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The Union of Legal and Political Theory

Noel B. Reynolds
Brigham Young University - Provo, nbr@byu.edu

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ABSTRACT:

This paper explores the social science concept of conventions as a way of understanding law that would bridge the enduring gap between natural law and legal positivist legal theories. It further finds in the conventionalist approach a promising account of the rule of law—both in how it may be characterized and in how it can be assessed in particular legal systems.

KEY WORDS:

Rule of law, legal theory, conventionalism, natural law, legal positivism, law and morals, constitutionalism

I. THE PROBLEM

The difficulty of accounting for both the factual and normative aspects of law has long defined the central issue in legal theorizing. Recent writers from both sides of this dispute have proposed that a mutually acceptable solution might lie in the characterization of law as a particular kind of convention which is "both a social fact and a framework of reasons for action."[1] The following essay is a preliminary attempt to sketch out such a theory of law to see what it might look like and what implications it might seem to have for significant questions in legal philosophy.

[1]See, e.g., G. Postema, "Coordination and Convention at the Foundations of Law," 11 Journal of Legal Studies 166 (1982).

One strength of positivist legal theory has been its usually constant determination to look to what is, to actual legal systems and laws, for its insights. The price for such puritanical empiricism has been that positivists have not been able to produce an account of good law in any strong sense of the term. How can positivists convince us that we have an obligation to obey the law or that judges and others have an obligation to enforce it? Positivist theory can tell us of any particular rule whether it is the law in a given legal system. But it cannot tell us whether it is just, even in a weak sense. Positivism cannot reach beyond mere legalism in its account of law. And at the level that most interests political theorists, positivist theories cannot distinguish meaningfully between free societies under systems of self-imposed law and tyrannies in which some men govern others using laws which depend on little more than the will and the resources of the rulers. I have stated these limitations of positivist theory in somewhat exaggerated terms to stake out a contrast which is more or less true and severe depending on one's point of view. But these are problems which continue to separate much contemporary legal theory from political theory.

Theorists of the rule of law on the other hand have placed their concept of law firmly at the center of political theory, insisting that it provides the best guidance available for distinguishing between good and bad law (Fuller), or between genuine law and tyrannical commands or directives (Oakeshott and Hayek). The concept of rule of law determines answers to the major questions of political theory. But the assertion of this conceptual analysis requires grounding

in our empirical understanding of law as it is if positivists are to be convinced that it has a central role to play in legal and political theory.

A Proposal

I will propose that recasting contemporary legal theory in terms of a model of conventional rules can simultaneously enable us to deal with this full range of questions from an empirical point of view. This approach derives all the fundamental legal concepts from our understanding of what is. And it provides us with standards internal to law for dealing straightforwardly with the question of good and bad law, or misuse of law by tyrannical governments. It also shows why moralistic theories designed to supplement the law in difficult cases are simplistic and misguided radical attempts to change the law directly without following the established processes of convention formation. In this sense, the approach follows one major strand of Lon Fuller's thought, though the analysis benefits most directly from more recent theorists.

II. LAW AS CONVENTIONAL RULES

From classical times to the present, philosophers have recognized the conventional character of law. In our own time H. L. A. Hart has helped us further to understand the law by characterizing it as a system of rules. I wish to explore the possibility that digging somewhat deeper into the concept of law as conventional rules will resolve some of the dissatisfaction described above. In doing so I will reach beyond contemporary legal theory to draw on work done in several fields including social choice theory, economics, philosophy of language,

sociology, and even psychology. This is not an exercise in mere eclecticism as many of these theorists have already recognized the connections between their respective projects.

At bottom, the attempt to analyze and explain law is a project in empirical theory. If legal theories do not describe actual or possible systems of law, they require correction. Abstract explorations of the logic of a legal system are often helpful in many ways. But legal theory must eventually focus on law as it is. And the approach to legal theory through conventional rules amounts to an assertion that in the normal case, a system of law is a system of conventional rules.

But if, as some have argued,[2] contemporary legal theory following Hart is an extension of the self-reflective process of the law itself, I want to go a step further with the sociologists and come to terms with the ideas of convention and rule in the most general context of human action, before exploring the implications of those ideas within law as only one of many realms of human action that rely on conventional rules.

A. Human Conduct and the Problem of Knowledge

The radically social nature of man is reflected in the fact that almost all of our actions take account of our expectations of the actions of others and of our expectations of others' expectations of our actions. And our expectations of others' actions will depend on our expectations of their expectations of our

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[2]N. Luhmann, A Sociological Theory of Law (M. Albrow and E. King trans. 1985).

expectations of them, which of course leads to an infinite regress of expectations. But it is only one source of uncertainty in our lives.

1. Empirical knowledge

The usual approach to the problem of human knowledge treats the world as a given of nature, governed by its secret laws and regularities, which can gradually be found out through observation and experimentation in conjunction with theorizing. As further observation falsifies aspects of our first theories, we amend the theories to accommodate the new facts. The process of growing older and wiser is in part the process of continually refining our cognitive model of the world to fit our experience more closely and to reduce the frequency of disappointment when our predictions do not pan out. Using this understanding of the natural world, we can frame rules of action for ourselves which will greatly reduce the frequency of disappointment.

Were this a strictly individual process, we might never reduce the frequency of disappointment very far. But the growth of knowledge is peculiarly a social process in which the experience of all is pooled to test the best theories that the brightest among us can devise. Statistics and elaborate experimental designs intelligible only to a few serve to significantly improve the predictive power of the model of the world used by all of us in forming our rules for action.

2. Uncertainty and rules of conduct

The rationale for relying on rules of action to reduce decision errors has been explained by economist, Ronald Heiner. On Heiner's view, decision making

under conditions of risk and uncertainty needs to accommodate not only the unreliability of information, but also the unreliability of decision makers themselves where "their ability to use information is also imperfect."[3]

Heiner first constructs a rational model for choosing to follow rules which are non-optimizing in particular cases. He begins with the limiting case of an ideal decision maker who has all information, who can use it perfectly, and who therefore maximizes future expected utility with every decision made. He then notes that even if imperfect information should be introduced into the model, the perfect decider would rationally expect to maximize future utility by choosing the optimal decision in each particular case. But once you complicate the picture by also acknowledging the imperfections of the decision maker (in particular as these are a function of personal acquaintance with all the facts and the background of the situation-what Heiner calls "localness") a different equation emerges. As the effects of imperfect information and imperfect ability to make a decision increase and their effects compound, expected future utility frequently will drop below the tolerance limits of the community or the decider--the limits beyond which the agent cannot really expect to benefit from attempts to optimize individual decisions. To avoid such intolerable results, agents rationally choose to limit or constrain all possible decisions in accordance with "processes that systematically restrict the use of information away from trying to make every decision that

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[3]R. Heiner, Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules, 15 Journal of Legal Studies 227 (1986).

optimizing agents would make." These processes are called rules.[4] A rational individual would lay down rules for his own conduct in those kinds of situations where spontaneous optimizing is more prone to error. In so doing he is acting prudentially. He does not redefine the world or his obligations to anyone in the world. He only tries to reduce the frequency of error in his own projects to pursue his ends in the world as it is.[5]

3. Uncertainty about human conduct

But this only partially explains how we cope with the inherent uncertainty of the social world. We do not ordinarily rely on predictions of others' behavior made according to psychological and sociological theories, though we may get some help from such quarters. Rather, the technique we use for reducing most of the uncertainty of our social world is mutual adherence to conventional rules. By convention we stipulate sets of legitimate expectations that we each have of others' conduct. This simplifies matters greatly in that when someone disappoints these expectations we can blame them without needing to revise our own cognitive models. Of course, we might alter cognitively our perception of that individual as one that will observe the conventions. (We might "make it a rule" in Heiner's sense of the term not to trust that individual to observe the conventions.) Armed with such sets of conventional rules for conduct we can interact meaningfully with others through language, markets, the law, family mores, morality, systems of

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[4]Id. at 235.

[5]Cf. J. Buchanan, The Limits of Liberty 93 (1974).

religion, or games. Furthermore, such interactions do not necessarily presuppose any prior experience with or knowledge of the others with whom we are interacting. All we need to eliminate most of the uncertainty that is possible in such relationships is that the other parties accept the same conventions. By adopting stipulated rules of action as conventions, we cut short the infinite spiral of expectations that must be calculated and render human actions and expectations predictable within the boundaries spelled out in the rules.

Just as our theories of the natural world provide us with a structure of rules to guide our interactions with nature, so conventions provide us with a structure of rules for guiding social interaction, or for coordinating our behavior with the legitimate expectations of others. This means that in our social lives we have two possibilities of reaction to disappointment. We can make cognitive adjustments or we can hold firm in our structures, requiring the world to adjust to our (normative) expectations. This account of the distinction between cognitive and normative structures is offered by the sociologist Luhmann to clarify elementary law-making mechanisms.[6] Normative expectations give grounds for holding disappointments against actors. Thus "norms are *counterfactually stabilised behavioural expectations*."

B. The Source of Legal Obligation

This counterfactual element of norms implies their unconditional validity and is the major source of the "ought" in the law. Legal obligation expresses this

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[6]N. Luhmann, supra note 2, at 33.

function of counterfactual validity. On this view, the ought of the law has little to do with morality or with background moral theories or threats of enforcement. All it means is that each member of a community has a legitimate expectation that others act as they ought, *i.e.*, in accordance with the conventional rules, just because those are the rules and not because they reflect any ultimate moral truth or other reality. The same obligation obtains in instances where the rule is arbitrary from every moral perspective (*e.g.*, driving on the left).

It is perhaps worth noting in passing that to attach the law to a theory of moral truth is to lose this advantage. For it ties the ought of the law back to a cognitive uncertainty, *i.e.*, the truth about morality. And to the extent that moral truth is thought to be objective and knowable, determining the ought of the law is transformed back into a cognitive problem with all the residual uncertainty and ground for controversy that entails. This is a fundamental objection to many forms of natural law. And it explains why natural law theorists strain so hard to make plausible the objective knowability of the good or the right.

It is important to stress that both normative and cognitive expectations are factual in that they are actually held by real people at particular times and are empirically discernible. The difference is in the way agents respond to disappointments of the two kinds of expectations, with normative response blaming the world, cognitive response blaming the structure. The distinction is not therefore, between the factual and the normative. Rather it is between

structures of expectation, the one which one uses to learn from disappointments (cognitive) and the other which one uses for guiding action (normative.)[7]

C. The Sociological Basis

The idea that human actions are best described with reference to such systems of reciprocal expectations is fundamental to the sociological theory of Talcott Parsons and other social interaction theorists. Parsons' central thesis was that

> "...as soon as several actors who are each able to choose the meaning of their action subjectively want to act in relation to each other in a given situation, the mutual expectations of behavior must be integrated, and this could happen by aid of the stability of lasting, learnable and internalizable norms. Otherwise the 'double contingency' of the determination of meaning between two subjects could not be overcome, nor could the 'complementarity' of expectations be established. Parsons goes on to claim that every lasting interaction presumes norms and without them a system could not exist."[8]

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[7] Id. at 34.

[8] Luhmann, supra note 2, at 17, citing T. Parsons and E. Shils, Toward a General Theory of Action 14ff. and 105ff. (1951). Lon Fuller also relied on Parsons and Shils, borrowing the term "complementary expectations" which, he said, "indicates accurately the function I am here ascribing to the law that develops out of human interaction, a form of law that we are forced--by the dictionaries and title headings--to call customary law." See L. Fuller, The Principles of Social Order 214 (K. Winston, ed. 1981).

D. The Explanation of Conventions from Game Theory

It is helpful in trying to grasp the huge magnitudes of the ignorance we overcome through the use of rules to look at the process in the microcosm of two person relationships. Schelling's work in game theory provides some of the most helpful insights into the nature of conventions and the process of forming conventions. Schelling recognized that not all games are zero-sum and that there are games in which each player can win only if the other does as well. Schelling became interested in these games because of the coordination strategies they can produce. The success of players in such games depends on the degree to which they can accurately perceive what the other player expects them to do so that they can do it and achieve perfect coordination. The universal strategy of players in such games, regardless of the level of communication allowed between them, is to establish conventional understandings which have no intrinsic value, but which serve to signal intentions and expectations to each other. Even in games where no communication is allowed, players universally find ways of suggesting patterns of conduct or rules of behavior to one another which greatly improve their joint chances of winning the game. In his pioneering work on this topic Schelling called this the process of forming traditions.[9]

One lesson from this is that even the simplest exercises in two person coordination require the establishment of at least implicit conventional rules. A complex society is possible only because personal face-to-face relationships are

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[9]See T. Schelling, Strategy of Conflict (1960).

not required for establishing such rules for mutual interaction. Rather, the community provides the means for producing, publishing, perpetuating and modifying the rules of language, markets, and the law. The rules which can protect us from risks of error are largely public goods equally available to all community members.

It is important to point out that the error from which we need protection in social interactions is not so much the error of predicting wrongly what others will do, but rather the error of misjudging what they will expect. Our own actions are based in expectations of expectations. Rules have their main benefit

> "at the reflexive level of expectations of expectations, thus creating certainty of expectation from which follow the certainty of one's behaviour and the predictability of others' behaviour only secondarily. . . . [C]ertainty in the expectation of expectations, whether it be by aid of purely psychological strategies or by aid of social norms, constitutes the essential basis of all interaction and is much more meaningful than the certainty of fulfilling expectations."[10]

Rules are able to accomplish this in a complex society for several reasons. Rules anonymize and take the expectations into the realm of the impersonal. They are valid regardless of who expects or does not expect. Rules are temporally stable;

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[10]N. Luhmann, supra note 2, at 30.

they do not require renewed ascertainment. And rules are so abstract in their factuality that they regulate the expectations of expectations.[11]

1. The concept of conventional rules

The relationship between conformative behavior and rules has been helpfully developed by D. S. Shwayder. Although his immediate objective was to produce a theory of language, he saw language as a form of "conformative behavior," much like games, law, and morality. This term is coined by Shwayder to identify that which is "common to rules, regulations, principles, etc."[12] Shwayder argues that,

> ". . . One follows a rule if he conforms to what he sees are the legitimate expectations of others; and the existence of a rule is, moreover, what entitles the others to their expectations, thus rendering them 'legitimate.' A community rule exists if the members of a community regulate their affairs according to what other members of the community would legitimately expect them to do. The rule is at once the expectations one conforms to and what legitimizes or warrants those expectations. The rule is, as it were, a system of community, mutual expectation. When one conforms to a rule he acts in the knowledge or belief that others would expect him so to behave. That the others are entitled to those expectations

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[11] Id. at 30.

[12] D. Shwayder, The Stratification of Behaviour 237 (1966).

> is his reason. Of course one may act in violation of such rules; but even there too one must believe that others have legitimate expectations. If one has no thoughts about what is expected of him, then he can neither conform to nor act in violation of the rule."[13]

And again,

> "An agent conforms to such a rule if he acts for the reason that the members of the community are entitled to expect him so to act. . . . [B]ehaviour is conformative only if the agent acts in the belief that there are or were creatures belonging to a specific community, who, were they present, would believe that he would act from the belief that they expect him to do such and such kind of act."[14]

This brings Shwayder to a rough definition of rules: ". . . [A] rule is a system of expectations . . , which, when called into operation by relevant circumstances, gives reason to act in certain ways."[15] In contending that rules are reasons for acting in and of themselves, Shwayder distances himself both from a Kantian position that would hold categorically that one ought to act to conform to rule and from the view that it is the penalties attached to rule violation which give one reason for acting.

2. Rules as conventions

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[13]Id. at 253.

[14]Id. at 252.

[15]Id. at 260.

Shwayder's work on rules has been incorporated into a subsequent theory of conventions developed by David K. Lewis, a philosopher who also had linguistic theory in mind, but who was also borrowing his analogies from law.[16] To prove a point about language, Lewis is keen to show that conventions can be implicit without being based on explicit agreements (which would presume language.) He then finds it convenient to characterize conventions as solutions to coordination problems such as the kind devised by Schelling. The result is a view of convention explicitly equivalent to that expressed in David Hume's account of the conventional origins of justice and property. Hume specified that such conventions did not seem to be based in a promise, but rather in

> "a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same

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[16] See D. Lewis, Convention: A Philosophical Study (1969). There is some awkwardness in switching to Lewis' account at this point inasmuch as Shwayder does go on to provide an elaborate account of conventions. But Shwayder felt compelled to strain the notion of agreement completely out of his concept of convention. This may be due to a desire to conform to the view of Quine and White that language is not analytic. Lewis, on the other hand, does want to argue that language is analytic, and sees the possibility for that in the concept of language as a system of conventions. As Lewis correctly asserts, in my view, an element of agreement is essential to the notion of convention, and the philosophical literature on the subject would certainly support that view. Shwayder's derivation takes up Part Four of his book. See D. Shwayder, supra note 12, at 281ff.

> manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually expressed, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be called a convention or agreement betwixt us, though without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are performed upon the supposition that something is to be performed on the other part. Two men who pull the oars of a boat, do it by an agreement or convention, though they have never given promises to each other."[17]

Conventions are rules for human conduct which stem at least implicitly from agreement between the parties that are obligated by the rule. It is ordinarily characteristic of such conventions that the rule could have been drawn somewhat differently than it was. The regularities in human behavior which are conventional can only be explained in terms of rules or of reciprocal expectations. And not any regularity in human behavior need be conventional.

III. CONVENTIONAL RULES IMPLY RULE OF LAW.

Because the agreement implicit in conventions is present most visibly at the time a convention is born, an understanding of conventions for the purposes of legal theory can benefit from accounts of the process of convention formation. Again, Schelling is perhaps the most helpful on this score. It would seem intuitively correct to assume that agreements emerge in the coordination of action

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[17]D. Hume, A Treatise of Human Nature III,ii,2 (1738).

(from the point of view of the actors) when there are opportunities to benefit mutually from such coordination. Because the operation of rules tends to regularize behaviour, rules most naturally enter our lives when there is advantage to be had from such regularization. Such areas of life include those where a) conflict might be dangerous, b) cooperation would be beneficial, c) understanding is a condition for amelioration, or d) one's behaviour directly impinges upon the welfare of others.[18]

When we speak of conventions as solutions to coordination problems we specifically think of the problem from the perspective of the various actors whose actions require coordination. In such problem situations there are two fundamental factors which prevail. First, the gains for each participant from coordinating action are usually so significant that there is substantial incentive to find a solution. Second, because each actor is a separate individual, his or her specific interests will indicate a preference for a somewhat different solution than will be most preferred by any other actor. Thus any solution reached by agreement among the actors must be mutually advantageous to all, but will not likely be maximally advantageous to any.

A. Non-conventional Rules

A different kind of solution comes not through the negotiations of the parties concerned, but by imposition from outside. An external power of sufficient magnitude and impatient with the process of negotiation can arbitrarily impose

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[18] Id. at 260.

non-conventional rules for the coordination of conduct. It is still possible that such rules might serve some of the interests of the actors. And it might even be true that they are all better off with the imposed solution than with a continuation of the situation without any solution. But it is more likely that such imposed rules will be aimed at coordinating conduct toward goals chosen by the external power than the goals the actors themselves are pursuing. Only by making an absurd equation between the goals of all the individual actors and the goals of the imposing power could we expect imposed rules and conventional rules to be the same.

This is right at the crux of the matter. The distinction is even more sharp when the external power imposes itself through commands rather than rules. There is a further difference between trying to satisfy the expectations of a person which may be vague and shifting as defined in terms of that person's will and interests, and satisfying expectations spelled out in terms of a rule. If a dictator only held his subjects responsible for conformity to a single system of rules, their lives would be much easier than if they were held responsible to satisfy his desires as these might fluctuate from day to day. But there might be a further difference between conforming to rules defined in terms of the expectations of a single ruler and rules chosen by the community as a whole. The first is not nearly so likely to be conventional, though in some Hobbesian world it could in principle be. The latter is conventional and treats every community member's interests as seen by that individual with respect.

B. Community and Conventions

The idea of community surfaces repeatedly in talk about rules and the formation of conventions. For present purposes, I will take "community" to refer to persons bound together by mutual expectations of conformity to rules. Thus it would make sense that different communities exist overlapping within a single population. A single community with respect to law might contain multiple language communities, religious communities, and possibly even different markets. Members of different legal communities could belong to the same language community, religious community, professional community, or participate in the same markets. Membership in the community would entail acceptance of the existing conventions of the community and participation in their modification or in the creation of new ones. But rules which are imposed from outside a community could not be considered to be conventions.

C. From Convention to Law

Given that we need an analysis of the idea of rule of law and a grounding for that standard in the idea and reality of law itself, it will not be adequate merely to show how it can emerge from one kind of legal conventions, *i.e.*, coordination norms. Rather, we will need a comprehensive account of all norms as products of agreements which will support the same rule of law analysis. This seems to require a story that moves from the simplest form of agreements to the most complicated of PD (prisoners' dilemma) and coordination norms and legislated rules. Only Fuller (and possibly Finnis) has suggested such a sweepingly

inclusive approach to the analysis of law. Almost all others have been anxious to distinguish custom and law and to restrict the analysis of law to explicit or even legislated rules. But that approach denies the analysis of law recourse to its empirical reality as a source of grounding for the standards of rule of law.

Perhaps the simplest example of rule formation is the one described above where the individual lays down prudential rules for himself. To maximize long run success at some activity, it is rational for an individual who is fallible to make rules for himself to follow. Such rules can easily be adjusted or replaced in accordance with experience. And they will save many errors from mistakes of judgment in particular cases.

An individual may lay down such rules for himself in accordance with what he learns from experience, from religious or moral doctrines, or from practical reasoning, or any combination of these or other sources of beliefs. His overall view of reality and his own life purposes would be expected to serve as guides.

Not only will these idiosyncratic rules simplify and reduce errors in the life of the individual who adopts them, they will also produce several side benefits to both the individual and the rest of society. Forming and choosing such rules may well be fundamental to the process of forming an identity and a character. The rules one chooses to follow give one a valuable form of control over both the future and the past. One need not have total memory or foresight to know where he has stood on matters before and how he will choose to stand on them in the future. And others can derive the same advantages in dealing with us as they

recognize our rule following conduct. It may be our appreciation for this range of individual and social advantages to individually self-imposed rule following that suggests to our minds the possible advantages of expanding the rules to include others through the simplest of agreements or conventions. Invoking the economists' model, James Buchanan has made the same point in different terms. The law-abiding or rule following behavior of any individual is a "pure external economy" to others. But obeying the law ourselves is the cost we pay for a legal system and others' law abidingness.[19]

As social beings we find the world of human action to be all important. Because we can make decisions and rules for our own conduct, we readily perceive that others can and do the same thing. The cumulative effect is that the world in which we live can be largely shaped and structured by human decisions, by will and practical reason, not in denial of the natural world, but supplementary to it. And individual rules are not the biggest part of that. For the same ability that we have to make such rules for ourselves enables us to join with others in establishing joint agreements that will guide our conduct in some reciprocal or mutual way. In a family or social club we improve the quality of our lives together by regularizing it according to mutually agreeable rules of conduct. The constellation of such agreements which is obligatory on any one of us constitutes one of the most significant realities of the world in which we live.

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[19]Supra note 5, at 108 and 110.

In our economic activities we greatly enhance our individual productivity by making arrangements for exchanges with others. The great interpersonal variation of opportunity costs creates this possibility. It is the differences between men and between their circumstances in life that create the most significant opportunities for mutual gain from agreements. Perhaps it is this fact which makes it possible for self-interested beings to prosper together.

Such arrangements can be implicit or explicit. What is essential is that they establish a set of reciprocal expectations for future conduct. These expectations make it possible for each participant to plan his conduct to satisfy others' needs and his own interests at the same time. Such sets of expectations serve an important informational function, like prices in a market. It is not possible for anyone to know what the interests of others might be. Conventional norms establish sets of expectations which guide our conduct, in pursuit of our own self-interest, but in a way that serves the interests of others to the extent that these are reflected in the norms.

D. Levels of Convention

Given the complexity of modern societies, we could not speak of law as convention unless—like Hume—we had an extended concept of convention formation that preserved the notions of participation and agreement beyond the point where face to face negotiation is possible. The following sketch of a theory of levels of convention formation might help show how that is possible.

To this point I have only considered examples of simple conventions where people could come together in arrangements which straightforwardly meet their various requirements. Nothing is required for such agreements beyond information, initiative, and knowledge of self-interest and some freedom of action.

But the enormous improvements available through such primary level conventions soon attract our interest in extending this technique into situations which are more complex. Simple exchanges or arrangements are not feasible for all situations where there are great mutual benefits to be had from agreements. Examples of such complicated situations, all of which are exemplified in some context by law, might include:

1. Conventions involving large numbers of participants where the time and effort required to include everyone in the negotiation are not easily justified by the gains to be had.

2. Conventions which benefit a community as a whole but do not benefit all participants equally.

3. Conventions which are neutral with respect to individual interests, and which could easily be different, but which are important to have, in whatever form. (traffic rules)

4. Conventions which produce or constitute public goods and thereby provide motivation for anonymous and unilateral cheating.

In a broad sense, all such complicated situations pose coordination problems in the game theory sense of the term, at least if it can be construed broadly.[20] In these situations, all participants stand to gain from mutual rules, but the means for negotiating such rules are costly or impossible to manage. For such situations, it does make sense, when the situations obtain for the same definable group of participants, to solve the coordination problem in Hobbesian fashion by creating an authority which can act not as a member of the community, but in the name of the community itself as an official, and can formulate rules to govern these situations. The constitution of the authority would have to be itself a convention of a very fundamental kind and would need to specify the means by which authoritative officials are to be selected and the procedures by which they can make and enforce rules.

But even this constitutional convention is not the most fundamental. For it does not require unanimity. The fundamental and essential convention on which all the rest stands is the agreement to enter into a community of authoritative rules or law. The constitution merely specifies the arrangements by which the community hopes to maintain and manage its law over time.

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[20]It seems strange that so many writers on this subject have strained to maintain the direct analogy to the strict formal structure of coordination problems in game theory, when some of the key conditions are obviously counterfactual and are imposed heuristically to make formal and determinate analysis possible.

It is important to note at this point and in a preliminary way that this idea of unanimity provides part of the answer to the puzzle about rule of law. Unanimity presupposes expected benefits to all and injury to none. Many party exchanges or agreements reached by unanimous consent retain the same unqualified voluntariness as a freely engaged two party agreement. A rule requiring unanimity "offers the only ultimate test for efficiency in many-party exchanges, efficiency being measured by individualistic criteria."[21] But actual unanimity in a law community is not possible to ascertain. And so a substitute notion is needed. The common error of much democratic theory is to compromise for something like majority rule. But the true analog to unanimity is rule of law. The conditions of equality, generality and prospectivity assumed in the rule of law can be construed to preserve the abstract conditions of unanimous agreement. It only makes sense that people would voluntarily cede their veto over the process of making conventions that would obligate them in the future on the grounds that (1) no such conventions could single out identifiable individuals for penalties or benefits, (2) that all individuals would be treated equally under any conventions rules or procedures, and (3) that the rules could not be changed after the fact or in any other way that might hand discretionary or arbitrary power to those who apply the penalties of law to specifiable individuals. These and other similar grounds that might be named are equivalent to the basic principles of the rule of law.

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[21]J. Buchanan, supra note 5, at 41, citing Knut Wicksell, Finanztheoretische Untersuchungen (1896).

It is at this point that the works of F. A. Hayek and Michael Oakeshott are so valuable in spelling out what such a form of association would be like in the abstract. But the actual constitutional structure of such a community and the actual laws it would produce over time would be contingent on the wisdom, interests and political balance in the community. And they could be authoritative only on the basis of an understood fundamental agreement to form and maintain a community of law, even knowing that there will be winners and losers on specific issues. The reasons for engaging in such a convention include not only the evils it can remove (Hobbes) but also the vastly augmented opportunities for human action that it creates (Hume). Nor is such a fundamental convention self-enforcing or maintaining, as the collapse of law under the Third Reich demonstrated.

Legislative authorities created in this way are expected to create norms or rules for the community as a whole which will be authoritatively enforced. These higher order conventions are what legal theorists usually want to call laws. But it must be remembered that the only difference between them and other conventions which obtain in the same society is the general authority which produced them. And that was done as a matter of convenience. They are not essentially different in either form or character or function from conventions of non-legal communities.

The agreement of a community to a convention of this kind constitutes a special kind of community which becomes defined by a large body of coincident norms, laws which apply equally to each member of the community, but not to

outsiders. Such communities are legal societies, bound by their obligations to a set of laws and a government.

Oakeshott must be right to draw a strong distinction between convention and law in the following sense. There is a substantial difference between a rule formulated through unanimous agreement of participants and one formulated by authority and accepted by the participants as obligatory. Similarly, a legal community is not partial, including all those who choose to agree, but is absolute within its sphere, including everyone and imposing obligations upon them. It embraces all other sub-communities and provides a framework within which they can function, stabilizing their expectations as they pursue their own ends.

Once a mechanism for creating new norms at the community level is in place, the mechanism itself becomes a factor in the calculations that individuals must make as they support or discourage the adoption of particular norms. Knowing that the community will need some rule on schooling, a minority would wisely throw its support to the possible policy least offensive to its preferences than to hold out hopelessly for an idiosyncratic view while allowing a much more harmful policy to be adopted. Where the actual interests of minority groups may not coincide, they may be able to act in a concerted way to prevent objectionable norms from being enacted.

E. Conditions of Conventionality

The linkage of rule of law to voluntary exchange made above from the perspective of economic theory can now be restated in the sociological terms of

convention. Because the regulation of this process of higher order convention formation does not involve all community members directly, it is necessary to have some set of standards by which the conventionality of the rules and actions of government can be measured. The assumption would be that the conventions establishing procedures and authorities for the creation and enforcement of higher order conventions would entail a proviso that all such higher order rules would retain the character of true conventions. To the extent this proviso is not followed, the community expectations are violated in what could only be characterized as a mistake. But such a standard is not itself a convention. Rather, it is to be deduced from what we can observe empirically in the process of convention formation. The standard is subject to correction or elaboration as our understanding of that process improves. The standard itself is analytic, but it is derived from empirical observation. The important point for our purposes is that it not be imported from an ideology. It does not matter that it may be more easily reconciled to one ideology than another.

The making of conventions for mutual gains appears to be a universal and pervasive human activity. Schelling (citations?) and others have noted some interesting features of this activity which might be registered as general characteristics. It should be remembered that we are discussing an empirically observable process which generates rules for conduct.

1. Conventions are adopted only when there is an expectation of mutual gain by all parties concerned. A rule which unduly restricted or frustrated community

members in the pursuit of self-chosen ends would not likely be conventional. More likely, the rule has been imposed on a broader group by a smaller community in a position of power.

2. A community of persons is comprised of those who are expected to participate in the formation of conventions. Those who have no meaningful way of participating in the formation of conventions are not fully persons in a system of law. Or they are not members of the community at all.

3. Conventions tend to form around a precedent, however marginally relevant, or a prominent or highly visible possible compromise standard. The point is that the convention be unambiguous. Rules which do not give clear signals of expectations and serve unambiguously as guides to action are not characteristic conventions.

4. Lacking salient natural criteria for agreement, expectations of rough equality govern convention formation. To the extent there is equal information available to participants and that they know this, the conventional outcomes tend to be equal. This equality recognizes differences in individual preferences by balancing the intensity and quantity of preferences. Rules which prescribe different expectations for different people are suspect and require plausible justification to be thought conventional.

5. Arbitrary solutions imposed by a referee are preferred over continuing ambiguity. (Judges must decide, so must legislatures in some cases, even where optimal solutions are unavailable.)

6. The need for agreement leads to the voluntary suppression of self-interest from the beginning of the process of convention formation. The parties tend to agree with what they know the other parties expect them to agree to. Evidence of some giving up of interests is not prima facie evidence of lack of conventionality. But, following Pareto, we would not expect voluntary conventions to leave any participants worse off.

7. New conventions would not be expected to conflict with or overturn related earlier conventions without doing so explicitly. New conventions are to be understood as accretions or adjustments to a previously existing system which gives them both meaning and validity. Conventional rules will tend toward stability and consistency.

8. The procedures for amending and extending the system of conventions must be equally open to meaningful initiative from all community members. Rules which are immune to revision in accordance with strongly felt needs in a community are not likely conventional.

9. A community-level rule-forming process founded in conventionality must be impersonal by definition. Because most community members cannot be present in the legislature, the rules produced cannot focus on benefits or penalties for specifiable individuals. This can best be achieved by the generality of application of the rules so formed. A system based on the notion of convention cannot give authority to some to harm others unilaterally in some way. Laws cannot be particular.

10. Conventions have a temporal dimension. They begin at specifiable points in time. And they are expected to continue in force either for a specified time period or until they are discontinued by a further authoritative act. Conventions are justified because they make the future of human action more predictable. This cannot be so if today's tomorrow can be changed the next day. Therefore, retrospective conventions could only be acceptable on the basis of (1) unanimous consent, or (2) pressing community necessity combined with compensation to losers.

F. General Criteria of Conventionality in Rules

The foregoing analysis is experimental and may require extensive refinement. In its present form it suggests all of the following as criteria or tests of conventionality in rules:

1. The rule must primarily serve to enhance the pursuit of individually chosen goals.
2. The rule must be a possible result of a process of negotiation including all community members.
3. The rules should be clear, unambiguous and public.
4. The rules apply to all community members equally.
5. There must be a means of resolving all disputes over the application of rules.
6. Rules are not suspect merely because they work some injustices or injuries.

7. The system of rules should be relatively stable and consistent.
8. There must be conventional procedures for changing the rules which are equally open to initiatives from all community members.
9. Rules must be general and not particular in their application.
10. Rules cannot be applied retrospectively without unanimous consent or compensation to injured parties.

Rules which fail to meet all or most of these criteria would be suspect of being founded on some basis other than convention. Of course it is possible for a non-conventional rule also to meet these criteria. But that does not seem to threaten the analysis. Benevolent despotism is always a logical possibility, however unlikely it may be in the real world.

G. The Rule of Law

On reflection, it should not be surprising that this list resembles the lists of principles of rule of law developed by F. A. Hayek and Lon Fuller. Each of these theorists intended to outline principles that would distinguish between free and tyrannical states, or as Hayek often put it, between rule of law and rule of will. The gain over these approaches which I have hoped for here is the derivation of this list directly from reflections on an empirically distinguishable phenomenon, the formation of conventions and the conduct of community members in accordance with conventions. If this derivation is plausible at all levels it would imply that there is available an ideologically neutral device for distinguishing between states that are based in a system of conventional rules and those that rest

on imposed rules. And the distinguishing device is integral to a legal theory which in most respects adheres closely to that version of positivism which has proven most successful.[22]

The strategy I have pursued would presumably be acceptable to Lewis who in explaining the theory of conventions mentioned that the rules of a prison camp are not conventions precisely because they are not designed to facilitate the actions of the prisoners in pursuit of their own preferences. Similarly rules enforced by sanctions so strong that the sanctions themselves are the primary reason for conformity could not be considered conventions.[23]

IV. THE IMPLICATIONS FOR CONTEMPORARY LEGAL THEORY

Modifying the concept of law to fit a model of conventional rules obviously does have extensive implications for the major questions in legal theory. As it is not the purpose of this paper to develop these, I will only mention some salient examples.

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[22]For a superb philosophical defense of the view that this approach to the understanding of law is compatible with Hart's positivism, see G. Postema, supra note 1, at 165. It must also be acknowledged that the most detailed study of game theory and coordination problems available concludes that these do not provide an adequate model for law. See E. Ullmann-Margalit, The Emergence of Norms (1977). By restricting herself to an analytic treatment of game theory and norms, Ullmann-Margalit misses the empirical possibilities for applying the notion of coordination and convention suggested by Hume and carried through by Luhmann.

[23]See D. Lewis, supra note 16, at 100-103.

One complaint against Hart has been that he has nowhere to go to explain the fundamental rule of recognition. On one reading it would seem that a rule of recognition in his scheme might require higher and higher rules of recognition ad infinitum to give it authority. The conventional approach short circuits all of that by placing the analysis firmly in history and tying the rules to specific statements of conventions made in conventional ways at particular points in time. And there is no need to trace down the full genealogy of any particular convention, because it is the set of conventions in force at any given time that matters. Each generation can accept, reject or revise the conventions inherited from the past. (This would deny that the tie to the past as normative is a fundamental postulate of conservatism. It is only a handy guideline based on the Law of Unintended Consequences.) This also avoids the inadequacies of the other way out of the criticism--pointing to the habits of judges, etc.

Hart is properly credited with a major advance on the theories of his positivist predecessors in that he recognized that many rules of law are facilitative, as well as directive. Laws governing contract, marriage, sales, etc., provide the means by which people may do the things they desire. But there may be an even larger and more significant function played by most rules of law. That is, rules signal to each community member how other community members expect him to behave, and how he can legitimately expect them to behave. This low cost informational function of law brings vast normative order into an uncertain world

and creates a corresponding expansion of the range of meaningful choices open to individuals in the pursuit of their own objectives.

The penalties attached to violation of rules, from this perspective, are not there to give them credibility as orders backed by threats of coercion, but rather serve as practical devices to protect the system of expectations created by the law. As most rules are fully conventional in the sense that they could have been different than they are, observance of the particular rules has no intrinsic importance to the community. What is important to the community is that rules successfully establish a system of reliable expectations to inform individual action. And the value of this system of expectations is of such great value to all community members that penalties are justified to protect it. If there were some equally effective or superior device for protecting the system from degeneration, penalties would not be needed. This suggests that the emphasis on coercive penalties in traditional positivism is as exaggerated as it usually sounds.

The foregoing analysis of rules enables us to make a fundamental distinction between judicial and legislative reasoning. Judging is a cognitive activity. Legislating is normative. In legislation we lay down the "oughts" which judges need to know and understand to carry out their functions. The judges form hypotheses as to what they believe the actual state of authoritative legal norms in the society to be. The validity of their conclusions depend on the correctness of this empirical hypothesis, and not on the correctness of the norms they invoke, according to some non-empirical standard of correctness. Judicial reasoning

entails a cognitive approach to normative conventions. This is not altered by the fact that judges often need to take into account the larger normative structure from which the legislation itself is drawn in order to correctly apply the rules in difficult cases.

V. THE UNION OF LEGAL AND POLITICAL THEORY

A. Justice and the Law

The derivation of the elements of rule of law internally from the process of convention formation, which is itself a universal human phenomenon, does not fully silence the criticism that the law may sometimes be unjust. It does, as has often been claimed, point to the measure of justice that is required internally by the nature of law itself. But there are many other theories of justice which can also be brought to bear in discussions of what the rules of law should be, and whether they should be changed through legislation. Criticizing the law from the perspective of any particular theory of justice is a secondary activity which can be conducted with the ideas of rule of law in mind. Our moral and ethical theories continue to be legitimate bases from which to criticize law and from which to recommend revisions in law. But they are not internal to law and so cannot be invoked by judges as grounds for decisions in law. Given that law is an empirical reality characteristic of (increasingly pluralistic) human communities, we would not expect it to meet all criticisms from idealistic theories short of reaching utopia. And even then, it would take a different utopia to satisfy each such theory.

B. The Obligation to Obey the Law

As explained earlier, Luhmann finds adequate justification for the obligation to obey the law simply and finally in terms of the legitimate expectations entailed in any system of conventions. But there might be more to be said about this, even from the conventionalist point of view.

Language theorists have recognized that an implicit assumption of language usage is that it is being used to tell the truth.[24] Lying is subversive of the conventions of language and destroys, even perverts the value of relying on it, making it counterproductive. Similarly, games only make sense to the extent the players observe the rules. It is not that observing the rules is the point of the game, though such a game might be invented. Rather it is that the objectives of the game cease to have the same meaning if obtained by cheating. One who does not play by the rules plays another game than the one he pretends to play. He is a hypocrite and a liar from the perspective of the other players, though he may have some perfectly rational justification for this behavior when considered from some perspective external to the game itself. Again, practitioners of a religious tradition must assume sincere effort on the part of other adherents to observe the requirements of the faith. One who feigns adherence for externally based reasons is a subversive and a hypocrite among the faithful.

Each of these conventional systems has its rules, and it has a morality, a form of justice, which requires observance of the rules in a deep sense. This does not mean that the honest rule follower need believe that in an ultimate sense, the

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[24]D. Lewis, supra note 16, at 177-95.

rules are somehow true, valid and just. But it does require that he acknowledge their legitimacy as restraints and guides for the particular activity in which he is engaged, whether it be speaking a language, participating in worship, driving a car, or engaging in commerce or politics. Strangers to a particular conventional system understand this immediately when they choose to participate for the advantages it might bring to them. And most conventional systems welcome outsider participation on conditions of good faith. But good faith is the assumed basis of legitimate participation. Participation without it is like lying with words. The first form of obligation to obey the rules in a conventional system is then that the system works only on the assumption that all participants accept the legitimacy of the rules, and that it is the reciprocal acceptance of the rules that makes them legitimate. This is analogous to the conventional obligation to tell the truth. And this obligation has nothing to do with one's belief that the rules are the most efficient or just available, or even reasonably so. They simply are the rules and are therefore the only possible rules to use until such time as by conventional procedures they can be improved.

But there is also a second form of obligation to obey the rules that arises in conventional systems, and particularly in a legal system. For systems of conventions are public goods in that they benefit all. Limited defection may not destroy those public benefits, but widespread defection does. Just as the maintenance or acquisition of any public good imposes moral obligations on all beneficiaries to contribute to the extent of their ability and proportional benefit, so

a conventional system is a public good which only exists and has value to the extent that the conventions are observed by the participants. Every participant is by definition a beneficiary, and observation of the rules is ordinarily possible for every participant. Hence, in the ordinary case, every participant is obligated to obey the rules in the same way we have an obligation to contribute to public schools, to aid for the needy, and to public defense against marauding bandits.

Still restricting ourselves to the framework of conventional worlds, constituted by stipulated rules, we can speak in straightforward and non-metaphorical ways of specific obligations to obey the rules. Clearly, such obligations can come into conflict as different conventional systems sometimes overlap, or even generate contradictions within themselves because of the richness of detail of real life and the inadequacy of any system of rules to fully anticipate that richness. Actual conventional systems are necessarily equipped with all kinds of devices and supplementary rules to help us resolve such conflicts.

But we are also fundamentally concerned with other worlds of truth, the worlds of nature and of ultimate moral truth and of the gods. We do not believe these realities are amenable to conventional stipulation. We can only come to understand the truth of these spheres to the extent we are capable of modifying our cognitive structures in accordance with experience, reason and revelation over time.

Conventional systems ordinarily attempt to accommodate themselves to such fundamental realities at least to the extent that there is a common sense view

that is not controversial. The law assumes and utilizes a common sense view of the physical world and of causation. And to the extent that science expands or alters that common sense view (as with modern medicine), the rules of the law adjust accordingly in the legitimate expectations that they establish. In homogeneous religious communities, the world view of the shared religion can be assumed by the law. In states where there is overwhelming acceptance of a moral responsibility to give assistance to the needy and helpless, it is possible for the legal system to extend itself to welfare functions. But where there is pluralistic diversity of view in these areas, the law must tread very carefully before enforcing one view of truth against the others. Should Jehovah's Witnesses be required to allow blood transfusions for their children?

One of the universal effects of modernization has been the emergence of pluralist societies which are not broadly homogeneous in the views men hold about the ultimate nature of the world, and particularly about the gods and moral truth. It would appear that the obligation to observe conventions is even stronger in such societies, because the opportunity to forsake one conventional system for another more suitable is more realistically available to the individual. There are hundreds of religious sects in the United States. What excuse is there for pretending to be an adherent to one and using that adherence cynically to promote hostile objectives?

But the nexus between cognitive reality and conventional reality is the individual actor who must make choices for his own conduct. The individual's

views about what is real and what is true and right will constrain his ability to participate in conventional systems. But short of transcending the ordinary limitations of human nature, no individual can become independent of such systems. Each therefore has the delicate task of participating in such a way that he both honors the conventional expectations and is true to the higher realities. Conflicts are inevitable, and the resolution of those conflicts is never easy. The wisdom of parents who teach their children to tell the truth, to return to each man his own, and to obey the law is based on an intuition of what is necessary and obligatory in the world of conventional systems. But because we ordinarily believe there is a higher reality which is not affected by our attempts to stipulate rules, there is always intellectual opportunity for reflective men (and particularly philosophers) to conjure up straightforward conflicts between the legitimate expectations of the conventional world and the straightforward requirements of a higher morality, as Plato has Socrates do in the Republic. How many modern men have given up the religions of their youth over this commonplace discovery?

But like Socrates in the Crito, we might realize that the logic of a higher justice requires us to conform to the rules of the conventional world except where these do positively require wicked conduct. We suffer for the inadequacies of the conventional. But that is the price of enjoying its enormous relative benefits. And it is necessary, again, because of the limitations of human nature. There is no choice not to have conventions. Human social life is possible only on the basis of accepting conventional order and obligation.

C. Public Virtue and the Rule of Law

Granted that the reasons for law obedience in specific instances will not always add up on a strictly egoistic calculus or even in terms of moral arguments, a conventional system may need constant support from other systems of education and belief. Families and religious orders teach manners, morals and myths which give alternative reasons for observing the conventions to the young or the unwise. The rationale for peace is not likely ever strong enough in its general appeal to maintain widespread observance of conventional rules.

There may be room in such an empirical model for development of a minimal notion of public virtue, including willingness to observe the conventions as an alternative to the unqualified and total pursuit of direct self-interest. All conventions succeed and make it possible for individuals to use them to expand their own individuality only on the presumption that individuals submit themselves to the convention sufficiently to make it reliable as a predictor of human action. Some such universal submission is implicit and necessary to the empirical existence of any convention. And in this kind of submission we may find all we need for a basic concept of public virtue.

D. Justification

The need to justify the approach with a single independent theory of justice is more obviously mistaken. The individual participants in the conventions will need justifications for their participation. But we hardly need expect these individually held rationales to amount to a single theory of justice. There could be

as many justifications in principle as there are participants. This sounds unlikely, but to say it clarifies an important matter. The conventions themselves are moral statements in that they are based in this diffuse way in the moral beliefs of the participants, but not in the sense that they could be deduced from a single authoritative moral theory.

E. Constitutionalism

On this view, constitutionalism becomes the science of preserving the conventional character of the social rules against attempts to convert these rules to particular or private advantage. The problem of the status of rights is much easier to deal with as convention is king, and rights must have their origin there. Privately held theories of rights will certainly influence those conventions as they are formed and reformed. But no theory of abstract rights has standing to be invoked by public authorities as law.

Finally, this approach brings into the law a powerful set of critical principles while giving full force to the pessimistic view of human nature. No assumptions need be made about the natural goodness or intelligence of human action. Rather, with the support of constitutionalist theory, the model of conventional rules works well with the opposite assumptions. And the more altruistic or intelligent the population actually using such a system, the more efficiently and less expensively it will function. So it does not depend on either assumption.

What it does irremediably depend on is a significant measure of understanding support from the population. The model of conventional rules

requires a population willing to make compromises in the forging of mutually acceptable rules. Once the understanding of this need and the willingness to abide by the basic rules of the system deteriorate, the system of impersonal rule will inevitably be replaced by personal rule. Whether benevolent or exploitative in the short run, a skeptical view of human nature would lead one to expect the worst over the not-too-long run. The fact is that this need for some basic consensus again distinguishes the systems of personal and impersonal rule, and emphasizes how the model unites legal and political theory.

F. The Rule of Law

On the theory sketched in this paper, the principles of rule of law become tests of conventionality. They provide a legal system with non-conventional, necessary norms for regulating a system of conventions. They are the substitute for a theory of justice or rights. Yet they are not substantive.

The principles of rule of law in this context need not be suspected of being disguised guardians of Kantian autonomy. People do not have to be Kantians to prefer a society of conventions to a rule of tyrants, even if it turns out that in principle Kantians would favor such an arrangement. So also might liberals of other stripes, including utilitarians.

The side benefits are enormous. The first of these is that by admitting the notion of convention, the logic of consensus infuses the system of law with a higher order of normativeness, the principles of rule of law which become non-ethical and non-natural law criteria for a principled criticism of law. And these

The weakness from the poin t of view of more extreme natu meta-legal principles are sufficiently powerful that they cover most of the ground that the ethical theorists and natural lawyers want included in the critique of law. Furthermore, it makes the critique internal to the legal system, and available to judges, whereas such criteria are not so available to positivist judges. It is a means whereby such second order norms can be invoked without any presumption that any particular system of ethics is correct or even preferable.

ral lawyers and political theorists will be that there is no absolute protection of rights. This is correct. The system cannot maintain itself against a determined contrary consensus in the population. But then any system that could do this would be tyrannical, and not founded in popular agreement. And that has always been the objection.