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ESSAY

THE CONCEPT AND THE RULE OF LAW

*Jeremy Waldron**

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I. INTRODUCTION

The Rule of Law is one of the most important political ideals of our time.¹ It is one of a cluster of ideals constitutive of modern political morality, the others being human rights, democracy, and perhaps also the principles of free market economy. Open any newspaper and you will see the Rule of Law cited and deployed—usually as a matter of reproach, occasionally as an affirmative aspiration, and almost always as a benchmark of political legitimacy. Here are a few examples, plucked at random from the world's press:

- In November 2007, when then-President Pervez Musharraf of Pakistan fired the Chief Justice of the Supreme Court of Pakistan and had him placed under house arrest, his actions were seen around the world as a crisis of the Rule of Law. Law societies and bar associations all over the world protested, and, in Pakistan itself, thousands of judges and lawyers demonstrated in the streets. Hundreds of them were beaten and arrested.²
- Earlier this year the *Financial Times* lamented that the “[a]bsence of the [R]ule of [L]aw undermines Russia’s economy.”³ Specifically, the British newspaper associated the absence of the Rule of Law

¹ I capitalize the term *Rule of Law* to distinguish it from a rule of law, which typically refers to a particular legal rule, such as the rule against perpetuities or the rule in the United States that the President must be at least thirty-five years old. U.S. CONST. art. 2, § 1, cl. 8.

² See Editorial, *Gathering Storm*, N.Y. TIMES, Nov. 8, 2007, at A32 (“The American Bar Association, its members horrified by events in Pakistan, has written to General Musharraf and condemned his ‘profound breach of the rule of law.’”); Noelle McGreener et al., Letter to the Editor, *Pakistan’s Leaders Must Respect the Rule of Law*, TIMES (London), Nov. 14, 2007, at 18 (calling on “military regime [of Pakistan] to respect the rule of law” and signed by chairs of bar associations in England, Scotland, Ireland, and Wales).

³ *Exile in Siberia: Absence of the Rule of Law Undermines Russia’s Economy*, FIN. TIMES (London), Feb. 7, 2008, at 10; see also *Russia Must Abjure Political Violence: To Win Respect, Moscow Must Itself Respect Rule of Law*, FIN. TIMES (London), July 20, 2007, at 10 (discussing Russia’s role in deteriorating East-West relations).

with the irregularity of Vladimir Putin regime's proceedings against Mikhail Khodorkovsky.⁴ But the newspaper also offered the more general suggestions that "no prosperous market economy or fair society can flourish without the [R]ule of [L]aw" and that this is "a lesson [that] foreign investors must heed."⁵

- Practices and policies associated with the war on terrorism are constantly being evaluated and found wanting against the criterion of the Rule of Law. The most prominent, of, course is the incarceration of hundreds of detainees by the United States at Guantánamo Bay in Cuba. A few days after the publication of its article on Russia and the Rule of Law, the *Financial Times* thundered again: "Military tribunals are not the way: Guantanamo is beyond the [R]ule of [L]aw and should be shut."⁶
- Many readers will remember that during the electoral debacle in Florida in 2000, the Rule of Law was invoked at each stage on all sides of every issue, culminating in the famous dissent by Justice Stevens in *Bush v. Gore*: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the [R]ule of [L]aw."⁷

⁴ *Exile in Siberia*, *supra* note 3.

⁵ *Id.*; see also Arkady Ostrovsky, *Investment Dries up as Rule of Law Seeps Away in Russia*, FIN. TIMES (London), Mar. 1, 2005, at 20 (discussing inability of investors to do business in atmosphere of complete lawlessness).

⁶ *Military Tribunals Are Not the Way: Guantanamo Is Beyond the Rule of Law and Should Be Shut*, FIN. TIMES (London), Feb. 12, 2008, at 8.

⁷ *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting). See generally Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002) (describing contestation of concept of Rule of Law and applying to context of 2000 presidential election).

Thousands of other examples could be cited. The Rule of Law is seen as a fragile but crucial ideal, and one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries' laws or constitution. Interfering with the courts, jailing someone without legal justification, detaining people without any safeguards of due process, manipulating the constitution for partisan advantage—all of these are seen as abuses of the Rule of Law.

In this Essay, I would like to consider the role of the Rule of Law in general jurisprudence, that is, in the conceptual work that we do in legal philosophy when we try to explain what "law" is.⁸ I put forward two propositions. First, I shall argue that our understanding of the Rule of Law and our understanding of the concept of law ought to be much more closely connected than they are in modern jurisprudence. Second, I shall argue that our understanding of the Rule of Law should emphasize not only the value of settled, determinate rules and the predictability that such rules make possible, but also the importance of the procedural and argumentative aspects of legal practice.

I shall argue, moreover, that these two propositions are connected. Grasping the connection between the Rule of Law and the concept of law is much easier when we understand the Rule of Law at least partly in terms of procedural and argumentative themes rather than purely in terms of determinacy and predictability. The procedural aspect of the Rule of Law helps bring our conceptual thinking about law to life, and an understanding of legal systems that emphasizes argument in the courtroom as much as the existence and recognition of rules provides the basis for a much richer understanding of the values that the Rule of Law comprises in modern political argument.

⁸ The term *law* is used in two ways. Sometimes it is used in the sense of a legal system: "The United States has a system of law." Other times it is used in the sense of legal propositions: "It is the law that you have to file a tax return by April 15." The two senses are clearly connected. A considerable amount of what I am going to say in this Essay will focus on the first sense. This is the sense in which I will argue that the Rule of Law and the concept of law need to be brought closer together. In Part IX, I will address the connection between the Rule of Law and the concept of law in the second sense.

II. WHAT IS THE RULE OF LAW?

The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.⁹

Beyond this, many conceptions of the Rule of Law place great emphasis on legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state.¹⁰ Citizens—it is said—need predictability in the conduct of their lives and businesses.¹¹ There may be no escaping legal constraints in the circumstances of modern life, but freedom is nevertheless possible if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs. Knowing in advance how the law will operate enables one to plan around its requirements.¹² And knowing that one can count on the law to protect certain personal rights and property rights enables each citizen to deal effectively with other people and the state. On this account, the Rule of Law is violated when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens, or when officials act on the basis of their own discretion rather than norms laid down in advance. If actions of this sort become endemic, then not only are people's expectations

⁹ See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 17 (2001) (“[A central element of the [R]ule of [L]aw, constraint from external authority, . . . helps assure that the processes of government, rather than the predilections of the individual decisionmaker, govern.”).

¹⁰ See *id.* at 4–12 (describing other elements common to conceptions of Rule of Law).

¹¹ See Sean Keveney, Note, *The Dishonesty Rule: A Proposal for Reform*, 81 *TEX. L. REV.* 381, 382 (2002) (“A [R]ule of [L]aw that fails to yield results with a minimum degree of consistency or predictability is of little use as an analytical tool and ceases to serve the legitimate goal of ordering the conduct of citizens.”).

¹² See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 156–57 (1960) (“The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions.”).

disappointed, but they will increasingly find themselves unable to form any expectations at all, and the horizons of their planning and their economic activity will diminish accordingly.

A conception of the Rule of Law like the one just outlined emphasizes the virtues that Lon Fuller discussed in *The Morality of Law*: the prominence of general norms as a basis of governance; the clarity, publicity, stability, consistency, and prospectivity of those norms; and congruence between the law on the books and the way in which public order is actually administered.¹³ On Fuller's account, the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly, predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so.¹⁴ Requirements of this sort are sometimes described as procedural, but I think that is a misdescription. Rather, they are formal and structural in character: they emphasize the forms of governance and the formal qualities—like generality, clarity, and prospectivity—that are supposed to characterize the norms on which state action is based.

There is, however, a separate current of thought in the Rule of Law tradition that does emphasize procedural issues. The Rule of Law is not just about general rules; it is about their impartial administration. For example, one of the great nineteenth century theorists of the Rule of Law, Albert Venn Dicey, placed at least as much emphasis on the normal operation of the ordinary courts as he did on the characteristics of the norms they administered.¹⁵ A procedural understanding of the Rule of Law requires not only that officials apply the rules as they are set out; it requires application

¹³ See LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (describing "routes to disaster" to be avoided in attempt to create and maintain system of legal rules).

¹⁴ See *id.* at 46–91 (providing account of elements required of system subjecting human conduct to governance of rules).

¹⁵ See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 193–95 (10th ed. 1961) (comparing English idea of legal equality as administered by ordinary courts to abuses of discretionary authority in continental Europe).

of the rules with all the care and attention to fairness that is signaled by ideals such as “natural justice” and “procedural due process.” Thus, if someone is accused of violating one of the general norms laid down, they should have an opportunity to request a hearing, make an argument, and confront the evidence before them prior to the application of any sanction associated with the norm. The Rule of Law is violated when the institutions that are supposed to embody these procedural safeguards are undermined. In this way the Rule of Law has become associated with political ideals such as the separation of powers and the independence of the judiciary.¹⁶

For the most part, these two currents of thought sit comfortably together. They complement each other. Clear, general public norms are valueless if they are not properly administered, and fair procedures are no good if the applicable rules keep changing or are ignored altogether. But there are aspects of the procedural side of the Rule of Law that are in some tension with the ideal of formal predictability. The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power. It requires that public institutions sponsor and facilitate reasoned argument in human affairs. But argument can be unsettling, and the procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal.¹⁷ By emphasizing the legal process rather than the formal attributes of the determinate norms that are supposed to emerge from that process, the procedural aspects of the Rule of Law seem to place a premium on values that are somewhat different from those emphasized in the formal picture.¹⁸ Instead of the certainty that makes private

¹⁶ See Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 405 (2005) (“What distinguishes our government in large part is the separation of powers [and] . . . an independent judiciary that ensures our adherence to the [R]ule of [L]aw.”).

¹⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 186–205 (1977) (arguing that rights of subjects are only truly recognized by government which allows occasional protests of its critics); see also Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in DWORKIN AND HIS CRITICS 319–36 (Justine Burley ed., 2004) (discussing argumentative aspect of Dworkin’s conception of Rule of Law).

¹⁸ See Richard Fallon, *“The Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18–19 (1997) (listing “Legal Process conceptions” of Rule of Law alongside

freedom possible, the procedural aspects of the Rule of Law seem to value opportunities for active engagement in the administration of public affairs. On both sides, the Rule of Law condemns official behavior that treats individual agency as something of no consequence. On one side it is private agency in civil society that is respected, while on the other side it is private agency exercised within the context of the institutions of the state.

If you were to ask which current of thought is more influential in legal philosophy, most scholars would say it is the one that is organized around predictability and the determinacy of legal norms, rather than the procedural current.¹⁹ It has received a great deal of attention in connection with Lon Fuller's argument in *The Morality of Law*.²⁰ But it is quite striking that in the popular and political deployments of the Rule of Law, of which I gave a few examples at the beginning of this Essay, it is the procedural current that tends to be emphasized.²¹ When people say, for example, that the Rule of Law is threatened on the streets of Islamabad or in the cages at Guantánamo, it is the procedural elements they have in mind, much more than the traditional virtues of clarity, prospectivity, determinacy, and knowing where you stand. They are worried about the independence of the Pakistani courts and about the due process rights of detainees in the war on terror. I will come back to this disparity between what legal philosophers emphasize and what ordinary people expect from the Rule of Law several times in what follows. But the main point of this Part has been to identify these two currents in the Rule of Law tradition and to understand both how they work together and the tensions that exist between them.

other conceptions).

¹⁹ See, e.g., James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 522 (2006) (discussing ordering function of rules and requirements of formal Rule of Law).

²⁰ See Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 535 (noting that World Bank has adopted Fuller's understanding of function of law).

²¹ See *supra* notes 2–7 and accompanying text.

III. THE RULE OF LAW AND THE CONCEPT OF LAW

Suppose for a moment that the Rule of Law does represent a more or less coherent political ideal. How central should this be to our understanding of law itself? What is the relation between the Rule of Law and the specialist work that modern analytic philosophers devote to the concept of law, and to the precise delineation of legal judgment from moral judgment and legal validity from moral truth?

Grammar suggests that we need to understand the concept of law before we can understand the Rule of Law. *The Rule of Law* is a complex phrase, and the word *law* is only one of its components. Just as we cannot understand a phrase like *the protection of human rights* unless we understand the smaller component phrase *human rights*, so it might appear that we cannot understand the meaning of *the Rule of Law* unless we already grasp the concept of law. But I disagree. I think the surface grammar here is misleading and that we cannot really grasp the concept of law without at the same time understanding the values comprised in the Rule of Law. I do not mean to say that we must understand the concept of the Rule of Law first, and then go on to conceptualize law itself in a way that is derivative from that understanding. Instead, I think we should understand these terms as a package, rather than understanding one as a separable component of the other. It is, after all, an accident of usage that the particular phrase *the Rule of Law* is used for this ideal. Some theorists use the term *legality* or *principles of legality* instead,²² and there is no grammatical or logical difficulty in supposing that law and legality need to be understood together, rather than law being understood first and legality second.

This issue about the priority of conceptual understanding is not just verbal. Joseph Raz offers a substantive version of the claim

²² See, e.g., H.L.A. Hart, *Philosophy of Law, Problems of*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 264, 273-74 (Paul Edwards ed., 1967) ("The requirements that the law . . . should be general . . .; should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality.")

that law must be understood first.²³ In a 1979 essay, he argues that the Rule of Law is intended to correct dangers of abuse that arise from law as such:

The law inevitably creates a great danger of arbitrary power—the [R]ule of [L]aw is designed to minimize the danger created by the law itself. . . . Thus the [R]ule of [L]aw is a negative virtue . . . the evil which is avoided is evil which could only have been caused by the law itself.²⁴

This implies that before you even get to the Rule of Law, you must understand what law is and the dangers to which it gives rise. I think Raz is wrong about this. The Rule of Law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular. Indeed, the Rule of Law aims to correct abuses of power by insisting on a particular mode of the exercise of political power: governance through law. That mode of governance is thought more apt to protect us against abuse than, say, managerial governance or rule by decree. On this account, law itself seems to be prescribed as the remedy, rather than identified as the problem that a separate ideal—the Rule of Law—seeks to remedy.

There is a broader version of the claim that an understanding of the Rule of Law presupposes an understanding of law. It has to do with the priority of what Jeremy Bentham called “expository jurisprudence” over what he termed censorial jurisprudence.”²⁵ It is said that if we do not maintain a bright line between expository and censorial jurisprudence, then our legal exposition will be contaminated by moralistic or wishful thinking and our moral evaluations will be confounded by a sense that nothing wicked can

²³ See JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 214 (1979) (explaining values that are served by Rule of Law).

²⁴ *Id.* at 224.

²⁵ See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 293–94 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (differentiating between expository jurisprudence—ascertaining what law is—and censorial jurisprudence—ascertaining what law ought to be).

be law and nothing legal can be wicked.²⁶ On this account, the Rule of Law should be placed firmly on the censorial—rather than the expository—side of this division, since it is undoubtedly an evaluative ideal. And since philosophical inquiry into the nature of law is conceived as a conceptual prelude to the expository side, it follows that the Rule of Law can have little bearing upon that philosophical inquiry.

What should we make of this argument? It is certainly true that we need to understand the facts of political life and the reality of the way in which power is being exercised before we can deploy the Rule of Law as an evaluative ideal. And we need all the conceptual apparatus that this descriptive or empirical task presupposes. But it begs the question to say that the concept of law must be regarded as part of that descriptive or empirical apparatus, or that we cannot perform the descriptive or empirical task without it. In my view, to describe an exercise of power as an instance of lawmaking or law-application is already to dignify it with a certain character; it is already to make a certain assessment or evaluation of what has happened. We look for certain patterns and features that matter to us when we are looking to characterize something as law. It is not a term we use to capture, at the most basic descriptive level, the reality of what is going on. Even in positivist jurisprudence, law is not a fundamental descriptive category. Calling something *law* supervenes on our being able to describe what is happening in other ways—in terms of practices, habits of obedience, dispositions to comply, and so on. So on all accounts, there is a layer of description beneath the level at which we use the term *law*, a layer of descriptive inquiry that everyone agrees needs to be conducted clear-headedly before we can begin the process of evaluation. That descriptive inquiry gives us the data for our evaluations. On the positivist account, a category like *law* is simply a way of sorting that

²⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 210 (2d ed. 1994) (“This sense, that there is something outside the official system . . . is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.”). See generally Liam Murphy, *The Political Question of the Concept of Law*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 371, 371–409 (Jules Coleman ed., 2001) (discussing role moral and political considerations play in determining what law is).

preliminary data before we begin to evaluate it; on the account that I favor, however, it is a way of beginning the process of evaluation. This dispute cannot be settled by simply reiterating the claim—with which everyone agrees—that we need to know the facts before we can begin evaluating.²⁷

IV. AGAINST CASUAL POSITIVISM

I said at the beginning of this Essay that the Rule of Law—like democracy—is one of our most prominent political ideals.²⁸ Clearly there are important connections between the two ideals, and these might be worth exploring on another occasion. For now, however, I would like to propose an analogy between the way we use the term *law* (particularly in the sense of legal system) and the way we use the term *democracy*.

During the Cold War, we did not take seriously the titles that certain societies gave themselves, such as “German Democratic Republic” (GDR).²⁹ We knew that the GDR was not a democracy and we were not fooled by its title. Just because something called itself a democracy did not mean that it *actually was* a democracy. We do not pander to the authoritarians. For us to recognize a system as a democracy means that the system has to satisfy certain substantive criteria. For example, it has to be a system that allows political dissent and organized opposition, and that conducts free and fair elections—with universal adult suffrage—on a regular basis.

I believe we should be similarly discriminating about how we use the term *law* (in the sense of legal system). Not every system of command and control that calls itself a legal system *is* a legal

²⁷ For a discussion of the connection between this dispute about whether law is a descriptive or evaluative term and similar disputes in political science, see Jeremy Waldron, *Legal and Political Philosophy*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 352, 378–81 (Jules Coleman & Scott Shapiro eds., 2002).

²⁸ See *supra* Part I.

²⁹ See Jochen A. Frowein, *Legal Advice for Foreign Policy in Germany*, 23 *WIS. INT'L L.J.* 25, 25 (2005) (“The German Democratic Republic, which never had any democratic legitimacy, existed for roughly forty years.”).

system. We need to scrutinize it a little—to see how it works—before we bestow this term.

I worry that modern students of jurisprudence—particularly modern legal positivists—are quite casual about what a system of governance has to be like in order to earn the appellation “law.” If it calls itself a system of law, they are very reluctant to question that self-characterization. Even if the starting point is not the self-characterization of actual systems of governance, however, the legal positivists’ own specifications for what it takes to count as a legal system are overly generous in my view: basically, any well-organized system of centralized order using articulate and identifiable prescriptions and prohibitions counts as law, provided that elite participants in the system can distinguish prescriptions and prohibitions coming from the center from other norms that may be circulating in the society.³⁰ This is the positivism of H.L.A. Hart and his modern followers. In this regard, it really is not much different from the positivism of earlier generations of jurists stretching back through John Austin and Jeremy Bentham, all the way to Thomas Hobbes: Law is any system of command with the power to dominate all other systems of command in a given society, where the chain of effective command can be traced to a single politically ascendant source.³¹ I call this “casual positivism.” On this account, the regimes of Kim Jong-Il in North Korea and Saddam Hussein in pre-2003 Iraq are legal systems. I propose that

³⁰ See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 153 (2001) (“[S]ocial facts are the grounds of the criteria of legality. . . . In the end their existence as criteria of legality in a given community depends only on their being adopted and practiced by the relevant officials.”); HART, *supra* note 26, at 116 (describing minimum conditions for existence of legal system as general obedience to rules of behavior and acceptance of rules of recognition by officials).

³¹ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 29 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (explaining that laws are commands that proceed from those whom members of society are in habit of obeying); JEREMY BENTHAM, *OF LAWS IN GENERAL* 1 (H.L.A. Hart ed., 1970) (defining law as “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state”) (emphasis omitted); THOMAS HOBBS, *LEVIATHAN* 202 (A.P. Martinich ed., Broadview Literary Texts 2002) (1651) (“[T]he law is a command, and a command consisteth in declaration or manifestation of the will of him that commandeth by voice, writing, or some other sufficient argument of the same . . .”).

a philosophy of law should be less casual and less accommodating than this.

Historically, the opponents of casual positivism have presented us with a richer array of positions. Some classical theorists—like Cicero, Augustine, and Aquinas—argued that a system of rule that calls itself law may fail to qualify as law because of its injustice.³² That is a substantive critique of casual positivism, and of course it amounts to a “Natural Law” critique of the positivist position itself. Other forms of opposition are structural rather than substantive: I have in mind the body of medieval English theory—culminating in the work of Sir John Fortescue—distinguishing between political forms of kingship and royal forms of kingship,³³ and the political philosophy of John Locke, which denied that an absolute monarch could be said to share a legal system with his unfortunate subjects.³⁴

In the twentieth century, there were theories of this kind that were formal as well as structural. For example, there was the jurisprudence of the highly original Bolshevik thinker Evgeny Pashukanis,³⁵ who honorably insisted—possibly at the cost of his life³⁶—that socialist legality was a contradiction in terms and that it was important to distinguish between law and the sort of social

³² See THOMAS AQUINAS, *The Summa of Theology*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 48 (Paul E. Sigmund ed. & trans., W.W. Norton & Co. 1988) (“A tyrannical law, since it is not in accordance with reason, is not a law in the strict sense, but rather a perversion of law.”); MARCUS TULLIUS CICERO, *On the Laws*, in ON THE COMMONWEALTH AND ON THE LAWS 120 (James E.G. Zetzel ed., Cambridge Univ. Press 1999) (c. 52 B.C.) (“The most stupid thing of all . . . is to consider all things just which have been ratified by a people’s institutions or laws.”); SAINT AUGUSTINE, THE CITY OF GOD 112–13 (Marcus Dods trans., Modern Library 1950) (426) (comparing kingdoms without justice to great robberies).

³³ See JOHN FORTESCUE, *In Praise of the Laws of England*, in ON THE LAWS AND GOVERNANCE OF ENGLAND 1, 17–23 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (c. 1470) (distinguishing royal rule from political rule).

³⁴ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 294 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (questioning whether rule by absolute monarch is distinguishable from state of war).

³⁵ See generally EVGENY B. PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY 47–64 (Chris Arthur ed., Barbara Einhorn trans., Ink Links 1978) (1929) (providing introduction to Pashukanis’s general theory of law).

³⁶ See Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157, 1159 (1949) (noting Pashukanis’s mysterious disappearance); John N. Hazard, Editorial Comment, *Pashukanis Is No Traitor*, 51 AM. J. INT’L L. 385, 385–86 (1957) (detailing accusations brought against Pashukanis and his transformation to “enemy of the people”).

ordering that might characterize the management of an industrial enterprise or the timetabling of a railroad or the internal workings of an army.³⁷ Pashukanis warned against using the word *law* to refer to a system of social regulation simply on account of its effectiveness.³⁸ He said that “the attempt to make the idea of external regulation the fundamental logical element in law leads to law being equated with a social order established in an authoritarian manner.”³⁹ He believed that law was a particular and distinctive form of social ordering, organized around the coordination and empowerment of private, independent agents.⁴⁰ Accordingly, he believed there was no future for law under communism.⁴¹

There is also the work of Lon Fuller, who famously insisted on distinguishing law as a mode of social ordering from the Nazi model of rule by terror,⁴² as well as from various forms of economic management⁴³ and psychiatric manipulation.⁴⁴ In Chapter Two of

³⁷ See PASHUKANIS, *supra* note 35, at 79 (illustrating differences between technical regulations and legal norms).

³⁸ See *id.* (arguing that “the regulation of social relations can assume legal character to a greater or lesser extent”).

³⁹ *Id.* at 101.

⁴⁰ See *id.* at 100–01 (“The legal system differs from every other form of social system precisely in that it deals with private, isolated subjects . . . [and] because it presupposes a person endowed with rights on the basis of which he actively makes claims.”).

⁴¹ See *id.* at 133 (“Only when we have closely examined . . . the withering away of private-law aspects of the legal superstructure and, finally, the progressive dissolution of the legal superstructure itself, . . . shall we be able to say that we have clarified at least one aspect of the process of building the classless culture of the future.”); see also Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1, 43 (2005) (noting that Pashukanis’s “proclamations about the future redundancy of law under communism” led to his ultimate demise).

⁴² See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958) (“To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.”).

⁴³ See FULLER, *supra* note 13, at 170–81 (discussing difficulty in discharging tasks of economic management through adjudicative forms).

⁴⁴ See *id.* at 38 (suggesting that “people could be made happy without rules”).

The Morality of Law, Fuller entertained his readers with a little fable about a king—King Rex—who ruled his country incompetently by issuing decisions and commands that were ad hoc and inconsistent, secret or unintelligible, retroactive and impracticable, and changing so constantly that the social environment they defined was completely unpredictable.⁴⁵ Do you remember how the fable ends? His subjects' constant complaints about these defects in governance led Rex to an embittered and premature death.⁴⁶ Fuller tells us: "The first act of his successor, Rex II, was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations."⁴⁷ Should we say that Rex II tried a different kind of law? No: I think we are supposed to infer that Rex II tilted away from lawmaking and the legal enterprise altogether. Henceforth, his subjects would be manipulated, treated, and ordered about in a way that would not involve the distinctive techniques, skills, and constraints of law. In Chapter Four, Fuller considers a number of trends in social control in modern societies that remind us of his fantasy about Rex II's regime.⁴⁸ He mentions the contemporary American narcotics control regime and alludes to the increasing use of actuarial techniques to regulate social intervention in the lives of ordinary people.⁴⁹ He also argues that to the extent that methods of social control such as therapy, conditioning, and psychological manipulation of deviants become standard, we will not just have changed the laws or amended our procedures; rather we will have abandoned the idea of a legal order because it will have come to seem archaic and troublesome—just as it seemed to Rex II.⁵⁰

Fuller's concerns about nonlegal modes of governance are associated by many legal philosophers with his particular

⁴⁵ See *id.* at 33–38 (providing allegorical account of hypothetical monarch to illustrate eight ways to fail to govern effectively).

⁴⁶ See *id.* at 38 ("Rex suddenly died, old before his time and deeply disillusioned with his subjects.").

⁴⁷ *Id.*

⁴⁸ See *id.* at 163–67 (discussing alternative modes of social control).

⁴⁹ *Id.* at 165–66.

⁵⁰ See *id.* at 165 ("When, for example, rehabilitation is taken as the exclusive aim of the criminal law, all concern about due process and a clear definition of what is criminal may be lost.").

characterization of Nazi Germany and his participation in the debate about whether the Nazis really had or made law.⁵¹ His position was that for the most part they did not.⁵² From a jurisprudential point of view, what was wrong in Germany from 1933 to 1945 was not so much that the Nazis used their power to advance oppressive and genocidal aims (though of course that is what matters in the broader scheme of things).⁵³ What was wrong in terms of law and legality was that they systematically undermined the formal and procedural conditions associated with the very existence of a legal system: they used retroactive directives, rumors of secret decrees, and verbal orders that could override formal statutes.⁵⁴ They also intimidated judges with a general requirement that courts not apply any standards or directives that conflicted with Nazi race ideology—which they treated as natural law—or with the interests of the party or the German people.⁵⁵ Further, they maintained facilities for concentrating and murdering large numbers of people—facilities which were free from anything other than industrial constraints.⁵⁶ To call this a system of law would make a mockery of the term, according to Fuller.⁵⁷ Rule by this sort of terror is not rule by law, and we need to make sure that our concept of law is not such as to preclude us from making that point. I believe that this claim by Fuller needs to be confronted whether or not we also agree with his further claim that a genuine system of law is less likely to engage in Nazi-style wrongdoing than any other system of governance.⁵⁸

⁵¹ See, e.g., Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2019–20 (1997) (discussing Hart-Fuller debate and Fuller's view that immoral laws should not retain legal force).

⁵² See Fuller, *supra* note 42, at 633 (criticizing Hart's view that legal system under Nazi Germany qualified as law "in a sense that would make meaningful the ideal of fidelity to law").

⁵³ See *id.* at 650 (criticizing assumption that "the only difference between Nazi law and . . . English law is that the Nazis used their laws to achieve ends that are odious to an Englishman").

⁵⁴ *Id.* at 650–52.

⁵⁵ See *id.* at 652 ("[T]he Nazi-dominated courts were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience . . .").

⁵⁶ *Id.*

⁵⁷ See *id.* at 660 (criticizing Nazi Germany's legal system).

⁵⁸ See *id.* at 636 ("[C]oherence and goodness have more affinity than coherence and

I mentioned the Rex II example, however, to indicate that Fuller pursued his distinction between legal and nonlegal modes of rule on a much wider front than was necessary to sustain his points about the extreme regime maintained in Germany by the Nazis. Placing the powers of government in the hands of psychiatrists and public relations experts is different from Nazi-style terror, both morally and formally. Fuller is prepared to accept that in some regards, it may even be desirable,⁵⁹ even where it is desirable, however, he still wants to say it is not rule by law.⁶⁰

There are features of Pashukanis's jurisprudence and of Fuller's jurisprudence that make them unattractive to many modern legal philosophers: Pashukanis' Marxism, of course, and Fuller's overstated claims about the connection between "the internal morality of law" and substantive justice.⁶¹ But they are both right about the need to overcome casual positivism—to keep faith with a richer and more discriminating notion of law.

V. THE ESSENCE OF A LEGAL SYSTEM

So how do we escape from casual positivism? Let me return to my democracy analogy. We should not call a system of governance a democracy if it does not regularly hold free elections to determine who occupies the highest political offices. Is there an equivalent for law? In other words, are there institutions or practices whose absence would decisively disqualify a system of rule from being regarded as a legal system, in the way that the absence of regular and free elections would decisively disqualify a system of governance from being regarded as a democracy?

evil. . . . [W]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness")

⁵⁹ Cf. FULLER, *supra* note 13, at 166 ("There is much reason to believe that our approach to the problem of drug addiction is wrong, and that more would be achieved through medical and rehabilitative measures than through the criminal law.")

⁶⁰ See *id.* at 163 (arguing that practices which deny that citizens are responsible, self-determining centers of action cannot be rule by law).

⁶¹ See *id.* at 157–59 (discussing relationship between internal morality of law and substantive justice).

I am going to make a number of suggestions about the elementary requirements for a system of rule to qualify as a legal system. You may be irritated by how obvious my suggestions are, but I hope you will redirect some of that irritation towards the philosophical theories of law—particularly positivist theories—that largely ignore or downplay these elements in contemporary jurisprudence.

A. COURTS

First and foremost, I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms, and that do so through the medium of hearings—formal events that are tightly structured to enable an impartial body to fairly and effectively determine the rights and responsibilities of particular persons after hearing evidence and argument from both sides.⁶²

It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence. The leading source is H.L.A. Hart's magisterial work, *The Concept of Law*.⁶³ Hart conceives of law in terms of the union of primary rules of conduct and secondary rules that govern the way in which the primary rules are made, changed, applied, and enforced.⁶⁴ He certainly seems to regard something like courts as essential; when he introduces the concept of secondary rules, he talks of the emergence of "rules of adjudication" in the transition from a pre-legal to a legal society⁶⁵—"secondary rules empowering individuals to make authoritative determinations of the question whether, on

⁶² See generally MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-64 (1981) (defining prototypical court according to triad structure); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-81 (1978) (discussing purposes and forms of adjudication and important requisites of courts).

⁶³ HART, *supra* note 26.

⁶⁴ See *id.* at 81, 94-99 (characterizing law as union of primary and secondary rules).

⁶⁵ *Id.* at 97.

a particular occasion, a primary rule has been broken.”⁶⁶ But this defines the relevant institutions simply in terms of their output function—the making of “authoritative determinations of the question whether . . . a primary rule has been broken.”⁶⁷ There is nothing on the distinctive process by which this function is performed.⁶⁸ A Star Chamber *ex parte* proceeding—without any sort of hearing—would satisfy Hart’s definition, as would the tribunals we call “kangaroo courts”⁶⁹ in the antipodes, and as would a Minister of Police rubber-stamping a secret decision to have someone executed for violating a decree.

Much the same is true of Joseph Raz’s view about the importance of what he calls “primary norm-applying organs” in *Practical Reason and Norms*.⁷⁰ Raz believes that norm-applying institutions are key to our understanding of legal systems, much more so than legislatures.⁷¹ There are all sorts of institutionalized ways in which norms may be applied, according to Raz, but “primary norm-applying organ[s]” are of particular interest.⁷² Raz describes their operation as follows: “They are institutions with power to determine the normative situation of specified individuals, which [institutions] are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong.”⁷³ He tells us that “[c]ourts, tribunals and other judicial bodies are the most

⁶⁶ *Id.* at 96.

⁶⁷ *Id.*

⁶⁸ Hart acknowledges that secondary rules will define processes for these institutions. *Id.* at 97. But he seems to think that this can vary from society to society and that nothing in the concept of law constrains that definition. See *id.* (discussing role of rules of adjudication).

⁶⁹ See BLACK’S LAW DICTIONARY 382 (8th ed. 2004) (“A self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied.”).

⁷⁰ See JOSEPH RAZ, PRACTICAL REASON AND NORMS 136 (Princeton Univ. Press 1990) (1975) (“[P]rimary norm-applying organ[s] . . . are institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong.”).

⁷¹ See *id.* at 132 (“Norm-applying institutions and not norm-creating institutions provide the key to our notion of an institutionalized system.”).

⁷² See *id.* at 134 (describing different kinds of norm-applying institutions and arguing that primary norm-applying organs are “crucial to our understanding of institutionalized systems”).

⁷³ *Id.* at 136.

important example[s] of primary organs.”⁷⁴ In his abstract philosophical account, however, the operation of primary norm-applying institutions is understood solely in terms of output (and in terms of what is done with their output).⁷⁵ Again, there is nothing about mode of operation or procedure. Secret military commissions might meet to “determine the normative situation of specified individuals . . . by applying existing norms,”⁷⁶ in the absence of the individuals in question and without affording any sort of hearing. The impression one gets from Raz’s account is that a system of rule dominated by institutions like that would count as a legal system. Of course, Raz would criticize such institutions, and he might use the ideal of the Rule of Law to do so: in his writing on that subject, he suggests that requirements of “[o]pen and fair hearing, absence of bias, and the like are obviously essential for the correct application of the law and thus . . . to its ability to guide action.”⁷⁷ But he seems to suggest that this is relevant to law only at an evaluative level, rather than at the conceptual level.

There is a considerable divergence here between what these philosophers say about the concept of law and how the term is ordinarily used. Most people, I think, would regard hearings and impartial proceedings—and the accompanying safeguards—as an essential rather than a contingent feature of the institutional arrangements we call legal systems.⁷⁸ For most people, their absence would be a disqualifying factor, just as the absence of free and fair elections would be in an alleged democracy.

I do not want to be too essentialist about details. The nature of electoral arrangements varies from one democracy to another,⁷⁹ and

⁷⁴ *Id.*

⁷⁵ *See id.* (defining primary norm-applying institutions by their ability to make “binding applicative determinations”).

⁷⁶ *Id.*

⁷⁷ RAZ, *supra* note 23, at 217.

⁷⁸ *See, e.g.,* Jamil Anderlini, *Rewards and Risks of a Career in the Legal System*, FIN. TIMES (London), July 24, 2008, at 10 (arguing that lax enforcement of existing legislation and absence of independent judiciary means that “there is no real legal system in the Western sense in China”).

⁷⁹ *See* Yen-Tu Su, *Beyond Nightmare and Hope: Engineering Proportionality in Presidential Democracies*, 30 J. LEGIS. 205, 211 (2004) (noting existence of different types of elections and electoral rules in democratic regimes).

equally the nature of hearings and the procedures used differ between one legal system and another.⁸⁰ But the essential idea is much more than merely functional—applying norms to individual cases. It is also partly structural, involving Martin Shapiro’s idea of the triad structure:⁸¹ a first party, a second opposing party, and above them an impartial officer with the authority to make a determination.⁸² Most importantly, it is procedural: the operation of a court involves a way of proceeding that offers to those who are immediately concerned an opportunity to make submissions and present evidence, such evidence being presented in an orderly fashion according to strict rules of relevance and oriented to the norms whose application is in question. The mode of presentation may vary, but the existence of such an opportunity does not. Once presented, the evidence is then made available to be examined and confronted by the other party in open court. Each party has the opportunity to present arguments and submissions at the end of this process and reply to those of the other party. Throughout the process, both sides are treated respectfully and above all listened to by a tribunal that is bound to attend to the evidence presented and respond to the submissions that are made in the reasons that are given for its eventual decision.⁸³

These are abstract characteristics—and it would be a mistake to get too concrete given the variety of court-like institutions in the world—but they are not just arbitrary abstractions. They capture a deep and important sense associated foundationally with the idea of a legal system—that law is a mode of governing people that treats them with respect, as though they had a view of their own to present on the application of a given norm to their conduct or situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It

⁸⁰ See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 34 (2002) (noting that procedures vary widely among legal systems).

⁸¹ See SHAPIRO, *supra* note 62, at 1–37 (describing triad structure).

⁸² See *id.* at 1 (“[W]henver two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution.”).

⁸³ See Fuller, *supra* note 62, at 387–88 (discussing importance of reasoned opinions).

involves paying attention to a point of view and respecting the personality of the entity one is dealing with. None of this is emphasized in the dominant positivist account; all of it, I submit, should be regarded as an essential aspect of our working conception of law.

B. GENERAL PUBLIC NORMS

A second feature is suggested by the way I have characterized courts. I argued that courts are institutions which apply norms established in the name of the whole society through the medium of tightly structured proceedings.⁸⁴ It is essential to our understanding of a legal system that there are such norms and that they play a central role in the legal system, a role to which almost all its defining features are oriented. A system of political rule is not a system of law unless social order is organized around the existence of identifiable norms issued for the guidance of conduct.

Two things about these norms are particularly important. First, they are general in character. As such, they form the basis for all the particular legal orders issued and enforced in the society, including the particular orders of courts. Some positivists see the generality of law as a pragmatic matter: Austin observed that “[t]o frame a system of duties for every individual of the community, [is] simply impossible: and if it were possible, it [would be] utterly useless.”⁸⁵ Hart said that “no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.”⁸⁶ But I think the generality of law is not just a contingent matter—as though a society could in principle be governed entirely by ad hoc decrees and still be said to have a system of law. Definitionally, the word *law* is associated with general, as opposed to particular, statements: consider its use in *laws of nature* or *law-like* statements in science, or *moral law* in

⁸⁴ See *supra* Part V.A.

⁸⁵ AUSTIN, *supra* note 31, at 28–29.

⁸⁶ HART, *supra* note 26, at 21.

Kantian ethics.⁸⁷ Our concept of law in jurisprudence embodies this meaning and the principles of impersonality and equality that it conveys.⁸⁸

Secondly, to play this central role in a legal system, the norms must be not only general but public. They must be promulgated to the public—those whose conduct will be assessed by them and those whose interests their application is supposed to affect. The public existence of such norms is to be contrasted with a situation where there are no abiding points of reference in one's relations with state authorities, where significant portions of the population are kept in the dark as to what is expected of them, and where the tribunals—whose job it is to resolve particular disputes—apply secret directives that are neither known to nor knowable by the non-state parties affected. Such a system of secret norms is not a legal system, for it lacks the dimension of publicity that most people associate with law.

The identifiability of law is one of the leading themes of modern positivism.⁸⁹ The idea of a rule of recognition—a way of determining whether a given norm has the status of law—is crucial to positivist jurisprudence, but this tradition has not emphasized *public* identifiability.⁹⁰ Modern positivists follow H.L.A. Hart in basing the identification of norms as law on the existence of an accepted rule of recognition practiced among the elite members of the society, notably the judges.⁹¹ Hart asserts that in a modern system of government, “a great proportion of ordinary citizens—perhaps a majority—[will] have no general conception of the legal structure or of its criteria of validity.”⁹² Hart acknowledges that such a

⁸⁷ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 14 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1797) (emphasizing universality of moral laws).

⁸⁸ For the best account, see HAYEK, *supra* note 12, at 148–56 (contrasting general and abstract nature of rules we call “laws” with specific and particular commands).

⁸⁹ See W.J. Waluchow, *The Many Faces of Legal Positivism*, 48 U. TORONTO L.J. 387, 388 (1998) (associating Hart’s “rule of recognition” with modern positivism).

⁹⁰ For an understanding of the legal positivist’s conception of “the rule of recognition,” see HART, *supra* note 26, at 94–95.

⁹¹ See Anthony J. Sebock, *Is the Rule of Recognition a Rule?*, 72 NOTRE DAME L. REV. 1539, 1553–54 (1997) (noting that most modern positivists believe that only community’s legal officials need accept “rule of recognition”).

⁹² HART, *supra* note 26, at 114. See generally Jeremy Waldron, *All We Like Sheep*, 12

conception is consistent with the regime of secret rules that I mentioned earlier.⁹³ Again, I think Hart is wrong about this. It is a mistake to think that a system of rule could be a legal system if there is no publicly accessible way of identifying the general norms that are supposed to govern people's behavior. I do not mean that a legal system may be said to exist only when knowledge of the law and how to find it is disseminated in detail among every last member of the community. The norms should be public knowledge in the sense of being *available* to anyone who is sufficiently interested, and available in particular to those who make a profession of being public norm-detectors (lawyers, as we call them) and who make that expertise available to anyone who is willing to pay for it. More generally, the public character of law is a matter of the abiding presence of certain norms in a given society. They present themselves as public standing norms—settled and calculable features of the social landscape—not necessarily immune from change, but not expected to have ephemeral half-lives that would make it not worth anyone's while to figure out what they are and what they require.

The publicity of these norms is not just a matter of pragmatic administrative convenience along the lines of its being easier to govern people if they know what is expected of them. It embodies a fundamental point about the way in which the systems we call "legal systems" operate. They operate by using, rather than suppressing and short-circuiting, the responsible agency of ordinary human individuals. Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. It is also quite different from eliciting a reflex recoil with a scream of command. The publicity and generality of law look to what Henry Hart and Albert Sacks called "self application," that is, to people's capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to

CAN. J.L. & JURISPRUDENCE 169 (1999) (arguing that Hart's version of legal system where only officials accept and use system's criteria of legal validity is real possibility).

⁹³ See HART, *supra* note 26, at 202 (warning that means of control that are characteristic of law also facilitate repressive rule); *supra* notes 45–54 and accompanying text.

norms that they can grasp and understand.⁹⁴ Even when the self-application of general norms is not possible and institutional determination is necessary, either because of disputes about application or because application inherently requires an official determination, the particular orders that are eventually issued still look towards self-application. Unsuccessful defendants in private law litigation are expected to pay the decreed damages themselves; rare is the case where bailiffs have to turn up and take away their property.⁹⁵ I do not mean to deny the ultimately coercive character of law. But even in criminal cases—where the coercive element is front and center—it is often the case that a date is set for a convict to report to prison of his own volition.⁹⁶ Of course, if he does not turn up, he will be hunted down and seized. Still, the law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees.

I believe this pervasive emphasis on self-application is definitive of law and that law is therefore sharply distinct from a system of rule that works primarily by manipulating, terrorizing, or galvanizing behavior.⁹⁷ Lon Fuller has argued that this emphasis embodies law's respect for human agency: "To embark on the enterprise of subjecting human conduct to the governance of rules involves . . . a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules,

⁹⁴ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 120–21 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[E]very directive arrangement which is susceptible of correct and dispositive application by a person to whom it is initially addressed is self-applying. . . . Overwhelmingly, the greater part of the general body of the law is self-applying, including almost the whole of the law of contracts, torts, property, crimes, and the like.").

⁹⁵ See Henry H. Perritt, Jr., *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 258 (2001) ("Most people pay civil judgments . . . voluntarily because they know that coercive enforcement is a realistic possibility.").

⁹⁶ Cf. *id.* (arguing that anticipation of coercive enforcement leads to voluntary compliance).

⁹⁷ Joseph Raz has pursued the idea of law's action-guiding character in this connection most thoroughly. See RAZ, *supra* note 23, at 214 ("[I]f the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it. This is the basic intuition from which the doctrine of the [R]ule of [L]aw derives: the law must be capable of guiding the behaviour of its subjects." (emphasis omitted)).

and answerable for his defaults."⁹⁸ Many positivists would agree with him; they accept that law's function is to guide action.⁹⁹ But they do not make the connection between this function and the definitive feature of publicity that I have emphasized. For example, Jules Coleman takes pains to argue that the action-guiding function of law is not necessarily expressive of a dignitarian value.¹⁰⁰ In my opinion, Coleman's view on this is motivated more by a dogmatic desire to resist any connection between the concept of law and substantive values like dignity than by any real insight into the distinctiveness of an action-guiding rather than a purely behavior-eliciting model of social control. I believe that the action-guiding character of law—with its emphasis on self-application and its reliance on agency and voluntary self-control—furnishes a second dignitarian theme in our understanding of law. At the end of my discussion of courts, I suggested that law is a mode of governance that deals with people on the basis that they have a view of their own to present on the application of the norm to their situation; it respects their dignity as beings capable of explaining themselves.¹⁰¹ We can now complement that with the idea that law is inherently respectful of persons as agents; it respects the dignity of voluntary action and rational self-control.

C. POSITIVITY

General norms of the kind that I have been talking about are often associated with the existence and operation of something like a legislature. The legal norms that govern our actions are not just discovered; they are man-made. Of course, legislation is not the

⁹⁸ FULLER, *supra* note 13, at 162.

⁹⁹ See, e.g., COLEMAN, *supra* note 30, at 206 (ascribing to law function of guiding conduct); HART, *supra* note 26, at 206–07 (arguing that rules of law consist primarily of general standards of conduct).

¹⁰⁰ Coleman insists that we can talk about the connection between the concept of law and the guidance of action and what action-guidance involves without pursuing or invoking these moral ideals. See COLEMAN, *supra* note 30, at 203–04 (criticizing Stephen Perry, *The Varieties of Legal Positivism*, 9 CAN. J.L. JURISPRUDENCE 361 (1996)). On the other hand, Coleman also associates the distinctiveness of law in this regard with the weak commendatory aspect of the predicate "law." *Id.* at 190.

¹⁰¹ See *supra* Part V.A.

only way in which laws are made and changed. International law emerges by treaty and custom,¹⁰² and in municipal legal systems, courts often play a major role in the development and growth of the law.¹⁰³ Courts, however, perform their law-making function non-transparently—under cover of a pretense that the law is being discovered, not made or changed—and through processes that are not organized as legitimate law-making processes.¹⁰⁴ Legislation, by contrast, conveys the idea of making or changing law explicitly, in an institution and through a process publicly dedicated to that task.¹⁰⁵

Modern legislatures are set up as large representative assemblies. Ideally, they are established on a democratic basis and they are organized in a way that is supposed to ensure that they are responsive to as many interests and opinions as possible. It is probably a mistake to identify these features of legislation as definitive of our modern concept of law, though some political theorists have done so.¹⁰⁶ At the other extreme, at least one theorist, Joseph Raz, has maintained that legislatures are not essential to a system of law.¹⁰⁷ But this turns out to mean only that Raz can *imagine* something like a legal system operating without a legislature, though he cannot point to any actual example of this. This possibility is similar to his suggestion that the imagination

¹⁰² See Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 11 (1995) (describing treaties and custom as major sources of international law).

¹⁰³ See Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 275 (2008) (noting role of courts in development of public law).

¹⁰⁴ See Jeremy Waldron, *Principles of Legislation*, in THE LEAST EXAMINED BRANCH 15, 22 (Richard W. Bauman & Tsvi Kahana eds., 2006) (“Although the lawmaking role of the courts is well known to legal professionals, judicial decision making does not present itself in public as a process for changing or creating law. . . . Courts are not set up in a way that is calculated to make lawmaking legitimate.”).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 81–82 (Maurice Cranston trans., Penguin Books 1968) (1762) (“[W]hen the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever. Here the matter concerning which a rule is made is as general as the will which makes it. And *this* is the kind of act which I call a law. . . . [L]aw unites universality of will with universality of the field of legislation . . .”).

¹⁰⁷ See RAZ, *supra* note 70, at 129–31 (suggesting that norm-applying institutions—such as courts—are more important than norm-creating organs).

need not balk at the idea of a legal system without sanctions.¹⁰⁸ In the real world, sanctions and the deliberate and public activity of legislatures are both definitive features of law. Their prominence—respectively, among the grounds of compliance and the basis of legal change—may vary from system to system, but their presence is indispensable to the ordinary notion of law.

The existence of such public law-producing processes reminds us of law's positivity, of its being something that people have made and people can control. Law is a man-made institution, and its central norms are human artifacts. True, we talk readily enough of divine law—God's law—so there are senses of the word *law* which do not have this connotation of being man-made.¹⁰⁹ But when we think of law as a mode of governance, we think of it as something humans have set up—sometimes using the image of the deliberate actions of a founding generation, sometimes using the image of the accretion of customs and practices over generations. To understand law in this way is not to beg any questions against natural law jurisprudence. Jurists in the natural law tradition do not deny the positivity of human law; indeed, they often talk about it much more sensibly than self-styled positivists. The distinctiveness of their position consists of a particular view about the relation between God's law and human law or between the moral law and human law—not in any denial of the positivity of human law.

Positivity is partly a matter of what law is: it is human, it is contingent, it is the product of historical processes. But it is also a matter of how people understand it. Those who are ruled by law understand that they are ruled in an order that is susceptible to change and modification. The norms by which they are ruled could be otherwise. It is only our decision to have them and keep them as a basis of governance that explains why *these* norms are law and not some others. (Once again, the idea of legislation conveys this most

¹⁰⁸ See *id.* at 158–61 (suggesting that legal system which does not provide for sanctions is logically possible, though humanly impossible).

¹⁰⁹ Just to complicate matters, we sometimes distinguish between divine positive law and other parts of God's law that are supposed to be discernible by reason. *Positive* can sometimes just mean *made* (even made by God) rather than specifically *man-made*. See AUSTIN, *supra* note 31, at 38–39 (discussing divine laws as positive law).

explicitly.) The idea of law, therefore, conveys an elementary sense of freedom, a sense that we are free to have whatever laws we like. Of course, the *we* in that sentence does not mean that any one of us is free to have whatever laws he or she likes, nor does it necessarily imply any idea of democratic control. The *we* is bound up with whatever system of human power is in place in a given community. Still, law's positivity underwrites the use of imagination and creative thought in regard to law: the norms we are governed by could be different. A demand that the law should be different may be impracticable from a political point of view, but it is not inherently futile (as it would be in the case of the laws of nature).

D. ORIENTATION TO THE PUBLIC GOOD

I have mentioned a number of regards in which law is essentially public.¹¹⁰ It is made known to members of the public as a basis on which they may organize their expectations, and it is made, changed, and administered in the public proceedings of institutions like courts and legislatures. There is also an additional sense of publicness relating to the way in which law is oriented to the good that it serves.

We recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole society and to address matters of concern to the society as such. We recognize institutions as part of a legal system when they orient themselves in their public presence to the good of the community—in other words, to issues of justice and the common good that transcend the self-interest of the powerful. It strains our ordinary concept of law to apply it to norms that address matters of personal or partial concern, or to institutions that make no pretense to operate in the name of the whole community, presenting themselves as oriented instead to the benefit of the individuals who control them.

That law presents itself in a certain way—as standing in the name of the public and as oriented to the public good—seems to me

¹¹⁰ See *supra* Part V.B.

to be one of its defining characteristics. I do not mean that nothing counts as law unless it actually promotes the public good. Jurists used to ask—in the vein of Saint Augustine—“What is the difference between a system of laws and a set of commands issued by a band of robbers?”¹¹¹ One answer might be that the robbers’ commands do not promote the public good; they are simply for the advantage of the robber band. That is something like a strong natural law position, however, and it is not what I am suggesting here. Positivist answers to Augustine’s question have tended to revolve around issues of effective institutionalization: the order constituted by the power of the robbers would not be effective enough nor be sufficiently institutionalized to call for the use of the concept of law in all its complexity.¹¹² There might be an intermediate position, however. Instead of saying that nothing is law unless it promotes the public good, we might say that nothing is law unless it *purports* to promote the public good, i.e., unless it presents itself as oriented in that direction.¹¹³ This is an aspirational or orientational idea, not a substantive one. But it is nevertheless very significant.

E. SYSTEMATICITY

The fifth feature of law that I want to mention is much harder to label than the others. I call it “systematicity,” though it is predicated on another closely related feature, which may be called the “cumulative” character of law.

A legal system builds on itself. Though it is always possible for a law to be amended or revoked, it is not usual for each new legislature to wipe the slate clean of the work of its predecessors. Instead, what legislators do—and what courts also do in their law-

¹¹¹ See AUGUSTINE, *supra* note 32, at 112–13 (comparing kingdoms without justice to great robberies).

¹¹² Cf. HANS Kelsen, *PURE THEORY OF LAW* 47 (Max Knight trans., Univ. of California Press 1967) (1934) (“Why is the coercive order that constitutes the community of the robber gang . . . not interpreted as a legal order? . . . Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed.”).

¹¹³ Cf. Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 761 (2001) (exploring similar suggestion about relation between law and justice).

making capacity—is add to the laws already in existence. That is what I mean by law's cumulative effect. Even when there is a radical change of personnel in the political system—with liberals replacing conservatives—indeed, even when there is a revolution, we hardly ever see a return to “Year Zero” so far as the law is concerned. Instead, law grows by accretion, so that new liberal legislation takes its place alongside old conservative legislation—or at least alongside the old conservative legislation that has not been explicitly repealed.

On the other hand, a legal system is not just a succession of legislated norms—like the common view of history in Toynbee's phrase, just “one damned thing after another.”¹¹⁴ On the simplest command model, particular laws come into existence by virtue of particular commands. The strongman in charge of a society issues one command; the next day he issues another command; and so on, until there is a whole heap of commands. On the crudest positivist understanding, that is what the law of the society amounts to—a heap of commands—whether or not anyone can make sense of them all together. But I do not think we would call that a legal system, or regard the unrelated and unreconciled heap of commands as a system of laws, if it was not thought appropriate to try to introduce some organizing system into the accumulation.¹¹⁵ Legal norms present themselves as fitting or aspiring to fit together into a system, each new ruling and each newly-issued norm taking its place in an organized body of law that is fathomable by human intelligence. Positivists like Raz have emphasized law's coherence as an institutional system.¹¹⁶ Law is not only a system in an institutional sense, however, but in a sense relating to logic, coherence, and perhaps even what Ronald Dworkin has called “integrity.”¹¹⁷ At its most modest, this feature of systematicity

¹¹⁴ ARNOLD J. TOYNBEE, *A STUDY OF HISTORY* 265 (1957).

¹¹⁵ See Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV 16, 31–32 (2000) (criticizing legal positivists for ignoring the importance of systematicity of laws in legal systems).

¹¹⁶ See generally RAZ, *supra* note 70, at 123–48 (analyzing importance of norm-applying and norm-creating institutions to normative systems).

¹¹⁷ See RONALD DWORKIN, *LAW'S EMPIRE* 165–66 (1986) (defining “political integrity” as government acting in principled and coherent manner toward all citizens).

amounts to something like Lon Fuller's requirement of consistency: people must not be confronted by the law with contradictory demands—for example, with rules that require and prohibit the same conduct at the same time and in the same circumstances.¹¹⁸ Legal systems satisfy this demand with the use of maxims like *lex posterior derogat priori*.¹¹⁹ Beyond that, there is a felt requirement essential to law that its norms make some sort of sense in relation to one another; even apart from formal consistency, we should interpret them so that the point of one does not defeat the point of another. That is why the use of analogy is appropriate in legal argument; it builds on a sense that individual norms are not self-contained and that the point of any one of them may have some bearing on how it is appropriate to think about any other. This broader sense of the systematicity of law helps explain why we think of a body of law as consisting of not just legislation and decisions in particular cases, but also principles whose content reflects powerful themes that run implicitly through the whole body of law and that are reflected in various ways in its explicit norms.¹²⁰ The principles of a legal system are not part of its enacted law or its formal holdings, but they represent the underlying *coherence* of its enacted laws and its formal holdings.

The making of law is often thought of as embodying a principle of will rather than reason. In the legislative process, something becomes law for no other reason than that someone wills it to be so.¹²¹ But legislation is not just the addition of a rule to the heap of laws; it is a modification of the corpus juris. That is why legislating is in part a technical task: each bill must be framed in a way that pays attention to the juridical (as well as the social) environment in which it is to operate. Also, it is striking the extent to which particular legislative measures present themselves not just as

¹¹⁸ See FULLER, *supra* note 13, at 65–70 (discussing difficulties of contradictory laws).

¹¹⁹ See BLACK'S LAW DICTIONARY 931 (8th ed. 2004) (“[A] later law prevails over an earlier one.”).

¹²⁰ See DWORKIN, *supra* note 17, at 22–41 (arguing importance of understanding principles behind rules as opposed to just rules themselves).

¹²¹ See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 11–12 (1999) (describing contrast between courts—which change laws indirectly, through decision making—and legislatures, which change laws directly).

peremptory fiats, but also as small-scale normative systems, with an array of provisions dealing with interpretation, application, exceptions and so on. (The extreme case, of course, is legislation that sets out explicitly to codify a given area of the law.) This systematicity also affects the way law presents itself publicly. Finding out what the law is consists of finding out how the accumulating system of norms has been modified.

Judges like to pretend that they are not making law in the willful way that legislators make law. Even when their conclusions are new, they present them as the product of reasoning rather than will.¹²² The systematicity of law helps explain this. The process by which courts make law involves projecting the existing logic of the law into an area of uncertainty or controversy, using devices such as analogy and reference to underlying principles. Courts would have to operate in quite a different way—and the pretense that they are really just finding the law rather than laying down new law would be much harder to sustain—were it not for the systematicity of the existing body of norms that they manipulate.

Above all, law's systematicity affects the way that law presents itself to those it governs. It means that law can present itself to its subjects as a unified enterprise of governance that one can make sense of. I do not just mean that one can make sense of each measure, as one might do on the basis of a statement of legislative purpose. I mean that one can make sense of the "big picture," with an understanding of how the regulation of one set of activities relates rationally to the regulation of another. This is another aspect of law's publicness. The law's susceptibility to rational analysis is a public resource that members of the public may make use of—not just for understanding or as an intellectual exercise, but in argument. In court, for example, the submissions that may be made on behalf of each party are not limited to a view of the facts and the citation of some determinate rule. They can also be a presentation of the way in which the antagonists take their positions to fit generally into the logic and spirit of the law. In this

¹²² *Id.* at 12.

way, the law pays respect to those who live under it, conceiving them now as bearers of individual reason and intelligence.

Again, the theme of dignity is important. Earlier we considered the way in which law respects the dignity of individual agency by relying largely upon the self-application of general norms.¹²³ Now we see that it also respects the dignity of reasoning and even argumentativeness. The individuals whose lives law governs are thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state.

VI. A NARROW CONCEPT OF LAW

I am unsure whether we should say that the five features I have considered provide the basis of a positivist account of law. The positivity of law is emphasized in my third feature, but—as I noted—it is also recognized by jurisprudential theories opposed to positivism. It is certainly not a purely descriptive account.¹²⁴ Shortly we will consider the significance of the fact that all five of these features are, to a greater or lesser extent, value-laden. Even if they do provide the basis of a positivist account of law, it is no longer casual positivism of the sort we considered in Part IV. It defines a distinctive mode of governance that is worth having and worth distinguishing from other modes of governance.

The mode of governance that is properly called law is quite common in the world today, but we should not infer from this that just any mode of governance necessarily conforms to it. There have been and are societies that are not ruled in this way. They may be the “pre-legal” societies of pure custom without institutions that

¹²³ See *supra* notes 94–98 and accompanying text.

¹²⁴ On the other hand, some positivist theories present the descriptive characteristics that they regard as definitive of law in a way that is quite explicit about the values that motivate the choice of these characteristics. See Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 26, at 411–33 (describing “normative positivism” as valuing separability of legal judgment and moral judgment).

H.L.A. Hart discussed in *The Concept of Law*.¹²⁵ They may also be modern tyrannies or totalitarian societies that do not use any institutional process recognizably like that of a court and that base their rule on a haphazard array of secret decrees issued at the whim of a strongman and known only to the officials charged with enforcing them. In societies like these it will be regarded as—at best—a puzzling naivety and—at worst—a fatal insolence to demand one's day in court, to attempt to present any sort of reasoned argument about one's own view of one's obligations, or to insist on knowing in advance and in stable and general terms what is required of one so that one can organize one's life accordingly.

The commands and decrees imposed in such a society may be called "laws" and the institutions that administer them may describe themselves in terms appropriate to a legal system. If someone wants to insist on these descriptions, we will not be bewildered; we will understand what is going on. The use of a concept does not always involve all of its meaning or resonance, and the use of complex and important concepts is often crude and peremptory, as people use them roughly to cover anything that they think is analogous to their proper or central application.¹²⁶ But those who use language so loosely should also not be surprised when others withhold the relevant terms, insisting on a more rigorous and specific meaning.

This is particularly the case when terms have an important appraisive or accreditative function. Consider terms like *doctorate* or *master's degree*. When someone says that they have a doctorate in physics or a master's degree in political science, I think we are entitled—conceptually—to expect that these terms refer to accredited qualifications from a proper university, with all the attributes and orientations that graduate education at a university involves. It may not be Harvard or Oxford, but we would expect it to be an institution of a certain kind or character.

¹²⁵ See HART, *supra* note 26, at 91–94 (describing conditions that must be satisfied for primitive communities to function by non-legal, primary rules).

¹²⁶ See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9–18 (1980) (explaining distinction between focal and peripheral—or deviant—cases of concepts like "law").

Yet we know there are dubious institutions that offer “degrees” on the basis of programs that do not conform to anything recognizable as advanced university education. Imagine receiving a spam e-mail that reads: “Too lazy to attend exam or classes? We have Diplomas and Degrees—Masters’ or Doctorates—to choose from in any field of your interest. Only two weeks required to deliver the prestigious, non-accredited university’s paper to your doorstep. Do not hesitate to give us a call today! 1-555-693-8861.” In this scenario, the company is not promising to send a Harvard doctorate in the mail. There is no element of misrepresentation. Degrees are relative to institutions: some people (after years of study) can put “Ph.D. (Harvard)” after their name, while others (two weeks after dialing 1-555-693-8861) can only put down “Ph.D. (Flybynight U.)” Anyone who orders a degree from this company knows what the degree will be worth. On the other hand, if I were insisting that *conceptually* a doctorate must be a qualification based on a serious program of advanced study, I do not think that I should be embarrassed by this e-mail as a counter-example. We all know what is going on. We know there can be unsophisticated uses of sophisticated concepts, and we can recognize this example as such. Certainly it would be a mistake to insist that since this e-mail represents an intelligible use of the word *doctorate*, our analysis of the concept of a doctorate must be relaxed enough to accommodate it. We can have a more stringent analysis than that, while still understanding the temptations and conveniences of using *doctorate* in this particular way.

The same is true of democracy in the analogy we have been using. We know what people were getting at when they described the United States in 1918 as a democracy, even though women were not guaranteed the right to vote; even apartheid South Africa might have been called a democracy—on account of universal adult white suffrage—to distinguish it from countries that were ruled by a king or a dictator not subject to the votes of ordinary people at all. And if elections are infrequent or corrupt, we may still understand what the supporters of a regime are doing when they call it a “democracy.” Even so, our ability to understand any of these uses

does not mean that a proper account of the concept of democracy requires that it be extended to cover them.

Similarly, a secret edict issued by a dictator to the effect that the assets of anyone who fails to display sufficient enthusiasm for the dictatorship are forfeited to members of the dictator's family can be called *law* if you like. We know what someone would mean by calling it the law of pre-invasion Iraq or wherever. But this usage need not embarrass us in our account of law's essential features, for our account is not promising to say what is conveyed by every intelligible use of the word *law*. It is an explication of the central concept of law which needs to be understood in itself as background to our necessarily more jaundiced understanding of these other degenerate, exploitative, and backhanded uses of the term.

In *The Concept of Law*, one of the grounds on which Hart defended a fairly relaxed—if not a casual—form of positivism was that any more restrictive use of the term *law* would not isolate a distinctive phenomenon worth separate study. “[N]othing is to be gained,” he said, “in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept [of law].”¹²⁷ Hart argued that any proposal to leave to another discipline the study of systems that did not satisfy the more restrictive test would simply invite confusion.¹²⁸ Note, however, that Hart was not talking about any of the five characteristics of law that I have mentioned, but instead about the traditional natural law view that certain edicts are too wicked to be called laws. And he may have been right about the idea of separating the “scientific” study of such edicts into a discipline separate from the study of laws that are just. But I do not think his argument applies to the case that has been made in this Essay.

Though there is a discipline devoted to the study of all forms of political order—namely, political science—a lot can be gained from defining a subfield that would concentrate on systems of governance that exhibit the five characteristics I have mentioned. Legal systems have complexity, and they engage the consciousness and

¹²⁷ HART, *supra* note 26, at 209.

¹²⁸ *Id.*

agency of their subjects in ways that starkly distinguish them from other forms of rule. They are likely to exhibit patterns of growth and decline and to generate certain outcomes under certain conditions that are worth studying as a matter separate from the patterns of growth and decline and the outcomes under similar conditions of dictatorships or “pre-legal societies.” Just as political scientists make a study of electoral politics, which is distinct from forms of study that include, say, Kremlinology, the study of how legal systems (in my sense) operate in the real world may well generate a body of research and literature that is not readily applicable to the behavior of other sorts of political systems where quite different types of institutions are involved and quite different modes of interaction and expectation exist between rulers and ruled.

Let me turn now to the evaluative dimension of my account. The features that I have suggested are definitive of law are formal, structural, institutional, and procedural in character. They are not substantive features, though they are not without moral significance. I think they define something worth treasuring as well as something worth studying. We have noted various ways in which these characteristics define a mode of governance that takes people seriously as dignified and active presences in the world—persons with lives of their own to lead, with points of view about how their lives relate to the interests of others, and with reason and intelligence to exercise in grasping their society’s system of order.

I am sure that my defining features can be stated in purely descriptive terms (if anyone wants them characterized in that way). But let us be clear: these features are morally motivated criteria—just as, in our analogy, the insistence on free and fair elections for a democracy is a morally motivated criterion. When we say that there cannot be a democracy unless there are elections, it is because democracy is something that we care about and the idea of elections goes to the heart of what matters to us. We could phrase this definitional requirement in purely descriptive terms, but in doing so, we would sell it short in our account of its importance and the connection between it and the overall value of democracy. Similarly, the criteria for law that I have identified—criteria like courts, with their characteristic *modus operandi*; governance by

general norms in a way that respects people's dignity as agents capable of autonomous self-government; law as representing a way in which a community takes public control of the conditions of its collective life; and law's amenability to reason—all of these go to the heart of what we value about law. They explain in evaluative terms why the distinction between legal systems and other types of systems of governance is important to us. Their definitional connection with law is not just a semantic point; it is a substantive moral thesis.

Hart addressed this aspect of the matter as well. He worried that a value-laden definition of law might confuse the issue of whether people should obey a law that they perceive to be iniquitous.¹²⁹ That issue, he worried, might become equivocally poised between the judgment that “[t]his is law; but it is too iniquitous to be applied or obeyed”¹³⁰ and the judgment that “[i]f this is as iniquitous as I think it is, it would not properly be regarded as law.”¹³¹ Hart went on to argue that:

What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may

¹²⁹ See *id.* at 207–09 (describing problems with laws which are morally iniquitous, yet properly enacted and clear in meaning).

¹³⁰ *Id.* at 208.

¹³¹ See *id.* (describing temptation to make conservative application of natural law position, to validate all enacted laws as necessarily just, simply on account of their status as law).

be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.¹³²

But plainly this is an argument only against a definition of law whose implicit values are supposed to clinch the issue of obedience. It is not an argument against a definition of law whose implicit values are relevant to, but far from determinative of, the overall question of obedience. The values that support my account of law's distinctive features are not the sort of values that can settle what we should do when faced with an edict that appears unjust or harmful to the public good. We may ask: Is it at least publicly presented in a way that is oriented to the public good? Is it administered through courts with familiar procedural safeguards? Has it been made available as a basis on which people might organize their lives, applying it themselves to their own conduct? Is it administered as part of an intelligible system? The answers to these questions may affect our overall moral estimate of the situation, but they still leave the crucial question of obedience unsettled. Thus, they do not give rise to the concern that Hart expressed.

Let me return to my democracy analogy to make another point. Elections in the real world are seldom perfect, even in the countries—like the United States—that we regard as paradigms of democracy. Electoral systems are flawed, registration and turnout are low, systems of recording and counting votes are often chaotic and vulnerable to manipulation, and so on.¹³³ “Free and fair elections” is a matter of degree, and when we call it a defining feature of democracy, we may have in mind a fairly low threshold compared with what a perfect system would offer. The same is true of law: all five criteria that I have mentioned are matters of degree. A particular directive may be more or less stable, more or less well-publicized, enforced through more or less scrupulous procedures, and integrated more or less fully into a coherent system of norms. I think we call something a legal system if it satisfies a recognizable

¹³² *Id.* at 210.

¹³³ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1389 (2006).

minimum along these five dimensions, at least to the extent that it pays credible tribute to the concerns that underlie each of the criteria. We may not have a precise sense of what that minimum is; there may be gray areas around the threshold that will likely generate dispute about whether a problematic case qualifies as a legal system. This is also true of democracy. It means that both the disciplinary boundaries we are imagining and the morally-motivated conceptual distinctions that we want to draw in these respective fields are not crisp, but only blurred and uncertain.

Not only are our defining criteria matters of degree, but they are matters of degree in several dimensions. One important dimension not mentioned so far is the extent to which recognizably legal institutions and requirements actually impact the way society works. Law is not a game. There might be a set of norms and institutions that exhibit all of the characteristics I have mentioned but which apply only to a very small subset of social, economic, and political interactions and regulate both public and private power to an inconsiderable extent. I do not think we should call such a system the legal system of a society if it is confined to an obscure corner in this way. It is part of our idea of law that, even if it does not regulate everything, it must be effective in governing many—if not most—of the more important interactions and conflicts in a given society. It must apply to the main ways in which ordinary people and businesses are subjected to and affected by the exercise of power in society (certainly by the exercise of public power and maybe by big centers of private power as well). And, it must effectively control, direct, govern, and—where appropriate—restrain the exercise of political power in ways that people can count on.¹³⁴

¹³⁴ Modern positivist theories include a condition of efficacy. See, e.g., HART, *supra* note 26, at 116–17 (describing minimum conditions necessary for existence of legal system as (1) effective acceptance of rules as common public standards of official behaviour; and (2) general obedience of rules by private citizens); KELSEN, *supra* note 112, at 11–12, 47–48, 211–14 (arguing that validity of legal norms requires a minimum of effectiveness). Such a condition requires only that such laws as there are be generally complied with or enforced; it does not require that law extend over any particular domain. Raz suggests that law claims comprehensive competence, but this is still a separate matter from the extent of its actual reach. Raz, *supra* note 70, at 150–51.

VII. FROM THE CONCEPT OF LAW TO THE RULE OF LAW

I said at the outset that one of my aims in this Essay is to argue for a closer connection between the idea of law and the idea of the Rule of Law.¹³⁵ Those who are familiar with the Rule of Law will have noted that what I have called the defining characteristics of law are also among the most prominent requirements of that ideal. The requirement I have just mentioned is a version of Lon Fuller's principle of congruence.¹³⁶ And of the five defining ideas explored in Part V, three are intimately connected with Rule-of-Law requirements: (1) systematicity is associated with the Rule-of-Law requirement of consistency or integrity;¹³⁷ (2) the existence of general norms is associated with the Rule-of-Law requirements of generality, publicity, and stability; and (3) the existence of the distinctive institutions we call courts is associated with the Rule-of-Law requirement of procedural due process.

Much like the criteria I used for specifying what we mean by *law*, the requirements associated with the Rule of Law are all matters of degree. They are matters of degree because first, a system of governance may satisfy the Rule of Law in some areas of governance and not others; second, the Rule of Law comprises multiple demands, some of which may be satisfied while others are not; and third a particular norm or directive may be more or less clear, more or less stable, more or less well-publicized, and enforced through more or less scrupulous procedures. Moreover, this feature of the Rule of Law seems essential to the work that it does as a political ideal. We use it to make nuanced and qualified assessments as well as all-or-nothing condemnations or commendations of systems of governance. We do sometimes say that there is a catastrophic failure of the Rule of Law (like the Nazi Germany of Fuller's characterization),¹³⁸ but mostly we talk about "departures" from the

¹³⁵ See *supra* Part I.

¹³⁶ See FULLER, *supra* note 13, at 81–91 (describing importance of congruence between law and official action).

¹³⁷ See Jeremy Waldron, *Retroactive Law: How Dodgy Was Duiynhoven?*, 10 OTAGO L. REV. 631, 653 (2004) (arguing that importance of Rule of Law requirement of prospectivity is connected to importance of systematicity in law).

¹³⁸ See FULLER, *supra* note 13, at 40 (describing Hitler's Germany as "a general and

Rule of Law, or actions that “undermine” the Rule of Law to a certain extent, or the “weakening” of the Rule of Law, or we talk of particular—though not necessarily systemic—violations of the Rule of Law, and so on.

I believe that one can understand these two sets of criteria—for the existence of law and for the Rule of Law—as two perspectives on the same basic idea. The very idea of law is a demanding concept, and there are two ways of thinking about its demanding-ness. We can think of the demands as being incorporated into the meaning of law itself, placing limits on our use of this term. Or we can think of the demands as being aspirations embodied in an ideal associated with the operation of a legal system—the Rule of Law. John Finnis brings the two perspectives together when he says, in his discussion of the Rule of Law in *Natural Law and Natural Rights*, that “the Rule of Law” is “[t]he name commonly given to the state of affairs in which a legal system is legally in good shape.”¹³⁹ A legal system can be in better or worse shape, but after a point it can be in such bad shape that it does not satisfy the criteria for being a legal system at all.

But even if it is recognizable as a legal system, we may still demand more from that system on any or all of these dimensions. The fact that we work with a roughly defined threshold for a system of governance to count as law does not mean that we rest satisfied with these minimum credible achievements. There is always room for improvement, and there is also danger of deterioration. The criteria I have outlined make themselves available as sources of continuing normative pressure to reach higher up each scale and to resist the downward pressure that other exigencies of politics inevitably generate.

For example, on the issue of courts, there is pressure to improve procedural due process and to resist the tendency to replace adjudicative hearings with other types of process. Regarding norms, there is a continuing campaign against retroactivity, failures of generality, vagueness, and other vices specified in Lon Fuller’s

drastic deterioration in legality”).

¹³⁹ FINNIS, *supra* note 126, at 270.

“inner morality of law.”¹⁴⁰ With systematicity, there are arguments for codification and for the promotion of a greater element of what Ronald Dworkin has called “integrity” in both legislation and common law.¹⁴¹ With the control of power, there may be a continuing aspiration to bring more and more of the discretion that characterizes the administrative and welfare state under the control of legal norms and institutions, particularly the forms of discretion that impact directly and deleteriously on individuals’ lives, liberties, and property.

These demands can be characterized in a number of ways. If the problems with a particular system of governance are deep, multifaceted, and endemic, we may understand the pressure for improvement as a demand that the system become a less marginal case of a legal system—more evidently and less controversially an example of the operation of law. Using our analogy again, it is like insisting that elections in Zimbabwe be free and fair, and uncontaminated by violence, so that the country can be regarded as a more definite case of a democracy rather than as the degenerate mixture of democratic forms and rule by fear that it has recently become.¹⁴² Even if a country is undoubtedly a democracy—such as the United States—one may still put pressure on its institutions to be more truly democratic. Whether this pressure is characterized in terms of the concept of democracy or some aspirational democratic ideal may be a matter of choice in the way that the demand is presented. Similarly, a system of governance that is undoubtedly a legal system may be reproached for occasional lapses into retroactivity, or for occasional failures to control bureaucratic power. Such reproaches may be phrased either in terms of the concept of law—“Let us make this a less marginal example of a legal system”—or in terms of the Rule of Law—“Let us apply the Rule-

¹⁴⁰ See FULLER, *supra* note 13, at 43 (describing moral aspiration of legislators to make laws clear and understandable).

¹⁴¹ See DWORKIN, *supra* note 117, at 176–86 (describing political integrity as principle that lawmakers try to make laws morally coherent and judges try to make laws adjudicatively coherent).

¹⁴² For a current discussion of the political climate in Zimbabwe, see generally Eliot Tofa & Moses Tofa, *Zimbabwe and Mugabe’s Politicization of State and Civic Institutions*, 13 GEO. PUB. POL’Y REV. 87 (2007).

of-Law ideal more rigorously to this legal system.” In both phrasings, there is an evaluation and a degree of categorization going on.¹⁴³

Usually, a reproach in terms of the concept of law indicates that we may be in danger of falling short of some minimum threshold, while a reproach in terms of the Rule of Law represents continuing upward pressure along each of these defining dimensions. Different people in various circumstances will use the terms differently, so there will be ample room for disagreement about whether a given case should be regarded as a poor example of a legal system, as opposed to one that does not score as highly on the Rule of Law requirements as it should. For instance, Jeremy Bentham might denounce the system of English common law as not really law at all,¹⁴⁴ while more moderate thinkers might say that it is a system of law—just one where there is massive room for improvement along Rule-of-Law dimensions. Each side can see what the other is getting at, however, and each side can understand the looseness in the use of this common terminology.¹⁴⁵ In addition, the existence of multiple criteria on both sides—in our definition of law and in our understanding of the Rule of Law—means that there is even more room for variation and indeterminacy. This is exactly what we should expect of a complex evaluative concept. It is what we have in our analogous case of democracy, and I suggest that it is what we should also expect for law.

¹⁴³ I do not dissent from Ronald Dworkin’s view that law is an interpretive concept. See DWORKIN, *supra* note 117, at 87 (“When [judges] disagree . . . their disagreements are interpretive. They disagree, in large measure or in fine detail, about the soundest interpretation of some pertinent aspect of judicial practice.”). Rather, what I am trying to do in this Essay is delineate the shape of the relation between our interpretation of law and our understanding of the Rule of Law.

¹⁴⁴ See BENTHAM, *supra* note 31, at 193 (“[T]he [common law] is a fiction from beginning to end: and it is in the way of fiction if at all that we must speak of it.”); see also GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 328–36 (1986) (describing Bentham’s contempt for common law).

¹⁴⁵ Cf. DWORKIN, *supra* note 117, at 104–08 (taking similarly open approach to old question of whether Nazi Germany had legal system).

VIII. DISPUTES ABOUT WHAT THE LAW IS

The word *law* is sometimes used in the sense of legal system and sometimes in the sense of legal proposition.¹⁴⁶ In this Essay, I have focused mostly on law in the sense of legal system. But what about law in the sense of legal proposition? We say, for example, that it is the law that you must pay your taxes by April 15. How is this second usage to be understood in the framework I am proposing?

A crude understanding might relate the two senses of law in the following way. Law in the first sense requires the existence of certain general norms that serve as a basis of orientation for people's behavior, as well as a basis for decision by the courts. That was our second defining element of law in Part V. Maybe this second sense of law is just a way of talking about those general norms: whether something is the law may simply be a matter of whether it can be found in the array of publicly promulgated general norms that I mentioned.¹⁴⁷

Unfortunately, this account is too crude, for a couple of reasons. First, we will want to include among the possible values of the predicate “__ is the law,” not only the identifiable general norms of the society, but also the particular decisions of courts. Once we do that, we are bound to feel some pressure to extend it to comprehend the basis on which courts make their decisions. If the courts seem to be establishing certain ways of understanding the general norms, or if the courts seem to be articulating certain principles of decision that are intermediate between the enacted general norms and the decision of particular cases, then it may be appropriate to describe such modes of interpretation and such intermediate principles as law, too.

Second, the emphasis placed on the systematicity of law and its penetrability by human reason in Part V may also mean that we must give the term *law* a broader extension. Occasionally, counsel or a judge may argue that people ought to be able to rely on some law-like proposition, even though that proposition has been neither

¹⁴⁶ See *supra* note 8 and accompanying text.

¹⁴⁷ See *supra* Part V.C.

adopted explicitly in legislative form nor articulated (until that moment) by a court. We might say nevertheless that since the proposition can be inferred from existing legal materials that already carry legal authority, it also should be accorded authority. It is a distinctive feature of legal systems that they set up institutions—courts—that are required to listen to submissions along these lines. These are not just arguments about what the law ought to be—made, as it were, in a sort of lobbying mode. They are arguments of reason that maintain competing contentions about what exactly the law is. Inevitably, the line between characterization and normativity in these arguments will be blurred. One party will argue that a particular proposition cannot be inferred from the law as it is; the other party will respond that it can be inferred if we just credit the law with more coherence than people have in the past. Our account of what the law is, then, is not readily separable from our account of how the law aspires to present itself. Our response to the pressure for coherence may well alter our sense of what the law already contains.

It follows from this that the determination of whether something is law or not may sometimes—perhaps characteristically—be a matter of doubt and contestation. Such contestation can be explained by the interaction of some of the features emphasized in this Essay: The invocation of clear public norms, on the one hand, and argumentation on the basis of coherence and systematicity, on the other. Both are practices to which the formalities of the courtroom are hospitable, and together they explain why people often disagree about what the law is.

Some lawyers will be troubled by the resulting indeterminacy. “How,” they will ask, “can it be so unclear what the law is?” But the approach I have indicated here has the descriptive advantage of explaining the disagreements about law that actually occur in legal practice. At times, of course, the law is clear. There is no controversy about the speed limit on Route 316 heading west out of Athens, Georgia towards Atlanta. But in many other cases the existence of disagreement about how to establish the truth of some legal proposition is undeniable. The account given here draws heavily on the recent work of Ronald Dworkin, who insists that our

concept of law must be able to make sense of the disagreements we often have about how to determine what the law on a particular topic is.¹⁴⁸ Moreover, it must be able to explain this disagreement not just as a jurisprudential puzzlement or pathology, but as a distinctive aspect of legal practice.¹⁴⁹

Dworkin has his favorite cases to cite on this point. He mentions the 1978 U.S. Supreme Court case of *Tennessee Valley Authority v. Hill*, where it was argued that the Endangered Species Act required halting the completion of a vast dam in its final stages of construction at a huge waste of public funds.¹⁵⁰ The Act requires that once a species has been identified as threatened with extinction in a particular habitat, no governmental action may be taken that might jeopardize the continued existence of such endangered species or result in the destruction or modification of its habitat.¹⁵¹ At the time the Act was passed, the Tellico Dam in Tennessee was already partially built.¹⁵² In the late stages of its construction, however, a small species of fish—the snail darter—was identified as endangered by the project.¹⁵³ An immense amount of money had already been spent on the dam, but more work needed to be done to complete it.¹⁵⁴ The question was whether the statute required the work on the dam to be halted immediately for the sake of the snail darter, or whether the Endangered Species Act should be read in a common sense way that would not prevent the completion of projects initiated long before its enactment.¹⁵⁵ Is the law that governs this case the literal text of the statute or the statute read in a way that avoids alarmingly costly and counterintuitive results?

¹⁴⁸ See DWORKIN, *supra* note 117, at 3–43 (discussing disagreements about law as they relate to our concept of law).

¹⁴⁹ Cf. NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW* 27 (2005) (“These contests are not some kind of a pathological excrescence on a system that would otherwise run smoothly. They are an integral element in a legal order that is working according to the ideal of the Rule of Law.”).

¹⁵⁰ DWORKIN, *supra* note 117, at 20–23 (discussing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

¹⁵¹ Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000).

¹⁵² *Tenn. Valley Auth.*, 437 U.S. at 172.

¹⁵³ *Id.* at 161–62.

¹⁵⁴ *Id.* at 172.

¹⁵⁵ *Id.* at 172–74.

Any plausible account of what went on in this case shows the two sides disagreeing about how to infer legal requirements from the same mass of legal materials.

Another example of legal disagreement cited by Dworkin is the 1980 decision of the California Supreme Court in *Sindell v. Abbott Laboratories*,¹⁵⁶ addressing the allocation of tort liability on the basis of market share.¹⁵⁷ Where a plaintiff has used a product—such as a pharmaceutical drug—supplied by a number of different manufacturers and suffered harm as a result of negligence in the manufacture of the product, is it right to assign liability to each manufacturer on the basis of market share without proof that any particular defendant caused the harm that the plaintiff actually suffered? The plaintiff might argue that this is the fairest resolution,¹⁵⁸ one that is consonant with what we might think of as the moral tenor of the background law. On the other hand, the defendant might argue that the law cannot countenance liability in this case because there is no legislative enactment or judicial precedent directly authorizing the imposition of this sort of liability absent proof of actual causation.¹⁵⁹

I think Dworkin is right to observe that those who disagreed in each of these cases disagreed not just about what to do, but about what it meant to *abide by the law* when deciding what to do.¹⁶⁰ There was no disagreement about the facts in these cases, the terms of any statute or precedent, or the contents of the opinions in the array of relevant precedents. What was in contention was what to make of all these agreed upon facts—physical and juridical—so far as the legal disposition of the cases was concerned. If there were no law to distract us, it might be obvious what the sensible or fair solution in each case would be. (We should finish constructing the

¹⁵⁶ 607 P.2d 924 (1980).

¹⁵⁷ See Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 3–5 (2004) (using fictional version of *Sindell*, with some slight adaptation of facts, to make jurisprudential point that judges should first identify general principles underlying settled laws and then apply those principles to facts of case).

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* (arguing that outcome of difficult cases “depends on the best answer to the difficult question of which set of principles provides the best justification for the law in [a particular] area as a whole”).

dam and make each pharmaceutical company pay Mrs. Sindell a fair measure of damages.) But in a system of law, the pragmatic pursuit of good outcomes is sometimes constrained by statutes, precedents, principles, and doctrines. In each of these cases, there was plenty of material to establish a sense that the law placed *some* constraint on what should be done; the contention was only about what that legal constraint amounted to.

If it is not unnatural to say that the two sides in *Tennessee Valley Authority* and the two sides in *Sindell* disagreed about what the relevant law was, then it is also not unnatural to say that they disagreed about what the Rule of Law required for the disposition of each case. This is because the Rule of Law is also a highly contestable idea.¹⁶¹ Jurists disagree about whether the Rule of Law requires rule by anything other than rules; they disagree about whether rule by judicial decision represents the Rule of Law or the rule of men; they disagree about whether statutory law, common law, customary law, or constitutional law should be taken as a paradigm for the Rule of Law; they disagree about whether the Rule of Law is conceived as a way of framing moral and political arguments in a community, or as a way of settling these arguments; and they disagree about whether or not the exercise of official discretion should be regarded as consistent with the Rule of Law when it is framed and authorized by statute.¹⁶²

In the name of legality, one side in *Tennessee Valley Authority* urged submission to the literal terms of the enactment, insisting that it was not for the courts to form any "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress,"¹⁶³ while the other side insisted that legality required the exercise of intelligence and common sense when selecting among possible interpretations of the statutory text.¹⁶⁴ Similarly, the

¹⁶¹ For an explanation of what I mean by the contestability of the Rule of Law, see Fallon, *supra* note 18, at 6 and Waldron, *supra* note 7, at 148 n.29, which define the Rule of Law as an "essentially contestable concept"—with evaluative as well as descriptive elements—whose correct application requires more than a simple appeal to ordinary usage.

¹⁶² See Waldron, *supra* note 7, at 140–48 for citations and details of these disagreements.

¹⁶³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

¹⁶⁴ See *id.* at 196 (Powell, J., dissenting) ("I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public

parties in *Sindell* disagreed about the constraints the Rule of Law imposes on one's thinking about a good—or fair or appropriate—solution to a public policy problem. According to one view, legality requires courts to limit liability on the basis of fundamental and long-established rules about causation.¹⁶⁵ Under the prevailing view in *Sindell*, however, it would not be incompatible with the Rule of Law for courts to adapt existing principles to the realities of contemporary complex commercial society in a thoughtful and consistent way (consistent with the spirit of their previous application).¹⁶⁶ So there is disagreement about what the Rule of Law requires as well as disagreement about what the law is.

It is Dworkin's view—and I think he is right—that disagreements about what constitutes law in these cases and about what the Rule of Law requires amount to the same disagreement.¹⁶⁷ We cannot sensibly drive a wedge between the claim that the judges disagreed about what the Rule of Law—or, as it is sometimes called, legality¹⁶⁸—required in these cases and the claim that the judges disagreed about what the law required. In *Sindell*, for example:

We can sensibly think that though the law rejects [the plaintiff's] claim for damages according to market share, justice supports that claim. Or (less plausibly) the other way around: that though the law grants her that claim, justice condemns it. But it would be nonsense to suppose that though the law, properly understood, grants her a right to recovery, the value of legality argues against it. Or that though the law, properly

weal.”).

¹⁶⁵ See *Sindell v. Abbott Lab.*, 607 P.2d 924, 942 (1980) (Richardson, J., dissenting) (arguing that majority's holding does violence to “traditional tort principles by the drastic expansion of liability proposed”).

¹⁶⁶ See *id.* at 936 (“The response of the courts can be either to adhere rigidly to prior doctrine . . . or to fashion remedies to meet . . . changing needs.”).

¹⁶⁷ See Dworkin, *supra* note 157, at 24–25 (describing “intimate connection” between legality and claims of law).

¹⁶⁸ See *supra* note 22 and accompanying text; see also Dworkin, *supra* note 157, at 24 (associating “legality” with “rule of law”).

understood, denies her a right to recovery, legality would nevertheless be served by making the companies pay.¹⁶⁹

It is evident in these cases, and thousands more, that there is intense disagreement among judges and lawyers about what it means to solve certain problems legally—as opposed to pragmatically—and what it is to constrain one’s moral or pragmatic solutions on the basis of what the law requires. Since this disagreement exists anyway, we should not be upset by any complaint about the introduction of contestability into the law on the account that I have given. Law is *already* contestable in cases like *Sindell* and *Tennessee Valley Authority*, and so the best way to characterize that contestability is to accept that disagreements about the Rule of Law are bound up with the very concept of law itself.

IX. PROCESS AND SETTLEMENT IN THE RULE OF LAW

I stated in Part II of this Essay that most conceptions of the Rule of Law emphasize the importance of determinacy and settlement.¹⁷⁰ For these, the essence of the Rule of Law is predictability—people want to know where they stand.¹⁷¹ Accordingly, such conceptions highlight the role of rules rather than standards, literal meanings rather than systemic inferences, direct applications rather than arguments, and *ex ante* clarity rather than labored interpretations.¹⁷² Conceptions of this kind are very popular.¹⁷³ So,

¹⁶⁹ Dworkin, *supra* note 157, at 25.

¹⁷⁰ See *supra* notes 10–12 and accompanying text.

¹⁷¹ See, e.g., HAYEK, *supra* note 12, at 152–57 (arguing that general applicability of abstract rules of law is important attribute which allows individuals to predict consequences of their actions).

¹⁷² See Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 9–11 (Carnegie Endowment Working Papers, Paper No. 30, 2002), available at <http://www.carnegieendowment.org/files/wp30.pdf> (describing World Bank ideal of Rule of Law); see also James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 517–21 (2006) (discussing threat of indeterminacy to Rule of Law); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (arguing that, where possible, Rule of Law requires that legal determinations reflect general rules as opposed to balancing modes of analysis or “totality of the circumstances”); Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 92–97, 120–23 (2007)

it is natural to think that the Rule of Law must condemn the uncertainty that arises out of law's argumentative character.

But I also said in Part II that there was another current in our Rule-of-Law thinking which emphasizes argument, procedure, and reason, as opposed to rules, settlement, and determinacy. This theme sometimes struggles to be heard.¹⁷⁴ But, as I argued at the end of Part II, it is often quite prominent in public and political use of the Rule of Law ideal.¹⁷⁵ The most common political complaint about the Rule of Law is that governments have interfered with the operation of the courts, compromised the independence of the judiciary, or made decisions affecting people's interests or liberties in a way that denies them their day in court—their chance to make an argument on their own behalf.¹⁷⁶

Here is my claim: If we understand the relation between the concept of law and the Rule of Law in the way that I have urged us to understand it, then the importance of the second procedural current is obvious. No conception of law will be adequate if it fails to accord a central role to institutions like courts, and to their distinctive procedures and practices, such as legal argumentation. Conceptual accounts of law that only emphasize rules and say nothing more about legal institutions than that some institutions make rules and some apply them are too casual in their understanding of what a legal system is; they are like understandings of democracy that neglect the central role of elections. A philosophy of law is impoverished as a general theory if it pays no attention to the formalized procedural aspects of courts and hearings or to more elementary features of natural justice like

(discussing rigid substantive conception of Rule of Law and arguing that such conception cannot account for political changes in response to circumstances over time).

¹⁷³ See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998) (defining Rule of Law as system in which laws are public knowledge, clear in meaning, and apply equally to all); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 370–72 (2006) (arguing that Rule of Law is best understood as “causeway” establishing stable institutional environment that permits calculation of risk and affords predictability).

¹⁷⁴ See *supra* notes 15–16 and accompanying text.

¹⁷⁵ See *supra* note 21 and accompanying text.

¹⁷⁶ See, e.g., Kahn, *supra* note 173, at 354–58 (arguing that Russian Federation uses law as metaphorical tool, subjecting citizens to arbitrary and capricious interference by government in all aspects of life, including operation of courts).

offering both sides an opportunity to be heard. Failing to capture this in abstract terms, or regarding it as just a contingent feature of some legal systems and not others—and therefore beneath the notice of general jurisprudence—can make conceptual analysis in jurisprudence seem empty and irrelevant. Even if one could defend focusing solely on the rules themselves, a philosophy of law is still impoverished if it pays no attention to the defining role of law's aspiration to achieve coherence among the norms that it contains and to the forms of reasoned argumentation that are involved both in maintaining consistency and in bringing it to bear in the application of norms to particular cases.

Neil MacCormick has pointed out various ways in which law is an argumentative discipline, and I am greatly indebted to his account.¹⁷⁷ No analytic theory of what law is and what distinguishes legal systems from other systems of governance can afford to ignore this aspect of our legal practice and the distinctive role it plays in a legal system's respect for ordinary citizens as active centers of intelligence. The fallacy of modern positivism is its exclusive emphasis on the command-and-control aspect of law, without any reference to the culture of argument that it frames, sponsors, and institutionalizes. The institutionalized recognition of a distinctive set of norms may be an important feature, but at least as important is what we do in law with the norms that we identify. We do not just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a continual process of argument, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us.

When positivists in the tradition of H.L.A. Hart pay attention to this aspect of interpretation and argument, they tend to treat it as an occasional and problematic sideline.¹⁷⁸ The impression given is

¹⁷⁷ See MACCORMICK, *supra* note 149, at 14–15, 26–28 (discussing “arguable character of law” and arguing that process of evaluating relative strengths of competing arguments is “a matter of more or less, a matter of opinion, calling for judgment”).

¹⁷⁸ See HART, *supra* note 26, at 135 (recognizing that there are circumstances where courts must strike balance by weighing adversaries' arguments, but concluding that “the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules”).

that in most cases, the authoritative identification of legal norms using a rule of recognition is sufficient; once it is recognized, a legal norm can become a straightforward guide to official action. Occasionally the language is unclear, however, because words have open texture or because our aims are indeterminate, or because for some other reason there is a hiccup in the interface between words and the facts to which they apply. Unfortunately, we are then left with no choice but to argue the matter through.¹⁷⁹ And usually, the positivist will add, the upshot is that the court will just have to cut through the Gordian knot of argumentation and make a new rule, which can be recognized and applied more readily without any attendant controversy.¹⁸⁰

But this account radically underestimates the point that argumentation—about what this or that provision means, or what may be the effect of a given array of precedents—is business as usual in law. We would be uneasy about counting a system that did not exhibit such argumentation and make routine provision for it as a legal system. And since it is a central part of our understanding of what a legal system is, it should also play a significant role in the ideal of the Rule of Law—as Finnis puts it, in the account we give of “the state of affairs in which a legal system is legally in good shape.”¹⁸¹

In this Essay, I have contrasted two views of the concept of law and two views of the Rule of Law. So far as the concept of law is concerned, we have what I call the “casual positivism” of Hart and his followers, contrasted with the richer account that I developed in Part V. The former emphasizes rules—primary rules identified by a secondary rule of recognition, together with a minimalist account of the institutions that produce and apply them. The latter pays more attention to the distinctive institutional features of a legal system and to the practices and modes of argumentation that they sponsor and accommodate. So far as the Rule of Law is concerned,

¹⁷⁹ See *id.* at 124–36 (arguing that open texture of language produces uncertainty at margins when general rules of law are used).

¹⁸⁰ See *id.* at 135–36 (arguing that courts perform rule-producing function at margins where there is uncertainty about applicability of rules).

¹⁸¹ FINNIS, *supra* note 126, at 270.

we have one conception that emphasizes the determinacy of enacted norms and the predictability of their application, and another, richer conception that also emphasizes procedural due process and the presence and importance of formally structured argument on behalf of ordinary citizens.

These might be regarded as separate controversies, but I believe they are intimately connected with one another. There is a natural correlation between a conceptual account of law (COL₁) that emphasizes rules and a Rule of Law ideal (ROL₁) that concentrates on their characteristics like their generality, determinacy, etc. Additionally, there is a natural correlation between a conceptual account of law (COL₂) that focuses not just on the general norms established in a society but on the distinctive procedural features of the institutions that administer them, and an account of the Rule of Law (ROL₂) that is less fixated on predictability and more insistent on the opportunities for argumentation and responsiveness to argument that legal institutions provide. These correlations can be expressed graphically as follows:

<i>THE CONCEPT OF LAW</i>	<i>THE RULE OF LAW</i>
COL ₁ : casual positivism: primary and secondary rules	ROL ₁ : determinacy, predictability, settlement, etc.
COL ₂ : courts, norms, systematicity, etc.	ROL ₂ : procedural due process and opportunity for argument

Conceivably, this correlation could be shaken loose by an insistence that the concept of law and the Rule of Law are to be understood quite independently of each other. Then, we might imagine someone acknowledging the need to move from COL₁ to COL₂ while still sticking with a conception of the Rule of Law (ROL₁) that does not go beyond the formal characteristics of rules. Or, we could imagine a positivist adhering dogmatically to COL₁, but acknowledging the importance of a separate Rule of Law ideal that emphasizes

procedural and argumentative values. But these combinations seem odd; they treat the Rule of Law as a rather mysterious ideal—with its own underlying values, to be sure, but quite unrelated to our understanding of law itself. It is simply one of a number of ideals (such as justice, liberty, or equality) that we apply to law, rather than anything more intimately connected with the very idea of law itself.

I have argued, on the contrary, that the Rule of Law as a normative ideal arises out of our understanding of what law is. It represents a natural trajectory of normative thought projected out from the normative significance of law's defining features. It seems to follow that just as a conception of law would be impoverished if it emphasized only the existence of rules and the bare minimum of institutions necessary to apply them, so too would a conception of the Rule of Law be impoverished as an ideal if it (1) emphasized only the clarity that crisp and determinate rules provide and the settlement and predictability that follow from their straightforward application, and (2) neglected (or, even worse, denigrated) the value we should give to law's procedural, rational, and argumentative aspects.

Whether we end up with an impoverished conception of law itself, an impoverished version of the Rule of Law, or—more likely—both, the damage to our understanding of the distinctive value of law is likely to be quite considerable. The concept of law will end up accommodating, and the Rule of Law will end up idealizing, aspects of governance that look quite demeaning and unpleasant from the point of view of what we value in legal practice—indeed, quite demeaning and unpleasant even from the point of view of those who extol ROL_1 .

Let me explain. I do not think that a conception of law or a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on governments to treat ordinary citizens with respect as active centers of intelligence. The demand for clarity and predictability is commonly made in the name of individual freedom—the freedom of the Hayekian individual in charge of his own destiny who needs to

know where he stands so far as social order is concerned.¹⁸² But with the best will in the world, and with even the most determinate-seeming law, circumstances and interactions can be treacherous. From time to time, the free Hayekian individual will find himself charged or accused of some violation, or his business will be subject—as he thinks, unjustly or irregularly—to some detrimental rule. Some such cases may be clear, but others may be matters of dispute. An individual who values his freedom enough to demand the sort of calculability, to which the Hayekian image of freedom under law is supposed to cater, is not someone who we can imagine always tamely accepting a charge or determination that he has done something wrong. He will have a point of view on that, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. And, when he brings his point of view to bear, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins—legal argumentation and the use of the facilities that the law creates for the formal airing of arguments.¹⁸³ Courts, hearings, and arguments are aspects of law which are not optional extras; they are integral parts of how law works and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to truncate what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active center of intelligence.

The Rule of Law and the concept of law can inform each other and protect each other against the prospect of that impoverishment. Our conception of what law is is our best guide to what matters

¹⁸² See HAYEK, *supra* note 12, at 148–61 (arguing that individuals achieve freedom under law when they obey general abstract rules, as opposed to another man's will, and that society can achieve order through reliance on such rules).

¹⁸³ For a fine account of this, see MACCORMICK, *supra* note 149, at 12–31, which describes the tension between the Rule of Law—which is supposed to provide certainty and predictability—and the argumentative character of law, and arguing that reconciliation is possible if the Rule of Law is viewed as dynamic rather than static, allowing new certainties to emerge from old certainties through rational argument.

about law, and a full understanding of how the legal system matters to us is our best guide to what is distinctive about legal as opposed to non-legal modes of governance. The alternative, I fear, is an impoverished concept of positive law, which emphasizes nothing more than the existence of two kinds of rules, and an impoverished account of the Rule of Law, which treats everything besides the determinacy of the rules as though it did not matter.

