Frank Lovett[1] February 2017

A REPUBLICAN ARGUMENT FOR THE RULE OF LAW

Abstract: While the rule of law is surely a very important good, the standard discussions in the literature lead many to conclude that the rule of law is either a relatively trivial political ideal, or else a redundant one. What is needed is a persuasive defense of the rule of law that properly reflects its great significance for human well being. The first step towards building such an argument is to question a widely-shared but often unnoticed assumption that the rule of law should be understood as a virtue of legal systems. The path is then cleared for a civic republican argument for the rule of law, built on two theses: first, the thought that an ideal society would be one in which no one is the master of anyone else, and second, the thought that our freedom from domination is not natural or pre-institutional.

This paper aims to defend the value of the rule of law from a civic republican point of view. It might seem the rule of law needs no defense: along with human rights, democracy, international cooperation, and so forth, the rule of law is today almost universally acknowledged a good thing. To be sure, the ideal had its detractors in times past (one might recall Marx's famous attack on bourgeois rights for instance), but hardly anyone bothers to challenge it any more. Nevertheless, the various arguments we have for the value of the rule of law are unsatisfactory. While it is surely a very important good, many of the arguments in the literature do not reflect this importance: some characterize the rule of law as a relatively trivial political ideal, others as a redundant one. The one notable exception – an argument that would, if successful, vindicate the importance of the rule of law – remains unfortunately controversial. Thus what is needed, and what this paper hopes to supply, is a new and per-

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suasive defense of the rule of law properly reflecting its great significance for human well being.

The first section of the paper briefly reviews the standard discussions of the rule of law in the contemporary literature, and shows how these discussions have led many to conclude that the rule of law ideal must either be trivial, or else redundant. The second section argues that the failure of the existing accounts is in part due to a widely-shared but often unnoticed assumption that the rule of law should be understood as a virtue of legal systems: reorienting our approach around a different assumption can help us find our way to a better argument. The third section of the paper sketches an account of the law as a social practice that will serve as the basis for a normative argument, in section four, for the value of the rule of law. The latter argument builds on two distinctively republican theses: first, the thought that an ideal society would be one in which no one is the master of anyone else, and second, the thought that our freedom from domination is not natural or pre-institutional.

I

As one might perhaps expect, there is a great diversity in the extensive contemporary literature on the rule of law. Nevertheless, many of the standard discussions tend to follow a basic pattern.

Often they begin with an apparently innocuous assertion that we should regard the rule of law as a virtue of legal systems. Thus, for instance, it is said that the rule of law is "one of the virtues which a legal system may possess and by which it is to be judged," or it is "the name commonly given to the state of affairs in which a legal

system is legally in good shape," or it is "the conception of formal justice … applied to the legal system," or it is the insistence that certain "moral and political rights be recognized in positive law."[2] In other words, on this view, we should say that societies enjoy the rule of law to the extent that their legal systems have certain desirable characteristics or exhibit certain desirable traits.

The standard discussions usually then proceed to specify the content of the rule of law in terms of a list of specific virtues or what are sometimes termed, following Lon Fuller, "principles of legality."[3] While there is no general agreement on what this list should or should not include, there is considerable overlap in the virtues proposed: among the most frequently mentioned, for example, are generality, prospectivity, publicity, clarity, consistency, and stability. Some authors attempt to pare down or reduce this list to a few fundamental virtues, while others elaborate or expand the list considerably.[4] Putting these two features of the standard discussions together we have the idea, roughly speaking, that societies enjoy the rule of law to the extent that their legal systems are composed of clear and consistent general rules that are published in advance and not changed too often.

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[2] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), p. 211; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 270; John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), p. 235; Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), p. 11.

[3] Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), p. 41 and *passim*.

[4] Standard and often-cited lists of the principles of legality can be found in Fuller, *The Morality of Law*, pp. 46–91; Raz *The Authority of Law*, pp. 214–218; and Finnis, *Natural Law and Natural Rights*, pp. 270–271. William N. Eskridge Jr. and John Ferejohn, "Politics, Interpretation, and the Rule of Law," in *Nomos 36: The Rule of Law*, ed. Ian Shapiro (New York: New York University Press, 1994), p. 265, propose a reduced list of three core virtues, while Rawls, *A Theory of Justice*, pp. 236–239, expands the list to some dozen or more. For a detailed recent discussion, see Andrei Marmor, "The Rule of Law and Its Limits," *Law and Philosophy* 23 (2004): 1–43.

So far, so good. Now at this juncture, it is natural to pose two questions. The first concerns why the rule of law, so understood, is a good thing. What precisely is the distinctive value served in having a legal system that answers to the principles of legality? The second concerns how we are supposed to settle disagreements as to which specific principles should be on the list. What are the criteria for determining whether something counts as a genuine rule of law virtue or not? Here the conversation diverges into two broad camps.

One approach involves interpreting the principles of legality as freestanding normative constraints on law. Generality, for instance, might be thought to require some degree of substantive legal equality. This would perhaps follow if we defined it, as Hayek suggests, so as to require that legal distinctions be acceptable to a majority of persons in each distinguished class.[5] The basic list of principles noted above might also be supplemented with other, even more explicitly normative requirements. Thus we might claim that the rule of law includes a requirement that the legislative process be open and democratic, or that the legal system recognize and respect individual rights.[6] On this substantive view of the rule of law, it is perfectly clear why we should regard it as a good thing: normative requirements of this sort would significantly constrain the purposes to which evil regimes might direct the legal system. On this view it is also clear, at least in theory, how disagreements concerning the correct list of principles should be settled: the correct list of principles

[5] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp. 153–154.
[6] See for instance Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010), chap. 7; and Dworkin, *A Matter of Principle*, ch. 1.

would be the one that properly answers to the criteria of good laws given by our preferred account of social justice, whatever that turns out to be. Thus, as Dworkin observes, the substantive approach "does not distinguish" in any fundamental sense "between the rule of law and substantive justice."[7]

There is an important difficulty with the substantive approach, however. Joseph Raz expresses the difficulty succinctly as follows:

> If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.[8]

In other words, on the substantive approach the principles of legality simply represent a view about what sorts of laws it would be good to have: to argue that the rule of law is a good thing would thus simply be to argue, redundantly, that good laws are a good thing. The concept of the rule of law, on this view, might perhaps serve as a more or less useful shorthand for that aspect of social justice which applies to the design of legal systems, but it would perform no independent work of its own. What is more, in tethering our account of the rule of law to an account of social justice, we ensure that disagreements about the former cannot firmly be settled until we agree about the latter, and alas agreement on the nature of social justice is not soon to be expected.

This brings us to the second, alternative approach. Suppose we interpret the principles of legality as strictly formal requirements, in the sense that we regard

[7] Dworkin, *A Matter of Principle*, p. 12.
[8] Raz, *The Authority of Law*, p. 211.

them as constraints only on the *form* legal rules should take and not substantive *content* of those rules – especially, not their merit or demerit from an ethical or moral point of view.[9] This requires that we exclude from our list of virtues any overtly normative requirements that the law be democratic, that it respect individual rights, and so forth. It also requires that we be careful to define otherwise ambiguous principles in a strictly formal manner. Generality, for instance, might be defined as the mere formal requirement that rules of law not identify persons or groups by their proper names. This approach has the significant advantage that we can settle disputes concerning the list of principles without prior agreement on the nature of social justice: the correct list of principles, on this view, can be understood as the one that most accurately reflects the formal properties inherent in the nature of effective law. In Fuller's influential expression, the principles of legality represent pragmatic success conditions for "the enterprise of subjecting human conduct to the governance of rules."[10] It is simply not possible, we might think, to effectively guide human conduct with rules that are unclear, secret, retroactive, and forth.[11]

Unfortunately, it is much harder on the formal approach to make out the supposed great value of the rule of law. To be sure, it is widely appreciated that individuals subject to a legal system derive some measure of benefit whenever the formal requirements are respected. At the very least, it is easier to plan our lives when legal

[9] To avoid confusion, it is the form enforced legal rules assume in practice that matters, not the mere written form as it appears in code or statute books.
[10] Fuller, *The Morality of Law*, p. 91; cf. pp. 53, 66, and 74.
[11] This is of course the lesson to be drawn from Fuller's story of the hapless ruler Rex: see ibid., pp. 33–38.

rules are predictable, consistent, and clear.[12] More significantly, perhaps, the very enterprise of subjecting human conduct to governance of rules may entail respecting those governed as responsible moral agents.[13] But these benefits seem to have definite limits. They arise as the mere side effect, so to speak, whenever a given political regime happens to employ law as an instrument for achieving its particular aims – whether those aims are good, bad, or indifferent. Indeed, there is apparently no reason a legal regime of slavery could not perfectly well observe the rule of law principles understood as mere formal requirements: rules permitting the ownership of human beings can be clear, consistent, published in advance, and so forth. No doubt slaves benefit to some extent from there being clear rules, and indeed the law of slavery might itself might evince some small degree of respect for slaves as human agents in addressing them as legal subjects at all. But the evil of human bondage overwhelms such paltry goods. "The law can violate people's dignity in many ways," Raz insists, and respecting "the rule of law by no means guarantees that such violations do not occur."[14]

To sum up, neither approach to the rule of law seems very satisfactory. On the substantive view, it is clear why the rule of law is valuable, but only at the cost of rendering that ideal redundant. On the formal view, the rule of law may stand as a

[12] These benefits are discussed in Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory," *Ratio Juris* 2 (1989): 79–96.
[13] Roughly speaking, this is Fuller's view according to the compelling interpretation offered in Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Oxford University Press, 2012).
[14] Raz, *The Authority of Law*, p. 221. Cf. H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), pp. 206–207: though "a minimum of justice is necessarily realized whenever human behavior is controlled by general rules publicly announced," nevertheless the rule of law so understood "is unfortunately compatible with very great evil."

distinctive value in its own right, but it can appear comparatively speaking a limited one. These problems have been widely discussed, of course; the purpose of this review has merely been to provide context for the argument that will follow, not to add anything new.

Before moving on, however, it is important to consider the attempt some authors have made to square the circle, so to speak, so as to avoid arriving at either of the disappointing outcomes mentioned. The basic strategy is to argue that, even understood as a set of formal requirements, the rule of law does in fact limit the capacity of evil regimes to direct the law towards malevolent purposes – that is, it constrains aims, not just means. This is essentially what Fuller tries to do, and he has been followed in this respect by others.[15] To show that the formal principles of legality do in fact impose constraints on the purposes to which evil regimes might bend the law, the advocates of this strategy often draw on historical evidence: thus, the Nazi regime frequently violated rule of law principles, as did the apartheid regime in South Africa. They were, perhaps, forced to do so insofar as their substantive aims were fundamentally at odds with the nature of law.

The challenge, of course, lies in explaining just how formal requirements can operate as substantive constraints. On the face of it, it might seem they cannot. In his review of Fuller's *The Morality of Law*, Hart put the issue as follows:

> [T]he crucial objection to the designation of these principles of good legal craftsmanship as morality … is that it perpetrates a confusion between … the no-

[15] See for example N. E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) and David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality,* 2nd ed. (Oxford: Oxford University Press, 2010). Note that I here refer to the commonly received understanding of Fuller. According to Rundle, *Forms Liberate*, esp. ch. 5, Fuller did not intend this to be his main position, but criticisms levelled by Hart and others more or less constrained him to adopt it.

> tions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.[16]

His point here is that, understood as pragmatic success conditions for the enterprise of subjecting human conduct to the governance of rules, the principles of legality themselves say little about the merit or demerit of that enterprise itself. Raz presses the same objection: granting that the principles of legality are "a necessary condition for the law to be serving directly any good purpose," they equally enable "the law to serve bad purposes." He draws a comparison with knives. "Being sharp is an inherent good-making characteristic of knives," but this is perfectly consistent with the fact that "a sharp knife can be used to harm."[17] Sharp knives are much more effective at slicing fruit than dull ones, but they are equally more effective at slicing throats. We have no reason, such critics argue, to suppose the law any different. While it is true that the Nazi and apartheid regimes frequently violated the principles of legality, this may have been out of convenience. Had either regime been sufficiently determined to maintain the rule of law, it is not difficult to imagine how they might have done so while nevertheless perpetrating terrible crimes on their subject populations.

It is not my intention here to take sides in this familiar dispute. Some argue that neither Hart nor Raz fairly addressed Fuller's claims, though perhaps others have

[16] H. L. A. Hart, review of Fuller's *The Morality of Law*, *Harvard Law Review* 78 (1965): 1286.
[17] Raz, *The Authority of Law*, p. 225.

more fully.[18] Nevertheless, the claim that formal principles of legality might constrain not only the means, but also the very aims of evil regimes remains controversial. Accordingly, my goal in what follows is to propose an alternative path to vindicating the rule of law – one that might persuade even those who accept the critique leveled by Hart and Raz.[19] Of course, the success of my argument would not undercut Fuller's, nor vice versa: both might well turn out to be true, in which case we would have two compelling reasons to regard the rule of law as especially important for human well being.

II

To clear the way for a fresh start, let us set aside the rule of law literature and for a moment reflect more broadly on the character of law as an institution. The law, we might say, is simply one mode of human association among others.[20] By mode of association here I mean roughly an arrangement of practices for managing the expectations and motivating the cooperation of diverse individuals.

It is obvious that there are enormous benefits to be gained from association with others – benefits from mutual assistance, from the division of labor, from exploiting diverse talents or abilities, and so forth. These benefits can only be secured, howev-

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[18] Most notably, Matthew H. Kramer, "On the Moral Status of the Rule of Law," *Cambridge Law Journal* 63 (2004): 65–97. Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *New York University Law Review* 83 (2008): 1135–1169, and Kristen Rundle, "Form and Agency in Raz's Legal Positivism," *Law and Philosophy* 32 (2013): 767–791, suggest that the reticence of Hart and Raz stems from a worry that Fuller's claims endanger the separability thesis of legal positivism. If so, the worry is unfounded. The separability thesis maintains only that the criteria of legal validity in any legal system need not include moral criteria. It is perfectly consistent with this claim that the law so identified as valid might have – indeed, might necessarily have – significant moral merit. See Marmor, "The Rule of Law and Its Limits," pp. 41–43.

[19] I am grateful to David Dyzenhaus for suggesting this framing of the argument.

[20] Though the terminology here is borrowed from Michael Oakeshott, *On History and Other Essays* (Totowa, NJ: Barnes & Noble, 1983), p. 119 and *passim*, the definition that follows is by design conceptually thinner.

er, when people manage to coordinate their various efforts, and the mere promise of benefit is not itself always sufficient to ensure that they will do so. Successful coordination is not automatic. It requires, first, that each individual have reasonably clear expectations regarding what everyone is supposed to do; and second, that each individual be sufficiently motivated to perform his or her part in particular. Coordination can fail, therefore, through either a failure to clarify expectations, or a failure to sufficiently motivate cooperation, or both.

There are many reasons these failures might arise despite the promise of mutual benefit. Three in particular stand out. The first is lack of information. Individuals might not be aware that there are benefits to be had from coordination, or know how those benefits might be obtained. Especially when it comes to economic planning, for example, the relevant information might simply be too vast and dispersed to be collected and properly understood by all the relevant actors. Even in much simpler situations, however, merely not knowing one another's preferences can obstruct coordination. Imagine a group of henchmen who all detest a dictator, but each without knowing that the others do: even if it would be easy for them to depose the dictator working together, they might not succeed simply for want of confidence that the others will go along.

The second is disagreement. Even when individuals know each other's preferences, and that benefits can be obtained through mutual cooperation, they might disagree about how that cooperation should be organized. Sometimes this will be because they have different goals or aims. A group of environmentalists might only succeed in influencing Congress, for example, provided they coordinate their lobby-

ing efforts. Unfortunately, some believe they should all focus on wilderness preservation and others on preventing global climate change; alternatively, they agree to focus on wilderness preservation, but disagree on who should do the fund raising and who should write the policy recommendations. Disagreements can also arise concerning how to divide the benefits of cooperation. Even supposing the dictator's henchmen manage to communicate their mutual preferences to one another, they might fail to organize a coup because they cannot agree who among them should become the new ruler.

The third is incentive failure. Sometimes, even when we know about the mutual benefits of coordination, and agree how that coordination should be organized, we fail through the lack of sufficient incentive. This problem commonly arises when there are externalities to the actions of individuals. Imagine a group of workers who can secure better terms of employment if they present a united front to their employer. Unfortunately, so long as the other workers remain on strike, it is in the interest of each individual worker to go back to work, since the benefit of doing so accrues entirely to the lone defector, whereas the cost is shared by all. Likewise, even if we all know that reducing pollution is necessary, and even if we all agree how to distribute the cost of that reduction fairly, there still remains the problem of ensuring that each does his or her particular part.

In order to secure the benefits of association, then, these and perhaps other challenges must be overcome: mutual expectations must be clarified, and cooperation sufficiently motivated. Fortunately, there are many ways to do this. One very familiar approach, for example, is through hierarchical organization. Suppose that one

member of an association is designated the association's leader, and the others are assigned to various ranks. Whenever there is disagreement as to what should be done, the will of the more authoritative person governs. When two parties to a dispute have the same rank, their dispute is settled by a mutual superior, as so on. Call this the *mode of authority*. The mode of authority is the usual manner in which expectations are clarified and cooperation motivated within corporations, armed forces, and many governmental organizations.

There are many other modes of association, however. Suppose we regard members of the association as equals. Whenever there is disagreement as to what should be done, everyone gathers together and debates the merits and demerits of the different options. Once discussion has run its course, consensus (if reached) or the will of the majority governs. Call this the *mode of deliberation*. Alternatively, suppose initial property holdings are settled in the association. Whenever there is some question as to what should be done, the interested parties engage in a process of bargaining and trading. Generally, the preference of the party willing to pay most determines the outcome, though perhaps with various side-payment to the others. Call this the *mode of bargaining*.

The differing approaches to managing expectations and motivating cooperation lend each of these modes of association its own distinctive character. In other words, the way people do things and relate to one another in the context of a hierarchical organization is different from the way they do things and relate to one another in the marketplace, and either from the way they do things and relate to one an-

other in the democratic forum. These differences mean that the felt experience of participating in each will have its own unique quality.

Which mode is best? It should be obvious that there is no general answer to this question. Some are better for some sorts of problems and situations, others are better for other sorts of problems and situations. Often, they work best in combination, and thus it is not surprising that many examples of each can be found in various domains of all reasonably complex societies.

Now the law, presumably, is yet another mode of association, different and distinct from each of the modes just mentioned. It too can be thought of as a particular arrangement of practices for managing the expectations and motivating the cooperation of diverse individuals. Sometimes it is said that the law is more fundamental than the other modes – indeed that it makes them possible. Public offices are created by law, for example, as are property rights, and there can be no authority without office, no bargaining without property. But this is obviously a mistake. It ignores the possibility that systems of authority and ownership might be based on social convention or custom rather than law.[21]

What are fundamental are social rules – customs, conventions, norms, and so forth. It is from complex and to some extent overlapping configurations of these that the distinct modes of law, authority, deliberation, and bargaining are ultimately constructed. Exactly what sets the mode of law apart from the others we will explore in

[21] There are two ways some version of the thesis might be maintained in the face of this objection, neither particularly attractive. On the one hand, we might define law so broadly as to include all forms of convention or custom, as some legal anthropologists have done: in that case, the primordiality of law is rendered true by definition, but trivially so. On the other hand, we might become strict Hobbesians and implausibly deny the possibility of social order without law.

the following section. Whether we ultimately agree on a specific view about the distinctive character of law, however, the mere intuition that it must have some such character is sufficient for present purposes. This is because, even though little we have said to this point should be very surprising or controversial, simply thinking about the law from this point of view enables us to reframe our understanding of the rule of law as an ideal. Let me explain.

It is not difficult to imagine that there are going to be certain problems or situations in which it is better to manage expectations and motivate cooperation through the mode of law than through any of the alternatives. To clarify, this is not the familiar claim that the law's legitimacy derives, at least in part, from its capacity to solve coordination problems.[22] Of course the law can solve coordination problems, but so too can market exchange, democratic deliberation, and so on. The relevant claim here is instead a comparative one: given that the different modes of association have different characteristic features, it stands to reason that in some contexts it will be better to organize our activities through law, just as in others it will be better to organize our activities through markets, and so on.

In which contexts might the law be best? Consider situations in which some persons or groups wield coercive force over others. Here we may take coercive force to mean roughly the use or imminent threat of violence or physical restraint. Among the most important issues facing any association of human beings must be how to manage the use of coercive force – who may employ it, to what extent, and on which

[22] Such claims date back at least to Aquinas, if not before; modern versions can be found in Finnis, *Natural Law and Natural Rights*, pp. 351–352; or Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford: Oxford University Press, 1999), pp. 64 and 159.

occasions. In the absence of clear expectations concerning when we are likely to be exposed to violence or physical restraint, hardly any of the other benefits of human association are possible. When people "live without other security, than what their own strength, and their own invention shall furnish," Hobbes famously observed,

> … there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death ….[23]

It is thus crucially important that we establish clear public guidelines concerning the use of coercive force, and sufficiently motivate the relevant individuals to respect those guidelines.

I want to suggest that the rule of law ideal can be understood in the first instance as the normative claim that it is always best for the use of coercive force to be controlled by law.[24] Section four will consider the grounds for this claim. Notice, however, that this way of orienting our argument involves a very different way of thinking about the rule of law than the one we usually find in the literature. The rule of law is not, on this view, properly understood as a virtue of legal systems, but rather as a virtue of social orderings.[25] Societies enjoy the rule of law to the extent that all

[23] Thomas Hobbes, *Leviathan,* ed. J. C. A. Gaskin (Oxford: Oxford University Press, 1998), I.13.9: p. 85.
[24] Whether or how far we might want to extend this ideal to certain non-coercive activities is beyond the scope of this paper. One might argue, for example, that all state action – coercive or otherwise – should be controlled by law.
[25] Something like this approach might be found in Fuller's earlier writings, before the debate with Hart: see Rundle, *Forms Liberate*, ch. 2. Glimpses can perhaps also be seen in the contrast he draws between law and managerial discretion in his "Reply to Critics," *Morality of Law*, esp. pp. 207–210.

public and private uses of coercive force are managed through the mode of law and not through some other mode (or simply left unmanaged).

The significance of understanding the rule of law in this way can be illustrated as follows. Consider a society in which there is a law that prohibits spouses from suing each other, and another that prohibits spouses from testifying against each other in criminal cases. If we think the rule of law is a virtue of *legal systems*, then we would have to concede that the family law regime in this society answers to that ideal, for its rules are perfectly clear, general, consistent, prospective, and so forth.[26] But if we think the rule of law is a virtue of *social orderings*, a very different picture emerges, for it is very far from the case that every public and private use of coercive force in that society is actually controlled by law. On the contrary, spouses in this society can to a considerable extent employ or threaten to employ violence or physical restraint against one another at their personal discretion, without effective legal consequence. To clarify, the issue here is not that the law is *silent* with respect to interspousal coercion. The rule of law would not be satisfied, on my account, by the addition of a third law that explicitly authorizes such coercion. To actually *control* the use of coercive force, the law must do more than merely grant that use a stamp of legal approval, so to speak. What more precisely will be explained in part three below.

It should be obvious with a bit of reflection that the rule of law, so conceived, is going to be very far from a trivial ideal. The law of slavery, for example, is to a large

[26] Here I assume that we have ruled out substantive approaches for the reasons reviewed earlier in the paper.

extent a law for slave owners, protecting their discretionary authority to coerce slaves as they please. However clear and consistent its rules, however generally framed and published in advanced, those rules inevitably leave a large domain of coercive force effectively uncontrolled by law.[27]

At the same time, this account of the rule of law is not redundant, as are the usual substantive accounts: it is not reducible to the mere assertion that good laws are a good thing. Rather, it rests on a strictly descriptive account of the felt experience of law as a mode of social ordering, together with a normative argument to the effect that this is the best or most appropriate mode when it comes to managing the use of coercive force. It thus does not wait on a full account of social justice.

III

Our argument for the rule of law, as just noted, rests on a descriptive account of the felt of experience of law as a mode of association. In order to judge when the law is the best method for managing expectations and motivating cooperation, it would seem that we need an account of the distinctive character of law as a mode of association. This is too tall an order for a short discussion. However, we can perhaps make do with something less. In order to make out the basic normative argument for the rule of law, we need only work out a few distinctive features of law, especially insofar as these are relevant to the use of coercive force.

[27] It is of course true historically that regimes of slave law over time tended towards moderation, introducing more and more constraints on the treatment of slaves. These changes would register as improvements from a rule of law perspective on my view, whereas on a view that regarded the rule of law as a virtue of legal systems they might be regarded negatively if the new regulations were vague or inconsistent. Slavery can never be fully reconcilled with the rule of law, however, so long as it includes the discretionary right to buy, sell, and transport human property.

We might begin, for instance, with the common thought that there is an important distinction to be made between standing rules and particular commands, and that whatever else is true of the law, it is surely first and foremost a system of rules. Immediately we run into objections, however. The issue is not, as usually believed, the problem of distinguishing rules from commands in the relevant sense. It is of course true that at a certain point there is no analytically sharp or precise distinction between rules and commands, but this need not undermine our argument. It is equally true of nearly all social phenomena that they exist on continua – that one tends to shade into the next. It does not follow that our felt experiences of all social phenomena are the same. Everyone knows what it feels like to be treated disrespectfully, say, even though there exist certain grey areas in which we cannot with analytic precision say whether a person has been treated with due respect or not. Since we experience different social phenomena differently, there will be normative reasons to organize our social world in some ways rather than others: thus we have reasons to aim to ensure that people are treated with respect, so far as this is possible. Similarly, we can perfectly well make do with a rough contrast between rules and commands. Provided there are many cases in which it is obvious that something is a rule, and many others in which it is obvious that something is a command, the existence of harder cases at the margins need not impede progress.

In this spirit, let us say that a *rule* prescribes an open-ended course of conduct defined abstractly and indefinitely, whereas a *command* prescribes a concrete and specific action. Thus 'wait in line for service' is a rule, whereas 'stand here until told

otherwise' is a command. As a useful shorthand, we might say that rules are practices while commands are performances.[28]

The difficulty with characterizing the law as a system of rules thus lies elsewhere. Recall that what we need is a way to get a handle on what distinguishes the law as a mode of association from other modes. The real difficulty is that all modes of association, including the law, seem to rely on a healthy mix of rules and commands. Since this can most easily be seen by comparing the modes of law and authority, I begin there. Suppose that some town has an anti-littering ordinance which carries a $100 fine. The somewhat indifferent Andrea nevertheless litters in the town square, and is issued a ticket by officer Bob. When she subsequently appears in court, judge Carla orders Andrea to pay the fine, which she begrudgingly does. Everything in this little story is by the book, so to speak, from a rule of law point of view. Notice that many different rules are involved here, and not only the obvious one against littering: police officers lie under the rule, 'ticket anyone who litters', judges under the rule, 'order properly ticketed litterers to pay the appropriate fine', and so on. But commands are involved as well: in the end, Andrea was commanded by the judge to pay $100 to the public purse, and in the event that she refused, this command was assuredly backed by coercive force.

Now consider a different town without an anti-littering ordinance. This town is instead governed autocratically by Carla with the support of her henchman Bob. As

[28] This helpful phrasing is derived from Oakeshott, *On History*, pp. 129–130. Note that 'command' as here defined should not be confused with the broader sense of 'command' relevant for debates concerning the command theory of law. The distinction drawn in the text roughly corresponds to the distinction between the two species of command as defined by John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (Indianapolis, IN: Hackett Publishing, 1998), pp. 18–24.

it happens, perhaps, Carla is not overly fond of Andrea. Seeing her litter in the public park one day, Carla instructs Bob to force Andrea to pay $100 to the public purse as a punishment. Now this is obviously an example of coercive command, but it turns out that rules are involved here as well. In particular, everyone in this town lies under the rule 'do what Carla says'. It is important that we see this *is* a rule in the relevant sense: in effect, this is the insight that underlies Hart's famous critique of classical positivism, though here pressed into broader service.[29] Given the natural equality of human beings, as Hobbes observed, it is simply not possible for any one person to successfully impose her will on many others through force alone. At the core of even the most despotic authoritarian organization there must be some sort of coordination rule at least among a circle of henchmen that they all follow the commands of their designated leader. Thus the town is not ruled by fear of Carla, strictly speaking, but rather by fear that unilateral deviations from the rule 'do as Carla says' will have bad consequences *given the expectation that others* (and especially her henchmen) *will continue to observe that rule*. Now one might protest that the authority-conferring rule is not written down and published, as was the anti-littering ordinance in the first town. But surely this does not matter. The experiential contrast between the two towns would not be reduced in any appreciable way if the rule 'do what Carla says' was in fact written down and published. That there is an important experiential contrast between the two towns cannot be denied; it just

[29] Hart, *The Concept of Law*, esp. chap. 4. Roughly, he argues that the will of a sovereign does not make law, but rather the following of a rule of recognition by legal officials.

cannot be *simply* the fact that the first town is organized through rules, while the second is organized through commands.

Let us therefore approach the problem from a different angle. In our argument for the rule of law, as we have said, what matters is the *felt experience* of law as contrasted with alternative modes of association. Accordingly, let us consider things from Andrea's point of view. Specifically, since what we are ultimately interested in is the incidence of coercive force, let us ask what Andrea must do, practically speaking, if she wants to avoid being exposed to the use or imminent threat of violence or physical restraint.

In the first town, the relevant rule for Andrea is 'don't litter'. Provided she follows this rule, she can reliably avoid experiencing coercive force. Now one might complain that the precise meaning of littering is subject to dispute, that it is in the nature of rules to have gaps, indeterminacies, and so forth; thus Andrea cannot be entirely certain whether Bob or Carla will regard some borderline conduct as littering in the relevant sense. We must grant this, of course, but the objection misses the point. Clearly there exists a wide swath of conduct any town resident would without hesitation agree does not count as littering. Provided Andrea actually cares about avoiding coercive force, she need only confine herself to operating within this comfortable range. Notice here that when she does so, it does not matter who in particular is the officer, nor who in particular is the judge: to that extent, the rule in question is, we might say, *impersonal*.

In the second town, the relevant rule for Andrea is 'do what Carla says'. Again supposing Andrea wants to avoid coercive force, this rule does not leave her without

recourse. There are in the second town, just as much as in the first, paths of conduct she might follow that would ensure she is not likely to experience the use or imminent threat of violence or physical restraint. These paths of conduct are rather different in character, however. For instance, suppose that Andrea has a reasonably good sense of Carla's personality or internal psychology: in this case, Andrea might adopt the plan of complementing Carla and earning her good graces. So long as Carla thus remains favorably disposed towards Andrea, Andrea can be reasonably certain she will not experience coercive force. Alternatively, suppose that Andrea happens to know Bob is susceptible to bribery: in this case, Andrea might litter as much as she please, provided she is willing to bribe Bob into looking the other way. So long as Bob continues to accept bribes, Andrea can be reasonably certain she will not experience coercive force. Notice, however, that in either case the strategies Andrea might adopt are not impersonal: on the contrary, they are highly dependent on the particular identities of the persons ingratiated or bribed. Substitute another ruler or henchmen, and Andrea may have to adjust her strategy accordingly.

In short, what distinguishes the towns is not that one is organized through rules while the other is organized through commands, nor even that strategies for avoiding coercive force are available in the first town but not the second. What distinguishes them is rather the *differing types* of strategies available in each town. Importantly, whatever else is true about the first town, it presents one opportunity not readily available in the second: namely, it is common knowledge in the first town that one can reliably avoid being exposed to violence or physical restraint by following an impersonal public rule.

Here we have been relying on the mode of authority for our contrast, but notice that the contrast works equally well for the modes of democratic deliberation and bargaining. In either of these latter modes, there will be strategies available for securing the reliable avoidance of coercive force, but in neither case will the strategies be impersonal. In democratic debate, for example, the outcome will depend on some combination of Andrea's rhetorical skills, together with the contingent preferences and beliefs of the others in the assembly. In bargaining, the outcome will depend on Andrea's available resources, together with the contingent preferences and resources of the others with whom she is bargaining.

Let us provisionally characterize law as the public coercive enforcement of impersonal rules. It is of course a well-established dogma in contemporary legal philosophy that coercion is not an essential feature of law.[30] Whether or not this dogma is sound we may here set aside, for our interest lies not in the concept of law or legal obligation, but rather with how ordinary people characteristically experience law as a possible method for managing the use of coercive force. Thus we need not pretend that this working definition captures everything true and distinctive about the law as a mode of human association (though elsewhere I argue it captures quite a bit).[31] It is enough that it capture the distinctiveness of law as relevant for the particular normative argument that will follow.

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[30] This dogma is largely due to Hart's influential attack on Austin in *The Concept of Law*, chs. 2–4, and it is now widely accepted by positivists and non-positivists alike. Some have challenged it, however: see for example Frederick Schauer, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law," *Ratio Juris* 23 (2010): 1–21.

[31] See Frank Lovett, *A Republic of Law* (Cambridge: Cambridge University Press, 2016).

In that spirit, let us say that coercive force is *controlled by law* when there exist rules of law the following of which reliably ensure that we will not be exposed to violence or physical restraint. Thus, insofar as there is no legal rule a slave can follow that will ensure she is immune to being sold and forcibly transported to a distant plantation far from her family, she does not to enjoy the rule of law – and this remains true no matter how carefully the laws defining the property rights of slave owners adhere to the formal principles of legality. The rule of law is not a virtue of legal rules: it is a virtue of social orderings.

IV

Whatever else may or may not be distinctive about the law as a mode of human association, we have said, it centrally involves the use of impersonal public rules to manage expectations and motivate cooperation. Societies enjoy the rule of law to the extent that all public and private uses of coercive force specifically are managed through law and not in some other way. What remains is to present the normative argument for the rule of law, so understood: why is it best for all public and private uses of coercive force to be controlled by law?

By this point it is no doubt fairly obvious how the argument will go: properly framing an issue often carries us halfway through to resolving it. Nevertheless, to fairly assess the strength of an argument it should be made fully explicit. The argument involves several steps, which for clarity of exposition may be briefly summarized as follows:

1. Law is the impersonal coercive enforcement of public rules.

2. When coercive force is employed in the impersonal support of a public rule, people can avoid being exposed to that coercive force by observing the rule, without depending on the good will of other human agents.

3. People should be able to avoid being exposed to coercive force without depending on the good will of other human agents.

4. (from [2] and [3]) Coercive force should never be employed *except* in the impersonal support of public rules.

5. Some uses of coercive force can be prevented only by having public rules that are themselves coercively enforced.

6. There should be some law (from [1], [3], and [5]).

7. There should be no uses of coercive force apart from law (from [1] and [4]).

Step two maintains that when coercive force is employed in the impersonal support of public rules, people can avoid experiencing that coercive force simply by observing the rule, without having to secure the good will of another human agent (for instance, through ingratiation or bribery). This thought was introduced in the previous section through a vignette. More generally, we might think of a public rule as any prescriptive guideline that as a matter of common knowledge in the relevant community more or less clearly partitions possible paths of action into those that count as observing the rule and those that do not.[32] Provided it is common knowledge what the rule requires – in central cases at least – it should be possible for a person to avoid being exposed to coercive force simply by selecting from among the paths of action that fall on the correct side of the partition.[33] Provided the

[32] Lawyers often distinguish between rules and standards, where by the former they mean something like 'drive at 55 miles per hour or less' and by the latter 'drive at a reasonable and safe speed'. Here I use the term 'rule' more broadly to encompass both bright-line rules and looser standards.
[33] Note that this condition might not hold for persons outside the relevant interpretive community who are thus unable to grasp the central meaning of the rules. Here we might consider not only

rule is impersonally enforced, it should not matter who the person happens to be, nor who the particular enforcers of the rule happen to be.

Step three – the claim that people should be able to avoid coercive force without depending on the good will of other human agents – introduces the first republican aspect of our argument. Contemporary civic republicans argue for the central value of freedom from arbitrary power or domination. One person or group is subject to the domination of another, we might say, when the former is dependent on a social relationship in which the latter holds uncontrolled or arbitrary power over the former.[34] There are many varieties of power one agent might hold over another, but certainly among the most consequential is the ability to employ violence or physical restraint. Significantly, for republicans it matters not just how *probable* it is that an agent might employ coercive force, but also the *character* of that probability. If Bob is unlikely to employ coercive force against Andrea simply because he happens to be favorably disposed towards her, this will be unsatisfactory from a republican point of view: their relationship remains a hierarchical one insofar as Andrea's ability to avoid coercion depends on his continued good will. Put another way, the republican ideal is a society in which no one is the master of anyone else – a society of genuinely free and equal citizens.

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young children and the mentally disabled, but perhaps also in some cases the members of different cultures.

[34] Leading contemporary civic republicans include Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); and Maurizio Viroli, *Republicanism*, trans. Anthony Shugaar (New York: Hill & Wang, 2002). For a more detailed discussion of domination, see Frank Lovett, *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010).

Notice that our argument here would not go through on the more familiar negative conception of freedom as the mere absence of hindrance or interference. This is the view of Hobbes, according to whom the liberty of a person "consisteth in this, that he finds no stop in doing what he has the will, desire, or inclination to do."[35] The use or imminent threat of violence or physical restraint undoubtedly counts as a hindrance in the relevant sense, but the conception of freedom as non-interference only gives us a reason to be concerned with the expected probability that people will actually be hindered in doing what they want to do. If our aim were simply to minimize the overall incidence of coercive force and other hindrances, the mode of authority might serve just as well as the mode of law: ruthless autocrats can be very effective at imposing social order, thus ensuring their subjects experience relatively little violence or physical restraint quantitatively speaking (provided they keep their heads down, naturally). Put another way, there is no necessary connection between the rule of law and freedom understood as non-interference, as there is between the rule of law and freedom understood as non-domination.

Putting the previous two thoughts together yields step four. If people should be able to avoid being exposed to coercive force without depending on the good will of other human agents, and if they can do so to the extent that coercive force is employed only in support impersonal public rules, then it follows that the use of coercive force should be limited to the impersonal enforcement of public rules alone. One minor complication here is the possibility that there might be other scenarios in which coercive force can be avoided without depending on the good will of another

[35] Hobbes, *Leviathan*, II.21.2: p. 139.

human agent. Imagine a robot programmed to coerce people at specific intervals determined by a complex numerical formula ϕ. In this case, people could avoid experiencing coercive force by correctly calculating the formula and then avoiding the robot at the pre-determined times. Of course this would in effect amount to the impersonal enforcement of a public rule – roughly, 'avoid the robot at times determined by ϕ'. But in any case, the example is fanciful. In practice, our choice is generally between impersonal public rules and discretion. If so, then coercion should be rule-governed.

Step five introduces a second republican thought – namely, that our freedom from domination is not natural or pre-institutional.[36] In the proverbial state of nature, there would be no freedom from domination, since we would have no assurance that others might not have the power to frustrate our choices whenever they so desire. More specifically, in the case of coercive force, we are all vulnerable to violence or physical restraint in the absence of institutional protection. It is difficult to see how in large modern societies we might prevent people from exercising coercive force over one another except by having impersonal public rules that prohibit such coercion (rules against murder, assault, rape, etc.), and then coercively enforcing those rules.[37] Thus, as Blackstone observed, "laws, when prudently framed, are by no means subversive but rather introductive of liberty," and indeed "where there is no law, there is no freedom."[38] This claim makes little sense on the negative concep-

[36] See Pettit, *Republicanism*, pp. 106–109.
[37] Here we remain agnostic as to how far it might be possible in small, tightly-knit communities to effectively control the use of coercive force through social convention and custom alone, and thus in a sense to enjoy the rule of law without law.
[38] William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), I.1.12: p. 122.

tion of freedom as non-interference: all law as such are hindrances, though by removing some freedoms other might be protected.[39]

From step five, step six clearly follows: given that people should be able to avoid coercive force, and that they can do so only if there are some impersonal and coercively enforced public rules, there should be some such rules. By the definition stipulated in step one, this is equivalent to saying that there should be some law. Though obvious on reflection, this important aspect of the rule of law is often ignored in the contemporary literature, which focuses almost exclusively on detailing the principles of legality. Indeed Raz goes so far as to claim that the "rule of law is designed to minimize the danger created by the law itself," as if we could satisfy the ideal of the rule of law simply by having no law.[40] As observed earlier, this mistake derives from the error of supposing the rule of law is a virtue of legal systems, rather than a virtue of social orderings.

Finally, step seven simply adds that there should be no public or private uses of coercive force *except* for the impersonal enforcement of public rules. In other words, we cannot satisfy the rule of law ideal by having a legal system that authorizes private coercion, no matter how clear and consistent its rules, no matter how generally framed and published in advanced the authorization. This requirement rules out not only arbitrary government and slavery, but also many traditional arrangements of family law in which husbands and fathers were effectively permitted considerable

[39] Cf. Jeremy Bentham's assertion in "Anarchical Fallacies," in *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, Jeremy Waldron, ed. (London: Metheun & Co., 1987), p. 57, that "all laws creative of liberty, are, as far as they go, abrogative of liberty."
[40] Raz, *The Authority of Law*, p. 224.

discretion in using coercive force against their wives and children. Under that dispensation it was not true of wives and children, any more than it was of slaves, that they could avoid being exposed to coercive force without depending on the good will of other human agents. Taken together, steps six and seven articulate the rule of law ideal. This is the ideal famously, though very imperfectly, expressed in Harrington's words as an "empire of laws and not of men."[41]

V

This paper has argued that the rule of law has significant value for human well being insofar as it secures an important aspect of our freedom from domination. It is perfectly consistent with this argument to believe that the rule of law confers other benefits as well: certainly it can provide a stable framework of expectations for people to plan their lives, and it might even enhance human dignity by respecting people as responsible moral agents. But the law is not unique in its ability to deliver these other goods. Properly functioning markets, for example, can generate clear expectations, and democratic deliberation respects people as responsible moral agents, perhaps better than law. The argument from republican freedom shows why law is special – why it is not merely a good, but a necessary good. When it comes to governing the use of coercive force in a manner consistent with our freedom, we have no apparent substitute for law.

[41] James Harrington, "The Commonwealth of Oceana," in *The Political Works of James Harrington*, ed. J. G. A. Pocock (Cambridge: Cambridge University Press, 1977), p. 161.

For all that, it is important not to fall into the trap of regarding the rule of law ideal as a complete public philosophy. Though a very important and perhaps sometimes underrated political value, it is by no means the only thing we should care about. Inevitably it follows that the value of the rule of law will sometimes conflict with other values – values of democracy, or equality, or historical justice, and so forth. Since the rule of law will not in all cases take priority over these other values, we must accept that it has limits.[42] It is not my ambition in this paper to trace those limits, however: it has simply been my aim to explore where the real value of the rule of law lies, and to express that value with as much force and clarity as possible. Doing so is the necessary first step to assigning the rule of law its appropriate place in a complete public philosophy.

[42] Some of which are discussed in Marmor, "The Rule of Law and its Limits," esp. pp. 9–38.