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## The Limits of Process

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### THE LIMITS OF PROCESS

ROBIN WEST

Jeremy Waldron's claim, as I understand it, is that the "Rule of Law" requires not only that the various laws that govern us consist of general, knowable rules with which we can all comply—the so-called formal requirements of the Rule of Law often identified with Lon Fuller's notorious King Rex and his eight ways to fail to make law<sup>1</sup>—but also that those laws be applied in a way that acknowledges our intelligence, respects our dignity, and broadly treats each of us as a worthy equal when it imposes its censorial and punitive will upon us.<sup>2</sup> Waldron wants to think of these latter ideals as the "procedural" requirements of the Rule of Law, which, he claims, are not reducible to Fuller's requirements and may on occasion conflict with them.<sup>3</sup> So, he distinguishes the "formal" from the "procedural" requirements of the Rule of Law. The formal, Fullerian Rule of Law requires that, whatever their content, laws must have a certain form, while the procedural, Waldronian Rule of Law requires that, however formally virtuous they may be, those rules must be applied in a way that is procedurally just.<sup>4</sup> The state may not, consistent with the Rule of Law thus understood, expose any of us to the risk of state-imposed punishment, liability, censure, or stigma without ensuring that the laws that have this consequence are applied against us in a fair way that respects our dignity.<sup>5</sup> And what does that fairness require? Minimally, that we have the opportunity, should we be so targeted by the state, to participate intelligently in the legal system that has brought

down its sword upon us.<sup>6</sup> Our rules of procedure should all be interpreted and applied toward that end. So, the procedural Rule of Law requires, for example, that we be granted a fair trial, that we be assured, at that trial, of the assistance of an attorney, and that, through decent procedures, we have a chance to tell our side of the story, and to do so in accordance with rules of evidence that guarantee that only relevant information will be garnered by the state to secure a conviction or verdict against us, rather than any old piece of defamatory nonsense the state might feel free to unleash.

More generally, the procedural Rule of Law requires that we be treated as an intelligent participatory member of law's empire, even when the state seeks to use law's sword to punish, stigmatize, or penalize us. The formal requirements broadly associated with Lon Fuller's work protect our interest in law's certainty and predictability and hence maximize our liberty and to some degree our dignity—they respect, for example, our agentic capacity to *decide* to be law abiding. Such a choice is available to us only if the laws we are being asked to abide by are in accordance more or less with Fuller's eight formal requirements. This is not, however, sufficient, Waldron argues, for a Rule of Law regime. Such a regime must also be procedurally just. Again, these are not the same thing, nor do they stem from the same core values. The procedural Rule of Law respects not so much our liberty or our agentic capacity to choose for or against law abidance but rather our intelligence and our individual perspective: decent procedure should grant us an opportunity to participate as an equal and intelligent citizen in the system of law that inflicts its will upon us, and to do so in a way that allows our elaboration of our own perspective on both the rules being applied against us and our own story about the events that triggered the law's hand. Finally, both contrast with a substantive understanding of the Rule of Law, argued by legal and political philosophers as requiring a state that protects property and contract rights and actively seeks to impose this understanding in emerging democracies interested in embracing a rule of law. Against such substantive and formal understandings, Waldron offers his procedural interpretation as a necessary complement. That's the argument as I understand it.

It would be churlish to object too strenuously to this humane

proposal to expand the Rule of Law of our imaginings to include a procedural dimension, particularly given contemporary national, global, and political realities. We are indeed suffering a deficit of procedural fairness in our various courts of criminal justice, from the military commissions in Guantanamo Bay,<sup>7</sup> to the district courts of Baltimore City,<sup>8</sup> to various points abroad. And, a growing body of Rule of Law scholarship that is proving influential in those countries with systems seeking to emulate our own identifies the Rule of Law almost exclusively with the certainty and predictability in economic life that are so beneficial to those with property: a limited and generally regressive conception of legalism that protects market-based liberties but little else.<sup>9</sup> Complementing that property-centered Rule of Law ideology with something that centers on people rather than profit can't hurt. We are also facing, although this may be low on the list of world problems, a badly demoralized domestic law school environment. The economic pressures on our graduates, who are facing a very poor job market; declining or lost faith, and for good reason, among constitutional academic lawyers that the Supreme Court will use its powers to move us toward a more just society and a lost faith in the adjudicative process that for many in the academy provided the *raison d'être* of law itself, of academic legal scholarship, and of their own participation in it; a growing malaise afflicting faculty and students caused by a lack of any shared sense of law's moral purpose or point to replace that declining faith;<sup>10</sup> despair among ethics professors and constitutional lawyers over the use of law's forms—"legal memoranda," "justice departments," "offices of legal counsel," and the like—in the George W. Bush administration to promote the seemingly lawless ends of the most powerful leviathan on Earth<sup>11</sup> coupled with the failure of the Obama administration to do anything about it; increased calls from the academy to the academy to stop doing "merely" normative, or "advocacy," or "doctrinal" scholarship, thus calling into question the point and even the existence of what has been for almost a century the bread and butter of good legal scholarship—because of all these factors, law school faculties, and therefore their students, find themselves in a profound crisis of identity, all stemming from a sense that both the academy and the profession it serves have been demoralized: they both self-avowedly lack a moral point. Briefly put, it's not clear anymore

that this perhaps not-very-remunerative-after-all profession for which we train our students and which for some time now has not been very much fun, either, is actually good for anything anymore, or whether it ever was, or whether it really is, as some skeptics have been saying for a long time, nothing but a legitimating mask of an increasingly insane and psychopathic sovereign beast. A little bit of Rule of Law idealism—whether formal, procedural, or substantive—can't hurt, in such a climate, and it might help. It might help make the case for robust procedural protections for our prisoners of our wars on terror abroad and on drugs here, it might help us temper, or at least complement, the Rule of Law interpretations that center profit with one that centers individual dignity and intelligence, and it might help us reclaim a sense of law's ennobling purpose in the contemporary legal academy. All of that would be terrific. I have no quarrel with the basic thrust of this project.

I do, though, have some objections—four of them—which I'll move through quickly and which I hope, if addressed, will strengthen the project. All are in the nature of suggested friendly amendments. My fifth and major comment—not an objection quite—goes to some of the features of all three paradigms of Rule of Law scholarship that Waldron has usefully identified and distinguished: formal, procedural, and substantive. All three identify the Rule of Law with a legalist impulse that might be used in a way to blunt or counter the pernicious abuse of power by a too-fierce state besotted by its own political will. This is not, I want to suggest, an exhaustive account of our hopes for Law, in mediating the relationship between the individual and the state, nor should it be. All three accounts, I will argue, ignore the ways in which the law expresses the will of the state to protect weaker parties harmed not by the state but by stronger private entities—employers, landlords, union bosses, private criminal gangs, oppressive church authorities, abusive parents or spouses, too-powerful private associations, and the like. This, too, should be a part of our theorizing over the Rule of Law if that theorizing is intended to capture our ideals of law, but it is almost routinely slighted in Rule of Law writing. And, it is not addressed here, so I will urge, at the end of these comments, that we do so.

Let me start, though, with my objections. First, I'm confused by Waldron's claim that there is no literature that expounds a

procedural conception of the Rule of Law as it is presented here. Owen Fiss, at Yale Law School, has devoted the better part of his extremely fruitful career to doing just that. His highly regarded leading casebook on civil procedure,<sup>12</sup> coauthored with Judith Resnick, makes the two-thousand-page case for the moral value of decent procedure, its centrality to the Rule of Law, and the role of procedure in furthering the deeply foundational purpose Waldron identifies here—giving voice to each individual participant in a way that treats him or her respectfully as an intelligent human being with a perspective that is worthy of attention and that must be heard. Fiss has also defended precisely this understanding of the Rule of Law in an extensive body of writings stressing the moral superiority of adjudication over alternative dispute resolution (ADR) methods.<sup>13</sup> The virtue of traditional adjudication, Fiss has argued, in contrast with ADR, is that it meets the imperative of justice that the law must, through procedure, give litigants full participation, an opportunity to voice their perspectives and views, and a panoply of procedural and evidentiary rules designed to protect that voice and participation. In fact, for Fiss, these procedural virtues are *so* central and so overriding—the opportunities for intelligent participation presented by the procedural aspects of adjudication so plentiful and profound—that they apparently obviate the need for civil disobedience and even external moral critique of law: there's virtually no claim, Fiss has asserted in his most extreme version of this position, that can't be voiced in a legal register and aired in a court of law, so there is literally never a basis for the anarchical claim that law can be reformed only from outside, rather than from inside the system itself.<sup>14</sup> These procedural values, furthermore, Fiss goes on to argue, constitute the long-sought bridge between the *ought* and the *is* and thus undercut legal positivism; to the extent that a legal system honors them, so says Fiss, the system has real and not just moral authority.<sup>15</sup> It is the source of a functional legal system's moral authority. This is an extreme version of the proceduralism Waldron wants us to recognize here, and it is certainly not required by the proceduralism urged here, but, nevertheless, even if overstated, Fissian jurisprudence is a counterexample to Waldron's claim that law scholars have overlooked the important of procedural justice when thinking through law's basic values.

But it's not just the Yale proceduralists who get overlooked in Waldron's claim that we've somehow neglected procedural values in our thinking about the Rule of Law. Led by the Warren Court, an entire generation of constitutional lawyers and thinkers, as well as large swaths of legal scholarship, underwent a so-called due process revolution in the 1960s and 1970s, itself fueled by a near-religious faith in—at least a romance with—the purifying powers of decent procedure. In a nutshell, that revolution was premised on exactly the understanding of the Rule of Law expounded by Waldron here: justice, the Fourteenth Amendment, and the due process clause, we all learned in those decades, all demand intelligent participation by individuals in the systems of law that impose stigma, harm, liability, or punishment. The due process revolution was real, not a dream—this is exactly what Gideon's trumpet was trumpeting—and, although it is easy to fault it for giving poor people an awful lot of procedure and very little substance—plenty of rights, but no means to enjoy any of them; all sorts of venues to voice complaints to a system unwilling to rectify the injustices that prompted them—it did nevertheless rest on precisely the values and even the vision that Waldron is calling for: a recognition that human dignity requires that we be treated respectfully as intelligent participants in the machinations of government, particularly when they are threatening us with stigma, harm, loss, liability, or punishment. That revolution bore fruit. As a result of it, for example, although we have no right to welfare, we have a right not to have our welfare benefits cut or taken from us without a decent hearing.<sup>16</sup> We may not have a right to various social security benefits, but we have a (limited) right to a hearing that determines what benefits we'll get or lose.<sup>17</sup> We may not have a right to various government jobs, but we have a right to a hearing before being sacked,<sup>18</sup> and, most famous, of course, pursuant to *Gideon v. Wainwright*,<sup>19</sup> lionized in Anthony Lewis's *Gideon's Trumpet*,<sup>20</sup> a loving history of the case that was read for years by every entering law student in "orientation weeks" of law school, we have a right to a lawyer before being punished for violating the state's criminal code. In almost a dozen cases, not just one or two, the Supreme Court held during the heyday of this due process movement that, while we may not have a right to some specified set of benefits, we nevertheless have a right not to have them taken away without

our having an opportunity to be heard.<sup>21</sup> It was that procedural revolution, in fact, at least as much as *Brown v. Board* or *Roe v. Wade*, that fueled an entire generation's outsize faith in the restorative abilities of adjudicative law and the arguably disproportionate allocation of progressive resources given over to adjudicative constitutionalism—a development that Waldron has in other contexts, along with others, deplored.<sup>22</sup> But my point here is solely descriptive. Waldron's call to law professors that we need to attend to the procedural rather than to the formal or substantive values of the Rule of Law is a bit like raising the flag on the Fourth of July and exhorting the assembled crowd to attend to the neglected value of patriotism. (Not entirely: it may well be that the professional philosophical literature has neglected this dimension of the Rule of Law, and it is of course that literature that is Waldron's target. But almost.) Legal scholars of a certain generation, process jocks all, most assuredly have not.

The second problem I want to highlight echoes the familiar contrast, in legal realist writings, of the difference between law on the books and law on the streets. Waldron's piece is a contribution to our legal ideals—an exploration of the values that we *should* hold and that *should* attend our legal system. As such, these legal ideals are twice removed from the law on the streets: they are the ideals that we should hold—not necessarily those we *do* hold, much less put into practice in legal life. Nevertheless, they are not unrelated to our extant ideals and find at least a dim echo in the practices of the juvenile court judge and state prosecutor. Our ideals for law must be derived at least in some way from our practice. Rule of Law literature in particular attempts to articulate values that are to some degree already imperfectly embedded in legal practice, as well as values that ought to be. The same is true here: the ideal that Waldron describes is by no means foreign to either our generally held ideals or our practices. So, as is often the case with scholarship that explores values that partly emerge from practice but then seeks to cleanly articulate them in order to both criticize and better guide that practice, Waldron's argument risks sugarcoating our current practices. If we accept his argument, in other words, that our Rule of Law scholarship is deficient in the way he suggests, because it doesn't reflect ideals embedded in practice, we might too readily accept the claim that we respect these procedural values in



practice far more than we actually do. After all, all we need to fix to satisfy Waldron, so to speak, is the Rule of Law scholarship that describes our practices, rather than the practices themselves. Then we run the danger of just baldly refusing to see how far we have moved from these ideals, whether stated or not. If we accept these ideals as ideals we should hold, then we run the risk, in a word, of hypocrisy—we don't do as we say we should do, even though what we say we should do is based in part on what we claim to do. In fact, the extent of that hypocrisy, particularly with respect to the touted ideal of procedural justice in the criminal justice system in this country, borders on the absurd.

In our scholarship and in popular culture—television shows and the like—we extol as evidence of our appreciation of the procedural virtues Waldron champions our insistence that every criminal defendant in this country has a right to a lawyer, a right to a day in court, and a right to a jury of his or her peers. That defendant further enjoys a presumption of innocence, an extremely favorable burden of proof, and, in general, a panoply of procedural and evidentiary rules that are so vividly stacked in his or her favor that we can say, and often do with real pride, that in *this* country at least, we prefer to risk the possibility that a hundred guilty criminals will go free than risk the wrongful incarceration of even one innocent. These values are so central, Waldron wants to further claim, that they must be present in a legal system for that system to claim the mantle of the Rule of Law.<sup>23</sup> And surely *we* have a Rule of Law. We often use the phrase "Rule of Law" precisely to describe the virtues of our system. But—if we have a Rule of Law and if the Rule of Law protects precisely these values, then why are the prisons so full? You'd think we'd have criminals roaming the streets and relatively empty prisons. Yet, we have a massive crisis in this country of *over-incarceration*.<sup>24</sup> *Something* must have gone very badly wrong. More than 70 percent of the inmates in our federal prisons got there without benefit of a trial.<sup>25</sup> They may have had a *right* to a trial and a jury of their peers and a presumption of innocence and a stacked deck burden of proof in their favor, but something must have been lost in translation: the vast majority of defendants never see a jury. Rather, their cases are "plea bargained," meaning that, at most, the real rather than hypothetical inmates in our prisons have had the opportunity to intelligently present their

own story to their own lawyer in a quick fifteen-minute interview prior to the recording of the bargain their lawyer recommends. We should be very clear about this, as we tout the necessity of procedural virtues that require intelligent participation by all prior to incarceration or other forms of stigma. We do not, in this country, accord those whom we arrest and incarcerate an opportunity to intelligently participate in the process that led to their arrest, conviction, or incarceration. We now have such massive overincarceration and absurdly high penalties, particularly for nonviolent offenses, that were we to switch course—were we to provide a trial and an opportunity to participate to each of these defendants we threaten to incarcerate—the entire criminal justice system would crash. At the so-called back-end, as well, we see the same pattern. Limits on appeals and habeas petitions<sup>26</sup> and the ever-expanding universe of immunities of state actors,<sup>27</sup> from prosecutors and lawmakers down to the cops on the street, limit the opportunity to air perspectives on the constitutionality of law enforcement in an intelligent way in a court of law governed by fair procedures, quite literally down to the vanishing point. We need to be careful not to ground the insistence that the Rule of Law rests on procedural values on our own practices when our own practices are so profoundly deficient, unless we are happy to say forthrightly that our own legal system does not abide by the Rule of Law. Arguing that the Rule of Law requires procedural niceties without acknowledging those deficiencies, I believe, is an embarrassment, albeit an entirely avoidable one.

Third, we should acknowledge, before championing too loudly the cause of proceduralism, that excessively precious procedures in the face of grotesque substantive law from which there is truly no exit, even with all the procedure in the world, can be a massive insult to dignity. So much so, that even the “winners lose,” to quote from one particularly poignant recent article documenting this phenomenon.<sup>28</sup> First of all, even the most just procedure might simply be pointless. Guantanamo detainees, according to one of their lawyers, don’t much value a visit with a lawyer if given the choice: visits with lawyers just lead to trouble, and even their (substantial) procedural victories are often empty. The detainees know they aren’t getting out no matter how welcome and fair-minded the judicial rhetoric granting them all sorts of rights.<sup>29</sup>

Alternatively, and I think more pervasively, a litigant might well be treated with the utmost procedural fairness, but the underlying law might be so profoundly unjust that even just procedure becomes a mockery or worse! One way to put the worry, perhaps, is that it isn't clear that all that good procedure adds more in justice than it costs in the legitimation it lends to the unjust regime or law. American antebellum courts in southern slave states decided, in open court hearings that observed decent procedures, whether litigants before them had enough drops of Negro blood before applying their slave laws and depriving the pleaders before them of their children, freedom, and husbands or wives.<sup>30</sup> Under these laws, and no doubt in part because of just procedure, some individuals were found not to be slaves and won some measure of freedom, but how do we weigh the value of that just procedure? Courts in Vichy France, Richard Weisberg has shown, acted with exquisitely just procedures when determining whether a litigant had a Jewish ancestor of sufficiently close sanguinity to justify depriving him of his livelihood or life under the Vichy "race laws."<sup>31</sup> Do we applaud their fidelity to principles of procedural justice? Israeli courts in the 1950s, according to Raif Zeik, exhibited an outsize respect for procedural justice when determining, with the utmost rectitude, whether a small number of Palestinians had returned to their life-long homes during "Freedom week"—a one-week period between judicial orders when for legalistic reasons Palestinians actually enjoyed a right of return to one particular town—or whether their return had occurred one moment before the designated week began or after it ended before deciding how or whether to apply the Law of Exclusion. As the court said in one such case, "there's a way to evict these people," and that way was in accordance with procedural justice.<sup>32</sup> Defendants sentenced to life without the possibility of parole under three-strikes laws for relatively petty and nonviolent offenses might find the justice of the procedural rules under which they are convicted to be quite generous—but they might find that very generosity to be disorienting, a mighty distraction, or worse.<sup>33</sup> In Hell, as Grant Gilmore observed, there will be perfect procedural justice.<sup>34</sup>

Now, it seems on first blush arithmetically or trivially true that application of these unjust laws under just procedures *must* lead to less injustice than the same laws imposed under unjust procedural

laws. Surely hell would be even more hellish if its unjust punishments were doled out in a procedurally unjust manner. But that first blush might be misleading. The very procedural justice of the trial, with its measured fairness, its appearance of rationality, its veneer of civility, its modulated dialogue, its exquisitely tortured rules of evidence, the apparent equality and equal regard with which participants are treated, all lend a sense of legitimacy as well as finality to the entire proceeding. The procedural justice itself sends a message of fairness as well as of the futility of resistance. In an unjust regime—Vichy France's race laws, South Africa's apartheid, the South's slave laws, California's three-strikes laws—the very fairness and sense of rationality that Waldron applauds also cleanses, to some degree, the injustice of the underlying law in the eyes of observers, while underscoring, in a sense, perversely but still underscoring, the totalizing violence of the law being enforced against its victims. We can do this to you—and we can even do it to you *fairly*, in a way that everyone will agree is *just*. Procedural justice is both a luxury of and a precondition of a confident legal system—it evidences as well as effectuates a system that is beyond challenge because it is beyond reproach. A fair system, after all, ought not be challenged, and a strong enough system to risk the victories against the state that are the inevitable byproduct of the fairness—some defendants, after all, will flunk the one-drop rule, some won't have a Jewish relative of sufficiently close sanguinity, some Palestinians will be granted a right to return, and some black South Africans will have their passes ruled intact, if these procedures are truly fair—is all the more likely to be a system that won't be challenged, at least from within. Procedural justice, in other words, can be *demoralizing*. After all, you had your day in court, so what's to complain of? The procedural justice, then, strengthens the system by legitimating it, all the more so in an unjust regime. If that effect—the legitimizing effect, for short—is substantial, then the procedural justice of a trial in an unjust regime may perversely increase the overall injustice of the regime, making it all the more invulnerable to change, whether through politics, revolution, or subterfuge. A legal system that abides by the Rule of Law, where the latter is defined by reference to procedural criteria, is not necessarily thereby more just. When it isn't, it's not clear where the

value of all that procedure lies, other than in the fodder it provides modernist writers.

Fourth: justice, for a range of additional reasons that have long been cited by the ADR movement<sup>35</sup> but have also been noted in some way ever since Bentham's broadsides,<sup>36</sup> may sometimes be frustrated rather than furthered by an excess of procedure: when procedures are overly technical; where they impose costs that might outweigh their value, at least to individuals; when they require skilled players; where they strengthen the monopoly power of lawyers and judges. Procedure can mask and then amplify, rather than address, the power of judges and lawyers over lay people's lives. Today, it's worth noting that when all that procedural justice is generously extended to corporations—rendered "persons" by a compliant Supreme Court—it strengthens corporate power, as well, although perhaps by this point redundantly so. All of these are reasons to treat procedural advances gingerly. The first procedural justice revolution at the beginning of the twentieth century—the creation of the federal rules of civil procedure, the invention of pretrial discovery, the innovations represented by interrogatories, depositions, and so forth—may have been in part motivated by the desire to lend transparency to a trial process that otherwise resembled a Dorothy Sayers mystery more than an attempt to find the factual truth of the matter, but it has devolved into something very different. It has become a means by which monied corporate litigants and their lawyers can defeat individual claimants through a barrage of costly motions. Privileges and immunities intended to shield the communications between embattled individual defendants and their lawyers in criminal courts of law have become means by which corporate malfeasance is rendered all the more immune from state and, therefore, public control.<sup>37</sup> These are not isolated examples; they represent a systemic problem. Procedures intended for the protection of beleaguered and relatively powerless individuals threatened by an all-powerful state, once generalized, become protections for the most powerful corporate actors against individuals who rightly seek the protection of the state or of state prosecutors seeking to restrain corporate power. Waldron's celebration of a procedural Rule of Law makes no mention of any of this. The story is rather of a ferocious

powerful state bent on exacting its will through punishment, censure, and the like, against a beleaguered individual, who seeks out the protections of the Rule of Law. Litigants and defendants, however, can be more or less powerful, as can states, as can those interests on whose behalf states act.

Last: Waldron's procedural Rule of Law, like Fuller's formal one and the libertarian's substantive one, presupposes a relation between the individual and the state and a metaphorical narrative about that relation, which is just incomplete. On all three accounts, substantive, formal, and procedural, the Rule of Law is obviously a very good thing. It is law's humane face, sought by the individual seeking protection against an act of power taken by a potentially dangerous and overreaching state. The Rule of Law, if we put these three models together, respects individual intelligence, perspective, dignity, liberty, and agency, as well as entrepreneurial and cooperative projects. The state, and the state's action, by contrast, is fraught with evil, unrestrained power, witlessness, and violence. The state, after all, punishes, penalizes, renders liable, censures, stigmatizes, or harms, while the Rule of Law respects, frees, supports, and so on. The harmed individual in this picture has dignitary and liberty interests that are first endangered by the punishing state and then protected by law. The state, in this scenario, is at best a necessary evil but at worst, when unrestrained by law, an unrelenting nightmare. It is far more powerful than the individual, and it has a license to inflict harm, stigma, punishment, and liability. The Rule of Law, on all three accounts, is further a very good thing because it can conceivably limit this unrestrained power—on Waldron's view, through decent procedure that requires that the state protect the individual's intelligence; on Fuller's, through formal rules that require that the state protect the individual's liberty; and on the libertarian's substantive account, through rules of property and contract that require that the state protect the individual's particular projects and investments. The unrestrained state, the power of a witless public in a functioning democracy, is the problem solved by the Rule of Law: the political state acts, and the Rule of Law protects the individual, his dignity and his intelligence, against that pernicious state action by requiring that the state invite the individual's intelligent participation in whatever proceeding the state contemplates in exacting its pound

of flesh. The individual in this story has every reason to be fearful of the state. The individual likewise has every reason to welcome the intervention of Law so as to protect him from that state's power.

There are familiar problems with this scenario. It overstates the rationality and possibly the good will of courts and of law, as the Critical Legal Studies movement argued a couple of decades back, and it understates the capacity for public-minded and reasonable deliberation by the lawmaking branches, as Jeremy Waldron has argued now for several years. There is, though, a further limitation with this understanding of the Rule of Law: it presupposes that the problem of power to which law is the solution is that of the beleaguered individual pressing up against an overbearing sovereign state. But this is not the only problem of power to which law is or ought to be the solution. Rather, law is, and I would suggest the Rule of Law is, perhaps quintessentially, the solution to the problem of private power. Without a state that monopolizes the weapons of force, any individual is vulnerable to the private violent power of any other, as Hobbes witnessed, and with decreasing public control of guns in this country we increasingly witness likewise. Without a state that regulates, somewhat, against the vagaries of fate and intergenerational family loyalty, an individual is vulnerable to the outsized economic power of another, whether that power is itself a function of genetic luck, social history, or inheritance. Without a state that guards against and compensates, through its law, fraud, bad faith, duress, negligence, breach of contracts, breach of fiduciary duties, and so on, an individual is buttressed by the tendency, not of states but of private actors, to stigmatize, inflict harm, punish, and the like. It's worth noting that this power of law—the power to intervene into the undue exercise of private power—serves a foundationally progressive function.

But there is nothing of this function of law and nothing of this in the articulation of law's ideals in most Rule of Law scholarship, including Jeremy Waldron's latest intervention. This is, I think, mightily odd. This is, after all, the Rule of *Law* we're talking about, and a lot of our laws are about protecting individuals against the undue aggressions of other individuals or corporations, not only through the criminal law but through much of private law as well. This purpose, in other words, is right at the heart of law's point.



But this understanding of law's point is somehow invisible in contemporary Rule of Law scholarship. Rather, the kind of law that is regarded as the point of the "law" that is referenced in the phrase "Rule of Law" is not our ordinary criminal law, tort law, and the rest of it that so clearly serve something like this function. Rather, it is a higher law—a constitutional law for some, a procedural law for others, a law of process maybe, a law of laws—that acts as a constraint, rhetorically, on the *state* and on pernicious state actors, as well as on the low-level law (criminal, contract, tort, and so on) that is the product of state action. That low-level law, apparently, is guided not by any deals we might have that are embraced imperfectly or not by our "Rule of Law" scholarship but rather by political whim. The higher law that constrains the state and ordinary law is what embodies the ideals expressed in Rule of Law scholarship.

The consequence of this division of labor is that a good bit of both our ideals for law and our practice is left out of the procedural, formal, and substantive ideal. First, and most striking, plaintiffs are left out. Waldron's procedural Rule of Law protects criminal and civil defendants—persons who find themselves ensnared in legal process against their will and against their wishes—against the tendency of the state to sanction, punish, impose liability, and so on. It does not protect plaintiffs—those who seek out legal process and legal protection, those who quite willfully attempt to invoke the powers of the state to protect them against the tendency of private actors—would-be defendants—to breach contracts, commit torts, or kill people, and the tendency, sometimes, of states to be complicit in those acts through a selectively willful failure to facilitate legal action against those private actors. Consequently, Waldron's procedural Rule of Law does not protect plaintiffs in court, against, for example, the immunities of various actors—not only prosecutors and police officers but also church officials or spouses or parents or charities—from liability or against rules of evidence designed to protect various "privileges" that drastically limit the liability of entire classes of defendants. His procedural Rule of Law does not protect would-be plaintiffs against various limiting doctrines, such as preemption, or limits imposed on entire classes of damages, such as pain and suffering awards, that place the public venue of the courtroom out of reach for the articulation of various sorts of injuries. Rather, it seemingly presupposes a body of private



law and criminal law that either perfectly protects or overly protects victims of crime and would-be plaintiffs against private wrong and then enforces these regimes in an unjustifiably heavy-handed manner against beleaguered defendants. Plaintiffs, in this imagining, are aligned with the state—the private attorneys general, so to speak—and become part of the state machinery in need of restraint by the idealized procedures of the Rule of Law.

More fundamental, Waldron's idealized Rule of Law, like the idealized rules of law that he is criticizing, does not contain even a hint of a reference to law's protective function. Law does a lot of things, but one of its core functions is to protect individuals against what would otherwise be undeterred privations against them—not by overreaching state officials but rather by undeterred private individuals, corporations, or entities. Law does, as Waldron says, stigmatize, punish, impose liability, and so on. Law also, though, compensates individuals for private wrongs and protects them at least much of the time against private violence. Sometimes it does this well, and sometimes it does it only sporadically or not at all. In my view, a society that claims to regulate conduct under the ideal of the Rule of Law—as opposed to the rule of the stronger, or the rule of the more mendacious, or the rule of the more richly endowed, or the rule of the more vindictive, or the more manipulative, or the more fraudulent, or the more violent and so forth—should, seemingly, require that law do as much. Rule of Law scholarship, then, one would think, should reflect these ideals.

But it doesn't, and it's worth asking why not? The phrase "rule of law" is obviously a metaphor—it is intended to reference the ideals we hold and should hold for actual legal systems. Presumably, an ideal legal system will target private wrongs as a problem of power that law should address. Yet, Rule of Law scholarship routinely fails to do so. One reason for this neglect may be that Rule of Law scholars share a two-step background narrative about both the state's and law's metaphoric beginnings. Individuals first create a state with a monopoly over violence to protect them from one another. The state then fashions criminal law, tort law, and the like in order to do so. That's step one. The state, however, then becomes dangerously powerful and itself must be constrained. So, we then create higher law—procedural law, constitutional law, and so on—to protect us against the state. That's step two. The

"Rule of Law" then becomes a metaphoric reference to the ideals we hold for those higher forms of law. The work of the state, then, is to control private conduct and private abuse of power through ordinary law. The work of the Rule of Law, by contrast, is to restrain the state from undue enforcement of the lower laws that are in turn intended to restrain individuals. The state constrains individuals through ordinary law. The Rule of Law constrains the state. Some other mechanism—maybe democratic accountability, maybe just conscience—prompts the promulgation of those laws intended to restrain private conduct, including prompting their creation where the state can't really be bothered.

The metaphor, however, is just that, and the narrative bears no relation to the actual creation of states, laws, higher laws, constitutions, or codes of procedure. If we scrap metaphor and narrative and simply ask what sorts of ideals our legal systems should strive to meet, I believe we get a richer and more complete picture than the metaphor and narrative implicit in Rule of Law scholarship yield. Minimally, such a picture would include, as current Rule of Law scholarship does not, acknowledgement of what we aim to do with law, not only what we aim to prohibit law from doing. And a part of what we aim to do with law, at least some of the time, is to prohibit abuses of private power or to provide a means by which conflicts over private power can be aired. This requires not only prohibiting the state from "stigmatizing, harming, punishing or imposing liability" without fair process. It also requires the state to compensate, deter, and retribute where need be and to monopolize the use of force. We want, from a liberal state that abides by the Rule of Law, not only a legal system that won't impose its will against us without respecting our intelligence and seeking out our participation. We also want, from a liberal state that abides by the Rule of Law, some measure of safety in our homes and neighborhoods against private violence, some measure of fairness in our commercial dealings, and some measure of wellbeing in our private lives, free of the privations of more powerful private actors.

This is an omission that matters. The stigma, punishment, harm, and so on that threaten the enjoyment of the lives of many people, all of which Waldron identifies as coming from state power, at least on occasion come not from states but from powerful nonstate entities. Part of the point of law is to do something about that. It has

been recognized by liberal theorists of the state from Hobbes to Rawls that the state, far from being nothing but a ferocious evil in people's lives that needs constraining, can also be a force for domestic peace, for equality, and for a generally high level of social wellbeing, precisely by virtue of ensuring, through lawful process, that the state successfully monopolize the use of force and by being a generally equalizing participant in the battle over the allocation of private power. We should, I believe, construct our ideals for law—which is what I take Rule of Law scholarship as attempting to do—in a way that incorporates these realities and these hopes for Law's reach. Doing so, I think, calls not for modification of any of the three paradigms, all of which can be read conjunctively, but for the construction of a fourth. It is not incompatible with Jeremy Waldron's proceduralism, just as his proceduralism is not at bottom inconsistent with Fuller's formalism and just as Fuller's formalism is not inconsistent with substantive accounts of the Rule of Law that prioritize the protection of private property. It may, however, be in tension, at points, with all of them. So, I would just issue this plea for a more robust understanding of our legalist ideals. If we are going to talk about our ideals for legalism through the metaphor of the Rule of Law, we should expand that conversation so that it includes our ideals regarding not only what the state may not do without decent procedure but also what it must do with its law if we are to enjoy the intelligence and perspectives that we all possess and that Waldron's procedural Rule of Law, to its credit, aims to protect.

## NOTES

1. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 33–39.
2. Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in this volume, 14–16.
3. *Ibid.*, 5–7, 16–17.
4. *Ibid.*, 19–20.
5. *Ibid.*, 5, 14–16.
6. *Ibid.*, 23.
7. *But see* Joseph Landau, "Muscular Procedure: Conditional Deference in the Executive Detention Cases," *Wash. L. Rev.* 84 (2009): 661.

8. See James Forman, "Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible," *N.Y.U. Rev. L. and Soc. Change* 33 (2009): 331-74.

9. Waldron, "The Rule of Law and the Importance of Procedure," 18.

10. See generally *Constitution in 2020*, ed. Jack M. Balkin and Reva B. Siegel (Oxford: Oxford University Press, 2009).

11. See David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007), 162-205.

12. Owen M. Fiss and Judith Resnik, *Procedure* (New York: Foundation Press, 1988).

13. See Owen Fiss, "Against Settlement," *Yale L.J.* 93 (1984): 1073, 1075; Owen Fiss, "Out of Eden," *Yale L.J.* 94 (1985): 1669; Owen Fiss, *The Law as It Could Be* (New York: New York University Press, 2003).

14. See Owen Fiss, "Interpretation and Objectivity," *Stan. L. Rev.* 34 (1982): 739, 749.

15. *Ibid.*, 753.

16. See *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (right to hearing prior to termination of welfare payments).

17. *Contra Matthews v. Eldridge*, 424 U.S. 319 (1976) (right to a hearing prior to termination of social security payments). See generally Henry Monaghan, "Of 'Liberty' and 'Property,'" *Cornell L. Rev.* 62 (1977): 405, 409, and Charles Reich, "The New Property," *Yale L.J.* 73 (1964): 733, 738.

18. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (right to pretermination hearing for public employees who can be discharged only for cause). Cf. *Board of Regents v. Roth*, 408 U.S. 564, 587-89 (1972) (J. Marshall dissenting) (arguing, against the majority, that pretermination hearings should be required for public employees even when renewal of their employment is not express or implied).

19. 372 U.S. 335 (1963).

20. See Anthony Lewis, *Gideon's Trumpet* (New York: Vintage Books, 1989).

21. See, e.g., *Goldberg*, 397 U.S. 254 (1970); *Loudermill*, 470 U.S. 532 (1985).

22. Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale L. Rev.* 115 (2006): 1346.

23. Waldron, "The Rule of Law and the Importance of Procedure," 5-7, 12-14.

24. For a good discussion of the moral issues this poses for liberal democracy, see Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buff. Crim. L. Rev.* 7 (2004): 307.

25. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 1998, at 51 (May 2000). See generally William J. Stuntz, "Plea Bargaining

and Criminal Law's Disappearing Shadow," *Harv. L. Rev.* 117 (2004): 2548, 2561.

26. See, e.g., James E. Pfander, "The Limits of Habeas Jurisdiction and the Global War on Terror," *Cornell L. Rev.* 91 (2006): 497; Daniel J. Meltzer, "Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror," *Harv. L. Rev.* 120 (2007): 2029; Bryan A. Stevenson, "Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases," *Harv. C.R.-C.L. L. Rev.* 41 (2006): 339.

27. See Nancy Leong, "The 'Saucier' Qualified Immunity Experiment: An Empirical Analysis," *Pepp. L. Rev.* 36 (2009): 667.

28. Raef Zreik, "When Winners Lose: On Legal Language," *International Review of Victimology* (forthcoming).

29. Muneer Ahmad, "Resisting Guantanamo: Rights at the Brink of Dehumanization," *NW. U. L. Rev.* 103 (2009): 1683.

30. See Mark Tushnet, *American Law of Slavery, 1810-1860, The Considerations of Humanity and Interest* (Princeton: Princeton University Press, 1981).

31. Richard H. Weisberg, *The Failure of the Word* (New Haven: Yale University Press, 1984), 181.

32. Quoted by Raef Zreik, in workshop presentation of "When Winners Lose," Georgetown Law Center, Spring, 2010.

33. Cal. Penal Code § 667; see, e.g., Mike Males and Dan Macallair, "Striking Out: The Failure of California's 'Three Strikes and You're Out' Law," *Stan. L. and Pol'y. Rev.* 11 (2001): 65; Michael Vitiello, "California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?," *U.C. Davis L. Rev.* 37 (2004): 1025.

34. "In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Ages of American Law* (New Haven and London: Yale University Press, 1977), 111.

35. See Symposium, "Against Settlement, Twenty-Five Years Later," *Fordham L. Rev.* 78 (2009): 1117.

36. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (London: Athlone Press, 1970); Jeremy Bentham, *Of Laws in General*, ed. H. L. A. Hart (London: Athlone Press, 1970).

37. Julie O'Sullivan, "The Federal Criminal 'Code' Is a Disgrace: Obstruction Statutes as Case Study," *J. Crim. L. and Criminology* 96 (2006): 643.