevant jurisdiction have some adjudication procedure that ensures that the rules of law are followed. Wager of law and trial by battle may have passed out of fashion as dispute settlement mechanisms, and arbitration and mediated negotiation may not have yet come have come into fashion, but the contemporary system of litigation in court is not the only means of ensuring that the law is enforced according to its terms.

Second, building an explicit requirement of a court system into the concept of the rule of law is unnecessary because the required procedural element is implicit in Fuller's eighth condition for law. This condition requires that there be a "congruence between official action and declared rule"[12] for law to be present. As long as there is some mechanism for ensuring such congruence, the rule of law can exist even if a contemporary court system does not.

But finally and most importantly, adding a procedural component to the definition of the rule of law would open the door to what Jeremy

[10] This is not intended to exclude common law or suggest that law is necessarily legislative in nature, merely that the law results from processes accepted as producing binding law.

[11] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 92–93.

[12] Fuller, *Morality of Law*, 81.

Waldron calls a dangerous "decline in political articulacy."[13] For the temptation will be to write normative elements into the procedural requirement. For example, one theorist argues that the procedural component of the rule of law requires "due process" that consists in a right to a trial conducted by an impartial judge in which the accused has the right to counsel, the rights to be present at trial, confront witnesses and present evidence, the right to exclude unreliable evidence, and the right to appeal.[14]

Due process is certainly an important liberal political value. A liberal government should afford its citizens a fair opportunity to be heard before taking any action against them. But what constitutes such an opportunity—what process is due—is a highly contested matter, as the last century and a half of Supreme Court jurisprudence demonstrates. Building an explicit procedural element into the definition of the rule of law carries the risk of conflating the distinct liberal values of due process and the rule of law. Doing so would not only render the definition of the rule of law much more obscure, but also import into it all the controversy surrounding the concept of procedural due process. This is something we would be wise to avoid if we wish to maintain analytical clarity.

In sum, the rule of *law* is best understood as the requirement that government may exercise coercion against its citizens only pursuant to properly enacted/legally valid rules of law.

B. The value of the rule of law

The rule of *law* limits the government's use of coercion to measures authorized by properly enacted rules of law. Advocates of the rule of law claim that this limitation promotes the values of freedom, efficiency, and individual dignity.

F. A. Hayek argues that the rule of law is not only essential to the maintenance of individual freedom, but constitutive of it. Apparently assuming that a world without law would be a Hobbesian war of all against all, Hayek claims that

[13] Jeremy Waldron, "Rule of Law," sec. 5.3, https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/. Waldron warns that any effort to pack substantive values into the concept of the rule of law

> sounds the analytic danger signal. Once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law. Those who favor property rights and market economy will scramble to privilege their favorite values in this regard. But so will those who favor human rights, or those who favor democratic participation, or those who favor civil liberties or social justice. The result is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals (sec. 5.3).

[14] A. Wallace Tashima, "The War on Terror and the Rule of Law," *Asian American Law Journal* 15, no. 1 (2008): 264.

> so far as men's actions toward other persons are concerned, freedom can never mean more than that they are restricted by only by general rules. . . . [F]reedom does mean and can mean only that what we may do is not dependent on the approval of any person or authority and is limited by the same abstract rules that apply equally to all.[15]

Hayek argues that as long as the law satisfies Fuller's eight conditions, the laws of the state function like the laws of nature by providing an individual "fixed features in the environment in which he has to move; though they eliminate certain choices open to him, they do not, as a rule, limit the choice to some specific action that somebody else wants him to take."[16] Thus, "[t]he conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free."[17]

Several theorists contend that the rule of law advances the value of social efficiency as well. By making the situations in which the government will employ coercion predictable, the rule of law enables individuals to plan and coordinate their activities more effectively. This results in both increased economic prosperity and more effective government control of society.

The ability to form stable expectations about the future extends the time horizon for individual planning, which permits increased economic activity,[18] facilitates business formation,[19] and results in increased social wealth. Hayek claims that "[t]here is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here."[20]

Similarly, H. L. A. Hart points out that "general rules clearly framed and publicly promulgated are the most efficient form of social control."[21] It is much easier to engineer a desired social outcome by issuing general rules requiring a specified form of conduct and leaving it to the individual members of society to decide how to comply than by attempting to direct particular orders to each member of society individually.

Finally, many theorists argue that the rule of law entails a recognition of the dignity and worth of individuals. This position is most eloquently stated by Lon Fuller. Fuller called his set of eight conditions for the existence of law the inner morality of the law.[22] Fuller contends that

[15] Hayek, *Constitution of Liberty*, 155.
[16] Ibid., 153.
[17] Ibid.
[18] Waldron, "Rule of Law," sec. 6.
[19] Bingham, *Rule of Law*, 38.
[20] Hayek, *Constitution of Liberty*, 208.
[21] Hart, "Problems of the Philosophy of Law," 115.
[22] Fuller, *Morality of Law*, 42.

a commitment to the rule of law—to a political system that respects the inner morality of the law—entails respect for the dignity of individual human beings. He states that

> [t]o embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.
>
> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.[23]

John Finnis agrees that the rule of law promotes dignity because "[i]ndividuals can only be selves—i.e. have the 'dignity' of being 'responsible agents'—if they are not made to live their lives for the convenience of others," and the rule of law provides the predictability necessary to "create a subsisting identity across a 'lifetime.'"[24] Joseph Raz similarly asserts that "observance of the rule of law is necessary if the law is to respect human dignity." He contends that "deliberate violation of the rule of law violates human dignity [either] when the law does not enable people to foresee future developments or to form definite expectations [or] when the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered."[25]

All of these claims—that the rule of law promotes freedom, efficiency, and individual dignity—are true. All of them are also greatly overstated.

One who is subject to rules has more freedom than a slave or personal servant who is subject to every command of a master. It is perfectly true that when one is governed by "abstract rules that apply equally to all,"[26] one is not required to take "specific action[s] that somebody else wants him to take."[27] But this guarantees only a minimal amount of freedom.

Abstract rules can and do eliminate wide swaths of individual liberty. Rules requiring all citizens to serve in the armed forces for ten years, or to turn over 85 percent of their income to the state, or to practice the Catholic faith, or to marry within one's racial group, or to refrain from using contraceptives are all perfectly general. The rule of law may guarantee that

[23] Ibid., 162.
[24] Finnis, *Natural Law*, 272.
[25] Joseph Raz, *The Authority of Law*, 2d ed. (Oxford: Oxford University Press, 2009), 221–22.
[26] Hayek, *Constitution of Liberty*, 155.
[27] Ibid., 153.

one will have the same amount of freedom as other members of society—that one will not be singled out for more specific interference with one's decisions than other citizens, but it does not by itself guarantee that one will enjoy any significant amount of substantive freedom.

There is no doubt that a state that governs on the basis of Fullerian rules of law can more efficiently control the behavior of its citizens than one that must issue particular commands to each individual. Hart's claim that adherence to the rule of law makes for more effective social control is quite correct. It is also true that general rules that give individuals discretion as to how best to conform their behavior to the law's dictates gives individuals greater ability to plan their activities and cooperate with others than is the case when they are subject to the inconstant personal commands of others.

But, again, the efficiency gain from this is fairly minimal. Fullerian rules of law can and frequently do greatly reduce the range of cooperative interpersonal behavior. Rules requiring licenses to sell a product or service, setting wage and price floors and ceilings, banning certain goods and services entirely, or prohibiting the ownership of private property can meet all of Fuller's conditions for law. Yet all such rules restrict the realm of interpersonal exchange that generates economic prosperity, and hence, restrain or undermine the growth of overall societal wealth.

Finally, it is certainly true that a commitment to the rule of law entails a view of human beings as responsible agents capable of self-determination. The very act of subjecting human conduct to rules implies that individuals have the capacity for the autonomous action required to obey them, and hence, that they are not mere tools for the use of others—that they have a fundamental dignity that must be respected.

But once again, this carries only a minimal commitment to respect the dignity of others. Recognizing that individuals are capable of autonomous action means that they should not be deprived of all choice and control over their lives. But it does not imply that they may not be deprived of a great deal of choice and control. Respect for one as an agent who can choose is compatible with greatly restricting the range of choices that one is permitted to make. Laws that satisfy all of Fuller's conditions can restrain individuals from practicing the religion of their choice, marrying outside of their race or in accordance with their sexual preference, and pursuing their preferred occupation. Such laws do not imply that individuals are not responsible agents, but are nevertheless serious affronts to their dignity as persons.

The rule of law is a genuine and important political value. But it is also a rather modest one. Without the rule of law, a just society is impossible. But by itself, the rule of law guarantees nothing more than that a just society is possible. It does not guarantee that individual rights will be respected, that democratic procedures will be followed, that private property will exist, or that there will be a commitment to equal citizenship or any particular conception of due process.

The rule of law is a necessary condition for justice, but nothing more. It gets one in the ballpark, but does not guarantee that the game will be fairly played. The rule of law is a protection against a *totally* oppressive society, but not against an oppressive society. Jeremy Waldron captured the definite but limited value of the rule of law best when he stated that it "takes some of the edge off the power that is necessarily exercised over [individuals] in a political community."[28]

C. *The practical application of the rule of* law

The rule of law is an important, but modest political value. It does not guarantee substantive justice. It guarantees only that the government must exercise its coercive power in accordance with properly enacted/legally valid rules of law that satisfy the eight conditions that comprise the inner morality of law. It does this by requiring that the political system adhere to the principle of legality.

The principle of legality, which is conventionally expressed in the Latin phrase *nullem crimen sine legel, nulla poena sine lege*, holds that government may punish individuals only pursuant to laws that provide advance warning of what conduct is prohibited. In addition to the obvious ban on retroactive legislation, this principle also demands that laws be expressed clearly enough to be understandable to the average person, establish "minimal guidelines to govern law enforcement"[29] so as not to "delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis,"[30] and requires that ambiguous criminal statutes be narrowly construed.[31] Thus, the principle of legality incorporates most of the requirements of the inner morality of law either explicitly—generality, promulgation, prospective application, intelligibility—or implicitly—the law must be relatively stable over time and enforced according to its terms if it is to be understood by the average person.

Adherence to the principle of legality doesn't guarantee freedom of expression, universal suffrage, economic freedom, or social justice, but it does protect against certain forms of abusive law enforcement and unrepresentative government.

The requirements that the law be expressed clearly and that all ambiguity be construed against the government makes it more likely that punishment falls only on those who are intentionally breaking the law. This helps protect citizens who are not genuinely blameworthy from governmental sanction.

[28] Waldron, "Rule of Law," sec. 6.
[29] *Kolendar v. Lason*, 461 U.S. 352, 358 (1983).
[30] *Grayned v. City of Rockford*, 408 U.S. 104 (1972), 108–109.
[31] This is known as the rule of lenity.

The requirement that the law contain definite enough guidelines to restrain the discretion of law enforcement agents makes it less likely that the law will be applied in a discriminatory manner to oppress disfavored groups. This aspect of the principle of legality is almost always invoked in cases in which the law is selectively enforced against racial and ethnic minorities.[32]

But perhaps more importantly in the age of the administrative state, the principle of legality can help maintain the representative aspect of a democratic government. This is because it prohibits elected legislators from endowing unelected bureaucrats with carte blanche to write rules and issue directives unrestrained by definite legislative provisions.

These considerations show that as the basis for the principle of legality, the rule of law has an important, if limited, role to play in the maintenance of a liberal society. If a law is just and adopted by just procedures, the rule of law helps ensure that it is justly applied. In doing so, it supplies one piece of a jigsaw puzzle that when properly fitted with the other liberal values forms a picture of a just society.

IV. The *Rule* of Law

The *rule* of law refers to the situation in which the law should rule. To rule is to be authorized to employ coercion to ensure compliance. To say that the law should rule is to say that it is morally appropriate to employ coercion to ensure that citizens comply with the law.

When is this the case? From a liberal perspective, it is when the law is produced by a political process that embodies all or most of the fundamental liberal political values. Liberal political theorists can and often do argue that the state is morally justified in coercively enforcing the laws of a polity that respects fundamental individual rights, employs democratic governance procedures, affords all citizens equality before the law, guarantees citizens due process, and provides for some degree of economic freedom. Such theorists claim that when these conditions are satisfied, the law is normatively binding on citizens. Citizens should obey the law, and the law should rule.

This colloquial use of the rule of law is usually associated with highly idealized political systems. Thus, the World Justice Project defines the rule of law as

> a system in which the following four universal principles are upheld:
>
> 1. The government and its officials and agents as well as individuals and private entities are accountable under the law.

[32] See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and *City of Chicago v. Morales*, 527 U.S. 41(1999).

2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[33]

Similarly, T. R. S. Allen identifies the rule of law with "a scheme of justice, implicit in our existing constitutional arrangements"[34] that "entails an equality of citizenship, conferring the equal protection of the law . . . [an] assurance that extravagant governmental powers will not be conferred by Parliament, jeopardizing our most basic rights and interests . . . [and] the sovereignty of the principle of liberty [that] upholds the freedom and dignity of those independent citizens who comprise the political community."[35] And Joseph Raz cites a report of the International Congress of Jurists that identifies the rule of law with legislation designed "to create and maintain the conditions which will uphold the dignity of man as an individual[, including] not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality."[36]

In this context, it is perfectly natural to assume that a commitment to the rule of law entails a duty to obey the law. Thus, T. R. S. Allen explains that "[t]he rule of law is ultimately an ideal of legitimate governance that explains the citizen's moral obligation of obedience. It seeks to reconcile governmental authority with individual autonomy, revealing the conditions under which compliance with positive state law is consistent with the freedom and self-respect of the morally responsible citizen."[37] Similarly,

[33] World Justice Project, "What Is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Last visited July 14, 2017).

[34] Allen, *Sovereignty of Law*, 91.

[35] Ibid., 90–91.

[36] Raz, *Authority of Law*, 210–11. Raz decries this use of the phrase the rule of law, arguing that it renders the concept so malleable as to be vacuous. He observes that "[n]ot uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated," and claims that there has been "a similar perversion of the doctrine of the rule of law" (210). This critique is echoed by Judith Shklar, who contends that "[i]t would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians" (Judith N. Shklar, "Political Theory and the Rule of Law," in Allan Hutcheson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* [Toronto: Carswell, 1987], 1). Although there is much to be said for this criticism, it is beyond the scope of the present work. Hence, its exploration must be left for another day.

[37] Allen, *Sovereignty of Law*, 128.

Andrei Marmor observes that "[t]he ideal of the rule of law is basically the moral-political ideal that it is good to be ruled by law."[38] And, as Joseph Raz points out, the association of the rule of law with the duty to obey the law arises out of the very meaning of the terms. Thus, "'[t]he rule of law' means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it."[39]

In this respect, the colloquial sense of the rule of law stands in stark contrast to its literal meaning. When used literally, the rule of law refers to one liberal political value that is necessary for a just society. But when used colloquially, it refers to a society in which a sufficient number of the liberal values are realized for the political system to generate morally binding laws.

The rule of *law* makes a just society possible. The *rule* of law assumes that a just society exists. The rule of *law* gets one into the ballpark, but offers no assurance that the game will be played fairly. The *rule* of law assumes that there is a level playing field, an impartial referee, and an unbiased score keeper. The rule of *law* offers some protection against a totally oppressive government—it "takes some of the edge off the power"[40] of the state. The *rule* of law assumes that the government does not act in an oppressive manner—that the state exercises its power in ways that do not need tempering. In short, the rule of *law* supplies one piece of the puzzle that can be assembled into a just society. The *rule* of law assumes that all or most of the pieces of that puzzle are in their proper places.

V. The Corruption of the Rule of Law

A. The duty to obey the law

Is there a duty to obey the law? A full treatment of this question would, of course, require its own essay.[41] However, it is plausible to argue that there is a moral duty to obey the laws of a just society. Liberal political theorists can and often do argue that individuals have a moral obligation to obey laws produced by a political system that exemplifies the fundamental liberal values—one that functions in accordance with the principle of legality, respects fundamental individual rights, employs democratic governance procedures, affords all citizens equality before the law, guarantees citizens due process, and provides for some degree of economic freedom. Thus, it is reasonable to associate a duty to obey the law with the output of a polity in which the full set of liberal political values are satisfied.

[38] Andrei Marmor, "The Ideal of the Rule of Law," in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. (Malden, MA: Blackwell, 2010), 666.

[39] Raz, *Authority of Law*, 212. Raz is describing, not endorsing this understanding of the rule of law.

[40] Waldron, "Rule of Law," sec. 6.

[41] See John Hasnas, "Is There a Duty to Obey the Law?" *Social Philosophy and Policy* 30, no. 1 (2013): 450.

Whether the duty exists when these conditions are met is a contentious philosophical question over which there is ongoing debate. However, it is clear that there is no duty to obey the law of a political system in which several of these conditions are *not* met. For example, there is no duty to obey properly enacted laws in a democratic polity in which there are no guaranteed individual rights and only propertied males are allowed to vote. Similarly, there is no duty to obey the personal edicts of a dictator even if he or she is constitutionally required to respect a fundamental set of individual rights. And there certainly is no duty to obey the law of a polity whose legislature is neither democratically selected nor bound to respect individual rights merely because that law satisfies all the conditions of Fuller's inner morality of law.

The principle of legality is an important liberal political value. It is a necessary condition for the existence of a moral duty to obey the law. But that is all it is. It certainly is not a sufficient condition for the existence of such a duty.

In fact, the association of the single value of the principle of legality with a duty to obey the law would have monstrous implications. For it would mean that individuals could be morally obligated to obey oppressive or patently immoral laws. Laws requiring the sterilization of citizens of low intelligence or requiring the separation of the races or prohibiting the entry of those professing a particular religion into the country satisfy all of the conditions necessary to be properly enacted/legally valid rules of law. This alone cannot mean that one is morally obligated to obey them.

B. Analysis and application

Let us now return to the case of Professor Smith with which this essay began. I submit that when the rule of law is correctly understood, Professor Smith acted in an entirely proper manner.

Note first that the literal usage of the rule of law—the rule of *law*—is not implicated in this story. There are many aspects of the story that may be troubling to a liberal. A liberal might object that punishing individuals for actions that do not cause harm to others is inconsistent with the necessary respect for individual rights or autonomy or self-determination. Or that the existence of strict liability crimes that permit punishment in the absence of blameworthy conduct is equivalent to using individuals merely as means and thus is inconsistent with proper respect for their dignity as rational agents. Or that the law in question was being enforced in a discriminatory manner. But the problem that Professor Smith faced did not derive from a violation of the principle of legality. The statute he was asked to apply may have been unjust, but it did not operate retroactively, was not unintelligibly vague, and did not invest law enforcement agents with discretion to define the crime as they saw fit. Strictly speaking, the liberal value of the rule of *law* is irrelevant to Professor Smith's dilemma.

Now note that there is good reason to believe that the colloquial usage of the rule of law—the *rule* of law—is similarly irrelevant to Professor Smith's situation. The *rule* of law imposes a duty to obey the law and support the state's law enforcement efforts when one is functioning in a political system that adheres to the full set of liberal values. But to determine whether he is under such a duty, Professor Smith must ask himself whether his state's political system is one that respects fundamental individual rights, employs democratic governance procedures, affords all citizens equality before the law, guarantees citizens due process, and provides for some degree of economic freedom.

If he concludes that he is fortunate enough to live in such a society, then he would be bound to apply the law as written, and his refusal to indict Juan Ramirez would be wrongful. However, the case as described, which was intended to be as realistic as possible, provides grounds to doubt that Professor Smith lives in such a society. If he does not, then he is under no duty to obey the law or support the state's effort to enforce it, and the question of how he should behave remains a live one.

In such a case, when Professor Smith exercises his judgment as a member of the grand jury to prevent what he regards as an injustice, he does not violate the *rule* of law, which is not operative. Rather, he does precisely what a grand juror is supposed to do, which is to impose the buffer of the ordinary citizen's conscience between state law enforcement agents and the individual members of society. Unless Professor Smith lives in a just or nearly just society, the rule of law raises no specter of the duty to obey the law to haunt Professor Smith's conscience and nothing to sway him from the pursuit of justice as he understands it.[42]

But now consider the situation when the rule of law is not correctly understood. Using the same name—"the rule of law"—to refer to both the principle of legality and the output of a just political system creates the risk that the two concepts will be conflated. The rule of *law*—the principle of legality—is something that is always valuable. Adherence to the principle of legality adds moral value to any political system that subscribes to it. It is a component of a just political system, and thus, something we wish all political systems to possess. In contrast, the *rule* of law—the idea that the law should rule and be obeyed—is only conditionally valuable. Being ruled by law is valuable only in cases in which the law is produced by a just political system, which for the liberal, means one that adheres to all

[42] Regardless of whether the rule of law is implicated, one could argue that no legal system can survive if individual citizens are generally authorized to elevate their conception of justice over that embodied in the law. But that is not what one is arguing when one claims that grand jurors are allowed to decide whether to indict on the basis of their personal conception of justice. The grand jury represents a circumscribed area within which Anglo-American criminal law permits the exercise of personal judgment as a means of preventing government oppression. Far from permitting citizens to determine whether to obey the law on the basis of their own consciences, it permits the exercise of individual conscience only when a citizen is called upon to play a law enforcement role.

or most of the fundamental liberal political values. Being ruled by the law of one's polity can be a positive evil when one lives under an unjust or oppressive political system.

The danger in conflating the two is that the idea that there is a duty to obey the law may become engrafted onto the universal desirability of compliance with the principle of legality. This can cause people to believe that the law should rule and be obeyed whenever it consists of properly enacted rules that meet Fuller's eight conditions, regardless of whether the political system adheres to the other liberal values. And this, in turn, opens the door to the monstrous consequences detailed in the last section.

As noted above, it is perfectly sensible to assert that if a polity satisfies all of the requirements of a liberal society, then there is a duty to obey the laws of the polity. But to come to the conclusion that there is a duty to obey the laws of any existing polity, one must first examine whether it is true that the polity satisfies the requirements of a liberal society. The conflation of the concept of the *rule* of law with the principle of legality short-circuits this analysis. It shifts the analytical focus from the extent to which the government of the polity conforms to the requirements of a liberal society to the question of whether the law under consideration was properly enacted or is recognized as valid by the system's rule of recognition–that is, to the law's pedigree.

This "corrupted" conception of the rule of law illicitly transmutes the moral duty to obey the law of a just polity into a duty to obey the law of a less-than-fully just polity. To the extent that the laws of the real-world polity are in fact just, there is no problem. But to the extent that the laws are illiberal, oppressive, or otherwise unjust, the belief that such a duty exists is highly corrupting.

In the absence of a belief that the rule of law requires adherence to all properly enacted laws, citizens would question the moral quality of individual laws. They might hesitate to support laws that were enacted by legislatures where certain segments of the population were disenfranchised, or that violate fundamental human rights, or that deny equal citizenship to particular groups, or whose language is so indeterminate that the law lends itself to discriminatory enforcement. But an appeal to a concept of the rule of law that contains an implicit duty to obey all laws with the proper pedigree trumps any such examination of the individual laws. A duty to obey a law even if unjust renders the question of whether the law is just moot.

The corrupted conception of the rule of law contains a type of black magic. It has the power to transform an unjust injunction into a morally required one by enacting it into law. Enact a prescription into law, and *poof,* a duty to obey magically attaches to it. Worse, citizens infer a duty to support the law's application to others. If the law is in fact unjust, citizens who are committed to the rule of law become accomplices in its unjust application.

People who would never dream of forcibly separating parents from their children become avid advocates of precisely that as soon as the parents are identified as *illegal* aliens. People who would never consider intruding into

the home life of those engaged in private consensual behavior become supporters of government agents breaking down doors and invading homes with flash-bang grenades as soon as there is legislation declaring a war on drugs. And people who would never consider evicting little old ladies from their ancestral homes are happy to do so as soon as the legislation declares that an industrial park would better serve the public interest.

The corrupted conception of the rule of law can cause ordinarily well-intentioned people to support what they would otherwise recognize as the unjust or oppressive treatment of their fellow citizens. Thus, the corrupt*ed* conception of the rule of law is also highly corrupt*ing*.

Consider again the story of Professor Smith's dilemma, this time employing the corrupted conception of rule of law that carries the implication that there is a duty to obey the law. There is no reason to doubt that the laws he is asked to apply during his month on the grand jury have been properly enacted. Therefore, he believes that his commitment to the rule of law requires him to apply the law as written despite his personal belief that doing so is unjust. Accordingly, for a month, he pushes his conscience aside and proceeds to indict individuals for conduct that he believes to be morally permissible. He does so knowing that those who are indicted are unlikely to get a fair trial and will have to accept a plea bargain. And he does so knowing that indictment may destroy the life prospects of many otherwise innocent individuals. Rather than serving as a bulwark against overreaching or abusive law enforcement officials as a grand juror is supposed to, he has become a rubber stamp for whatever action the prosecutors want to take. Professor Smith's commitment to the rule of law has turned a committed classical liberal into what he himself would consider an agent of oppression. This is an impressive testament to how corrupting this confused conception of the rule of law can be.

Toward the end of his grand jury service, Professor Smith refused to vote to indict Juan Ramirez for the possession of marijuana despite the fact that the prosecutor had introduced sufficient evidence to show that Ramirez had committed the crime. In doing so, he knowingly refused to apply the law as written. He knowingly allowed his personal beliefs about justice to override a law that had been properly enacted and was a valid law of the polity. Those who subscribe to the corrupted conception of the rule of law would claim that in so acting Professor Smith was corrupting the rule of law. I disagree. I believe that at the end of his grand jury service Professor Smith finally overcame his misguided commitment to a corrupted conception of the rule of law, and properly fulfilled his role as a grand juror. Professor Smith did not corrupt the rule of law. Rather, he rejected the corruption wrought by an erroneous conception of the rule of law.

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