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Why we don't understand the rule of law

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Abstract:
This paper presents an assessment of current theories of law and their continuing failure to account in a convincing way for the rule of law as an ideal that guides and reassures modern democratic societies. It then explores the possibility that emerging understandings of human evolution and brain function may help us understand the process of convention making in a way that could reveal the underlying moral and epistemological context of law and allow us to identify a complete set of standards for the rule of law in human societies.

Key Words:
rule of law, theories of law, legal theory, natural law, cognitive epistemology, F. A. Hayek, coordination thesis

Preface for the Thursday Group

My goal for this "paper" is for it to evolve into an introductory chapter for a book-length treatment of the concept of rule of law. It will be successful if it can present a compelling or at least an intriguing case for refining and extending existing theories of law to provide a more coherent and adequate understanding of the rule of law. My problem is not to find a solution to that theoretical problem—I think I have the basics for that in place already. The problem is to convince a discipline that is focused on a battle between traditional approaches that there is good reason to look seriously at alternatives.

While I have had some modest success with this effort in the past, it is also clear that a lot more needs to be done if the theoretical solution I have sketched in ten previously published papers is to be fully articulated and defended in a book that legal theorists will read. Legal theory is a book discipline, and it is unusual for journal articles to be cited for significant theoretical contributions. When I was active in this field, I was personally acquainted with all the leading scholars in legal theory. But during the last fifteen years when I have been focused primarily on administrative assignments, a younger and, I hope, more open generation of young scholars has emerged.

Many senior legal theorists are aware of my project. I have hosted a large

share of them in small conferences on this topic. I have edited one issue of the European journal Ratio Juris *using papers contributed to one of these conferences. And I have been invited to contribute to similar conferences organized by some of them. I was one of the four theorists that the American Philosophical Association invited to contribute to a 2002 newsletter, when they chose to feature the rule of law as a topic of growing interest.*[1] *But my approach does not come out of either of the principal theoretical camps. Both legal positivists and natural lawyers will be wary of an approach that portrays their position as rootbound and incapable of growing or moving to the next level without some serious revision.*

Some have suggested that I should enlist the new political science to promote my project. (Cambridge UP has already published one excellent empirical study of the rule of law.[2]*) I was pleasantly surprised at a small conference featuring the Cambridge volume last January, to learn that it had actually been organized with one of its principal objectives being to recruit me personally to an empirical approach and to help me see how empirical studies could be designed to test the capacity for the rule of law to perpetuate itself. While I was flattered by this focused attention, it also helped me clarify my reasons for declining to take that approach. The issue for me really is one of theory—do we know what law and the rule of law are? And so the goal of this paper is strategic—can I make a compelling case for listening to a proposed revision of the theory of law and of the rule of law?*

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One of the most serious, but least recognized anomalies in contemporary political and legal thought is the lack of a convincing theoretical account of the rule of law. While governments and other agencies around the world devote unprecedented effort to the promotion of the rule of law as the means to greater personal freedom and democratic institutions, none of these can produce much beyond surface platitudes in defining the rule of law without wading into a morass of contradictions. While there is a widely shared recital of political and legal rights and procedures that pertain to rule of law, there is no common theory that explains all of these in terms of a shared or authoritative account of law and the rule of law. Recognizing this lacuna in contemporary political and legal thought, legal philosophers and theorists have recently turned their attention to this problem. But

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[1] *Noel B. Reynolds, "Legal Theory and the Rule of Law," APA Newsletters*, Vol. 1, (Spring 2002, No. 2), 117–122.

[2] *Jose Maria Maravall and Adam Przeworkski, eds., Democracy and the Rule of Law,* Cambridge, Cambridge University Press, 2003.

the results to date mostly rehash the same old doctrines without producing promising new syntheses or approaches.

Because the notion of rule of law is an expansion on the idea of law itself, it will be important to begin with the more fundamental idea. Law should be understood as a human invention or technology that is designed to increase individual productivity, freedom, and quality of life by stabilizing our expectations of conduct across a defined range of human activities for some group of people. But as groups of humans agree to accept the authority of established rules or laws that will govern their conduct, they simultaneously acquire an interest in the content of those rules, giving rise to politics—understood as the activity of shaping the content and the administration of the authoritative rules. It is not difficult to imagine people grasping the possibility of extending the technology of rules–which may have been formulated initially by smaller groups to facilitate such basic processes as exchange and family formation—to reduce the frequency of error and corruption in the making, enforcing, and administration of the rules as the size of the reference groups grew. And as law-based communities experienced the evils of tyrants who were able to grasp control of all these public functions, the necessity of subjecting all rulers to law would have been fairly obvious as the only potential solution that could preserve the great gains achieved by the original adoption of law. And that simple solution is what we mean by the phrase, the rule of law.

The problem with this simplistic account is in its assumed theory of law—what is law? And where does it come from? While the twentieth century produced more theoretical writing on this subject than the preceding thirty centuries, the only significant agreements produced were an agreement to disagree and a shared recognition that all the proffered theories of law have some limitations and cannot fully explain our experience with law. The differences between our theories were demonstrated in the twentieth century in debates about legal or judicial reasoning, and more recently in attempts to explain or provide a theory for the traditional notion of the rule of law in the face of the worldwide demand for rule of law in nations that do not enjoy its benefits.

In this paper, I will briefly review the more important efforts to address this issue, over the last half century. I will then list the continuing deficiencies of contemporary efforts to define the rule of law. Finally, I will sketch some requirements and directions for a successful resolution of the perennial difficulties in this theoretical enterprise.

Friedrich A. Hayek and the framing of the twentieth-century debate.

The phrase, *the rule of law*, was first invoked as a siren to marshall allegiance to traditional institutions of political liberty by the famous British jurist, A. V. Dicey at the end of the nineteenth century, when he was alarmed by the early signs that Britain was beginning to import continental notions of administrative law and that common law was threatened by that development.[3] Subsequently, an Austrian economist fleeing from nationalist socialism, chose the same siren to warn 1944 "socialists of all parties" of the dangers they risked in their promotion of British Labor Party programs for the UK. The idea that socialism or even a welfare state was not just an extension of the democratic form of government, but would rather require subversion of fundamental principles upon which western style liberty was based was most famously and effectively formulated by F. A. Hayek in his insight into the fundamental importance of the rule of law.[4]

While Hayek's thesis would prove to be the most enduring and formative for late twentieth century analyses, two additional and more urgent developments in the international arena have propelled discussions of the rule of law to the forefront. The Nazi takeover of the German state, its subsequent use of German political and legal institutions to implement an ethnic extermination program and a wholesale invasion of other European nations, followed in turn by the efforts of special international tribunals to prosecute Nazi officials as "war criminals," all combined to provoke substantial historical and legal soul-searching about the rule of law and what it really was. And finally, the triumph of Communism in Soviet Russia with its consequent exportation to many other countries and its eventual demise moved most western governments as well as academic lawyers and legal philosophers to ramp up their studies of the rule of law as a support for the worldwide effort to bring the rule of law to post-communist nations, as well as to developing nations that were troubled with the dictatorships emerging in post-colonial states.

Hayek himself was perhaps the most important convert to his 1944 thesis that the rule of law is the central plank in western liberty. Over the next sixteen years he engaged in a range of multi disciplinary research projects designed to build a broad, solid, and compelling historical and philosophical foundation for and expansion of his 1944 thesis. Hayek realized that he had moved from his original economic concept of liberty to the concept, which he found fundamental to the western tradition, that was grounded in the idea of law. Exchange presumes property, and property presumes law. His *magnus opus*, *The Constitution of*

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[3] A. V. Dicey, *Introduction to the Study of the Law of the Constitution Eighth Edition of 1915,* Indianapolis, Liberty Press, 1982.

[4] F. A. Hayek, *The Road to Serfdom,* Chicago, University of Chicago Press, 1944.

Liberty, was published in 1960, and was in its third hardback printing by 1961.[5] While his grounding in economics was still evident, Hayek had explicitly moved into the realms of political and legal theory.[6] He saw himself mounting the first comprehensive articulation of the ideals of western liberty in several generations, and he saw everywhere the evidence that these ideals and their justifications had been lost or forgotten. Inspired by "a low opinion of men's wisdom and capacities," Hayek consciously rejected the "perfectionism" he detected in the contemporary offspring of the Enlightenment—the confident and enthusiastic movements intended to perfect human beings and the societies in which they live. Rather, he saw these movements as the greatest dangers to the highest achievements of civilization, the lives of peace and liberty enjoyed by men living under the rule of law.[7]

The sixteen intervening years of discussion and research had alerted Hayek to the necessity of distinguishing his conception of the rule of law from "mere legality," the requirement that the government follow its procedures and pursue its objectives using laws rather than commands and directives. He realized that the rule of law constituted a form of limitation on governments, including legislatures. Because the rule of law is not a legislated rule or even part of a constitution, it cannot be changed by any government. Rather it is "a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."[8] Because it is not a legislated part of the law of any nation, "it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority."[9] It is instructive to note that a decade later, Aleksandr Solzhenitsyn would attribute the failure of the Russian people to stand up for itself and resist the tiny group of Bolsheviks that seized their government and consolidated dictatorial power, through a long campaign of illegal nighttime arrests and imprisonments, to the absence of just such a moral tradition in their society.[10]

The short list of principles that Hayek identified as necessary requirements for the existence of rule of law was original for his time, but did explicitly draw on the insights of thinkers from ancient times to the present. It has become familiar to

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[5] F. A. Hayek, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960.
[6] Hayek told his readers in 1944 that his central argument was borrowed from "Freedom and the Economic System," a paper he wrote for the April issue of *Contemporary Review* in 1938. See, *Road to Serfdom*, xxii.
[7] Ibid., 8.
[8] Ibid., 206.
[9] Ibid.
[10] Aleksandr Solzhenitsyn, *The Gulag Archipelago*, vol. 3,

us all, and has not changed much since that 1960 formulation.[11] He saw the following as principles restricting governments in their coercive activities:

1. Citizens can only be punished for violating "announced general rules." This compact statement implies that rules have to be general—applying to all citizens all the time, that they must be publicly announced or knowable, and that they must be known in advance of their application. This one principle is often disaggregated into at least three—generality, publicity, and prospectivity.
2. Laws must be known and certain in the sense that the decisions of courts should be largely predictable, even though it is not possible to spell out all legal possibilities in advance of their applications to emerging situations.
3. The principle of equality is hard to define, but it entails that the law treat everyone equally, and that there not be differences of laws for specified classes of people. Some version of this notion is often at the heart of our concepts of justice.
4. Administrative and judicial discretion must be tightly restricted with rules and review procedures that can lead to remedies when public officials err.
5. The sphere of free individual choice and action encompasses anything not prohibited by law. Hayek's reservations about bills of rights echoes those of American founders Madison and Hamilton who feared any such list of rights might be interpreted by courts and legislatures to be exhaustive.
6. The constitutional principles of separation of powers and of an independent judiciary are also essential if citizens are to have the ability to seek legal protection from inappropriate administrative or legislative incursions on their liberties.
7. Because none of these requirements can be absolute, rule of law requires that exceptions to these principles, if not consensual, be compensated fairly.
8. Finally, while Hayek recognizes the great value of procedural safeguards such as trial by jury, habeas corpus, etc., in the historical development and protection of English liberties, he sees these as extra protections invented in a society that had not achieved reliable adherence to the foregoing principles and as not necessary in principle.

The response to Hayek's challenge to contemporary legal theorists.

The ideological dimensions of rule-of-law talk in the twentieth century may explain the lack of response from Hayek's target audience. One reviewer

[11] See the discussions in Hayek, *COL*, 206–219.

characterized *The Constitution of Liberty* as a dinosaur "stalking out of the Pleistocene Age."[12] But leading professors of legal and political theory just kept quiet, perhaps hoping this would go away. Socialist tendencies among academicians had not yet suffered the flight that would occur with the 1970s revelations of widespread communist and socialist atrocities and failures. And Hayek had offended an even wider group with his general arguments for severe limitations on welfare state experiments.

The exception was Lon L. Fuller, Harvard Law School's widely respected and appreciated professor of contracts and legal theory. In his 1963 Storrs lectures at Yale University, Fuller advanced eight principles of "the inner morality of law," which are essential to the formulation and administration of good law, principles which reorganized—but largely restated—the principles listed by Hayek in 1960.[13] Over time, Fuller's formulation has proven more congenial for legal theorists, but in the first instance, it was not embraced any faster than Hayek's. Published discussions of the rule of law in the 1950s and 1960s tended to be produced by panels of American lawyers who felt motivated to help people around the world see the advantages of the kind of legal and constitutional system they enjoyed in the United States. They did not contribute much to theoretical understanding of the concept.

The next step in the story did not leave much of a paper trail in journal articles or book publications in legal theory. Hayek's book was making significant inroads among libertarian and conservative thinkers in the United States and Europe who played central roles in advising the political administrations of Ronald Reagan, Margaret Thatcher, and other sympathetic regimes around the world. But even this high profile attention provoked only limited academic response. But there was a significant unpublished response taking place in the academic community during the decades of the 1970s and 1980s. The recently organized Liberty Fund, based in Indianapolis, began to focus some its newly developed schedule of fully funded, but private and mostly unpublished conferences, on topics that incorporated some reading and discussion of Hayek's volume. Beginning in the mid-1970s, these conferences contributed to the development of a wider community of scholars, including most of the leading scholars in legal and political theory, who attended one or more Liberty Fund conferences where Hayek

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[12] Source?

[13] Lon L. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1964. When I asked Fuller in 1976 about his reliance on Hayek, he readily admitted that he probably had Hayek in mind, though his published volume only mentions Hayek's 1944 foray, and that mention was only to complain about Hayek's lack of appreciation for one common feature of American law.

and other rule-of-law writers were discussed. Many of the scholarly articles regarding the rule of law published in this period were by-products of Liberty Fund conferences.[14] The most important developments, however, were not in the initial attempts of these scholars to respond to Hayek. Quite a number of these and others have let these ideas develop in their own work over the last several decades resulting recently in a remarkable spate of new books focused on the idea of rule of law.[15]

One of the most helpful attempts to address this issue in recent years was written by St. Johns law professor Brian Tamanaha.[16] After a brief review of historical understandings of rule of law in Europe, Tamanaha turns his full attention to the twentieth century debates in legal theory and their implications for the idea of rule of law. By organizing his survey in terms of the ideologies of the writers he considers (liberal, conservative, and far left), he is able to demonstrate that their attitudes toward law are central to their ideological positions. His approach clearly exposes the usually unmentioned, but driving ideological presuppositions of twentieth century writers in legal theory. After reviewing a variety of formalistic theories of rule of law and noting that none can ensure that the law will not be captured by evil forces for their own ends, he goes on to an

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[14] An early example was Oxford University's Joseph Raz, whose "The Rule of Law and its Virtue," *Law Quarterly Review*, vol. 93, 1977, 195, was first presented to a Liberty Fund seminar in January 1976 . In this paper, Raz recognized the rule of law, much as Hayek had defined it, as one among many competing virtues of law, and explicitly doubted that it should be seen as a requirement that could trump the reasons that justify the welfare state. In another example, the entire issue of *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*, Vol. 2 No. 1 (March, 1989), was devoted to papers written for a Liberty Fund conference I organized in Scotland in 1986 by Jules Coleman, John Finnis, Richard Friedman, Timothy Fuller, Shirley Robin Letwin, Neil MacCormick, and Jeremy Waldron. The small conference included other equally prominent theorists including Michael Oakeshott, Nigel Simmonds, Robert Cooter, and Richard Twining. Also, see Robert L. Cunningham, ed., *Liberty and the Rule of Law*, College Station, Texas A&M University Press, 1979 which includes the contributions of a distinguished group of contributors to a 1976 Liberty Fund conference held in San Francisco, including the Raz paper mentioned above.

[15] See, for example, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004; Lars Vinx, *Hans Kelsen's Pure theory of Law: Legality and Legitimacy*, Oxford, Oxford University Press, 2007; Neil McCormick, *Rhetoric and the Rule of Law*, Oxford, Oxford University Press, 2005; Ian Shapiro, *The Rule of Law*, NY: NYU Press, 1994, and a host of others.

[16] See Tamanaha, *On the Rule of Law* and also his *Law as a Means to an End: Threat to the Rule of Law*, Cambridge, Cambridge University Press, 2006.

examination of substantive theories that claim to provide controls on the content of laws. Like other critics of natural law jurisprudence, he notes that the incorporation of natural rights or natural law as basic values into the law tends to elevate the authority of the judiciary over that of legislatures and leads to the "judicialization of law," contradicting widespread understandings of rule of law in terms of individual liberty or democracy.

From all of these approaches, Tamanaha distills three principal themes that in his view capture the range of meanings associated with the rule of law.[17] The first is the idea that the rule of law is the antidote for tyranny, that governments and regimes can be limited by law, and that law prevents regimes from using the lives of their subjects for their own ends. The second theme he identifies is formal legality, the idea explicitly formulated by Hayek that the requirements that laws be public, prospective, general, certain and of equal application will produce about as much protection for the liberties of the people as can be practicably maintained, principally by making the impact of laws predictable for all legal actors. The third rule-of-law theme he identifies is the one heard so much in American revolutionary and constitutional rhetoric, that it is better to be ruled by laws than by men. The largely predictable regime of legal rules is much less likely to compromise individual liberty than the discretionary rule of men who commonly display a range of vices, including bias, passion, prejudice, error, ignorance, cupidity, and whim. All of these themes were developed by Hayek, who did not see them so separable as Tamanaha claims them to be.

While Tamanaha's collection and review of scholarly efforts to make sense of the concept of rule of law is helpful in many ways and deserves our appreciation, his readers will not be wrong to wonder how the theoretical understanding of the rule of law has been significantly enhanced. There is not much here that cannot be found in Hayek's 1960 presentation. So you can imagine my anticipation upon discovering that Jeremy Waldron, one of the very best legal and political theorists of our day, undertook a year ago to provide a current assessment and analysis of rule-of-law theory in his Sibley Lecture at the University of Georgia Law School. In a parallel effort at that Liberty Fund conference in Scotland twenty years ago, Waldron had reviewed the rule-of-law implications of the more significant liberal *political* theories of the day, with plenty of criticism of Hayek's formulation thrown in for good measure.[18] Imagine my double surprise upon reading his recent paper that now focused on the leading

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[17] Ibid, pp. 114–126.

[18] Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory," *Ratio Juris* Vol 2, No 1 (March 1989), 79–96.

contemporary *legal* theorists to discover (1) that he could find no significant advances in their theoretical accounts of the rule of law, and (2) that he, like Tamanaha, now sees Hayek's account of rule of law as a legal and political ideal as the strongest and most complete reference point for this kind of work.[19]

On the one hand, it is remarkable that this economist-turned-political-and-legal-philosopher, working pretty much on his own, has produced an analysis of one of the most significant features of law that has emerged pre-eminent after fifty years of criticism by both political and legal theorists. On the other hand, it is disappointing that none of the academic theories of law available to us in the twenty-first century have proved capable of equaling or surpassing the understanding of the rule of law that Hayek gave us a half century ago using a common sense understanding of law that is widely disparaged by our leading legal theorists. In the next section of this paper I will briefly identify the deficiencies of the currently received account of the rule of law. For all its strengths, Hayek's account has many shortcomings, and there is a demonstrable need for a theory of law that can explain our understanding of and experience with what we label "the rule of law."

What's missing from the Hayek/Fuller account of rule of law from the perspective of legal theory?

The instinctive ideological objections most legal theorists initially felt in reading Hayek's book may explain why it took several decades for them to fully appreciate the strengths of his account of the rule of law and the power provided to his conclusions by the foundations he laid through his analysis of coercion and law as an institutional solution to the problem of coercion and his thorough review of the history of liberty under the rule of law from ancient times to the present. Accepting a Humean view of human nature, Hayek concluded that tyranny is endemic in human governments. Also following Hume, Hayek came to see law less as an instrument of social control and more as an instrument for minimizing coercion in human interactions. This approach already distinguished Hayek from the positivist tradition that dominated legal theorizing from Bentham and Austin to the present and from much of modern social science.

Although legal theorists have often seen so much similarity in Hayek's and Fuller's analyses, there are some important differences that must be noted. It is a certainty that Fuller would not have wanted the two approaches to be conflated in

[19] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* vol 43 (2008), 1–33.

subsequent discussions of this topic. Fuller actually avoids the terminology "rule of law"—probably to reduce the likelihood that his approach would be seen as derivative from Hayek's recent book. In fact, he never refers to the *Constitution of Liberty*, but only to the much earlier and more exploratory *The Road to Serfdom*. Fuller's readers would never infer that he was positively influenced by Hayek. He did not start with the problems of tyranny and coercion, but rather deduced his eight principles of rule of law from an analysis of the ways in which regimes of law can go wrong—making the law ineffective. He then advanced these principles as standards inherent in good or effective law in any regime. In that sense, Fuller's proposal could be characterized as a natural law position. It did not rest on some claimed version of universal moral truth as the standard for good law, but it did find standards inherent in law as such, which certainly meets a minimal criterion of natural law. While Fuller always maintained that his eight principles of good law were logically independent of the moral content of the laws, he also felt it was in a practical sense highly improbable that an evil regime (think Nazis) could pursue their ends without compromising those principles. In his elaboration of his eight principles he repeatedly takes the opportunity to show how particular principles were ignored or violated by Hitler's regime.

While this did make Fuller's account more usable for a wide range of theorists, it is not clear that he can fully resist making coercion and freedom the explicit focus. It is clear in many of his writings that law and legal duties all have their origins in the concept of reciprocity, which is not always easy to distinguish from the idea of individual human liberty. In his discussion of reciprocity as a preparation for his analysis of the "inner morality of law," Fuller generalizes that all duties can be traced to the principle of reciprocity, which has three optimizing conditions: 1) that it be grounded in voluntary agreement, 2) that it realize some strong notion of equivalence or equality, and 3) that the resulting duties be symmetrical.[20] It is not likely that Hayek would see an account based on (economic) reciprocity as far distant from his own analysis based in an analysis of individual freedom and coercion.

It may be a measure of the poverty of twentieth-century legal theories, however, that they were not able to probe the theoretical limitations of Hayek's account of the rule of law or to take its common sense assumptions and conclusions to the next level of theoretical analysis. I will list here a few of the questions that could and should be addressed. Some of these are prompted by the observation that Hayek's list of principles includes some very different kinds of requirements. Some seem like logical extensions of a Humean conception of

[20] Fuller, *The Morality of Law*, 19–23.

human nature, considered together with a concern for human liberty. Others are straightforwardly principles of constitutionalism as developed in the seventeenth and eighteenth centuries—practical structural devices for minimizing likelihood that a regime will become tyrannical. Others are procedural devices established over time in English and some other legal systems. And some read like cautions against judicial activism that characterize contemporary conservative analyses of courts and judges.

1. What do the principles of the rule of law have in common? How would we decide whether a proposed principle belongs in such a list?

2. What is law? It is a recurring human institution. How is it generated?

3. How can we justify Hayek's and Fuller's claims that the laws propagated by Communist and Nazi regimes do not really qualify as law?

4. Recognizing that legal systems do rely on coercion for the enforcement of laws, how can they be distinguished convincingly from other systems of social control that rest on coercion?

5. What is the connection between law and morality? Do laws have to meet some external moral standard to be valid law?

6. How do the principles of the rule of law interact with the standard criteria of legal validity—as spelled out, for example, in state and federal constitutions?

7. Can or should the rule of law be self-enforcing or self-perpetuating. Do failures of the rule of law refute the claims of rule-of-law promoters?

8. Is there a general obligation to obey the law? If so, why?

9. What is the source of law's authority? What are its limits?

The inability of contemporary legal theorists to transcend, refute, or incorporate Hayek's commonsense account of the rule of law provides one more

important indicator of the inadequacy of the theories of law that they propose. It has been generally recognized for many decades that we lack a single theory of law that can account simultaneously for the social fact character of law and for the moral dimension of law, and particularly our sense of obligation to obey the law. Natural law and other moralistic theories—which are much resurgent in recent decades—have had no problem talking about the authority of law or the obligation to obey it. But these same theories have not been able to deal convincingly with the long-standing positivist insight that law is a social fact which can be altered at will by legislatures, etc. Positivist thinkers from Bentham to Hart and Raz have made important theoretical advances with their commitment to the insight that law and morals are separate things. But that same commitment has made it impossible to this date to produce a satisfying account of legal authority and obligation. It is my contention in this paper that we can add to this conundrum one more clear indicator of the inadequacy of current theories of law; none of them offer a clear and coherent theory of the rule of law. None of them have been able to refute, transcend, or intelligently incorporate the common sense account of the rule of law framed a half century ago by F. A. Hayek. And as helpful as that account has been for the world of practical affairs, it leaves a long list of important questions unanswered when viewed from the perspective of legal theory. The situation of physicists with regard to their theories of light may provide an apt analogy. While different phenomena are well explained by either the wave theory or the particle theory of light, no comprehensive theory has yet been advanced that will explain all light phenomena. This continuing limitation in theories of light has been worked around more effectively in physics than in what we see as an ongoing debate in legal theory.

The rule of law has also attracted the attention of political scientists who accuse the legal theorists in their debates of confusing "a description for an explanation." In staking out a stage where empirical political science can investigate and illuminate the rule of law, they point out that "to develop a positive conception of the rule of law, one just start with political forces, their goals, their organization, and their conflicts." Conceptualizing law as a reflection of power relationships in a society, they point out that only when "conflicting political actors seek to resolve their conflicts by recourse to law, does law rule." So "rule of law can prevail only when the relation of political forces is such that those who are most powerful find that the law is on their side...when law is the preferred tool of the powerful." "Rule of law and rule by law occupy a single continuum and do not present mutually exclusive options." And "the powerful will cede power only to rival powerful forces." "The difference between rule by law and rule of law lies

then in the distribution of power, the dispersion of material resources.... In societies that approximate the rule of law, no group becomes so strong as to dominate the others..."[21] Here again, rule of law is a description borrowed from Hayek's analysis, but the explanation derives from theories focused on power relationships.

While a large share of legal theorizing in the last half century has focused on internal issues in the different theoretical schools of thought, serious attention has been given by some theorists in each camp to these persistent bridging issues. One student of H.L.A. Hart, the clear leader of twentieth-century legal positivism, has tried to rearticulate natural law theory in such a way that it will accommodate the most important positivist claims.[22] While the world of legal theory has been impressed with the sophistication of John Finnis's effort compared to other natural law theories, not many have been persuaded that his attempt at a comprehensive solution will work. On the other side, many legal positivists, including Hart himself and such distinguished allies as Jules Coleman, have softened their line to accommodate some minimal role for morality. Joseph Raz is the exception here, and he has held firm on the key positivist thesis of the separation of law and morals. But in all of this, no general agreement has emerged. The inability of legal theories to account simultaneously for the social fact and moral dimensions of law persists today.

The continuing durability of this problem and the inability to deal more effectively with the basic concept of the rule of law both suggest that we need something genuinely new in our approach to legal theorizing. Sometimes a new direction of attack or a wholly new approach can put familiar things in a new light that will open up new potential solutions to old problems. The main purpose of this paper is to point the way to just such an undertaking.

Possibilities for an empirical approach.

When considering a change of direction, a new tack in the pursuit of a long-established destination, it may be useful to review the fundamental purposes of theoretical and philosophical inquiry. Natural scientists are often heard to complain that philosophical treatments of nature are fuzzy or merely conceptual, when the real issues are facts that need to be studied and understood with empirical theories. In particular, the social sciences of the last two centuries have been complicated repeatedly with struggles between philosophical and empirical

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[21] Jose Maria Maravall and Adam Przeworkski, eds., *Democracy and the Rule of Law,* Cambridge, Cambridge University Press, 2003, 2–4.

[22] John Finnis, *Natural Law and Natural Rights*, Oxford, Clarendon, 1980.

theoretical approaches. And while law is quite obviously an empirical reality, both natural lawyers and legal positivists today feature philosophical skills and approaches in their efforts to explain law. But what complaining empiricists sometimes forget is that empirical sciences flow out of philosophical theories. It is when philosophical analyses are able to find ways of framing their theories so they can be tested empirically that new sciences are born. Almost every branch of empirical science can trace its origins to philosophical speculations of thinkers some time in the past. I have seen this most dramatically in my own career. For my first five years at BYU I taught epistemology or the theory of knowledge in the philosophy department, a topic that has been considered fundamental to all human inquiry for 2500 years or more. And it was still regarded in the 1970s as the proprietary turf of philosophers. But my curiosity led me to read the fledgling efforts of child psychologists and learning theorists who were studying how human beings do in fact learn and develop their understanding of the world. In 1973 I wrote an article to philosophers arguing that this new field of "cognitive epistemology" had found new and promising ways of pursuing the age-old questions philosophers ask about human knowledge that would eventually yield greater understanding through empirical research.[23] As it turned out, I was not the only one thinking this way, and within two decades traditional epistemological studies were replaced by psychological studies and neuroscience. The connection between philosophical reflection and empirical science is perhaps most evident in the work of the pre-Socratic philosophers who quite obviously saw themselves trying to account for the full range of human experience. Aristotle himself, the philosopher than which none greater can be conceived, engaged a wide range of empirical studies, ranging from the biological to the political, with his students. Note, for example, how this is explained in the introduction to a current volume on Aristotle:

> "The activity we call *science* is dependent upon and embedded within a prior activity known as *philosophy*. Any scientific understanding presupposes opinions about the way things are. Those fundamental opinions, which must be the foundations of any science, are the direct topics of reflection in thinking that is philosophical. Philosophy is a permanent human possibility, and it must have arisen in all places and times when anyone paused in the business of life to wonder about things, but it was among the ancient Greeks

[23] Noel B. Reynolds, "Empirical Science and the Future of Epistemology," *Proceedings of the World Congress of Philosophy*, Varna, Bulgaria, 1973.

that it was named and described and began to be reflected in written texts."[24]

While H. L. A. Hart explicitly borrowed the social science perspective or "external point of view" to help explicate his positivist conclusions,[25] neither he nor his followers chose to make the jump to an explicitly empirical account of the phenomenon of law in human experience. But even among social theorists the tendency has been to assume we know what law is and to talk about its impact for good and ill or to study various social problems that have a legal dimension. There are two sociological theorists who have recently focused their attention on law as an experience of individual human beings, a focus which seems to me to offer some prospect of enabling some advances beyond the current stalemate in legal theory. James S. Coleman of the University of Chicago took the individualist approach because of a preference developed in his years of collaborative discussion with the highly successful economists at his university.[26] But I will feature here the approach of Niklas Luhmann, a German student of Talcott Parsons, who found himself forced to deviate temporarily from the traditional holistic social theories of his discipline in order to make sense of the phenomenon of law.[27]

The coordination thesis.

In the 1980s, writers from both sides of this dispute in legal theory proposed that a mutually acceptable solution might lie in the characterization of law as a particular kind of convention which was both a social fact *and* a framework of reasons for action. The thesis at issue has been variously labeled the coordination thesis or the thesis that law is convention. (This would not have seemed so profound to ancient Greeks who used the word *nomos* for both law and convention. They just were the same thing. The provocative counter theory proposed by Aristotle was that law might have some basis in nature.)

The basic ideas are drawn from that branch of formal game theory which deals with coordination problems, those problems in which all parties stand to gain through collaboration. Certain social and linguistic theorists have seen in these non-zero-sum games a helpful explanation for the emergence of conventions or rules. Given that in this account such rules arise out of simple factual conditions, if it can also be shown that these rules provide reasons for action—the generally

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[24] Joe Sachs, *Aristotle's* Physics*: A Guided Study* (New Brunswick and London: Rutgers University Press, 2008), p. 1.
[25] H. L. A. Hart, *The Concept of Law*, Oxford, Clarendon, 1961, pp. 86–87.
[26] James S. Coleman, *Foundations of Social Theory*, Cambridge, Harvard University Press, 1990
[27] Niklas Luhmann, *A Sociological Theory of Law* (London: Routledge and Kegan Paul, 1985).

accepted philosophical criterion for moral obligation—we may, in fact, have a promising solution to the central quarrel of legal philosophy.

Early critics of the coordination thesis, as well as advocates such as John Finnis, focused on coordination analysis as a means of justifying particular rules of law, rather than the fundamental convention that establishes a community of law. In my view, this was a serious mistake on both sides. Advocates were hard pressed to demonstrate that every rule was a true coordination solution, and critics were handed too many easy targets. The coordination problem, as defined centuries ago by Thomas Hobbes, is the human condition in the state of nature without law. The coordination solution to that problem is the consensual creation of an authority. The subsequent rules made by that authority may or may not meet the formal requirements of coordination problems and solutions. But that doesn't matter, as their justification need only derive from their origins in valid exercises of the authority. The right place to focus our interest in coordination theory as it might apply to legal theory is where the classical and contemporary theorists of political contract have focused. If a coordination thesis has a chance to bridge the gap between positivist and natural law theory, it will be by conceiving of the fundamental arrangement that constitutes the legal society as a convention arising out of a coordination problem. If Hart's rule of recognition can be seen as being derived from this convention, perhaps it can be shown also to have the kind of normative force that its critics have denied it.

The perspective of sociological theory.

Before exploring the particular implications of a conventionalist theory of law, it will help to review what sociological theorists from Parsons to Luhmann have learned about the ideas of convention and rule in the most general context of human action. Mutual adherence to conventional rules is the technique we use for reducing most of the uncertainty of our social world. By convention we stipulate sets of legitimate expectations that we each have of one another's conduct. This simplifies life enormously. When someone disappoints these expectations we can blame them without needing to revise our own cognitive models of the world. Equipped with such sets of conventional rules for conduct, we can interact meaningfully with others through language, markets, the law, family mores, morality, systems of religion, or games. Furthermore, such interactions do not necessarily presuppose any prior experience with or knowledge of the others with whom we are interacting. Eliminating most of the uncertainty in such relationships requires only that the 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 for human interaction and thereby render human actions and expectations predictable. As certainty rises, so does the value of the individual freedom of society members to work toward an improvement of their lives or toward other goals important to them.

Just as our man-made theories of the natural world provide us with a structure of laws that can guide our interactions with nature, so also, man-made 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 can react in either of two ways to disappointment. We can make cognitive adjustments, or we can hold firm in our mental 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. Normative expectations give us grounds for holding disappointments against actors. Thus "norms are *counterfactually stabilised behavioural expectations.*"[28]

This counterfactual element of norms implies their unconditional validity and is the major source of the "ought" in the law. Legal obligation expresses this function of counterfactual validity. On this view, the "ought" of the law has little to do with either background moral or political theories or threats of enforcement. All it means is that each member of a legal community has a legitimate expectation that others act as they ought, i.e., in accordance with the conventional rules, just because they have agreed to the authority which has produced those 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 right or on the left). Just as players in a game are understood to accept the binding nature of the rules of that game, so legal actors are presumed to accept the authority of existing law in all their activities.

It is worth noting in passing that to attach the law to a theory of moral truth is to lose this advantage—for that would tie the "ought" of the law back to a cognitive uncertainty, i.e., the truth about morality. And to the extent that moral truth is claimed 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 which that entails.

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

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[28] Ibid., p.

> . . . 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. . . . [E]very lasting interaction presumes norms and without them a system could not exist."[29]

It has been noted already that practitioners of the natural sciences often shake their heads when they observe this way of building social theories on a vast world of mental entities which in a positivist century could not be said properly to exist. And it really is even worse than that. Not only do these sociologists posit a seemingly infinite supply of real and potential norms or rules as mental entities in the minds of individuals everywhere, they give equal importance to the attitudes these individuals hold toward each of these mental entities. Do they accept them as authoritative or regard them in some other way? Perhaps nothing marks the passing of early twentieth-century logical positivism so clearly as the emergence of empirical theories of man that recognize vast ranges of our ideas and attitudes as having causal force and explanatory power in the world of human action.

The recent emergence of neuroscience and increasingly sophisticated studies of brain function have only reinforced this trend. Neuroscience is now telling us that early linguists were right to assume that humans are hardwired for language. The human brain seems to have an infinite capacity to discover and apply rules in language, and in everything else we do. The brain appears to have a hypothesis generator that readily proposes explanations for our experience, whether it be a rule that would explain how people use certain words, or a law of nature that would explain a series of observed facts. We observe that free rule-generating capacity as people (even children) create and modify rules for games or lay down rules around the house. Humans must be understood as explainers and arrangers. We try to explain our experience by positing regularities. We try to manage our lives by establishing regularities of conduct for ourselves and others.

The bottom line is that human beings are self-conscious rule makers and learners. While neuroscientists are only able to provide vague descriptions of the chemical and physical processes and connections in the brain that would correspond to any particular rule or idea that we might generate or consider, it is

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[29] Talcott Parsons and Edward A. Shils, eds., *Toward a General Theory of Action* (Cambridge: Harvard University Press, 1951): 14, 105.

clear that the brain is constantly engaged in this kind of activity and that any explanation of human conduct that avoids consideration of such mental activity will completely miss the most important human reality. In a strong sense, Aristotle has been vindicated in his claim that what distinguishes human beings from other animals is their speech—their rationality. And while vast areas of natural science have been able to make spectacular progress without having to explain these kinds of mental entities, the social sciences, including legal science, may not be able to progress from the philosophical stage to the empirical approach without first sorting out the structure and the dynamics of our mental worlds.

Conventions and Their Assumptions: Insights 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 rule-formation 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 ubiquitous human activity 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 overt 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.[30]

From this we learn that even the simplest exercises in two-person coordination require the establishment of at least implicit conventions or rules. A complex society is possible only because personal, face-to-face relationships are 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 we seek to avoid in social interactions is not so much the error of predicting wrongly what others will do but misjudging what they will expect us to expect them to do. Our own actions are

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[30] Thomas C. Schelling, *Strategy of Conflict* (Cambridge: Harvard University Press, 1960).

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. 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; they do not require renewed ascertainment. And rules are so abstract in their factuality that they regulate the expectations of expectations.[31]

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 (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 behavior, 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 behavior directly impinges upon the welfare of others.

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 incentive on both sides to find a solution. Second, because each actor is a separate individual, his or her specific interests may indicate a somewhat different solution than what will be most preferred by any other actor. Thus, any solution reached by agreement among the actors must be advantageous in some way to each one, but will not likely be maximally advantageous to any.

In subsequent chapters I will spell out how this combination of pursuit of self-interest, agreement, and mutual advantage can enrich and complete our concepts of law and authority and can provide us with clear criteria and

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[31] Luhmann, 30.

explications for the principle of the rule of law.