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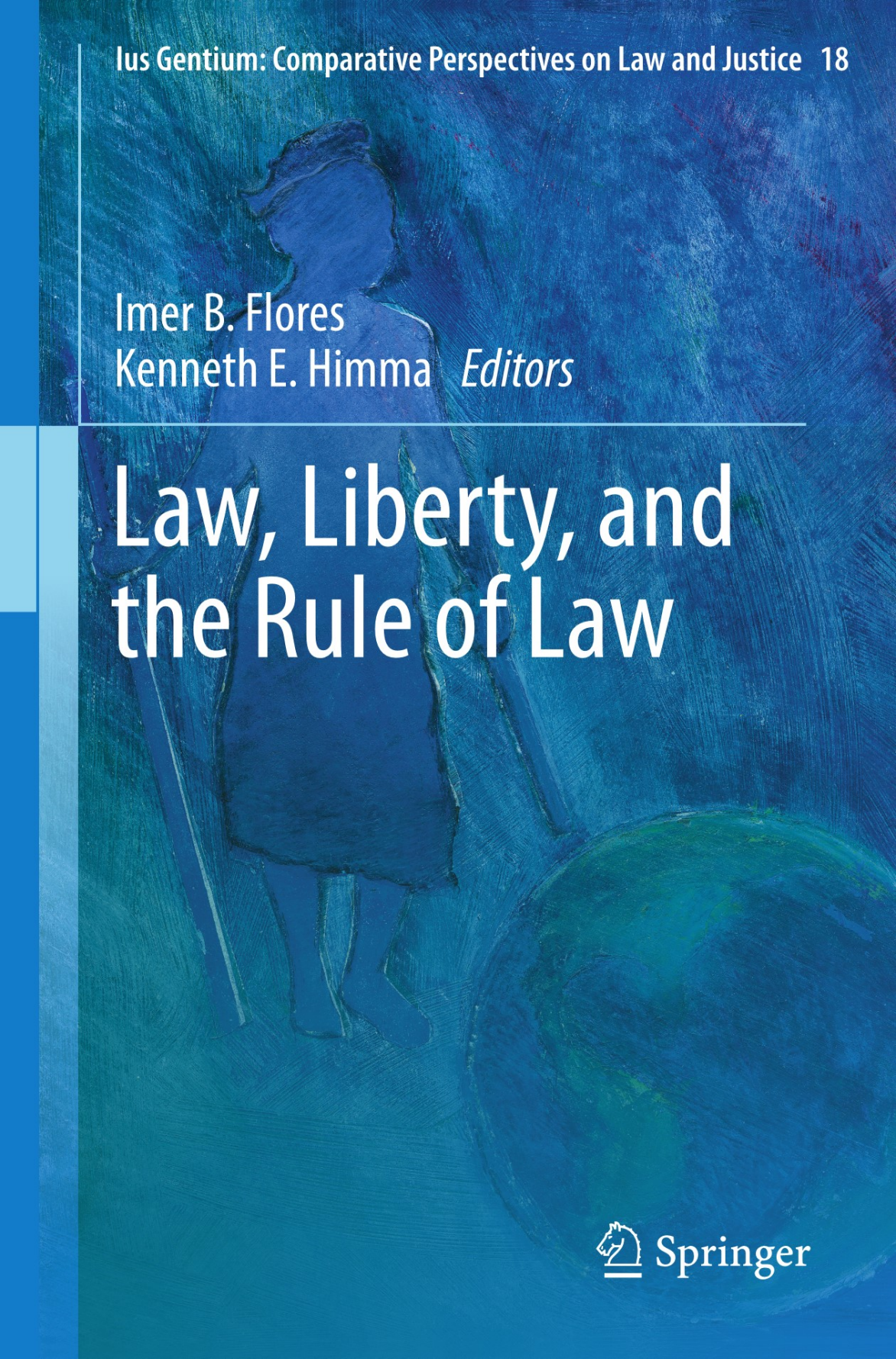
Law, Liberty, and the Rule of Law



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Chapter 2
The Concept of the Rule of Law

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2.1 Introduction: Pervasive Disagreement in Rule of Law Discourse

It is undeniable that the "Rule of Law".[1] is an important political ideal. In fact, it has been called "*the most* important political ideal today" (Tamanaha 2004; Waldron 2008, 1). The concept is frequently invoked by politicians, the media and scholars in attempts to justify or condemn state actions, political decisions, or whole legal systems. As Jeremy Waldron writes: "Open any newspaper and you will see the "Rule of Law" cited and deployed – usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy" (Waldron 2008, 1). While it might be going too far to say that the "Rule of Law" is *universally* accepted, it has indisputably achieved unprecedented support. As a testament to its current influence, despite supporting diverse ideologies, many heads of state from a variety of countries have expressed a commitment to and acknowledged the desirability of the "Rule of Law" including former American President George W. Bush, Robert Mugabe of Zimbabwe, President Mohammed Khatami of Iran, and Mexican President Vicente Fox Quesada (Tamanaha 2004, 1–2). This widespread support, in turn, has given rise to an unmatched rhetorical power. This term has the power to impress, persuade, convince, satisfy, legitimate and justify.

So what is the "Rule of Law"? What state of affairs does the term connote? What conditions must be present for a claim that the "Rule of Law" exists to be legitimate? In the interest of transparent and unambiguous communication, upon which the success of legal and political decisions often depend, and because of its current

[1] As Waldron (2008, fn 1) does: "I capitalize the term "Rule of Law" to distinguish it from the phrase "a rule of law" which may be used to refer to a particular legal rule such as the rule against perpetuities or the rule in the United States that the President must be at least thirty-five years old."

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prominence in legal and political discourse, it is essential that those involved in the discourse have a similar understanding of what the concept signifies.

Unfortunately, in its recent popularity, the "Rule of Law" has become a catchphrase. As Richard Bellamy and Joseph Raz have noted, "some accounts of the "Rule of Law" use the term as a catch-all slogan for every desirable policy one might wish to see enacted" (Bellamy 2007, 54). The term is frequently accused of having no determinate meaning. Waldron has called it an "essentially contested concept" (Waldron 2002, 137), and Olufemi Taiwo has commented that "[it] is very difficult to talk about the "Rule of Law". There are almost as many conceptions of the "Rule of Law" as there are people defending it" (Taiwo 1999, 154). According to some, the "Rule of Law" is a metric for evaluating whether or not there is law in a given society (Kramer 2004, 172–222). On other accounts, it is the quality of the law that is evaluated (Finnis 1980, 270). Some scholars suggest that to claim that the "Rule of Law" exists in a given society says nothing of the value of law in that society (Kramer 2004, 172–222). Some think that it *is* a value, albeit not a moral value (Raz 1979, 210–32), while others regard it as among the highest of political ideals (Waldron 2008, 1). In fact, the only thing that seems to consistently garner *agreement* within "Rule of Law" discourse is that there is pervasive *disagreement* within "Rule of Law" discourse.

On a fundamental level, I find this to be a troublesome and undesirable state of affairs: there is no agreement about what the concept "Rule of Law" signifies, yet it is invoked incessantly by politicians, the media and scholars. I do not believe that well-informed, successful discussions and decisions are possible without effective communication, and the current pervasive disagreement about the "Rule of Law" has resulted in a discourse where participants are often talking past one another.

While undesirable, I do not think that this state of affairs is by any means *unavoidable*. The radical disagreement that currently surrounds the "Rule of Law" is evidence of undisciplined conceptual theorizing. In what follows, I sketch some basic methodological points about conceptual analysis, which have been overlooked by many current theorists engaged in "Rule of Law" discourse. In order to move towards a shared understanding of the "Rule of Law", it is necessary to re-evaluate the plethora of disparate theories and reconsider the concept in light of these considerations. The "Rule of Law" has become a powerful rhetorical tool in contemporary society, and we have a responsibility to clarify this concept, or at least narrow the scope of the disagreement, in order to ensure that our most important and salient political discussions and decisions have meaning and merit, not just force.

2.2 Increasing Consensus Through Conceptual Analysis

It is important for participants in any debate, argument or conversation to understand the terms of their conversation in (at least) similar ways for communication to be successful and meaningful. The problem with "Rule of Law" discourse has been that participants have often been using the term in very different ways, thus disabling meaningful communication. Philosophy is particularly amenable to the aim of clarifying, analyzing and reflecting upon concepts, and it is a suitable medium to

employ in fulfilling our responsibility of bringing clarity to "Rule of Law" discourse. The "task of philosophy", according to Isaiah Berlin, is to reveal the way human beings think and to "discern the conflicts between [their use of words, images and other symbols] that prevent the construction of more adequate ways of organising and describing and explaining experience" (Berlin 1999, 10). The goal of conceptual analysis in particular is "improved understanding", according to Michael Giudice, who provides an outline of the first step towards clarifying concepts (Giudice 2005, 15–6):

> First […] philosophical analysis of existing concepts or participant understanding aims at revealing confusion and disagreement, with the goal of clearing a way for the construction of more adequate theories or models with which to understand ourselves. Even if new or better concepts are not easy to find or develop, recognition of the limits or pitfalls of existing concepts is progress.

Though the concept in question may not be *easily* clarified, as Giudice points out, recognizing the existence of confusion or vagueness about its meaning is the first step to eliminating that confusion, and moving towards a situation where the concept can be meaningfully employed. Similarly, for Quentin Skinner and Joel Feinberg, "The goal of conceptual analysis […] is thus to arrive, by way of reflecting on 'what we normally mean when we employ certain words', at a more finished delineation of what we had better mean if we are to communicate effectively, avoid paradox and achieve general coherence" (Skinner 1984, 199 fn 21; *cf*. Feinberg 1973). With the foregoing in mind, I would like to make some simple (and hopefully uncontroversial) recommendations for engaging in the conceptual analysis of the "Rule of Law". While each suggestion may seem almost trivial, there are a number of theorists who have not taken one or more of these points into consideration when theorizing about the "Rule of Law".

In order to begin to clarify the concept of the "Rule of Law", it is necessary to consider "what we normally mean" when we use that phrase. This requirement implicates an investigation of the current usage of the concept, and, since continuity exists with respect to the use of the term over time, an investigation of the historical usage of the term.

It is important to consider how a term is currently being used if, as Wittgenstein argued, the meaning of a word is its use in ordinary language. In other words, a word without a use has no meaning. Admittedly, as Stavropoulos points out, "actual usage is not, as it stands, *sufficient* for correct explication of meaning, as it is usually too unruly or haphazard, and may rest on incomplete understanding or be affected by general epistemic impediments" (Stavropoulos 2001, 81 – emphasis added). Language users have not come to a state of reflective equilibrium with respect to all of the concepts in their repertoire. If this was the case, conceptual analysis would be largely unnecessary. Investigating the current usage of a term is necessary to uncover confusion and disagreement, the first step towards improving clarity. Further, it is desirable for the concept in its analyzed form to maintain some kind of familiarity for average language users, since the overall goal of the analysis is to illuminate the "contents" of the concept and thereby improve communication and understanding. Stavropoulos continues (*Id*.):

> Actual usage sets limits [to the analysis of concepts]: the principle cannot fail to fit actual usage, except to the extent that it orders and ensures consistency of such usage. The principle

> cannot introduce distinctions never made in the course of or entailed by actual usage, nor can it collapse distinctions actually made or entailed. Ambitious analysis therefore must track actual understanding.

Beginning with ordinary language use provides a good foundation for achieving the goal of conceptual analysis.[2]

2.3 The Rule of Law: Current and Historical Usage of the Concept

Though content of the concept seems elusive, if we consider the statements of politicians, journalists, people writing editorials and bloggers, it is possible to get a sense of the spirit in which the "Rule of Law" is currently used. In my introductory remarks, I observed that the "Rule of Law" is considered a political ideal and a desirable state of affairs. It is globally recognized that it sets a desirable standard for governments: there are attempts to implement it in developing countries through initiatives like the World Justice Project (http://worldjusticeproject.org/). It seems for the most part that it is understood as evaluating legal systems in a morally significant way. Regimes are criticized for violating the "Rule of Law" and praised for striving to achieve it. Decisions made and actions taken in accordance with the "Rule of Law" are seen as legitimate. In Waldron's research on the current state of "Rule of Law" discourse, he points to articles from *The New York Times*, *The Times* (London), *The Financial*

[2] I think that this is the appropriate place to begin despite some concerns that the reader may have at this point. First of all, a term may have different meanings in different contexts: "star" could mean a gravitational field of gases burning billions of miles away from the Earth; it could mean the shape, with four, five or more points; it could be understood as a pin-prick of light in the night sky; or perhaps one might think of an entertainer (musician or actor) as a star. Because a term might have a variety of current usages does not mean that this is not the correct place to begin collecting raw data. It simply means that the data will have to be sorted – and while this might be a harrowing task, its difficulty does not indicate that the wrong raw material has been considered.

There is also the possibility that individuals are not descriptive in their use of terms, but rather revisionary – it is meant to be used for some purpose. Therefore, the material collected may consist of data that is reported based on what individuals take to be the case from experience, but it may also consist of data that is constructed to serve a particular end. On this point, first of all, I think that instances of constructed concepts are likely to be much less prevalent that otherwise; average people are unlikely to be constructing their concepts to serve a particular purpose, especially if they see this understanding as at odds with the accepted understanding. It is more likely the case that it is scholars who revise concepts in this way – and, again, this is data that can be broken down and analyzed to determine whether or not it ought to be retained for the final analysis. If the conception on offer is so revisionary that it is miles away from ordinary usage, it may be discarded in the final analysis.

Finally the fact that many concepts are persuasive or evaluative does not cause any problems at this point. I think that it is important initially to collect a broad cross section of data to evaluate. The fact that some people might use the "*Rule of Law*" in a morally loaded way, such as the way we use *justice*, and that others might not use it in that way, but in a more descriptive way, such as the way we use *chair,* does not concern me at this point. These are problems to be addressed after the collection of such data.

Times and American case law to demonstrate that the "Rule of Law" is a benchmark of legitimacy (Waldron 2008, 1). This is evident even if you consider briefly some of the many things that have been said with respect to the United States' war on terror and treatment of detainees at Guantanamo Bay alone: "The "Rule of Law" has yet to be reinstated in the U.S. battle on terror. The problem started when the (Bush) administration rejected the Geneva conventions, which are intended to apply to every armed conflict in the world" (Barbara Olshansky quoted in "US builds…" 2006). Consider a second example (Michael Ratner quoted in "A mixed…" 2004):

> The Supreme Court has not closed the doors of justice to the detainees imprisoned at Guantanamo Bay. This is a major victory of the "Rule of Law" and affirms the right of every person, citizen or non-citizen, detained by the United States to test the legality of his or her detention in a U.S. Court

And a third (Ann Beeson quoted in "ACLU…" 2006):

> In the name of national security, the Bush administration has eroded the "Rule of Law" and the system of checks and balances in the United States, both fundamental principles in any democracy. In our America, we will not tolerate illegal spying or torture. The ACLU calls on the Human Rights committee to join us in our effort to hold the U.S. government accountable.

The message is clear: the "Rule of Law" is important, and its violation ought not to be tolerated. Overall, we seem to think that the "Rule of Law" is a good thing to have, and an ideal to aspire to.[3]

The current use of the "Rule of Law" just outlined, together with the importance of beginning conceptual analysis with current usage, calls into question the success of certain attempts to theorize it. While current usage is not the only criterion that Waldron thinks is necessary for both law and the "Rule of Law", his assertion that the "Rule of Law" is a political ideal is very much in line with it. This fact is unsurprising as Waldron makes explicit appeals to current understandings of the "Rule of Law" to provide a foundation for his theory. Matthew Kramer, on the other hand, offers a theory that seems to completely ignore current understandings of the "Rule of Law". He asserts that what he means by the "Rule of Law" is no more and no less than Lon Fuller's eight criteria of legality (Fuller 1969, 39), which can be used equally in the service of evil and the service of good. What is more, he argues that the "Rule of Law" has no necessary connection to morality insofar as the "freedom" it provides, might not actually obtain (Kramer 2004, 172–222).

John Finnis and Joseph Raz both offer nuanced theories of the "Rule of Law", and while it at first appears that Finnis's understanding is in line with current usage and that Raz's is not, upon further inspection it is possible to argue the opposite as well. While Finnis suggests that the "Rule of Law" is the name given to the state of affairs

[3] At this point, I am beginning to demonstrate that the "Rule of Law" is viewed as something of value by contemporary societies. However, does value entail *moral* value? I think in this case it does. First, acknowledgement of its desirability seems to be widespread, and people seem to think that without it, justice cannot be served (and justice is typically understood as a morally evaluative term). The "Rule of Law" has the potential to seriously affect the fundamental interests that people have, and in that sense it is morally relevant to their lives. Thank you to Professor W. Waluchow for bringing this point to my attention.

where the law is functioning as it ought to, namely in the service of the common good (Finnis 1980, 270), he also backtracks at one point and admits that the "Rule of Law" may be used in the service of self-interested and even evil aims (*Ibid.*, 273–4). However, his attempt to incorporate moral value into his theory of the "Rule of Law" demonstrates that he has taken into account a perspective at least akin to the current perspective, even if his theory seems to have problems with overall coherence. Conversely, at first it is difficult to read Raz as asserting anything but the neutrality of the "Rule of Law". Like Kramer, he seems committed to a view of the "Rule of Law" as a neutral tool. His example of the sharp knife has become infamous in arguments supporting such a conception. "Of course," he writes (Raz 1979, 225–6):

> [C]onformity to the rule of law also enables the law to serve bad purposes [as well as good ones]. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife.

In other words, it is necessary that a knife is, to some extent, sharp in order to perform its primary function of cutting. However a sharp knife would be both an excellent knife for carving a turkey as well as an excellent choice for quickly bringing about the death of the neighbour's cat. According to Raz's analogy, the "Rule of Law" is a tool, morally neutral in and of itself, and can be used for both very good and extremely heinous ends. However, Raz does maintain that the "Rule of Law" is a value, albeit not a moral value, and in this way I think he tries to make room for understandings which link the "Rule of Law" to some desirable state of affairs.

It is important to consider not only current, but also the historical usage of a term as part of the initial stages of conceptual analysis. While it is true that concepts develop over time, it is also undeniable that if there is continuity of *use* over time, there is likely to be some kind of continuity with respect to how a term is used and understood. In the case of the "Rule of Law" there is a long and rich history to consider: the term has existed at least since antiquity when Aristotle debated the desirability of "the "Rule of Law" and not of men" in the *Politics* more than 2,000 years ago (2000, Book III). There are a variety of related themes that can be extracted from the discussions of the "Rule of Law" over the centuries, but most of them center on the idea that the "Rule of Law" is in some way the antithesis of the arbitrary use of power. Two streams of thought dominate the history of "Rule of Law" discourse: (i) the "Rule of Law", not of Man and (ii) the "Rule of Law" as formal legality.

In *Politics*, Aristotle, like Plato before him in *Laws* and *Statesman*, was concerned with outlining the way society ought to be set up and function in order to maximize people's ability to live well and achieve the good. This idea is also echoed later in the work of Cicero and St. Thomas Aquinas. Endorsing the "Rule of Law" is a crucial part of the social and political recommendations made by these philosophers, and, in particular, is meant to safeguard against the dangers of tyranny.

The "Rule of Law" is seen as desirable in this case since it is characterized as objective and in accordance with reason, and as such is contrary to the "Rule of Man", which is characterized as arbitrary and "subject to the unpredictable vagaries of [individual rulers]" (Tamanaha 2004, 122). To live under the "Rule of Law" "is to be shielded from

the familiar human weakness of bias, passion, prejudice, error, ignorance, cupidity, or whim" which are associated with the "Rule of Man" (*Id.*). A sovereign or ruler who rules in accordance with the "Rule of Law" appeals to factors external to himself – existing rules, principles and reason – when creating legal norms and adjudicating disputes. A sovereign or ruler who typifies the "Rule of Man" does not appeal to factors external to himself, but only to internal factors such as his own needs, desires or predilections. Thus, it is evident how the rule of man might devolve into tyranny.[4]

[4] At this point it may be necessary to address one of the most important criticisms of this way of understanding the "Rule of Law". Aristotle, Aquinas, and Hobbes, among others, suggest that it is logically impossible for a sovereign to be limited by law, since the law depends on the authority of the sovereign and "for the plain reason that the law may be altered at the lawmaker's will" (Tamanaha 2004, 48). Further, laws do not exist, nor can they be applied without human interpretation and participation. Jean Hampton articulates this idea (Hampton 1994, 16):

> A rule is inherently powerless; it only takes on life if it is interpreted, applied, and enforced by individuals. That set of human beings that has final say over what the rules are, how they should be applied, and how they should be enforced has ultimate control over what these rules actually *are*. *So human beings control the rules*, and not vice versa.

So it seems that we can never escape the problems that derive from human involvement in law, which are intended to be circumvented by adhering to the "Rule of Law". According to Tamanaha, "the inevitability of such participation provides the opportunity for the reintroduction of the very weakness sought to be avoided by resorting to law in the first place" (Tamanaha 2004, 123). In other words, since we cannot escape the human element in law, it does not make sense to suggest that this way of understanding the "Rule of Law" is viable.

Aristotle was one of the first to identify this problem. He defined the sovereign as someone who was not himself subject to any other, and therefore thought that it was logically impossible for the sovereign to be limited by positive law. Aquinas took up this problem and while he agreed with Aristotle that it was logically impossible for the sovereign to be limited by positive law because the positive law was derived, in part, from the sovereign, he argued that the sovereign *could and should subject himself* to the law (Aquinas 1947, q. 96, art. 5). According to Aquinas, because there is no other human being suitable to pass judgment on the sovereign, he is therefore exempt from the law's coercive power. However, one reason for the sovereign to observe the dictates of law in Aquinas's time is that there is one who is competent to judge everyone including the sovereign: God. In contemporary society, the separation of powers also constitutes a limit on the exercise of power. However these are practical and not normative constraints on the sovereign.

The fact that human participation is unavoidable in law does not inevitably reduce the "Rule of Law" to the "Rule of Man", or mean that the "Rule of Law" is *prima facie* impossible. While sanctions add an extra element of assurance, it is not the case that they must necessarily exist in order for people to be persuaded to follow rules or principles. In *A Common Law Theory of Judicial Review: The Living Tree*, Wil Waluchow demonstrates that it is conceptually possible to talk about normative restrictions on a sovereign, even in the case where the executive, legislative and judicial responsibilities are assumed by one person. He points out that there is an important distinction to be made between *de facto* and *normative* freedom. It is true that a solitary ruler has *de facto* freedom to create and change rules and adjudicate according to her will. But having the *de facto* freedom to do so does not entail having *normative* freedom. If there are rules that pertain to her and limit her power, she does not have the *normative* freedom to break them if we can take a cue from Waluchow and H.L.A. Hart and accept the working definition that rules are "prescribed guides for conduct or action. They set general normative standards for correct behaviour or conduct" (Waluchow 2007, 32). So, while there may be limited ways of ensuring the existence of the "Rule of Law" by coercion or force, it is nonetheless possible despite the fact that human participation is inevitable.

One of the most significant aspects of this understanding of the "Rule of Law" is that the content or substance of the laws which promote the "Rule of Law" is restricted. Laws cannot have just any content and still contribute to the "Rule of Law" as is evident from the emphasis that philosophers from this tradition place on achieving the common good. The restraints they place on what can be law "properly so-called" are important because they identify which laws can contribute to the "Rule of Law". It might be useful to think of the "Rule of Law" (as opposed to the "Rule of Man") as an end, rather than a means. It is an end that can only be reached by adhering to certain content restrictions, among other things. Because of the nature of these content restrictions – the necessity of having an eye to the common good, being in accordance with right reason and moral principles – it is acceptable to say that in this sense, the "Rule of Law" is a moral ideal. It denotes a morally good state of affairs, rather than a morally neutral one.

The "Rule of Law" as rule by law or formal legality does not place content restrictions on rules and has therefore been called morally neutral; yet it is another way of understanding the "Rule of Law" as the antithesis of the exercise of arbitrary power. Both Waldron and Brian Tamanaha identify this sense of the "Rule of Law" as "favoured by legal theorists" and it is the conception held by the majority of post-Enlightenment legal theorists working on the subject.

This sense of the "Rule of Law" emphasizes the characteristics and the benefits of rules, where a law counts as a type of rule and the aim of rules is generally thought to be the guidance of human conduct. Recalling Lon Fuller's eight criteria of legality is useful here, as they provide criteria required of *all* rules with the capacity to guide. For instance, they must be public, prospective, understandable, and relatively stable (Fuller 1969, 39). There must be congruence between the rules as they are expressed and their application. This means, not only that individuals will be able to foresee what is expected of them, but also that the sovereign or government must operate in accordance with the rules that they set. Defined by these criteria, rules are able to provide predictability and certainty for individuals about what is expected of them and the consequences that will follow if they do not meet the requirements.

The "Rule of Law" in this second sense means the rule or governance of a community through the use of laws (rules), rather than by arbitrary or particular commands, which cannot provide standing guidance to individuals. This understanding of the "Rule of Law" has been articulated most clearly by F.A. Hayek, who writes (1944, 72):

> Stripped of all technicalities, [the "Rule of Law"] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

Formal legality is desirable because when people have rules to structure their lives, their interactions with others and with the government, they are able to make plans, both short and long-term, around the existing rules. The ability to make plans is thought to be valuable because it allows individuals to exercise their autonomy, and by doing so contributes to their dignity as individual persons and potentially to their well-being.

In this way many theorists have argued that freedom does not exist without law. Without law, each is subject to the unpredictable impulses of others and the arbitrary whims of lawmakers and adjudicators. Hayek saw no freedom in such a way of life, nor did Montesquieu, who argued that "liberty is a right of doing whatever the laws permit" (1748, Book XI, s. 3). John Locke, one of the foundational figures of liberal theory, also understood freedom as requiring law. He writes (1689, Chapter 2, s. 23):

> Freedom of men under government is, to have a standing rule to live by, common to everyone in society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.

His articulation of what freedom requires is very much in line with the "Rule of Law" as formal legality.

One of the most frequently debated topics in "Rule of Law" discourse is whether or not the "Rule of Law", understood as formal legality, has any necessary connection to moral goodness. Above, I outlined the reasons that this sense of the "Rule of Law" is seen as desirable: the certainty and predictability associated with it provide for expressions of autonomy, and are related to dignity and well-being. It is even compatible with value and moral pluralism, which enables individuals to strive to achieve what each considers to be the good.

The same characteristics, namely the absence of content requirements, which enable formal legality to be compatible with pluralism, also enable it to be compatible with the aims of evil and iniquitous regimes. Because it makes no substantive demands on the content of legal rules, this understanding of the "Rule of Law" is "open to a range of ends" (Tamanaha 2004, 94). The fact that the "Rule of Law" as formal legality is open to being used in the service of a variety of ends, its moral worth has been seriously questioned. There are those, such as Joseph Raz, who argue that it is a virtue insofar as it entails an appreciation of the individual as an autonomous, rational being, who is capable of following rules, and that its necessary, though not sufficient, connection with good law makes it morally significant. On the other side of the argument one can maintain that formal legality is just as useful for the aims of an iniquitous regime as it is for the aims of a just one. There may be no interesting connection between the "Rule of Law" and morality if it is both a necessary condition for the effectiveness of good and bad laws alike.

Tamanaha offers yet another point of view on the moral neutrality of formal legality. He maintains that it is contrary to the long tradition of the "Rule of Law" (not of Man) which finds its motivation in the attempt to restrain the sovereign from tyrannical rule. According to Tamanaha, "such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules, to include the understanding that there were certain things the government or sovereign could not do" (*Ibid.*, 96). He recalls that the limits imposed by law historically had moral substance derived from shared customs and principles, Christian morality, right reason, and the good of the community. "Formal legality," he argues, "discards this orientation": the government can do anything that it desires as long as it enacts a legal rule first, in this way maintaining the "Rule of Law". Further, if the government

decides to do something that is not currently legally permitted, it may change the law to allow for the desired action, as long as it meets the criteria that enable rules to guide the conduct of individuals.

Contemporary scholars have, in large part, been selective in their investigation into the history of the "Rule of Law" by focusing on accounts provided by one or two historical scholars to the exclusion of the others, or have overlooked the historical component completely. Though Kramer's work is compatible with an understanding of the "Rule of Law" as formal legality, the farthest back he goes when explaining what the concept means is a discussion of Lon Fuller's eight criteria of legality. His account does not provide evidence that the greater history was taken into account. Finnis's theory of the "Rule of Law" is not only commensurable with the "Rule of Law", not of Man conception, some of the theoretical work is so similar that it is evident that he has drawn upon the work of the ancient scholars and Aquinas in developing his theory of law and the "Rule of Law". His discussion of the common good and the "Rule of Law" as the appropriate end of law fits nicely in line with this historical trend. There is a small point of contention in Finnis' theory, surrounding whether or not he considers the "Rule of Law" to be an end or a means when he concedes that it might be used for illegitimate aims. While it is a confusing point in his theory, it is evidence that he also considered the formal legality trend in the "Rule of Law"'s history. Waldron's theory is rather problematic in terms of its ability to account for historical understandings of the "Rule of Law". While it is certainly not a theory of formal legality – Waldron is very interested in content and procedural restrictions on law – it is not a theory that is compatible with the "Rule of Law", not of Man trend either. The requirements Waldron outlines for law and the "Rule of Law" are very context dependent on modern Western liberal democracies. While he does suggest that norms ought to be oriented towards the public good, he also attempts to include in his conception more modern institutions of government such as courts and legislatures as we currently understand them – institutions that did not exist in the same way in ancient Greece or medieval Europe. In this way his account is both commensurable with and at odds with the "Rule of Law", not of Man. Still, there are others who seem to have taken account of even less. For example, Richard Bellamy argues that "in many respects, the "Rule of Law" is simply rule by democracy" (Bellamy 2007, 53). Such a claim seems to ignore important facts of the history of the "Rule of Law": the "Rule of Law" and democracy are two distinct concepts with distinct histories and we *use them* as distinct concepts, and many contemporary and historical societies which were not democratic made claims to and discussed the value of the "Rule of Law".

2.4 External and Internal Conceptual Coherence

Gathering raw material is not the end of conceptual analysis: it is only the beginning. Overall, the goal is to achieve something like reflective equilibrium with respect to a particular concept, in this case, with respect to the "Rule of Law". The raw materials – theory, history, and the understanding of individuals, among other things – do not

always point to the same conclusion about what features make up the core of a particular concept. In fact, agreement between all of these sources is highly improbable. So it is unsurprising that in the case of the "Rule of Law" the raw materials do not point to one unified conclusion. It is important to appreciate, however, that because the analysis may be difficult due to the variety of material under consideration it does not mean that the wrong material is being considered.

As mentioned, not all of the raw material will point toward the same conclusion; fortunately, some of it can be discounted. The information gathered needs to be sorted and evaluated before it can be put together in a way that has the potential to illuminate the concept in question. There are at least two ways to evaluate raw material in the initial phase when it is being collected: discarding unconsidered opinions and making note of widespread ones. It is *prima facie* important to consider opinions which are widespread because it is important that the theorized concept be in line with participant usage as much as possible. It is also necessary to eliminate unconsidered opinions. An opinion may be unconsidered for a variety of reasons: for example, it may be based on little or no knowledge or it may be obviously incoherent. Giudice nicely summarizes the idea that while usage must be the beginning of conceptual analysis, there remains work for philosophers to do after the collection of material. He writes (2005, 11–2):

> In the explanation of concepts of social phenomena such as law, ordinary or participant understanding serves initially but only roughly to define the category or subject matter… Initial views […] give philosophers a point of departure but also a responsibility… Philosophers must also ask whether there are questions which participants have not thought about or perhaps are puzzled about…

By considering things that individuals (participants) have not, such as whether their conception is based on partial or false information, or if it is particularly uncommon or atypical, it is possible to eliminate some opinions from those that will ultimately contribute to the theorized concept.

Once the raw material has been initially sorted, it is logical to move onto the more rigorous analyses which make up the next phase of conceptual analysis. The concept in question ought to cohere with other related (external) concepts, and they may perhaps illuminate one another. It is also important to make sure the concept coheres internally: that some features believed to be necessary do not conflict with other necessary features of the concept. External conceptual coherence (or inter-conceptual coherence) is a desirable end of conceptual analysis where related concepts benefit from the illumination resulting from their comparison and contrast. To fully grasp a concept it is necessary to engage in an investigation of how it relates to and differs from others. According to Giudice, who is also taking account of social phenomena (*Ibid.*, 15):

> Philosophically-constructed theories may supply a better understanding of a social phenomenon by exploring its relations with other related phenomena… it is important not to collapse these important social phenomena into each other, but also that there are revealing distinctions and connections between these phenomena which contribute to a broad understanding of social life.

Thus, as Giudice points out, there are benefits to a coherent web of related concepts, and conversely, there are important drawbacks that occur when there is overlap or the collapse of two or more concepts. Giudice admits that "concepts which prove difficult to grasp on first thought are so often because the phenomenon they seek to explain or determine shares similarities and connections with other closely related phenomena" (*Ibid.*, 12). Indeed, the "Rule of Law" appears to share similarities and connections with many other social and political ideas, particularly law. Unfortunately, the intimate connection between the "Rule of Law" and law has created considerable confusion within "Rule of Law" discourse, and there has been an overwhelming tendency to significantly overlap and even collapse the two concepts. I suspect the reason for the collapse goes something like this: In order to determine what the "Rule of Law" is it is necessary to first investigate "law" since "law" is part of "Rule of Law", grammatically speaking. Once the concept of law has been developed, the "Rule of Law" may be derived, at least in part, from it. In other words the thought is that it is impossible to determine what the "Rule of Law" is without first grasping law *simpliciter*, since law appears to be one of the component parts of the "Rule of Law".

I think the enthusiasm with which the debates about the concept of law have proceeded over the last 50 years has contributed to the tendency to consider the "Rule of Law" as derivable from law, rather than considering the "Rule of Law" in its own right. There has been much investigation into the concept of law, and the concept of the "Rule of Law" seems like a natural place to attempt to apply some of the insights about law generally. Recall that many contemporary scholars are primarily concerned with the concept of law, and only derivatively concerned with the "Rule of Law". To reduce one concept to another is certainly not clarificatory in a way that enables communication and understanding; law and the "Rule of Law", like democracy and liberalism, are distinct ideas, and it does no service to the discourse to collapse them.

Waldron claims that there is "a natural correlation" between positivism and formalist conceptions of the "Rule of Law" and between richer concepts of law and the "Rule of Law" (Waldron 2008, 64):

> Conceivably the correlation could be shaken loose by an insistence that the concept of law and the "Rule of Law" are to be understood quite independently of one another.... Or we could imagine some positivist sticking dogmatically to [a positivistic concept of law], but acknowledging the importance of a separate Rule-of-Law ideal that emphasized procedural and argumentative values. But those combinations seem odd: they treat the "Rule of Law" as a rather mysterious ideal – with its own underlying values, to be sure, but quite unrelated to our understanding of law itself. It is simply one of a number of ideals (like justice or liberty or equality) that we apply to law, rather than anything more intimately connected with the very idea of law itself.

I think that Waldron is creating a false dilemma. The "Rule of Law" is an independent concept from, but not unrelated to, law. They ought to be *compatible*: neither identical nor unrelated. For my part, I do think that one can remain a legal positivist while acknowledging a more morally robust concept of the "Rule of Law". He ultimately concludes that law and the "Rule of Law" lie on the same spectrum: the same criteria are required for both, though the "Rule of Law" achieves the criteria to a

higher degree. "Those who are familiar with the "Rule of Law"," he explains, "will have noted that what I have called the defining characteristics of law are also the most prominent requirements of that ideal" (*Ibid.*, 47). More explicitly, he states, "I believe that one can understand these two sets of criteria – for the existence of law and for the "Rule of Law" – as two views of the same basic idea" (*Ibid.,* 48). This is problematic. He does not introduce a *principled* distinction between the two concepts, and as a result, the "Rule of Law" and law are difficult to identify as distinct on his model. Is he guilty of *completely* collapsing law and the "Rule of Law"? Perhaps not due to his insistence that they lie at different points on the spectrum; but he has certainly overlapped the two terms to a significant degree, which makes it difficult to compare and contrast them. What is troubling is that Waldron seems to accept this overlap/collapse, and he is by no means the only scholar guilty of this kind of redundancy.

Kramer also admits to using his theory of law to inform his account of the "Rule of Law". While this is an acceptable place to begin, he goes too far and suggests: "[Many] of my analyses in support of legal positivism have aimed to show that the "Rule of Law" is not an inherently moral ideal" (Kramer 2004, 173). Unfortunately, he does not explain what the connection is between legal positivism and the "Rule of Law", and why analyses of positivism should shed any light on the moral composition of the "Rule of Law". Why must the neutrality of a theory of law extend to one's conception of the "Rule of Law"? What is more, the sum of the criteria which he calls the "Rule of Law" are synonymous with Fuller's eight criteria for legality: without which Fuller claimed *law* (not the "Rule of Law") could not exist. It is unclear why Kramer gives no account of his choice to make use of the Fullerian criteria of legality as the conditions for the "Rule of Law". If the "Rule of Law" is simply Fuller's eight criteria of legality for Kramer, then his conception of the "Rule of Law" seems to reduce to law *simpliciter*,[5] as Fuller's arguments in favour of these criteria aimed to demonstrate that the law cannot exist without them. By stipulating that Fullerian criteria of legality are synonymous with the "Rule of Law", Kramer effectively collapses the two concepts.

Finnis does the clearest job of maintaining two separate concepts. First of all, while he has a strict definition of what counts as law "properly so called," he admits that positive law *can* be created without considering the common good. However, such laws would not contribute to the "Rule of Law". The *telos* of laws which are created with an eye to the common good is the "Rule of Law"; it obtains when laws are being made and adjudicated as they ought to be. By inferentially identifying law as

[5] Kramer thinks that the "Rule of Law" criteria, though not moral in nature, are ones in terms of which legal systems can be evaluated, more or less instrumentally. He thinks that whether we have law and whether and to what extent the system which qualifies as law fulfils the "Rule of Law" criteria are two separate though related questions. However, I am unclear as to how these are separate questions if the criteria for law are the same criteria for the "Rule of Law". Perhaps, like Waldron, he intends for them to exist on a spectrum: law must fulfil a minimum of the criteria, while the "Rule of Law" strives to achieve the criteria more substantially. Still, I would like to see a principled distinction made between the two concepts. If the criteria are the same, what is to prevent us from saying the "Rule of Law" exists whenever law exists and vice versa?

a means, and the "Rule of Law" as an end, it is possible to see the distinction between the two concepts quite clearly.[6]

Internal conceptual coherence (or intra-conceptual coherence) focuses on one opinion, theory or conception of a particular concept and aims at a harmonious relationship among its constituent parts. In other words, theorists and philosophers desire to achieve a logical, orderly and consistent relation of parts whereby the whole concept or theory is intelligible. Testing for internal conceptual coherence is primarily reserved for more complex theories or models since simple opinions which lead to absurdity or are obviously incoherent are usually discarded at the first level of analysis as unconsidered opinions. Questioning the internal coherence of a theorized concept or model is what many scholars do when they are trying to refute another's position. It can take the form of questioning the truth of assumptions and premises, or demonstrating that the premises and assumptions lead to a conclusion not intended by the original scholar. For example, one might try to demonstrate that the premises lead to an absurdity, a contradiction, to a result the original scholar was not aiming to prove, or even to the antithesis of what he or she was trying to prove. Essentially when we test for internal conceptual coherence, we are looking for any defect that will be detrimental to a theory to the point that it must ultimately be discarded, or at least reconstituted. For example, a conception of the "Rule of Law" which suggests that it is a state of affairs where there are no lawmakers at all – perhaps to avoid the inevitability of subjective participation in and manipulation of law – is internally problematic. Because the existence of law depends upon the existence of some lawmaker, divine, human or otherwise, if there are no lawmakers then there can be no law.

An example of a contemporary theory where internal coherence is uncertain is that of Finnis.[7] Finnis's theory, while it takes into account a good deal of raw material, is possibly internally flawed because he seems to associate the "Rule of Law" both with means and ends. It is an end for Finnis insofar as it is the state of affairs which obtains when the law is functioning as it ought to – via general rules with the aim of supporting the common good of a community. However, if the "Rule of Law" is an end, then it cannot also be a means; it cannot be *used* to perpetuate iniquity. Again the reason this seems to be the case is Finnis's admission that it is conceptually possible, though he maintains that it is unlikely, that the "Rule of Law" can obtain in an iniquitous regime. If it can do that, it appears to be a means to an end rather than

[6] Before discussing internal conceptual coherence, there is an objection that I must consider: What if the "Rule of Law" and law actually do denote the same concept? I do not think this is much of a possibility considering the foregoing investigation. However, if it is the case, I think the burden of proof rests with those scholars who believe it. For such a position to be probable it must be argued for and the two concepts must not be collapsed without explanation. Thank you to Colin Macleod for bringing this possibility to my attention.

[7] Testing for internal coherence can be a long and meticulous process: scholars spend years trying to disprove the theories of their opponents! Here I will only be able to make some cursory comments on the flaws apparent in Finnis's theory.

an end itself. However, if Finnis means to suggest that having an eye to the common good will not always yield morally good state of affairs, then there is the possibility that the regime may not be morally good, while still having the "Rule of Law".

2.5 Conclusion

This essay was initially motivated by my desire to discover the meaning of the "Rule of Law". As a student of legal philosophy I felt compelled to investigate the meaning of this concept, particularly since it appeared, often without much explanation, in much of the theoretical literature that I had the benefit of studying. I also felt the need to understand the "Rule of Law" since its presence in contemporary law and politics continues to be pervasive. For me, these two motivations are undeniably related; I believe that gaining an understanding of the "Rule of Law" is critical: the theoretical discussions of it can and do play an important role in contemporary discourse. A concept such as this deserves careful consideration and it is important that we – scholars, politicians, and citizens – consider it carefully in order to facilitate meaningful discussions about it, the conditions that determine its existence, whether or not it is intrinsically valuable, and if it is a justifiable goal for societies.

So, what *is* the "Rule of Law"? One of the conclusions I have come to is that there is anything but an easy answer to this question.[8] Contemporary theorists provide no uniform answer; in fact, contemporary theoretical opinions on the "Rule of Law", though all provide valuable insights, are quite varied and thus are a confusing and difficult place to begin one's search. Contemporary scholars assert a variety of propositions about the "Rule of Law", many which are impossible to reconcile with one another. Though the indeterminacy that pervades "Rule of Law" discourse is undesirable because it inhibits meaningful communication between parties, it is not unavoidable. In order to sort through the chaos that is contemporary "Rule of Law" discourse, I have provided some standards and methods by which opinions and theories about the "Rule of Law" can be evaluated, and I hope that on this basis it is possible to begin refining and re-evaluating conceptions of the "Rule of Law". My suggestions will not bring about consensus, but they should nevertheless enable us to begin to engage one another on similar terms, and therefore in meaningful and fruitful discussions.

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[8] My own conclusions about the content of the concept are beyond the modest scope of this article.

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